

Issued in Washington, DC, on November 30, 2012.

**John A. Anderson,**

*Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.*

[FR Doc. 2012-29475 Filed 12-5-12; 8:45 am]

**BILLING CODE 6450-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. EL13-25-000]

#### H.Q. Energy Services (U.S.) Inc. v. ISO New England Inc.; Notice of Complaint

Take notice that on November 28, 2012, pursuant to section 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206, H.Q. Energy Services (U.S.) Inc. (Complainant) filed a formal complaint against ISO New England Inc. (Respondent), requesting the Commission to issue an order requiring the Respondent to revise its Forward Capacity Market tariff rules to reflect that the Respondent has the burden to change its standards for determining deliverability for import capacity resources, as more fully explained in the complaint.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5:00 p.m. Eastern Time on December 21, 2012.

Dated: November 30, 2012.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2012-29464 Filed 12-5-12; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket Nos. EC12-145-000; ER12-2681-000; EL12-107-000]

#### ITC Holdings Corp.; Entergy Corporation; Midwest Independent Transmission System Operator, Inc.; Notice of Filing

Take notice that, on November 20, 2012, ITC Holdings Corp. and Entergy Services, Inc. (together, Applicants) submitted a filing styled as an answer in the above-referenced proceedings attaching a series of confidential workpapers and additional background information relating to Applicants' joint application that was filed in the above-referenced proceedings on September 24, 2012 under sections 203 and 205 of the Federal Power Act. (*See Joint Application for Authorization of Acquisition and Disposition of Jurisdictional Transmission Facilities, Approval of Transmission Service Formula Rate and Certain Jurisdictional Agreements, and Petition for Declaratory Order on Application of Section 305(a) of the Federal Power Act*, Docket Nos. EC12-145-000, ER12-2681-000, and EL12-107-000). Applicants' filing is hereby noticed as an amendment to the application.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to

these proceedings. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on Applicants and all of the parties in these proceedings.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* January 22, 2013.

Dated: November 30, 2012.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2012-29465 Filed 12-5-12; 8:45 am]

**BILLING CODE 6717-01-P**

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-9758-2]

### California State Nonroad Engine Pollution Control Standards; In-Use Portable Diesel Engines 50 Horsepower and Greater; Notice of Decision

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

**ACTION:** Notice of decision.

**SUMMARY:** EPA is granting the California Air Resources Board's (CARB's) request for an authorization of its airborne toxic control measure for in-use portable diesel-fueled compression-ignition engines 50 horsepower and greater.

**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-2011-0101. 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](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 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](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 [www.regulations.gov](http://www.regulations.gov) Web site, enter EPA-HQ-OAR-2011-0101 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 (6405), NW., Washington, DC 20460. Telephone: (202) 343-9949. Fax: (202) 343-2800. Email: [knapp.kristien@epa.gov](mailto:knapp.kristien@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

#### **I. Background**

##### *A. California's Portable Diesel Equipment Regulation*

In a letter dated December 5, 2006, CARB submitted to EPA its request pursuant to section 209 of the Clean Air Act ("CAA" or "the Act"), regarding its regulations to enforce its airborne toxic control measure (ATCM) for in-use

portable diesel-fueled engines 50 brake-horsepower (hp) and greater (CARB's "PDE" regulation).<sup>1</sup> As defined in CARB's regulation, "portable engines" are engines that may be moved easily from location to location.<sup>2</sup> The engines are used to power a variety of equipment, including pumps, ground support equipment at airports, cranes, oil-well drilling and workover rigs, power generators, dredging equipment, rock crushing and screening equipment, welding equipment, woodchippers, and compressors. To be portable, the engine must not reside at any one location for more than 12 consecutive months. A location is defined as any place of operation or single site at a building, structure, facility, installation or well site. CARB expects the PDE regulation to reduce diesel particulate matter (PM) emissions by 95 percent, and significant health costs will be saved by reduced mortality, reduced incidences of cancer, chronic bronchitis, asthma and fewer hospital visits caused by pneumonia and asthma-related conditions.

CARB's authorization request covers four primary substantive requirements: (1) Starting on January 1, 2010, all portable engines in California must be certified to meet a federal or California standard for newly manufactured nonroad engines; (2) Starting on January 1, 2020, all portable engines in California must be either (a) certified to meet federal Tier 4 emission standards, (b) equipped with a properly functioning CARB Level-3 verified technology,<sup>3</sup> or (c) equipped with a combination of control strategies that have been verified together with CARB to achieve at least an 85 percent reduction in diesel PM emissions; (3) All portable engines that, prior to January 1, 2006, have not been either registered in CARB's Portable Equipment Registration Program ("PERP") or permitted under the permit program of an air quality management district or air pollution control district must meet the most stringent of the federal or California emission standards for nonroad engines at the time the engine is either registered in the PERP

<sup>1</sup> Letter from Catherine Witherspoon, Executive Officer, California Air Resources Board to Administrator Stephen L. Johnson, December 5, 2006, EPA-HQ-OAR-2011-0101-002.

