6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9655-9]

California State Nonroad Engine Pollution Control Standards; Large Spark-Ignition (LSI) Engines; New Emission Standards and In-Use Fleet Requirements; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Decision.

SUMMARY: EPA is granting the California Air Resources Board's (CARB's) request for authorization of California's emission standards and certification and test procedures for large spark-ignition nonroad engines and in-use fleet average emission requirements for large- and medium-sized fleets. California's LSI in-use fleet requirements are applicable to fleets comprised of four or more pieces of equipment powered by LSI engines, including forklifts, industrial tow tractors, sweepers/scrubbers, and airport ground support equipment.

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-2011-0830. 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-2011-0830 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.

FOR FURTHER INFORMATION CONTACT: Kristien G. Knapp, Attorney-Advisor, Compliance Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue (6405J), NW, Washington, DC 20460. Telephone: (202) 343-9949. Fax: (202) 343-2800. Email: knapp.kristien@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. California's LSI Regulations

By letter dated December 10, 2008, CARB submitted to EPA its request pursuant to section 209(e) of the Clean Air Act ("CAA" or "the Act"), regarding its regulation of emissions from new off-road large spark-ignition (LSI) engines and its in-use fleet requirements for

forklifts and other industrial equipment with LSI engines.[1] The LSI regulations are designed to reduce emissions of hydrocarbons (HC) and oxides of nitrogen (NO_X) from forklifts and other industrial equipment powered by LSI engines. CARB approved the LSI regulations at a public hearing on May 25, 2006 (by Resolution 06-11).[2] After making modifications to the regulation available on December 1, 2006, and February 1, 2007 for supplemental public comment, CARB's Executive Officer formally adopted the LSI regulations in Executive Order R-07-001 on March 2, 2007.[3] The LSI regulations are codified at title 13, California Code of Regulations, sections 2775 through 2775.2.[4]

Underpinning CARB's LSI regulations is a set of emission standards for new off-road LSI engines beginning in 2007. The emission standards include: adoption of EPA's 2007 and later model year emission standards for the same engines, more stringent standards for the 2010 and later model years, optional certification standards, and more rigorous certification and test procedures. The LSI regulations also apply to operators of large- and medium-sized fleets of forklifts, sweepers/scrubbers, airport ground support equipment (GSE), and industrial tow tractors with engine displacements of greater than one liter. These fleets must meet a fleet average in-use emission standard.

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 new nonroad engines or vehicles. States are also preempted from adopting and enforcing standards and other requirements related to the control of emissions from

[1] California Air Resources Board ("CARB"), "Request for Authorization," December 10, 2008, EPA-HQ-OAR-2011-0830-0001.
[2] CARB Enclosure 1, "Resolution 06-11," EPA-HQ-OAR-2011-0830-0002.
[3] CARB Enclosure 2, "Executive Order R-07-001," EPA-HQ-OAR-2011-0830-0003.
[4] CARB Enclosure 3, "Final Regulation Order," EPA-HQ-OAR-2011-0830-0004.

non-new nonroad engines or vehicles. Section 209(e)(2) requires the Administrator, after notice and opportunity for public hearing, to authorize California to enforce such standards and other requirements, unless EPA makes one of three findings. In addition, other states with attainment plans may adopt and enforce such regulations if the standards, and implementation and enforcement procedures, are identical to California's standards. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, regulations providing the criteria, as found in section 209(e)(2), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards.[5] EPA later revised these regulations in 1997.[6] As stated in the preamble to the 1994 rule, EPA has historically interpreted the section 209(e)(2)(iii) "consistency" inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).[7]

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

---

[5] 59 FR 36969 (July 20, 1994).

[6] *See* 62 FR 67733 (December 30, 1997). The applicable regulations, now in 40 CFR part 1074, subpart B, § 1074.105, provide:

> (a) The Administrator will grant the authorization if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards.
>
> (b) The authorization will not be granted if the Administrator finds that any of the following are true:
>
> > (1) California's determination is arbitrary and capricious.
> >
> > (2) California does not need such standards to meet compelling and extraordinary conditions.
> >
> > (3) The California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.
>
> (c) In considering any request from California to authorize the state to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

[7] *See* 59 FR 36969 (July 20, 1994).

be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same "consistency" criteria that are applied to motor vehicle waiver requests. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California "standards and accompanying enforcement procedures are not consistent with section 202(a)" of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures are inconsistent with section 202(a) if: (1) there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

C. Burden of Proof

In *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("*MEMA I"*), the U.S. Court of Appeals stated 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.[8]

The court in *MEMA I* considered the standards of proof under section 209 for the two findings related to granting a waiver for an "accompanying enforcement procedure" (as opposed to the standards themselves): (1) protectiveness in the aggregate and (2) consistency with section 202(a) findings. The court instructed that "the standard of proof must take account of the nature

[8] *MEMA I*, 627 F.2d at 1122.

