

The Environmental Protection Agency's Administrator, Gina McCarthy, signed the following notice on January 11, 2017 and we are submitting it for publication in the Federal Register. While we have taken steps to ensure the accuracy of this Internet version of the notice, it is not the official version. Please refer to the official version in a forthcoming Federal Register publication, which will appear on the Government Printing Office's FDSys website (www.gpo.gov/fdsys/search/home.action) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2013-0024. Once the official version of this document is published in the Federal Register, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2013-0024; FRL]

California State Nonroad Engine Pollution Control Standards; In-Use Diesel-Fueled Transport Refrigeration Units (TRUs) and TRU Generator Sets and Facilities Where TRUs Operate; 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 ("CARB") request for authorization of 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 (together "2011 TRU Amendments").

EPA's decision also confirms that certain of the 2011 TRU amendments are within the scope of prior EPA authorizations. The 2011 TRU Amendments primarily provide owners of TRU engines with certain flexibilities; clarify recordkeeping requirements for certain types of TRU engines; establish requirements for businesses that arrange, hire, contract, or dispatch the transport of goods in TRU-equipped trucks, trailers, or containers; and address other issues that arose during the initial implementation of the regulation. This decision is issued under the authority of the Clean Air Act ("CAA" or "Act").

DATES: Petitions for review must be filed by **[INSERT DATE SIXTY DAYS FOLLOWING PUBLICATION OF THIS NOTICE]**

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ADDRESSES: EPA has established a docket for this Notice of Decision under Docket ID EPA-HQ-OAR-2015-0224. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m.; Monday through Friday, excluding legal 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. You may access EPA dockets at <http://www.regulations.gov>. After opening the www.regulations.gov website, enter EPA-HQ-OAR-2015-0224 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, Attorney-Advisor, Transportation and Climate Division, Office of Transportation and Air Quality, U.S.

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Environmental Protection Agency, 1200 Pennsylvania Ave. N.W., (6405J), Washington, DC 20460. Telephone: (202) 343-9256. Fax: (202) 343-2804. Email: dickinson.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

EPA granted an authorization for California's initial set of TRU regulations on January 9, 2009.¹ EPA also granted a within-the-scope authorization for amendments to the TRU regulations, adopted in 2010, on June 28, 2013.² The TRU regulations establish in-use performance standards for diesel-fueled TRUs and TRU generator sets which operate in California, and facilities where TRUs operate. The TRU regulations are contained in an Airborne Toxic Control Measure ("ATCM") adopted by CARB to reduce the general public's exposure to diesel particulate matter ("PM"), other toxic airborne contaminants and air pollutants generated by TRUs and reduce near source risk at facilities where TRUs congregate. TRUs are refrigeration systems powered by internal combustion engines which control the environment of temperature-sensitive products that are transported in semi-trailer vans, truck vans, "reefer" railcars or shipping containers. The engines in TRUs do not propel the vehicle, but are used strictly to power the refrigeration system. These TRU engines are nonroad engines and vary in horsepower ("hp") generally from 7 hp to 36 hp.

By letter dated March 2, 2015, CARB submitted a request to EPA for authorization of amendments to its TRU regulations³ pursuant to section 209(e) of the CAA.⁴ The 2011 TRU Amendments were adopted by CARB on October 21, 2011, and became operative state law on

¹ 74 FR 3030 (January 16, 2009).

² 78 FR 38970 (June 28, 2013).

³ 13 California Code of Regulations (CCR), sections 2111, 2112, Appendix A therein, 2139, 2147, 2440, 2441, 2442, 2443.1, 2443.2, 2443.3, 2444.1, 2444.2, 2445.1, 2445.2, 2447, 2474 and 2448.

⁴ "Clean Air Act § 209(e)(2) Authorization Support Document submitted by the California Air Resources Board, March 2, 2015," at EPA-HQ-OAR-2015-0224-0002 (Authorization Support Document).

