

The Environmental Protection Agency's Administrator, Gina McCarthy, signed the following notice on January 11, 2017 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-2014-0534. 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-2014-0534; FRL]

California State Nonroad Engine Pollution Control Standards; Commercial Harbor Craft Regulations; Notice of Decision

AGENCY: ENVIRONMENTAL PROTECTION AGENCY

ACTION: Notice of Decision

SUMMARY: The Environmental Protection Agency ("EPA") is granting the California Air Resources Board ("CARB") its request for an authorization of its amendments to its Commercial Harbor Craft regulations ("CHC Amendments"). EPA is also confirming that certain CHC amendments are within the scope of a prior EPA authorization. CARB's CHC Amendments primarily subject diesel-fueled engines on crew and supply, barge and dredge vessels to the in-use engine emission requirements of the original CHC regulations; allow CARB or EPA Tier 2 or higher tier certified off-road ("nonroad") engines to be used as auxiliary or propulsion engines in both new and in-use CHC vessels; and clarify requirements and address certain issues that have arisen during CARB's implementation of the original CHC regulations. This decision is issued under the authority of the Clean Air Act ("CAA" or "Act").

DATES: Petitions for review must be filed by **[INSERT DATE SIXTY DAYS AFTER FR PUBLICATION DATE OF THIS NOTICE]**.

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ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2014-0534. 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, located at 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 Web site is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) 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 website, enter EPA-HQ-OAR-2014-0534 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 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>.

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SUPPLEMENTARY INFORMATION:

I. Background

EPA granted an authorization for California's initial set of CHC regulations on December 5, 2011.¹ California's initial CHC regulations established emission standards, requirements related to the control of emissions, and enforcement provisions. The requirements are applicable to diesel propulsion and auxiliary engines on new and in-use commercial harbor craft, with some exceptions. Commercial harbor craft include a variety of different types of vessels, including ferries, excursion vessels, tugboats, towboats, and commercial and charter fishing boats. The initial CHC regulations established in-use emission limits for in-use ferries, excursion vessels, tugboats, and towboats equipped with federal Tier 0 and Tier 1 propulsion and auxiliary marine engines. Owners and operators of these vessels were required to upgrade the engines to meet emission limits equal to or cleaner than federal Tier 2 or Tier 3 marine engine certification standards, according to a compliance schedule that was also set forth in the regulations. The compliance schedule was based on the model year of the original engine

¹ 76 FR 77521 (December 5, 2011).

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("in-use engine model year"), its hours of operation, and the vessel's home port location.

The CHC regulations apply separately to new and in-use engines used on harbor craft.²

In a letter dated May 28, 2014, CARB submitted to EPA its request pursuant to section 209(e) of the CAA, regarding authorization of its amendments to California's CHC regulations to reduce emissions from diesel engines on commercial harbor craft ("CHC Amendments").³ The CARB Board approved the CHC Amendments on June 24, 2010 (by Resolution 10-26).⁴

The CHC Amendments set forth a variety of in-use requirements, including extending the applicability of the CHC regulations to in-use crew and supply, barge, and dredge vessels that are equipped with federal Tier 0 and Tier 1 propulsion and auxiliary marine engines that operate within the Regulated California Waters.⁵ The CHC Amendments also eliminate certain exemptions for CHC engines that had been registered in CARB's portable equipment registration program ("PERP") or permitted by local air pollution districts, and now subject such engines to the CHC regulations. In addition, the CHC Amendments clarify and define "swing engines" as replacement engines that are maintained at dockside locations and require such engines to comply with the CHC

² The regulations are codified at title 13, California Code of Regulations (CCR), section 2229.5 and title 17, CCR section 93118.5.

³ Letter and attached memo from Richard Corey, CARB to Gina McCarthy, EPA dated May 28, 2014 ("Waiver Support Document"), EPA-HQ-OAR-2014-0534-0002.

⁴ CARB Resolution 10-26, June 24, 2010, EPA-HQ-OAR-2014-0534-0008.

⁵ Regulated California Waters include all California inland waters, all California estuarine waters, and all waters within a zone 24 nautical miles seaward of the California coastline, except for specified areas along the Southern California coastline, Title 17 CCR 93118.5(d)(68). The original CHC regulations required owners or operators of in-use ferries, excursion vessels, and tugboats equipped with Tier 0 and Tier 1 propulsion and auxiliary marine engines to meet equal to or cleaner than federal Tier 2 or Tier 3 new marine engine certification standards in effect for the year that in-use engine compliance was required. The compliance schedule was based on the in-use engine model year, hours of operation, and the vessel's home port location. The amendments establish compliance schedules applicable to crew and supply vessel engines and a separate set of compliance schedules applicable to both barge and dredge vessel engines that are based solely on the in-use engine model year and annual hours of operation.