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."[9]

The court upheld the Administrator's position that, to deny a waiver, there must be 'clear and compelling evidence' to show that proposed procedures undermine the protectiveness of California's standards.[10] 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.[11]

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 accompanying enforcement procedures, there is nothing in the opinion to suggest that the court's analysis would not apply with equal force to such determinations. EPA's past waiver decisions have consistently made clear that: "[E]ven in the two areas concededly reserved for Federal judgment by this legislation – the existence of 'compelling and extraordinary' conditions and whether the standards are technologically feasible – Congress intended that the standards of EPA review of the State decision to be a narrow one."[12]

Opponents of the waiver bear the burden of showing that the criteria for a denial of California's waiver request have been met. As found in *MEMA I*, this obligation rests firmly with opponents of the waiver in a section 209 proceeding:

---

[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *See, e.g.*, 40 FR 21102-103 (May 28, 1975).

> [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.[13]

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.'"[14] Therefore, the Administrator's burden is to act "reasonably."[15]

D. EPA's Administrative Process in Consideration of California's LSI 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) authorization analysis, by publication of a *Federal Register* notice on October 31, 2011.[16] 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 response to EPA's October 31, 2011 *Federal Register* notice, EPA received one public comment, from Airlines for America ("A4A"). A4A comments that California's LSI regulations

[13] *MEMA I*, 627 F.2d at 1121.
[14] *Id*. at 1126.
[15] *Id*.
[16] 76 FR 67184 (October 31, 2011).

as applicable to airport ground support equipment is preempted by the Federal Aviation Act and the Airline Deregulation Act.

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 California 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 06-11, finding that California's LSI regulations will not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.[17] CARB presents that California's LSI program is at least as stringent as the federal LSI program "because for 2010 and later model-year LSI engines, California's standard for HC+NOX at 0.8 g/kW-hr is more stringent than applicable federal standard at 2.0 g/kW-hr and California's other LSI engine standards are equivalent to federal standards for these model years."[18] CARB contends that its protectiveness determination, based on the stringency of its program as compared to the federal program, "clearly is not arbitrary and capricious."[19]

EPA did not receive any comments challenging California's protectiveness determination. Therefore, based on the record before us, EPA finds that opponents of the authorization have not shown that California was arbitrary and capricious in its determination

[17] "BE IT FURTHER RESOLVED that the Board hereby determines, pursuant to section 209(e)(2) of the federal Clean Air Act that the emission standards and other requirements related to the control of emissions adopted as part of these regulations are, in the aggregate, at least as protective of public health and welfare as applicable federal standards, that California needs the adopted standards to meet compelling and extraordinary conditions, and that the adopted standards and accompanying enforcement procedures are consistent with the provisions in section 209." CARB, Resolution 06-11, EPA-HQ-OAR-2011-0830-0003.
[18] CARB, Request for Authorization at 19.
[19] *Id*.

that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

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

Section 209(e)(2)(ii) of the Act instructs that EPA cannot grant an authorization if the agency finds that California "does not need such California standards to meet compelling and extraordinary conditions . . .." This criterion restricts EPA's inquiry to whether California needs its own mobile source pollution program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions.[20] As discussed above, for over forty years CARB has repeatedly demonstrated the need for its mobile source emissions program to address compelling and extraordinary conditions in California. In its Resolution 06-11, CARB affirmed its longstanding position that California continues to need its own motor vehicle and engine program to meet its serious air pollution problems. Likewise, EPA has consistently recognized that California continues to have the same "geographical and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, create serious pollution problems."[21] Furthermore, no commenter has presented any argument or evidence to suggest that California no longer needs a separate mobile source emissions program to address compelling and extraordinary conditions in California. Therefore, EPA has determined that we cannot deny California an authorization for its LSI regulations under section 209(e)(2)(ii).

C. Consistency with Section 209 of the Clean Air Act

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

[20] *See* 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889-18890 (May 3, 1984).
[21] 49 FR 18887, 18890 (May 3, 1984); *see also* 76 FR 34693 (June 14, 2011), 74 FR 32744, 32763 (July 8, 2009), and 73 FR 52042 (September 8, 2008).

described above, EPA has historically evaluated this criterion for consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C).

1. Consistency with Section 209(a)

To be consistent with section 209(a) of the Clean Air Act, California's LSI regulations must not apply to new motor vehicles or new motor vehicle engines. California's LSI regulations expressly apply only to off-road vehicles and do not apply to engines used in motor vehicles as defined by section 216(2) of the Clean Air Act.[22] No commenter presented otherwise. Therefore, EPA cannot deny California's request on the basis that California's LSI regulations are not consistent with section 209(a).