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October 15, 2012.⁵ The 2011 TRU Amendments provide owners of 2001 through 2003 model year (MY) TRU engines that complied with applicable Low-Emission TRU (“LETRU”) in-use performance standards by specified compliance deadlines a one- or two-year extension from the more stringent Ultra-Low Emission (“ULETRU”) in-use performance standards. The amendments also clarify manual recordkeeping requirements for electric standby-equipped TRUs and ultimately require automated electronic tracking system requirements for such TRUs and establish requirements for businesses that arrange, hire, contract, or dispatch the transport of goods in TRU-equipped trucks, trailers or containers. A more detailed description of the 2011 Amendments is presented below in the context of which amendments CARB seeks within-the-scope confirmation and those amendments for which CARB seeks a full authorization.

A. *California's Authorization Request*

California requested EPA perform two types of review. First, CARB requested an EPA determination that certain provisions of the 2011 amendments are within the scope of the prior authorizations, or in the alternative, merit full authorization (“Within-the-Scope Amendments”). The Within-the-Scope Amendments provide owners of 2003 and older MY TRUs an extension of the ULETRU compliance date if the TRUs complied with the LETRU standard by specified dates. Such TRU engines that are 2001 MY and older are given an extension to December 31, 2016 for the ULETRU deadline, 2002 MY TRUs are given a new deadline of December 31, 2017, and 2003 MY TRUs are given a new deadline of December 31, 2018. The Within-the-Scope Amendments also provide up to a one-year extension of the compliance dates if owners demonstrate that compliant technology is unavailable or is delayed due to financing, delivery, or installation and provides other flexibilities based upon certain requirements. In addition, the

⁵ *Id.*, Attachment 13.

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Within-the-Scope Amendments provide a host of new or clarified exemptions including: (1) clarification that non-operational TRUs are generally exempt from compliance with the performance standards, but are still prohibited from being sold, rented or leased to a person that could reasonably be expected to operate such TRUs in California; (2) a limited exemption for TRU-equipped trucks and trailers used by mobile catering companies to feed emergency responders, such as firefighters (such engines are subject to registration and other requirements); (3) an exemption for non-compliant, non-operational TRUs on refrigerated railcars that travel through California based on CARB's Executive Officer approval under certain contingencies; and (4) an exemption for railway carriers from the owner/operator requirements for TRUs not owned by the railway carrier. Lastly, the Within-the-Scope Amendments clarify that the in-use performance standards and associated compliance deadlines are to be based on the year the TRU unit itself was manufactured (including the potential for a prior model year TRU engine to be installed in limited circumstances), instead of basing the compliance deadline on the model year of the TRU engine.⁶

Second, CARB requested full authorization for amendments that revise standards or establish new requirements ("Full Authorization Amendments"). These provisions include amendments that require new replacement engines to meet more stringent requirements (based on the new replacement engine's model year or effective model year) than the original TRU engines. The Full Authorization Amendments also provide that to the extent TRUs now may be repowered with rebuilt engines such rebuilt engines must meet more stringent emission standards

⁶ See CARB's Authorization Support Document. CARB's Within-the-Scope Amendments also include those provisions referenced at page 11 (allowance of California TRU dealers to acquire non-compliant TRUs under certain conditions), pages 13-14 (clarification on the prohibition of selling non-compliant TRUs), page 15 (allowance of the use of unique identification numbers instead of a CARB identification number), and page 16 (clarification of the registration requirements and consistency with current CARB Equipment Registration ("ARBER") system screens).