<sup>2</sup> See California Air Resources Board ("CARB"), "Authorization Request Support Document," December 5, 2006, EPA-HQ-OAR-2011-0101-0003, at 4 (hereinafter "CARB Support Document").

<sup>3</sup> Level 3 p.m. control technology refers to a control technology that has been verified to achieve PM reductions of at least 85 percent under the CARB "Verification Procedure, Warranty and In-Use Compliance Requirements for In-Use Strategies to Control Emissions from Diesel Engines," 13 California Code of Regulations (CCR) sections 2700-2710.

or registered for a permit; and (4) Each fleet of portable engines must comply with increasingly more stringent weighted PM emission fleet averages that apply on three different deadlines (January 1, 2013, January 1, 2017 and January 1, 2020).<sup>4</sup> Owners of in-use equipment have options available to meet the CARB requirements.<sup>5</sup> These include: purchasing new equipment with cleaner engines, repowering existing equipment with cleaner engines, using verified add-on control devices on existing equipment and engines, switching to alternative diesel fuels or alternative fuels, or electrifying some or all of the in-use fleet and receiving emission credits.

Certain types of diesel-fueled engines are exempt from the PDE regulations. Engines used to propel mobile applications are exempt, including dual-use engines that both propel the equipment and operate the attached equipment.<sup>6</sup> Dual-fuel diesel pilot engines, military tactical support equipment, and ground support equipment (used at airports) are also exempt from the regulation. PDEs that are used solely in emergency applications or are "low-use" engines that run less than eighty hours annually are also not subject to the fleet emission standards.<sup>7</sup>

Credits toward satisfying the fleet standard can be earned by opting to use electric power on a given project in lieu of a portable diesel engine, if more than 200 hours of grid power are used.<sup>8</sup> Under certain circumstances, alternative-fueled engines operating more than 100 hours per year can be allowed into the fleet. Also, fleet owners who purchase federal Tier 4 engines prior to January 1, 2013 may count the engine twice in calculating the fleet weighted diesel PM emission rates for the 2013 deadline, and the same allowance is made for Tier 4 engines purchased prior to the 2017 deadline. The PDE regulation also has recordkeeping and reporting requirements.<sup>9</sup> Records must be kept only for engines taking advantage of the incentives and exemptions described above. For example, records must be kept for engines with hourly limitations, like low-use engines, or hourly minimums, like alternative-fuel engines.

<sup>4</sup> The PDE regulation contains a fifth substantive requirement that pertains to the fuels that may be used in in-use portable equipment engines, but this fuels requirement is not preempted by CAA section 209(e). See CARB Support Document at 2.

<sup>5</sup> See CARB Support Document at 4.

<sup>6</sup> See CARB Support Document at 5.

<sup>7</sup> See CARB Support Document at 10.

<sup>8</sup> See CARB Support Document at 11.

<sup>9</sup> See CARB Support Document at 12-13.

Status reports and compliance statements must be submitted to CARB and include information identifying each engine and its emission rate, as well as the fleet emission rate. The local air districts and CARB both are given authority to review or seek enforcement action for violation of the fleet emission standards, and either can take appropriate enforcement action as necessary.

CARB's PDE regulation was considered at the Board's public hearing on February 26, 2004.<sup>10</sup> The proposed regulations were approved, with modifications, in Resolution 04-7, in which the CARB Board directed the CARB Executive Officer to adopt the PDE regulation after making the proposed language available for public comment for a supplemental period of fifteen days.<sup>11</sup> The public comment period ended June 1, 2004, and the CARB Executive Officer considered the two submitted written comments and determined that the comments did not require the regulation to be modified or reconsidered by the CARB Board.<sup>12</sup> The Executive Officer adopted the ATCM by executive order G-04-080 on December 23, 2004.<sup>13</sup> California's Office of Administrative Law approved the PDE regulation on February 9, 2005, and the regulations were adopted at 93116-93116.5, title 17, California Code of Regulations, effective March 11, 2005.<sup>14</sup>

#### B. Nonroad 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 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.<sup>15</sup> EPA later revised these regulations in 1997.<sup>16</sup> As stated in the preamble to the 1994 rule, EPA has historically 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).<sup>17</sup>

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.

