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Dated: December 8, 2011.

**Alexa Posny,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

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## ENVIRONMENTAL PROTECTION AGENCY

[FRL–9503–4]

### California State Nonroad Engine Pollution Control Standards; Ocean-Going Vessels At-Berth in California Ports; Notice of Decision

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

**ACTION:** Notice of decision.

**SUMMARY:** EPA has granted the California Air Resources Board (CARB) its request for an authorization to adopt and enforce regulations for its airborne toxic control measures for auxiliary

diesel engines operated on ocean-going vessels at-berth in California ports (“At-Berth Regulation”). The At-Berth Regulation is designed to reduce emissions of oxides of nitrogen and particulate matter from auxiliary diesel engines on container vessels, passenger vessels and refrigerated cargo vessels while they are docked at specified California ports.

**DATES:** Petitions for review must be filed by February 13, 2012.

**ADDRESSES:** EPA has established a docket for this action under Docket ID EPA–HQ–OAR–2011–0548. 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 <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 <http://www.regulations.gov> Web site, enter EPA–HQ–OAR–2011–0548 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>.

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### SUPPLEMENTARY INFORMATION:

#### I. Background

##### A. California’s At-Berth Regulation

By letter dated August 2, 2010, CARB submitted to EPA its request pursuant to section 209(e) of the Clean Air Act (“CAA” or “the Act”), regarding its regulations to enforce its airborne toxic control measures (ATCM) for auxiliary diesel engines operated on ocean-going vessels at-berth in California ports (“At-Berth Regulation”).<sup>1</sup> The At-Berth Regulation is designed to significantly reduce emissions of diesel particulate matter (PM), which is a CARB-identified toxic air contaminant, oxides of nitrogen (NO<sub>x</sub>), and carbon dioxide (CO<sub>2</sub>), a greenhouse gas. These reductions will assist California in meeting Federal and state ambient air quality standards for the South Coast and San Joaquin Valley air basins for ozone and fine particulate matter (PM<sub>2.5</sub>). CARB approved the At-Berth Regulation at a public hearing on December 6, 2007 (by Resolution 07–57).<sup>2</sup> After making modifications to the regulation available on August 22, 2008 for supplemental public comment, CARB’s Executive Officer formally adopted the At-Berth Regulation in Executive Order R–08–013 on October 16, 2008.<sup>3</sup> The At-Berth Regulation is codified in title 13, California Code of Regulations, section 2299.3, and title 17, California Code of Regulations, section 93118.3.<sup>4</sup>

CARB’s At-Berth Regulation contains requirements that apply, with limited exceptions,<sup>5</sup> to any person who owns,

<sup>1</sup> California Air Resources Board (“CARB”), “Request for Authorization,” August 2, 2010, EPA–HQ–OAR–2011–0548–0001.

<sup>2</sup> CARB Attachment #4, “Resolution 07–57,” EPA–HQ–OAR–2011–0548–0006.

<sup>3</sup> CARB Attachment #6, “Executive Order R–08–013,” EPA–HQ–OAR–2011–0548–0008.

<sup>4</sup> CARB Attachment #8, “Final Regulation Order for title 13, CCR section 2299.3,” EPA–HQ–OAR–2011–0548–0010; CARB Attachment #9, “Final Regulation Order for title 17, CCR section 93118.3,” EPA–HQ–OAR–2011–0548–0011.

<sup>5</sup> The following vessels are exempt from the At-Berth Regulation: Ocean going vessel voyages consisting of continuous and expeditious navigation (i.e., traversing Regulated California Waters without entering California internal estuarine waters or calling at a port); vessels owned or operated by local, state, Federal, or foreign governments in government non-commercial services; steamships; auxiliary engines using natural gas; and fleets composed solely of container or refrigerated cargo vessels making fewer than twenty-five visits to the same California port in a calendar year or fleets composed solely of passenger

Continued

operates, charters, rents or leases any container vessel, passenger vessel, or refrigerated cargo vessel that visits any of six specified California ports.<sup>6</sup> It also contains requirements that affect any person who owns or operates those ports or terminals located at them.

