6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2016-0181; FRL]

California State Nonroad Engine Pollution Control Standards; Evaporative Emission Standards and Test Procedures for Off-Highway Recreational Vehicles (OHRVs); 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 Off-Highway Recreational Vehicle regulation ("OHRV Amendments"). The OHRV Amendments establish new evaporative emission standards and test procedures for 2018 and subsequent model year OHRVs. The California OHRV category encompasses a wide variety of vehicles, including off-road motorcycles, all-terrain vehicles ("ATVs"), off-road sport and utility vehicles, sand cars, and golf carts. 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].

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2016-0181. 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-2016-0181 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.

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SUPPLEMENTARY INFORMATION:

I. Background

CARB first adopted exhaust emission standards and test procedures applicable to OHRVs and the engines used in OHRVs in 1994, and EPA authorized California to enforce such standards and test procedures in 1996.[1] CARB subsequently adopted amendments to the OHRV regulation in 1996, 1999, 2003, and 2007, and EPA determined those amendments either fell within the scope of previously granted authorizations or met the criteria for a new authorization.[2]

In 2002, EPA adopted regulations that established both exhaust and evaporative emission standards for nonroad recreational vehicles and engines, including off-road motorcycles and ATVs.[3] EPA's evaporative emission standards applied to 2008 and subsequent model year nonroad recreational vehicles, and established a fuel tank permeation limit of 1.5 grams per square meter per day (g/m2/day) and a fuel hose permeation limit of 15 g/m2/day. Correspondingly, CARB's 2007 amendments to their OHRV regulation set forth, among other provisions, evaporative emission standards for new 2008 and subsequent model year OHRVs that are identical to the federal evaporative emission standards for 2008 and subsequent model year nonroad vehicles. In 2014,

[1] 61 FR 69093 (December 3, 1996).
[2] 65 FR 69673 (November 20, 2000) [1996 amendments]; 79 FR 6584 (February 14, 2014) [1999. 2003, and 2007 amendments].
[3] 67 FR 68242 (November 8, 2002). The terms "off-road" and "nonroad" are used interchangeably, generally CARB uses the term off-road and EPA uses the term nonroad.

CARB adopted the OHRV Amendments that establish a new test procedure and evaporative emission standard of 1.0 gram per day (g/day) of total organic gas (TOG) for a 3-day diurnal period.[4]

A. CARB's Authorization Request

In a letter dated February 26, 2016, CARB submitted to EPA its request pursuant to section 209(e) of the CAA, regarding authorization of its OHRV Amendments.[5] The CARB Board approved the OHRV Amendments on July 25, 2013 (by Resolution 13-33).[6] The OHRV Amendments were approved by California's Office of Administrative Law (OAL) on December 17, 2014 and became operative state law on April 1, 2015.

The OHRV Amendments differ from preexisting OHRV requirements because they impose a 1.0 g/day evaporative emissions standard for the complete OHRV fuel system. Previously the OHRV regulation only required fuel tanks and fuel hoses to meet specific permeation standards. The OHRV Amendments comprehensively address all potential sources of evaporative emissions, including running losses (evaporative emissions generated during vehicle operation), hot soak (evaporative emission generated directly after vehicle operation), and diurnal losses (evaporative emissions generated during long term storage). The OHRV Amendments establish diurnal and fuel system leakage standards and associated test procedures for new 2018 and subsequent model year OHRVs. In addition, the OHRV Amendments establish durability test procedures

[4] CARB's regulatory text enacted by the OHRV Amendments (which EPA is authorizing by this action), is set forth in California Code of Regulations, Title 13, sections 2416,2417, 2418, 2419, 2419.1, 2419.2, 3419.3, and 2419.4. A full description of the OHVR Amendments is found in CARB's Authorization Request Support Document, 2014 Amendments to Evaporative Emissions Control Requirements for Off Highway Recreational Vehicles, dated February 26, 2016 ("Authorization Request Support Document") at EPA-HQ-OAR-2016- 0181-0002.
[5] Authorization Request Support Document.
[6] CARB Resolution 13-33, July 25, 2013, EPA-HQ-OAR-2016-0181-0006.

