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Dated: June 7, 2011.

Kimberly D. Bose,
Secretary.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-9318-7]

California State Motor Vehicle Pollution Control Standards; Within-the-Scope Determination for Amendments to California’s Motor Vehicle Greenhouse Gas Regulations; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Within-the-Scope Determination.

SUMMARY: EPA confirms that amendments promulgated by the California Air Resources Board (“CARB”) are within the scope of an existing waiver of preemption issued by EPA for California’s motor vehicle greenhouse gas emissions program. EPA also finds, in the alternative, that California’s standards, as amended, meet the requirements for a new waiver of preemption.

DATES: Petitions for review must be filed by August 15, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2010-0653. All documents relied upon in making this decision, including those submitted to EPA by CARB, and public comments, 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 (e-mail) 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 <http://www.regulations.gov> Web site, enter EPA HQ-OAR-2010-0653 in the “Enter Keyword or ID” fill-in box to view documents in the record of CARB’s passenger vehicle GHG amendments within-the-scope waiver request. 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 many historical documents regarding California’s greenhouse gas waiver request, including those associated with this within-the-scope confirmation request; the page is accessible at <http://www.epa.gov/otaq/climate/ca-waiver.htm>. OTAQ also 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>.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Chronology

On December 21, 2005, the California Air Resources Board (“CARB”) submitted a request to EPA, seeking a

waiver of preemption under section 209(b) of the Clean Air Act for California’s motor vehicle greenhouse gas (“GHG”) regulations.¹ EPA initially denied that request, and published that denial in a **Federal Register** notice on March 6, 2008.² CARB subsequently submitted a request that EPA reconsider that waiver denial on January 21, 2009. EPA took action on that request for reconsideration by reopening its public process.³ The agency held a public hearing to hear oral testimony and received thousands of written comments from a wide variety of interested persons. EPA’s decision on reconsideration—granting California’s waiver request—was issued on June 30, 2009, and published in the **Federal Register** on July 8, 2009.⁴

B. CARB’s Motor Vehicle Greenhouse Gas Amendments

Since EPA’s grant of a waiver of preemption for California’s greenhouse gas emission regulations, CARB has promulgated two sets of amendments, which are at issue here. Both sets of amendments are intended to ease manufacturer compliance burdens. CARB’s Board adopted the first set of amendments in September 2009. The September 2009 amendments, known as the “Section 177 State ‘Pooling’ Amendments,” include provisions intended to streamline manufacturers’ obligations by: (1) Providing manufacturers with the option of pooling vehicle sales across California and in states that have adopted California’s greenhouse gas standards starting with model years 2009 through 2011,⁵ and (2) revising certification requirements to accept data from the Federal Corporate Average Fuel Economy (“CAFE”) program.⁶ CARB’s Board adopted the second set of amendments in February 2010. The February 2010 amendments are known as the “2012–2016 Model Year National Program Amendments”; they provide that compliance with EPA’s greenhouse gas standards will be deemed compliance with the California

¹ See 72 FR 21260 (Apr. 30, 2007).

² 73 FR 12156 (March 6, 2008).

³ 74 FR 7040 (February 12, 2009).

⁴ 74 FR 32744 (July 8, 2009). The Chamber of Commerce of the United States and the National Automobile Dealers Association (“NADA”) sought review of EPA’s July 8, 2009 waiver decision in the United States Court of Appeals for the District of Columbia Circuit (No. 09-1237). On April 29, 2011, the Court dismissed the petition for review for lack of jurisdiction.

⁵ California Code of Regulations, Title 13 1961.1(a)(1)(A)(i).

⁶ California Code of Regulations, Title 13 1961(a)(1)(B).

standards during the 2012 through 2016 model years.⁷

C. EPA's Review of California's Greenhouse Gas Within-the-Scope Request

By letter dated June 28, 2010, CARB submitted a request to EPA seeking confirmation that these two sets of amendments are within the scope of the waiver of preemption issued by EPA under section 209(b) of the Clean Air Act on June 30, 2009. EPA announced its receipt of California's within-the-scope confirmation request in a **Federal Register** notice on January 31, 2011.⁸ In that notice, EPA offered an opportunity for public hearing and comment on CARB's request.

Although CARB's request regarding its "Section 177 State 'Pooling' Amendments" and its "2012–2016 Model Year National Program Amendments" was submitted as a within-the-scope request, EPA invited comment on several issues. Within the context of a within-the-scope analysis, EPA invited comment on whether California's standards: (1) Undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as comparable Federal standards; (2) affect the consistency of California's requirements with section 202(a) of the Act; and (3) raise any other new issues affecting EPA's previous waiver determinations. EPA also requested comment on issues relevant to a full waiver analysis, in the event that EPA determined that California's standards should not be considered within the scope of CARB's previous waivers, and should instead be subjected to a full waiver analysis. Specifically, EPA sought 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 separate standards to meet compelling and extraordinary conditions; and (c) whether California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Act.

