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ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2013-0573; FRL-9954-96-OAR]

California State Motor Vehicle Pollution Control Standards; Malfunction and Diagnostic System Requirements and Enforcement for 2004 and Subsequent Model Year Passenger Cars, Light Duty Trucks, and Medium Duty Vehicles and Engines; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Decision.

SUMMARY: The Environmental Protection Agency (EPA) is granting the California Air Resources Board's ("CARB") request for a waiver of Clean Air Act preemption to enforce amendments to regulations entitled "Malfunction and Diagnostic System Requirements -- 2004 and Subsequent Model-Year Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles and Engines" ("OBD II Requirements") and amendments to CARB's regulations entitled "Enforcement of Malfunction and Diagnostic Systems Requirements for 2004 and Subsequent Model-Year Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles and Engines" ("OBD II Enforcement Regulation"). This decision is issued under the authority of the Clean Air Act ("CAA" or "the Act").

DATES: Petitions for review must be filed by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2013-0573. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy

at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's website is http://www.epa.gov/oar/docket.html. The email address for the Air and Radiation Docket is: a-and-r-docket@epa.gov, the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system at http://www.regulations.gov. After opening the www.regulations.gov website, enter EPA-HQ-OAR-2013-0573 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality ("OTAQ") maintains a webpage that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at http://www.epa.gov/otaq/cafr.htm.

FOR FURTHER INFORMATION CONTACT: David Dickinson, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave (6405J), N.W., Washington, DC 20460. Telephone: (202) 343-9256. Fax: (202) 343-2800. Email: dickinson.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

CARB initially adopted the OBD II regulation in July 1990 and has adopted a number of amendments subsequently. The OBD II regulation directs motor vehicle manufacturers to incorporate vehicle onboard diagnostic systems meeting particular requirements on all new passenger cars, light-duty trucks, and medium-duty vehicles and engines. Specifically, manufacturers are required to install OBD II systems that effectively monitor all emission-related components and systems on the motor vehicle for proper operation and for deterioration or malfunctions that cause emissions to exceed specific thresholds. The regulation also requires that OBD II systems provide specific diagnostic information in a standardized format through a standardized serial data link on-board the vehicles to ensure that service and repair technicians can properly and promptly repair identified malfunctions.

EPA issued a waiver under section 209(b) of the CAA for the OBD II regulations, as last amended through 1995, on October 11, 1996.[1] After the granting of the waiver, CARB adopted further amendments to the OBD II regulation in 1997 and 2003.[2] CARB subsequently filed requests on December 24, 1997 and October 30, 2003, that the EPA respectively find the amendments to the OBD II Requirements adopted in 1997 and 2003

[1] The decision was signed on October 2, 1996, and published at 61 FR 53371 (October 11, 1996). Included in the waiver decision were the 1992, 1993, and 1995 amendments. CARB's initial OBD II regulations were codified at Title 13, California Code of Regulations (CCR), Section 1968.1

[2] The CARB Board (Board) initially approved the amendments at rulemakings held respectively on December 12, 1996 and April 25, 2002. In 2003 (upon the final adoption of the amendments initially adopted in 2002), CARB codified the regulations at section 1968.2 (this section carried over most of the monitoring requirements of section 1968.1, and apply to 2004 and subsequent model year vehicles). The 2003 amendments included several new provisions that expressly applied to vehicles after the date of the amendments. The 2003 amendments also included OBD-II specific enforcement provisions, including requirements for post-assembly line evaluation of production vehicles (section 1968.2(j)) and in-use testing procedures at 1968.5

be found to be within the scope of the previously granted OBD II waiver. The October 30, 2003, request further asked that OBD II Enforcement Regulation be found within the scope of the previously granted waivers for "California's Enforcement of New and In-Use Vehicle Standards," title 13, Cal. Code Regs. Section 2100 *et seq.*[3] EPA published a notice of opportunity for hearing and comment on the 1997 and 2003 California requests on February 5, 2004.[4]

On August 9, 2007, CARB adopted additional amendments to the OBD II Requirements and minor amendments to the OBD II Enforcement Regulation and to its emission warranty regulations. The 2007 OBD II Requirements amendments were made, *inter alia*, to address manufacturer compliance concerns and to align the monitoring requirements with those adopted by CARB in 2005 for heavy duty diesel engines.[5] By letter dated January 22, 2008, CARB requested that EPA find the 2007 amendments fall within the scope of the previous OBD II waiver.

