



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2014-0699; FRL-9954-95-OAR]

California State Motor Vehicle Pollution Control Standards; Malfunction and Diagnostic System Requirements for 2010 and Subsequent Model Year Heavy-Duty Engines; Notice of Decision

AGENCY: Environmental Protection Agency.

ACTION: Notice of decision.

SUMMARY: The Environmental Protection Agency (EPA) is granting the California Air Resources Board's (CARB's) request for a waiver of Clean Air Act preemption for amendments made in 2013 ("2013 HD OBD Amendments") to its Malfunction and Diagnostic System Requirements for 2010 and Subsequent Model Year Heavy-Duty Engine (HD OBD Requirements) and to its Enforcement of Malfunction and Diagnostic System Requirements for 2010 and Subsequent Model-Year Heavy-Duty Engines ("HD OBD Enforcement Regulation"), collectively referred to herein as HD OBD Regulations. EPA also confirms that certain of the 2013 HD OBD Amendments are within the scope of the previous waiver for the HD OBD Requirements and HD OBD 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-2014-0699. 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-2014-0699 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., NW. Telephone: (202) 343-9256. Email: dickinson.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

CARB initially adopted the HD OBD Requirements in December 2005. The HD OBD Requirements require manufacturers to install compliant HD OBD systems with diesel and gasoline powered engines used in vehicles having a gross vehicle weight rating greater than 14,000 pounds. HD OBD systems monitor emission-related components and systems for proper operation and for deterioration or malfunctions that cause emissions to exceed specific thresholds.

EPA issued a waiver under section 209(b) of the CAA for the 2005 HD OBD Requirements in 2008.¹ CARB subsequently updated the HD OBD Requirements to align the HD OBD Requirements with OBD II Requirements for medium-duty vehicles, and adopted the HD OBD Enforcement Regulation, in 2010. EPA issued California a waiver for the 2010 HD OBD Regulations in December 2012.² CARB subsequently amended the HD OBD Regulations again in 2013. CARB formally adopted the 2013 HD OBD Amendments on June 26, 2013, and they became operative under state law on July 31, 2013. The HD OBD Requirements are codified at title 13, California Code of Regulations, section 1971.1. The HD OBD Enforcement Regulation is codified at title 13, California Code of Regulations, section 1971.5.

¹ 73 FR 52042 (September 8, 2008).

² 77 FR 73459 (December 10, 2012).

By letter dated February 12, 2014³, CARB submitted to EPA a request for a determination that the 2013 HD OBD Amendments are within the scope of the previous HD OBD waiver or, alternatively, that EPA grant California a waiver of preemption for the 2013 HD OBD Amendments.

CARB's February 12, 2014 submission provides analysis and evidence to support its finding that the 2013 HD OBD Amendments satisfy the CAA section 209(b) criteria and that a waiver of preemption should be granted. CARB briefly summarizes the 2013 HD OBD Amendments as accomplishing the following primary purposes:

“accelerate the start date for OBD system implementation on alternate-fueled engines from the 2020 model year to the 2018 model year, relax some requirements for OBD systems on heavy-duty hybrid vehicles for the 2013 through 2015 model years, relax malfunction thresholds for three major emission control systems (particulate matter (PM) filters, oxides of nitrogen (NOx) catalysts, and NOx sensors) on diesel engines until the 2016 model year, delay monitoring requirements for some diesel-related components until 2015 to provide further lead time for emission control strategies to stabilize, and clarify requirements for several monitors and standardization.”⁴

The 2013 HD OBD Amendments include several dozen amendments overall.⁵

II. Principles Governing this Review

A. Scope of Review

Section 209(a) of the CAA provides:

“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

³ CARB, “Request for Waiver Action Pursuant to Clean Air Act Section 209(b) for California’s Heavy-Duty Engine On-Board Diagnostic System Requirements (HD OBD) and On-Board Diagnostic System Requirements for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles and Engines (OBD II),” February 12, 2014 (“California Waiver Request Support Document”) See www.regulations.gov website, docket number EPA-HQ-OAR-2014-0699-0003.

⁴ California Waiver Request Support Document, at 11-12.