The At-Berth Regulation requires fleets of container vessels, passenger vessels and refrigerated cargo vessels to either: (1) Limit the amount of time they operate their auxiliary diesel engines by connecting to shore power for most of a vessel's stay at port ("Shore Power Option"); or (2) achieve equivalent emission reductions by employing other emission control techniques ("Equivalent Emission Reduction Option").<sup>7</sup> Fleet operators who elect the Shore Power Option are required to obtain the power that would otherwise be provided by a vessel's auxiliary engines by connecting to shore power for a percentage of the fleet's annual port visits.<sup>8</sup> The required percentage of shore power connected port visits increases over the life of the regulation. Specifically, fifty percent of a fleet's total visits must be connected to shore power by 2014, followed by seventy percent by 2017, and eighty percent by 2020. Additionally, if a vessel is equipped to connect to shore power and it visits a berth equipped to provide compatible power, the vessel must use the shore power provided.

Fleet operators who elect the Equivalent Emission Reduction Option must reduce their fleet's auxiliary engine emissions by specific amounts below the fleet's baseline emissions by specific dates.<sup>9</sup> This option requires that

vessels making fewer than five visits to the same California port in a calendar year. Exemptions also exist for emergency events and hotelling required by a Federal agency. Title 17, California Code of Regulations (CCR), section 93118.3(b)(3), CARB Attachment #9, "Final Regulation Order for title 17, CCR section 93118.3," EPA-HQ-OAR-2011-0548-0011.

<sup>6</sup> The At-Berth Regulation applies to vessels docked at six California ports: the Port of Hueneme, the Port of Los Angeles, the Port of Long Beach, the Port of Oakland, the Port of San Diego, and the Port of San Francisco.

<sup>7</sup> "Fleet" means "all container, passenger, and refrigerated cargo vessels, visiting a specific California port, which are owned and operated by, or otherwise under the direct control, of the same Person \* \* \* For purposes of this section, a person shall be deemed to have separate fleets for each California port visited and each fleet is composed of one type of vessel." Title 17, CCR section 93118.3(c)(16). See also CARB, "Authorization Support Document," EPA-HQ-OAR-2011-0548-0002.

<sup>8</sup> "Shore power" is defined as "electrical power being provided by either the local utility or by distributed generation." CARB Attachment 9, "Final Regulation Order for title 17, CCR section 93118.3," EPA-HQ-OAR-2011-0548-0011.

<sup>9</sup> CARB, "Authorization Support Document," August 2, 2010, EPA-HQ-OAR-2011-0548-0002 (hereinafter "CARB Support Document").

a fleet achieve a ten percent reduction from the fleet's baseline emissions by 2010, a twenty-five percent reduction by 2012, a fifty percent reduction by 2014, a seventy percent reduction by 2017, and an eighty percent reduction by 2020. Emission reductions can be achieved by: (1) Using grid-based shore power; (2) using distributed generation equipment to provide power to the vessel; (3) using alternative emission controls onboard a vessel or at the berth; or (4) using a combination of these techniques. Fleets that achieve reductions of emissions of oxides of nitrogen or particulate matter in excess of the prescribed reductions receive fleet emission credits that can be used to comply with emission reduction requirements in subsequent years.

The At-Berth Regulation also requires operators of terminals that received more than fifty vessel visits in 2008 to submit terminal plans identifying how the terminals will be upgraded to accommodate vessels under the two compliance options, including a schedule for implementing the needed infrastructure improvements. Terminal operators are required to submit plan updates at a frequency dependent upon the compliance option selected by the vessel fleet owner or operator and the terminals. The At-Berth Regulation also includes associated enforcement requirements, such as reporting and recordkeeping requirements.

#### *B. Clean Air Act Nonroad Engine and Vehicle Authorizations*

Section 209(e)(1) of the Act permanently preempts any State, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain new nonroad engines or vehicles. Section 209(e)(2) of the Act requires the Administrator to grant California authorization to enforce its own standards for new nonroad engines or vehicles that are not listed under section 209(e)(1), subject to certain restrictions. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, 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. On October 8, 2008, the regulations promulgated in that rule were moved to 40 CFR part 1074, and modified slightly.<sup>10</sup> As stated in the preamble to

<sup>10</sup> 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,

the section 209(e) 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>11</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 (DC Cir. 1979) ("*MEMA I*"), the U.S. Court of Appeals

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>11</sup> See 59 FR 36969 (July 20, 1994).