#### 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.<sup>18</sup>

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."<sup>19</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>20</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>21</sup>

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

<sup>15</sup> 59 FR 36969 (July 20, 1994).

<sup>16</sup> See 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.

<sup>17</sup> See 59 FR 36969 (July 20, 1994).

<sup>18</sup> *MEMA I*, 627 F.2d at 1122.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>10</sup> See CARB Support Document at 2.

<sup>11</sup> CARB, Resolution 04-7, EPA-HQ-OAR-2011-0101-0004.

<sup>12</sup> CARB Support Document at 2. See also CARB Executive Order G-04-080, EPA-HQ-OAR-2011-0101-0005.

<sup>13</sup> CARB, Executive Order G-04-080, EPA-HQ-OAR-2011-0101-0005.

<sup>14</sup> CARB, Final Regulation Order, EPA-HQ-OAR-2011-0101-0006.

procedures, there is nothing in the opinion to suggest that the court's analysis would not apply with equal force to such determinations. EPA's past waiver decisions have consistently made clear that: "[E]ven in the two areas concededly reserved for Federal judgment by this legislation—the existence of 'compelling and extraordinary' conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one."<sup>22</sup>

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 its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.<sup>23</sup>

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.'"<sup>24</sup> Therefore, the Administrator's burden is to act "reasonably."<sup>25</sup>

#### D. EPA's Administrative Process in Consideration of California's PDE Regulation

Upon receipt 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.<sup>26</sup> 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, EPA received one request for a public hearing, which was withdrawn, and no public comments.<sup>27</sup>

## II. Discussion

### A. 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. The California Air Resources Board made a protectiveness determination in Resolution 04–7, finding that California's PDE regulations will not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.<sup>28</sup> CARB presents that California's PDE regulations will be, in the aggregate, "undisputedly at least as stringent as applicable federal regulations" because "there are no federal standards for in-use portable engines."<sup>29</sup> CARB received no information calling this determination into question.<sup>30</sup> Accordingly, CARB concludes that the protectiveness determination "clearly is not arbitrary or capricious."<sup>31</sup>

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.

### B. 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.<sup>32</sup> 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 04–7, CARB affirmed its longstanding position that California continues to need its own motor vehicle and engine program to meet its serious air pollution problems.<sup>33</sup> 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."<sup>34</sup> 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 PDE regulation under section 209(e)(2)(ii).

### C. 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).

<sup>27</sup> EPA, "Memorandum from Cassie Weaver to Docket EPA-HQ-OAR-2011-0101," EPA-HQ-OAR-2011-0101-0029.

<sup>28</sup> "BE IT FURTHER RESOLVED that the Board hereby determines that pursuant to Title II, section 209(e)(2) of the federal Clean Air Act, as amended in 1990, that the emission standards and other requirements related to the control of emissions adopted as part of this ATCM are, in the aggregate, at least as protective of public health and welfare as applicable federal standards, that California needs the adopted standards to meet compelling and extraordinary conditions, and that the adopted standards and accompanying enforcement procedures are consistent with the provisions of section 209." CARB, Resolution 04–7, EPA-HQ-OAR-2011-0101-0004.

<sup>29</sup> CARB Support Document at 19. See also CARB, Resolution 04–7, EPA-HQ-OAR-2011-0101-0004.

<sup>30</sup> CARB Support Document at 19.

<sup>31</sup> *Id.*

<sup>32</sup> See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889–18890 (May 3, 1984).

<sup>33</sup> CARB, "Resolution 04–7," EPA-HQ-OAR-2011-0101-0004.

<sup>34</sup> 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).

<sup>22</sup> See, e.g., 40 FR 21102–103 (May 28, 1975).

<sup>23</sup> *MEMA I*, 627 F.2d at 1121.

<sup>24</sup> *Id.* at 1126.

<sup>25</sup> *Id.*

<sup>26</sup> See 76 FR 7196 (February 9, 2011).

### 1. Consistency With Section 209(a)

To be consistent with section 209(a) of the Clean Air Act, California's ATCM for portable diesel engines must not apply to new motor vehicles or new motor vehicle engines. California's PDE regulation expressly apply only to in-use nonroad engines and do not apply to engines used in motor vehicles as defined by section 216(2) of the Clean Air Act.<sup>35</sup> No commenter presented otherwise. Therefore, EPA cannot deny California's request on the basis that California's PDE regulation are not consistent with section 209(a).

