



## ENVIRONMENTAL PROTECTION AGENCY

[FRL-9816-8]

### **California State Nonroad Engine Pollution Control Standards; In-Use Heavy Duty Vehicles (As Applicable to Yard Trucks and Two-Engine Sweepers); 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 accompanying enforcement procedures for in-use nonroad yard trucks and auxiliary engines used in two-engine sweepers as found within CARB's "Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria Pollutants from In-Use Heavy-Duty Diesel-Fueled Vehicles" (Truck and Bus Regulation). The yard truck and auxiliary engine regulation that EPA is authorizing represents only a subset of provisions within the broader Truck and Bus Regulation. The California Truck and Bus Regulation establishes requirements for and principally applies to "non-new" on-road motor vehicles which are not the subject of this decision (such regulations are not preempted under the Clean Air Act). However, the Truck and Bus Regulation also applies to some engines that are subject to preemption, including any nonroad engines used to power yard trucks (which are principally used in nonroad agricultural operations) and the auxiliary engines used to power the broom or vacuum functions on two-engine sweepers. EPA's authorization in this Notice of Decision applies only to the yard truck and auxiliary engine provisions in the Truck and Bus Regulation.

**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-2012-0335. 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](http://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](mailto: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](http://www.regulations.gov) website, enter EPA-HQ-OAR-2012-0335 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality ("OTAQ") maintains a webpage that contains general information on its review of California waiver requests. Included

on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

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**SUPPLEMENTARY INFORMATION:**

**I. Background**

**A. California's Regulation**

By letter dated March 2, 2012, CARB submitted to EPA its authorization request (CARB Authorization Request) pursuant to section 209(e) of the Clean Air Act ("CAA" or "the Act"), regarding its regulation of emissions from yard trucks and two-engine sweepers (Yard Trucks Regulation).<sup>1</sup> The Yard Trucks Regulation, contained within CARB's Truck and Bus Regulation, was approved by the CARB Board at a public hearing on December 11, 2008 (by Resolution 08-43),<sup>2</sup> and formally adopted on October 19, 2009. The Truck and Bus Regulation is codified at title 13, California Code of Regulations, section 2025.<sup>3</sup> The CARB Board subsequently amended the regulation on September 19, 2011 (by Resolution 10-44),<sup>4</sup> which was approved by the California Office of Administrative Law on December 14, 2011.

With exceptions applicable to certain agricultural vehicles, including agricultural yard trucks, and auxiliary engines in two-engine sweepers, all agricultural vehicles and the auxiliary engines in two-engine sweepers must comply with general in-use emission

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<sup>1</sup> CARB Authorization Request at EPA-HQ-OAR-2012-0335-0001.

<sup>2</sup> CARB Resolution 08-43 at EPA-HQ-OAR-2012-0335-0021.

<sup>3</sup> CARB Final Regulation Order at EPA-HQ-OAR-2012-0335-0005.

<sup>4</sup> CARB Resolution 10-44 at EPA-HQ-OAR-2012-0335-0019.

requirements depending upon the gross vehicle weight rating (GVWR) and model year of the vehicle. The amended regulation does not require that these vehicles be equipped with particulate matter (PM) filters but does require them to be upgraded to 2010 or later model year engines based upon a model year/GVWR compliance schedule. Additional compliance flexibilities are provided for heavier, heavy-duty vehicles and for smaller fleets. In addition, the Yard Trucks Regulation includes a number of other compliance flexibilities (e.g. early compliance credits, exemptions for NOx-exempt areas, etc). Special provisions apply to low-mileage agricultural vehicles, including agricultural yard trucks with nonroad engines and special provisions also apply to auxiliary engines used in two-engine sweepers.

#### 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.<sup>5</sup> For all other nonroad engines (including “non-new” nonroad engines), States are preempted from adopting and enforcing standards and other requirements relating to the control of emissions, except that section 209(e)(2) of the Act requires EPA, after notice and opportunity for public hearing, to authorize California to adopt and enforce such regulations unless EPA makes one of three specifically enumerated findings. In addition, other states with air quality attainment plans, approved under part D of Title I of

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<sup>5</sup> 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.

the Act, may adopt and enforce such regulations if the standards, and implementation and enforcement, 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 nonroad engine or vehicle emission standards.<sup>6</sup> EPA revised these regulations in 1997.<sup>7</sup> 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).<sup>8</sup>

In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same "consistency" criteria that are applied to motor vehicle waiver requests. 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

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<sup>6</sup> 59 FR 36969 (July 20, 1994).

<sup>7</sup> See 62 FR 67733 (December 30, 1997) and 40 CFR 1074.105.

<sup>8</sup> See 59 FR 36969 (July 20, 1994).

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.<sup>9</sup>

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 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.”<sup>10</sup>

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.<sup>11</sup> The court noted that this standard of proof

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<sup>9</sup> *MEMA I*, 627 F.2d at 1122.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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.<sup>12</sup>

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.”<sup>13</sup>

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:

[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.<sup>14</sup>

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*

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<sup>12</sup> *Id.*

<sup>13</sup> *See, e.g.*, 40 FR 21102-103 (May 28, 1975).

<sup>14</sup> *MEMA I*, 627 F.2d at 1121.

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.’”<sup>15</sup> Therefore, the Administrator’s burden is to act “reasonably.”<sup>16</sup>

#### **D. EPA’s Administrative Process in Consideration of California’s Yard Trucks Regulation**

Upon receipt 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 August 21, 2012.<sup>17</sup> 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.

