

The Environmental Protection Agency's Administrator, Gina McCarthy, signed the following notice on January 9, 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-2016-0017. 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-2016-0017; FRL]

California State Motor Vehicle Pollution Control Standards; Amendments to On-Highway Heavy-Duty Vehicle In-Use Compliance Program, Amendments to 2007 and Subsequent Model Year On-Highway Heavy-Duty Engines and Vehicles, and Amendments to Truck Requirements; 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 On-Highway Heavy-Duty Vehicle In-Use Compliance program ("In-Use Regulation"). EPA is also confirming that CARB's amendments to its 2007 and Subsequent Model Year On-Highway Heavy-Duty Engines and Vehicles regulation ("2007 Amendments") and CARB's amendments to its Truck Idling requirements ("Truck Idling Amendments") are within the scope of previous waivers issued by EPA. The In-Use Regulation establishes a manufacturer-run in-use compliance program using portable emission measurement systems ("PEMS"). The 2007 Amendments specify the NO_x emission standard for heavy- and medium-duty diesel engines to two significant figures and provide manufacturers the option to certify chassis-certified diesel vehicles within the phase-in compliance provisions of the 2007 and Subsequent Model Year On-Highway Heavy-Duty Engines and Vehicles regulation. The Truck Idling Amendments

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exempt armored cars and workover rigs (a mobile self-propelled rig used to perform remedial operations on producing oil or gas wells to restore or increase well production)

from the new engine requirements of the preexisting California Truck Idling regulation.

This decision is issued under the authority of the Clean Air Act ("CAA" or "the Act").

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

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2016-0017. 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-2016-0017 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the

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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

On August 19, 2005, EPA granted California a waiver of preemption pursuant to section 209(b) of the CAA, 42 USC 7543(b), for CARB's amendments to its heavy-duty diesel engine standards for 2007 and subsequent model year (MY) vehicles and engines and related test procedures, including not-to-exceed (“NTE”) and supplemental steady-state tests to determine compliance with applicable standards (“2007 California HDDE standards”).¹ Those standards apply to all heavy-duty diesel engines, and align California's standards and test procedures with corresponding federal standards and test procedures. In 2010 EPA granted California a waiver of preemption for CARB's adoption of amendments applicable to 2008 and subsequent MY heavy-duty Otto-cycle engines.² In 2005, CARB adopted truck idling requirements, including an element

¹ 70 FR 50322 (August 26, 2005).

² 75 FR 70237 (November 17, 2010).

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whereby new California-certified 2008 and subsequent MY on-road diesel engines in trucks with a gross vehicle weight rating ("GVWR") greater than 14,000 pounds were required to be equipped with a system that automatically shuts down the engine after five minutes of continuous idling ("Truck Idling regulation"). In lieu of the automatic engine shutdown systems, manufacturers are allowed to optionally certify engines to a NO_x idling emission standard. EPA granted a waiver for the Truck Idling regulation in 2012.³

CARB's In-Use Regulation establishes a manufacturer-run in-use compliance program that is largely identical to EPA's previously adopted heavy-duty in-use testing program ("HDIUT program") originally adopted in 2005.⁴ The regulation applies to 2007 and subsequent MY engine-dynamometer certified heavy-duty diesel engines installed in a motor vehicle with GVWR greater than 8,500 pounds. CARB's initial In-Use Regulation, adopted in 2006, included requirements for manufacturers screening test vehicles with portable emission measurement systems (PEMS) and testing the vehicles by operating them over typical driving routes, and under the same vehicle loads and environmental conditions that the vehicles routinely encounter. The in-use compliance program is comprised of two phases. The first phase, Phase 1, involves testing a designated engine family for conformity with the applicable NTE requirements. In the second phase, if the engine family does not pass the Phase 1 requirements then testing, under more narrowly defined test conditions, may be required to target specific noncomplying operating conditions. The initial regulation incorporated temporary measurement allowances when testing for compliance using PEMS. In 2007, CARB amended the In-Use Regulation to set forth new measurement allowances for gaseous

³ 77 FR 9239 (February 16, 2012).

⁴ 70 FR 34594 (June 14, 2005).

