Comments of the
State and Territorial Air Pollution Program Administrators ("STAPPA")
and the
Association of Local Pollution Control Officials ("ALAPCO")
on the
July 16, 2004 Request by California
for a Waiver of Federal Preemption under Section 209 (b) of the Clean Air Act
to Permit Enforcement of California's Emission Standards and Test Procedures
for Model Year 2007 and Subsequent Heavy Duty Diesel Engines
EPA Docket No. OAR-2004-0132

January 24, 2005

SUMMARY

On January 18, 2001, the U.S. Environmental Protection Agency ("EPA") promulgated a sweeping set of new regulations ("the Federal 2007 Rule") that will dramatically reduce pollution from on-highway, heavy-duty trucks commencing in 2007 by requiring, for the first time, that those vehicles be equipped with exhaust treatment devices similar to catalytic converters that have been used on passenger motor vehicles for many years. On October 25, 2001, the California Air Resources Board ("CARB") approved regulations ('the California 2007 Rule") that were identical to the Federal 2007 Rule in most respects. Since that time a number of other states have employed the "opt-in" provisions of section 177 of the Clean Air Act ("CAA") to adopt the California 2007 Rule. However, those state regulations cannot be enforced unless EPA grants a waiver of the federal preemption of motor vehicle emission regulation as provided by section 209 of the CAA.

On July 16, 2004, California submitted its request for a waiver[1] under section 209 to EPA. Included with that request was a comprehensive set of documents and analysis establishing that California had met the requirements of section 209. On November 15, EPA published a *Federal Register* notice soliciting comment on California's waiver request (69 FR 65594, November 15, 2004). EPA's notice correctly identifies the very narrow role reserved to EPA by Congress when it decided that California, which already had a motor vehicle emissions program prior to the initiation of the Federal vehicle emissions program, could maintain that program. As EPA notes in its *Federal Register* notice, under section 209(b) of the Clean Air Act EPA <u>must</u> grant California's waiver request unless EPA can affirmatively determine that (1) California acted in an arbitrary and capricious matter when it determined that its motor vehicle emissions program standards "will be as protective of the public health and welfare as applicable federal standards," (2) California does not need its motor vehicle emissions program standards to meet compelling and extraordinary

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1. California's letter included an alternative request that EPA determine that a grant of an additional waiver is not required in this instance since EPA has already waived federal preemption of regulation of this class of vehicles. STAPPA and ALAPCO support the grant of California's request in either form.

conditions or (3) California's motor vehicle emission standards were not "consistent with" the requirements of section 202 (a) of the Act.

STAPPA and ALAPCO have reviewed the Administrative Record made available by EPA respecting California's pending waiver request for this critical set of diesel emission requirements and have concluded that EPA's record does not contain sufficient information to rebut the "presumption of regularity" that is to be afforded the actions of a state acting in its regulatory capacity or to demonstrate that the California Air Resources Board ("CARB") acted arbitrarily. Accordingly, in our judgment EPA does not have the discretion to deny the request. Under the facts and the applicable law as we understand them, EPA must grant California's request for a waiver.

BACKGROUND

STAPPA and ALAPCO's Involvement in the HDDE Rules

When it established the Clean Air Act ("CAA") in 1970, Congress determined that air pollution prevention and control "is the primary responsibility of States and local governments." Section 101 of the CAA, 42 U.S.C. 7401. STAPPA and ALAPCO are nonpartisan associations of those agencies directly responsible for managing and implementing state and local air pollution control programs under the Federal CAA. Many of STAPPA and ALAPCO's several hundred individual members have decades of experience in evaluating and administering air pollution control programs. Based on the collective experience of these seasoned officials, STAPPA and ALAPCO are uniquely qualified to address the issues raised in the present rulemaking.

Since at least 1970, state and local governments have been working to bring ozone and particulate matter levels into compliance with the National Ambient Air Quality Standards ("NAAQS") through State Implementation Plans ("SIPs") and to ensure that in the future air quality reaches and continues to achieve these health-based standards. However, in many instances regulation of stationary sources cannot, by itself, achieve the necessary improvements in air quality. Congress attempted to balance the general rule that environmental protection is best addressed by state and local government with the need of the automobile industry to avoid dozens of potentially conflicting requirements for motor vehicles by providing a general prohibition against state regulation of new motor vehicle emissions, except in California. See, Section 209 of the CAA, 42 U.S.C. 7543. However, Congress also provided, under section 177 of the CAA, that states may adopt and enforce California's vehicle emission standards. See, Section 177 of the CAA, 42 U.S.C. 7507.

As emissions from mobile sources become a greater percentage of local emissions inventories, many state and local air pollution control agencies have taken a greater interest in regulation of mobile sources to help ensure clean air for their constituents. For this reason, STAPPA and ALAPCO have, for a number of years, remained closely involved in the development of the 2007 HDDE rules, both at the

federal level and in California. In addition to working with EPA and CARB in the development of those rules, in 2004 STAPPA and ALAPCO took the unusual step of developing a model rule to assist those states that wished, under section 177 of the CAA, to adopt California's HDDE emission standards. These efforts were fueled in part by comments suggesting that, notwithstanding their failed legal challenges, the trucking industry intended to continue to seek political and/or legal relief from the obligation to match emission reductions long ago required of passenger vehicles. To date, states with a collective population of over 100 million residents (i.e., one–third of the country) have either adopted or indicated their intent to adopt the California 2007 HDDE standards to preserve emission reductions that would be lost in the event of a rollback at the Federal level. Section 177 provides that in order for these regulations to be enforceable in the adopting states, EPA must have granted California's request for a waiver of Federal preemption.

