

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

## II. What action is the agency taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the Administrator determines that emergency conditions exist which require the exemption. The Washington Department of Agriculture, Idaho State Department of Agriculture, and the Oregon Department of Agriculture have requested the Administrator to issue a specific exemption regional request for use of hop beta acids in honey bee hives to control varroa mites. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the applicants assert that the varroa mite is a highly destructive pest and is having a catastrophic effect on honey bee populations. The parasitic mite is considered the primary pest of honeybees and its control is necessary for successful beekeeping in the PNW. According to the applicants, the currently available registered products no longer successfully control varroa mites, because repeated use has contributed to widespread development of mite resistance. Further, some of the

alternative products have been reported to cause bee mortality, have labeling limitations which make them impractical for large beekeeping operations, or provide inconsistent mite control. Varroa mite outbreaks are also associated with colony viruses, which result in large colony losses.

The Applicants propose to make no more than three treatments per year of two cardboard strips, coated with liquid product per brood super, during the spring, summer and fall. Approximately 181,000 honey bee colonies could be treated in all counties throughout Washington, Idaho, and Oregon, requiring 2,172,000 strips for three treatments. The total amount of hop beta acids applied would be 4,170 kilograms (2,172,000 × 1.92 grams of hop beta acids per strip), which is equivalent to 9,194 pounds, if all honey bee colonies in the PNW were treated.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 of FIFRA require publication of a notice of receipt of an application for this specific exemption regional request which proposes use of a new chemical (*i.e.*, an active ingredient) which has not been registered by EPA. The notice provides an opportunity for public comment on the application. The Agency will review and consider all comments received during the comment period in determining whether to issue the specific exemption requested by the Washington, Oregon, and Idaho Departments of Agriculture.

### List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 4, 2010.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2010-28816 Filed 11-16-10; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-9228-3]

### California State Motor Vehicle Pollution Control Standards; California Heavy-Duty On-Highway Otto-Cycle Engines and Incomplete Vehicle Regulations; Notice of Decision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Decision Granting a Waiver of California's Heavy-Duty On-Highway Otto-Cycle Engines and Incomplete Vehicle Regulations.

**SUMMARY:** The Environmental Protection Agency (EPA), pursuant to section 209(b) of the Clean Air Act (Act), is granting California its request for a waiver of Clean Air Act preemption for three sets of amendments applicable to its heavy-duty Otto-cycle engines and incomplete vehicle regulations for the 2004, 2005 through 2007, and 2008 and subsequent model year regulations. These amendments align each of California's exhaust emission standards and test procedures with its federal counterpart in an effort to streamline and harmonize the California and federal programs.

**ADDRESSES:** Materials relevant to this decision are contained in Docket ID No. EPA-HQ-OAR-2006-0018. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open to the public on all federal government work days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's Web site is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) address for the Air and Radiation Docket is: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the <http://www.regulations.gov> Web site, enter EPA-HQ-OAR-2006-0018 in the "Enter Keyword or ID" fill-in box to view documents in the record of CARB's amendments to its heavy-duty Otto-cycle engines and incomplete vehicle regulations. 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 also maintains a Web page that contains general information on its review of California waiver requests. Included on that page are links to several of the prior waiver **Federal Register** notices which are cited throughout today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

**FOR FURTHER INFORMATION CONTACT:**

David Dickinson, Compliance and Innovative Strategies Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue (6405), NW., Washington, DC 20460. *Telephone:* (202) 343-9256. *Fax:* (202) 343-2800. *E-mail:* [dickinson.david@epa.gov](mailto:dickinson.david@epa.gov).

**SUPPLEMENTARY INFORMATION:****I. Background***A. CARB's 2000 and 2002 Amendments*

On December 7, 2005, the California Air Resources Board ("CARB") submitted a request to the Environmental Protection Agency ("EPA") for confirmation that CARB's amendments, adopted in 2000 and 2002, to the California heavy-duty Otto-cycle regulations for 2004, 2005-2007, and 2008 and subsequent model years (MYs) are within-the-scope of previously granted waivers of preemption under section 209(b) of the Act, 42 U.S.C. 7543(b). On June 15, 2006, CARB supplemented its original request of December 7, 2005, with a letter adding to its rationale and additionally requesting, in the alternative, for EPA to consider the request as a new waiver of preemption under section 209(b) of the Act.

