

publication by the Environmental Protection Agency of a Notice of Availability of the Final SEIS.

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Acting General Counsel.

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ENVIRONMENTAL PROTECTION AGENCY

[AMS-FRL-8292-8]

California State Nonroad Engine and Vehicle Pollution Control Standards; Authorization of Marine Outboard, Personal Watercraft and Tier One Inboard/Stern Drive Engine Standards, Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Decision for Authorization of California Marine Outboard, Personal Watercraft and Tier One Inboard/Stern Drive Engine Emission Standards.

SUMMARY: EPA today, pursuant to section 209(e) of the Clean Air Act (Act), 42 U.S.C. 7543(e), is granting California its requests for authorization of its Marine Spark-Ignition Engines regulations for outboard and personal watercraft engines in their entirety, and for the first tier of regulations affecting inboard and stern drive engines. EPA is deferring an authorization decision on the second tier of inboard and stern drive standards pending the completion of testing currently underway to evaluate the technological feasibility of both the California inboard and stern drive standards and Federal inboard and stern drive standards which are expected to be proposed regulations in 2007.

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 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 5:30 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.

FOR FURTHER INFORMATION CONTACT: Robert M. Doyle, Attorney-Advisor, Office of Transportation and Air Quality, (6403), 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. Obtaining Electronic Copies of Documents

EPA makes available an electronic copy of this Notice 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.

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 Docket ID EPA-HQ-OAR-2004-0403 to view documents in the record of this Marine 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.

II. 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

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

Section 209(e)(2) of the Act allows the Administrator 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. On July 20, 1994, EPA promulgated a regulation that sets 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

Section 209(e)(2) requires the Administrator, after notice and opportunity for public hearing, to authorize California to enforce standards and other requirements relating to emissions control of new engines not listed under section 209(e)(1).³ The section 209(e) rule and its codified regulations⁴ formally set forth the criteria, located in section 209(e)(2) of the Act, by which EPA must grant California authorization to enforce its new nonroad emission standards:

40 CFR part 85, Subpart Q, § 85.1605 provides:

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

(b) The authorization shall not be granted if the Administrator finds that:

- (1) The determination of California is arbitrary and capricious;
- (2) California does not need such California standards to meet compelling and extraordinary conditions; or
- (3) California standards and accompanying enforcement procedures are not consistent with section 209.

As stated in the preamble to the section 209(e) rule, EPA has interpreted the requirement that EPA cannot find "California standards and accompanying enforcement procedures are not consistent with section 209" to mean that California standards and

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.

² See 59 FR 36969 (July 20, 1994), and regulations set forth therein, 40 CFR part 85, Subpart Q, §§ 85.1601-85.1606.

³ As discussed above, states are permanently preempted from adopting or enforcing standards relating to the control of emissions from new engines listed in section 209(e)(1).

⁴ See 40 CFR part 85, Subpart Q, § 85.1605.

accompanying enforcement procedures must 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.⁵ 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.⁶ 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 he finds that California "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.⁷

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.⁸

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.⁹

If California acts to amend a previously authorized standard or accompanying enforcement procedure, the amendment may be considered within the scope of a previously granted authorization provided that it does not undermine California's determination that its standards in the aggregate are as protective of public health and welfare as applicable Federal standards, does not affect the consistency with section 209 of the Act, and raises no new issues affecting EPA's previous authorization determination.¹⁰

(B) Summary of Background Requests

The California Air Resources Board (CARB) submitted to EPA three separate but related requests to authorize various marine spark ignition engine regulations. EPA examined all three submissions together in our review of the requests to enforce CARB's marine SI engine emissions regulation program.

⁷ 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).

⁸ *See, e.g., Motor and Equipment Manufacturers Association, Inc. v. EPA*, 627 F.2d 1095, 1111-14 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980) (MEMA I); 43 FR 25729 (June 14, 1978).

While 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.

⁹ *See* 43 FR 36679, 36680 (August 18, 1978).

¹⁰ Decision Document for California Nonroad Engine Regulations Amendments, Dockets A-2000-05 to 08, entry V-B, p. 28.

These requests are summarized in order below.

(1) By letter dated April 4, 2000, CARB requested EPA authorization to enforce California's marine SI regulations affecting outboard (OB) marine engines. The CARB regulations set emission standards for these marine engines commencing with model year 2001 for both certification and in-use standards. The first tier of the CARB regulations basically adopted the standards equivalent to the EPA 2006 marine SI engines. CARB also adopted a second tier of outboard engine regulations, commencing in model year 2004 requiring emissions at levels approximately 80% of the EPA 2006 standards, and a third tier, commencing in 2008, requiring emissions at levels approximately 35% of the EPA 2006 standard. Manufacturers are permitted to meet the standards directly or on a corporate average basis, where some engine families may emit more than the emission standard if they are offset by engines which emit sufficiently less than the standard. To accompany the new standards, CARB also adopted regulations requiring manufacturer production line testing (along with CARB authority to conduct Selective Enforcement Audits), manufacturer demonstration of in-use compliance, emission warranties, permanent emission certification labels for covered engines, and special "hang tags" for consumer/environmental awareness of clean technology engines.¹¹

(2) By letter dated June 5, 2002, CARB extended the earlier authorization request to include regulations for marine SI engines in personal watercraft (PWC)¹² for model year 2002 and beyond. The PWCs are subject to the same emission standards and requirements as the marine outboard SI engines discussed above. The CARB marine regulations had included both outboards and PWCs from the outset, but PWCs had not been included in the original CARB request because of technical issues raised by PWC manufacturers related to compliance with the CARB standards for model year 2001. The June 5, 2002 CARB request stated that those issues had been

¹¹ At the time this request was presented to EPA, the California Office of Administrative Law had not approved the section of the regulations dealing with these hang tags because of problems it found with the applicability date of the hang tag requirement. These problems were resolved and the hang tag requirement was included as part of the CARB June 5, 2002 request described below.