No party requested an opportunity for a hearing to present oral testimony, and EPA received only three written comments. One of the comments is not responsive or relevant to the issues EPA sought comment on; a second comment

requests that EPA vacate the underlying waiver; and the third comment supports CARB's amendments, and encourages EPA to confirm that the amendments are within the scope of CARB's greenhouse gas waiver. The written comments are from a private citizen,⁹ the National Automobile Dealers Association ("NADA"),¹⁰ and the Association of Global Automakers ("Global Automakers"), respectively.¹¹ The private citizen's comment is not responsive to the issues under EPA's consideration as described in EPA's January 31, 2011 **Federal Register** notice.¹² NADA comments that California's amendments effectively eliminate any need for California's greenhouse gas standards, and therefore EPA should vacate the underlying waiver. NADA did not offer any comment specifically on whether California's amendments meet the within-the-scope criteria, and it did not explicitly offer substantive comments on any of those criteria. NADA did comment on whether California's regulations met the second criterion of a full waiver, concerning whether California needs State standards to meet compelling and extraordinary conditions. NADA also requests that EPA delay taking action on CARB's within-the-scope request until the litigation related to the underlying waiver has been completed. Global Automakers comments that it "unreservedly supports" California's amendments, and encourages EPA to confirm that the amendments are within the scope of the previously issued greenhouse gas waiver.¹³ As noted below, Global Automakers offered specific comments on all of the issues described for public comment in EPA's January 31, 2011 **Federal Register** notice.

D. Clean Air Act Waivers of Preemption

Section 209(a) of the Clean Air Act preempts states and local governments from setting emission standards for new motor vehicles and engines. It provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions

⁹ Comments of Joyce Dillard, EPA-HQ-OAR-2010-0653-0004 (March 17, 2011).

¹⁰ Comments of NADA, EPA-HQ-OAR-2010-0653-0005 (March 17, 2011).

¹¹ Comments of the Association of Global Automakers ("Global Automakers"), EPA-HQ-OAR-2010-0653-0003 (March 17, 2011).

¹² This comment generally appears to express concern for public health and welfare. Because this comment is not responsive to the issues before EPA or to EPA's request for comments, EPA is not responding to this comment.

¹³ Comments of Global Automakers, EPA-HQ-OAR-2011-0653-003.

from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Through operation of section 209(b) of the Act, California is able to seek and receive a waiver of section 209(a)'s preemption. Section 209(b)(1) requires a waiver to be granted for any State that had adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966,¹⁴ if the State determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards (this is known as California's "protectiveness determination"). However, no waiver is to be granted if EPA finds that: (A) California's above-noted "protectiveness determination" is arbitrary and capricious;¹⁵ (B) California does not need such State standards to meet compelling and extraordinary conditions;¹⁶ or (C) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.¹⁷ Regarding consistency with section 202(a), EPA reviews California's standards for technological feasibility and evaluates testing and enforcement procedures to determine whether they would be inconsistent with Federal test procedures (e.g., if manufacturers would be unable to meet both California and Federal test requirements using the same test vehicle).¹⁸

If California amends regulations that were previously granted a waiver of preemption, EPA can confirm that the amended regulations are within the scope of the previously granted waiver if three conditions are met. These conditions are discussed below.

E. Burden of Proof

In *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (DC 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 * * *

¹⁴ Because California was the only state to have adopted standards prior to 1966, it is the only state that is qualified to seek and receive a waiver. See S.Rep. No. 90-403 at 632 (1967).

¹⁵ CAA section 209(b)(1)(A).

¹⁶ CAA section 209(b)(1)(B).

¹⁷ CAA section 209(b)(1)(C).

¹⁸ See, e.g., 74 FR at 32767 (July 8, 2009); see also *MEMA I*, 627 F.2d at 1126.

⁷ California Code of Regulations, Title 13 1961.1(a)(1)(A)(ii). The National Program and EPA's greenhouse gas standards referred to in California's regulation can be found at 75 FR 25323 (May 7, 2010).

⁸ 76 FR 5368 (January 31, 2011).

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.¹⁹

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.”²⁰

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.²¹ 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.²²

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 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.”²³

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.²⁴

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.’”²⁵ Therefore, the Administrator’s burden is to act “reasonably.”²⁶

II. Discussion

A. Within-the-Scope Analysis

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. Even though EPA sought comment on whether California’s amendments should be subjected to a full waiver analysis, no party expressed the opinion that California’s amendments require such an analysis. Global Automakers, the only commenter to address this threshold issue of which criteria to apply, stated the amendments at issue qualify for a within-the-scope determination. Global Automakers points out that California’s greenhouse gas amendments do not increase the stringency of any emission standard, or add any new pollutant or other emission standard to California’s existing greenhouse gas regulations. Therefore, we have evaluated CARB’s request by application of our traditional within-the-scope analysis.