On April 5, 2010, CARB adopted additional amendments to the OBD II Requirements, but not to the OBD II Enforcement Regulation.[6] The 2010 OBD II

[3] *See* 61 FR 53371 (October 11, 1996), 43 FR 9344 (March 7, 1978), and 43 FR 25729 (June 14, 1978) for grant of EPA's waivers for "California's Enforcement of New and In-Use Vehicle Standards" at title 13, CCR, section 2100 et seq. CARB's OBD II Requirements generally set monitoring requirements on various emission control components and the OBD II Enforcement Regulation generally sets forth the manufacturing testing requirements and expected follow up from manufacturers based on in-use testing results.

[4] *See* 69 FR 5542 (February 5, 2004). EPA has not issued a waiver determination regarding the 1997 and 2003 amendments.

[5] Many of the amendments pertain to monitoring requirements for gasoline vehicles which CARB maintains were adopted to provide relief to manufacturers and to address their concerns about complying with the requirements. CARB also amended the OBD II requirements to address light- and medium-duty manufacturer concerns with complying with the malfunction thresholds for certain diesel emission controls and to better align the OBD II requirements with those that had been adopted for heavy-duty diesel engines in the HD OBD regulation. CARB also amended section 1968.5, including specific criteria in determining whether mandatory recall is appropriate for noncompliant OBD II systems that present valid testing of the affected vehicles in the California Smog Check program.

[6] The California Office of Administrative Law (OAL) approved the 2010 OBD II amendments on May 18, 2010 and the amendments primarily modify section 1968.2.

Requirements amendments were made to primarily harmonize the medium-duty diesel vehicle requirements with revisions to monitoring requirements for heavy-duty diesel engines.[7] By letter dated December 15, 2010, CARB requested that EPA find that the 2010 OBD II Requirements amendments fall within the scope of the previous waiver or alternatively, that a new waiver be granted for the amendments.

On March 12, 2012, and on June 26, 2013, CARB adopted additional amendments to the OBD II Requirements and to the OBD II Enforcement Regulation. The 2012 OBD II Requirements amendments were primarily made to relax and/or clarify OBD II Requirements in response to manufacturer concerns. The 2013 OBD II Requirements amendments primarily affect medium-duty vehicles, to align the OBD II monitoring requirements with those adopted by CARB for heavy duty diesel engines. By letter dated February 12, 2014, CARB requested that EPA find that the 2012 and 2013 OBD II amendments fall within the scope of the previous waiver or, alternatively, that a full waiver be granted for the amendments.

The various amendments, noted above, to the OBD II Requirements are codified at title 13, California Code of Regulations, section 1968.2. The various amendments, noted above, to the OBD II Enforcement Regulations are codified at title 13, California Code of Regulations, section 1968.5. The scope of today's waiver specifically addresses the 2007 through 2013 amendments, and sections 1968.2 and 1968.5.

II. Principles Governing this Review

A. Scope of Review

Section 209(a) of the CAA provides:

[7] The 2010 amendments include changes that relax the malfunction thresholds until the 2013 model year for three major emission controls: particulate matter (PM) filters, oxides of nitrogen (NOx) catalysts, and NOx sensors.

> "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment."[8]

Section 209(b)(1) of the Act requires the Administrator, after an opportunity for public hearing, to waive application of the prohibitions of section 209(a) for any state that has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the state determines that its state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.[9] However, no such waiver shall be granted if the Administrator finds that: (A) the protectiveness determination of the state is arbitrary and capricious; (B) the state does not need such state standards to meet compelling and extraordinary conditions; or (C) such state standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.[10]

Key principles governing this review are that EPA should limit its inquiry to the specific findings identified in section 209(b)(1) of the Clean Air Act, and that EPA will give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended the Agency's review of California's decision-making to be narrow. EPA has rejected arguments that are not specified in the statute as grounds for denying a waiver:

[8] CAA § 209(a). 42 U.S.C. § 7543(a).
[9] CAA § 209(b)(1). 42 U.S.C. § 7543(b)(1). California is the only state that meets section 209(b)(1)'s requirement for obtaining a waiver. *See* S. Rep. No. 90-403 at 632 (1967).
[10] CAA § 209(b)(1). 42 U.S.C. § 7543(b)(1).

> "The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in California air quality not commensurate with its costs or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California."[11]

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.[12] Thus, EPA's consideration of all the evidence submitted concerning a waiver decision is circumscribed by its relevance to those questions that may be considered under section 209(b)(1).