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regulation's in-use engine requirements. The original CHC regulations required replacement engines for in-use CHC vessels to be certified to current EPA model year engines standards. CARB found this requirement could present difficulties for in-use CHC vessels in certain situations. Therefore, the CHC Amendments allow an owner or operator to use a non-current-year certified replacement engine under certain circumstances. In addition, the CHC Amendments allow the use of existing engines in a fleet to replace an older engine otherwise subject to the in-use requirements (the existing engine becomes subject to the in-use compliance date that applied to the engine being replaced). The CHC Amendments also expand the compliance extension options to fleets of three or more vessels.

CARB's CHC Amendments also include requirements that are applicable to both new and in-use engines. The original CHC regulation provided that new or in-use diesel propulsion or auxiliary engines for in-use harbor craft could not be sold, offered for sale, leased, rented, or acquired unless the engines were certified to at least federal Tier 2 or Tier 3 marine emission standards for a new engine of the same power rating and displacement in effect at the time of the aforementioned actions. The amendments now provide compliance flexibility to CHC owners or operators with the option of using EPA or CARB Tier 2 or higher tier certified off-road engines provided the engine or vessel manufacturer has complied with the provisions of 40 CFR 1042.605, which establishes requirements for marinized land-based engines.

A. *California's Authorization Request*

California requested that EPA perform two types of review. First, CARB requested an EPA determination that certain provisions of the CHC Amendments are

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within the scope of a prior authorization issued by EPA, or in the alternative, merit full authorization ("Within-the-Scope Amendments"). CARB includes as part of the Within-the-Scope Amendments: the provisions allowing use of EPA or CARB certified off-road CI engines to comply with the new and in-use requirements for propulsion and/or auxiliary engines; the amendments that subject CHC engines registered and permitted by local air pollution districts prior to January 1, 2009, CHC auxiliary engines registered to CARB's PERP prior to January 1, 2009, and CHC auxiliary engines not permanently affixed to the vessel and registered in PERP on or after January 1, 2009 to the CHC Regulation; and the amendments that clarify swing engines are replacement engines subject to the CHC regulation's in-use requirements, along with the exemptions for replacement engines in in-use CHC vessels, the allowance of the use of existing engines to replace an older engine subject to in-use requirements, and the expansion of the availability of compliance extensions for CHC vessel fleets.

Second, CARB requests full authorization for amendments that establish new requirements ("Full Authorization Amendments"). The Full Authorization Amendments pertain to the new provisions establishing in-use requirements applicable to crew and supply, barge, and dredge vessels. The amendments extend the applicability of the previous requirement that specified categories of CHC vessels (ferries, excursions vessels tugboats, towboats, push boats, and multipurpose harbor craft) to meet emission limits equal to or cleaner than federal Tier 2 or Tier 3 new marine engine emission standards, as applicable and in effect for the year that in-use engine compliance is required under the compliance schedule set forth within the regulation.

B. Clean Air Act Nonroad Engine and Vehicle Authorizations

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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.⁶ For all other nonroad engines, states generally are preempted from adopting and enforcing standards and other requirements relating to the control of emissions. Section 209(e)(2), however, requires the Administrator, after notice and opportunity for public hearing, to authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. However, EPA shall not grant such authorization if it finds that (1) the determination of California is arbitrary and capricious; (2) California does not need such California standards to meet compelling and extraordinary conditions; or (3) California standards and accompanying enforcement procedures are not consistent with [CAA section 209].⁷

On July 20, 1994, EPA promulgated a rule interpreting the three criteria set forth in section 209(e)(2)(A) that EPA must consider before granting any California

⁶ States are expressly preempted from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from new nonroad engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. Such express preemption under section 209(e)(1) of the Act also applies to new locomotives or new engines used in locomotives. CAA §209(e)(1), 42 U.S.C. §7543(e)(1)(A).