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than the standards of the original engine, and provided the engines are rebuilt by engine rebuilders in compliance with federal and state engine rebuilding requirements for off-road compression ignition engines.⁷ CARB's TRU regulations allow TRU owners to utilize hybrid electric, hybrid cryogenic, and electric-standby ("E/S") equipped TRUs as an "Alternative technology" compliance option, which requires such TRUs to be operated in a manner that eliminates diesel engine operations at the facilities where the TRUs operate. The Full Authorization Amendments establish new recordkeeping requirements that will require the application of hardware to monitor the engine hour usage of the TRUs along with other automated monitoring, recordkeeping and reporting requirements. In addition, the TRU regulations now cover business entities that arrange, hire, contract for, or dispatch the transport of perishable goods in TRU-equipped trucks, trailers, shipping containers, or railcars. Lastly, the Full Authorization Amendments create new disclosure requirements for TRU original equipment manufacturers that are primarily designed to address engine emission labels on new replacement engines and new flexibility engines, as well as disclosure requirements for dealers and repair shops in order that the ARBER registration information is supplied to the end-user.

B. Clean Air Act Nonroad Engine and Vehicle Authorizations

Section 209(e)(1) of the Act permanently preempts any state, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain new nonroad engines or vehicles.⁸ For all other nonroad engines, states generally are preempted from adopting and enforcing standards and other requirements

⁷ 40 CFR section 89.130 and 1068.120 and Cal. Code Regs. Tit. 13., section 2423(l), respectively.

⁸ 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. CAA §209(e)(1), 42 U.S.C. §7543(e)(1)(A).

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relating to the control of emissions. Section 209(e)(2), however, requires the Administrator, after notice and opportunity for public hearing, to authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. However, EPA shall not grant such authorization if it finds that (1) the determination of California is arbitrary and capricious; (2) California does not need such California standards to meet compelling and extraordinary conditions; or (3) California standards and accompanying enforcement procedures are not consistent with [CAA section 209].⁹

On July 20, 1994, EPA promulgated a rule interpreting the three criteria set forth in section 209(e)(2)(A) that EPA must consider before granting any California authorization request for nonroad engine or vehicle emission standards.¹⁰ EPA revised these regulations in 1997.¹¹ As stated in the preamble to the 1994 rule, EPA historically has interpreted the consistency inquiry under the third criterion, outlined above and set forth in section

⁹ EPA's review of California regulations under section 209 is not a broad review of the reasonableness of the regulations or its compatibility with all other laws. Sections 209(b) and 209(e) of the Clean Air Act limit EPA's authority to deny California requests for waivers and authorizations to the three criteria listed therein. As a result, EPA has consistently refrained from denying California's requests for waivers and authorizations based on any other criteria. In instances where the U.S. Court of Appeals has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the Court has upheld and agreed with EPA's determination. *See Motor and Equipment Manufacturers Ass'n v. Nichols*, 142 F.3d 449, 462–63, 466–67 (D.C. Cir.1998), *Motor and Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1111, 1114–20 (D.C. Cir. 1979). *See also* 78 FR 58090, 58120 (September 20, 2013).

¹⁰ *See* "Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards," 59 FR 36969 (July 20, 1994).

¹¹ *See* "Control of Air Pollution: Emission Standards for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts; Preemption of State Regulation for Nonroad Engine and Vehicle Standards; Amendments to Rules," 62 FR 67733 (December 30, 1997). The applicable regulations are now found in 40 CFR part 1074, subpart B, section 1074.105.

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209(e)(2)(A)(iii), 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) of the Act.¹²

In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same "consistency" criteria that are applied to motor vehicle waiver requests under section 209(b)(1)(C). That provision provides that the Administrator shall not grant California a motor vehicle waiver she finds that California "standards and accompanying enforcement procedures are not consistent with section 202(a)" of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures will be found to be 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,¹³ or (2) the federal and state testing procedures impose inconsistent certification requirements.¹⁴

In light of the similar language in sections 209(b) and 209(e)(2)(A), EPA has reviewed California's requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that it has historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor vehicle engine standards under

¹² 59 FR 36969 (July 20, 1994). EPA has interpreted 209(b)(1)(C) in the context of section 209(b) motor vehicle waivers.