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emissions.⁵ In 2011, CARB approved additional amendments to the In-Use Requirements to establish a new particulate matter ("PM") measurement allowance. EPA similarly amended its federal HDIUT program in 2010 to incorporate this same measurement allowance.⁶

CARB initially adopted the 2007 California HDDE standards in 2001 to fully align California's NO_x emission standards for 2007 and subsequent MY HDDEs and medium-duty diesel engines ("MDDEs") certified to ultra-low-emission vehicle ("ULEV") standards to the corresponding federal NO_x emission standard of 0.20 gram per brake-horsepower hour (g/bhp-hr) (two significant figures). CARB also established a more stringent NO_x standard for MDDEs certified to optional ultra-low-emission vehicle ("SULEV") emission standards of 0.10 g/bhp-hr). CARB's 2007 Amendments clarify that the NO_x ULEV emission standard for HDDEs is the same as the federal NO_x emission standard of 0.20 g/bhp-hr and amended the NO_x SULEV standard to 0.10 g/bhp-hr (CARB had inadvertently specified these NO_x emission standards to only one significant figure (0.2 and 0.1 g/bhp-hr, respectively)). CARB had also inadvertently failed to include a provision that provided manufacturers the option to include chassis-certified 2007 through 2009 MY heavy-duty diesel vehicles under 14,000 pounds GVWR within the phase-in compliance provision of the 2007 HDDE standards. The 2007 Amendments incorporate this optional provision. In addition, the 2007 Amendments incorporate the flexibility provided by EPA in 2006, whereby manufacturers may apply multiplicative deterioration factors if, based on good engineering judgment,

⁵ See the California Air Resources Board's Waiver Request Support Document ("Waiver Support Document"), dated December 31, 2015 at EPA-HQ-OAR-2016-0017-0018, at 7-8.

⁶ Waiver Support Document at 9, *citing* 75 FR 68448 (November 8, 2010).

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multiplicative deterioration factors are more appropriate for a particular engine family (as opposed to an adjustment by the addition of appropriate deterioration factors).⁷

In 2008 CARB adopted amendments to the new engine requirements within the Truck Idling regulation to address specific issues regarding armored cars and workover rigs. Specifically, the Truck Idling Amendments provide that new 2008 and subsequent MY heavy-duty diesel engines used in armored cars and workover rigs are exempt from the new engine idling requirements. In addition, in 2011 CARB provided additional regulatory clarification of the exemption.⁸

By letter dated January 27, 2016, 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 In-Use Regulation. CARB's submission provided analysis and evidence to support its finding that the In-Use Regulation satisfies the CAA section 209(b) criteria and that a waiver of preemption should be granted. CARB's request also sought confirmation that its 2007 Amendments and the Truck Idling Amendments are within the scope of waivers of preemption previously granted by EPA.⁹

II. Principles Governing this Review

A. Scope of Review

Section 209(a) of the CAA provides:

“No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle

⁷ *Id.* at 11, *citing* 71 FR 51481 (August 30, 2006).

⁸ *Id.*

⁹ *Id.*

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engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.”¹⁰

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.¹¹ 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.¹²

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 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

¹⁰ CAA § 209(a). 42 U.S.C. § 7543(a).

¹¹ 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).

¹² CAA § 209(b)(1). 42 U.S.C. § 7543(b)(1).

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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.”¹³

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.¹⁴ “[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. Within-the-scope Determinations

If California amends regulations that have been 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 review 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 waiver or authorization decisions.¹⁵

¹³ “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.

¹⁴ See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (“*MEMA I*”).

¹⁵ 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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C. *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.”¹⁶

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.’”¹⁷ Therefore, the Administrator’s burden is to act “‘reasonably.’”¹⁸

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.”¹⁹

¹⁶ *MEMA I*, note 19, at 1121.

¹⁷ *Id.* at 1126.

¹⁸ *Id.* at 1126.

¹⁹ *Id.* at 1122.

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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 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.”²⁰

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.²¹ 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.²²

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

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

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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."²³

D. 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."²⁴

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.²⁵ 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,

²³ See, e.g., "California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption," 40 FR 23102 (May 28, 1975), at 23103.

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

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

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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.²⁶

E. 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.²⁷ In that notice, EPA requested comments on whether the 2007 Amendments and the Truck Idling Amendments, each individually assessed, should be considered under the within-the-scope analysis or whether they should be considered under the full waiver criteria. For the In-Use Regulation, and to the degree the 2007 Amendments or the Truck Idling Amendments should not be considered under the within-the-scope criteria, EPA sought comment 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.