⁷ EPA's review of California regulations under section 209 is not a broad review of the reasonableness of the regulations or its compatibility with all other laws. Sections 209(b) and 209(e) of the Clean Air Act limit EPA's authority to deny California requests for waivers and authorizations to the three criteria listed therein. As a result, EPA has consistently refrained from denying California's requests for waivers and authorizations based on any other criteria. In instances where the U.S. Court of Appeals has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the Court has upheld and agreed with EPA's determination. *See Motor and Equipment Manufacturers Ass'n v. Nichols*, 142 F.3d 449, 462–63, 466–67 (D.C. Cir.1998), *Motor and Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1111, 1114–20 (D.C. Cir. 1979). *See also* 78 FR 58090, 58120 (September 20, 2013).

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authorization request for nonroad engine or vehicle emission standards.⁸ EPA revised these regulations in 1997.⁹ As stated in the preamble to the 1994 rule, EPA historically has interpreted the consistency inquiry under the third criterion, outlined above and set forth in section 209(e)(2)(A)(iii), 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) of the Act.¹⁰

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 under section 209(b)(1)(C). That provision provides that 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 and enforcement procedures will be found to be inconsistent with section 202(a) if (1) there is inadequate lead time to permit the development of the necessary technology, giving

⁸ See "Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards," 59 FR 36969 (July 20, 1994).

⁹ See "Control of Air Pollution: Emission Standards for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts; Preemption of State Regulation for Nonroad Engine and Vehicle Standards; Amendments to Rules," 62 FR 67733 (December 30, 1997). The applicable regulations are now found in 40 CFR part 1074, subpart B, section 1074.105.

¹⁰ 59 FR 36969 (July 20, 1994). EPA has interpreted 209(b)(1)(C) in the context of section 209(b) motor vehicle waivers.

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appropriate consideration to the cost of compliance within that time,¹¹ or (2) the federal and state testing procedures impose inconsistent certification requirements.¹²

In light of the similar language in sections 209(b) and 209(e)(2)(A), EPA has reviewed California's requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that it has historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor vehicle engine standards under section 209(b).¹³ These principles include, among other things, that EPA should limit its inquiry to the three specific authorization criteria identified in section 209(e)(2)(A),¹⁴ and that EPA should give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended EPA's review of California's decision-making 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.¹⁵

¹¹ H. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967)

¹² S. Rep. No. 403, 90th Cong., 1st Sess. 32 (1967)

¹³ *See Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996): "... EPA was within the bounds of permissible construction in analogizing §209(e) on nonroad sources to §209(a) on motor vehicles."

¹⁴ *See EPA's Final 209(e) rulemaking* at 59 FR 36969, 36983 (July 20, 1994).

¹⁵ "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. In the 1990 amendments to section 209, Congress established section 209(e) and similar language in section 209(e)(1)(i) pertaining to

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This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.¹⁶ Thus, EPA's consideration of all the evidence submitted concerning an authorization decision is circumscribed by its relevance to those questions that may be considered under section 209(e)(2)(A).

B. Within-the-Scope Determinations

If California amends regulations that were previously authorized by EPA, California may ask EPA to determine that the amendments are within the scope of the earlier authorization. A within-the-scope determination for such amendments is permissible without a full authorization if three conditions are met. First, the amended regulations must not undermine California's previous determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 209 of the Act, following the same criteria discussed above in the context of full authorizations. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.¹⁷

C. Deference to California

In previous waiver and authorization decisions, EPA has recognized that the intent of Congress in creating a limited review based on the section 209(b)(1) criteria was

California's nonroad emission standards which California must determine to be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

¹⁶ See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("*MEMA I*").

¹⁷ See "California State Motor Vehicle Pollution Control Standards; Amendments Within the Scope of Previous Waiver of Federal Preemption," 46 FR 36742 (July 15, 1981).

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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. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to "catch up" to some degree with newly promulgated standards. Such an approach ... may be attended with costs, in the shape of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these 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 Clean Air Act.²⁰ 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

¹⁸ 40 FR 23102, 23103-23104 (May 28, 1975).

¹⁹ *Id.* at 23104; 58 FR 4166 (January 13, 1993).

²⁰ *MEMA I*, 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-302 (1977)).

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the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.²¹

D. 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 the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.²²

The same logic applies to authorization requests. 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

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

²¹ *Id.*

²² *MEMA I*, *supra* note 17, at 1121.

²³ *Id.* at 1126.

²⁴ *Id.* at 1126.

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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.²⁵

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.²⁶ 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.²⁷

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. 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."²⁸

E. EPA's Administrative Process in Consideration of California's Commercial Harbor Craft Regulations

Upon review of CARB's request, EPA offered an opportunity for a public hearing, and requested written comment on issues relevant to a full section 209(e)

²⁵ *Id.* at 1122.