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>12</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>13</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>14</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>15</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 procedures, there is nothing in the opinion to suggest that the court's analysis would not apply with equal force to such determinations. EPA's past waiver decisions have consistently made clear that: "[E]ven in the two areas conceded reserved for Federal judgment by this legislation—the existence of 'compelling and extraordinary' conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one."<sup>16</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>17</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>18</sup> Therefore, the Administrator's burden is to act "reasonably."<sup>19</sup>

#### *D. EPA's Administrative Process in Consideration of California's At-Berth Regulation*

Upon review of CARB's request, EPA offered an opportunity for a public hearing, and requested written comment on issues relevant to a full section 209(e) authorization analysis, by publication of a **Federal Register** notice on June 29, 2011.<sup>20</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 June 29, 2011 **Federal Register** notice, EPA received one public comment. The comment is from the Pacific Merchant Shipping Association ("PMSA"). PMSA makes four general comments. First, PMSA comments that California's At-Berth

Regulation is arbitrary and capricious under section 209 of the Clean Air Act. Second, PMSA comments that the At-Berth Regulation does not adequately address significant economic impact issues and assess fleet composition. Third, PMSA comments that CARB lacks statutory authority to pursue its At-Berth Regulation as an in-use operation regulation that requires retrofits. Fourth, PMSA comments that the California At-Berth Regulation is preempted under section 209(e)(2) of the Clean Air Act.

## 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. CARB's Board made a protectiveness determination in Resolution 07–57, finding that California's At-Berth Regulation will not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.<sup>21</sup> CARB highlights that EPA is authorized to regulate new nonroad engines, and only California may adopt emission standards and other emission-related requirements for in-use nonroad engines.<sup>22</sup> Accordingly, CARB points out that EPA has not adopted any emission standards or other requirements applicable to in-use nonroad engines, including auxiliary diesel engines operated on ocean-going vessels. CARB concludes that "no question exists that the At-Berth Regulation is at least as protective of public health and welfare as applicable federal standards."

EPA did not receive any comments directly challenging California's protectiveness determination, but did receive one comment from PMSA, who

<sup>21</sup> "BE IT FURTHER RESOLVED that the Board hereby determines, pursuant to section 209(e)(2) of the Federal Clean Air Act, the requirements in the adopted regulation, to the extent they are determined to be emission standards or requirements related to the control of emissions, 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 requirements, standards, and accompanying provisions are consistent with the provisions in section 209." CARB, Resolution 07–57, EPA–HQ–OAR–2011–0549–0007.

<sup>22</sup> CARB Support Document at 7; see *Engine Mfrs. Assoc. v. EPA*, 88 F.3d 1075, 1089–1090 (DCCir 1996).

<sup>12</sup> *MEMA I*, 627 F.2d at 1122.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., 40 FR 21102–103 (May 28, 1975).

<sup>17</sup> *MEMA I*, 627 F.2d at 1121.

<sup>18</sup> *Id.* at 1126.

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

<sup>20</sup> 76 FR 38155 (June 29, 2011).

presents that California's At-Berth Regulation is, more generally, arbitrary and capricious. PMSA's "arbitrary and capricious" comment is not concerned with California's protectiveness determination (*i.e.*, the stringency of the standards, or the health and welfare effects of the regulation); what PMSA is concerned about is that the regulation should be more closely tailored to the emissions it seeks to reduce. PMSA complains that California regulates only some types of vessels and not others. EPA's review of California's protectiveness determination, however, is limited under section 209(e)(2)(i). The Agency's review is highly deferential to California's policy judgment as expressed in its final regulation. The Clean Air Act does not leave room for EPA to second-guess the wisdom of California's policy. EPA is charged with determining whether California made its protectiveness determination arbitrarily and capriciously; conversely, EPA is not tasked with conducting a more searching "arbitrary and capricious" review of California's regulation. Furthermore, the issues PMSA raises when it opines that California's At-Berth Regulation is "arbitrary and capricious" are not the type of issues that EPA traditionally considers as part of its evaluation of California's protectiveness determination. When evaluating California's protectiveness determination, EPA traditionally compares the stringency of the California and Federal standards at issue in a given waiver or authorization 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. EPA refrains from conducting a more detailed examination of the California rulemaking more generally. Such an undertaking would seemingly go beyond the review that Congress intended.<sup>23</sup> Considering PMSA's comments within the context of EPA's traditional protectiveness provides no additional opportunity to question California's protectiveness determination because PMSA provides no indication that California's standards are less stringent than comparable Federal standards. Additionally, even if we were to take into account PMSA's "arbitrary and capricious" concerns when reviewing California's protectiveness determination, PMSA's concerns to do not present sufficient evidence to meet its burden of proof. PMSA does not present any factual

