

202(a) if the California test procedures were to impose certification requirements inconsistent with the federal certification requirements. Such inconsistency means that manufacturers would be unable to meet both the California and federal testing requirements using the same test vehicle or engine.⁵² CARB presents that the PDE regulation raises no issue regarding test procedure consistency because the regulation does not establish any test procedures for which there are comparable federal test procedures.⁵³

EPA received no comments suggesting that CARB's PDE regulation poses any test procedure consistency problem. Therefore, based on the record, EPA cannot find that CARB's testing procedures are inconsistent with section 202(a). Consequently, EPA cannot deny CARB's request based on this criterion.

E. Authorization Determination for California's PDE Regulation

After a review of the information submitted by CARB, EPA finds that those opposing California's request have not met the burden of demonstrating that authorization for California's PDE regulation should be denied based on any of the statutory criteria of section 209(e)(2). For this reason, EPA finds that an authorization for California's PDE regulation should be granted.

III. Decision

The Administrator has delegated the authority to grant California section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating California's PDE regulation and CARB's submissions, EPA is granting an authorization to California for its PDE regulation.

My decision will affect not only persons in California, but also entities outside the State who must comply with California's requirements. 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 February 4, 2013. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

IV. Statutory and Executive Order Reviews

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

Dated: November 29, 2012.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2012-29511 Filed 12-5-12; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9758-1]

California State Nonroad Engine Pollution Control Standards; Portable Equipment Registration Program; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Decision.

SUMMARY: EPA is granting authorization for the California Air Resources Board's (CARB's) amendments to its Portable Equipment Registration Program (PERP), and confirming that certain portions of CARB's PERP program is within the scope of previous EPA authorizations. PERP is a voluntary statewide program that enables registration of nonroad engines and equipment that operate at multiple locations across California, so that the engine and equipment owners can operate throughout California without obtaining permits from local air pollution control districts.

DATES: Petitions for review must be filed by February 4, 2013.

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2011-0102. 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 to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's Web site is <http://www.epa.gov/oar/doCKET.html>. The electronic mail (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 Web site, enter EPA-HQ-OAR-2011-0102 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 Web page that contains general information on its review of California waiver requests. Included on that page are links to prior waiver **Federal Register** notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

FOR FURTHER INFORMATION CONTACT: Kristien G. Knapp, Attorney-Advisor, Compliance Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue (6405J) NW., Washington, DC 20460. Telephone: (202) 343-9949. Fax: (202) 343-2800. Email: knapp.kristien@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. California's PERP Authorization Request

In a letter dated December 5, 2008, CARB submitted to EPA its request pursuant to section 209 of the Clean Air Act ("CAA" or "the Act"), regarding its Portable Equipment Registration Program ("PERP").¹ The PERP was

⁵² See, e.g., 43 FR 32182 (July 25, 1978).

⁵³ CARB Support Document at 27.

¹ California Air Resources Board (CARB), Request for Authorization, December 5, 2008, EPA-HQ-OAR-2011-0102-0002.

established by CARB as a voluntary program to address the concern that equipment owners who moved equipment within California often faced the need to obtain preconstruction and operating permits from different local air pollution control districts in the state.² The PERP allows voluntary registration of either spark-ignition (SI) or compression-ignition (CI) portable piston driven internal combustion engines or portable equipment units. Under the PERP, once registered, equipment is no longer subject to local air pollution control district permitting requirements. Rather, registration with the PERP allows equipment to be moved more freely within the state. "Portable" as defined within CARB's PERP program, means equipment that is designed and capable of being transported from one location to another. Not all equipment is eligible for registration in the PERP; generally, engines used for propulsion, as part of a stationary source, or used to produce power into the California electricity grid are not eligible for registration under the PERP. The PERP sets out four general requirements applicable to all registered equipment: (1) Registered equipment may not operate in a manner that causes a nuisance; (2) registered equipment may not interfere with attainment of federal or state air quality standards; (3) registered equipment may not cause an exceedance of an ambient air quality standard; and (4) owners of registered equipment (or combined operation of such equipment) must provide notice and comply with requirements for prevention of significant deterioration (PSD) if it would constitute a major modification of that source. The PERP also has specific requirements for both registered engines and certain types of equipment units. For engines, the specific requirements include fuel-type restrictions, opacity limits, mass emissions and emission concentration limits, and metering requirements, based on engine size. With limited exceptions, after January 1, 2006, only engines that meet the most stringent CARB or EPA emission standards in