and other test procedure provisions for preconditioning evaporative emission control systems and components, running loss and hot soak preconditioning tests, and test procedures for the 72-hour and steady-state diurnal tests. Finally, the OHRV Amendments include many of CARB's general compliance provisions, including among other provisions: annual certification of the evaporative emission control systems, the applicability of the in-use recall provisions that CARB previously adopted for OHRVs in 1994, and emissions warranty requirements.[7]

B. Clean Air Act Nonroad Engine and Vehicle Authorizations

Section 209(e)(1) of the Act permanently preempts any state, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain new nonroad engines or vehicles.[8] 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

[7] *See* Authorization Request Support Document at 8-10 for a complete list of provisions.
[8] 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).

compelling and extraordinary conditions; or (3) California standards and accompanying enforcement procedures are not consistent with [CAA section 209].[9]

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 authorization request for nonroad engine or vehicle emission standards.[10] EPA revised these regulations in 1997.[11] 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.[12]

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

[9] 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).

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

[11] *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.

[12] 59 FR 36969 (July 20, 1994). EPA has interpreted 209(b)(1)(C) in the context of section 209(b) motor vehicle waivers.

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 appropriate consideration to the cost of compliance within that time,[13] or (2) the federal and state testing procedures impose inconsistent certification requirements.[14]

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).[15] 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),[16] 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-

[13] H. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967)
[14] S. Rep. No. 403, 90th Cong., 1st Sess. 32 (1967)
[15] *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."
[16] S*ee* EPA's Final 209(e) rulemaking at 59 FR 36969, 36983 (July 20, 1994).

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.[17]

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.[18] 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).

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 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

[17] "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 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.

[18] *See, e.g., Motor and Equip. Mfrs Assoc.* v. *EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (''*MEMA I*''), *Ford Motor Co. v.* EPA, 606 F.2d 1293, 1300 (D.C. Cir. 1979).

> ''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.[19]

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.[20] This interpretation is supported by relevant discussion in the House Committee Report for the 1977 amendments to the Clean Air Act. [21] 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.[22]

D. Burden and Standard of Proof

[19] 40 FR 23102, 23103-23104 (May 28, 1975).
[20] *Id. at* 23104; 58 FR 4166 (January 13, 1993).
[21] *MEMA I*, 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-302 (1977)).
[22] *Id.*

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.[23]

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.'"[24] Therefore, the Administrator's burden is to act "reasonably."[25]

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.[26]

[23] *MEMA I*, *supra* note 17, at 1121.
[24] *Id.* at 1126.
[25] *Id.* at 1126.
[26] *Id.* at 1122.

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.[27] 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.[28]

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."[29]

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 section 209(e)(2)(A) authorization analysis, by publication of a *Federal Register* notice on August 9, 2016.[30] Specifically, we requested comment on: (a) whether CARB's determination that its

[27] *Id.*
[28] *Id.*
[29] *See, e.g.,* "California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption," 40 FR 23102 (May 28, 1975), at 23103.
[30] 81 FR 52684 (August 9, 2014).

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.

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. 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 13-33, declaring that "the Amendments approved for adoption herein will not cause California emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards."[31] CARB asserts that EPA has no basis to find that the CARB Board's determination is arbitrary or capricious.[32] CARB notes that EPA's existing evaporative emission standards for 2008 and subsequent model year nonroad recreational vehicles and engines solely consist of permeation evaporative emission standards applicable to fuel tanks and fuel hoses. Conversely, CARB notes that

[31] Authorization Request Support Document at 11.
[32] *Id.* at 12.

the OHRV Amendments provide for more comprehensive control of the evaporative emission system. CARB projects the OHRV Amendments will reduce OHRV evaporative emissions by over 70 percent as compared to current model-year vehicles, and are therefore clearly, in the aggregate, at least as protective of the public health and welfare as applicable federal standards.

After evaluating the materials submitted by CARB, and since EPA has not adopted any comparable standards or requirements for OHRVs, and based on the lack of any comments submitted to the record, I cannot find that CARB's protectiveness determination is arbitrary and capricious and thus I cannot deny CARB's authorization request based on this criterion.

B. Need for California Standards to Meet Compelling and Extraordinary Conditions

Section 209(e)(2)(A)(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.[33]

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

California has asserted its longstanding position that the State continues to need its own nonroad engine program to meet serious air pollution problems.[34] 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 fine particulate matter ("PM2.5") 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.[35]

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 PM2.5 and ozone.[36] 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

[34] *See Authorization Request* Support Document at p. 12, referencing CARB Board Resolution 13-33.
[35] *Id. See* 74 FR 32744, 32762-32763 (July 8, 2009); 79 FR 6584, 6588-6590 (February 4, 2014).
[36] 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

state standards, including the OHRV Amendments, 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 OHRV Amendments based on the section 209(e)(2)(A)(ii) criterion.