STAPPA and ALAPCO and their members do not stand to benefit in any economic way from the recommended grant of California's request for a waiver to permit enforcement of the California 2007 HDDE standards. EPA's grant of the requested waiver will assist STAPPA/ALAPCO's members in carrying out their charge to provide clean air in their respective states. The 2007 rules, if fully implemented, will reduce heavy-duty on-road vehicle emissions to slightly more than one percent of nitrogen oxides ("NO_x") emissions from all sources – a huge benefit. The impact of these rules is even more significant in many metropolitan areas with serious air pollution problems. Thus, the 2007 rules represent a significant opportunity that will greatly assist state and local authorities in fulfilling their obligations to provide clean air for the public. Yet, recent history suggests that full and timely implementation of these rules cannot be taken for granted at this stage. For this reason STAPPA and ALAPCO strongly support California's request for a waiver under section 209 of the CAA.

Heavy-Duty Diesel Engine Emissions

Most Americans currently live in areas of the country that have unhealthful air. According to EPA, 159 million people in this country live in areas that exceed the NAAQS for ground-level ozone; 95 million people live in areas recently designated as nonattainment for fine particulate matter ("PM"). The adverse health effects of these pollutants include premature mortality, aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions and emergency room visits, school absences, work loss days, and restricted activity days), changes in lung function and increased respiratory symptoms, changes to lung tissues and structures, altered respiratory defense mechanisms, chronic bronchitis, and decreased lung function.

Ozone also causes crop and forestry losses, and PM causes damage to materials and soiling of commonly used building materials and culturally important items such as statues and other works of art. NO_x, sulfur dioxide ("SO_2"), and PM each contribute to substantial visibility impairment in many parts of the U.S. NO_x emissions also contribute to the acidification, nitrification, and eutrophication of

water bodies, while SO_2 emissions contribute to acid rain that denudes forests and renders streams and lakes in the eastern U.S. unable to support aquatic life.

Emissions from heavy-duty vehicles contribute to the adverse health and welfare effects of ozone, PM, NO_x, SO_2, and volatile organic compounds ("VOCs"). Both NO_x and VOCs contribute to the formation of ground-level ozone, while PM, NO_x, SO_2, and VOCs contribute to PM levels. Heavy-duty, on-road vehicle emissions contribute 15 percent of all NO_x emissions nationally. Without full implementation of the 2007 rule, as the economy grows and vehicle miles traveled increase, heavy-duty diesel truck contributions to air pollution will continue to grow.

In particular, emissions from heavy-duty diesel engines account for substantial portions of the country's ambient PM and NO_x concentrations. EPA has estimated that by 2007, heavy-duty vehicles will account for 28 percent of mobile source NO_x emissions and 20 percent of mobile source PM emissions. These proportions are even higher in some urban areas, such as in Sacramento, Atlanta, and Washington, DC, where heavy-duty vehicles contribute over 34 percent of the mobile source NO_x emissions, and in Santa Fe, Los Angeles, and Hartford, where heavy-duty vehicle PM emissions account for 38, 25, and 30 percent of the mobile source PM emissions inventory, respectively. Given the growth in vehicle population and in vehicle miles traveled that is anticipated in the future, these impacts will increase absent further controls.

In addition to its contribution to PM inventories, diesel exhaust PM is of special concern because it has been implicated in an increased risk of lung cancer and respiratory disease. EPA's draft Health Assessment Document for Diesel Exhaust was reviewed in public session by the Clean Air Scientific Advisory Committee ("CASAC") on October 12-13, 2000[2]. EPA concluded, and the CASAC agreed, that diesel exhaust is likely to be carcinogenic to humans.

The 2007 HDDE RULES

The Federal 2007 Rule

The Federal 2007 Rule marks the first time that heavy-duty trucks will be required to employ aftertreatment devices similar to catalytic converters employed on passenger cars for the past 25 years. This standard will be phased – 50 percent of the new engines sold in MYs 2007 through 2009 are to meet the new NO_x emission standard of 0.2 g/bhp-hr, with full compliance required commencing in MY 2010. When fully implemented, this new rule will require an overall NO_x emission reduction of 98.5 percent from uncontrolled highway cruise levels, and an emission level that is 90 percent below the current standard. The Federal 2007 Rule also establishes a new lower limit on emissions of non-methane hydrocarbons ("NMHC") of 0.14 g/bhp-hr, phased in the same manner as the NO_x limits. The new rule will further reduce

[2] EPA's (2000) Review of EPA's Health Assessment Document for Diesel Exhaust (EPA 600/8-90/057E). Review by the Clean Air Scientific Advisory Committee (CASAC) December 2000. EPA-SAB-CASAC-01-003.

allowable PM emissions to 0.01 g/bhp-hr, to take full effect for diesels in MY 2007. Under the Federal 2007 Rule heavy-duty gasoline engines will be subject to the same standards as heavy-duty diesel-fueled engines based on a phase-in requiring 50 percent compliance in MY 2008 and full compliance in MY 2009.

