6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2012-0741; FRL-9828-3]

California State Nonroad Engine Pollution Control Standards; Within-the-Scope Determination for Amendments to California's "Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and Facilities Where TRUs Operate"; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of decision.

SUMMARY: EPA confirms that amendments promulgated by the California Air Resources Board ("CARB") are within the scope of an existing authorization issued by EPA for California's in-use diesel-fueled TRU regulations.

DATES: Petitions for review must be filed by [INSERT DATE SIXTY DAYS AFTER FR PUBLICATION DATE IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2012-0741. All documents relied upon in making this decision, including those submitted to EPA by CARB, and public comments, 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-2012-0741 in the "Enter Keyword or ID" fill-in box to view documents in the record of CARB's TRU amendments within-the-scope authorization request. 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. Chronology

EPA granted an authorization for California's initial set of TRU regulations on January 9, 2009.[1] By letter dated May 13, 2011, CARB submitted to EPA its request pursuant to section 209(e) of the Clean Air Act ("CAA" or "the Act"), regarding amendments to its "Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and Facilities Where TRUs Operate" (hereinafter CARB's "ATCM" or "TRU amendments").[2] CARB asked that EPA confirm that the amendments either fall within the scope of the authorization EPA granted on January 9, 2009, pursuant to section 209(e) of the Clean Air Act, or are not subject to CAA preemption.

B. CARB's TRU Amendments

Since EPA's grant of an authorization for California's TRU regulations in 2009, CARB has promulgated several amendments, which are at issue here. CARB's Board adopted the TRU amendments on November 18, 2010, in Resolution 10-39. CARB's TRU amendments accomplish three main objectives: (1) relax the TRU in-use compliance requirements for all 2003 and some 2004 model year TRUs and TRU generator sets (collectively referred to as "TRUs"); (2) clarify the operational useful life of TRU flexibility engines[3]; and (3) establish new reporting and recordkeeping requirements for TRU original equipment manufacturers (OEMs). CARB formally

[1] 74 FR 3030 (January 16, 2009).
[2] California Air Resources Board ("CARB"), "Request for Authorization," May 13, 2011.
[3] Flexibility engines are engines that meet less stringent emission standards than otherwise required for new off-road engines. CARB, "Request that Amendments to California's Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and Facilities Where TRUs Operate Be Found Within the Scope of the Existing Authorization Granted Pursuant To Section 209(e) Of The Clean Air Act", EPA-HQ-OAR-2012-0741-0002, (May 13, 2011), at page 3.

adopted the TRU amendments on February 4, 2011,[4] and they became operative under California law on March 7, 2011. The TRU amendments are codified at title 13, California Code of Regulations, section 2477.[5]

1. Relaxation of Standards for 2003 and 2004 Model Year TRUs

These amendments allow owners of model year 2003 TRUs in the 25 horsepower (hp) and greater category the option of complying with the ATCM's in-use standards by meeting the low emission TRU ("LETRU") standard, which achieves a 50 percent particulate matter (PM) emission reduction. Prior to amendment, the ATCM had required that owners comply with the more stringent ultra-low emission TRU ("ULETRU") in-use standard, which achieves an 85 percent PM reduction. This change, according to CARB, provides owners with more compliance flexibility and is needed because ULETRU compliance options presently are limited and relatively costly compared to LETRU compliance costs. The compliance date for meeting one of these standards would remain December 31, 2010, seven years after the 2003 engine model year, which is the end of the TRU's operational life.[6] Seven years later (i.e., by December 31, 2017), owners choosing to

[4] CARB, "Resolution 10-39," November 18, 2010; CARB, "Executive Order R-11-001," February 2, 2011.
[5] CARB, "Final Regulation Order for title 13, California Code of Regulations, section 2477."
[6] Operational life is the life of the engine or unit as allowed under the regulation before an in-use standard must be met. Operational life should be distinguished from useful life, as defined under new engine standards and used for survivability (engine mortality over time) in engine population inventory reports. CARB, "Request that Amendments to California's Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and Facilities Where TRUs Operate Be Found Within the Scope of the Existing Authorization Granted Pursuant To Section 209(e) Of The Clean Air Act", EPA-HQ-OAR-2012-0741-0002, (May 13, 2011), at page 2.

