

ENVIRONMENTAL PROTECTION AGENCY**[AMS-FRL-9301-6]****California State Nonroad Engine and Vehicle Pollution Control Standards; Authorization of Tier II Marine Inboard/Stern Drive Spark Ignition Engine Emission Standards; Notice of Decision****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice of Decision.

SUMMARY: EPA today, pursuant to section 209(e) of the Clean Air Act (Act), 42 U.S.C. 7543(e), is granting California its request for authorization to enforce its emission standards and other requirements for its second tier ("Tier II") of emission standards for new marine inboard/stern drive spark ignition engines.

DATES: Petitions for review must be filed by July 5, 2011.

ADDRESSES: The Agency's Decision Document, containing an explanation of the Assistant Administrator's decision, as well as all documents relied upon in making that decision, including those submitted to EPA by California, are available for public inspection in EPA's Air and Radiation Docket and Information Center (Air Docket). Materials relevant to this decision are contained in Docket OAR-2004-0403 at the following location: EPA Air Docket, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460. The EPA Docket Center Public Reading Room is open from 8 a.m. to 4:30 p.m. Monday through Friday, except on government holidays. The Air Docket telephone number is (202) 566-1742, and the facsimile number is (202) 566-1741. You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR part 2.

Additionally, 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, select "Environmental Protection Agency" from the pull-down Agency list, then scroll to "Keyword or ID" and enter EPA-HQ-OAR-2004-0403 to view documents in the record of this Marine Engine Authorization Request docket. 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 makes available an electronic copy of this Notice via the Internet on

the Office of Transportation and Air Quality (OTAQ) homepage (<http://www.epa.gov/OTAQ>). Users can find this document by accessing the OTAQ homepage and looking at the path entitled "Federal Register Notices." This service is free of charge, except any cost you already incur for Internet connectivity. Users can also get the official **Federal Register** version of the Notice on the day of publication on the primary Web site: (<http://www.epa.gov/docs/fedrgstr/EPA-AIR/>). Please note that due to differences between the software used to develop the documents and the software into which the documents may be downloaded, changes in format, page length, etc., may occur.

EPA's Office of Transportation and Air Quality also maintains a Web page that contains general information on its review of California waiver and authorization 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: Robert M. Doyle, Attorney-Advisor, Office of Transportation and Air Quality, (6405J), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460 (U.S. mail), 1310 L Street, NW., Washington, DC 20005 (courier mail). Telephone: (202) 343-9258; Fax: (202) 343-2804; E-Mail: doyle.robert@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Background****A. Nonroad Authorizations**

Section 209(e)(1) of the Act addresses the permanent preemption of 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.¹ Section 209(e)(2) of the Act requires the Administrator, after notice and opportunity for public hearing, to grant California authorization to enforce state standards for new nonroad engines or

vehicles which are not listed under section 209(e)(1), subject to certain restrictions. EPA regulations set forth, among other things, the criteria, as found in section 209(e)(2), by which EPA must consider any California authorization requests for new nonroad engines or vehicle emission standards (section 209(e) rules).² These regulations, codified at 40 CFR part 1074, 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 the 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 of California 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.

As stated in the preamble to the section 209(e) rule, EPA has interpreted the requirement regarding whether "California standards and accompanying enforcement procedures are not consistent with section 209" to require that California standards and accompanying enforcement procedures must in particular 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 motor vehicle waivers.³ 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. Secondly, California's nonroad standards and enforcement procedures must be consistent with section 209(e)(1), which identifies the categories permanently preempted from state regulation.⁴

² See 59 FR 36969 (July 20, 1994), and regulations set forth therein, 40 CFR part 85, subpart Q, §§ 85.1601-85.1606. EPA has moved these regulations, without changing their substance to 40 CFR part 1074. See 73 FR 59033, 59279 (October 8, 2008).

³ See 59 FR 36969, 36983 (July 20, 1994).

⁴ Section 209(e)(1) of the Act has been implemented at 40 CFR Part 1074, 1074.10, 1074.12. § 1074.10 provides in applicable part:

(a) States are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new engines smaller than 175 horsepower that are primarily used in farm or construction equipment or vehicles, as defined in this part. For equipment that is used in applications in addition to farming or construction activities, if the equipment is primarily used as farm and/or construction equipment or vehicles (as defined in this part), it is considered farm or construction equipment or vehicles.

¹ Section 209(e)(1) of the Act provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this Act—

(A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.

(B) New locomotives or new engines used in locomotives. Subsection (b) shall not apply for purposes of this paragraph.

California's nonroad standards and enforcement procedures would be considered inconsistent with section 209 if they applied to the categories of engines or vehicles identified and preempted from State regulation in section 209(e)(1).