### 2. Consistency With Section 209(e)(1)

To be consistent with section 209(e)(1) of the Clean Air Act, California's ATCM for portable diesel engines must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB presents that its PDE regulation does not apply to new locomotives or locomotive engines.<sup>36</sup> To the extent that an owner or operator elects to meet the standards established by the PDE regulation by replacing existing equipment with new equipment, or repowering existing equipment with new engines, the PDE regulation requires the use of engines meeting federal and California certification requirements for new engines.<sup>37</sup> Therefore, CARB states, "the ATCM does not establish emission standards that are otherwise preempted" under Clean Air Act section 209(e)(1).<sup>38</sup> CARB received no information calling this determination into question.<sup>39</sup> No commenter presented otherwise to EPA. Therefore, EPA cannot deny California's request on the basis that California's PDE regulation is not consistent with section 209(e)(1).

### 3. 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.<sup>40</sup>

#### a. Technological Feasibility

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.<sup>41</sup> 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.<sup>42</sup> For example, a previous EPA waiver decision considered California's standards and enforcement procedures to be consistent with section 202(a) because adequate technology existed as well as adequate lead-time to implement that technology.<sup>43</sup> Subsequently, Congress has stated that, generally, EPA's construction of the waiver provision has been consistent with congressional intent.<sup>44</sup>

CARB presents that its PDE regulation satisfies the technological feasibility and lead time criteria because CARB either has "demonstrated that the necessary technology presently exists to meet the established standards or has specifically identified the projected control

technology \* \* \* and has explained its reasons for believing that each of the steps can be completed in the time available."<sup>45</sup> CARB states that the individual portable engine requirements and the initial fleet average requirements which take effect in 2013 will likely be met by purchasing new equipment with cleaner engines or repowering existing equipment with cleaner engines.<sup>46</sup> In addition to engine replacement, owners and operators of portable diesel engines will likely use verified diesel particulate matter retrofit strategies to meet the two subsequent fleet average requirements that take effect in 2017 and 2020.<sup>47</sup>

CARB presents that the individual portable engine requirements are technologically feasible in the time provided because they parallel federal emission standards for off-road compression ignition engines, set forth in 40 CFR parts 89 and 1039, for which the EPA made express findings of technological feasibility.<sup>48</sup> CARB has established a verification program for diesel particulate matter retrofit technologies, and based on the activity of that program, presents that there is a solid base of control technology to meet the fleet average requirements in the PDE regulation.<sup>49</sup> Finally, owners and operators of portable diesel engines will not be required to use retrofit technologies until 2017, which CARB found to be "ample lead time to allow the development of the necessary control techniques." \* \* \*<sup>50</sup> CARB expects that the costs associated with the PDE regulation will be generated by the early replacement or repower of portable engines, prior to the end of the engine's useful life, and will range from \$135–\$220 per horsepower.<sup>51</sup>

EPA did not receive any comments suggesting that CARB's standards and test procedures are technologically infeasible and no information to contradict CARB's cost estimates. Consequently, based on the record, EPA cannot deny California's authorization based on technological infeasibility.

#### b. Consistency of Certification Procedures

California's standards and accompanying enforcement procedures would also be inconsistent with section

<sup>35</sup> CARB Support Document at 5 ("Engines used to propel \* \* \* motor vehicles are not regulated by the ATCM.") Also, "the ATCM neither applies to motor vehicles that are preempted under 209(a) or to new engines less than 175 hp used in farm and construction equipment and vehicles or to new locomotives or locomotive engines." *Id.* at 21.

<sup>36</sup> CARB Support Document at 18.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *MEMA I*, 627, F.2d at 1126.

<sup>41</sup> H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 301 (1977).

<sup>42</sup> See, e.g., 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).

<sup>43</sup> 41 FR 44209 (October 7, 1976).

<sup>44</sup> H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 301 (1977).

<sup>45</sup> CARB Support Document at 22.

<sup>46</sup> See CARB Support Document at 4, 22.

<sup>47</sup> *Id.* at 22.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 22. See also *id.* at 22–26.

<sup>50</sup> *Id.* at 26.

<sup>51</sup> CARB, "CARB Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Appendix G: Economic Impact Analysis Methodology," January 2004, EPA-HQ-OAR-2011-0101-0022, at G-2.

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.<sup>52</sup> 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.<sup>53</sup>

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.*

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### 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](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 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](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 [www.regulations.gov](http://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](mailto: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").<sup>1</sup> The PERP was

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

<sup>52</sup> See, e.g., 43 FR 32182 (July 25, 1978).

<sup>53</sup> CARB Support Document at 27.