The technologies needed to meet these more stringent standards for diesel engines are sensitive to sulfur in the fuel. For this reason the Federal 2007 Rule also requires that ultra-low-sulfur diesel be generally available by late 2006. Sulfur in diesel fuel for on-road use is currently limited to 500 parts per million by weight ("ppm"); the new rule will reduce this limit to 15 ppm sulfur, a 97-percent reduction. All MY 2007 and later diesel-fueled vehicles must be refueled with this new low-sulfur diesel fuel. This rule will also enable cleaner diesel passenger vehicles and light-duty trucks. The availability of ultra-low-sulfur diesel fuel enables the use of similar aftertreatment devices in those vehicles in order to meet EPA's Tier 2 emissions standards for light-duty highway vehicles (65 FR 6698, February 10, 2000). Ultra-low-sulfur diesel will also reduce emissions and maintenance costs in the existing fleet of highway diesel vehicles. These benefits will include reduced sulfate, PM, and sulfur oxides emissions; reduced engine wear; less frequent oil changes; and longer-lasting exhaust gas recirculation components. Heavy-duty gasoline vehicles will also be expected to have much lower emissions due to the transfer of recent technology developments for light-duty applications, and the recent action taken to reduce sulfur in gasoline as part of EPA's Tier 2 rule.

The Federal 2007 Rule adopts new evaporative emissions standards for heavy-duty gasoline engines and vehicles, effective on the same schedule as the gasoline engine and vehicle exhaust emission standards. The new standards for 8,500 to 14,000 pound vehicles are 1.4 and 1.75 grams per test for the three-day diurnal and supplemental two-day diurnal tests, respectively. A standard of 1.9 and 2.3 grams per test, respectively, will apply for vehicles over 14,000 pounds. These standards represent more than a 50-percent reduction in the numerical standards as they exist today.

The Federal 2007 Rule includes a combination of flexibilities available to refiners to ensure a smooth transition to ultra-low-sulfur highway diesel fuel. Refiners can take advantage of a temporary compliance option, including an averaging, banking, and trading component, beginning in June 2006 and lasting through 2009, with credit given for early compliance before June 2006. Under this temporary compliance option, up to 20 percent of highway diesel fuel may continue to be produced at the existing 500-ppm sulfur maximum standard. Highway diesel fuel marketed as complying with the 500-ppm sulfur standard must be segregated from 15-ppm fuel in the distribution system, and may only be used in pre-2007 MY heavy-duty vehicles. The rule also provides hardship provisions for small refiners who require more time to install the needed technologies and additional relief for refiners subject to the Geographic Phase-in Area provisions of the Tier 2 gasoline sulfur program, which will allow them the option of staggering their gasoline and diesel investments. Finally, the rule includes a general hardship provision for which any refiner may apply on a case-by-case basis under certain conditions. These

hardship provisions, coupled with the temporary compliance option, will provide a "safety valve" allowing up to 25 percent of highway diesel fuel produced to remain at 500 ppm for the transitional years to minimize any potential for highway diesel fuel supply problems.

The California 2007 Rule

The California 2007 Rule is found as amendments to the California Code of Regulations (CCR), Title 13, Chapter 1, Article 1.5 and the incorporated "California Exhaust Emission Standards and Test Procedures for 1985 and Subsequent Model Heavy-Duty Diesel Engines and Vehicles" that provide for nearly identical emission standards, test procedures, and other requirements contained in the Federal 2007 Rule. Although the California 2007 Rule includes diesel certification test fuel specifications, the rule does not contain a requirement for the production and sale of ultra-low-sulfur diesel fuel in California and does not provide new emissions standards for heavy-duty spark-ignited engines. These topics are being considered as part of separate rulemaking actions. In addition to the emission standards and test procedures, other requirements were incorporated from the Federal 2007 Rule to harmonize federal and California requirements for MY2007 and subsequent heavy-duty diesel engines.

Emission Standards

The California 2007 Rule includes the stringent emission standards for 2007 and subsequent MY heavy-duty diesel-cycle engines and medium-duty diesel-cycle engines found in the Federal 2007 Rule. Heavy-duty diesel-cycle engines include diesel-cycle engines fueled with diesel, natural gas, and liquefied petroleum gas. The emission limitations of the California 2007 Rule are 0.20 g/bhp-hr of NO_x, 0.14 g/bhp-hr of NMHC, 0.01 g/bhp-hr of PM, and 15.5 g/bhp-hr of carbon monoxide ("CO"). The adopted optional NO_x, NMHC, PM and CO super ultra low-emission vehicle ("SULEV") emission standards are set at 50 percent of the newly adopted heavy-duty diesel engine emissions standards (*i.e.*, 0.10 g/bhp-hr of NO_x, 0.07 g/bhp-hr of NMHC, 0.005 g/bhp-hr of PM, and 7.7 g/bhp-hr of CO).[3] Additionally, for medium-duty diesel engines, the formaldehyde emission standard will remain at 0.050 g/bhp-hr.

As with the Federal 2007 Rule, the NO_x and NMHC emission standards will be phased. The phase-in period for these emission standards will be four years, as follows: 50 percent for MYs 2007 through 2009 and 100 percent for the 2010 and subsequent model years. There is no phase-in of the PM and CO emission standards. Those standards will be fully implemented beginning with the 2007 model year.

