**ENVIRONMENTAL PROTECTION AGENCY**

**California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Determination of the Administrator (Within the Scope Determination Regarding Zero Emission Vehicle Requirement)**

## I. Introduction

By this decision, issued under section 209(b) of the Clean Air Act, as amended ("Act") 42 U.S.C. §7543 (b), the Environmental Protection Agency (EPA) today is determining that California's amendments to its motor vehicle pollution control program that modify the zero-emission vehicle (ZEV) requirements of the Low-Emission Vehicle (LEV) program (including the repeal of the ZEV requirements for model years 1998 through 2002), are within the scope of the previous waiver of Federal preemption granted to the California Low-Emission Vehicles (LEV waiver) program pursuant to section 209(b) of the Act.

Section 209 (a) of the Act, 42 U.S.C. Section 7543(a) provides:

> No State or political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles of any 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 sale, titling (if any), or registration of such motor vehicle, motor vehicle, or equipment.

Section 209(b)(1) of the Act requires the Administrator, after notice and an opportunity for public hearing, to waive application of the prohibitions of section 209(a) for standards adopted by California if the State[1] determines that the standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards and if the Administrator does not find that: (A) the determination of the State is arbitrary and capricious;

---

[1]California is the only State that meets section 209(b)(1) eligibility criteria for obtaining waivers. See e.g., S. Rep. No. 90-403, at 632 (1967).

(B) the State does not need such State standards to meet compelling and extraordinary conditions; or (C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. State standards and enforcement procedures are inconsistent with section 202 (a) if there is inadequate lead time to permit development of the necessary technology, given the cost of compliance within the time, or if the Federal and California test procedures impose inconsistent certification requirements.[2]

Once EPA provides California a waiver of Federal preemption for standards or enforcement procedures for a certain class of motor vehicles, California may adopt other conditions precedent to the initial retail sale, titling or registration of those vehicles without receiving an additional waiver of Federal preemption.[3]

Regarding enforcement procedures accompanying standards, I must grant the requested waiver unless I find that these procedures may cause California's standards, in the aggregate, to be less protective of public health and welfare than the applicable Federal standard promulgated pursuant to section 202(a), or unless the California and Federal certification test procedures are inconsistent.[4]

---

[2] See, e.g., 43 Fed. Reg. 32182 (July 25, 1978). 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 requirements with the same test vehicle in the course of the same test.

[3] See 43 Fed. Reg. 36679, 36680 (August 18, 1978).

[4] See e.g., Motor and Equip. Mfrs. Ass'n., Inc., v. EPA ("MEMA"), 627 F.2d 1095, 1111-1114 (D.C. Cir. 1979), cert. denied, 446 U.S. 952 (1980); 43 Fed. Reg. 25,729 (Jun. 14, 1978). While inconsistency with section 202(a) includes technological infeasibility, lead time, and cost, these aspects are typically relevant only with regards to standards. The aspect of consistency with 202 (a) which is of primary applicability to enforcement procedures (especially test procedures) is test procedure consistency.

If California acts to amend a previously waived standard or accompanying enforcement procedure, the amendment may be considered within the scope of a previously granted waiver, provided that it does not affect California's determination that its standards are as protective of the public health and welfare as comparable Federal standards, raises no new issues regarding previous EPA waiver decisions and is consistent with section 202(a) Act.[5]

## II. Background

In 1990, California adopted regulations establishing a Low Emission Vehicle (LEV) program, which requires automobile manufacturers ("manufacturers") to meet progressively more stringent automobile standards beginning in model year 1994. The LEV program provides that manufacturers must build vehicles (CARB terms this as passenger cars and light-duty trucks) that meet one of several sets of standards (i.e. Transitional Low Emission Vehicles (TLEVs), Low Emission Vehicles (LEVs), Ultra-Low Emission Vehicles (ULEVs) and Zero Emission Vehicles (ZEVs)) and that manufacturer's fleets for each model year must meet a fleet wide non-methane organic gases (NMOG) emission average, which becomes progressively more stringent each year.

