

of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in EPA's electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

#### *B. How and to Whom Do I Submit Comments?*

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic

public docket system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: November 14, 2003.

**Lisa K. Friedman,**

*Associate General Counsel, Air and Radiation Law Office, Office of General Counsel.*

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**BILLING CODE 6560-50-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

**[AMS-FRL-7590-1]**

### **California State Nonroad Engine and Vehicle Pollution Control Standards; Authorization of Nonroad Durability Standards, Notice of Decision**

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

**ACTION:** Notice.

**SUMMARY:** EPA today, pursuant to section 209(e) of the Clean Air Act (Act), 42 U.S.C. 7543(b), is authorizing California to enforce amendments to its Small Off-Road Engine (SORE) regulations which set new durability standards for covered engines. The California Air Resources Board (CARB), by letter dated October 4, 1999, requested that EPA confirm CARB's finding that these new durability standards and other amendments to the SORE Regulations are within-the-scope of a prior authorization under section 209(e) of the Act, granted by EPA to CARB's original SORE Regulations in July 1995. EPA determined that most of the amendments were within the scope of the prior authorization, but because the durability requirements amendments are brand new standards, EPA offered the opportunity for a public hearing, and requested comments, on these new standards. After completing review of these amendments, EPA is authorizing California to enforce the durability standards.

**ADDRESSES:** The Agency's Decision Document, containing an explanation of the Assistant Administrator's decision, as well as all documents relied upon in

making that decision, including those submitted to EPA by CARB, are available for public inspection in EPA Air Docket A-2000-09 at the following address: EPA Docket Center (EPA/DC), Public Reading Room, Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, except on government holidays. The Air Docket telephone number is (202) 566-1742, and the facsimile number is (202) 566-1741. You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR part 2.

#### **FOR FURTHER INFORMATION CONTACT:**

Robert M. Doyle, Attorney-Advisor, Certification and Compliance Division, (6403), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460 (U.S. mail), 1301 L Street NW., Washington, DC 20005 (courier mail). Telephone: (202) 343-9258, Fax: (202) 343-2057, E-Mail: [Doyle.Robert@EPA.GOV](mailto:Doyle.Robert@EPA.GOV).

#### **SUPPLEMENTARY INFORMATION:**

#### **I. Obtaining Electronic Copies of Documents**

EPA makes available an electronic copy of this Notice and the Agency's Decision Document on the Office of Transportation and Air Quality (OTAQ) homepage (<http://www.epa.gov/OTAQ>). Users can find these documents by accessing the OTAQ homepage and looking at the path entitled "Recent Additions." This service is free of charge, except any cost you already incur for Internet connectivity. Users can also get the official **Federal Register** version of the Notice on the day of publication on the primary Web site: (<http://www.epa.gov/docs/fedrgstr/EPA-AIR/>).

Please note that due to differences between the software used to develop the documents and the software into which the documents may be downloaded, changes in format, page length, etc., may occur.

## **II. Background**

### **A. Nonroad Authorizations**

Section 209(e)(1) of the Act addresses the permanent preemption of any State, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain new nonroad engines or vehicles.<sup>1</sup>

<sup>1</sup> Section 209(e)(1) of the Act provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines

Section 209(e)(2) of the Act allows the Administrator to grant California authorization to enforce state standards for new nonroad engines or vehicles which are not listed under section 209(e)(1), subject to certain restrictions. On July 20, 1994, EPA promulgated a regulation that sets forth, among other things, the criteria, as found in section 209(e)(2), by which EPA must consider any California authorization requests for new nonroad engines or vehicle emission standards (section 209(e) rules).<sup>2</sup>

Section 209(e)(2) requires the Administrator, after notice and opportunity for public hearing, to authorize California to enforce standards and other requirements relating to emissions control of new engines not listed under section 209(e)(1).<sup>3</sup> The section 209(e) rule and its codified regulations<sup>4</sup> formally set forth the criteria, located in section 209(e)(2) of the Act, by which EPA must grant California authorization to enforce its new nonroad emission standards:

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

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

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

(1) The determination of California is arbitrary and capricious;

(2) California does not need such California standards to meet compelling and extraordinary conditions; or

(3) California standards and accompanying enforcement procedures are not consistent with section 209.

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

must be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C), as EPA has interpreted that subsection in the context of motor vehicle waivers.<sup>5</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. Secondly, California's nonroad standards and enforcement procedures must be consistent with section 209(e)(1), which identifies the categories permanently preempted from state regulation.<sup>6</sup> California's nonroad standards and enforcement procedures would be considered inconsistent with section 209 if they applied to the categories of engines or vehicles identified and preempted from State regulation in section 209(e)(1).

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

and State test procedures impose inconsistent certification requirements.<sup>7</sup>

With regard to enforcement procedures accompanying standards, EPA must grant the requested authorization unless it finds that these procedures may cause the California standards, in the aggregate, to be less protective of public health and welfare than the applicable Federal standards promulgated pursuant to section 213(a), or unless the Federal and California certification test procedures are inconsistent.<sup>8</sup>

Once California has received an authorization for its standards and enforcement procedures for a certain group or class of nonroad equipment engines or vehicles, it may adopt other conditions precedent to the initial retail sale, titling or registration of these engines or vehicles without the necessity of receiving an additional authorization.<sup>9</sup>

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

#### B. The SORE Amendments Request

EPA granted California authorization for its SORE Rule by decision of the Administrator dated July 5, 1995.<sup>11</sup> The

<sup>5</sup> See 59 FR 36969, 36983 (July 20, 1994).

<sup>6</sup> Section 209(e)(1) of the Act has been implemented, See 40 CFR part 85, subpart Q, §§ 85.1602, 85.1603.