¹³ H. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967)

¹⁴ S. Rep. No. 403, 90th Cong., 1st Sess. 32 (1967)

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section 209(b).¹⁵ These principles include, among other things, that EPA should limit its inquiry to the three specific authorization criteria identified in section 209(e)(2)(A),¹⁶ and that EPA should give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended EPA's review of California's decision-making 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 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.¹⁷

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.¹⁸ Thus, EPA's consideration of all the evidence submitted concerning an authorization decision is circumscribed by its relevance to those questions that may be considered under section 209(e)(2)(A).

C. Within-the-scope Determinations

If California amends regulations that have been previously authorized by EPA, California may ask EPA to determine that the amendments are within the scope of the earlier authorization.

¹⁵ See *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996): "... EPA was within the bounds of permissible construction in analogizing §209(e) on nonroad sources to §209(a) on motor vehicles."

¹⁶ See EPA's Final 209(e) rulemaking at 59 FR 36969, 36983 (July 20, 1994).

¹⁷ "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. In the 1990 amendments to section 209, Congress established section 209(e) and similar language in section 209(e)(1)(i) pertaining to California's nonroad emission standards which California must determine to be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

¹⁸ See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("*MEMA I*").

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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 209 of the Act, following the same criteria discussed above in the context of full authorizations. Third, the amended regulations must not raise any new issues affecting EPA's prior waiver or authorization decisions.¹⁹

D. 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. 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. 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 shape 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.²⁰”

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

¹⁹ See “California State Motor Vehicle Pollution Control Standards; Amendments Within the Scope of Previous Waiver of Federal Preemption,” 46 FR 36742 (July 15, 1981).

²⁰ 40 FR 23102, 23103-23104 (May 28, 1975).

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decision on “ambiguous and controversial matters of public policy” to California’s judgment.²¹

This interpretation is supported by relevant discussion in the House Committee Report for the 1977 amendments to the Clean Air Act.²² 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.²³

E. 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 California waiver request 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.²⁴"

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

²¹ *Id.* at 23104; 58 FR 4166 (January 13, 1993).

²² *MEMA I*, 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-302 (1977)).

²³ *Id.*

²⁴ *MEMA I*, at 1121.

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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.'"²⁵ Therefore, the Administrator's burden is to act "reasonably."²⁶

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."²⁷

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, 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."²⁸

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.²⁹ The court

²⁵ *Id.* at 1126.

²⁶ *Id.* at 1126.

²⁷ *Id.* at 1122.

²⁸ *Id.*

²⁹ *Id.*

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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.³⁰

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 what the standards of proof would be 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."³¹

F. EPA's Administrative Process in Consideration of California's Request for Authorization of the 2011 TRU Amendments

The CAA directs EPA to offer an opportunity for public hearing on authorization requests from California. On November 17, 2015, EPA published a *Federal Register* notice announcing an opportunity for written comment and offering a public hearing on California's request for authorization of the 2011 TRU Amendments.³² The request for comments specifically included, but was not limited to, the following issues.

³⁰ *Id.*

³¹ See, e.g., "California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption," 40 FR 23102 (May 28, 1975), at 23103.

³² 80 FR 71791 (November 17, 2015).

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First, EPA requested comment on whether the 2011 amendments for which CARB requested a within-the-scope determination should be considered under a within-the-scope analysis. We specifically requested comment on whether the Within-the-Scope Amendments (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 requirement with section 209 of the Act, or (3) raise any other new issue affecting EPA's previous authorization determinations.

Second, EPA requested comment on whether the Within-the-Scope Amendments would satisfy the criteria for full authorization if they do not meet the criteria for within-the-scope analysis.