Because of past technological limitations, turbocharged diesel engines are currently exempt from federal and California emission limits on crankcase emissions.

[3] Optional standards are provided for smaller engines to provide incentives for engine manufacturers to introduce lower-emitting engines.

However, advances in crankcase filtration have now reached the stage where this exemption is no longer necessary. Accordingly, the California 2007 Rule eliminates this exemption, as does the Federal 2007 Rule.

Similarly, the California 2007 Rule provides incentives for early introduction of lower-emitting engines. Manufacturers of engines that satisfy the adopted requirements and that are introduced into the marketplace before 2007, will receive credits equal to 1.5 times the number of diesel-cycle engines that are introduced during the phase-in. Thus, for example, two early introduction engines will reduce the number of required phased-in engines (2007-2009) by three. Each early engine must meet all requirements applicable to the 2007 model year engines. If the engine complies only with the PM requirements, then the offsets may be used only for 2007 PM credits.

Engines that can meet one-half of the adopted NO_x emission standard (0.10 g/bhp-hr) earlier than the phase-in period, in addition to all other requirements applicable to the 2007 model year engines, will be classified as “Blue Sky Series” engines. Manufacturers of these engines will receive a credit of 2.0 times the number of 2007 model year compliant engines. Thus, two “Blue Sky Series” engines will reduce the number of required phased-in engines by four.

Test Procedures

The Federal 2007 Rule adopted supplemental certification test procedures that apply to 2007 and subsequent model year heavy-duty diesel-cycle engines certified to the 0.20-g/bhp-hr NO_x standard. These test procedures are slightly different from those in the 1998 Federal Consent Decrees and California Settlement Agreements, and the 2005 supplemental test procedures adopted by CARB and 13 other states.

The Federal 2007 Rule included several changes to EPA’s 2004 final rule test procedures that will apply to all 2007 and subsequent model year heavy-duty diesel-cycle engines. The amendments adopted in the California rulemaking include identical revisions to the California 2004 final rule test procedures.[4]

Due to the lower emission standards adopted, the maximum allowable emission limit (“MAEL”) test and the three “mystery points” will be removed from the test procedures for engines with a NO_x family emission limit (“FEL”) less than 1.5 g/bhp-hr. Further, the NO_x Not-to-Exceed (“NTE”) cap will be increased from 1.25 to 1.5 times the FTP-based standard for engines with a NO_x FEL less than 1.5 g/bhp-hr. The PM NTE cap will be increased from 1.25 to 1.5 times the FTP-based standard. There is no change to the CO and NMHC NTE cap. Note that MAEL test requirements and an NTE cap of 1.25 times the FTP-based standard still apply to engines with a NO_x FEL of 1.5 g/bhp-hr or above. The increased NTE cap multiplier is intended to

[4] The amendments of California’s test procedures on October 25, 2001, included the Federal 2007 Rule test procedure amendments.

allow increased flexibility when using the test to compare the emissions to the newly adopted emission standards.

In addition to the higher NO_x NTE emissions cap, NO_x and NMHC aftertreatment devices are allowed warm-up time. When the exhaust temperature at the outlet of the aftertreatment device is less than 250º C, the NTE NO_x and NMHC caps do not apply. Another change is the elimination of the PM carve-out areas of the NTE control zone.[5] Due to the expected effectiveness of advanced diesel PM filters, relief from the NTE test through the PM carve-out areas was deemed unnecessary. However, relief from the NTE test is provided, if necessary, by allowing manufacturers to exclude certain regions of the NTE control zone. This is allowed if the vehicle is not capable of operating at the specific conditions or where operation is minimal.

The California 2007 Rule also modified the sampling time for the NTE test to account for aftertreatment regeneration events.[6] The sampling time for the NTE test will be at least 30 seconds. If regeneration of the aftertreatment device occurs during the NTE test, the averaging period will be at least as long as the time between the regeneration events multiplied by the number of complete regeneration events that occur in the sampling period. This revised sampling period will only be allowed for engines that send an electronic signal indicating the start of the regeneration event. In addition, up to three deficiencies from the NTE test may be approved per engine family for the 2010 through 2013 model years.[7]

The California 2007 Rule also incorporates several changes to the test procedures adopted in the Federal 2007 Rule to improve the precision of emission measurements. Changes include the type of PM filters that are used, improvements to the method of weighing PM filters, and requirements for more precise microbalances. Another change allows lower dilution ratios during emission measurements.[8] The final change adopts a new NO_x calibration procedure that provides more precise and continuous measurements of low NO_x concentrations. Manufacturers are provided the option of using their current test procedures if they are more convenient or cost-effective in the short term.

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[5] The PM carve-out area is the area within the NTE control area where the NTE cap on PM emissions does not apply. Operation in the PM carve-out area does not require compliance with NTE requirements, although all other requirements during operation in that area still apply.

[6] A regeneration event occurs when the storage media in the aftertreatment device is cleansed. The event can be triggered naturally with higher exhaust heat and extra fuel, or triggered externally using a heating element.