EPA can confirm that amended regulations are within the scope of a previously granted waiver of preemption if three conditions are met. First, the amended regulations must not undermine California’s determination

that its standards, in the aggregate, are at least as protective of public health and welfare as applicable Federal standards. Second, the amended regulations must not undermine our previous determination with respect to consistency with section 202(a) of the Act. Third, the amended regulations must not raise any new issues affecting EPA’s prior waiver determinations. CARB, in its Resolution 09–53 (September 25, 2009),²⁷ and Resolution 10–15 (February 25, 2010),²⁸ expressly stated that its greenhouse gas amendments meet each of these criteria.

1. California’s Protectiveness Determination

When granting a waiver of preemption for California’s greenhouse gas emission standards, EPA found that opponents of the waiver had not met their burden to demonstrate that California’s protectiveness determination was arbitrary and capricious. The protectiveness determination at issue in EPA’s previous greenhouse gas waiver proceeding was primarily based upon a comparison of California’s greenhouse gas emission standards to then non-existent Federal greenhouse gas emission standards.²⁹ In the July 30, 2009 decision, EPA noted that “[i]f federal greenhouse gas standards are promulgated in the future, and if such standards bring this determination into question, then EPA can revisit this decision at that time.” We also noted that “EPA would then determine whether these changes are within-the-scope of its prior waiver or if a new, full waiver determination would need to be made, as would be required if California decided to increase the stringency of its greenhouse gas standards.”³⁰

California’s greenhouse gas amendments, as described above, do not increase the numerical stringency of its greenhouse gas emission standards or change the California fleet average greenhouse gas emission limits. In addition, although EPA has

²⁷ CARB Resolution 09–53, EPA–HQ–OAR–2010–0653–0002.7 (September 24, 2009).

²⁸ CARB Resolution 10–15, EPA–HQ–OAR–2010–0653–0002.17 (February 25, 2010).

²⁹ See 74 FR 332744, 32749–32759. EPA also examined then existing CAFE standards promulgated by the NHTSA. EPA found that such standards are not “applicable federal standards,” and even if they were considered as such, opponents of the waiver had not demonstrated that CARB’s protectiveness determination was arbitrary and capricious. EPA also examined whether CARB’s protectiveness determination was arbitrary and capricious based on the real world in-use effects of the GHG standards, and found that opponents of the waiver had not met their burden of proof.

³⁰ 74 FR 32752–32753 (July 8, 2009).

¹⁹ *MEMA I*, 627 F.2d at 1122.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See, e.g., 40 FR 21102–103 (May 28, 1975).

²⁴ *MEMA I*, 627 F.2d at 1121.

²⁵ *Id.* at 1126.

²⁶ *Id.* at 1126.

subsequently promulgated its own emission limits for greenhouse gases, those limits do not begin until the 2012 model year, in contrast to CARB's standards, which began in the 2009 model year. As such, if EPA were to undertake a comparison of California-to-Federal greenhouse gas emission standards, that analysis would compare three years of existing California standards against three years of non-existent Federal standards. Thus, EPA agrees with CARB that California's greenhouse gas amendments do not undermine California's previous protectiveness determination with regard to the 2009 through 2011 model years.

In its June 28, 2010 Letter requesting a within-the scope determination, CARB points out that it made an additional finding that its standards are in the aggregate at least as protective of public health and welfare as comparable Federal greenhouse gas emission standards, and that California's amendments do not undermine the emission reductions from the previously waived California standards.

The comment from Global Automakers states that California's amendments do not cause California's greenhouse gas standards to be less protective than the Federal standards. Global Automakers asserts that the "deem to comply" prong of California's amendments render emission benefits to be equally protective as between the California and Federal programs.

In its comments, NADA notes that CARB stated that the national program "will achieve equal or better GHG emission reduction benefits from MY 2012-16 light-duty vehicles compared to those sold in California and states that have adopted California's Pavley standards as provided in Section 177 of the Clean Air Act." NADA believes that CARB's statement leads to the conclusion that "vacating the waiver * * * likewise will result in no adverse environmental effects * * *." However, such a conclusion does not logically follow from the statement CARB made. CARB's statement was in reference to the fact that the national program affects vehicles in all 50 states, whereas the pre-existing California program only affected vehicles in California and section 177 states; it was not a statement with regard to the emission reduction benefits of the California standards themselves in California and the section 177 states. In reviewing the California standards themselves, CARB found that the national program greenhouse gas standards from 2012 to 2015 were slightly less stringent than comparable California standards, and were

equivalent to California standards in 2016. CARB also found that emission reductions in California and the section 177 states might be reduced slightly if manufacturers meet California regulations by demonstrating compliance with Federal standards, rather than meeting the pre-existing California standards.³¹ NADA does not take issue with this finding. Thus, at the very least, compliance with California's greenhouse gas standards under the revised regulations will result in the same, if not more, emission reductions than would occur in the absence of the California standards. NADA provides no evidence that CARB's standards are less protective than the applicable Federal standards. As such, NADA fails to present any evidence or make any showing that the amendments undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable Federal standards.