effect at the time of registration are allowed in the PERP. Registered compression-ignition engines must also meet requirements of the CARB Airborne Toxic Control Measure (ATCM) for in-use portable diesel-fueled engines 50 brake-horsepower (hp) and greater portable engines (CARB's portable diesel equipment (PDE) regulations).³ For equipment, the PERP sets daily and annual mass emission limits for all registered equipment units (exclusive of engine emissions). Certain types of equipment, such as concrete batch plants and rock crushing and screening plants, have specific, additional requirements, primarily aimed to minimize particulate emissions associated with their operation. The PERP also includes regulatory requirements for recordkeeping, reporting, inspection, testing, fee collection, and enforcement.

In 1995, the California Legislature passed Assembly Bill (AB) 531 to address a perceived problem with the use of portable equipment and associated engines that were operated in more than one air pollution control district.⁴ CARB was directed by AB 531 to create and administer a voluntary statewide program for the registration of portable equipment.⁵ In 1997, CARB adopted regulations creating the PERP,⁶ which was amended by CARB in 1998, 2005, 2006, and March 2007.⁷ CARB adopted Resolution 07-9 on March 22, 2007, which amended the PERP, after a public hearing held earlier that month.⁸ Executive Order G-07-013 was issued by the Executive Officer, and the regulations were submitted to the Office of Administrative Law (OAL), on July 31, 2007.⁹ On September 12, 2007, OAL approved the regulations and they became operative the same day.¹⁰

CARB has requested that EPA confirm that parts of the voluntary PERP for portable engines and equipment fall within the scope of previously issued authorizations or submitted authorization requests (i.e., the ATCM for Portable Diesel Engines),¹¹ and that

the Administrator grant a new authorization for those emission standards not otherwise covered by a within-the-scope confirmation.

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. States are also preempted from adopting and enforcing standards and other requirements related to the control of emissions from non-new nonroad engines or vehicles. Section 209(e)(2) requires the Administrator, after notice and opportunity for public hearing, to authorize California to enforce such standards and other requirements, unless EPA makes one of three findings. In addition, other states with attainment plans may adopt and enforce such regulations if the standards, and implementation and enforcement procedures, are identical to California's standards. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, regulations providing the criteria, as found in section 209(e)(2), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards.¹² EPA later revised these regulations in 1997.¹³ As stated in the preamble to the 1994 rule, EPA has historically

for 1996 and later New Diesel Cycle Engines 175 Horsepower and Greater, 60 FR 48981 (September 21, 1995); California State Nonroad Engine and Vehicle Pollution Control Standards; Authorization of Large Off-Road Spark-Ignition Engine Standards, Notice of Decision, 71 FR 29621 (May 23, 2006).

¹² 59 FR 36969 (July 20, 1994).

¹³ 62 FR 67733 (December 30, 1997). The applicable regulations, now in 40 CFR part 1074, subpart B, 1074.105, provide:

(a) The Administrator will grant the authorization if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards.

(b) The authorization will not be granted if the Administrator finds that any of the following are true:

(1) California's determination is arbitrary and capricious.

(2) California does not need such standards to meet compelling and extraordinary conditions.

(3) The California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

(c) In considering any request from California to authorize the state to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

² CARB notes in its request that "For the record, CARB believes that because participation in the Statewide Program is voluntary, the emission standards for registered nonroad engines are not subject to the [Clean Air Act] § 209 preemption. Since the emission standards apply only if an owner voluntarily elects to register, the standards do not constitute 'standards and other requirements' within the meaning of section 209(e), which CARB believes only applies to mandated requirements. However, without prejudice to CARB's position and to avoid further delay in obtaining federal authorization, CARB submits this request." EPA takes no position here on CARB's beliefs with respect to its need for authorization of a voluntary program.

³ CARB has requested an authorization for its air toxic control measure for portable diesel engines. EPA announced the opportunity for public hearing and public comment on that request by a **Federal Register** notice published February 9, 2011. See 76 FR 7196 (February 9, 2011).