evidence or analysis of any health and welfare effects they expect to be caused by California's regulation. Such evidence and analysis would be necessary to show that California's standards are less protective of health and welfare. Thus, in this comment PMSA does not meet its burden to show that California's protectiveness determination was arbitrary and capricious.<sup>24</sup>

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>25</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 07-57, CARB affirmed its longstanding position that California continues to need its own motor vehicle and engine program to meet its serious air pollution problems. 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>26</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.<sup>27</sup> Therefore,

<sup>24</sup> PMSA's "arbitrary and capricious" comment is also addressed below in section III.D.

<sup>25</sup> See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889-18890 (May 3, 1984).

<sup>26</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>27</sup> PMSA did comment that the possibility that other states may adopt California's At-Berth Regulation "raises the issue that CARB has not

EPA has determined that we cannot deny California a waiver for its At-Berth 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).

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

To be consistent with section 209(a) of the Clean Air Act, California's At-Berth Regulation must not apply to new motor vehicles or new motor vehicle engines. California's At-Berth Regulation apply to auxiliary diesel engines, which are nonroad engines, not on-highway motor vehicles or engines. CARB further clarifies that because auxiliary diesel engines are regulated as nonroad engines, they fall within the regulatory definition of nonroad engine, and are, thus, consistent with section 209(a). No commenter presented otherwise; therefore, EPA cannot deny California's request on the basis that California's At-Berth Regulation is 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 At-Berth Regulation must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB again clarifies that its At-Berth Regulation applies to in-use auxiliary diesel engines operated on ocean-going vessels while at-berth in a California port. Such engines are not used in locomotives and are not primarily used in farm and construction equipment vehicles. No commenter presented otherwise; therefore, EPA cannot deny California's request on the basis that California's At-Berth 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

demonstrated that this regulation is necessary 'to meet compelling and extraordinary conditions' under section 209(e)(2)(A)(ii), of the Act.' However, after raising the issue, PMSA did not offer any argument or evidence to support its conclusion. California clearly provided a demonstration in its request for authorization that it needs its standards to meet compelling and extraordinary conditions.

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

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>28</sup>

#### a. Technological Feasibility

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.<sup>29</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>30</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>31</sup> Subsequently, Congress has stated that, generally, EPA's construction of the waiver provision has been consistent with congressional intent.<sup>32</sup>

CARB presents that the technology required to comply with both the Shore

Power Option and the Equivalent Emission Reduction Option is currently available, and that it has provided sufficient lead-time.<sup>33</sup> For the Shore Power Option, which CARB expects to be the choice of most vessel operators, CARB asserts that technology is proven and currently in use at several terminals. The technology needed to comply with the Shore Power Option is grid-based shore power, in which vessel operators shut off vessel auxiliary engines and switch to shore based electricity to power a berthed vessel. CARB acknowledges that while some terminals already have implemented shore power capacity, others have not; nevertheless, all twenty-eight terminals subject to the At-Berth Regulation have already submitted compliance plans to install grid-based shore power at their terminals. Also, although the installation may take between two and three years to complete, CARB has provided six years of lead-time. CARB also notes that vessels have an additional flexibility, because fleets may route ships to certain ports to comply. For the Equivalent Emission Reduction Option, CARB asserts that there are a variety of emission control technologies that currently exist and are already in use, including distributed electrical generation technologies, such as compressed natural gas generators that are equipped with best available control technology. CARB explains that the At-Berth Regulation allows vessel operators to combine technologies and shore power to meet their emission reduction requirements, and that the compliance levels require increasing reductions over the course of ten years. CARB believes that its compliance flexibilities and phased-in timelines establish that there is sufficient lead-time.