The LEV program also initially included a provision requiring that, beginning in model year 1998, two percent of all automobiles offered for sale by manufacturers in any model year must be ZEVs. This percentage increased to five percent in model year 2001 and to ten percent in model year 2003. The certification test procedures for ZEVs require that the vehicle be operated through the Highway Fuel Economy Driving Schedule followed by the Urban

---

[5] See Decision Document accompanying scope of waiver determination in 51 F.R. 12391 (April 10, 1986) at p.2; see also, e.g., 46 Fed.Reg. 36742 (July 15, 1981).

Dynamometer Driving Schedule to establish the All-Electric Vehicle Range. The only vehicles that can meet this requirement using current technology are electric vehicles.[6]

On January 13, 1993, EPA granted California's request for a waiver of preemption under section 209(b) of the Act for its LEV program, including the ZEV provisions.[7] In September of 1994, the EPA enacted standards for certification of ZEVs within the Clean-Fuel Fleet program.[8]

By letter dated February 26, 1997[9] (Request Letter), the California Air Resources Board (CARB) notified EPA that on March 29, 1996, CARB amended its regulations that had established the LEV program. [10] CARB requested that EPA confirm the Board's determination that these amendments fall within the scope of the section 209(b) waiver of preemption that EPA published January 13, 1993 for CARB's LEV program.

These amendments provide for (1) the elimination of the requirement upon manufacturers to certify, produce, and offer for sale in California ZEVs in amounts equal to two percent of their total California sales of passenger cars and light-duty trucks weighing less than 3,750 pounds beginning with the 1998 model year, increasing to five percent in the 2001 model year and two

---

[6] Under CARB's regulations manufacturers can meet the ZEV requirements by producing ZEVs classified as PCs, LDTs 0-3750 lbs. LVW, LDTs 3751-5750 lbs. LVW, or MDVs. The regulations also include provisions for earning marketable credits for use in complying with the ZEV sales percentage requirements.

[7] See 58 Fed. Reg. 4166 (January 13, 1993).

[8] See 40 CFR §88.104-94(g). 59 FR 50074 (Sept. 30, 1994).

[9] See Air Docket A-97-20 (Docket) entry II-B-1.

[10] The amendments were adopted by California Executive Order G-96-048 on July 24, 1996 and approved by the California Office of Administrative Law on January 3, 1997.

percent in the 2003 model year (the ten percent ZEV requirement for the 2003 model year has been retained by California); (2) the creation of multiple ZEV credits for vehicles produced prior to the 2003 model year; and (3) the creation of test procedures for determining All-Electric Vehicle Range. Separate from the LEV program amendments noted above, and not included in CARB's 1997 Request Letter, CARB entered into memoranda of agreement (MOAs) with the seven largest vehicle manufacturers. In the MOAs, the manufacturers agreed to a demonstration program under which manufacturers would place in California substantially fewer numbers of ZEVs from calendar years 1998 to 2000 than were required under the initial regulations. The manufacturers agreed to place a combined total of 750 ZEVs in California in 1998 and a combined total of 1500 ZEVs in California in both 1999 and 2000. No ZEVs were required in calendar years 2001 and 2002. California agreed in the MOAs to provide a certain amount of infrastructure and support to facilitate the use of ZEVs. Manufacturers also agreed to provide LEVs nationwide under the National Low Emission Vehicle (NLEV) program. These MOAs were not incorporated into California's Code of Regulations, but remain as contractual obligations.[11]

On March 26, 1999, EPA published a Federal Register notice of opportunity for public hearing and public comment regarding this request for a within the scope determination.[12] EPA received a request for a pubic hearing from the Motor & Equipment Manufacturers Association (MEMA); thus, EPA held a hearing on April 23, 1999.[13] EPA received testimony from Thomas

---

[11] See Docket entry II-B-15 (Master Memorandum of Agreement).

[12] See 64 Fed. Reg. 14715 (March 26, 1999).

[13] The transcript for this hearing is at Docket entry III-A-3.