If California amends regulations that were previously waived by EPA, California may ask EPA to determine that the amendments are within the scope of the earlier waiver. A within-the-scope determination for such amendments is permissible without a full authorization review if three conditions are met. First, the amended regulations must not undermine California's previous determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 202(a) of the Act, following the same criteria discussed above in the context of full waivers. Third, the amended regulations must not raise any ''new issues'' affecting EPA's prior waivers.[13]

B. Burden and Standard of Proof

[11] "Waiver of Application of Clean Air Act to California State Standards," 36 FR 17458 (Aug. 31, 1971). The more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

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

[13] *See* ''California State Motor Vehicle Pollution Control Standards; Amendments Within the Scope of Previous Waiver of Federal Preemption,'' 46 FR 36742 (July 15, 1981).

As the U.S. Court of Appeals for the D.C. Circuit has made clear in *MEMA I*, opponents of a waiver request by California bear the burden of showing that the statutory criteria for a denial of the request have been met:

> "[T]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied."[14]

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.'''[15] Therefore, the Administrator's burden is to act ''reasonably.''[16]

With regard to the standard of proof, the court in *MEMA I* explained that the Administrator's role in a section 209 proceeding is to:

> "[...]consider all evidence that passes the threshold test of materiality and … thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver."[17]

In that decision, the court considered the standards of proof under section 209 for the two findings related to granting a waiver for an ''accompanying enforcement procedure.''

[14] *MEMA I*, note 19, at 1121.
[15] *Id.* at 1126.
[16] *Id.* at 1126.
[17] *Id.* at 1122.

Those findings involve: (1) whether the enforcement procedures impact California's prior protectiveness determination for the associated standards, and (2) whether the procedures are consistent with section 202(a). The principles set forth by the court, however, are similarly applicable to an EPA review of a request for a waiver of preemption for a standard. The court instructed that ''the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.''[18]

With regard to the protectiveness finding, the court upheld the Administrator's position that, to deny a waiver, there must be ''clear and compelling evidence'' to show that proposed enforcement procedures undermine the protectiveness of California's standards.[19] 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.[20]

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for ''standards,'' as compared to a waiver request for accompanying enforcement procedures, there is nothing in the opinion to 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

[18] *Id.*
[19] *Id.*
[20] *Id.*

'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."[21]

C. Deference to California

In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on specifically listed criteria was to ensure that the federal government did not second-guess state policy choices. As the Agency explained in one prior waiver decision:

> "It is worth noting … I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator.… Since a balancing of risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score."[22]

Similarly, EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on "ambiguous and controversial matters of public policy" to California's judgment.[23] This interpretation is supported by relevant discussion in the House Committee Report for the 1977 amendments to the CAA. Congress had the opportunity through the 1977 amendments to restrict the preexisting waiver provision, but elected instead to expand California's flexibility to adopt a complete program of motor vehicle emission controls. The report explains that the amendment is intended to ratify and strengthen the preexisting California waiver provision and to affirm the

[21] *See, e.g.,* "California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption," 40 FR 23102 (May 28, 1975), at 23103.
[22] 40 FR 23102, 23103-04 (May 28, 1975).
[23] 40 FR 23102, 23104 (May 28, 1975); 58 FR 4166 (January 13, 1993).

underlying intent of that provision, that is, to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.[24]

D. EPA's Administrative Process in Consideration of California's Requests

On November 20, 2014, EPA published a notice of opportunity for public hearing and comment on California's waiver requests (November 20, 2014 Notice). EPA scheduled a public hearing concerning CARB's request for January 14, 2015, and asked for written comments to be submitted by February 16, 2015.[25] EPA's notice of CARB's requests invited public comment on the following: Whether CARB's 2007, 2010, 2012, and 2013 OBD II amendments, individually or collectively assessed, should be considered under the within-the-scope analysis or under the "full waiver criteria." To the extent such amendment(s) should be considered under the within-the-scope criteria, EPA requested comment on whether the amendment(s) "(1) undermine California's previous determination that its standards, in the aggregate, are at least 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 "new issue" affecting EPA's previous waiver or authorization determinations."