²⁶ *MEMA I*, 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977)).

²⁷ 81 FR 52678 (August 9, 2016).

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III. Discussion

A. Within-the-Scope Analysis

EPA initially evaluates California's 2007 Amendments and Truck Idling 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 waivers, EPA looks at whether CARB's revision is either limited to minor technical amendments to previously waived regulations or modifying regulations in order to provide additional compliance flexibility without significantly reducing the overall stringency of previously waived regulations. The amendments at issue in this request provide regulatory clarity and corrections, and provide limited exemptions in order to provide for compliance flexibility

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 2007 Amendments or Truck Idling Amendments require a full authorization analysis. Given the lack of comments on this issue, and EPA's assessment of the nature of the amendments, I will evaluate California's 2007 amendments and Truck Idling Amendments by application of the traditional within-the-scope analysis, as CARB requested.

As noted above, EPA can confirm that the amended regulations are within the scope of a previously granted waiver of preemption if three conditions are met. First, the amended regulations do not undermine California's determination that its standards, in

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the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations do not affect consistency with section 202(a) of the Act. Third, the amended regulations do not raise any "new issues" affecting EPA's prior authorizations.

B. Full Authorization Analysis

CARB's waiver request also included the In-Use Regulation. EPA must grant a waiver for the In-Use Regulation 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 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 2007 Amendments, the Truck Idling Amendments, and the In-use Regulation is set forth below. Because of the similarity of the within-the-scope criteria and the full waiver criteria, a discussion of all three sets of respective amendments take place within each waiver 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 waiver analysis, such application is also addressed below.

C. 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

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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.²⁸

CARB notes that in its initial adoption and amendments to the In-Use Regulation in 2006, 2007, and 2011, the CARB Board approved Resolutions 06-27, 07-56 and 11-19 in which it declared:

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.²⁹

CARB also notes that EPA has previously granted California a waiver for California's 2007 California HDDE standards (which included the NTE test procedures), and the addition of the In-Use Regulation will help ensure that the emission control systems on HDDEs are properly designed and sufficiently durable to ensure compliance with the emission requirements during their useful life. CARB further noted that the In-Use Regulation provisions are "essentially identical to the requirements of EPA's corresponding HDIUT program."³⁰ CARB also notes that the 2007 Amendments in no way undermine the stringency of the underlying exhaust emission standards or the associated test procedures (which is the criterion under the within-the-scope analysis), but

²⁸ *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).

²⁹ Waiver Support Document at 17. *See* EPA-HQ-OAR-2016-0017-0027, EPA-HQ-OAR-2016-0017-0047, and EPA-HQ-OAR-2016-0017-0056.

³⁰ *Id.*

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instead ensure that California's standards remain as, or more protective than, applicable federal standards.³¹ Similarly, CARB notes that with regard to the Truck Idling Amendments that EPA's regulations do not require new heavy-duty diesel engines to be equipped with idling shutdown systems or to optionally comply with NO_x idling emission standards.³²

As it is clear that California's standards are at least as protective of public health and welfare as applicable federal standards, and that no evidence is in the record suggesting otherwise (and EPA is not otherwise aware of any information), I find that California's respective protectiveness determinations are not arbitrary and capricious for purposes of the In-Use Regulation, the 2007 Amendments, and the Truck Idling Amendments.

D. 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 that are the subject of the waiver request are necessary to meet such conditions.³³ In recent waiver actions, EPA again examined the language of section

³¹ *Id.* at 21.

³² *Id.* at 24, *citing* Resolution 11-19.

³³ *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.

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209(b)(1)(B) and reiterated this longstanding traditional interpretation as the better approach for analyzing the need for "such State standards" to meet "compelling and extraordinary conditions."³⁴

In conjunction with the initial adoption and subsequent amendments of the In-Use Regulation in 2006, 2007, and 2011, respectively (see Resolutions 06-27, 07-56, and 11-19 noted above), the CARB's Board confirmed California's longstanding position that California continues to need its own motor vehicle emission program to meet serious air pollution problems. CARB notes that the geographical and climatic conditions and the tremendous growth in vehicle population and use that moved Congress to authorize California to establish separate vehicle standards in 1967 still exist today.³⁵ "Nothing in these conditions has changed to warrant a change in EPA's confirmation, and therefore there can be no doubt of the continuing existence of compelling and extraordinary conditions justifying California's need for its own motor vehicle emissions control program."³⁶

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

³⁴ 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).