2. Consistency with Section 209(e)(1)

To be consistent with section 209(e)(1) of the Clean Air Act, California's LSI regulations must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB presents that the Board "ensured consistency with section 209(e)(1) by specifically excluding new off-road engines under 175 horsepower primarily used in farm and construction vehicles and equipment from the definition of off-road LSI engines."[23] No commenter presented otherwise. Therefore, EPA cannot deny California's request on the basis that California's LSI regulations are not consistent with section 209(e)(1).

3. 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

[22] CARB, Request for Authorization at 20.
[23] *Id*.

consideration to the cost of compliance within that timeframe. California's accompanying enforcement procedures would also be inconsistent with section 202(a) if federal and California test procedures conflicted. 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 procedures.[24]

a. Technological Feasibility

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.[25] 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.[26] For example, a previous EPA waiver decision considered California's standards and enforcement procedures to be consistent with section 202(a) because adequate technology existed as well as adequate lead-time to implement that technology.[27]

[24] *MEMA I*, 627, F.2d at 1126.
[25] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).
[26] *See, e.g.*, 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).
[27] 41 FR 44209 (October 7, 1976).

Subsequently, Congress has stated that, generally, EPA's construction of the waiver provision has been consistent with congressional intent.[28]

CARB presents that the technology required to comply with its LSI regulations is currently available, and that it has provided sufficient lead-time, giving consideration to cost of compliance.[29] CARB points to EPA's own analysis in the federal rule for these same engines, but also separately concluded that fleet owners will be able to absorb or pass compliance costs to their customers. CARB's LSI fleet requirements progressively increase in stringency from year-to-year, and allow a variety of compliance options, including combinations of retrofits that have already been verified, lower-emission purchases, and zero emission purchases. Capital costs of these options range from $30 to $5,000, and may be exceeded by resultant lowered fuel use and lessened maintenance. CARB also points out that fleet requirements apply selectively, provide several exemptions, and that compliance extensions may be granted.

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

b. Consistency of Certification Procedures

California's standards and accompanying enforcement procedures would also be inconsistent with section 202(a) if the California test procedures were to impose certification requirements inconsistent with the federal certification requirements. Such inconsistency means that manufacturers would be unable to meet both the California and federal testing requirements using the same test vehicle or engine.[30] CARB presents that the LSI fleet requirements raise no issue regarding test procedure consistency because there are no analogous federal test procedures

[28] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).
[29] CARB, Request for Authorization at 24-28.
[30] *See, e.g.*, 43 FR 32182 (July 25, 1978).

for LSI retrofit technologies.[31] CARB also points out that its retrofit verification program is a voluntary program available to retrofit device manufacturers, and not directly required of fleet owners.

EPA received no comments suggesting that CARB's LSI regulations pose any test procedure consistency problem. Therefore, based on the record, EPA cannot find that CARB's testing procedures are inconsistent with section 202(a). Consequently, EPA cannot deny CARB's request based on this criterion.

D. Other Issues

Airlines for America ("A4A") has provided comments opposing EPA's grant of authorization for California's LSI regulations. The reasons A4A provides in its comments are outside the scope of EPA's scope of review of California authorization requests under section 209(e)(2). A4A claims that California's LSI rules are preempted by the Federal Aviation Act and the Airline Deregulation Act. As EPA has stated on numerous occasions, 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 our 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.[32] 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.[33] A4A's comment raises issues of federal preemption that are not included within the criteria listed

[31] CARB, Request for Authorization at 28.
[32] *See, e.g.*, 74 FR 32744, 32783 (July 8, 2009).
[33] *See* Motor and Equipment Manufacturers Ass'n v. Nichols, 142 F.3d 449, 462-63, 466-67 (DC Cir.1998), Motor and Equipment Manufacturers Ass'n v. EPA, 627 F.2d 1095, 1111, 1114-20 (DC Cir. 1979).

under sections 209(b) and 209(e).[34] Therefore, in considering whether to grant authorization for California's LSI regulations under section 209(e), EPA cannot deny California's request for authorization based on the issues raised by A4A.

[34] A4A may raise these issues in a direct challenge to California's regulations in other forums, but these issues are not relevant to EPA's limited review under section 209.

E. Authorization Determination for California's LSI Regulations

After a review of the information submitted by CARB and A4A, EPA finds that those opposing California's request have not met the burden of demonstrating that authorization for California's LSI regulations should be denied based on any of the statutory criteria of section 209(e)(2). For this reason, EPA finds that an authorization for California's LSI regulations should be granted.

III. Decision

The Administrator has delegated the authority to grant California section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating California's LSI regulations, CARB's submissions, and the public comments from A4A, EPA is granting an authorization to California for its LSI regulations.

My decision will affect not only persons in California, but also entities outside the State who must comply with California's requirements. For this reason, I determine and find that this is a final action of national applicability for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by [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.

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: March 29, 2012.

Gina McCarthy
Assistant Administrator
Office of Air and Radiation

[FR Doc. 2012-8112 Filed 04/03/2012 at 8:45 am; Publication Date: 04/04/2012]