Jennings and Jack Kitowski on behalf of CARB, Marc Fleischaker on behalf of the Motor & Equipment Manufacturers Association, Automotive Warehouse Distributors Association, Automotive Engine Rebuilders Association, Automotive Parts Rebuilders Association, Automotive Parts and Service Alliance, Automotive Service Association, Coalition for Auto Care Equality, and Speciality Equipment Market Association (the Aftermarket), and Gary Marchant on behalf of the Alliance of Automobile Manufacturers (AAM). The public comment period closed on May 10, 1999. During the public comment period, EPA received written comments from CARB, the Attorney General from Massachusetts, and joint comment from the Alliance of Automobile Manufacturers and the Association of Internal Automobile Manufacturers.[14]

After EPA received CARB's within the scope waiver request dated February 26, 1997 and before EPA published the Federal Register Notice of March 26, 1999 noted above, announcing the public comment period, EPA received written comments from the Aftermarket, CARB, and the Massachusetts Department of Environmental Protection.[15] All comments received by EPA and placed in the Docket regarding this matter were considered by EPA in today's decision.

As explained more fully below, by today's action EPA determines that it can not make any of the necessary findings to deny CARB request that its ZEV amendments to its LEV program be considered as within the scope of the previous waivers. In response to comments, EPA also reviewed the MOAs signed by California and the seven automobile manufacturers and

---

[14]See Docket entries III-B-1 to III-B-3.

[15]See Docket entries II-D-1 to II-D-19.

determines that the MOAs do not adversely affect the criteria by which a within the scope determination is made for CARB's ZEV amendments to its LEV program.

## III. Standard and Burden of Proof in Waiver Proceedings

In Motor and Equipment Manufacturers Assn v. EPA,[16] ("MEMA I or MEMA"), the U.S. Court of Appeals for the District of Columbia determined that the Administrator's role in a section 209(b) proceeding is to:

> [C]onsider 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 denial of the waiver.[17]

The court in MEMA I considered the standards of proof under section 209(b) for two findings necessary to grant a waiver for an "accompanying enforcement procedure," the "protectiveness in the aggregate" and "consistency with section 202(a)" findings. The court instructed:

> 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.[18]

The court upheld the Administrator's finding that to deny a waiver for an accompanying procedure "there must be clear and convincing evidence to show that the proposed procedures

---

[16]627 F. 2d 1095 (D.C. Cir. 1979).

[17]Id. at 1122.

[18]Id.

undermine the protectiveness of California's standards."[19] The court also noted that this standard of proof "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 . . ."[20]

With respect to the "consistency with section 202(a)" 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.[21] Although MEMA I did not explicitly consider the standard of proof under section 209 concerning a waiver request for "standards," 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:

> Even in the two areas reserved for Federal judgment by this legislation - existence of "compelling and extraordinary" conditions and whether the standards are technologically feasible- Congress intended that the standard of EPA review of the State decision be a narrow one.[22]

Congress's intent that EPA's review of California's decision making be narrow has led EPA in the past to reject arguments, whatever their apparent appeal, that are not specified as grounds for denying a waiver:

> The law makes clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its costs or is

---

[19] Id.

[20] Id.

[21] Id. at 1122-23.

[22] 40 Fed. Reg. 23102, 23103 (May 28, 1975).

> otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under Section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.[23]

Thus, my consideration of all the evidence submitted concerning this waiver decision is circumscribed by its relevance to those questions that I may consider under section 209.

Finally, it is important to remember that the burden of proof is squarely upon the opponents of the waiver:

> The language of the statute and its legislative history indicate that California's regulations, and California's determination that they 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 attack 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]

Lastly, an amendment may be considered to be within the scope of a previously granted waiver if it does not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as comparable Federal standards, does not affect the consistency of California's requirement with Section 202(a) of the Act, and raises no new issues affecting EPA's previous waiver determination. Historically, EPA has made a within-the-scope

---

[23]36 Fed. Reg. 17458(Aug. 31, 1971). Note that the "more stringent" standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that the California standards must be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. See MEMA, supra note 15 at 1116-1117 (holding that EPA properly declined to consider the alleged anti-competitive effect of California's in-use maintenance regulations).

[24]See MEMA , supra note 16, at 1121.

determination when CARB's amendments or regulations have not constituted new or different standards.

## IV. DISCUSSION

As noted above, an amendment may be considered to be within the scope of a previously granted waiver if the following occurs: (1) it does not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as comparable Federal standards; (2) does not affect the consistency of California's requirements with section 202(a) of the Act; (3) and raises no new issues affecting EPA's previous waiver determination.

### A. Should EPA consider CARB'S request as within the scope of the previous waiver for California's LEV program or should it be considered and examined as a new waiver request?