⁵ The many 2013 HD OBD Amendments are individually summarized by CARB in the California Waiver Request Support Document, from pages 11-39.

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.”⁶

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.⁷ 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.⁸

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:

“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

⁶ CAA section 209(a). 42 U.S.C. 7543(a).

⁷ CAA section 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).

⁸ CAA section 209(b)(1). 42 U.S.C. 7543(b)(1).

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.”⁹

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.¹⁰ 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).

B. Burden and Standard of Proof

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.”¹¹

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

⁹ “Waiver of Application of Clean Air Act to California State Standards,” 36 FR 17458 (Aug. 31, 1971). Note that the more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

¹⁰ See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (“*MEMA I*”).

¹¹ *MEMA I*, note 19, at 1121.

‘arbitrary and capricious.’¹² Therefore, the Administrator’s burden is to act ‘‘reasonably.’’¹³

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.”¹⁴

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.’’ 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 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.’’¹⁵

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.¹⁶ The court noted that this standard of proof also accords with the

¹² *Id.* at 1126.

¹³ *Id.* at 1126.

¹⁴ *Id.* at 1122.

¹⁵ *Id.*

¹⁶ *Id.*

congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.¹⁷

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 ‘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.”¹⁸

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

¹⁷ *Id.*

¹⁸ *See, e.g.*, “California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption,” 40 FR 23102 (May 28, 1975), at 23103.

scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score."¹⁹

Similarly, EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on "ambiguous and controversial matters of public policy" to California's judgment.²⁰ This interpretation is supported by relevant discussion in the House Committee Report for the 1977 amendments to the 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 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.²¹

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

On November 20, 2014, EPA published a notice of opportunity for public hearing and comment on California's waiver request. In that notice, EPA requested comments on whether the 2013 HD OBD Amendments should be considered under the within-the-scope analysis or whether they should be considered under the full waiver criteria, and on whether the 2013 HD OBD Amendments meet the criteria for a full waiver.²² EPA additionally provided an opportunity for any individual to request a public hearing.

¹⁹ 40 FR 23102, 23103-04 (May 28, 1975).

²⁰ 40 FR 23102, 23104 (May 28, 1975); 58 FR 4166 (January 13, 1993).

²¹ *MEMA I*, 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977)).

²² 79 FR 69104 (November 20, 2014).

EPA received no comments and no requests for a public hearing. Consequently, EPA did not hold a public hearing.

III. Discussion

A. Within-the-Scope Determination

CARB proposes that certain of the 2013 HD OBD Amendments meet all three within-the-scope criteria, i.e. that the amendments: (1) do not undermine California's previous protectiveness determination that its standards, in the aggregate, are at least as protective of public health and welfare as comparable federal standards; (2) do not affect the consistency of California's requirements with section 202(a) of the Act, and (3) do not raise any new issue affecting the prior waiver. CARB identifies the amendments it considers to be within the scope of the prior waiver in Attachments 2, 3, and 4 of the California Waiver Request Support Document.²³ CARB does acknowledge that a number of the 2013 HD OBD Amendments potentially establish new or more stringent requirements, and thus will need a new waiver.²⁴ These were identified by CARB in Attachments 1 and 4 of its Waiver Request Support Document.²⁵ EPA must also assess whether the HD OBD Amendments that have been identified by CARB as requirements within the scope of the prior waiver can be confirmed by EPA to not need a new waiver. If EPA determines that the amendments do not meet the requirements for a within-the-

²³ See California Waiver Request Support Document [EPA-HQ-OAR-2014-0699-0003], at Attachment 2 ("2013 Amendments to HD OBD and OBD II Requirements That Relax Existing Requirements"), at Attachment 3 ("2013 Amendments to HD OBD and OBD II Requirements That Clarify Existing Requirements"), and at Attachment 4 (the portion identified as "Amendments that Relax of Clarify Existing Requirements").

²⁴ See California Waiver Request Support Document [EPA-HQ-OAR-2014-0699-0003], at 42-43.