C. 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 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 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 OHRV Amendments (and CARB's underlying OHRV regulation) must not apply to new motor vehicles or new motor vehicle engines. California's OHRV regulation applies to a wide variety of vehicles, including off-road motorcycles, ATVs, off-road sport and utility vehicles, sand cars, and golf carts. CARB states that the OHRV Amendments, much like the previously authorized OHRV regulation, do not apply to the categories of preempted mobile sources. No commenter presented otherwise, and EPA is not otherwise aware of

any contrary evidence; therefore, EPA cannot deny California's request on the basis that California's OHRV regulation (including the OHRV Amendments) is not consistent with section 209(a).

To be consistent with section 209(e)(1) of the Clean Air Act, California's OHRV regulation must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB presents that OHRV engines are not used in locomotives and are not primarily used in farm and construction equipment or vehicles. No commenter presented otherwise, and EPA is not otherwise aware of any contrary evidence; therefore, I cannot deny California's request on the basis that California's OHRV regulation (including the OHRV Amendments) is 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.[37]

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.[38] Section 202(a)(2) states, in part, that any regulation promulgated under its authority "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Section 202(a) thus requires the Administrator to first determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect. The latter scenario also requires the Administrator to decide whether the cost of developing and applying the technology within that time is feasible. Previous EPA waivers are in accord with this position.[39]

CARB states that its Staff Report explains the technology needed to comply with the primary diurnal evaporative emission standards and that such technology clearly exists as it is being used by manufacturers of on-road mobile sources.[40] In addition, CARB states that it received no comments indicating that the requirements to comply with the new evaporative emission standards was technically infeasible.[41] As described in the Staff Report, CARB identified (but did not prescribe) technologies that have been successfully employed in the automotive sector and that are expected to be utilized in

[37] *MEMA I*, 627, F.2d at 1126.
[38] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).
[39] *See, e.g.*, 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).
[40] Authorization Request Support Document at 14, citing "CARB Staff Report: Initial Statement of Reasons for Proposed Regulation," dated June 5, 2013. EPA-HQ-OAR-2016-0181-0004.
[41] *Id.*

OHRVs. These technologies include: low permeation materials to be utilized in fuel tanks and fuel lines, activated carbon canisters to control diurnal emissions by capturing hydrocarbons that would otherwise be vented when the fuel system heats up during engine operation or storage, pressure relief valves on the vent of the fuel tank, strategic placement or insulation of the fuel tank so the tank is not affected by large temperature increases, and improvements in connectors, carburetors and fuel injectors.[42] CARB also identifies roll-over values presently used in on-road motorcycles to meet the fuel system leakage test and notes that the ATV fuel filler neck compatibility requirement presents no issue since the fuel pipe sealing specification is identical to on-road motor vehicles.[43]

With regard to test procedure consistency, CARB states that the OHRV Amendments present no issue of incompatibility between California and federal test procedures since there are no analogous federal standards or associated test procedures applicable to 2018 and subsequent model year nonroad recreational vehicles and engines.[44]

EPA did not receive any comments that suggests California's OHRV Amendments regulations are technologically infeasible. In addition, EPA believes that CARB has reasonably identified, within the lead time provided, the types of technologies that can be used to meet the OHRV Amendments. EPA is not otherwise aware of any evidence to suggest such technologies cannot be employed in the manner CARB has identified. In addition, EPA finds no basis to determine that CARB's test procedures are

[42] *Id.* at 14-15.
[43] *Id.* at 15-16.
[44] *Id.* at 16-17.

incompatible with federal test procedures given the lack of applicable federal evaporative emission standards and test procedures.

Therefore, based on the record before us, I cannot find that the OHRV Amendments are technologically infeasible or otherwise inconsistent with section 202(a). Therefore, I cannot deny CARB's authorization based on the section 202(a) criterion.

III. Decision

After evaluating California's OHRV Amendments and CARB's submissions for EPA review as described above, I am granting an authorization for the OHRV Amendments.

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 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