Before EPA reviews CARB's amendments to its emission standards for passenger cars, light-duty trucks and medium-duty vehicles it is necessary to determine the criteria by which EPA will review the amendments. Therefore, EPA must determine whether the amendments require a full waiver review as envisioned by section 209(b) of the Act or whether it need only consider the criteria applicable to a within the scope request.

In CARB's request letter it requests EPA to "confirm the Board's determination that these amendments fall within the scope of the Clean Air Act (CAA) section 209(b) waiver of preemption for the California LEV program regulations, announced by the U.S. Environmental Protection Agency (USEPA) on January 13, 1993." Further, CARB states:

> "The Administrator has previously waived preemption for California's exhaust emission standards for 1993 and subsequent model passenger cars, light-duty trucks and medium-duty vehicles. The most recent waivers

> covered the original California low-emission vehicle regulations as they apply to passenger cars and light-duty trucks, and amendments to our medium-duty vehicle standards adopted in 1990. Several other waivers applicable to these classes of vehicles have been issued as well. Our request for preemption of the original California low-emission vehicles is still pending.[25] For the reasons described below, we have determined that the amendments covered by this letter fall within the scope of these previous waivers, and the pending medium-duty low-emission vehicle waiver we have previously requested.[26]

The Aftermarket Associations submit that a complete waiver analysis is required. Despite CARB only seeking a within the scope of a previous waiver determination for its regulatory amendments, the Aftermarket maintains that the MOAs are integral to CARB's regulatory scheme and that the MOAs necessitate a full waiver analysis.[27] Neither the Aftermarket nor any other party submitted information to suggest that CARB's ZEV amendments per se require a full waiver analysis or should not be determined to be within the scope of previous waivers.

Joint comments received from the Alliance of Automobile Manufacturers and the Association of International Automobile Manufacturers, Inc. (hereinafter "Automobile Manufacturers") suggest that the MOAs do not affect and are not relevant to EPA's statutory

---

[25] In EPA's January 13, 1993 waiver decision EPA only waived preemption to the passenger car and light-duty truck elements of CARB's LEV program because there was a pending waiver request from 1990 for medium-duty vehicles. On September 22, 1994 (59 Fed. Reg. 48625) EPA issued its waiver for the 1990 medium-duty vehicle standards. On April 15, 1998 EPA issued a waiver determination for the medium-duty vehicle standards that are part of CARB's LEV program. Thus, CARB's summary of the status of preemption for its medium-duty vehicles was correct at the time of its request letter, however, at the current time no additional waivers are necessary before CARB's ZEV amendments may properly be considered to be within the scope of a previous waiver.

[26] Request Letter at p. 5.

[27] Docket entry III-A-5 at pgs. 2-6.

review responsibilities, as the MOAs are voluntary agreements that are not preempted by section 209(a) and thus not eligible for a section 209(b) waiver.[28] The Automobile Manufacturers maintain that CARB has consistently treated the MOAs as non-regulatory in nature and thus not preempted by section 209(a).[29]

Since EPA issued the public notice inviting public comment on CARB's request, including the invitation of comment on how to consider the MOAs, EPA provided its opinion of the status of the MOAs in an opinion letter to Massachusetts, at the request of the Court of Appeals for the First Circuit, in connection with the state's litigation with Automobile Manufacturers.[30] EPA stated that, in general MOAs should not be preempted under section 209(a) of the Clean Air Act, because they are voluntary contractual agreements. "The language of the statute appears to indicate that provisions in voluntary agreements should not generally be considered standards under section 209. The legislative history of section 209 also appears to indicate that the prohibition in section 209 is meant to apply to state mandates (regulations and laws), not voluntary agreements. Moreover, if production requirements in voluntary agreements were generally preempted, then every such requirement in agreements in every state would be preempted .... EPA believes it would be an inappropriate interpretation of section 209(a) to treat

---

[28] IV-D-2 at p. 1.

[29] IV-D-2 at 6-7. The Automobile Manufacturers cite the CARB's General Counsel letter to EPA (Docket entry II-D-2): "The MOAs are voluntary agreements between the ARB and each of the seven largest automobile manufacturers. They are not adopted by the ARB as regulations. They are enforceable under contract law, not through the exercise of the state's police powers. It necessarily follows that the MOAs do not embody state standards relating to new motor vehicle emissions that would come within the ambit of section 209(a)."