²⁵ See Attachment 1 ("2013 Amendments to HD OBD and OBD II Requirements That Potentially Establish New or More Stringent Requirements") of the California Waiver Request Support Document [EPA-HQ-OAR-2014-0699-0003, at 72-73], and Attachment 4 (the portion identified as "Amendments that Establish New or More Stringent Requirements").

scope confirmation, we will then consider whether the amendments satisfy the criteria for full waiver.

As described previously, EPA specifically invited comment on whether the 2013 HD OBD Amendments are within the scope of the prior waiver. We received no comments disputing CARB's contentions on this issue.

With regard to the first of the within-the-scope criteria, CARB notes its finding in Resolution 12-29 that the 2013 HD OBD Amendments do not undermine California's previous protectiveness determination that its standards, in the aggregate, are at least as protective of public health and welfare as comparable federal standards.²⁶ CARB maintains that its HD OBD Regulations are more stringent than comparable federal regulations.²⁷ As there are no comments and EPA is not aware of evidence to the contrary, EPA finds that the 2013 HD OBD Amendments do not undermine the previous protectiveness determination made with regard to California's HD OBD Requirements and HD OBD Enforcement Regulation.

With regard to the second within-the-scope prong (affecting consistency with section 202(a) of the Act), CARB argues that the 2013 HD OBD Amendments listed in Attachments 2, 3 and 4 as relaxing or clarifying existing requirements do not affect the consistency of California's requirements with section 202(a) of the Act. For these amendments, CARB states that there is sufficient lead time to permit the development of technology necessary to meet the standards, giving appropriate consideration to the cost of compliance, since the amendments merely relax or clarify existing standards, and that manufacturers can still meet both the state and federal test requirements with one test

²⁶ See California Waiver Request Support Document [EPA-HQ-OAR-2014-0699-0003], at 43, 51, and Attachment 14 (CARB Resolution 12-29, dated August 23, 2012).

²⁷ *Id.*

vehicle or engine.²⁸ California contends that the 2013 HD OBD Amendments (other than those specifically listed in Attachments 1 and 4 as being otherwise) do not create new or more stringent requirements.²⁹ In addition, regarding the third within-the-scope prong, CARB argues that the 2013 HD OBD Amendments (other than those identified in Attachments 1 and 4 as establishing new or more stringent standards) do not raise any new issue affecting the prior waiver.³⁰

Despite CARB's contentions on the second and third within-the-scope prongs, it was self-evident in EPA's review of the record that some of the amendments identified by CARB as being within the scope of the prior waiver instead require a new waiver because the amendments raise new issues regarding the waiver and may affect the consistency of California's requirements with section 202(a) of the Act. As stated in the background section, while the burden of proof rests with opponents of a waiver request (and there were none in this case), EPA retains the burden "to make a reasonable evaluation of the information in the record" before it. In evaluating the record, it is clear that some of the 2013 HD OBD Amendments listed by CARB as clarifying or relaxing existing requirements arguably provide new or more stringent requirements that must be met by manufacturers. Specifically, in addition to the amendments listed by CARB in Attachment 1 to its Waiver Request Support Document, EPA notes that the following additional 2013 HD OBD Amendments also provide new or more stringent requirements and thus require a new waiver:

[In the order presented in the Waiver Request Support Document, Attachment 2]

²⁸ See California Waiver Request Support Document [EPA-HQ-OAR-2014-0699-0003], at 45-46, 51-52.

²⁹ See California Waiver Request Support Document [EPA-HQ-OAR-2014-0699-0003], at 50-54.

³⁰ *Id.*

Section 1971.1(d)(4.3.2)(E): Denominator Specifications [providing new criteria to increment the denominator]

Section 1971.1(d)(4.3.2)(J): Denominator Specifications for Hybrid Vehicles [providing new criteria to increment the denominator for hybrid vehicles]

Section 1971.1(e)(8.2.4): NMHC Conversion Monitoring [requiring monitoring of capability to generate desired feed gas]

Section 1971.1(e)(9.2.2)(A): NO_x and PM Sensor Malfunction Criteria [requiring fault before emissions are twice the NMHC standard]

Section 1971.1(e)(9.3.1): NO_x and PM Sensor Monitoring Conditions [requiring track and report of “monitoring capability” monitors]