After evaluating the materials submitted by CARB, as well as the public comments from Global Automakers and NADA on this issue, EPA confirms that California's greenhouse gas amendments do not undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable Federal standards.

2. Consistency With Section 202(a) of the Clean Air Act

EPA has stated in the past that California standards and accompanying test procedures would be inconsistent with section 202(a) of the Clean Air Act if: (1) There is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to cost of compliance within the lead time provided, or (2) the Federal and California test procedures impose inconsistent certification requirements.³² CARB states that the amendments do not undermine our previous determination with respect to consistency with section 202(a) because California's standards have remained the same and the amendments were intended to provide flexibility and reduce the costs of compliance with the regulations.³³ EPA received one public

comment on this issue, from Global Automakers. Global Automakers believes that California's amendments "do not cause California's requirements to be inconsistent with Section 202(a) of the Act."³⁴ Global Automakers further states that harmonizing the California program with EPA's Federal program renders California's regulations to be "more consistent" with the Clean Air Act.

The first prong of EPA's inquiry into consistency with section 202(a) of the Act depends upon technological feasibility. This requires EPA to evaluate 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. Here, CARB has not changed its overall California fleet average greenhouse gas emission standards. The amendments at issue have been adopted to provide additional means and flexibilities for manufacturers to comply with the standards. These amendments do not require the development or application of any additional technology beyond that already required by California's original greenhouse gas emission standards. EPA received no comments indicating that CARB's amendments present lead-time or technology issues with respect to consistency under section 202(a) and knows of no other evidence to that effect. Consequently, CARB's amendments do not affect our prior determination regarding consistency with section 202(a), based on lead-time or technological feasibility issues.

The second prong of EPA's inquiry into consistency with section 202(a) of the Act depends on the compatibility of the Federal and California test procedures. CARB's greenhouse gas amendments are designed to deem manufacturer compliance with EPA's greenhouse gas emission standards as compliant with California's requirements. CARB further points out that its amendments are intended to provide flexibility and reduce compliance costs. Therefore, CARB asserts that its amended regulations strengthen CARB's previous analysis that its regulations are consistent with section 202(a) of the Clean Air Act. EPA agrees with this analysis, and EPA received no comments that dispute this analysis. Because CARB's regulations provide additional flexibilities, which

³¹ California Air Resources Board, Staff Report: Initial Statement of Reasons for Rulemaking (January 7, 2010), at page 7, EPA-HQ-OAR-2010-0653-0002.6.

³² See, e.g., 75 FR 8056 (February 23, 2010) and 70 FR 22034 (April 28, 2005).

³³ CARB, Request that Amendments to California's New Passenger Motor Vehicle

Greenhouse Gas Regulations Be Found Within the Scope of the Existing Waiver of Clean Air Act Preemption, EPA-HQ-OAR-2010-0653-0002, (June 28, 2010), at page 4.

³⁴ Comments of Global Automakers, EPA-HQ-OAR-2010-0653-0003, page 5.

reduce compliance costs and even make CARB compliance more flexible to the extent that Federal compliance is deemed to comply with California's requirements, CARB has made their compliance program, including its test procedures, more compatible with the Federal compliance program. Consequently, nothing in the amendments undermines our prior determination concerning consistency of California's test procedures with our own.

For the reasons set forth above, EPA confirms that California's greenhouse gas amendments do not undermine our prior determination concerning consistency with section 202(a) of the Clean Air Act.

3. New Issues

EPA has stated in the past that if California promulgates amendments that raise new issues affecting previously granted waivers, we would not confirm that those amendments are within the scope of previous waivers.³⁵ CARB states that it is not aware of any new issues presented by its greenhouse gas amendments.³⁶ Similarly, Global Manufacturers state that the amendments do not raise any new issues affecting the Administrator's previous waiver: "[T]he amendments merely provide manufacturers the increased compliance flexibility of pooling their California and Section 177 State fleets, and using compliance with the Federal program to show compliance with the California program."³⁷

The comments from NADA do not specifically state that the amendments create new issues, but the comments appear to suggest NADA's belief that they do. NADA states that the provision that allows compliance with Federal greenhouse gas regulations as an alternative compliance option for compliance with California's greenhouse gas regulations renders California's greenhouse gas standards redundant and because of this "CARB cannot claim that its rules any longer are needed to meet compelling and extraordinary circumstances." This quote is a reference to the requirement in Clean Air Act section 209(b)(1)(B) that EPA shall not grant a waiver to

California if it finds that California "does not need such State standards to meet compelling and extraordinary conditions."