⁴ CARB, Request for Authorization at 2; California Health and Safety Code (CA HSC) § 41750.

⁵ CA HSC § 41752.

⁶ California Code of Regulations, title 13 §§ 2450 through 2465.

⁷ CARB, Request for Authorization at 3.

⁸ *Id.*; CARB, Resolution 07-9 at 1.

⁹ CARB, Resolution 07-9 at 1.

¹⁰ *Id.*

¹¹ See California State Nonroad Engine Pollution Control Standards; Authorization of State Standards

interpreted the section 209(e)(2)(iii) “consistency” inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).¹⁴

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. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if 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 are inconsistent with section 202(a) if: (1) There is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

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

C. Burden of Proof

In *Motor and Equip. Mfrs. Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (“*MEMA I*”), the U.S. Court of Appeals

stated that the Administrator’s role in a section 209 proceeding is to:

consider all evidence that passes the threshold test of materiality and * * * thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.¹⁵

The court in *MEMA I* considered the standards of proof under section 209 for the two findings related to granting a waiver for an “accompanying enforcement procedure” (as opposed to the standards themselves): (1) Protectiveness in the aggregate and (2) consistency with section 202(a) findings. The court instructed that “the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.”¹⁶

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.¹⁷ 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.¹⁸

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,” as compared to accompanying enforcement procedures, there is nothing in the opinion to suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have consistently made clear that: “[E]ven in the two areas conceded 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.”¹⁹

Opponents of the waiver bear the burden of showing that the criteria for a denial of California’s waiver request have been met. As found in *MEMA I*, this obligation rests firmly with opponents of the waiver in a section 209 proceeding:

[t]he language of the statute and it’s 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.²⁰

The Administrator’s burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: “here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as ‘arbitrary and capricious.’”²¹ Therefore, the Administrator’s burden is to act “reasonably.”²²

D. EPA’s Administrative Process in Consideration of CARB’s PERP Request

Upon review of CARB’s request, EPA offered an opportunity for a public hearing, and requested written comment on issues relevant to a full section 209(e) authorization analysis, by publication of a **Federal Register** notice on February 9, 2011.²³ Specifically, we requested comment on: (a) Whether CARB’s determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious, (b) whether California needs such standards to meet compelling and extraordinary conditions, and (c) whether California’s standards and accompanying enforcement procedures are consistent with section 209 of the Act.

In response to EPA’s February 9, 2011 **Federal Register** notice,²⁴ EPA received one request for a hearing, which was

¹⁵ *MEMA I*, 627 F.2d at 1122.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See, e.g., 40 FR 21102–103 (May 28, 1975).

²⁰ *MEMA I*, 627 F.2d at 1121.

²¹ *Id.* at 1126.

²² *Id.*

²³ 76 FR 7194 (February 9, 2011).

²⁴ *Id.*

¹⁴ 59 FR 36969 (July 20, 1994).

later withdrawn, and no public comments.²⁵

II. Discussion

A. Full Authorization Analysis

1. California's Protectiveness Determination

Section 209(e)(2)(i) of the Act instructs that EPA cannot grant an authorization if the agency finds that California 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 made a protectiveness determination in Resolution 07–9, finding that California's PERP is, “in the aggregate, at least as protective of public health and welfare as applicable federal standards.”²⁶ CARB presents that California's PERP is at least as stringent as the federal standards: “since no federal standards exist for in-use nonroad engines,²⁷ the emissions standards [submitted] are unquestionably as protective of comparable federal regulations.”²⁸

EPA did not receive any comments challenging California's protectiveness determination. Therefore, based on the record before us, EPA finds that opponents of the authorization have not shown that California 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.

2. Need for California Standards To Meet Compelling and Extraordinary Conditions

Section 209(e)(2)(ii) of the Act 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 * * *.” 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.²⁹ As discussed above, for over forty years CARB has repeatedly demonstrated the need for its mobile source emissions program to address compelling and extraordinary conditions in California. In its

Resolution 07–9, CARB affirmed its longstanding position that, in order to fight its serious air pollution problems, “California needs its off-road engine emission standards to meet compelling and extraordinary conditions.”³⁰ Likewise, EPA has consistently recognized that California continues to have the same “geographical and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, create serious pollution problems.”³¹ Furthermore, no commenter has presented any argument or evidence to suggest that California no longer needs a separate mobile source emissions program to address compelling and extraordinary conditions in California. Therefore, EPA has determined that we cannot deny California an authorization for its PERP under section 209(e)(2)(ii).