[7] Criteria for deficiencies occurring during 2007 through 2009 model years, including phased-in engines, is detailed in the 2007 Final Rule. Deficiencies during this time period are approved on an engine model and/or horsepower rating basis within an engine family. Additionally, deficiencies are applicable for one model year at a time. No deficiencies are allowed beyond 2013.

[8] A reduced dilution ratio reduces the amount of dilution air during the emission sampling period. This helps to improve measurement of gaseous and particulate emissions.

When Congress first considered the question of how to implement a Federal program for the regulation of mobile source emissions, it recognized that California had led the national effort to develop such a program and that California had a particular interest in mobile source emissions programs. For this reason, as EPA has correctly noted, Congress included a provision under section 209 (b)(1) of the CAA, 42 U.S.C. 7543(b)(1), that was intended to allow California to continue to lead the nation in developing and implementing motor vehicle emissions programs. Under these provisions, EPA must approve requests from California for a waiver of the Federal preemption of state regulation provided at section209 (a) of the CAA, 42 U.S.C. 7543(a), unless EPA can make one of the following determinations:

(1) California acted in an arbitrary and capricious matter when it determined that its motor vehicle emissions program standards [as a group] "will be as protective of the public health and welfare as applicable federal standards,"

(2) California does not need its motor vehicle emissions program standards [as a group] to meet compelling and extraordinary conditions or,

(3) the California standards [as a group] are not "consistent with" the requirements of section 202 (a) of the Act.

PRIOR CALIFORNIA WAIVER REQUESTS

EPA has reviewed more than 100 requests from California since 1968 under the provisions of the CAA that were applicable at the time of the request. In the course of responding to those requests EPA has established a body of precedent to guide the current decision. Under applicable precedent EPA is not to substitute its judgment for that of CARB as to the wisdom of adopting a particular standard[9], but is to consider California's standards as a group. Thus, the question is not whether a particular standard is a stringent as a Federal standard, but whether CARB acted in an arbitrary and capricious manner when it determined that the California motor vehicle emission program was as protective as the federal program. Similarly, the question is not whether California needs the HDDE rule to meet compelling and extraordinary conditions or whether the California 2007 Rule complies with the lead time, stability and technological feasibility requirements of section 202(a) of the CAA. Instead, the issues are more properly framed as whether California needs to maintain its motor vehicle emissions program to meet compelling and extraordinary conditions and whether California's motor vehicle emission standards are "consistent with" the requirements of section 202(a).

Moreover, as California has pointed out in its waiver request, under the applicable law

…California's regulations, and California's determinations that

[9] See, e.g. 40 FR 23102, 104

> they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements …the burden of proving otherwise is on whoever attacks them[10].

EPA has determined, on numerous occasions in the past and as recently as April, 2003, that the facts needed to deny a waiver request respecting California's motor vehicle emissions program had not been shown. No facts have been presented in this proceeding to suggest a change in circumstance that would warrant a reversal of those earlier determinations.

CALIFORNIA'S MOTOR VEHICLE EMISSION PROGRAM STANDARDS ARE AS PROTECTIVE OF THE PUBLIC HEALTH AND WELFARE AS THE APPLICABLE FEDERAL STANDARDS

On October 25, 2001, CARB adopted Resolution 01-38 in which it determined that

> "the [California 2007 HDDE rules will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards."

STAPPA and ALAPCO's members are very familiar with the California motor vehicle emission program. STAPPA and ALAPCO have for many years maintained a standing technical committee on Mobile Sources and Fuels whose members focus on issues relating to control of air pollution in these areas. In our judgment, California's program continues to lead the effort to reduce emissions from motor vehicles.[11] This leadership role is demonstrated by, among other things, California's rulemaking in recent years concerning emissions from passenger motor vehicles and by its adoption of mandatory reflashing requirements for certain in-use heavy duty diesel engines. Therefore, we believe CARB's determination that the California program is not less protective than the federal program is correct.

The rules that are the subject of the current waiver request are identical in all meaningful respects to the federal rules for the covered vehicles, except that the California rules establish enforceable limitations on emissions of formaldehyde, while the federal rules do not contain such a limit. Thus, for these vehicles, the California 2007 Rule does not permit greater emissions than the equivalent part of the federal program and can only increase the protectiveness of the California program.

The California 2007 Rule does not apply to heavy-duty gasoline engines or to urban buses, while the Federal 2007 Rule includes these vehicles. However, as EPA has acknowledged, the relevant inquiry is not a standard-by-standard evaluation, but a consideration of whether California's program is as protective as the federal

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[10]See, Motor *and Equipment Manufacturers Association, Inc. v. EPA*, 627 F.2d 1095, 1120-1121 (D.D. Cir. 1979) cited in *Basis and Analysis for California's Request for a Clean Air Act Section 209(b) Determination*, EPA Docket No. OAR-2004-0132, p.18.

[11] This opinion was specifically endorsed by the United States Court of Appeals for the D.C. Circuit in *Engine Manufacturers Association v. U.S. EPA,* 88 F.3d 1075, 1090 (D.C. Cir. 1996).

program. In the first instance, we note that California has conducted separate rulemakings setting stringent standards with respect to those classes of engines and vehicles. Second, it is clear that other aspects of California's motor vehicle program, including its passenger motor vehicle standards, more than offset the emissions from these relatively small classes of engines and vehicles California has regulated, but for which EPA may not yet have received a request for a waiver or for a determination that California's action is within the scope of an earlier waiver.