EPA does not believe that California's amendment allowing compliance with federal greenhouse gas regulations as an option for compliance with California's greenhouse gas regulations raises any new issues regarding our prior determination concerning CAA section 209(b)(1)(B).

In the underlying waiver decision, EPA found that "the better approach for analyzing the need for 'such State standards' to meet 'compelling and extraordinary conditions' is to review California's need for its program, as a whole, for the class or category of vehicles being regulated, as opposed to its need for individual standards."³⁸ EPA also reiterated its traditional understanding that "the term compelling and extraordinary conditions 'do not refer to the levels of pollution directly.' Instead, the term refers primarily to the factors that tend to produce higher levels of pollution—'geographical and climatic conditions (like thermal inversions) that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems.'" ³⁹ EPA further found that CARB has repeatedly demonstrated the need for its motor vehicle program to address compelling and extraordinary conditions in California.⁴⁰ In its initial greenhouse gas Waiver Request letter, CARB stated:

California—the South Coast and San Joaquin Air basins in particular—continues to experience some of the worst air quality in the nation. California's ongoing need for dramatic emission reductions generally and from passenger vehicles specifically is abundantly clear from its recent adoption of state implementation plans for the South Coast and other California air basins.⁴¹ The unique geographical and climatic conditions, and the tremendous growth in the vehicle population and use which moved Congress to authorize California to establish separate vehicle standards in 1967, still exist today.⁴²

NADA's comments do not indicate that, as a result of the amendments, California no longer needs a separate motor vehicle emissions program to address compelling and extraordinary conditions in California, or provide any

indication that EPA's prior determination on this issue is undermined in any way. Therefore, its comments do not show that California's amendments raise any new issues relevant to EPA's initial waiver decision.

Moreover, although NADA's comments reference the words of the section 209(b)(1)(B), "need * * * to meet compelling and extraordinary circumstances" criterion, they do not appear to be directed towards the geographical or climatological conditions that are being referred to by the words "compelling and extraordinary circumstances." Instead, NADA's comments appear to be directed at the stringency of the greenhouse gas standards. The stringency of California's standards is at issue in section 209(b)(1)(A), where Congress addressed the comparison of California standards to federal standards, but it is not an issue under section 209(b)(1)(B). As noted in EPA's underlying waiver decision, section 209(b)(1)(A) calls for a review of California standards "in the aggregate," and EPA can only deny a waiver if it finds that California was arbitrary and capricious in its finding that "its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." EPA notes that the language of section 209(b)(1)(A) clearly indicates Congress's determination that EPA review the effect of stringency on the protectiveness of California's standards "in the aggregate," and that EPA cannot deny a waiver on the grounds of protectiveness if California standards are at least equally protective as Federal standards. "Redundancy" is not the criterion; it is whether California's standards are, in the aggregate, at least as protective as applicable Federal standards. Furthermore, NADA does not address California's standards "in the aggregate" and, as noted above, does not provide any evidence to suggest, even with regard to California's greenhouse gas standards, that California was arbitrary and capricious in its finding that its standards are at least as protective as comparable federal standards. The stringency issue raised by NADA is not relevant under section 209(b)(1)(B), and it would be inconsistent with the intent of Congress to deny a waiver or a within-the-scope determination based on section 209(b)(1)(B) for reasons Congress clearly addressed and clearly determined should not be the basis for a denial under section 209(b)(1)(A). NADA's comments, therefore, do not raise any

³⁸ 74 FR at 32762.

³⁹ 74 FR at 32759.

⁴⁰ 74 FR at 32762–32763.

⁴¹ See, e.g., Approval and Promulgation of State Implementation Plans; California—South Coast, 64 FR 1770, 1771 (January 12, 1999). See also 69 FR 23858, 23881–90 (April 30, 2004) (designating 15 areas in California as nonattainment for the federal 8-hour ozone national ambient air quality standard).

⁴² California Air Resources Board, EPA–HQ–OAR–2006–0173–0004.1, at page 16.

³⁵ See, e.g., 75 FR 8056 (February 23, 2010), and 70 FR 22034 (April 28, 2005).

³⁶ CARB, Request that Amendments to California's New Passenger Motor Vehicle Greenhouse Gas Regulations Be Found Within the Scope of the Existing Waiver of Clean Air Act Preemption, EPA–HQ–OAR–2010–0653–0002, (June 28, 2010), at page 5.

³⁷ Comments of Global Automakers, EPA–HQ–OAR–2010–0653–0003, page 5.

new issues regarding our preexisting waiver for California greenhouse gas emission standards.

For these reasons, EPA confirms that California's greenhouse gas amendments raise no new issues with respect to previously granted waivers of preemption.

4. Within-the-Scope Confirmation

For all the reasons set forth above, EPA can confirm that California's amendments to its motor vehicle greenhouse gas emissions program are within the scope of existing waivers of preemption.