Third, EPA sought comment on whether the Full Authorization Amendments, for which CARB requested full authorization, satisfy the full authorization criteria. We specifically requested comment on whether (1) California's protectiveness determination (i.e., that California standards will be, in the aggregate, as protective of public health and welfare as applicable federal standards) is arbitrary and capricious, (2) California does not need such standards to meet compelling and extraordinary conditions, or (3) the California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

EPA received no request for a public hearing. Consequently, EPA did not hold a public hearing. EPA received one written comment and a response comment from CARB, discussed below.

II. Discussion

A. Within-the-Scope Analysis

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We initially evaluate California's Within-the-Scope 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. In determining whether amendments can be viewed as within the scope of previous waivers, EPA looks at whether CARB's revision has been limited to making minor technical amendments to previously waived regulations or modifying the regulations in order to provide manufacturers with additional compliance flexibilities without significantly reducing the overall stringency of the requirements. The Within-the-Scope Amendments at issue in this request provide for certain compliance extensions and certain exemptions from the TRU in-use performance standards. The Within-the-Scope Amendments also clarify pre-existing requirements.

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 Within-the-Scope Amendments require a full authorization analysis. Given the lack of comments on this issue, and EPA's assessment of the nature of the amendments, EPA will evaluate California's Within-the-Scope Amendments by application of our traditional within-the-scope analysis, as CARB requested.

As set forth above, EPA is able to confirm that the 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 consistency with section 202(a) of the Act. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations. For

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the reasons set forth below, I find that the Within-the-Scope Amendments meet each of the conditions for a within-the-scope determination.

B. Full Authorization Analysis

As noted above, CARB's authorization request also included the Full Authorization Amendments. EPA must grant an authorization of the Full Authorization Amendments unless the Administrator finds: (1) California's determination that its standards will be, in the aggregate, as protective of public health and welfare as applicable federal standards is arbitrary and capricious; (2) California does not need such California standards to meet compelling and extraordinary conditions; or (3) California's standards and accompanying enforcement procedures are not consistent with this section.

EPA's evaluation of the 2011 TRU Amendments, including the Within-the-Scope Amendments and Full Authorization Amendments, is set forth below. Because of the similarity of the within-the-scope criteria and the full authorization criteria, a discussion of both sets of respective amendments take place within each authorization criterion. To the extent that the criteria are applied uniquely, or that additional criteria apply under either the within-the-scope analysis or the full authorization analysis, such application is also addressed below.

1. California's Protectiveness Determination

In its March 2, 2015 letter requesting a within-the-scope determination, CARB stated that in approving the amendments to the TRU ATCM, the Board approved Resolution 11-35.³³ The Board expressly declared "... that the Board hereby determines that pursuant to Title II, section 209(e)(2) of the federal Clean Air Act, as amended in 1990, that the emission standards and other requirements related to the control of emissions adopted as part of the amendments to the TRU

³³ See Authorization Support Document at 18-19. See also EPA-HQ-OAR-2015-0224-0002, Attachment 6.

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ATCM are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.”³⁴ CARB noted that EPA cannot find CARB's determination to be arbitrary and capricious for the reason that EPA does not have comparable federal emission standards that regulate in-use TRUs and TRU engines.

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, I 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. Thus I cannot deny CARB's within-the-scope request based on this criterion. Similarly, with regard to the Full Authorization Amendments I cannot make a finding that CARB's protectiveness determination is arbitrary and capricious and thus I cannot deny CARB's Full Authorization Amendments based on this criterion.

2. Whether the Standards Are Necessary to Meet Compelling and Extraordinary Conditions

Section 209(e)(2)(A)(ii) instructs that EPA cannot grant an authorization if the Agency finds that California “does not need such California standards to meet compelling and extraordinary conditions” EPA's inquiry under this second criterion (found both in paragraphs 209(b)(1)(B) and 209(e)(2)(A)(ii)) has been to determine whether California needs its own mobile source pollution program (i.e. set of standards) for the relevant class or category of vehicles or engines to meet compelling and extraordinary conditions, and not whether the specific standards that are the subject of the authorization or waiver request are necessary to meet such conditions.³⁵

³⁴ *Id.*

³⁵ *See* 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889-18890 (May 3, 1984).