Finally, because California's nonroad standards and enforcement procedures must be consistent with section 209(b)(1)(C), EPA will review nonroad authorization requests under the same "consistency" criteria that are applied to motor vehicle waiver requests. Under section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California's "standards and accompanying enforcement procedures are not consistent with section 202(a)" of the Act. Previous decisions granting waivers of Federal preemption for motor vehicles have stated that State standards are inconsistent with section 202(a) if there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time period or if the Federal and State test procedures impose inconsistent certification requirements.⁵

With regard to enforcement procedures accompanying standards, EPA must grant the requested authorization unless it finds that these procedures may cause the California standards, in the aggregate, to be less protective of public health and welfare than the applicable Federal standards promulgated pursuant to section 213(a), or unless the Federal and California certification test procedures are inconsistent.⁶

§ 1074.12 provides in applicable part:

States and localities are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives and new engines used in locomotives.

§ 1074.5 provides definitions of terms used in § 1074.0 and states in applicable part:

Construction equipment or vehicle means any internal combustion engine-powered machine primarily used in construction and located on commercial construction sites.

Farm Equipment or Vehicle means any internal combustion engine-powered machine primarily used in the commercial production and/or commercial harvesting of food, fiber, wood, or commercial organic products or for the processing of such products for further use on the farm.

Primarily used means 51 percent or more.

⁵ To be consistent, the California certification procedures need not be identical to the Federal certification procedures. California procedures would be inconsistent, however, if manufacturers would be unable to meet both the state and the Federal requirement with the same test vehicle in the course of the same test. *See, e.g.*, 43 FR 32182 (July 25, 1978).

⁶ *See, e.g., Motor and Equipment Manufacturers Association, Inc. v. EPA*, 627 F.2d 1095, 1111–14 (DC Cir. 1979), cert. denied, 446 U.S. 952 (1980) (MEMA I); 43 FR 25729 (June 14, 1978). While

Once California has received an authorization for its standards and enforcement procedures for a certain group or class of nonroad equipment engines or vehicles, it may adopt other conditions precedent to the initial retail sale, titling or registration of these engines or vehicles without the necessity of receiving an additional authorization.⁷

B. CARB's Authorization Request and EPA's Authorization Proceeding

The California Air Resources Board (CARB) requested EPA's authorization of the IB/SD marine engine emission standards by letter dated March 2, 2004.⁸ The CARB standards were implemented in two tiers; the first tier set HC and NO_x standards beginning with the 2003 model year engines, and the second tier set more stringent HC and NO_x standards beginning with the 2007 model year engines. As required by the Act, EPA offered the opportunity for a public hearing and requested public comments on these new standards on January 12, 2005;⁹ this hearing also covered earlier CARB authorization requests for emission standards for marine outboard and personal watercraft spark ignition engines. EPA received a request for a hearing from the National Marine Manufacturers Association (NMMA),¹⁰ and a hearing was held on February 28, 2005,¹¹ at which the NMMA, several boat manufacturers, and the Manufacturers of Emission Controls Association (MECA) testified. In addition, EPA received written comments from several boat manufacturers (some of whom also testified at the hearing), the U.S. Coast Guard, MECA, NMMA, Senator Herb Kohl (D-WI), and Senator James Inhofe (R-OK), as well as a supplemental

inconsistency with section 202(a) includes technological feasibility, lead time, and cost, these aspects are typically relevant only with regard to standards. The aspect of consistency with 202(a) which is of primary applicability to enforcement procedures (especially test procedures) is test procedure consistency.

⁷ See 43 FR 36679, 36680 (August 18, 1978).

⁸ Letter from Catherine Witherspoon, Executive Officer, CARB to Administrator, EPA regarding its "Request for Authorization to Enforce California's Emission Standards and Test Procedures for New 2003 and later Spark-Ignition Inboard and Stern-drive Marine Engines," dated March 2, 2004 ("CARB IB/SD Request letter"), Docket Entry EPA-HQ-OAR-2004-0403-0018.

⁹ 70 FR 2151 (January 12, 2005).

¹⁰ See Letter from John McKnight, National Marine Manufacturers Association (NMMA), to Robert M. Doyle, USEPA, dated January 27, 2005, Docket Entry EPA-HQ-OAR-2004-0403-0030.

¹¹ Written statements presented at this hearing and the hearing transcript appear in the Docket as Docket Entries EPA-HQ-OAR-2004-0403-0031 through EPA-HQ-OAR-2004-0403-0036.