²⁶ *Id.*

²⁷ *Id.*

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

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authorization analysis, by publication of a *Federal Register* notice on November 24, 2014.²⁹ Specifically, we requested comment on: (a) whether CARB's determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious, (b) whether California needs such standards to meet compelling and extraordinary conditions, and (c) whether California's standards and accompanying enforcement procedures are consistent with section 209 of the Act. In addition, EPA requested comment on issues relevant to a within-the-scope analysis for any CARB amendments that may merit confirmation of being within the scope of EPA's prior authorization of the CHC regulation.

EPA did not receive a request for hearing and therefore no hearing was held. EPA did not receive any written comments. EPA's evaluation is based on the record, which includes CARB's authorization request and accompanying documents.

II. Discussion

A. Within-the-Scope Analysis

We initially evaluate California's Within-the-Scope Amendments by application of our traditional within-the-scope analysis, as CARB requested. If we determine that CARB's request does not meet the requirements for a within-the-scope determination, we then evaluate the request based on a full authorization analysis. In determining whether amendments can be viewed as within the scope of previous authorizations, EPA looks at whether CARB's revisions have been limited to making minor technical amendments to previously waived regulations or modifying the regulations in order to

²⁹ 79 FR 69482 (November 24, 2014).

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provide manufacturers with additional compliance flexibilities without significantly reducing the overall stringency of the requirements.

EPA sought comment on a range of issues, including those applicable to a within-the-scope analysis as well as those applicable to a full authorization analysis. No party submitted a comment that California's Within-the-Scope Amendments require a full authorization analysis. Given the lack of comments on this issue, and EPA's assessment of the nature of the amendments, EPA will evaluate California's Within-the-Scope Amendments by application of our traditional within-the-scope analysis, as CARB requested.

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

B. Full Authorization Analysis

As noted above, CARB's authorization request also included the Full Authorization Amendments. EPA must grant an authorization of the Full Authorization Amendments unless the Administrator finds: (1) California's determination that its standards will be, in the aggregate, as protective of public health and welfare as applicable federal standards is arbitrary and capricious; (2) California does not need such

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California standards to meet compelling and extraordinary conditions; or (3) California's standards and accompanying enforcement procedures are not consistent with this section.

EPA's evaluation of the CHC Amendments, including the Within-the-Scope Amendments and Full Authorization Amendments, is set forth below. Because of the similarity of the within-the-scope criteria and the full authorization criteria, a discussion of both sets of the respective amendments take place within each authorization criterion. To the extent that the criteria are applied uniquely, or that additional criteria apply under either the within-the-scope analysis or the full authorization analysis, such application is also addressed below.

C. 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 10-26, finding that "the California emission standards and other requirements related to the control of emissions in the amended regulation are, in the aggregate, at least as protective of public health and welfare than applicable federal standards."³⁰ CARB asserts that EPA has no basis to find that the CARB Board's determination is arbitrary or capricious.³¹ CARB points out that because the California and federal emission standards and test procedures for off-road CI engines are essentially aligned, and because California and federal off-road CI emission standards are generally more

³⁰ CARB Resolution 10-26, EPA-HQ-OAR-201-0534-0008.

³¹ CARB Support Document at 7-8.

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stringent than the equivalent federal marine engine emission standards, that EPA has no basis to find that the option to use the off-road CI engines would cause the CHC Amendments to be less protective.³² With respect to in-use engines, CARB maintains there is no question that the option of using EPA or CARB Tier 2 or higher tier certified off-road CI engines to meet the CHC regulation's in-use requirements are more stringent than applicable federal regulations, given that EPA is not authorized to regulate in-use off-road engines.³³ In addition, CARB notes that the Within-the-Scope Amendments do not undermine the protectiveness determination made by EPA in granting the initially authorized CHC regulation. As explained above, CARB adopted the Within-the-Scope Amendments to accommodate implementation and compliance issues that have arisen under the original CHC regulations. Given that EPA has no authority to regulate in-use engines, CARB notes that it is indisputable that its in-use provisions are more stringent than non-existent "applicable" federal requirements.

After evaluating the materials submitted by CARB, and since EPA has not adopted any standards or requirements for in-use CHC engines and based on the lack of any comments submitted to the record, I cannot find that California's Within-the-Scope Amendments undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards. Thus I cannot deny CARB's within-the-scope request based on this criterion. Similarly, with regard to the Full Authorization Amendments I cannot make a finding

³² *Id.* at 11. In addition, EPA's existing regulations for new marine diesel engines also allow the use of certified off-road land-based engines in marine vessels.