Section 1971.1(g)(3.2.2)(B)(ii)d: Diesel Idle Control System Monitoring [requiring manufacturer to consider known, not given, operating conditions]

[In the order presented in the Waiver Request Support Document, Attachment 3]

Section 1971.1(c): “Alternate-fueled engine” [new scope of exempted vehicles]

Section 1971.1(c): “Ignition Cycle” and “Propulsion System Active” [new specific requirements for hybrid vehicles]

Section 1971.1(d)(2.3.1)(A) and (2.3.2)(A): MIL Extinguishing and Fault Code Erasure Protocol [requiring MIL to be extinguished after three driving cycles]

Section 1971.1(d)(2.3.1)(C)(ii)(b).3 and (2.3.2)(D)(ii)b.3: Erasing a Permanent Fault Code [requiring erasure of fault code if not detected again for 40 warm-up cycles]

Section 1971.1(d)(5.5.2)(B): Ignition Cycle Counter [requiring counter to be incremented when hybrid vehicle propulsion system is active for minimum time period]

Section 1971.1(f)(7.1): Evaporative System Monitoring [requiring evaporative system monitoring for alternative-fueled engines]

Section 1971.1(h)(3.2): SAE J1939 Communication Protocol [prohibiting use of 250 kbps baud rate version for 2016 model year]

Section 1971.1(h)(4.1): Readiness status [removing exceptions allowing readiness status to say “complete” under certain conditions without completion of monitoring]

Section 1971.1(h)(4.2.2) and (h)(4.2.3)(E): Data Stream [requiring additional information in data stream]

Section 1971.1(h)(4.5.5): Test Results when Fault Memory Cleared [requiring report of non-zero values corresponding to “test not complete”]

Section 1971.1(i)(3.1.2): Diesel Misfire Monitor [requiring continuous misfire monitoring for diesel engines and demonstration testing for the misfire monitor]

Section 1971.1(i)(3.2.1): Gasoline Fuel System [requiring demonstration testing of air-fuel cylinder imbalance monitor]

[In the order presented in the Waiver Request Support Document, Attachment 4]

Section 1971.5(d)(3)(A)(iii) [adding mandatory recall criteria for diesel misfire monitors]

Section 1971.5(d)(3)(A)(vi) [adding mandatory recall criteria for PM filter monitors]

The amendments listed above combined with those listed in Attachment 1 to Waiver Request Support Document will hereafter be referred to as 2013 HD OBD New or Stricter Requirements. For the remaining 2013 HD OBD Amendments that are not listed above (i.e., the “Relaxed 2013 HD OBD Requirements”), no evidence or comment

was received indicating that the Relaxed 2013 HD OBD Requirements are not within the scope of the prior waiver, nor was there anything self-evident from the record indicating otherwise. Therefore, EPA cannot find that the Relaxed 2013 HD OBD Requirements either affect the consistency of California’s requirements with section 202(a) of the Act or raise a new issue affecting the prior waiver. California has thus met the within-the-scope criteria, and EPA confirms that the Relaxed 2013 HD OBD Requirements are within the scope of the previous waiver of the HD OBD Requirements and HD OBD Enforcement Regulation.

B. New Waiver Determination

a. Whether California’s Protectiveness Determination was Arbitrary and Capricious

As stated in the background, section 209(b)(1)(A) of the Act sets forth the first of the three criteria governing a new 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.³¹

CARB did make a protectiveness determination in adopting the 2013 HD OBD Amendments, and found that the 2013 HD OBD Amendments would not cause California motor vehicle emissions standards, in the aggregate, to be less protective of the

³¹ *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).

public health and welfare than applicable federal standards.³² EPA received no comments or EPA is not otherwise aware of evidence suggesting that CARB's protectiveness determination was unreasonable.

As it is clear that California's standards are at least as protective of public health and welfare as applicable federal standards, and that the 2013 HD OBD New or Stricter Requirements make California's standards even more protective, EPA finds that California's protectiveness determination is not arbitrary and capricious.