Most importantly, nothing has been introduced into the record to rebut the presumption of regularity that is to be afforded to California's determination or to demonstrate that CARB's determination was arbitrary and capricious.

CALIFORNIA NEEDS ITS MOTOR VEHICLE EMISSION PROGRAM TO MEET COMPELLING AND EXTRAORDINARY CONDITIONS

EPA has acknowledged that

> "compelling and extraordinary conditions" does not refer to levels of pollution directly, but primarily to the factors that tend to produce them: geographical and climactic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems" 46 FR 26371, 26373 (May 12, 1981).

The unique geographical and climactic conditions that tend to foster the creation and retention of ozone in the Los Angeles basin are as they were in the 1970s, when Congress and EPA each initially recognized California's need for its own motor vehicle emissions program. Similarly, the very large number and concentration of motor vehicles in parts of California continue to this day. Also unchanged is the fact that a very large part of the total emissions inventory in parts of California comes from mobile sources. Moreover, California continues to experience serious air pollution problems.

In its waiver request CARB reasserted its earlier determination that it continues to have a need to maintain its own motor vehicle emissions program. California's need to maintain its motor vehicle emissions program has been confirmed by EPA in each of its prior grants of California waiver requests, including as recently as April, 2003 (68 FR 19811, 19812, April 22, 2003). These determinations are consistent with the intent of Congress when it enacted the original waiver provisions and when it amended those provisions.

Some might argue that California no longer "needs" its mobile source program because emissions of key pollutants, such as ozone and $PM_{2.5}$ have declined significantly over the past decades. While California has experienced significant emission reductions in most pollutants since 1977, those reductions do not demonstrate that the California mobile source program is no longer needed, since a significant part of those reductions occurred because of the California mobile source program. There is nothing in the Administrative Record to suggest that this progress

could be sustained, or maintained, absent continued aggressive regulation by California of motor vehicle emissions.

Moreover, portions of California remain the most intractable areas of pollution and do not attain CAA standards. Thus, for example, while $PM_{2.5}$ levels have been reduced by 50 percent in Los Angeles over time, those levels remain significantly higher than other cities in the United States and do not meet health-based standards. In addition, while concentrations of pollutants are declining, the science respecting adverse environmental impacts of pollution has advanced to the point where greater emission reductions are now known to be needed. This fact has been recognized by EPA in its adoption of more stringent National Ambient Air Quality Standards for $PM_{2.5}$ and ozone. We have also come to learn that diesel emissions in particular have greater adverse health consequences than previously identified. For these reasons, notwithstanding all its improvements in emission levels, California clearly needs an aggressive mobile source program if it is to reach its goal of providing clean air to its residents.

The Administrative Record does not contain sufficient information to demonstrate that EPA should vary from its earlier determinations concerning California's need for a motor vehicle emissions program.

CALIFORNIA'S STANDARDS ARE "CONSISTENT WITH" THE REQUIREMENTS OF SECTION 202(a) OF THE CAA

Section 202(a) of the CAA provides several limitations on EPA's authority to promulgate motor vehicle emission standards. These include (1) the standards must reflect the greatest degree of emission reductions achievable, given the application of technology which the Administrator determines will be available, giving appropriate consideration to cost, energy and safety factors ("technical feasibility'); (2) any standard shall apply for no less than three model years ("stability") and (3) shall not commence until the fourth model year after promulgation of the standard ("lead time"). Given the lead time constraints of the CAA, EPA will, of necessity, forecast the technology that it believes will be available several years in the future.

In this instance, in 2001 EPA forecast the technology that it believed would be available in the 2007–2010 time frame. Under Federal law, EPA's judgment in this regard may only be challenged within 60 days of publication of the regulation in the *Federal Register*. Such a challenge is to be based on a review of the administrative record (i.e., the information available to the agency at the time it made its decision). Subsequently discovered information is considered only in extraordinary and limited circumstances. Thus, if information is discovered in 2006 suggesting that EPA's 2001 determination was incorrect, a person may petition the agency to withdraw or amend the rule, but may no longer challenge the original rulemaking decision.

Section 209(b) does not require that California standards "meet" the requirements of section 202(a), merely that they be "consistent with" those requirements. We believe that this requirement is met if California's rules for

establishing motor vehicle emission standards contain the same limitations as section 202(a) and if California law provides a procedure for review of those standards that is substantively equivalent to the Federal procedures[12]. This view is consistent with the decision in *Motor and Equipment Manufacturers Association v. Nichols* in which the court concluded that

> section 209(b)(1) makes clear that section 202(a) doesn't require through its cross referencing, consistency with each federal requirement in the act. California's consistency is to be evaluated "in the aggregate," rather than on a one-to-one basis. [13]

We do not believe section 209(b) requires or authorizes EPA to review the substance of California's decision respecting an individual rule and certainly not on the basis of after-acquired facts. For EPA to do so would provide two or three "bites at the apple" by stakeholders and greatly expand the rights of litigants to challenge decisions years after they are made by suing, not on the basis of the initial decision, but over EPA's review of a waiver request. Such a result is itself inconsistent with the Clean Air Act. Moreover, principles of Federalism disfavor a Federal agency reviewing the decisions of an appellate State court. This could occur if a litigant lost a challenge to a CARB rule in State court and EPA subsequently denied a waiver request based on its review of the substantive merits of the CARB decision respecting the individual rule at issue.