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EPA does not examine the section 209(e)(2)(A)(ii) criterion in the context of within-the-scope requests since the original regulations (that received a previous authorization from EPA) have already been evaluated under this criterion. However, should CARB adopt amendments that require a full authorization assessment (*e.g.* the addition of more stringent emission standards, etc.) then EPA believes it is appropriate to reevaluate whether California continues to demonstrate the need for its own mobile source program. EPA's assessment of the Full Authorization Amendments under this criterion is set forth below.

California has asserted its longstanding position that the State continues to need its own nonroad engine program to meet serious air pollution problems.³⁶ The relevant inquiry under section 209(e)(2)(A)(ii) is whether California needs its own emission control program to meet compelling and extraordinary conditions, not whether any given standard is necessary to meet such conditions.³⁷

There has been no evidence submitted to indicate that California's compelling and extraordinary conditions do not continue to exist. California, including the South Coast and the 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 (PM_{2.5}) and ozone.³⁸

³⁶ See Authorization Support Document at 23, "In adopting Resolution 11-35, the Board confirmed CARB's longstanding position that California continues to need its own nonroad engine program to meet serious air pollution problems."

³⁷ *Id.*

³⁸ 74 FR 32744, 32762-63 (July 8, 2009), 76 FR 77515, 77518 (December 13, 2011), 81 FR 95982 (December 29, 2016). EPA continually evaluates the air quality conditions in the United States, including California. California continues to experience some of the worst air quality in the country and continues to be in nonattainment with National Ambient Air Quality Standards for fine particulate matter and ozone, *see* "Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone National Ambient Air Quality Standard (NAAQS)" at EPA-HQ-OAR-2016-0751-0001, 82 FR 1733 (January 6, 2017).

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We received no contrary evidence or comments contesting California's longstanding determination that its TRU ATCM program is needed to address the state's compelling and extraordinary conditions, nor did we receive any suggestion that CARB's nonroad program is not still necessary. In addition, EPA is not aware of any other information that would suggest that California no longer needs its nonroad emission program. Therefore, based on the record of this request and absence of comments or other information to the contrary, I cannot find that California does not continue to need such state standards, including the 2011 TRU Amendments, to address the "compelling and extraordinary conditions" underlying the state's air pollution problems.

3. Consistency with Section 209 of the Clean Air Act

Section 209(e)(2)(A)(iii) of the Act instructs that EPA cannot grant an authorization if California's standards and enforcement procedures are not consistent with "this section." As described above, EPA's section 209(e) rule states that the Administrator shall not grant authorization to California if she finds (among other tests) that the "California standards and accompanying enforcement procedures are not consistent with section 209." EPA has interpreted the requirement to mean that California standards and accompanying enforcement procedures must be consistent with at least section 209(a), section 209(e)(1), and section 209(b)(1)(C), as EPA has interpreted this last subsection in the context of motor vehicle waivers.³⁹ Thus, this can be viewed as a three-pronged test.

a. Consistency with Section 209(a) and 209(e)(1)

Section 209(a) of the Clean Air Act prohibits states or any political subdivisions of states from setting emission standards for new motor vehicles or new motor vehicle engines. Section

³⁹ See 59 FR 36969 (July 20, 1994).

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209(a) is modified in turn by section 209(b) which allows California to set such standards if other statutory requirements are met. To find a standard to be inconsistent with section 209(a) for purposes of section 209(e)(2)(A)(iii), EPA must find that the standard in question actually regulates new motor vehicles or new motor vehicle engines.

To be consistent with section 209(e)(1) of the Clean Air Act, California's standards or other requirements relating to the control of emissions must not relate to new engines which are used in farm or construction equipment or vehicles and which are smaller than 175 horsepower (hp), and new locomotives or new engines used in locomotives.