³³ *Id.* at 12.

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that CARB's protectiveness determination is arbitrary and capricious and thus I cannot deny CARB's Full Authorization Amendments based on this criterion.

D. 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." EPA's inquiry under this second criterion (found both in paragraph 209(b)(1)(B) and 209(e)(2)(A)(ii)) has been to determine whether California needs its own mobile source pollution program (i.e. set of standards) for the relevant class or category of vehicles or engines (e.g., on-highway mobile source or nonroad mobile source) to meet compelling and extraordinary conditions, and not whether the specific standards that are the subject of the authorization or waiver request are necessary to meet such conditions.³⁴

California has asserted its longstanding position that the State continues to need its own nonroad engine program to meet serious air pollution problems.³⁵ CARB notes that "California, and particularly the South Coast and San Joaquin Valley Air Basins, continue to experience some of the worst air quality in the nation and continue to be in non-attainment with national ambient air quality standards for PM_{2.5} and ozone. The unique geographical and climatic conditions, and the tremendous growth in on and off-road vehicle population and use that moved Congress to authorize California to establish separate on-road motor vehicle standards in 1967 and off-road engine standards in 1990 still exists today."³⁶

³⁴ See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887-18890 (May 3, 1984).

³⁵ See Waiver Support Document at p. 18.

³⁶ *Id.* See 74 FR 32744, 32762-32763 (July 8, 2009); 79 FR 6584, 6588-6590 (February 4, 2014).

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There has been no evidence submitted to indicate that California's compelling and extraordinary conditions do not continue to exist. California, including the South Coast and the San Joaquin Valley air basins, continues to experience some of the worst air quality in the nation and continues to be in non-attainment with national ambient air quality standards for fine particulate matter (PM_{2.5}) and ozone.³⁷ In addition, EPA is not aware of any other information that would suggest that California no longer needs its nonroad emission program.

Therefore, based on the record of this request and absence of comments or other information to the contrary, I cannot find that California does not continue to need such state standards, including the CHC regulations, to address the "compelling and extraordinary conditions" underlying the state's air pollution problems. I have determined that I cannot deny California authorization for its Full Authorization Amendments under section 209(e)(2)(A)(ii). As noted above, EPA's within-the-scope analysis (that is applicable to the Within-the-Scope Amendments) does not require an assessment of section 209(e)(2)(A)(ii).

E. Consistency with Section 209 of the Clean Air Act

Section 209(e)(2)(A)(iii) of the Act instructs that EPA cannot grant an authorization if California's standards and enforcement procedures are not consistent with "this section." As described above, EPA's section 209(e) rule states that the

³⁷ 74 FR 32744, 32762-63 (July 8, 2009), 76 FR 77515, 77518 (December 13, 2011), 81 FR 95982 (December 29, 2016). EPA continually evaluates the air quality conditions in the United States, including California. California continues to experience some of the worst air quality in the country and continues to be in nonattainment with National Ambient Air Quality Standards for fine particulate matter and ozone, *see* "Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone National Ambient Air Quality Standard (NAAQS)" at EPA-HQ-OAR-2016-0751.

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Administrator shall not grant authorization to California if she finds (among other tests) that the "California standards and accompanying enforcement procedures are not consistent with section 209." EPA has interpreted this requirement to mean that California standards and accompanying enforcement procedures (under both the full authorization and the within-the-scope analysis) must be consistent with at least sections 209(a), 209(e)(1), and 209(b)(1)(C), as EPA has interpreted this last subsection in the context of motor vehicle waivers. Thus, this can be viewed as a three-pronged test.

1. Consistency with Section 209(a) and 209(e)(1)

To be consistent with section 209(a) of the Clean Air Act, California's commercial harbor craft regulations must not apply to new motor vehicles or new motor vehicle engines. California's commercial harbor craft regulations apply to nonroad marine vessels and engines, not on-highway motor vehicles or engines. CARB states that the new vessel requirements regulate new diesel engines, and apply only to nonroad engines that are neither new motor vehicles nor new motor vehicle engines. No commenter presented otherwise; therefore, I cannot deny California's request on the basis that California's commercial harbor craft regulations are not consistent with section 209(a).