To the extent any party believed that the 2007, 2010, 2012, or 2013 OBD II amendments do not merit consideration as within-the-scope of the previous waiver, EPA also requested comment on whether those amendments meet the criteria for a full waiver, specifically "Whether (a) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as

[24] *MEMA I*, 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977)).
[25] 79 FR 69106 (November 20, 2014).

applicable federal standards is arbitrary and capricious, (b) California needs such standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Clean Air Act."

As noted above, EPA has previously given notice and taken comments on CARB's requests for within-the-scope determinations related to CARB's 1997 and 2003 OBD II amendments. Thus EPA sought additional comment on any relevant effects the more recent OBD II amendments may have on the prior 1997 and 2003 OBD II amendments. EPA received no comment or evidence suggesting that the more recent OBD II amendments, which are the subject of this waiver, would have any effect on them.

Additionally, EPA received no requests for a public hearing, so EPA did not hold a hearing. EPA received no written comments on the November 20, 2014 Notice. EPA bases its waiver determination on the public record which in this instance consists of the waiver requests dated January 11, 2008, December 15, 2010, and February 12, 2014, and supporting materials submitted by CARB.

III. Discussion

As noted, EPA previously issued CARB a waiver for its OBD II Requirements for light- and medium-duty vehicles in 1996. Since that time EPA has offered an opportunity for public hearing and took public comment on CARB's 1997 and 2003 OBD II Requirements and Enforcement Regulation amendments, and EPA has received three additional waiver requests from CARB relating to its 2007, 2010, 2012, and 2013 OBD II amendments. EPA may evaluate CARB's waiver request under the within-the-scope

criteria if three criteria are met, including whether CARB's regulation or amendments raise any new issues. EPA has generally found "new issues" to exist if CARB's regulatory amendments include new more stringent standards or require updated emission control technology or other requirements on manufacturers or fleet operators. EPA believes that new issues may also exist when EPA has adopted its own emission standards, for the regulated industry, in the intervening years between when EPA last considered CARB's regulatory program. In this instance, as a result of the significant evolution of CARB's OBD II regulatory program since 1996, the sheer number of amendments – some in part designed to address a variety of manufacturers concerns with the technological feasibility of complying with previous versions of the OBD II regulations, EPA has evaluated these requests under the full waiver criteria.[26] Evaluating the amendments under the criteria for a full waiver has provided EPA and other stakeholders with a full opportunity to explore whether CARB's standards are as protective of public health and welfare, in the aggregate, as applicable federal standards and whether CARB's standards (as amended) are technologically feasible and otherwise consistent with section 202(a). Given that CARB's 2007 and later OBD II amendments significantly modify the OBD II program after the amendments of 1997 and 2003, EPA has considered, and applied the full waiver criteria to, CARB's regulations as of the date of the adoption of the 2007 amendments up through the adoption of the most recent amendments in 2013.

A. California's Protectiveness Determination

[26] EPA notes that no comment suggested that the amendments do not meet the criteria for a within-the-scope determination. EPA is making no decision on whether the amendments do or do not meet the criteria for a within-the-scope determination.

Section 209(b)(1)(A) of the Act sets forth the first of the three criteria governing a waiver request – whether California was arbitrary and capricious in its determination that its state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards. Section 209(b)(1)(A) of the CAA requires EPA to deny a waiver if the Administrator finds that California's protectiveness determination was arbitrary and capricious. However, a finding that California's determination was arbitrary and capricious must be based upon clear and convincing evidence that California's finding was unreasonable.[27]

CARB made protectiveness determinations in adopting each of the OBD II amendments, and found that the OBD II Requirements and OBD II Enforcement Regulation would not cause California motor vehicle emissions standards, in the aggregate, to be less protective of the public health and welfare than applicable federal standards.[28]

In adopting the initial OBD II Requirements and subsequent amendments thereto in 1989 through 1994, CARB resolved that its standards, in the aggregate, were at least as protective of public health and welfare as the applicable federal standards, including federal OBD standards. In granting the 1996 waiver, the Administrator held that she could not find the CARB's determination was arbitrary and capricious.[29]

CARB maintains that its most recent round of amendments (the 2012 and 2013 Amendments) do not disturb the finding from 1996, even though EPA has since adopted amendments to its federal OBD requirements. "The 2012 amended OBD II requirements,

[27] *MEMA I*, 627 F.2d at 1122, 1124 ("Once California has come forward with a finding that the procedures it seeks to adopt will not undermine the protectiveness of its standards, parties opposing the waiver request must show that this finding is unreasonable."); *see also* 78 FR 2112, at 2121 (Jan. 9, 2013).
[28] *See* CARB Board Resolutions 06-26, 09-37, 12-11, 12-21, and 12-29.
[29] *See* OBD II Waiver Decision Document at 34.