[30] See Docket entry III-C-1.

all such agreements as prohibited." *Id. at 14.* However, EPA's opinion letter then states that given the unique factual circumstances surrounding these MOAs, the MOAs should be considered standards under section 209(a), and thus subject to the preemption provisions under that section. *Id.* EPA stated its concern that the MOAs may have just replaced the binding ZEV requirements and that there were indications that California and the automakers entered into the MOAs so that other states not be able to adopt them under section 177 as formal requirements. The letter also noted that the MOAs provided for severe contractual remedies in the event of nonperformance. The United States Court of Appeals for the First Circuit then provided its decision in that litigation on the question of whether the MOAs are preempted by section 209 and whether a full waiver analysis is required or permitted. The Court states:

> The district court held that the MOAs entered into by California and the automakers are not standards within the meaning of section 177, because they are voluntary contractual agreements rather than legislation or formal administrative regulations. See AAMA III, 998 F. Supp. At 20-24. The court found that both the language and the legislative history of the CAA suggested that the provisions of §§209 and 177 were intended to govern formal regulations adopted by the states, rather than voluntary and cooperative agreements between the states and automakers.
>
> The district court's ruling is consistent with Supreme Court precedents holding that federal preemption is generally confined to formal state laws and regulations and not applicable to contracts and other voluntary agreements. See American Airlines Inc. v. Wohlens, 513 U.S. 219, 228-29 (1995) (contractual obligations not "standards" within meaning of federal preemption statute); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 526 (1992) (holding voluntary contractual agreements not preempted by federal statute).[31]

[31] See Association of International Automobile Manufacturers, Inc. v. Commissioner, Massachusetts Department of Environmental Protection, 208 F.3d 1, 7 (1st Cir. 2000) (AIAM).

This same court considered the argument that the MOAs should be treated as standards because of the unique factual circumstances. The Court states:

> We find these considerations insufficient to support a conclusion at odds with the EPA's general (and we think, correct) interpretation of the statute. Although we understand EPA's central concern - that allowing agreements such as the MOAs to escape § 177 analysis could interfere with the ability of other states to emulate the regulatory scheme actually in effect in California - we think that our result is dictated by the plain language and intent of the statute. The circumstances of this case provide no justification, if in fact one could exist, for ignoring the mandates of the Act.[32]

As noted in EPA's opinion letter, EPA believes that in general, voluntary agreements ordinarily should not be considered "standards" subject to section 209(a) and therefore do not require a waiver of federal preemption. This is supported by the decision from the First Circuit. Regarding the First Circuit's decision on the MOAs, although EPA is not bound by the decision of that court in other jurisdictions and although EPA previously opined that the MOAs were a unique exception to the general rule regarding preemption of voluntary agreements, the Agency understands the rationale of the court in making its decision in AIAM, and we agree that the statutory language of section 209(a) does not on its face provide for exceptions to the general rule. In this instance, the Agency believes it is appropriate to acquiesce to the decision of the court. Thus, the Agency finds that California and the Automobile Manufacturers are correct that the MOAs are not subject to the waiver provisions of section 209. However, EPA does believe it appropriate to take the MOAs into consideration as it reviews CARB's mobile source emission program in general, and to specifically consider the effect of the MOAs on the within the scope criteria EPA will review for CARB's ZEV amendments.

---

[32] AIAM, supra at 8.

Despite the Automobile Manufacturers assertions that the MOAs are not only not preempted but are wholly irrelevant to a proper waiver determination by EPA, they nevertheless acknowledge that "In the unlikely event California were ever to adopt voluntary agreements that somehow undermined the protectiveness of its regulatory program relative to the federal program, EPA would have the authority to take appropriate action in denying, conditioning or withdrawing a waiver."[33] In addition, at the EPA waiver hearing regarding this matter the Automobile Manufacturers again recognized the ability of EPA to consider the MOAs in the context of whether they had any adverse affects on the criteria for a waiver.[34] The Aftermarket acknowledges that "the EPA certainly has the ability to look at what is really happening out there when these regulations are adopted, and not simply what is in this written request for a waiver, ...."[35] Lastly, CARB itself states "We think that EPA has the authority to look at the regulations that were (sic) seeking the waiver or scope-of-the-waiver determination on in the context of the rest of reality, and the rest of reality includes the MOAs in this case.[36]