CARB also considered the cost of compliance in its rulemaking record, and asserts that "ports, terminal operators, and fleet owners and operators will largely be able to pass on their compliance costs for both compliance options [] to their customers without incurring significant economic disruption or impact on business competitiveness."<sup>34</sup> CARB presents that costs incurred by terminal operators will be passed along to vessel fleet operators, who will pass them along to their customers. CARB expects the cost of its At-Berth Regulation on a typical terminal operator to be about \$11 million over the course of the 2009–2020 compliance schedule. CARB also

expects that costs will be passed on to customers, at different rates depending on the category of vessel and each vessel's particular use. Compliance with the Shore Power Option will also include the added cost of the grid-based electricity. CARB presents that container ships will not see a net increase because lower fuel costs will offset the increased electricity costs; passenger vessels and refrigerated cargo vessels, on the other hand, may see an increase in energy cost that can be passed along to customers through "negligible increases in cargo costs."<sup>35</sup> Based on its presentation of technological feasibility and cost of compliance, CARB concludes "the At-Berth Regulation is feasible within the time provided for compliance, giving appropriate consideration of costs."<sup>36</sup>

EPA did not receive any comments suggesting that CARB's standards and test procedures are technologically infeasible. EPA did receive comments—from PMSA—suggesting that CARB did not adequately address the cost of compliance. PMSA asserts that California's At-Berth Regulation did not adequately address the significant economic impact issues or appropriately assess fleet composition. PMSA therein presents several challenges to the cost-effectiveness of the At-Berth Regulation. First, PMSA suggests that CARB did not consider actual baseline emissions of vessels at-berth. Second, PMSA suggests that there is tremendous variability of compliance costs associated with the At-Berth Regulation, so terminal operators and ocean-carriers who find themselves on the high end of the cost spectrum due to their port authority and municipal utility will face higher compliance costs. Third, PMSA asserts that CARB failed to identify ports as direct contributors in its assignment of costs. PMSA presented each of these comments in the California rulemaking, and CARB responded to each in its Final Statement of Reasons for Rulemaking ("FSOR"). With regard to PMSA's first point, CARB answered that it did not count voluntary emission reductions because they are not required by law, and that it did not count reductions from its low sulfur fuel requirements so as not to double-count those reductions.<sup>37</sup> With respect to PMSA's second point on cost-effectiveness, CARB agrees with PMSA that compliance costs are variable, and

<sup>28</sup> *MEMA I*, 627, F.2d at 1126.

<sup>29</sup> H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 301 (1977).

<sup>30</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>31</sup> 41 FR 44209 (October 7, 1976).

<sup>32</sup> H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 301 (1977).

<sup>33</sup> CARB Support Document at 9–11.

<sup>34</sup> CARB Support Document at 11; see also CARB, Technical Support Document, EPA–HQ–OAR–2011–0548–0006.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> CARB, "Final Statement of Reasons for Rulemaking Including Summary of Comments and Agency Responses," EPA–HQ–OAR–2011–0548–0010, pp. 70–71 (hereinafter "CARB FSOR").

answers that the At-Berth Regulation presents compliance options that treat terminal operators and ports fairly, and that the market—not CARB—will determine who bears the various costs of compliance.<sup>38</sup> With respect to PMSA's third point on identification of ports as direct contributors, CARB concurred that ports will incur costs due to the regulation, and explained that it allocated costs to vessel fleet operators, terminals, and utilities because vessel fleet operators are the entities who are responsible for costs associated with compliance.<sup>39</sup> CARB assigned the cost of port improvements to the terminals on its assumption that ports would make the improvements and pass the costs of the improvements along to the terminals.

EPA's own review with regard to cost of compliance occurs within the context of its review of whether California's At-Berth Regulation is consistent with section 202(a) of the Clean Air Act. As described above, EPA's review here is narrow. That is, section 202(a) consistency calls for a limited review of technological feasibility, including analysis of the cost of new technology, if technology does not currently exist. Section 202(a) does not allow EPA to conduct a more searching review of whether the costs are outweighed by the overall benefits of the California regulations. In this case, no party has objected to CARB's demonstration that technologies are in existence and are being used in actual operation. EPA's traditional review of costs considers whether the cost of compliance per engine would render the regulation cost prohibitive and thus infeasible, not whether California's regulation is cost-effective. Here, CARB acknowledges and understands that there are significant costs associated with compliance, but CARB expects those costs to eventually be passed on to the consumer, without significant effect. PMSA's comments do not challenge the feasibility of the regulation. PMSA instead challenges overall cost-effectiveness of the regulation, how costs are allocated, and the variability of costs. These issues are more appropriately considered by CARB in its rulemaking, and not here in EPA's limited section 209(e) authorization review. More importantly for this proceeding, PMSA has not presented that the compliance costs are such that compliance with the At-Berth Regulation would be infeasible or unreasonable. To the contrary, CARB has presented that the costs of the regulation are not prohibitive. CARB has