To be consistent with section 209(e)(1) of the Clean Air Act, California's commercial harbor craft regulations must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB represents that commercial harbor craft engines are not used in locomotives and are not primarily used in farm and construction equipment vehicles. No commenter presented otherwise and EPA is otherwise not aware of any information to the contrary; therefore, I

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cannot deny California's request on the basis that California's commercial harbor craft requirements are not consistent with section 209(e)(1).

2. Consistency with Section 209(b)(1)(C)

The requirement that California's standards be consistent with section 209(b)(1)(C) of the Clean Air 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.³⁸

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.³⁹ 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

³⁸ *MEMA I*, 627, F.2d at 1126.

³⁹ H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).

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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.⁴⁰

As described above, the Full Authorization Amendments require in-use Tier 0 and Tier 1 propulsion and auxiliary marine engines on crew and supply, barge, and dredge vessels to meet emission limits equal to or cleaner than federal Tier 2 or Tier 3 new marine engine certification standards in effect for the year that in-use engine compliance is required (based on the model year of the in-use engine and annual hours of operation). Vessel owners are provided the same compliance options that were available to owners of Tier 0 and Tier 1 marine engines in the initial CHC regulations: (1) replacing an in-use engine with a new marine engine certified to applicable Tier 2 or Tier 3 marine standards, (2) demonstrating that the in-use marine engine already meets the most stringent Tier 2 or Tier 3 marine standards in effect for new engines of similar power rating and displacement, (e.g., utilizing engine rebuild kits or aftertreatment technologies), (3) demonstrating that an in-use marine engine has not and will not operate more than a specified number of hours per calendar year (300 hours for crew and supply vessel engines or 80 hours for barge and dredge vessel engines), or (4) using the flexibility provided through the exemptions and compliance extensions of the regulation. CARB notes "In granting California the authorization for the original CHC regulation, EPA stated that 'no party objected to CARB's demonstration that [compliance] technologies

⁴⁰ See, e.g., 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).

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are in existence and are being used in actual operation,' and also found no issue of incompatibility between California and federal test procedures."⁴¹ CARB also notes that the CHC Amendments now provide owners or operators the additional compliance flexibility option of using CARB or EPA Tier 2 or higher tier certified off-road CI engines to meet the requirements for auxiliary or propulsion engines, so owners or operators may also elect to comply with the amended in-use requirements by replacing an in-use engine with a new off-road engine, or by demonstrating that an existing in-use engine meets CARB or EPA Tier 2 or Tier 3 off-road CI engines standards (e.g., through utilization of engine rebuild kits or aftertreatment technologies).

CARB maintains that the Within-the-Scope Amendments present no issue regarding technical feasibility or inconsistent test procedures as the amendments only maintain or relax the stringency of the original CHC regulation's in-use requirements.

EPA did not receive any comments suggesting that California's commercial harbor craft regulations are technologically infeasible.

Therefore, based on the record before us, I cannot find that the CHC Amendments are technologically infeasible or otherwise inconsistent with section 202(a). Therefore, I cannot deny CARB's authorization request for the Full Authorization Amendments and likewise cannot deny the within-the-scope request for the Within-the-Scope Amendments based on the section 202(a) criterion.

F. New Issues

⁴¹ Waiver Support Document at 19 (citing EPA's authorization at 76 FR 77521, 77527 (December 13, 2011)).

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EPA has stated in the past that if California promulgates amendments that raise new issues affecting previously granted waivers or authorizations, we would not confirm that those amendments are within the scope of previous authorizations.⁴² I do not believe that the Within-the-Scope Amendments raise any new issues with respect to our prior granting of the authorization. Moreover, EPA did not receive any comments that CARB's CHC Amendments raised new issues affecting the previously granted authorization. Therefore, I cannot find that CARB's Within-the-Scope Amendments raise new issues and consequently cannot deny CARB's request based on this criterion.

III. Decision

After evaluating California's CHC Amendments and CARB's submissions for EPA review as described above, I am taking the following actions. First, I am granting an authorization for the Full Authorization Amendments. Second, I confirm that the Within-the-Scope Amendments are within-the scope of EPA's previous authorization.

This decision will affect not only persons in California, but also 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(e)(2)(A) authorization has been granted if certain criteria are met, this decision would also affect those states and those persons in such states. *See* CAA section 209(e)(2)(B). 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

⁴² *See, e.g.*, 78 FR 38970 (June 28, 2013), 75 FR 8056 (February 23, 2010), and 70 FR 22034 (April 28, 2005).

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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 FR PUBLICATION DATE OF THIS NOTICE]**. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

IV. Statutory and Executive Order Reviews

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: _____

Gina McCarthy
Administrator