considered as a whole, continue to be more stringent than the federal OBD regulation for light-duty vehicles and trucks and heavy-duty trucks (under the federal regulation) of the same vehicle weight rating as the California medium-duty vehicle category. The Board affirmed this determination in Resolutions 12-11 and 12-21."[30] Likewise, with regard to the 2013 Amendments pertaining to the OBD II requirements set forth in section 1968.2 of the CCR and the OBD II Enforcement Regulation set forth at 1968.5 of the CCR, CARB notes that in the adoption of Resolution 12-29, the Board "expressly found that the 2013 Amendments to the OBD II Requirements and related enforcement regulations (sections 1968.2 and 1968.5) do not undermine California's previous determinations that its standards are, in the aggregate, at least as protective of the public health and welfare as applicable federal standards."[31]

In addition, CARB notes similar protectiveness findings with regard to its 2007 and 2010 amendments. In the context of its 2007 amendments, CARB notes that generally the California OBD II Requirements set forth that components be monitored to indicate malfunctions when component deterioration or failures cause emissions to exceed 1.5 times the applicable tailpipe emission standards and that the regulation also requires components be monitored for functional performance even if the failure of such components does not cause emissions to exceed 1.5 times the applicable standard threshold. In contrast, CARB notes that the federal requirements only require monitoring of the catalyst, engine misfire, evaporative emission control system and oxygen sensors, and that other emission control systems and components need only be monitored if by their malfunctioning the vehicle would exceed 1.5 times the applicable tailpipe standard

[30] *See* 2014 Waiver Request Support Document at 63.
[31] *Id.* at 55.

(thus, not for functional performance). CARB notes "The amended OBD II requirements, considered as a whole, continue to be more stringent than the federal OBD regulation for light-duty vehicles and trucks and heavy-duty trucks (under the federal regulation) of the same vehicle weight rating as the California medium-duty vehicle category. The Board affirmed this determination in Resolution 12-29."[32]

EPA received no comments or evidence suggesting that CARB's protectiveness determination is arbitrary and capricious. In particular, no commenter disputes that California standards, whether looking at the particular California standards analyzed in this proceeding or the entire suite of California standards applicable to light- and medium-duty motor vehicles, are at least as stringent, in the aggregate, as applicable federal standards.

Because no commenters have presented evidence to show that CARB's protectiveness determinations are arbitrary and capricious, and EPA is not otherwise aware of such evidence, EPA cannot find that California's protectiveness determinations are arbitrary and capricious nor deny the waiver requests under this waiver criterion.

B. Whether the Standards are Necessary to Meet Compelling and Extraordinary Conditions

Section 209(b)(1)(B) instructs EPA not to grant a waiver if the Agency finds that California "does not need such State standards to meet compelling and extraordinary conditions." EPA's inquiry under this second criterion has traditionally been to determine whether California needs its own mobile source pollution program (i.e. set of standards) to meet compelling and extraordinary conditions, and not whether the specific standards (i.e., OBD II Requirements and OBD II Enforcement Regulation) that are the subject of

[32] *Id.* at 56.

the waiver request are necessary to meet such conditions.[33] In recent waiver actions, EPA again examined the language of section 209(b)(1)(B) and reiterated this longstanding traditional interpretation as the better approach for analyzing the need for "such State standards" to meet "compelling and extraordinary conditions."[34]

CARB confirmed in Resolutions 06-26 (2007 Amendments), 09-37 (2010 Amendments**)** and 12-29 (2013 Amendments) that California continues to need its own motor vehicle program to meet serious ongoing air pollution problems.[35] CARB asserted that "[t]he geographical and climatic conditions and the tremendous growth in vehicle population and use that moved Congress to authorize California to establish vehicle standards in 1967 still exist today. EPA has long confirmed the ARB's judgment, on behalf of the State of California, on this matter…and therefore there can be no doubt of the continuing existence of compelling and extraordinary conditions justifying California's need for its own motor vehicle emissions control program."[36] CARB also notes that "[n]othing in these conditions has changed to warrant a change in EPA's confirmation, and therefore there can be no doubt of the continuing existence of compelling and extraordinary conditions justifying California's need for its own motor vehicle emission program.[37]

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[33] *See* California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles," 74 FR 32744 (July 8, 2009), at 32761; *see also* "California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision," 49 FR 18887 (May 3, 1984), at 18889-18890.