EPA first granted waivers for the alignment of California's heavy-duty engine and vehicle emission standards and test procedures in 1988, separately for the diesel engine standards and the gasoline engine standards.<sup>1</sup> Since the 1988 waivers, CARB has requested and received confirmation that various amendments to the standards and test procedures for the current CARB categories of heavy-duty vehicles are within-the-scope of the previously granted waivers. Significant among these, in 1997 CARB requested a within-the-scope determination for a revision to its heavy-duty engine emission standards for NO<sub>x</sub> and PM for both diesel and Otto-cycle (gasoline) engines applicable in the 1998 and subsequent model years.<sup>2</sup> EPA approved the request on October 6, 2004.<sup>3</sup>

CARB's current request concerns its amendments to the exhaust emission standards for heavy-duty Otto-cycle engines and vehicles above 8,500 pounds gross vehicle weight rating (GVWR) for the 2004, 2005 through 2007, and the 2008 and subsequent MYs. California amended its heavy-duty Otto-cycle regulations through two separate CARB rulemakings: one in

2000 (hereinafter the "2000 amendments") and the other in 2002 (hereinafter the "2002 amendments").<sup>4</sup> Both rulemakings followed EPA rulemakings increasing the stringency of federal emission standards, which surpassed the stringency of California's previous requirements for 2005 and all subsequent model years. Therefore, CARB believes its effort to harmonize standards with the federal heavy-duty Otto-cycle engine standards allows manufacturers to make one vehicle to meet both California and federal standards and participate in the federal averaging, banking, and trading program without compromising the stringency or efficacy of its emission standards.<sup>5</sup>

CARB's 2000 and 2002 amendments affect the heavy-duty Otto-cycle standards for oxides of nitrogen (NO<sub>x</sub>), non-methane hydrocarbons plus oxides of nitrogen (NMHC+NO<sub>x</sub>), and carbon monoxide (CO). Specifically, the amendments: (1) Harmonize the California and federal MY 2005 and beyond NO<sub>x</sub> standards at 1.0 grams per brake horsepower-hour (g/bhp-hr); (2) align the California and federal standards for 0.14 g/bhp-hr for NMHC, 0.20 g/bhp-hr for NO<sub>x</sub>, 14.4 g/bhp-hr for CO; and (3) create a new 0.01 g/bhp-hr standard for particulate matter (PM). These changes amend title 13, California Code of Regulations (CCR), section 1956.8<sup>6</sup> and the incorporated amended "California Exhaust Emission Standards and Test Procedures for 1987 through 2003 Model Heavy-Duty Otto-cycle Engines and Vehicles," and the adoption and the amendments to the incorporated in "California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Otto-cycle Engines."

*B. Clean Air Act Waivers of Preemption*

Section 209(a) of the Act preempts states and local governments from setting emission standards for new motor vehicles and engines; it 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 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.

Through operation of section 209(b) of the Act, California is able to seek and receive a waiver of section 209(a)'s preemption. If certain criteria are met, section 209(b) (1) of the Act requires the Administrator, after notice and opportunity for public hearing, to waive application of the prohibitions of section 209(a). Section 209(b) (1) only allows a waiver to be granted for a State that had 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 standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards (this is known as California's "protectiveness determination"). Because California was the only state to have adopted standards prior to 1966, it is the only state that is qualified to seek and receive a waiver.<sup>7</sup> The Administrator must grant a waiver unless she finds that: (A) California's above-noted "protectiveness determination" is arbitrary and capricious;<sup>8</sup> (B) California does not need such State standards to meet compelling and extraordinary conditions;<sup>9</sup> or (C) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.<sup>10</sup> Regarding consistency with section 202(a), EPA reviews California's standards for technological feasibility and evaluates testing and enforcement procedures to determine whether they would be inconsistent with federal test procedures (e.g., if manufacturers would be unable to meet both California and federal test requirements using the same test vehicle).<sup>11</sup>

If California amends regulations that were previously granted a waiver of preemption, EPA can confirm that the amended regulations are within-the-scope of the previously granted waiver when three conditions are met. First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are

<sup>1</sup> 52 FR 20777 (June 3, 1987), 53 FR 7021 (March 4, 1988).

<sup>2</sup> 53 FR 6197 (March 1, 1988) (Diesel) and 53 FR 7022 (March 4, 1988) (Otto-cycle).

<sup>3</sup> 69 FR 59920 (October 6, 2004).

<sup>4</sup> The 2004/5 Standards were formally adopted December 27, 2000, by Executive Order G-00-069 (CARB, Item 7). The 2008 Standards were formally adopted December 12, 2002, by Executive Order G-03-016 issued September 5, 2003. (CARB, Item 20).