found that cost of the At-Berth Regulation is reasonable, cost-effective, and capable of being absorbed by the regulated industry and passed on to consumers, with minimal overall economic impact. 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 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>40</sup>

CARB presents that its At-Berth Regulation does not pose any inconsistency as between California and Federal test procedures. First, CARB asserts that its At-Berth Regulation does not adopt or create any new test procedures. Second, CARB asserts that although its At-Berth Regulation incorporates by reference a number of standards and test procedures, it does not require any additional certification requirement beyond those already required for new engines, at the Federal and state levels. Third, CARB asserts that its At-Berth Regulation does not conflict with existing Federal and state diesel emission control verification testing.

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

#### D. Other Issues

PMSA presents three general comments in opposition to California's At-Berth Regulation that are outside the scope of EPA's scope of review of California authorization requests under section 209(e)(2).

First, PMSA asserts that California's regulation is arbitrary and capricious under section 209 of the Clean Air Act. To that end, PMSA asserts that California's At-Berth Regulation is discriminatory in its application to types of vessels without regard to the frequency with which those vessels visit California ports, and in its advantage

towards vessels already equipped with shore power connections. PMSA first presented these comments to CARB in its rulemaking, and CARB answered these comments directly. CARB disagreed that the At-Berth Regulation is discriminatory, arbitrary and capricious.<sup>41</sup> CARB further stated that it intends to develop regulations to reduce at-berth emissions from all ship categories, but in this first regulation it has targeted emissions from three ship categories.

In response to these comments from PMSA, EPA again notes its limited review of California's request under section 209, which only includes the three criteria listed in section 209(e)(2) for California's At-Berth Regulation. PMSA's comment here goes to the overall reasonableness of the At-Berth Regulation, and not specifically towards any of the section 209(e)(2) criteria. As such, it is outside the scope of EPA's authorization evaluation. Additionally, we note that these are issues that PMSA already raised in the California rulemaking, which CARB considered and responded to with reasoned analysis.

Second, PMSA asserts that California lacks statutory authority to pursue its At-Berth Regulation as an "In-Use Operations" regulation that requires retrofits. PMSA's point here is that the Equivalent Emissions Reduction Option would require retrofits or modifications that could affect the stability, structural integrity, and general safety of a ship. PMSA believes that such requirements can result in impacts that are under the purview of the U.S. Coast Guard, and the respective classification societies as designated by a ship's flag state. PMSA made this same comment in the California rulemaking, and CARB responded.<sup>42</sup> CARB first answered that the At-Berth Regulation does not require vessels to retrofit or perform modifications to ships and engines because the regulation is not prescriptive but allows flexibility between its two compliance options. Then, CARB pointed out that its At-Berth Regulation, section (b)(2), expressly states:

Nothing in this section shall be construed to amend, repeal, modify, or change in any way any applicable U.S. Coast Guard requirements. Any person subject to this section shall be responsible for ensuring compliance with both U.S. Coast Guard regulations and requirements of this section, including but not limited to, obtaining any

<sup>38</sup> CARB FSOR at 69–70.

<sup>39</sup> CARB FSOR at 70.

<sup>40</sup> See, e.g., 43 FR 32182 (July 25, 1978).

<sup>41</sup> CARB FSOR at 87.

<sup>42</sup> CARB FSOR at 19.

necessary approvals, exemptions, or orders from the U.S. Coast Guard.<sup>43</sup>

CARB also points out that many vessels already use shore power while docked, presumably in compliance with U.S. Coast Guard regulations.