In its authorization request, CARB states that in granting an authorization for the initial TRU ATCM regulation, EPA found that the TRU ATCM was consistent with CAA sections 209(a) and 209(e)(1) because the ATCM did not apply to new motor vehicles and engines or to new engines under 175 hp used in farm and construction vehicles or equipment or to new locomotives or locomotive engines.⁴⁰ CARB notes that the 2011 TRU Amendments likewise do not apply to the above categories of preempted mobile sources and thus EPA cannot find that such amendments are inconsistent with section 209(a) and 209(e)(1). No commenter argued the contrary or otherwise asserted that the 2011 TRU Amendments are not consistent with section 209(a) and 209(e)(1) and EPA is otherwise not aware of such evidence.

Therefore, I cannot deny California's request on the basis that 2011 TRU Amendments are not consistent with section 209(a) and section 209(e)(1).

b. Consistency with Section 209(b)(1)(C)

The requirement that California's standards be consistent with section 209(b)(1)(C) of the Clean Air Act effectively requires consistency with section 202(a) of the Act. To determine this

⁴⁰ See Authorization Support Document at page 19.

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consistency, EPA has applied to California nonroad standards the same test it has used previously for California motor vehicle standards; namely, state standards are inconsistent with section 202(a) of the Act if there is inadequate lead-time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that timeframe. California's accompanying enforcement procedures would also be inconsistent with section 202(a) if federal and California test procedures conflicted. The scope of EPA's review of whether California's action is consistent with section 202(a) is narrow. The determination is limited to whether those opposed to the authorization or waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedures.⁴¹

The legislative history of section 209 (including the "consistency with section 202(a)" requirement in 209(b)(1)(C)) indicates that this provision is intended to relate to technological feasibility.⁴² Section 202(a)(2) states, in relevant part, that any regulation promulgated under its authority "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Section 202(a) thus requires the Administrator to first determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect. The latter scenario also requires the Administrator to decide whether the cost of developing and applying

⁴¹ *MEMA I*, 627, F.2d at 1126.

⁴² H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).

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the technology within that time is feasible. Previous EPA waivers are in accord with this position.⁴³

With regard to the Within-the-Scope Amendments, CARB notes that the amendments are designed to provide owners with greater flexibility to comply with the existing TRU ATCM's in-use requirements. The amendments were not the result of non-existing technologies according to CARB, but rather that the Board determined that special considerations were necessary to accommodate TRU owners during implementation of the rule, including the availability of certain diesel emission control devices or the availability of cleaner Tier 4 standard engines in the later model years. With regard to the amendments that specify requirements for repowering TRUs with new replacement engines and the allowance for owners to repower TRUs with rebuilt engines, CARB notes that these amendments do not modify the pre-existing compliance dates that EPA previously authorized and EPA has previously addressed rebuilding requirements.⁴⁴ CARB also notes that several of its Full Authorization Amendments help ensure that the TRU ATCM is effectively implemented and enforced, and therefore constitute "accompanying enforcement provisions" ("AEPs").⁴⁵ CARB notes that the AEPs that pertain to new automated monitoring, recordkeeping and reporting requirements for E/S, hybrid-electric, and hybrid cryogenic TRUs present no issues regarding technical feasibility. CARB maintains that the technology needed to comply with the reporting requirements already exists and the GPS

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

⁴⁴ See 74 FR 3030 (January 16, 2009), Authorization Support Document at 22.

⁴⁵ See Authorization Support Document at 25. Section 209(e)(2)(A)(iii) requires that both standards and accompanying enforcement procedures be consistent with section 202(a). AEPs are not mentioned elsewhere in section 209(e). AEPs are general procedures or other requirements designed to ensure that the levels of emission reductions sought by the standards are achieved, see *MEMA I* at 1113.