B. Full Waiver of Preemption Analysis

In our January 31, 2011 **Federal Register** notice, EPA requested comment on the within-the-scope criteria, and on issues relevant to a full waiver analysis, in the event that EPA determined that California's standards should not be considered within the scope of CARB's previous waivers, and should instead be subjected to a full waiver analysis. Specifically, EPA sought 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 separate standards to meet compelling and extraordinary conditions; and (c) whether California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Act. As discussed above, EPA confirms that California's amendments meet the within-the-scope criteria. Additionally, because we received comment that appears to dispute this within-the-scope determination, we have applied our traditional full waiver analysis to California's amendments in the alternative to that determination. We have determined that those in opposition to granting a waiver have not met their burden of showing that California's regulations, as amended, do not meet the criteria for a new waiver of preemption.

1. California's Protectiveness Determination

Section 209(b)(1)(A) of the Act requires EPA to deny a waiver if the Administrator finds that California was arbitrary and capricious in its determination that its State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. When evaluating California's protectiveness determination, EPA compares the stringency of the California and Federal

standards at issue in a given waiver request. That comparison is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA previously found were not arbitrary and capricious.

In our existing waiver for California's greenhouse gas standards, we reviewed California's protectiveness determination:

California made a protectiveness determination with regard to its greenhouse gas regulations in Resolution 04-28, adopted by the California Air Resources Board on September 23, 2004. Included in that Resolution were several bases to support California's protectiveness determination. Most generally, CARB made a broad finding that observed and projected changes in California's climate are likely to have a significant adverse impact on public health and welfare in California, and that California is attempting to address those impacts by regulating in a field for which there are no comparable federal regulations. CARB also found that its greenhouse gas standards will increase the health and welfare benefits from its broader motor vehicle emissions program by directly reducing upstream emissions of criteria pollutants from decreased fuel consumption. Beyond that analysis of the new regulations' impact on its broader program, CARB projected consumer response to the greenhouse gas regulations. With respect to consumer shifts due to a potential "scrapage effect" (the impact of increased vehicle price on fleet age) and "rebound effect" (the impact of lower operating costs on vehicle miles travelled), CARB found minor impacts—but net reductions—on criteria pollutant emissions. Further, even assuming larger shifts in consumer demand attributable to the greenhouse gas emission standards, CARB found that the result remains a net reduction in both greenhouse gas emissions and criteria pollutant emissions. That is, CARB found that the addition of its greenhouse gas emission standards to its larger motor vehicle emissions program (LEV II), which generally aligns with the federal motor vehicle emissions program (Tier II), renders the whole program to be more protective of public health and welfare. CARB noted that EPA has already determined that California was not arbitrary and capricious in its determination that the pre-existing California standards for light-duty vehicles and trucks, known as LEV II, is at least as protective as comparable Federal standards, the Tier II standards. Implicit in California's greenhouse gas protectiveness determination, then, is that the inclusion of greenhouse gas standards into California's existing motor vehicle emissions program will not cause California's program to be less protective than the federal program.⁴³ (citations omitted)

After reviewing California's protectiveness determination and the evidence presented by opponents of the

waiver, EPA was unable to find that California was arbitrary and capricious in its making its protectiveness determination. Against this backdrop, California made new protectiveness determinations when amending its motor vehicle greenhouse gas emissions program.

In both of the CARB rulemakings for the amendments at issue here, the CARB Board found that the amendments did not undermine the Board's previous determination that the regulation's emission standards, other emission related requirements, and associated enforcement procedures are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.⁴⁴ The CARB Board found that no basis existed for it to find that its previous protectiveness determination would be undermined by the amendments. With respect to the 2009-2011 model years, the fleet average greenhouse gas emission limits remain unchanged from the previously waived standards; moreover, they remain the only greenhouse gas emission limits in existence for those model years. Because of those factors, California maintains that those standards are "undisputedly more protective."⁴⁵ With respect to the 2012-2016 model years, in addition to making a new protectiveness determination, CARB's Executive Officer made an additional protectiveness determination after reviewing EPA's final rule promulgating Federal greenhouse gas emission standards.⁴⁶

No commenter expressed an opinion or presented any evidence suggesting that CARB was arbitrary and capricious in making its three above-noted protectiveness findings. Therefore, based on the record before me, I cannot find that California was arbitrary and capricious in its findings that California's motor vehicle greenhouse gas emission standards, as amended, are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

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

Under section 209(b)(1)(B) of the Act, I cannot grant a waiver if I find that California "does not need such State standards to meet compelling and extraordinary conditions." EPA has traditionally interpreted this provision

⁴⁴ California Air Resources Board, Resolution 09-53 (September 25, 2009) and Resolution 10-15 (February 25, 2010).

⁴⁵ CARB Request Letter at page 4.

⁴⁶ CARB Executive Order G-10-051 (June 28, 2010).