As above, PMSA's comment here is again outside the scope of EPA's section 209(e)(2) evaluation of California's authorization request. EPA does not review the general appropriateness of California's regulations; nor does EPA's review permit analysis of whether California's regulations conflict with areas of Federal law under the purview of other agencies. This PMSA comment does not make any attempt to show that California's regulations are in conflict with any of the criteria in section 209(e)(2). It therefore cannot be the basis for any denial of California's request for authorization under section 209(e)(2).

Third, PMSA comments that California's At-Berth Regulation's "retrofit requirements" are preempted under section 209(e) of the Clean Air Act. This is another issue that PMSA first presented to CARB during the California rulemaking. At that time, CARB disagreed.<sup>44</sup> CARB again pointed out that its At-Berth Regulation does not require vessel operators to retrofit or modify their engines. CARB further pointed out that despite section 209(e)'s preemption, section 209(e)(2) allows California to seek authorization to adopt and enforce its nonroad engine regulations, which it intended to do and has now done.

PMSA's comments compare this situation to the one addressed by the Supreme Court in *United States v. Locke*, 529 U.S. 89 (2000). However, in this case, unlike in the case of *Locke*, the statute in question, the Clean Air Act, explicitly permits California to promulgate its own standards applicable to emissions from marine vessels as long as EPA does not make any of the findings required under section 209(e)(2) to deny authorization.

Also, as part of this third general comment, PMSA raises two additional issues. First, PMSA raises the issue that EPA's authorization would allow other states to adopt the At-Berth Regulation, and that it is difficult to envision how other states would do so. PMSA is correct that other states may adopt and enforce California standards, if such states meet the requirements of section 209(e)(2)(B) of the Act. While PMSA notes that there may be difficulties with

other states' adoption of the At-Berth Regulation—and PMSA has not made it clear that there would be—PMSA makes no attempt to explain how this difficulty in any way effects California's ability to receive authorization under section 209(e)(2)(A). Second, PMSA presents its opposition to California's At-Berth Regulation on the basis that ocean-going vessel emissions are an issue of broad concern and should be addressed internationally through the International Maritime Organization. This comment relates to the broad policy considerations affecting California's regulation of vessels, but it does not address any of the criteria in section 209(e)(2). It is therefore not within the scope of EPA's review under that section.

As EPA has stated on numerous occasions, sections 209(b) and 209(e) of the Clean Air Act limits our authority to deny California requests for waivers and authorizations to the three criteria listed therein. As a result, EPA has consistently refrained from denying California's requests based on any other criteria.<sup>45</sup> In instances where the U.S. Court of Appeals has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the Court has upheld and agreed with EPA's determination.<sup>46</sup>

None of the above-described issues PMSA raises is among—or fits within the confines of—the criteria listed under sections 209(e).<sup>47</sup> Therefore, in considering California's At-Berth Regulation, EPA cannot deny California's request for authorization based on these comments.

#### *E. Authorization Determination for California's At-Berth Regulation*

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

### III. Decision

The Administrator has delegated the authority to grant California section

<sup>45</sup> See, e.g., 74 FR 32744, 32783 (July 8, 2009).

<sup>46</sup> See *Motor and Equipment Manufacturers Ass'n v. Nichols*, 142 F.3d 449, 462–63, 466–67 (DC Cir.1998), *Motor and Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1111, 1114–20 (DC Cir. 1979).

<sup>47</sup> PMSA may raise these issues in a direct challenge to California's regulations in other forums, but these issues are not relevant to EPA's limited review under section 209(e).

209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating California's At-Berth Regulation, CARB's submissions, and the public comments from PMSA, EPA is granting an authorization to California for its At-Berth 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 13, 2012. 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 28, 2011.

**Gina McCarthy,**

*Assistant Administrator, Office of Air and Radiation.*

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### ENVIRONMENTAL PROTECTION AGENCY

[FRL–9503–5]

#### **California State Nonroad Engine Pollution Control Standards; Commercial Harbor Craft Regulations; Notice of Decision**

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

**ACTION:** Notice of Decision.

<sup>43</sup> At-Berth Regulation section (b)(2), section 93118.3(b)(2), title 17, chapter 1, subchapter 7.5, California Code of Regulations, EPA–HQ–OAR–2011–0548–0012.

<sup>44</sup> CARB FSOR at 20.