³⁵ Waiver Support Request Support Document at 18.

³⁶ *Id.*

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national ambient air quality standards for fine particulate matter and ozone.³⁷ As

California has previously stated, “nothing in [California’s unique geographic and climatic] conditions has changed to warrant a change in this determination.”³⁸

Based on the record before us, including EPA’s prior waiver decisions, I am 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 its In-Use Regulation, to meet compelling and extraordinary conditions in California.

E. 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

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

³⁸ *Id.*

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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 necessary to meet the In-Use Amendments, the 2007 Amendments, or the Truck Idling Amendments that are the subject of the waiver request, giving appropriate consideration to the cost of compliance within that time.³⁹ 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.⁴⁰

Regarding test procedure conflict, CARB notes both EPA and CARB utilize essentially identical test procedures in certifying 2007 and subsequent MY heavy-duty engines and that the 2007 Amendments also do not preclude manufacturers from conducting one set of tests on a heavy-duty engines or vehicle to determine compliance with both the California and federal requirements.⁴¹ For the reasons set forth above, and because there is no evidence in the record or other information that EPA is aware of, I cannot find that CARB's In-Use Compliance Regulation, 2007 Amendments, and Truck Idling Amendments are inconsistent with section 202(a) based upon test procedure inconsistency

In addition, EPA did not receive any comments arguing that the CARB's In-Use Regulation, 2007 Amendments, and Truck Idling Amendments were technologically infeasible or that the cost of compliance would be excessive, such that California's

³⁹ See, e.g., 38 F.R 30136 (November 1, 1973) and 40 FR 30311 (July 18, 1975).

⁴⁰ See, e.g., 43 FR 32182 (July 25, 1978).

⁴¹ *Id.* at 20, 22.

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standards might be inconsistent with section 202(a).⁴² In EPA's review of CARB's In-Use Regulation, I find that CARB's statements about the capability of PEMS technology to measure gaseous pollutants as well as PM emissions is accurate.⁴³ With regard to the 2007 Amendments, I find that the amendments do not raise any new issues regarding technological feasibility given that the amendments regarding how the NO_x standard is expressed is a regulatory clarification and the amendment regarding the new option for certain chassis-certified 2007 through 2009 model year heavy-duty vehicles provides additional compliance flexibility. Similarly, the Truck Idling Amendments merely provide compliance flexibility to a previously waived program by setting forth limited compliance exemptions (i.e., the exemptions for armored vehicles and workover rigs).

I therefore cannot find that California standards, which include the CARB's In-Use Regulation, 2007 Amendments, and Truck Idling Amendments are inconsistent with section 202(a).

F. New Issues

EPA has stated in the past that if California promulgates amendments that raise new issues affecting previously granted waivers, we would not confirm that those amendments are within the scope of previous waivers.⁴⁴ I do not believe that either the 2007 Amendments or the Truck Idling Amendments raise any new issues with respect to our prior waivers governing their underlying regulations. Moreover, EPA did not receive any comments that CARB's 2007 Amendments or Truck Idling Amendments raised new

⁴² 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).

⁴³ Waiver Support Document at 19 (CARB explains that several PEMS capable of measuring gaseous emissions are commercially available and that the further development needed (at the time of CARB's initial adoption of the In-Use Regulation) for PM emissions monitoring by PEMS has been resolved.

⁴⁴ 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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issues affecting the previously granted waivers. Therefore, I cannot find that CARB's 2007 Amendments and Truck Idling Amendments raise new issues and consequently, cannot deny CARB's within-the-scope requests based on this criterion.

IV. Decision

After evaluating CARB's In-Use Regulation and CARB's submissions for EPA review, I am hereby granting a waiver for the In-Use Regulation. After evaluating CARB's 2007 Amendments and Truck Idling Amendments and CARB's submissions for EPA review, I am hereby confirming that such amendments are within the scope of prior EPA waivers.

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 SIXTY 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.

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California State Motor Vehicle Pollution Control Standards; Amendments to On-Highway Heavy-Duty Vehicle In-Use Compliance Program, Amendments to 2007 and Subsequent Model Year On-Highway Heavy-Duty Engines and Vehicles, and Amendments to Truck Requirements; Notice of Decision page 22 of 22

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).

Dated: _____

Gina McCarthy
Administrator