comply by meeting the LETRU standard would be required to meet the ULETRU standard.[7]

The amendments similarly provide owners of 2003 and 2004 model year TRU engines in the less than 25 hp category with the option of complying with the in-use standards by meeting the LETRU in-use standard in lieu of being required to meet the ULETRU standard by December 31, 2010, for model year 2003 engines and December 31, 2011, for model year 2004 engines. As with the larger horsepower engines, those owners electing to comply by meeting the LETRU standard would need to upgrade their model year 2003 and 2004 engines to the ULETRU standard seven years after initial compliance in either 2010 or 2011 (i.e., by December 31, 2017 or 2018, respectively).[8]

2. Clarification in Calculation of Operational Life for TRU Flexibility Engines in Future

When the TRU ATCM was first adopted, CARB assumed that TRU engines manufactured in a specific year would meet the emission standards applicable for that year and that these engines would be upgraded to more stringent emission standards seven years after initial certification. CARB subsequently discovered that TRU OEMs were using significantly more flexibility engines in California than originally anticipated, with the consequence that the ATCM is achieving fewer emission reductions than forecasted. To address this problem, CARB amended the regulation to clarify that for flexibility engines installed in new TRUs after March 7, 2011 (the

[7] CARB, "Request that Amendments to California's Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and Facilities Where TRUs Operate Be Found Within the Scope of the Existing Authorization Granted Pursuant To Section 209(e) Of The Clean Air Act," EPA-HQ-OAR-2012-0741-0002 (May 13, 2011) at page 2.
[8] *Id.*

date that the amendments became operative under California law), the seven-year operational life of a TRU engine must be based on the effective model year of the engine. The effective model year is defined as the last year that the lower emission tier of the flexibility engine was in effect for new engines. The amendments clarify that owners of TRU flexibility engines installed before the operative date of the amendments would be provided a full seven years of operational life from the year of the engine's manufacture before having to meet the more stringent ULETRU in-use performance standard. Flexibility engines installed after that date will have a reduced operational life given that compliance would be based on the last year that the flexibility engine's tier standard was in effect. CARB maintains that owners will not be adversely affected as TRU OEMs are required under the amendments to provide notice at the point of sale to the end-user that the TRUs are equipped with flexibility engines and have a shorter operational life. They must also provide the end-user with the date that the engine must meet the ULETRU standard.[9]

3. New Reporting and Recordkeeping Requirements for TRU OEMs

CARB amended the TRU ATCM to require that TRU OEMs report production information, including information on flexibility engines installed in TRUs. The reporting, according to CARB, will ensure that manufacturers provide the data necessary to ensure that owners properly register TRUs in CARB's equipment registration system (ARBER) and more accurately estimate emissions inventories, as well as allow CARB and TRU owners to properly track flexibility engines. TRU

[9] CARB, "Request that Amendments to California's Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and Facilities Where TRUs Operate Be Found Within the Scope of the Existing Authorization Granted Pursuant To Section 209(e) Of The Clean Air Act", EPA-HQ-OAR-2012-0741-0002, (May 13, 2011), at page 3-4.

OEMs would be required to periodically report data on each TRU and installed engine produced in future model years and submit reports on TRU sales from previous years.[10]

C. EPA's Review of California's TRU Within-the-Scope Request

By letter dated May 13, 2011, CARB submitted a request to EPA seeking confirmation that these amendments are within the scope of the authorization issued by EPA under section 209(e) of the Clean Air Act on January 9, 2009. EPA announced its receipt of California's within-the-scope confirmation request in a *Federal Register* notice on January 4, 2013.[11] In that notice, EPA offered an opportunity for public hearing and comment on CARB's request.