[34] *See* 78 FR 2112, at 2125-26 (Jan. 9, 2013) ("EPA does not look at whether the specific standards at issue are needed to meet compelling and extraordinary conditions related to that air pollutant." S*ee also* EPA's July 9, 2009 GHG Waiver Decision wherein EPA rejected the suggested interpretation of section 209(b)(1)(B) as requiring a review of the specific need for California's new motor vehicle greenhouse gas emission standards as opposed to the traditional interpretation (need for the program as a whole) applied to local or regional air pollution problems.

[35] 2014 Waiver Request Support Document at 16-17.

[36] *Id.* at 17, 45 (citing 70 FR 50322, 50323 (August 26, 2005), 77 FR 73459, 73461 (December 10, 2012).

[37] *Id.*

There has been no evidence submitted to indicate that California's compelling and extraordinary conditions do not continue to exist. California, particularly the South Coast and San Joaquin Valley air basins, continues to experience some of the worst air quality in the nation and continues to be in non-attainment with national ambient air quality standards for fine particulate matter and ozone.[38] As previously stated, according to California "nothing in [California's unique geographic and climatic] conditions has changed to warrant a change in this determination."[39]

Based on the record before us, EPA is unable to identify any change in circumstances or evidence to suggest that the conditions that Congress identified as giving rise to serious air quality problems in California no longer exist. Therefore, EPA cannot deny the waiver requests based on this waiver prong.

D. Consistency with Section 202(a)

For the third and final criterion, EPA evaluates the OBD II Requirements and OBD II Enforcement Regulation that are subject to this waiver request for consistency with section 202(a) of the CAA. Under section 209(b)(1)(C) of the CAA, EPA must deny California's waiver request if EPA finds that California's standards and accompanying enforcement procedures are not consistent with section 202(a). Section 202(a) requires that regulations "shall take effect after such period as the Administrator finds necessary to permit the development and application of the relevant technology, considering the cost of compliance within that time."

EPA has previously stated that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards

[38] 74 FR 32744, 32762-63 (July 8, 2009).
[39] 74 FR 32744, 32762 (July 8, 2009); 76 FR 77515, 77518 (December 13, 2011).

are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure. Infeasibility is shown by demonstrating that there is inadequate lead time, from the time of CARB's adoption, to permit the development of technology necessary to meet the OBD II Requirements and OBD II Enforcement Regulation that are subject to the waiver request, giving appropriate consideration to the cost of compliance within that time.[40] California's accompanying enforcement procedures would also be inconsistent with section 202(a) if the federal and California test procedures conflicted, i.e., if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.[41]

EPA has reviewed the information submitted to the record by CARB to determine whether the parties opposing the waiver (no comments opposing the waiver have been submitted) requests have met their burden to demonstrate that the OBD II Requirements and OBD II Enforcement Regulation subject to the waiver requests are not consistent with section 202(a). Regarding potential test procedure conflict, as CARB notes, there is no issue of test procedure inconsistency because the federal regulations provide that manufacturers of engines and vehicles certified to California's OBD II Requirements are allowed to demonstrate compliance with the federal standards due to the "deemed to comply" provisions of EPA's standards.[42] EPA has received no adverse comment or evidence of test procedure inconsistency. Therefore, EPA cannot deny the waiver on the grounds of test procedure inconsistency.

[40] *See, e.g.*, 38 FR 30136 (November 1, 1973) and 40 FR 30311 (July 18, 1975).
[41] *See, e.g.*, 43 FR 32182 (July 25, 1978).
[42] *See* 40 CFR §1806-05(j).

EPA did not receive comments arguing that the OBD II Requirements and OBD II Enforcement Regulation were infeasible when reviewed purely as a matter of technology or cost.