3. Consistency With Section 209 of the Clean Air Act

Section 209(e)(2)(iii) of the Act instructs that EPA cannot grant an authorization if California's standards and enforcement procedures are not consistent with section 209. As described above, EPA has historically evaluated this criterion for consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C).

a. Consistency With Section 209(a)

To be consistent with section 209(a) of the Clean Air Act, California's PERP must not apply to new motor vehicles or new motor vehicle engines. California's PERP expressly applies only to portable vehicles and expressly precludes registration of engines used to propel motor vehicles as defined by section 216(2) of the Clean Air Act.³² No commenter presented otherwise. Therefore, EPA cannot deny California's request on the basis that California's PERP is not consistent with section 209(a).

b. Consistency With Section 209(e)(1)

To be consistent with section 209(e)(1) of the Clean Air Act, California's PERP must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB presents that “locomotive and locomotive engines cannot be registered in the Statewide Program.”³³ CARB also presents that new farm and construction equipment do not fall under the

program.³⁴ No commenter presented otherwise. Therefore, EPA cannot deny California's request on the basis that California's PERP is not consistent with section 209(e)(1).

c. 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. California 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.³⁵

i. Technological Feasibility

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.³⁶ Section 202(a)(2) states, in 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 the technology within that time is feasible. Previous EPA waivers are in accord with this position.³⁷ For example, a previous EPA waiver decision considered California's standards and enforcement procedures to be consistent with section 202(a)

²⁵ EPA, “Memorandum from Brianna Iddings to Docket ID EPA–HQ–OAR–2011–0102,” EPA–HQ–OAR–2011–0102–0014.

²⁶ CARB, Resolution 07–9 at 5.

²⁷ CAA § 213.

²⁸ CARB, Request for Authorization at 14.

²⁹ See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889–18890 (May 3, 1984).

³⁰ CARB, Resolution 07–9 at 5.

³¹ 49 FR 18887, 18890 (May 3, 1984); see also 76 FR 34693 (June 14, 2011), 74 FR 32744, 32763 (July 8, 2009), and 73 FR 52042 (September 8, 2008).

³² CARB, Request for Authorization at 12.

³³ *Id.* at 13.

³⁴ *Id.*

³⁵ *MEMA I*, 627 F.2d at 1126.

³⁶ H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 301 (1977).

³⁷ See, e.g., 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).

because adequate technology existed as well as adequate lead-time to implement that technology.³⁸ Subsequently, Congress has stated that, generally, EPA's construction of the waiver provision has been consistent with congressional intent.³⁹

CARB presents that the technology required to comply with its PERP has already been established and is currently available.⁴⁰ CARB has determined that "participants in the Statewide Program can pass on any compliance costs without incurring significant economic disruption."⁴¹ CARB further stresses that admission into PERP is entirely voluntary, so any costs associated with compliance of the program are voluntarily incurred by those that choose to participate in the program.⁴²

CARB staff estimate "that the total economic impact of the proposed amendments to the Statewide PERP Regulation to affect private businesses and public agencies is \$6.6 million over its lifetime (\$6.1 million for private businesses and \$0.5 million for public agencies)."⁴³ The economic impact comes from fees for non-compliant engines. However, if affected parties were instead required to purchase new engines that meet current emission standards, the overall cost to those parties would be around \$250 million.⁴⁴ The PERP thus results in an estimated savings of \$243.4 million.⁴⁵

EPA did not receive any comments suggesting that CARB's standards and test procedures are technologically infeasible. Consequently, based on the record, EPA cannot deny California's authorization based on technological infeasibility.

ii. Consistency of Certification Procedures

California's standards and accompanying enforcement procedures would also be inconsistent with section 202(a) if the California test procedures were to impose certification requirements inconsistent with the federal certification requirements. Such inconsistency means that manufacturers would be unable to meet both the

California and federal testing requirements using the same test vehicle or engine.⁴⁶ CARB presents that the PERP requirements raise no issue regarding test procedure consistency because the tests procedures incorporated into the program are existing EPA and CARB test procedures.⁴⁷ Either agency's test procedures may be used to demonstrate compliance with the program.⁴⁸