Although CARB's request regarding its TRU amendments was submitted as a within-the-scope request, EPA invited comment on several issues. Within the context of a within-the-scope analysis, EPA invited comment on whether California's standards: (1) undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as comparable Federal standards; (2) affect the consistency of California's requirements with section 202(a) of the Act; and (3) raise any other new issues affecting EPA's previous waiver or authorization determinations. EPA also requested comment on issues relevant to a full authorization analysis, in the event that EPA determined that California's standards should not be evaluated under the within-the-scope criteria noted above, and should instead be subjected to a full authorization analysis. Specifically, EPA sought comment on: (a) whether CARB's determination that its standards, in the

[10] *Id.* at 4.
[11] 78 FR 721 (January 4, 2013).

aggregate, are at least as protective of public health and welfare as applicable Federal standards is arbitrary and capricious; (b) whether California needs separate standards to meet compelling and extraordinary conditions; and (c) whether California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Act.

No party requested an opportunity for a hearing to present oral testimony, and EPA received only one written comment. The comment supports CARB's amendments, and encourages EPA to confirm that the amendments are within the scope of CARB's TRU authorization. The written comment is from the Manufacturers of Emission Controls Association ("MECA").[12]

D. 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.[13] For all other nonroad engines (including "non-new" 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 attainment plans may adopt and enforce such regulations if

[12] Comments of the Manufacturers of Emission Controls Association ("MECA"), EPA-HQ-OAR-2012-0741-0003 (March 1, 2013).

[13] 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 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.[14] EPA later revised these regulations in 1997.[15] 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).[16]

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 regulate engine categories that are permanently preempted from state regulation. To determine consistency with section

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[14] 59 FR 36969 (July 20, 1994).

[15] 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.

[16] 59 FR 36969 (July 20, 1994).

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 the Administrator 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.

E. Within-the-Scope Determinations

If California amends regulations that were previously granted an authorization, EPA can confirm that the amended regulations are within the scope of the previously granted authorization. Such within-the-scope determinations are permissible without a full authorization review if three conditions are met. First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 202(a) of the Act. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.

F. Deference to California

In previous waiver 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. This has led EPA to state:

> It is worth noting … I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to "catch up" to some degree with newly promulgated standards. Such an approach … may be attended with costs, in the shaped 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.[17]

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.[18]

The House Committee Report explained as part of the 1977 amendments to the Clean Air Act, where Congress had the opportunity to restrict the waiver provision, it elected instead to explain California's flexibility to adopt a complete program of motor vehicle emission controls. The amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.[19]

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[17] 40 FR 23103-23104 (May 28, 1975); *see also* LEV I Decision Document at 64 (58 FR 4166 (January 13, 1993)).
[18] 40 FR 23104; 58 FR 4166.
[19] *MEMA I*, 627 F.2d at 1110 (*citing* H.R.Rep. No. 294, 95 Cong., 1st Sess. 301–02 (1977).

G. 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.[20]

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."[21]

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.[22] 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.[23]

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[20] *MEMA I*, 627 F.2d at 1122.
[21] *Id*.
[22] *Id*.
[23] *Id*.

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."[24]

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.[25]

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

[24] *See, e.g.*, 40 FR 21102-103 (May 28, 1975).
[25] *MEMA I*, 627 F.2d at 1121.

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.'"[26] Therefore, the Administrator's burden is to act "reasonably."[27]

II. Discussion

A. Within-the-Scope Analysis

We initially evaluate California's TRU amendments by application of our traditional within-the-scope analysis, as CARB requested. If we determine that CARB's request does not meet the requirements for a within-the-scope determination, we then evaluate the request based on a full authorization analysis. EPA sought comment on a range of issues, including those applicable to a within-the-scope analysis as well as those applicable to a full authorization analysis. No party submitted a comment that California's TRU amendments require a full authorization analysis. Given the lack of comments on this issue, and the nature of the amendments, EPA will evaluate California's TRU amendments by application of our traditional within-the-scope analysis, as CARB requested.

