

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

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

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

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

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

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

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

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

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

must be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C), as EPA has interpreted that subsection in the context of motor vehicle waivers.<sup>5</sup> In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. Secondly, California's nonroad standards and enforcement procedures must be consistent with section 209(e)(1), which identifies the categories permanently preempted from state regulation.<sup>6</sup> California's nonroad standards and enforcement procedures would be considered inconsistent with section 209 if they applied to the categories of engines or vehicles identified and preempted from State regulation in section 209(e)(1).

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

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

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

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

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

#### B. The SORE Amendments Request

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

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

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

Section 85.1603 provides in applicable part:

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

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

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

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

*Primarily used* means used 51 percent or more.

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

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

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

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

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

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

or nonroad vehicles subject to regulation under this Act—

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

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

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

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

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