In the context of CARB's 2007 amendments, CARB notes that "[a]s set forth in detail in the ISORs [Initial Statement of Reasons] and the Final Statement of Reasons for the 2003 and 2007 amendments…, and in the ISOR and Final Statement of Reasons for the HD OBD rule …, CARB has identified specific technologies for near-term implementation dates for the amended monitoring requirements as they apply to gasoline and diesel light- and medium-duty vehicles. Consistent with EPA's continuum analysis for determining technical feasibility, all monitoring requirements that manufacturers are required to implement in the near term have been required since adoption of the 2003 amendments and sufficient lead time has been provided. Among other things, the amendments have provided additional lead time and phase-in schedules for several gasoline engine monitors (e.g., catalyst monitoring) and nearly all diesel engine monitors and have relaxed requirements for other monitors (e.g. secondary air system, monitoring on gasoline vehicles)."[43] CARB also notes the 2007 amendments specifically address concerns that were raised about the feasibility of the 2003 OBD II amendments as applied to light- and medium duty diesel vehicles beginning in model year 2004, including by providing higher interim malfunction thresholds through the 2012 model year for both light- and medium-duty vehicles and permanent malfunction thresholds for medium-duty diesel engines starting with the 2013 model year.[44]

[43] 2007 Waiver Support Document at 33.
[44] *Id.* at 33-34.

As previously explained, in the context of the November 20, 2014 Notice, EPA requested and received no comments stating that the 2003 OBD amendments when read together with the 2007 OBD amendments create requirements that are technologically infeasible. As noted above, CARB has provided additional lead time and phase-in schedules for several of their gasoline engine monitors (e.g., catalyst monitoring) requirements, and nearly all of CARB's diesel engine monitors requirements, and they have relaxed requirements for other monitors (e.g. secondary air system) on gasoline vehicles.

CARB also addresses the technological feasibility of the new monitoring requirements associated with the 2007 amendments. CARB states and EPA agrees that most of the 2012 and 2013 amendments either relax or clarify existing provisions and therefore, largely provide additional compliance flexibility to the regulated industry. For example, CARB identified the use of front and rear oxygen sensor signals in order for manufacturers to monitor air-fuel ratios, and provided manufacturers with approximately five years of lead time and a phase-in of the requirement for most vehicles between the 2011 and 2013 model years, along with the use of a higher interim threshold during the phase-in period. CARB also identified similar compliance flexibilities for diesel vehicles starting with the 2007 model year and based on CARB's HD OBD regulatory experience.[45] CARB makes similar arguments with regards to its 2010 and later amendments. EPA also did not receive any comments arguing that the new monitoring requirements contained in the 2007 Amendments, and the additional requirements found in the 2010, 2012, and 2013 OBD Amendments were technologically infeasible or that the cost of compliance would be excessive, such that California's standards might be

[45] *Id.*

inconsistent with section 202(a).[46] In EPA's review of the 2007, 2010, 2012 and 2013 OBD Amendments, we likewise cannot identify any requirements that appear technologically infeasible or excessively expensive for manufacturers to implement within the timeframes provided by California at the time of adoption of the amendments. EPA therefore cannot find that the OBD II Requirements and OBD II Enforcement Regulations do not provide adequate lead time or are otherwise not technically feasible. In summary, no evidence is in the record to show that the OBD II Requirements and OBD II Enforcement Regulation are technologically infeasible, considering costs of compliance. Indeed, such a finding is particularly unlikely where CARB has continued to delay and phase-in the monitoring requirements and in some instances adjust the malfunction thresholds to be less burdensome. As such, the record does not support a finding that the OBD II Requirements and OBD II Enforcement Regulation are inconsistent with Section 202(a).

IV. Decision

The Administrator has delegated the authority to grant California section 209(b) waivers to the Assistant Administrator for Air and Radiation. After evaluating CARB's amendments to the OBD II Requirements and OBD II Enforcement Regulation described above and CARB's submissions for EPA review, EPA is hereby granting a waiver for California's 2007, 2010, 2012, and 2013 amendments to its OBD II Requirements and OBD II Enforcement Regulation.

This decision will affect not only persons in California, but also manufacturers nationwide who must comply with California's requirements. In addition, because other

[46] *See, e.g.*, 78 FR 2134 (Jan. 9, 2013), 47 FR 7306, 7309 (Feb. 18, 1982), 43 FR 25735 (Jun. 17, 1978), and 46 FR 26371, 26373 (May 12, 1981).

states may adopt California's standards for which a section 209(b) waiver has been granted under section 177 of the Act if certain criteria are met, this decision would also affect those states and those persons in such states. For these reasons, EPA determines and finds that this is a final action of national applicability, and also a final action of nationwide scope or effect for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

V. Statutory and Executive Order Reviews

As with past 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: October 24, 2016.

Janet McCabe,
Acting Assistant Administrator,
Office of Air and Radiation.
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