While EPA considers it appropriate to consider CARB's regulations in the context of "reality" of CARB's overall mobile source emission control program, EPA also recognizes the constraints imposed by both the statutory language of section 209 and the MEMA decision. Therefore, EPA will continue to only waive preemption for CARB's emission regulations for new motor vehicles and limit its review to the criteria set forth in section 209(b); however, EPA

---

[33] Docket entry IV-D-2 at p. 10.

[34] Docket entry III-A-3 at p. 83.

[35] Id. at p. 59.

[36] Id. at p. 34.

does believe it appropriate to look at all existing facts, data, documents, legal holdings to determine whether CARB's regulations do indeed meet the applicable criteria.

**1. Public Health and Welfare**

Under Section 209(b)(1)(A) of the Act, the EPA cannot grant a waiver if the agency finds that CARB's determination that its standards are, in the aggregate, at least as protective of public health and welfare is arbitrary and capricious. As noted above, an amendment may be considered to be within the scope of a previously granted waiver if it does not undermine California's determination that its standards, in the aggregate, are less protective of public health and welfare as comparable federal standards.

California's original LEV program includes an NMOG fleet average requirement for all model years, beginning in 1994, including model years 1998-2002 (the five model years for which the ZEV requirement was eliminated in CARB's 1996 rulemaking). The NMOG fleet averages for those model years are as follows: 1998 MY = 0.157 g/mi, 1999 MY = 0.113 g/mi, 2000 MY = 0.073 g/mi, 2001 MY = 0.070 g/mi, and 2002 MY = 0.068 g/mi. During this 1998 to 2002 time frame the federal standard, under EPA's Tier 1 standards, is 0.25 g/mi NMHC.[37] In addition to CARB's NMOG fleet average requirement in its LEV program[38], which is still in effect, manufacturers producing 0.075 g/mi NMOG LEVs and 0.040 g/mi NMOG ULEVs will be required to meet a NOx standard of 0.2 g/mi compared to the federal Tier 1 NOx standard of 0.4 g/mi. Thus CARB's LEV standards, as originally adopted and waived by EPA, and as

---

[37] NMOG equals NMHC plus alcohols and carbonyls (see generally section 241(3) of the Act.

[38] See LEV Waiver Decision Document, pages 27-45.

amended by CARB's 1996 ZEV amendments, remain at least as stringent, in the aggregate, as the federal standards.

In support of its protectiveness determination CARB states that:

> The amendments to the LEV regulations covered by this letter eliminate the ZEV requirement for model years 1998 through 2002. But the relaxation of the LEV program overall as a result of this change is minimized because manufacturers will still be required to meet the applicable NMOG fleet average standard. Moreover, there is no question that the California standards for PCs and LDTs and for MDVs in the aggregate remain at least as protective of public health and welfare as the applicable federal standards because California's tiered standards for these vehicles are more stringent than the comparable federal standards and because the federal standards do not require manufacturers to certify and produce any ZEVs.[39]

CARB does acknowledge that its regulatory amendments relax their pre-existing LEV program requirements in two ways: one is the elimination of the 1998 to 2002 ZEV sales percentage requirement, and; two, is the creation of multiple ZEV credits for vehicles produced prior to the 2003 model year wherein credits are based on vehicle range or on the specific energy of the battery.[40]

However, as noted above, CARB did not change the fleet average NMOG requirement so that the reduction or elimination of ZEVs from the fleet mix does not change the finding that CARB's emission standards are at least as stringent as EPA's.[41]

---

[39] Request letter at p. 6.

[40] Docket III-A-3 at p. 22.