EPA received no comments suggesting that CARB's PERP poses any test procedure consistency problem. Therefore, based on the record, EPA cannot find that CARB's testing procedures are inconsistent with section 202(a). Consequently, EPA cannot deny CARB's request based on this criterion.

d. Full Authorization Determination for California's PERP Regulations

After a review of the information submitted by CARB, EPA finds that those opposing California's request have not met the burden of demonstrating that authorization for California's PERP should be denied based on any of the statutory criteria of section 209(e)(2). For this reason, EPA finds that an authorization for California's PERP should be granted.

B. Within-the Scope Confirmation

In our February 9, 2011 **Federal Register** notice, 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 waiver analysis. EPA received no public comment in response to our request, including no public comments on whether EPA should consider CARB's request according to a within-the-scope analysis of full authorization analysis. Therefore, we have evaluated CARB's request by application of our traditional analysis of authorizations. At the same time, CARB believes it meets the requirements for a within-the-scope confirmation to the extent that EPA has already authorized the numeric emission standards referenced in its PERP program. According to our analysis, as discussed below, we can confirm that the PERP program is within the scope of previous authorizations issued on September 21, 1995 (60 FR 48981), May 23, 2006 (71 FR 29621), and April 4, 2012 (75 FR 8056).

If California amends regulations that were previously granted an authorization, EPA can confirm that the amended regulations are within the scope of the previously granted

authorization. Such within-the-scope amendments are permissible without a full authorization review if three conditions are met. First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 209 of the Act. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.

EPA issued an authorization of CARB's diesel emission standards for 1996 and later new diesel cycle engines 175 horsepower and greater on September 21, 1995 (60 FR 48981). EPA also issued authorizations applicable to CARB's large off-road spark-ignition engine standards on May 23, 2006 (71 FR 29621) and April 4, 2012 (75 FR 8056). As discussed above, the first two within-the-scope criteria regarding protectiveness and consistency with section 209 of the Act have been established for the PERP program. Additionally, because registration to such standards does not appear to present a new issue, and no commenter presented otherwise, EPA can confirm that CARB's PERP program is within the scope of the above-noted EPA authorizations, to the extent that the PERP requirements are reliant upon the emission standards at the heart of the above-noted authorizations.⁴⁹ To the extent that CARB's PERP program allows registration of engines and equipment to emission standards that are not the subject of a previous EPA authorization, EPA cannot confirm they are within the scope as consideration of those provisions present "new issues" that have not previously been the subject of an authorization.

III. Decision

The Administrator has delegated the authority to grant California section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating California's PERP amendments, and CARB's submissions, EPA is granting an authorization to California for its PERP amendments. To the extent that the PERP program allows registration of equipment for which EPA has already issued authorizations to California, EPA is confirming that those

³⁸ 41 FR 44209 (October 7, 1976).

³⁹ H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).

⁴⁰ CARB, Request for Authorization at 16-17.

⁴¹ *Id.* at 16.

⁴² *Id.*

⁴³ CARB Staff Report: Initial Statement of Reasons for the Proposed Amendments to the Statewide Portable Equipment Registration Program Regulation and Airborne Toxic Control Measure for Diesel Particulate Matter From Portable Engines at vi.-vii.

⁴⁴ *Id.* at vii.

⁴⁵ *Id.*

⁴⁶ See, e.g., 43 FR 32182 (July 25, 1978).

⁴⁷ CARB, Request for Authorization at 17.

⁴⁸ *Id.*

⁴⁹ To the extent that any provision in CARB's PERP program, which is herein confirmed as within the scope, is later construed as not within-the-scope of EPA's prior authorizations, then a full authorization is appropriate and granted based upon the full authorization evaluation as discussed above.

provisions are within the scope of its previous authorizations.

My decision will affect not only persons in California, but also entities outside the State who must comply with California's requirements. 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 February 4, 2013. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

IV. Statutory and Executive Order Reviews

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

Dated: November 29, 2012.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2012-29513 Filed 12-5-12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-9758-3]

New York State Prohibition of Discharges of Vessel Sewage; Receipt of Petition and Tentative Affirmative Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice—receipt of petition and tentative affirmative determination.