<sup>5</sup> California Air Resources Board Request for Confirmation that Amendments Are Within the Scope of Previous Waivers of Preemption Under Clean Air Act Section 209(b), December 7, 2005, pg. 2.

<sup>6</sup> See California Air Resources Board Request for Confirmation that Amendments Are Within the Scope of Previous Waivers of Preemption Under Clean Air Act Section 209(b), December 7, 2005, pg. 2.

<sup>7</sup> See S.Rep. No. 90-403 at 632 (1967).

<sup>8</sup> CAA section 209(b)(1)(A).

<sup>9</sup> CAA section 209(b)(1)(B).

<sup>10</sup> CAA section 209(b)(1)(C).

<sup>11</sup> See, e.g., 74 FR at 32767 (July 8, 2009); see also *Motor and Equip. Mfrs. Assoc. v. EPA*, 627 F.2d 1095, 1126 (DC Cir. 1979).

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 waivers. CARB, in its Resolutions 00–45 and 02–31, expressly found that its amendments met each of these criteria.<sup>12</sup>

#### C. EPA’s Consideration of CARB’s Request

Because EPA believed it possible that CARB’s amendments did in fact raise “new issues” through the imposition of more stringent standards for heavy-duty Otto-cycle engines above 8,500 pounds GVWR for the 2004, 2005 through 2007, and the 2008 and subsequent MYs, EPA offered the opportunity for a public hearing and requested public comments on these new requirements.<sup>13</sup> EPA received no request for a public hearing, nor were any comments received on the CARB amendments at issue. Therefore, EPA has made this determination based on the information submitted by CARB in its request.

#### D. Standard and Burden of Proof in Clean Air Act Section 209 Proceedings

In *Motor and Equip. Mfrs. Assoc. v. EPA*, 627 F.2d 1095 (DC Cir. 1979) (herein “*MEMA I*”), the United States Court of Appeals stated that the Administrator’s role in a section 209 proceeding is to: [C]onsider 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 \* \* \* have shown that the factual circumstances exist in which Congress intended a denial \* \* \*.<sup>14</sup>

The court in *MEMA I* considered the standards of proof pursuant to section 209 for the two findings necessary to grant a waiver for an “enforcement procedure” (as opposed to the standards themselves): (1) “Protectiveness in the aggregate” and (2) “consistency with section 202(a)” findings. The court instructed that, “the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.”<sup>15</sup>

The court upheld the Administrator’s position that, to deny a waiver, “there

must be ‘clear and compelling evidence’ to show that proposed procedures undermine the protectiveness of California’s standards.”<sup>16</sup> The court noted that this standard of proof “also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.”<sup>17</sup>

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all section 209 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. *MEMA I* made clear that: [E]ven in the two areas concededly reserved for Federal judgment by this legislation—the existence of “compelling and extraordinary” conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one.”<sup>18</sup>

Furthermore, Congress intended that EPA’s review of California’s decision-making be narrow in scope.<sup>19</sup> This has led EPA in the past to reject arguments that are not specified within the statute as grounds for denying a waiver or authorization:

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 air quality not commensurate with its cost 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.<sup>20</sup>

Thus, EPA’s consideration of all the evidence submitted concerning this waiver decision is circumscribed by its relevance to those questions which the Administrator is directed to consider by section 209.

Finally, opponents of the waiver bear the burden of showing whether

California’s waiver request is inconsistent with section 202(a). As found in *MEMA I*, this obligation rests firmly with opponents in a section 209 proceeding; the court held that:

The language of the statute and its legislative history indicate that California’s regulations, and California’s determinations that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing, and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.<sup>21</sup>

The Administrator’s burden, on the other hand, is to determine that she has made a reasonable and fair evaluation of the information in the record when coming to the waiver decision. As the court in *MEMA I* stated, “[h]ere, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if [s]he seeks to overcome that evidence with unsupported assertions of [her] own, [s]he runs the risk of having [her] waiver decision set aside as arbitrary and capricious.”<sup>22</sup> Therefore, the Administrator’s burden is to act “reasonably.”<sup>23</sup>

#### E. Within-the-Scope Waivers

CARB suggests in its request letter(s) that since these amendments are standards and test procedures that EPA previously issued waivers for, that the amendments should be found to be within-the-scope of previous EPA waivers.<sup>24</sup> As noted above, if California acts to amend a previously authorized standard or accompanying enforcement procedure, the amendment may be considered within-the-scope of a previously issued waiver provided that it: (1) Does not undermine California’s determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards, (2) does not affect consistency with section 202 of the Act, and (3) raises no new issues affecting EPA’s previous waiver.<sup>25</sup>

<sup>21</sup> *MEMA I* at 1121.