EPA can confirm that amended regulations are within the scope of a previously granted waiver of preemption if three conditions are met. First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect

[26] *Id*. at 1126.
[27] *Id*. at 1126.

consistency with section 202(a) of the Act. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.

1. California's Protectiveness Determination

In its May 13, 2011 letter requesting a within-the scope determination, CARB points out that in approving the amendments relaxing the standards for 2003 and 2004 model year TRUs, it found, in Resolution 10-39,[28] that the TRU ATCM, as amended, in the aggregate, continues to be at least as protective of public health and welfare as applicable federal standards. CARB noted that EPA could not find that CARB's determination is arbitrary and capricious, even though the amended regulation includes short-term relaxation of in-use compliance requirements in the 2003 and 2004 model years, for the reason that EPA does not have comparable federal emission standards that regulate in-use TRUs and TRU engines. This same reasoning applies to the TRU amendments clarifying the operational useful life of TRU flexibility engines, and the TRU amendments establishing new reporting and recordkeeping requirements for TRU original equipment manufacturers (OEMs).

After evaluating the materials submitted by CARB, and since EPA has not adopted any standards or requirements for in-use TRU systems or engines, and based on no comments submitted to the record, EPA cannot find that California's TRU amendments undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards.

2. Consistency with Section 202(a) of the Clean Air Act

[28] CARB, "Resolution 10-39," November 18, 2010.

EPA has stated in the past that California standards and accompanying test procedures would be inconsistent with section 202(a) of the Clean Air Act if: (1) there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to cost of compliance within the lead time provided, or (2) the federal and California test procedures impose inconsistent certification requirements.[29]

The first prong of EPA's inquiry into consistency with section 202(a) of the Act depends upon technological feasibility. This requires EPA to evaluate 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. In its May 13, 2011 letter, CARB states the amendments raise no new issue that disturb EPA's earlier finding that the TRU in-use performance requirements are technologically feasible within the lead time provided for compliance. The amendments relax the initially adopted performance requirements, providing additional lead time for owners of all 2003 model year TRU engines, regardless of horsepower, and for 2004 model year TRUs with horsepower ratings less than 25 hp, to comply with ULETRU in-use standard. The amendments at issue have been adopted to provide owners with more compliance flexibility, and are needed because ULETRU compliance options presently are limited and relatively costly compared to LETRU compliance costs. The relaxation will provide sufficient time for market restrictions to abate and provide the full range of compliance options that CARB envisioned when the TRU ATCM was first adopted. In regard to the TRU amendments clarifying the operational useful life of TRU flexibility engines, CARB stated in its May 13, 2011 letter that "no issue

[29] *See, e.g.*, 75 FR 8056 (February 23, 2010) and 70 FR 22034 (April 28, 2005).

of technological feasibility exists in that manufacturers, in having used the flexibility provisions of federal and state law, have never contended that use of such provisions was necessitated for reasons of technical feasibility – i.e., because engines certified to the most stringent emission tier could not be used with newly manufactured TRU systems. Moreover, the clarifying amendments ensure that existing owners' TRU-flexibility engines will not be penalized."[30] Additionally, the TRU amendments establishing new reporting and recordkeeping requirements for TRU OEMs do not impose any new concerns regarding the technical feasibility of engine or equipment manufacturers in meeting the in-use performance requirements of the TRU ATCM and do not affect the bases for which the authorization was initially granted.[31]

EPA received no comments indicating that CARB's TRU amendments present lead-time or technology issues with respect to consistency under section 202(a) and knows of no other evidence to that effect. Consequently, EPA cannot find that CARB's amendments affect our prior determination regarding consistency with section 202(a), based on lead-time or technological feasibility issues.