[41] With regard to the elimination of the ZEV requirement from 1998-2002, the Automobile Manufacturers correctly note that the protectiveness finding is a comparison between the applicable federal and California emission programs. (See IV-D-2 at p. 8) Thus EPA will not be comparing CARB's LEV program before and after the ZEV amendments, rather EPA will only examine whether CARB's ZEV amendments undermine CARB's previous protectiveness

The Aftermarket, while not directly challenging or submitting any analysis to demonstrate that CARB's LEV program is not as stringent, in the aggregate, as EPA's standards, asserts that "If the MOAs are not considered in evaluating California's revised LEV program requirements, CARB's protectiveness determination must be considered arbitrary and capricious."[42] Carrying this logic further, the Aftermarket points to CARB's substitution of the MOAs in place of the regulatory ZEV sales requirement in 1998 to 2002 to support California's State Implementation Plan (SIP) and claims that CARB is unable to demonstrate that its standards, without the MOAs, are as protective as the Federal standards. Therefore, EPA believes the thrust of the Aftermarket's position is that CARB cannot rely upon the incremental benefit to California of the adoption of the MOAs in making its protectiveness determination.

EPA believes CARB's analysis is correct and its relevant emission standards, as demonstrated by its NMOG fleet average requirement, continues to be as least as stringent, in the aggregate, as the applicable Federal standards. Therefore, CARB does not and need not rely upon the MOAs for purposes of demonstrating the protectiveness of its standards within the context of section 209(b). Further, CARB's use of the MOAs within its SIP is not relevant to the issue of whether California's regulations are, in the aggregate, at least as protective as federal

---

determination that its LEV standards are at least as stringent, in the aggregate, as the federal standards. Based on CARB's carrying forward its NMOG fleet average requirement EPA is not making a finding of any "backsliding" as a result of the elimination of the ZEV requirement from 1998-2002; however, even if "backsliding" occurred in this instance EPA nevertheless believes CARB has the ability to receive a waiver. *See, e.g.*, 46 FR 36742 (July 15, 1981) (EPA waiver approval for CARB amendments delaying the model year 1983 heavy duty engine emission standards for one year); 48 FR 1537 (Jan. 13, 1983) (EPA approval for delay of standards for one year).

[42] Docket entry III-A-3 at p. 67.

regulations. Moreover, it is clear factually that the MOAs, to the extent they are reviewed for their effect on California's regulations, can only add to the protectiveness of those regulations because their provisions add to the emission-related measures manufacturers will be expected to meet. Thus, they would have no adverse effect on this element of our within-the-scope determination.

Therefore, based on the record before it, EPA cannot find CARB's assertion, that its amendments do not undermine their determination that the emission standards and test procedures are, in the aggregate, at least as protective of public health and welfare as applicable federal standards for 1990 and later model years, to be arbitrary or capricious.

**2. Consistency with Section 202(a)**

CARB's asserts that its amendments are consistent with section 202(a) of the Act. As previously noted, California's standards would be inconsistent with section 202(a) if the following were to occur: (1) there is inadequate lead time to permit the development of the technology necessary to meet those requirements, given appropriate consideration to the cost of compliance within that time frame; or (2) the Federal and state test procedures are inconsistent; i.e., it is necessary that two incompatible test procedures be performed to meet the certification requirements of EPA and California.[43]

CARB maintains that its LEV regulations as modified by its ZEV amendments remain consistent with section 202(a) of the Act. In terms of technological feasibility, CARB claims that "the primary purpose and effect of the amendments is to eliminate the ZEV requirement for

[43] Even where there is incompatibility between the California and federal test procedures, EPA has granted a waiver under circumstances where EPA accepts a demonstration of federal compliance based on California test results, thus obviating the need for two separate tests.

model years 1998 through 2002. This change provides affected manufacturers with an additional five years lead time to comply with the ZEV requirements. EPA received no information from the automobile manufacturers or any other party, or any request by the same, to suggest that EPA's original LEV waiver that held the LEV standards (including ZEV) to be technologically feasible is changed by California's ZEV amendments. In fact the Automobile Manufacturers affirmatively state that the California ZEV amendments present no problems under section 202(a) in terms of leadtime and technological and economic feasibility. They state "Because the CARB amendments repeal the ZEV mandate, they present no such leadtime or feasibility issues for manufacturers."[44]

CARB also maintains that the amendments to the "All-Electric Range Test" provisions of the certification test requirements for ZEVs do not create any inconsistencies with the federal test procedures. According to CARB there is not test procedure inconsistency since EPA has not yet established any test procedures for ZEVs. While CARB's rationale was correct at the time it sent its request to EPA, it should be noted that EPA has since adopted Tier 2 motor vehicle standards including test procedures for ZEVs. These test procedures require manufacturers to measure emissions from ZEVs using CARB test procedures.[45] Therefore, the evidence in the record indicates that the ZEV amendments are consistent with section 202(a) of the Act.