<sup>22</sup> *Id.* at 1126.

<sup>23</sup> *Id.*

<sup>24</sup> CARB Request for Confirmation that Amendments Are Within the Scope of Previous Waivers of Preemption Under Clean Air Act Section 209(b), December 7, 2005, at 1 citing 68 FR 19811 and 60 FR 22034 (April 28, 2005).

<sup>25</sup> See, e.g., 51 FR 12391 (April 10, 1986) and 65 FR 69673, 69674 (November 20, 2000). The first within-the-scope determination stated that a CARB request made subsequent to an EPA waiver, “exists within the meaning and intent of the waiver granted.” 37 FR 14831 (July 25, 1972).

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

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., 40 FR 23, 102–103 (May 28, 1975).

<sup>19</sup> See, e.g., *MEMA I*, 627 F.2d at 1110–11, citing H.R. Rep. No. 294, 95th Cong., 1st Sess. 301–02 (1977).

<sup>20</sup> 36 FR 17458 (August 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’s standards must be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

<sup>12</sup> CARB –determinations affirmed in Executive Orders G–00–069 and G–03–016.

<sup>13</sup> 72 FR 27114 (May 14, 2007).

<sup>14</sup> *Motor and Equip. Mfrs. Assoc. v. EPA (MEMA I)*, 627 F.2d 1095, 1122 (DC Cir. 1979).

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

Regardless of whether the first two criteria can be established, the third criterion alone prevents EPA from considering this request as within-the-scope of EPA's prior waivers. EPA has previously stated that if CARB's amendments raise "new issues" affecting previously granted waiver, we cannot confirm that those amendments are within-the-scope of previous waivers.<sup>26</sup> Further, EPA has stated in prior waiver and authorization determinations that increases in the numerical stringency of standards are "new issues" for which a full waiver or authorization is required.<sup>27</sup> Here, CARB increased the stringency of its exhaust emission standards for heavy-duty Otto-cycle engines and vehicles above 8,500 pounds GVWR for the 2004, 2005 through 2007, and the 2008 and subsequent MYs. Therefore, EPA believes it appropriate to go beyond an examination of whether the new standards affect the prior consistency with section 202(a) findings and, in this context, require a new analysis of whether (A) California's above-noted "protectiveness determination" is arbitrary and capricious;<sup>28</sup> (B) California does not need such State standards to meet compelling and extraordinary conditions;<sup>29</sup> or (C) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.<sup>30</sup>

## II. Discussion

As detailed below, EPA finds that CARB has demonstrated that it meets the requirements for a new section 209(b) waiver for heavy-duty Otto-cycle engines and vehicles above 8,500 pounds GVWR and, therefore, believes a new waiver is appropriate.

### A. California's Protectiveness Determination

Section 209(b)(A)(1) of the Act instructs that EPA cannot grant a waiver if the agency finds that CARB was arbitrary and capricious in its determination that its standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. CARB's Board made

protectiveness determinations in Resolutions 00–45 and 02–31, dated December 7, 2000 and December 12, 2002. Resolution 00–45 found that amendments to sections 1956.8 and 1961 of title 13, California Code of Regulations (CCR), as set forth in its Attachment A, the amendments to (and adoption of) the documents incorporated by those regulations as set forth in Attachments B, C, and D, with the modifications set forth in Attachment E to Resolution 00–45 would not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.<sup>31</sup> Resolution 02–31 found that amendments to sections 1956.1, 1956.8, 1965, and 1978 of title 13, CCR, as set forth in Attachment A and the amendments to, and adoption of, the documents incorporated by reference in those regulations as set forth in Attachments B, D, E, F, G and H to Resolution 02–31, and section 1961, title 13, CCR, as set forth in Attachment A thereto, and the amendments to the document incorporated by that regulation as set forth in Attachment C, with the modifications set forth in Attachment I to the Resolution would not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.<sup>32</sup> CARB's protectiveness determinations in both rulemakings were, therefore, based on comparisons to the Federal standards thereby demonstrating that CARB's standards and test procedures align with the Federal program.