submission from CARB responding to matters raised at the public hearing.¹²

After our review of the information submitted by CARB in its requests, and the information presented to the Agency at the public hearing and in the comments received after the hearing, EPA granted authorization for the CARB emission regulations for marine spark-ignition outboard and personal watercraft (PWC) engines in their entirety. EPA also granted authorization for the first Tier of the CARB regulations covering (IB/SD) engines. For the Tier I standards (as well as for the outboard and personal watercraft engines), EPA determined that CARB had successfully shown that these standards were technologically feasible, and thus met the authorization criterion of consistency with section 202(a). Regarding the Tier II IB/SD emission standards, all parties who testified at the hearing and submitted comments after the hearing, with the exception of CARB and MECA, had expressed concern that CARB had not shown that the Tier II IB/SD standards were technologically feasible, because they believed CARB had not shown that catalysts needed for the marine IB/SD engines to comply with the CARB standards were safe and durable in saltwater operation. Accordingly, EPA deferred authorization of these standards until the conclusion of then ongoing joint testing (by CARB, EPA, the U.S. Coast Guard, and the industry), to evaluate the technological feasibility of both the CARB Tier II IB/SD standards and Federal IB/SD standards which, at that time, were expected to be proposed in 2007. These Federal standards were proposed in May 2007 and finalized in October 2008.¹³

Shortly after the EPA IB/SD proposed standards were published, the NMMA wrote to EPA stating that "at this stage of catalyst development, there is little or no additional data to be obtained by completing the (joint test program). * * * NMMA agrees that EPA and CARB can cancel the saltwater test program." Additionally, NMMA dropped its objection to the "waiver" of the CARB standards because "one manufacturer is already in production with catalysts, and the others will be

¹² These comments can be found in the Docket as Docket entries EPA-HQ-OAR-2004-0037 through EPA-HQ-OAR-2004-0047.

¹³ The NPRM is found at 72 FR 14546 (March 28, 2007), and the final regulations at 73 FR 59034 (October 8, 2008).

ready to meet the CARB standard in 2008.”¹⁴

II. Decision

EPA, based on the record of this proceeding, cannot find that CARB's Marine Tier II IB/SD protectiveness determination was arbitrary and capricious, that CARB does not need its own standards to meet compelling and extraordinary conditions, or that the CARB standards are inconsistent with section 209 of the Act. Therefore, EPA grants authorization for CARB to enforce the second tier of its regulations for IB/SD engines which set a level of 5.0 g/kW-hr HC plus NO_x and phases in beginning with 45% of manufacturers' sales in 2007, 75% in 2008, and 100% in 2009 and beyond. EPA has made this authorization decision based on the information submitted by CARB in its requests, and the information presented to the Agency at the public hearing and in the comments received after the hearing. A full explanation of EPA's decision, including our review of comments received, is contained in our Decision Document which may be obtained as explained above in the **ADDRESSES** section of this Notice.

My decision will affect not only persons in California but also persons outside the State who would need to comply with California's Marine Tier II IB/SD regulations to produce engines for introduction into commerce in California. For this reason, I hereby determine and find that this is a final action of national applicability.

Under 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 July 5, 2011. Under section 307(b)(2) of the Act, judicial review of this final action may not be obtained in subsequent enforcement proceedings.

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

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

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).

Finally, the Administrator has delegated the authority to make determinations regarding authorizations under section 209(e) of the Act to the Assistant Administrator for Air and Radiation.

Dated: April 26, 2011.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2011-10752 Filed 5-2-11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2010-0782; ER-FRL-8996-7]

Initiation of Scoping for an Environmental Assessment (EA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Initiation of Scoping.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) (42 U.S.C. 4321-4370h), the Council on Environmental Quality's NEPA regulations (40 CFR parts 1500-1508), and EPA's regulations for implementing NEPA (40 CFR part 6), EPA will prepare an Environmental Assessment (EA) to analyze the potential environmental impacts related to the reissuance of the National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges from Construction Activities. The EA will evaluate the potential environmental impacts from the discharge of pollutants associated with stormwater runoff from construction activities greater than one acre, where EPA is the permitting authority. EPA will use the information in the EA to determine whether to prepare an Environmental Impact Statement (EIS).

This notice initiates the scoping process by inviting comments from Federal, State, and local agencies, Indian tribes, and the public to help identify the environmental issues and reasonable alternatives to be examined in the EA. The scoping process will inform the preparation of the EA, which will be made available for public comment.

DATES: Comments must be received by May 27, 2011.

ADDRESSES: You may submit scoping comments to the Docket ID No. EPA-

HQ-OW-2010-0782 by any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments by clicking on "Help" or "FAQs."

- **Mail:** Attn: CGP Scoping Comments, U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Mail Code: 2252A, Washington, DC 20460.

- **Courier:** Attn: CGP Scoping Comments, U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Rm. #7241C, Washington, DC 20004, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.

- **Fax:** 202-564-0072, ATTN: CGP Scoping Comments.

Comments should be received within 30 days of the date of the publication of the Proposed Construction General Permit in the **Federal Register**. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov>. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT:

Jessica Trice, NEPA Compliance Division, Office of Federal Activities, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Mail Code: 2252A, Washington, DC 20460. Telephone: (202) 564-6646.

SUPPLEMENTARY INFORMATION: EPA is seeking public comment to determine the scope of environmental issues and

¹⁴ Letter from John McKnight, NMMA to Robert Doyle, EPA, dated May 11, 2007, Docket Entry EPA-HQ-OAR-2004-0403-0042.