The Aftermarket challenges CARB's consistency finding. However, the Aftermarket bases its consistency argument not on the LEV regulatory amendments but rather on the MOAs. The Aftermarket states that "Given that the MOAs give CARB the power to enforce, on a

---

[44] IV-D-2 at p. 8.

[45] See 40 CFR § 86.1811-04(n).

national basis, emission standards stricter than those that EPA can enforce on a national basis under the clear terms of Section 202(a), CARB's California LEV Program changes cannot meet the consistency requirement necessary to obtain a Section 209(b) waiver."[46] As previously noted, the Court of Appeals for the First Circuit has determined that the MOAs are not preempted and do not require a waiver of federal preemption. EPA accepts the decision of the Court. Therefore, EPA could not deny a waiver based on the MOAs' violation of section 209, since the MOAs themselves are not subject to section 209. Additionally, EPA believes that the Aftermarket's concerns regarding the NLEV provisions of the MOAs are unfounded because: (1) EPA has codified the NLEV provisions as a national program and the manufacturers subject to the MOAs have become bound by the provisions of NLEV independent of any CARB mandate, and superceding the MOA provisions;[47] and (2) regardless of any NLEV requirement within the MOAs, manufacturers are still required to certify their national fleet to EPA's regulations and CARB does not have the independent authority to perform such certification. Finally, regarding the impact of MOAs on CARB's existing regulations that are subject to the waiver, the MOAs do not affect the consistency of California's regulations with section 202(a). No commenter has indicated any relationship between the MOAs and the regulations that would raise any questions regarding the consistency of the regulations with section 202(a). Because these amendments raise no unresolved leadtime or technological feasibility issues, and because they do not establish any new certification procedures inconsistent with the Federal certification requirements, EPA

[46] Docket entry III-A-3 at p. 71.

[47] 63 Fed. Reg. 925 (January 7, 1998).

agrees with CARB's determination that its amendments are not inconsistent with section 202(a) of the Act.

While EPA reviews CARB's emission regulations it is not necessary nor does EPA have the authority to determine where California's policy choices associated with its regulations are the wisest choices or are even legal outside the criteria of section 209(b).[48] EPA believes the rationale behind EPA's limited oversight is even stronger when it comes to voluntary or non-regulatory measures (e.g. MOAs, etc) by California.

**3. New issues affecting previous waiver determination**.

Finally, CARB states that "we are not aware of any new issues affecting the previously granted and pending waiver determinations regarding California's exhaust emission standards and test procedures that are raised by the amendments ...."[49] No other commenters claimed that any new issues, other than the ones already addressed above, have arisen due to CARB's amendments. Therefore, EPA agrees with CARB's determination that no new issues have arisen that affect the previously granted waiver.

## IV. Determination

Because these regulations and amendments do not undermine California's determination that its standards are, in the aggregate, as protective of the public health and welfare as the Federal standards, are not inconsistent with section 202(a) of the Act, and raise no new issues affecting previous waiver decisions, EPA finds that these regulations and amendments are within

---

[48] MEMA at p. 1122.

[49] Request letter at p. 7.

the scope of the waiver granted for California's LEV program exhaust emission standards and test procedures.

Accordingly, Title 13, California Code of Regulations (CCR), section 1900, 1960.1, and 1976 as amended, and test procedures incorporated by reference in section 1960.1: the document titled "California Exhaust Emission Standards and Test Procedures for 1988 and Subsequent Model Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles," are within the scope of the previous waiver granted to California for its exhaust emission standards and test procedures.

The Administrator has delegated the authority to grant a state a waiver of Federal preemption, under section 209(b) of the Act to the Assistant Administrator for Air and Radiation.

Dated:_____

_____
Robert A. Perciasepe
Assistant Administrator
for Air and Radiation

cc: Gregory Green
Margo Oge
Robert Perciasepe
6405J:D. Dickinson:lm:VCPG 5:Decdoc.wpd:564-9256:8/11/00