⁴³ 74 FR 32749-32750 (July 8, 2009).

as considering whether California needs a separate motor vehicle emissions program to meet compelling and extraordinary conditions. In EPA's greenhouse gas waiver decision issued on June 30, 2009, EPA followed its traditional interpretation and was unable to identify any change in circumstances or any evidence to suggest that the conditions that California identified as giving rise to serious air quality problems in California no longer exist. Therefore, EPA was unable to deny the waiver request under section 209(b)(1)(B).

EPA also reviewed California's greenhouse gas standards on the two alternative grounds relied upon in the March 2006 decision to deny a waiver. EPA reviewed California's greenhouse gas standards separately from its program and found that it could not find that opponents of the waiver had demonstrated that California did not need its greenhouse gas emission standards to meet compelling and extraordinary conditions, or that opponents of the waiver had demonstrated that the impacts of climate change in California are not compelling and extraordinary. While recognizing that EPA was not adopting these alternative interpretations of section 209(b)(1)(B), EPA determined that it would be unable to deny the waiver request under section 209(b)(1)(B) under these alternative grounds.

As discussed above in section II.A.3, CARB has repeatedly demonstrated the need for its motor vehicle emissions program to address compelling and extraordinary conditions in California. Furthermore, no commenter has presented any argument or evidence to suggest that California no longer needs a separate motor vehicle emissions program to address compelling and extraordinary conditions in California, or that EPA's prior determination on this issue is undermined in any way. Therefore, I determine that I cannot deny California a waiver for its motor vehicle greenhouse gas emission standards, as amended, under section 209(b)(1)(B). Furthermore, no commenter has presented any argument or evidence to suggest that EPA's prior determinations regarding the alternative interpretations discussed in the June 30, 2009 waiver decision are undermined in any way.

3. Consistency With Section 202(a) of the Clean Air Act

Under section 209(b)(1)(C) of the Act, EPA must deny a California waiver request if the Agency finds that California standards and accompanying

enforcement procedures are not consistent with section 202(a) of the Act. The scope of EPA's review under this criterion is narrow. EPA has stated on many occasions that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with Federal test procedures. Previous waivers of Federal preemption have stated that California's standards are not consistent with section 202(a) 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 time. California's accompanying enforcement procedures would be inconsistent with section 202(a) if the Federal and California test procedures conflict, *i.e.*, if manufacturers would be unable to meet both the California and Federal test requirements with the same test vehicle.

In the June 30, 2009 waiver decision, EPA found that industry opponents had not met their burden of producing the evidence necessary for EPA to find that California's greenhouse gas standards are not consistent with section 202(a) of the Act. EPA determined that CARB demonstrated a reasonable projection that compliance with California's greenhouse gas standards was reasonable based on availability of technologies in the lead-time provided and consideration of cost of compliance. Therefore, EPA was unable to find that California's greenhouse gas emission standards were not technologically feasible within the available lead-time, giving appropriate consideration to the cost of compliance.

In its within-the-scope request, CARB states that its greenhouse gas amendments "do not undermine [its] previous discussions [regarding consistency with section 202(a)] both because the California standards have remained the same (*i.e.*, covering the same vehicles for the same model-years at the same stringency) and because the amendments were intended to provide flexibility and reduce the costs of manufacturers' compliance, thereby increasing the feasibility of meeting the standards."⁴⁷ CARB also asserts that its amendments may reduce compliance costs. EPA received one public comment on this issue, from Global Automakers. Global Automakers believes that California's amendments

"do not cause California's requirements to be inconsistent with Section 202(a) of the Act."⁴⁸ Global Automakers further states that harmonizing the California program with EPA's Federal program renders California's regulations to be "more consistent" with the Clean Air Act. No commenter expressed any disagreement with these statements from CARB, and no commenter presented any evidence opposing CARB's assertions regarding technological feasibility, lead-time, and cost of compliance. Therefore, EPA is unable to find that California's greenhouse gas emission standards, as amended, are not technologically feasible within the available lead-time, giving appropriate consideration to the cost of compliance.

4. Full Waiver of Preemption Determination

After a review of the information submitted by CARB and other parties to this proceeding, I find that those opposing California's request have not met the burden of demonstrating that a waiver of California's amended greenhouse gas regulations should be denied based on any of the three statutory criteria of section 209(b)(1). For this reason, I find that, in the alternative, even if California's revisions to its greenhouse gas standards were not within-the-scope of the earlier waiver, California's amended motor vehicle greenhouse gas emission regulations would receive a full waiver.

C. Other Issues

NADA requests that EPA not take action on this within-the-scope request until after the Court of Appeals for the District of Columbia Circuit has acted on NADA's petition for review of the underlying waiver related to California's greenhouse gas emission standards. On April 29, 2011, the Court of Appeals acted on NADA's petition for review, dismissing it for want of jurisdiction. The request by NADA is therefore moot.