Here, both EPA and CARB amassed significant documentation concerning technical feasibility. Since both 2007 rules were promulgated in 2001 there can be not question as to whether they meet whatever lead time and stability rules apply[14]. CARB's rule was promulgated in 2001 and does not apply until 2007. Several manufacturers challenged whether the Federal 2007 rule met the requirements of section 202(a) – based on EPA's administrative record. EPA's rule was sustained, thus establishing that on the basis of information available at the time, the rule complied with the limitations of section 202(a).

Applying the test we believe is appropriate; there is no basis to deny the requested waiver. California's rules contain the limitations found in section 202(a) verbatim. In promulgating its rule CARB made specific determinations that the California 2007 HDDE rule met the requirements of section 202(a). Whether CARB met those limitations was open to challenge in a process that was substantively similar to available federal processes. Rather than permitting two avenues of appeal of the substantive decisions by CARB – one to the California courts on the initial

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[12] Indeed, it would seem to be literally impossible for California to maintain a "more stringent program" if each of EPA's regulations were held in the same way as California's rules to the provision in section 202 that standards must reflect the "greatest emissions reductions achievable."

[13] 142 F. 3d 449, 464 (D.C. Cir. 1998)

[14] We understand that CARB and EPA disagree as to whether the lead time and stability provisions of section 202 apply to California's motor vehicle emissions program. This issue should not be determinative here, since the California rule at issue meets the test EPA believes is applicable.

decision, the other to EPA and the Federal Courts on EPA's decision on a waiver request, EPA should limit its inquiry to whether the California motor vehicle program is "consistent with" the Federal requirements found in section 202(a).

If EPA believes it must review the substance of CARB's rulemaking decision, it should do so with great deference. It should do so respecting Congressional recognition that in many instances CARB would require technology that might not yet be ready for nationwide introduction or that might cost more than EPA thought was prudent. See, 40 FR 23102, 43104, cited in *Basis and Analysis for California's Request for a Clean Air Act Section 209(b) Determination*, *infra.*, at pp 17-18. Importantly, EPA should not "redecide" the issue, but limit its review to whether CARB was arbitrary and capricious in making its decisions in 2002, based on the information that was available at the time.

Clearly, in reviewing California's substantive decisions in this rulemaking, EPA cannot impose a standard of review that is higher than established by the CAA for review of EPA's rulemaking decisions. The courts have determined that EPA's burden in this context is relatively low. In *Natural Resources Defense Counsel v. U.S. E.P.A.* the court determined that EPA

> will have demonstrated the reasonableness of its basis for prediction if it answers any theoretical objection to the [projected control technology], identifies the major necessary refinement of the [technology], and offers ***plausible reasons for believing*** that each of those steps can be completed in the time available[15]. (emphasis provided)

Thus, if EPA decides that it must review the substance of California's decisions with respect to lead time issues in the California 2007 rule its review is limited to whether California has offered ***plausible reasons for believing*** that the technology can be completed in the 2007/2010 timeframe[16].

Here again, there is no basis to deny the requested waiver. CARB's determinations were the same as EPA's, based on much of the same information. The CARB Administrative Record incorporated and expanded upon the EPA Administrative Record. Given that the Federal 2007 HDDE rule was found by the U.S. Court of Appeals to comply with section 202(a) we can see no basis in the relevant record for EPA to reverse itself and somehow find, on the identical record, that the California 2007 HDDE rule is "not consistent" with those requirements.

Finally, if EPA concludes that it must review California's 2001 rulemaking on the basis of current facts, those facts do not support a finding that the California HDDE rule is "not consistent" with section 202(a). California's request for waiver includes a lengthy and detailed updated technology assessment that demonstrates

[15] 655 F.2d 318, 331-332 (D.C. Cir 1981)

[16] Given the phasing, banking and trading provisions of the California 2007 rule, manufacturers can comply in the 2007-2009 time frame by achieving the full 2010 emission reductions on half of their fleet or by achieving lesser emission reductions on a greater percentage of their fleet.

that the initial technical feasibility determinations by EPA and CARB were correct. Nothing in the record to date demonstrates that CARB acted arbitrarily when it determined in 2001 that the California 2007 rule was technically feasible or in 2004, when it reaffirmed that determination.

COMMENTS SUBMITTED BY THE ENGINE MANUFACTURERS' ASSOCIATION MAKE IT CLEAR THAT THERE IS NO LAWFUL REASON TO DENY CALIFORNIA'S REQUEST FOR A WAIVER

On January 21, 2005 the Engine Manufacturers Association ("EMA") submitted comments respecting California's request for a waiver. In its comments EMA conceded that there is no question as to whether the 2007 standards are technically feasible.

> All stakeholders are now on record confirming the feasibility
> of the 2007 emission limits, and no amendments or
> deferral of those standards are being sought or contemplated.
> Indeed, most recently, the American Trucking Association
> (the entity apparently perceived by STAPPA/ALAPCO as being
> opposed to the 2007 HDOH Standards) has publicly announced
> on November 19, 2004, that it does not intend to challenge
> the 2007 standards[17].