SUMMARY: Notice is given that, pursuant to Clean Water Act Section 312(f)(3), the State of New York has determined that the protection and enhancement of the

quality of the New York State (NYS or the State) portion of Lake Erie requires greater environmental protection, and has petitioned the United States Environmental Protection Agency, Region 2, for a determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for those waters, so that the State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters.

New York State has proposed to establish a "Vessel Waste No Discharge Zone" for the State's portion of Lake Erie stretching from the Pennsylvania-New York State boundary to include the upper Niagara River to Niagara Falls. The proposed No Discharge Zone encompasses approximately 593 square miles and 84 linear shoreline miles, including the navigable portions of the Upper Niagara River and numerous other tributaries and harbors, and embayments of the Lake, including Barcelona Harbor, Dunkirk Harbor and Buffalo Outer Harbor, and other formally designated habitats and waterways of local, state, and national significance.

DATES: Comments regarding this tentative determination are due by January 7, 2013.

Petition: You may view Lake Erie No Discharge Zone Petition by clicking the link below: <http://www.epa.gov/region02/water/permits.html>.

ADDRESSES: You may submit comments by any of the following methods:

- **Email:** chang.moses@epa.gov.

Include "Comments on Tentative Affirmative Decision for NYS Lake Erie NDZ" in the subject line of the message.

- **Fax:** 212-637-3891.

- **Mail and Hand Delivery/Courier:** Moses Chang, U.S. EPA Region 2, 290 Broadway, 24th Floor, New York, NY 10007-1866. Deliveries are only accepted during the Regional Office's normal hours of operation (8 a.m. to 5 p.m., Monday through Friday, excluding federal holidays), and special arrangements should be made for deliveries of boxed information.

FOR FURTHER INFORMATION CONTACT: Moses Chang, (212) 637-3867, email address: chang.moses@epa.gov.

SUPPLEMENTARY INFORMATION: Notice is given that the State of New York has petitioned the United States Environmental Protection Agency (EPA), Region 2, pursuant to section 312(f)(3) of Public Law 92-500 as amended by Public Law 95-217 and Public Law 100-4, that adequate facilities for the safe and sanitary

removal and treatment of sewage from all vessels are reasonably available for the NYS portion of Lake Erie. Adequate pumpout facilities are defined as one pumpout station for every 300-600 boats under the Clean Vessel Act: Pumpout Station and Dump Station Technical Guidelines (**Federal Register**, Vol. 59, No. 47, March 10, 1994).

The Great Lakes are the largest group of freshwater lakes on Earth, containing 95% of the fresh surface water in the United States and serving as the largest single reservoir on Earth. The glacial history and the influence of the Lakes themselves create unique conditions that support a wealth of biological diversity, including over 200 globally rare plants and animals and more than 40 species that are found nowhere else in the world.

Lake Erie is the smallest of the Great Lakes. It is also the shallowest, with depths that range from an approximate average of 24 feet in the western basin, to 82 feet in the deeper eastern basin. As the shallowest of the Great Lakes, it warms quickly in the spring and summer, and cools quickly in the fall. This shallowness and the warmer temperatures result in making Lake Erie the most biologically productive of the Great Lakes.

The New York State Department of Environmental Conservation (DEC) developed the New York State petition in collaboration with New York State Department of State (DOS) and the New York State Environmental Facilities Corporation (EFC) to establish a vessel waste No Discharge Zone (NDZ) on the open waters, tributaries, harbors and embayments of New York State's portion of Lake Erie.

A Clean Water Act Section 312(f)(4)(B) NDZ designation for drinking water intake zones might be appropriate for the vast majority of the Lake Erie waters included in this petition. However, to address the few areas that are not Class A (including Barcelona Harbor, Dunkirk Harbor and the Black Rock Canal), the State is seeking a determination by EPA, under Section 312(f)(3), that adequate facilities exist for the safe and sanitary removal and treatment of sewage from all vessels using this area of the Lake, and has provided information on Lake resources, vessel traffic, and vessel pumpout facilities in support of such a determination. In support of its petition, the state also submitted a Certification of the Need for Greater Protection and Enhancement of Lake Erie waters.

The Lake Erie watershed is home to approximately one-third of the total human population of the Great Lakes basin: 11.6 million people (10 million