The second prong of EPA's inquiry into consistency with section 202(a) of the Act depends on the compatibility of the federal and California test procedures. California's standards and accompanying enforcement procedures would 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

[30] CARB, "Request that Amendments to California's Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and Facilities Where TRUs Operate Be Found Within the Scope of the Existing Authorization Granted Pursuant To Section 209(e) Of The Clean Air Act", EPA-HQ-OAR-2012-0741-0002 (May 13, 2011) at page 7.
[31] *Id.* at 8.

California and federal testing requirements using the same test vehicle or engine.[32] As discussed above in section II.1, there are no comparable federal emission standards that regulate in-use TRUs and TRU engines. Therefore, this prong does not warrant further discussion.

For the reasons set forth above, EPA confirms that California's TRU amendments do not undermine our prior determination concerning consistency with section 202(a) of the Clean Air Act.

3. New Issues

EPA has stated in the past that if California promulgates amendments that raise new issues affecting previously granted waivers or authorizations, we would not confirm that those amendments are within the scope of previous authorizations.[33]

EPA does not believe that California's TRU amendments relaxing the TRU in-use compliance requirements for all 2003 and some 2004 model year TRUs and TRU generator sets, clarifying the operational useful life of TRU flexibility engines, and establishing new reporting and recordkeeping requirements for TRU OEMs raise any new issues with respect to our prior granting of the authorization. A relaxation of compliance requirements and a clarification of operational useful life of TRU flexibility engines are not new issues that substantively affect the previously granted authorization, and are consistent with the purpose and intent of the TRU ATCM and its previously granted authorization. Additionally, although there are "new" reporting and recordkeeping requirements for TRU OEMs, as stated above, they do not impose any new concerns regarding the technical feasibility of meeting the in-use

[32] *See, e.g.*, 43 FR 32182 (July 25, 1978).
[33] *See, e.g.*, 75 FR 8056 (February 23, 2010) and 70 FR 22034 (April 28, 2005).

performance requirements of the TRU ATCM and do not affect the bases for which the authorization was initially granted. Moreover, EPA did not receive any comments that CARB's TRU amendments raised new issues affecting the previously granted authorization. Therefore, EPA cannot find that CARB's TRU amendments raise new issues and consequently, cannot deny CARB's request based on this criterion.

For these reasons, EPA confirms that California's TRU amendments raise no new issues with respect to the previously granted authorization.

4. Within-the-Scope Confirmation

For all the reasons set forth above, EPA can confirm that California's amendments to its TRU ATCM are within the scope of the existing authorization.

III. Decision

The Administrator has delegated the authority to grant California a section 209(e) authorization to the Assistant Administrator for Air and Radiation. This includes the authority to determine whether amendments to its regulations are within the scope of a prior authorization. CARB's May 13, 2011 letter seeks confirmation from EPA that CARB's amendments to its TRU ATCM regulations are within the scope of its existing authorization. After evaluating CARB's amendments, CARB's submissions, and the public comments, EPA confirms that California's regulatory amendments meet the three criteria that EPA uses to determine whether amendments by California are within the scope of previous authorizations. First, EPA agrees with CARB that the TRU amendments do not undermine California's protectiveness determination from its previous authorization request. Second, EPA agrees with CARB that California's TRU amendments do not undermine EPA's prior

determination regarding consistency with section 202(a) of the Act. Third, EPA agrees with CARB that California's TRU amendments do not present any new issues which would affect the previous authorization for California's TRU ATCM regulations. Therefore, I confirm that CARB's TRU amendments are within the scope of EPA's authorization for California's TRU ATCM regulations.

My decision will affect not only persons in California, but also manufacturers outside the State who must comply with California's requirements in order to produce TRU systems for sale in California. 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: June 19, 2013.

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

[FR Doc. 2013-15437 Filed 06/27/2013 at 8:45 am; Publication Date: 06/28/2013]