Section 85.1603 provides in applicable part:

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

Section 85.1602 provides definitions of terms used in § 85.1603 and states in applicable part:

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

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

*Primarily used* means used 51 percent or more.

<sup>7</sup> To be consistent, the California certification procedures need not be identical to the Federal certification procedures. California procedures would be inconsistent, however, if manufacturers would be unable to meet both the state and the Federal requirement with the same test vehicle in the course of the same test. See, e.g., 43 FR 32182 (July 25, 1978).

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

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

<sup>9</sup> See 43 FR 36679, 36680 (August 18, 1978).

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

<sup>11</sup> 60 FR 37440 (July 20, 1995). The CARB small engine emission regulations were then called the Utility, Lawn and Garden Engine (ULGE) regulations. The new amendments, among other things, renamed the ULGE regulations as the SORE regulations.

or nonroad vehicles subject to regulation under this Act—

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

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

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

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

<sup>4</sup> See 40 CFR part 85, subpart Q, § 85.1605.

SORE Rule, which applies to all gasoline, diesel, and other fueled utility and lawn and garden equipment engines 25 horsepower and under, with certain exceptions established two "tiers" of exhaust emission standards for these engines (Tier 1 from 1995 through 1998 model years, and Tier 2 for model year 1999 and beyond), as well as numerous other requirements. By letter dated October 4, 1999, CARB notified EPA that it had adopted numerous amendments to its SORE Regulations which were first approved at a public hearing on March 26, 1998. These amendments are the product of CARB's continuing reviews of industry efforts to comply with the requirements of the CARB nonroad program. The Board directed the CARB staff to review the industry progress in developing the technology required to comply with the Tier 2 standards, and to consider issues raised by the industry in this process. The staff recommended to the Board that the SORE regulations "be modified to reflect the realities of the small engine market and the technological capabilities of the industry."<sup>12</sup> These recommended amendments which CARB adopted consequently reduce compliance burdens on manufacturers while also "preserving most of the emission reductions—including most reductions in excess of comparable federal program—that U.S.E.P.A. previously authorized."<sup>13</sup>

In its request letter, CARB asked EPA to confirm the CARB determination that the amendments to the SORE regulations set forth in its request package are within the scope of the 209(e) authorization of the original authorization granted by EPA for the SORE Rule in July 1995. EPA has made such a determination for most of the regulation amendments included in the CARB request.<sup>14</sup> EPA also determined, on the other hand, that one set of regulation amendments in this request cannot be considered within the scope of the previous authorization because these particular amendments set brand new, more stringent standards and therefore properly should be reviewed as a new authorization request. These amendments set useful life standards for covered engines (where before there were none). Accordingly, EPA offered the opportunity for a public hearing,

and requested public comments, on these new standards, as the Act requires us to do, by publication of a **Federal Register** notice to such effect on November 20, 2000.<sup>15</sup> There was no request for a public hearing, nor were any comments received on the CARB standards at issue. Therefore, EPA has made this determination based on the information submitted by CARB in its request.

### C. Authorization Decision

EPA has decided to authorize California to enforce amendments to its SORE regulations that set durability standards for engines covered by the Rule. In its request letter, CARB stated that the various amendments will not cause the California nonroad standards, in the aggregate, to be less protective of public health and welfare than the applicable Federal standards. CARB also stated that California's need for the emission reductions retained from the SORE regulations obviously remains compelling. Finally, regarding consistency with section 209, CARB stated that the amendments (1) apply only to nonroad engines and vehicles and not to motor vehicles or engines, (2) apply only to those nonroad engines and vehicles which are not included in the preempted categories, and (3) do not raise any concerns of inadequate leadtime or technological feasibility or impose any inconsistent certification requirements (compared to the Federal requirements).

EPA agrees with all CARB findings with regard to the provisions listed. Additionally, no information was presented to EPA by any party which would demonstrate that California did not meet the burden of satisfying the statutory criteria of section 209(e). For these reasons, EPA authorizes California to enforce these durability standards.

My decision will affect not only persons in California but also the manufacturers outside the State who must comply with California's requirements in order to produce nonroad engines and vehicles for sale in California. For this reason, I hereby determine and find that this is a final action of national applicability.

Under section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by January 20, 2004. Under section 307(b)(2) of the Act, judicial review of this final action may not be obtained in subsequent enforcement proceedings.

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule, for purposes of 5 U.S.C. 804(3).

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

Dated: November 10, 2003.

**Robert Brenner,**

*Acting Assistant Administrator for Air and Radiation.*

[FR Doc. 03–29183 Filed 11–20–03; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

(ER–FRL–6645–7)

### Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 04, 2003 (68 FR 16511).

### Draft EISs

ERP No. D–AFS–L65429–WA Rating EC2, Gotchen Risk Reduction and Restoration Project, Implementation, Mount Adams Ranger District, Gifford Pinchot National Forest, Skamania and Yakima Counties, WA.

**Summary:** EPA expressed environmental concerns regarding potential adverse impacts to water quality and designated critical habitat and endangered species from proposed

<sup>12</sup> CARB Notice of Public Hearing with attached Staff Report, Docket A–2000–09, entry II–B–2, p. 2.

<sup>13</sup> Letter from CARB to EPA requesting within the scope confirmation for amendments to SORE Rule, dated October 4, 1999, Docket A–2000–09, entry II–B–1, p. 3.

<sup>14</sup> Decision Document for California Nonroad Engine Regulations Amendments, Dockets A–2000–05 to 08, entry V–B.

<sup>15</sup> 65 FR 69763 (November 20, 2000).