III. Decision

The Administrator has delegated the authority to grant California a section 209(b) waiver of preemption to the Assistant Administrator for Air and Radiation. This includes the authority to determine whether amendments to its regulations are within the scope of a prior waiver. CARB's June 28, 2010 letter seeks confirmation from EPA that CARB's amendments to its new passenger motor vehicle greenhouse gas regulations are within the scope of its

⁴⁷ CARB Request at page 4.

⁴⁸ Comments of Global Automakers, EPA-HQ-OAR-2010-0653-0003, page 5.

existing waiver of preemption. After evaluating CARB's amendments, CARB's submissions, and the public comments, EPA confirms that California's regulatory amendments meet the three criteria that EPA uses to determine whether amendments by California are within the scope of previous waivers. First, EPA agrees with CARB that the greenhouse gas amendments do not undermine California's protectiveness determination from its previously waived greenhouse gas request. Second, EPA agrees with CARB that California's greenhouse gas amendments do not undermine EPA's prior determination regarding consistency with section 202(a) of the Act. Third, EPA agrees with CARB that California's greenhouse gas amendments do not present any new issues which would affect the previously issued waiver for California's greenhouse gas regulations. Therefore, I confirm that CARB's greenhouse gas amendments are within the scope of EPA's waiver of preemption for California's greenhouse gas regulations.

While EPA has confirmed that the amendments to California's greenhouse gas regulations are within the scope of EPA's prior waiver, we have also, in the alternative analyzed California's greenhouse gas regulations, as amended, under the criteria for a full waiver. Based on that analysis, we have determined that EPA could not deny a waiver of preemption for California's regulations, as amended. California has made a determination that its regulations as amended are at least as protective as the Federal GHG standards, and those opposing the waiver have not met the burden of demonstrating that any of the three statutory criteria for a denial under section 209(b)(1) have been met. Therefore, having given consideration to all the material submitted for this record, and other relevant information, I find that I cannot make the determinations required for a denial of a waiver pursuant to section 209(b) of the Act. I find that, even if California's revisions to its greenhouse gas standards were not within-the-scope of its earlier waiver, California's amended motor vehicle greenhouse gas emission regulations would receive a full waiver. Consequently, even if the amendments were not within the scope of the earlier waiver, I am, in the alternative, granting California a full waiver of preemption for its amended motor vehicle greenhouse gas regulations.

My decision will affect not only persons in California, but also manufacturers outside the State who must comply with California's

requirements in order to produce vehicles for sale in California. For this reason, I determine and find that this is a final action of national applicability for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by August 15, 2011. 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: June 8, 2011.

Gina McCarthy,
Assistant Administrator for Air and Radiation.

[FR Doc. 2011-14686 Filed 6-13-11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2011-0431, FRL-9318-5]

Protection of Stratospheric Ozone: Request for Methyl Bromide Critical Use Exemption Applications for 2014

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of solicitation of applications and information on alternatives.

SUMMARY: EPA is soliciting applications for the critical use exemption from the phaseout of methyl bromide for 2014. Critical use exemptions last only one year. All entities interested in obtaining a critical use exemption for 2014 must provide EPA with technical and economic information to support a

“critical use” claim and must do so by the deadline specified in this notice even if they have applied for an exemption in previous years. Today's notice also invites interested parties to provide EPA with new data on the technical and economic feasibility of methyl bromide alternatives.

DATES: Applications for the 2014 critical use exemption must be postmarked on or before August 15, 2011.

ADDRESSES: EPA encourages users to submit their applications electronically to Jeremy Arling, Stratospheric Protection Division, at arling.jeremy@epa.gov. If the application is submitted electronically, applicants must fax a signed copy of Worksheet 1 to 202-343-2338 by the application deadline. Applications for the methyl bromide critical use exemption can also be submitted by U.S. mail to: U.S. Environmental Protection Agency, Office of Air and Radiation, Stratospheric Protection Division, Attention Methyl Bromide Team, Mail Code 6205J, 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by courier delivery to: U.S. Environmental Protection Agency, Office of Air and Radiation, Stratospheric Protection Division, Attention Methyl Bromide Review Team, 1310 L St., NW., Room 1047E, Washington DC 20005.

FOR FURTHER INFORMATION CONTACT:

General Information: U.S. EPA Stratospheric Ozone Information Hotline, 1-800-296-1996; also <http://www.epa.gov/ozone/mbr>.

Technical Information: Bill Chism, U.S. Environmental Protection Agency, Office of Pesticide Programs (7503P), 1200 Pennsylvania Ave., NW., Washington, DC, 20460, 703-308-8136. E-mail: chism.bill@epa.gov.

Regulatory Information: Jeremy Arling, U.S. Environmental Protection Agency, Stratospheric Protection Division (6205J), 1200 Pennsylvania Ave., NW., Washington, DC, 20460, 202-343-9055. E-mail: arling.jeremy@epa.gov.

SUPPLEMENTARY INFORMATION:

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