EPA did not receive any comments stating that CARB's amendments are not, in the aggregate, as stringent as applicable Federal standards. Therefore, based on the record before me, I cannot find that CARB's amendments, as noted, would cause the California heavy-duty Otto-cycle exhaust emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.

### B. Need for California Standards to Meet Compelling and Extraordinary Conditions

Section 209(b)(1) of the Act also 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, or (C) such State standards and accompanying enforcement procedures are not consistent with section [202(a)] of the Act." This criterion restricts EPA's inquiry to whether California needs its own mobile source pollution program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions.<sup>33</sup> As to the need for the particular standards that are the subject of this decision, California is entrusted with the power to select "the best means to protect the health of its citizens and the public welfare."<sup>34</sup> CARB has repeatedly demonstrated the existence of compelling and extraordinary conditions in California.<sup>35</sup>

EPA has not received any adverse comments to suggest that California no longer suffers from serious and unique air pollution problems. In its supplemental waiver request letter, CARB concluded that "California needs its own on-road engine and vehicle program to meet serious air pollution problems unique to the State."<sup>36</sup> EPA has repeatedly declined to find fault in California's demonstrations of "compelling and extraordinary conditions" when waiving preemption for motor vehicle emission standards under section 209(b) and authorization for California's nonroad regulations under section 209(e) of the CAA.<sup>37</sup> Moreover, because EPA has not received adverse public comment challenging California's need for its own mobile source pollution control program or asserting any change from California's previous demonstrations, I cannot deny the waiver based on a lack of

<sup>33</sup> See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889–18890 (May 3, 1984).

<sup>34</sup> H.R. Rep. No. 95–294, 95th Cong., 1st Sess., 301–02 (1977) (cited in *MEMA I*, 627 F.2d at 1110).

<sup>35</sup> CARB expressed its needs for its own emission control program in both of the rulemakings at issue here. ("Be It Further Resolved that the Board hereby finds that separate California emission standards and test procedures are necessary to meet compelling and extraordinary conditions." CARB Resolution 00–45 at 6 (December 7, 2000), CARB's Item 5; CARB Resolution 02–31 at 6 (December 12, 2002), CARB's Item 19.

<sup>36</sup> CARB's Supplemental Request Letter dated June 15, 2006 at 1.

<sup>37</sup> See, e.g., 41 FR 44209, 42213 (October 7, 1976); 49 FR 18887, 18892 (May 3, 1984). See also *Final 209(e) Rule*, 59 FR at 36982.

<sup>26</sup> See, e.g., 75 FR 8056 (February 23, 2010); 70 FR 22034 (April 28, 2005).

<sup>27</sup> See, e.g., 71 FR 44027 at 44028 (August 3, 2006) ("EPA believed it possible that CARB's amendments do in fact raise "new issues" as they impose new more stringent standards \*\*\*") and 51 FR 6308 at 6309 (February 21, 1986) ("[T]hese amendments do raise significant new issues not considered in prior waiver decisions. In effect, California's amendments establish new standards \*\*\*").

<sup>28</sup> CAA section 209(b)(1)(A).

<sup>29</sup> CAA section 209(b)(1)(B).

<sup>30</sup> CAA section 209(b)(1)(C).

<sup>31</sup> "Be it further resolved that the Board hereby determines that the California motor vehicle emission standards for passenger cars, light-duty trucks and medium duty engines, and for heavy-duty Otto-cycle engines, with the amendments approved herein, are, in the aggregate, at least as protective of public health and welfare than applicable federal standards." CARB Resolution 00–45 at 6 (December 7, 2000).

<sup>32</sup> "Be it further resolved that the Board hereby determines that the regulations approved and adopted herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards." CARB Resolution 02–31 at 6 (December 12, 2002).

compelling and extraordinary conditions.

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

EPA has stated in the past that California standards and accompanying test procedures would be inconsistent with section 202(a) of the Clean Air Act if: (1) There is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to cost of compliance within the lead time provided, or (2) the federal and California test procedures impose inconsistent certification requirements.<sup>38</sup>