EPA received no comments or testimony in response to EPA’s August 21, 2012 *Federal Register* notice. EPA offered an opportunity for public hearing, related to CARB’s authorization request, on September 20, 2012. No one notified EPA stating a desire to testify at the public hearing and therefore no hearing was held. The written comment period closed on October 22, 2012.

## **II. Discussion**

### **A. California’s Protectiveness Determination**

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<sup>15</sup> *Id.* at 1126.

<sup>16</sup> *Id.*

<sup>17</sup> 77 FR 50502 (August 21, 2012).

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 08-43, finding that its amendments will not cause its nonroad engine emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.<sup>18</sup> CARB presents that there is no basis for EPA to find that the Board's determination is arbitrary and capricious since California is the only governmental jurisdiction in the nation entrusted with authority to adopt its own emission compliance requirements for in-use nonroad vehicles and engines. CARB envisions that nonroad yard truck fleets (and two-engine sweepers) will comply with the emission compliance requirements by modernizing their fleets through purchasing newer vehicles and engines and installing retrofit PM filters that will achieve emission reductions equal to or greater than the reductions that can be achieved under federal new engine emission standards.<sup>19</sup>

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 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**

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<sup>18</sup> CARB Resolution 08-43; *see also* CARB Resolution 10-44.

<sup>19</sup> CARB Authorization Request at 9.

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.<sup>20</sup> As discussed above, for more than 40 years CARB has repeatedly demonstrated the need for its mobile source emissions program to address compelling and extraordinary conditions in California. In its Resolution 08-43, CARB affirmed its longstanding position that California continues to need its own motor vehicle and engine program to meet its serious air pollution problems.<sup>21</sup> 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.”<sup>22</sup> 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 Yard Trucks Regulation 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 described above, EPA has historically evaluated this criterion for consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C).

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<sup>20</sup> See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889-18890 (May 3, 1984).

<sup>21</sup> CARB Resolution 08-43 and CARB Resolution 10-44.

<sup>22</sup> 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).

### **1. Consistency with Section 209(a)**

To be consistent with section 209(a) of the Clean Air Act, California's Yard Trucks Regulation must not apply to new motor vehicles or new motor vehicle engines. California's Yard Trucks Regulation expressly applies only to in-use off-road yard trucks and auxiliary engines in two-engine sweepers and does not apply to new engines used in motor vehicles as defined by section 216(2) of the Clean Air Act.<sup>23</sup> No commenter presented otherwise. Based on the evidence in the record, EPA cannot deny California's request on the basis that California's Yard Trucks Regulation is 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 Yard Trucks Regulation must not affect new farming or construction vehicles or engines that are below 175 horsepower (hp), or new locomotives or their engines. CARB presents that the regulation specifically does not apply to locomotives and it further does not apply to new farm and construction equipment with engines less than 175 horsepower hp.<sup>24</sup> In addition, CARB notes that its regulation does not immediately attempt to regulate new farm and construction equipment and that under any compliance pathway a fleet is not required to take any action on a vehicle less than 7 years old. CARB maintains that its in-use regulations are consistent with the definition of new in EPA's section 209(e) rule. No commenter presented otherwise. Based on the evidence in the record, EPA cannot deny California's request on the basis that California's Yard Trucks Regulation is not consistent with section 209(e)(1).

### **3. Consistency with Section 209(b)(1)(C)**

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<sup>23</sup> CARB Authorization Request at 11-13.

<sup>24</sup> *Id.*

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 timeframe. California's accompanying enforcement procedures would also be inconsistent with section 202(a) if federal and California test procedures conflicted such that the same engine could not meet both the federal requirements and the California requirements. 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.<sup>25</sup>

**a. Technological Feasibility**

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.<sup>26</sup> 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

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<sup>25</sup> *MEMA I*, 627, F.2d at 1126.

<sup>26</sup> H.R. Rep. No. 95-294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 301 (1977).

within that time is feasible. Previous EPA waivers are in accord with this position.<sup>27</sup> 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.<sup>28</sup> Subsequently, Congress has stated that, generally, EPA's construction of the waiver provision has been consistent with congressional intent.<sup>29</sup>

CARB presents that the technology required to comply with its Yard Trucks Regulation is currently available, and that it has provided sufficient lead-time, giving consideration to cost of compliance.<sup>30</sup> 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.

EPA did not receive any comments suggesting that CARB's standards and test procedures are technologically infeasible. Based on the evidence in 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.<sup>31</sup> CARB presents that the Yard Trucks Regulation raises no issue regarding test procedure consistency because

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<sup>27</sup> *See, e.g.*, 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).

<sup>28</sup> 41 FR 44209 (October 7, 1976).

<sup>29</sup> H.R. Rep. No. 95-294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 301 (1977).

<sup>30</sup> CARB Authorization Request at 13-18.

<sup>31</sup> *See, e.g.*, 43 FR 32182 (July 25, 1978).

there are no additional test procedures for engine manufacturers or fleet owners to meet beyond federal and state certification testing for new engines.<sup>32</sup> 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 Yard Trucks Regulation pose any test procedure consistency problem. Based on the evidence in 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. Authorization Determination for California's Yard Trucks Regulation**

After a review of the information submitted by CARB and the record for this authorization request, EPA finds that no basis exists to demonstrate that authorization for California's Yard Trucks Regulation 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 Yard Trucks Regulation 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 Authorization Request, and the public record for this matter, EPA is granting an authorization to California for its Yard Trucks Regulation.

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

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<sup>32</sup> CARB Authorization Request at 18, *See* 49 CFR parts 89 and 1039 and title 13, CCR, sections 2400 through 2427 and 2700 et seq.

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: May 16, 2013.

Gina McCarthy,  
Assistant Administrator,  
Office of Air and Radiation.

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