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tracking systems are already being used and are capable of wirelessly transmitting reports and data.⁴⁶

EPA received comment acknowledging that the technology for data collection and record reporting currently exists, but that additional development will be necessary to ensure that the technology will provide the necessary information for reporting purposes while also providing the necessary security and safeguards to protect proprietary information of both the original equipment manufacturers (“OEMs”) and the equipment owner.⁴⁷ This commenter also requested further definition of “stationary location” as well as seeking an increase in the 5 minute requirement to 15 minutes.⁴⁸ CARB responds by noting that the commenter acknowledges that the technology needed to comply with the automated monitoring, recordkeeping and reporting requirements currently exists and that the commenter fails to specify and provide any evidence of the types of proprietary information that is at issue and how such potential information is included in what information must be reported to CARB. CARB also notes that the Alternative Technology TRUs are subject to reporting requirements that include the address of each stationary location where such a TRU was operated longer than five minutes. CARB states that “Thermo King does not describe why or how the current 5-minute stationary requirement may be causing confusion and/or false stationary readings. Furthermore, Thermo King has presented no evidence to support its argument that the five-minute requirement will result in confusion or erroneous readings.”⁴⁹

⁴⁶ See Authorization Support Document at 27.

⁴⁷ See comment submitted by Thermo King, EPA-HQ-OAR-2015-0224-0003.

⁴⁸ *Id.* Thermo King also raises a series of questions regarding the electronic tracking system requirements that CARB has addressed in its supplemental comments at EPA-HQ-OAR-2015-0224-0004 (“CARB Supplemental Comments”). EPA agrees with CARB that questions about whether the definition and requirements of the electronic tracking system apply to OEMs and “free access” are questions that do not fall under EPA’s review given the limited statutory criteria for authorization review.

⁴⁹ CARB Supplemental Comments at 7-8.

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As noted above, EPA's determination is limited to whether those opposed to the authorization or waiver have met their burden of establishing that California's standards are technologically infeasible. I agree that the Within-the-Scope Amendments are designed to relax (i.e. extend the compliance deadlines in limited circumstances and provide additional exemptions) and clarify existing TRU ATCM requirements and therefore provide additional flexibility to regulated parties. EPA also did not receive any comments arguing that the Within-the-Scope Amendments were technologically infeasible. With regard to the Full Authorization Amendments I find that CARB has presented sufficient information to demonstrate that the technology needed to meet the applicable requirements already exists. To the extent that comments were raised concerning Alternative Technology TRUs and associated reporting requirements, the commenter raising such concerns has failed to meet their burden of proof in demonstrating why such requirements are technologically infeasible. As such, the record does not support a finding that the 2011 TRU Amendments are inconsistent with Section 202(a).

4. 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.⁵⁰ I do not believe that the Within-the-Scope Amendments that extend the compliance dates under certain circumstances, provide new or clarify existing exemptions from the TRU in-use performance standards, and provide clarifications to CARB's existing TRU ATCM raise any new issues with respect to our prior granting of the authorization. Moreover, EPA did not receive any comments that CARB's TRU Amendments raised new issues affecting the previously granted authorization. Therefore, I

⁵⁰ See, e.g., 78 FR 38970 (June 28, 2013), 75 FR 8056 (February 23, 2010), and 70 FR 22034 (April 28, 2005).

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cannot find that CARB's Within-the-Scope Amendments raise new issues and consequently, cannot deny CARB's request based on this criterion.

III. Decision

After evaluating CARB's 2011 TRU Amendments described above, EPA is taking the following actions. First, I am granting an authorization for the Full Authorization Amendments. Second, I confirm that the Within-the-Scope Amendments are within the scope of the previous EPA authorizations.

This decision will affect persons not only in California, but also 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(e)(2)(A) authorization has been granted if certain criteria are met, this decision would also affect those states and those persons in such states. *See* CAA section 209(e)(2)(B). 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 60 DAYS AFTER PUBLICATION OF THIS NOTICE 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.

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.

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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: _____

Gina McCarthy
Administrator