The first prong of EPA's inquiry into consistency with section 202(a) of the Act depends upon technological feasibility. This requires EPA to 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. CARB noted during its rulemakings that the methods that can be used to meet the 2004–2005 standards consist of technologies that have already been developed in response to federal emission standards. The technology changes that were expected to occur as a result of the new regulations include: Improved durability catalysts with increased precious metal loading, optimization of the catalyst and fuel metering systems (including improved fuel injection and heated oxygen sensors), increased use of air injection and retarded spark ignition to control cold start emissions, and improved exhaust gas recirculation for better NO<sub>x</sub> control.<sup>39</sup> Additionally, CARB notes that the technological feasibility demonstrations for the exhaust emission standards reflect the technological feasibility in EPA's own analysis for the federal standards.<sup>40</sup> CARB also relied on the federal findings of technological feasibility for technologies that can be used to meet the 2008 and beyond standards.<sup>41</sup> EPA finds that CARB employed appropriate projections of the feasibility of the technologies necessary to meet both the 2004–2005 standards and the 2008 standards. CARB's examination of the technological feasibility findings made by EPA in the federal rulemaking along with subsequent technology developments provide no basis upon which to find that CARB's standards are

not consistent with section 202(a) of the Act.

The second prong of EPA's inquiry into consistency with section 202(a) of the Act depends on the compatibility of the federal and California test procedures. CARB points out that its certification requirements are nearly identical to those adopted by EPA.<sup>42</sup> In fact, CARB found that beginning with the 2008 model year, California's test procedures are identical to the federal test procedures for heavy-duty gasoline engines and incomplete vehicles.<sup>43</sup> EPA agrees with this analysis and finds that one set of tests for a heavy-duty engine or vehicle could be used to determine compliance with both California and federal requirements. Therefore, we cannot find California's test procedures to be inconsistent with our own.

For these reasons, I cannot deny the waiver based on a finding that the 2000 and 2002 amendments are inconsistent with section 202(a) of the Clean Air Act.

### III. Decision

EPA's analysis finds the criteria for granting a waiver of preemption to be satisfied. The amendments require a new waiver of preemption because "new issues" are presented by the establishment of more stringent numerical standards in efforts to harmonize California standards with federal standards. Upon evaluation, EPA has determined that CARB has met the criteria for a waiver of preemption for the 2000 and 2002 amendments.

The Administrator has delegated the authority to grant California a section 209(b) waiver to enforce its own emission standards for on-road engines to the Assistant Administrator for Air and Radiation. Having given consideration to all the material submitted for this record, and other relevant information, I find that I cannot make the determinations required for a denial of a waiver pursuant to section 209(b) of the Act. Therefore, I grant a waiver of Clean Air Act preemption to the State of California with respect to its heavy-duty Otto-cycle engine and vehicle requirements as set forth above.

My decision will affect not only persons in California but also manufacturers outside the State who must comply with California's requirements in order to produce engines for sale in California. For this reason, I determine and find that this is a final action of national applicability

for purposes of section 307(b) (1) of the Act.

Pursuant to section 307(b) (1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by January 18, 2011. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b) (2) of the Act.

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.

Dated: November 10, 2010.

**Gina McCarthy,**

*Assistant Administrator, Office of Air and Radiation.*

[FR Doc. 2010–28971 Filed 11–16–10; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–UST–2010–0651; FRL–9227–8]

### Compatibility of Underground Storage Tank Systems With Biofuel Blends

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of proposed guidance and request for comments.

**SUMMARY:** EPA's Office of Underground Storage Tanks intends to issue guidance that would clarify EPA's underground storage tank (UST) compatibility requirement as it applies to UST systems storing gasoline containing greater than 10 percent ethanol and diesel containing an amount of biodiesel yet to be determined. Today's **Federal Register** notice solicits comment on the proposed guidance, which provides owners and operators of underground storage tank systems greater clarity in demonstrating compatibility of their tank systems with these fuels.

**DATES:** Comments must be received on or before December 17, 2010, 30 days after publication in the **Federal Register**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–UST–2010–0651, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.
- *E-mail:* [rcra-docket@epa.gov](mailto:rcra-docket@epa.gov).
- *Mail:* EPA Docket Center, Environmental Protection Agency,

<sup>38</sup> See, e.g., 75 FR 8056 (February 23, 2010); 70 FR 22034 (April 28, 2005).

<sup>39</sup> CARB Item 2 at 7–8.

<sup>40</sup> 65 FR 59896 (October 6, 2000).

<sup>41</sup> 66 FR 5002 (January 18, 2001), at pp. 5053 to 5055.

<sup>42</sup> *Id.* And Item 2 at pp. 7–8.

<sup>43</sup> CARB Request for Confirmation that Amendments Are Within the Scope of Previous Waivers of Preemption Under Clean Air Act Section 209(b), December 7, 2005 at 14.