While conceding that there is no basis under section 209 of the CAA to deny California's waiver request, EMA recommends that EPA not decide whether to grant California's waiver request until just before the implementation date for the 2007 rule. EMA argues that if EPA delays, States may decide not to adopt the California 2007 Rule, thus sparing its members hypothetical recordkeeping burdens.

EMA's argument must fail for several reasons. First, nothing in the CAA permits EPA to consider issues relating to section 177 in deciding whether California has met the requirements of section 209. Second, under the terms of second 209, EPA may not defer a decision on a California waiver request. This is because section 209 does not depend on any discretionary act by EPA. In the absence of an affirmative finding (that EMA concedes EPA cannot make) EPA must grant California's request. Third, section 177 does not provide for any EPA review of state decisions to adopt California motor vehicle standards. Accordingly, for EPA to decide to "pocket veto" California's decision under section 209 based on issues under section 177 that are not within its purview would necessarily be arbitrary and not in accordance with law.

EMA also fails to show a hardship to its members sufficient to warrant the recommended intrusion on states' rights. EMA suggests a burden associated with complying with standards in states that adopt California's rules, but fails to identify, let alone prove, how such "burden" would be beyond "nominal" for a company that

[17] Comments of the Engine Manufacturers Association, January 24, 2005 (sic), p.3.

must already comply with both Federal and California rules. STAPPA and ALAPCO believe that states adopting the California 2007 Rule are willing to work with EMA and others to avoid any unnecessary complications that may be perceived to arise. Significantly, EMA has not shown that it has attempted to work with individual states in that regard or that its efforts have been rebuffed without valid reason.

EMA also asserts, without any attempt to demonstrate, that there will be no harm to CARB if EPA delays a decision on its request. Without presuming to speak for CARB, it appears to us that there is a significant adverse risk of harm to California's motor vehicle emission program if EPA's decision on California's waiver request is not rendered in time to permit resolution of any legal challenges to that decision and to permit an orderly process for implementation and enforcement of the California 2007 rule. Moreover, if the Federal 2007 Rule is deferred or withdrawn, litigation over the California 2007 Rule, itself, is likely and must have time to be resolved if the 2007 implementation date is to be maintained in California. EMA has not argued that there would be no harm to other adopting state programs and indeed, it cannot, since adopting states must also have time to resolve legal challenges and implement programs. Adopting states are also subject to attainment date requirements under the CAA and must have time to engage in planning and alternate legislation and/or rulemaking if the environmental benefits of the 2007 rules are lost in their states.

Finally, EMA's suggestion that delaying a waiver decision will dissuade states from adopting the California 2007 Rule is wrong, in part because it comes too late. Most states that intend to adopt the California 2007 rule have already commenced their rulemaking processes and many states have completed those processes. If EPA simply does not decide the issue, it will not become clear for many months whether the absence of a decision is simply a workload issue or adoption of EMA's comment – and so those states will conclude their rulemaking processes. If on the other hand, EPA announces that it will take the extraordinary step of holding its waiver decision for several years pending additional technical reviews, that step, by itself, is likely to increase concerns within states about the fate of the Federal 2007 rule and encourage more states to adopt the California 2007rule.

CONCLUSION

STAPPA and ALAPCO recognize that certain potential purchasers of 2007 trucks remain concerned that the necessary technologies might not be fully developed at that time. This issue is inherent in any program that relies on relatively lengthy lead times to drive innovation. However, the presence of this issue is not a reason to delay or deny California's request for a waiver. In establishing the waiver procedure under section 209, Congress necessarily intended that California would address such issues as they arise with respect to California standards. California has addressed such issues on numerous occasions and is fully capable of resolving this issue if, in fact it does arise in the context of the California 2007 HDDE rule.

Congress determined (1) that the states have "primary responsibility" for "air pollution prevention and control" and (2) that California should be permitted to adopt and enforce a motor vehicle emissions program that was more stringent than the Federal program. As set out above, and in California's waiver request, these principles are reflected in the language and the structure of the CAA and mandate that EPA narrowly limit its role in reviewing waiver requests from California. The record in support of California's waiver request is quite strong, incorporating key information from the companies that will be called upon to provide the necessary technology. Given the nature of these proceedings, STAPPA and ALAPCO must necessarily submit their comments without an opportunity[18] to review the all of the comments of potential customers or others who may oppose the grant of California's waiver request. However, given the EMA concession that the systems are currently considered technologically feasible and limited opportunity for potential customers or others to know and understand the trade secrets of each of the potential manufacturers of applicable pollution control systems, it is difficult to imagine what information could be submitted that would warrant a denial of California's request. Moreover, as we have pointed out, after acquired information has no relevance to whether EPA should approve California's request. Finally, the suggestion of EMA that EPA should consider factors outside of section 209 and employ procedures that would frustrate review of EPA's decision on California's waiver request are contrary to law and unsupported by the record in this matter.

EPA should grant California request for a waiver because (a) a waiver is in the public interest; (b) a waiver will assist California and other states in carrying out their responsibilities under the CAA and (c) EPA is required to do so under the waiver provisions of the CAA.

[18] If EPA believes that a showing is made by some person in the course of this comment period that California's waiver request should be denied, administrative due process would require that EPA make the information that such a proposed determination would be based on available to the public and provide an additional opportunity to comment on EPA's proposed denial and the reasons therefore.