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

Section 209(b)(1)(B) instructs that EPA cannot 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 motor vehicle emission control program (i.e. set of standards) to meet compelling and extraordinary conditions, and not whether the specific standards (the 2013 HD OBD New or Stricter Requirements) that are the subject of 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

³² California Waiver Request Support Document [EPA-HQ-OAR-2014-0699-0003], at 43, 51, and Attachment 14 (CARB Resolution 12-29, dated August 23, 2012).

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." ; see also EPA's July 9, 2009 GHG Waiver Decision wherein EPA rejected the suggested interpretation of section

In conjunction with the 2013 HD OBD Amendments, CARB determined in Resolution 12-29 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 ... 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

There has been no evidence submitted to indicate that California’s compelling and extraordinary conditions do not continue to exist. California, particularly in the South Coast and San Joaquin Valley air basins, continues to experience some of the worst air quality in the nation, and many areas in California continue to be in non-attainment with national ambient air quality standards for fine particulate matter and ozone.³⁷ As California has previously stated, “nothing in [California’s unique geographic and climatic] conditions has changed to warrant a change in this determination.”³⁸

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 find that California does not need its state standards to meet compelling and extraordinary conditions in California.

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 motor vehicle emission program as a whole) applied to local or regional air pollution problems.

³⁵ California Waiver Request Support Document, at 44 and Attachment 14 (Resolution 12-29, dated August 23, 2012).

³⁶ California Waiver Request Support Document, at 45.

³⁷ 74 FR 32744, 32762-63 (July 8, 2009).

³⁸ 74 FR 32744, 32762 (July 8, 2009); 76 FR 77515, 77518 (December 13, 2011).

c. Consistency with Section 202(a)

For the third and final criterion, EPA evaluates the program 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 are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure. Infeasibility would be shown here by demonstrating that there is inadequate lead time to permit the development of technology necessary to meet the 2013 HD OBD New or Stricter Requirements that are subject to the waiver request, giving appropriate consideration to the cost of compliance within that time.³⁹ 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.⁴⁰

Regarding test procedure conflict, CARB notes that there is no issue of test procedure inconsistency because federal regulations provide that engines certified to California's HD OBD regulation are deemed to comply with federal standards. EPA has

³⁹ See, e.g., 38 F.R 30136 (November 1, 1973) and 40 FR 30311 (July 18, 1975).

⁴⁰ See, e.g., 43 FR 32182 (July 25, 1978).

received no adverse comment or evidence of test procedure inconsistency. We therefore cannot find that the 2013 HD OBD New or Stricter Requirements are inconsistent with federal test procedures.

EPA also did not receive any comments arguing that the 2013 HD OBD Amendments were technologically infeasible or that the cost of compliance would be excessive, such that California's standards might be inconsistent with section 202(a).⁴¹ In EPA's review of the 2013 HD OBD New or Stricter Requirements, we likewise cannot identify any requirements that appear technologically infeasible or excessively expensive for manufacturers to implement within the timeframes provided. EPA therefore cannot find that the 2013 HD OBD New or Stricter Requirements do not provide adequate lead time or are otherwise not technically feasible.

We therefore cannot find that the 2013 HD OBD New or Stricter Requirements that we analyzed under the waiver criteria are inconsistent with section 202(a).

Having found that the 2013 HD OBD New or Stricter Requirements satisfy each of the criteria for a waiver, and having received no evidence to contradict this finding, we cannot deny a waiver for the amendments.

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 2013 HD OBD Amendments and CARB's submissions for EPA review, EPA is hereby confirming that the 2013 HD OBD Amendments, with the exception of the 2013 HD OBD New or Stricter Requirements identified above, are within the scope of EPA's

⁴¹ 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).

previous waivers for the HD OBD Requirements and HD OBD Enforcement Regulation. In addition, EPA is hereby granting a waiver for the 2013 HD OBD New or Stricter Requirements.

This decision will affect persons in California and those manufacturers and/or owners/operators nationwide who must comply with California's requirements. In addition, because other states may adopt California's standards for which a section 209(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 and authorization 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 G. McCabe,
Acting Assistant Administrator,
Office of Air and Radiation.

[FR Doc. 2016-26865 Filed: 11/4/2016 8:45 am; Publication Date: 11/7/2016]