¹² Personal watercraft are small watercraft on which the rider sits or stands during operation, such as jet skis and wave runners. CARB Staff Report, October 23, 1998, at p. 9, Docket OAR-2004-0403.

⁵ *See* 59 FR 36969, 36983 (July 20, 1994).

⁶ Section 209(e)(1) of the Act has been implemented. *See* 40 CFR part 85, Subpart Q §§ 85.1602, 85.1603.

§ 85.1603 provides in applicable part:

(a) 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 subpart, it is considered farm or construction equipment or vehicles. (b) 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 subpart.

§ 85.1602 provides definitions of terms used in § 85.1603 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 used 51 percent or more.

resolved, so CARB submitted this extension. In addition, CARB submitted for authorization the marine engine consumer hang tag regulations because the earlier model year applicability issue had been resolved.

(3) By letter dated March 2, 2004, CARB extended the earlier requests by requesting authorization to enforce California's marine SI regulations affecting inboard and sterndrive (IB/SD) engines for model years 2003 and beyond.¹³ The first tier of regulations, for model year 2003 through 2008, sets a cap reflecting average emission levels of 16.0 grams per kilowatt hour (g/kW-hr) HC plus NO_x which manufacturers can meet directly by engine family or by corporate average. The second tier of standards sets a level of 5.0 g/kW-hr HC plus NO_x and will phase in beginning with 45% of manufacturers' sales in 2007, 75% in 2008 and 100% in 2009 and beyond. For 2007 and 2008, all engines subject to the standard must comply directly with the standard, with no option for sales weighted-averaging. Besides these new standards, other regulations establish requirements for certification, emission test procedures, emissions warranty, and emission certification labels and consumer/environmental awareness hang tag labels. In addition, the IB/SD regulations require on-board diagnostics for these engines. Finally, as part of the IB/SD rulemaking, CARB adopted some minor amendments to the OB and PWC regulations to clarify some definitions and labeling requirements made necessary by the adoption of the regulations for IB/SD marine engines.

As required by the Act, EPA offered the opportunity for a public hearing and requested public comments on these new standards by publication of a **Federal Register** notice to such effect on January 12, 2005.¹⁴ EPA received a request for a hearing from the National Marine Manufacturers Association,¹⁵ and a hearing was held on February 28, 2005.¹⁶ In addition, EPA received post-hearing written comments for the

¹³ Inboard engines include a propeller shaft that penetrates the hull of the marine vessel, while the engine and the remainder of the drive unit are internal to the hull of the marine watercraft. In sterndrive engines, the drive unit is external to the hull of the marine watercraft, while the engine is internal to the hull of the marine watercraft. CARB Staff Report, June 8, 2002, at p. 4, Docket OAR-2004-0403.

¹⁴ 70 FR 2151 (January 12, 2005).

¹⁵ See Letter from John McKnight, National Marine Manufacturers Association, to Robert M. Doyle, USEPA, dated January 27, 2005, Docket Entry 2004-0403-0030.

¹⁶ Written Statements presented at this hearing and the hearing transcript appear in the Docket as Docket Entries 2004-0403-0031 through 2004-0403-0036.

Docket of this proceeding from the U.S. Coast Guard, the Manufacturers of Emissions Controls Association, the National Marine Manufacturers Association, several marine engine manufacturers, Senator Herb Kohl (D-WI), and Senator James Inhofe (R-OK), and a supplemental submission from CARB responding to matters raised at the public hearing.¹⁷ Accordingly, 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.

(C) Authorization Decision

After review of the information submitted by CARB and other parties to the record of this Docket, EPA finds that no party has presented information to the Agency which would demonstrate that California did not meet the burden of satisfying the statutory criteria of section 209(e). For this reason, EPA is granting authorization for the CARB Marine Spark-Ignition Engines regulations for OB and PWC engines in their entirety. With respect to the regulations affecting IB/SD engines, EPA grants authorization for CARB to enforce the first tier of these regulations for model year 2003 through 2008, which set a cap reflecting average emission levels of 16.0 grams per kilowatt hour (g/kW-hr) HC plus NO_x which manufacturers can meet directly by engine family or by corporate average. EPA is deferring an authorization decision on the second tier of standards which set a level of 5.0 g/kW-hr HC plus NO_x and will phase in beginning with 45% of manufacturers' sales in 2007, 75% in 2008 and 100% in 2009 and beyond. There is testing currently underway, performed as a joint program by CARB, EPA, the U.S. Coast Guard and the industry, to evaluate the technological feasibility of both the CARB IB/SD standards and Federal IB/SD standards which are expected to be proposed regulations in 2007. At the conclusion of this testing, EPA will issue its authorization decision for the second tier (i.e., for 2007 and beyond) CARB IB/SD standards.

My decision will affect not only persons in California but also the manufacturers outside the State who must comply with California's requirements in order to produce nonroad engines and vehicles for sale in California. For this reason, I hereby

¹⁷ These comments appear in the Docket as Docket Entries 2004-0403-0037 through 2004-0403-0047.

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 May 29, 2007. 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 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: March 22, 2007.

William L. Wehrum,

Acting Assistant Administrator for Air and Radiation.

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ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2007-0037; FRL-8118-3]

Pesticide Registration Review; New Dockets Opened for Review and Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has established registration review dockets for the pesticides listed in the table in Unit III.A. With this document, EPA is opening the public comment period for these registration reviews. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that