



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

APR 13 1998

OFFICE OF  
AIR AND RADIATION

Honorable David M. McIntosh, Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform and Oversight  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your February 23, 1998, letter in which you requested information about the Environmental Protection Agency's (EPA) position on the applicability of the Small Business Regulatory Enforcement Fairness Act (SBREFA) to EPA's decisions under section 209 of the Clean Air Act. The following information is in response to the questions you raise in that letter.

Question 1: Since enactment of both section 209(b), as amended, and 209(e), has EPA ever formally determined whether or not such a waiver is or is not a rule subject to SBREFA? If yes, please provide a copy of that determination. Was the determination and the basis for it made available to the public for review and comment by publication in the Federal Register or any other means? If that has not happened, please explain why. Please also provide any letters, memoranda, notes or other documents in EPA files for 1977 to the present, including any rulemaking docket files, that address in any way the question of whether or not a waiver is a rule, including any correspondence with the Office of Management and Budget about the nature of such waivers and about the procedures for granting them.

Answer: EPA has found on several occasions, both prior to and since the enactment of SBREFA, that waiver determinations under CAA section 209 are not rules subject to the Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, which was amended by SBREFA. (The term "waiver" is used for actions under section 209(b) and the term "authorization" is used for actions under section 209(e) - for purposes of this letter, both actions will be referred to as waivers.) In fact, EPA has included language indicating that waiver determinations are not rules subject to the RFA in Federal Register notices granting waivers since 1981. Copies of Federal Register notices where such determinations were made are enclosed and included in response to Question 6. SBREFA did not change the applicability of the RFA (except with regard to certain IRS interpretive rules not relevant here). Therefore, since the enactment of SBREFA, EPA has continued to find that the RFA is not applicable to waiver determinations.

EPA has consistently held in all of its waiver notices that waiver proceedings are not rulemakings. (See Answer to Question 2 below for the rationale upon which EPA relies in making this decision.) SBREFA (in particular, the RFA, as amended by SBREFA, and the Congressional Review Act (CRA), 5. U.S.C. §§ 801-808) apply on their face only to rules. Therefore, neither the RFA or the CRA apply to waivers. The issue of SBREFA's applicability to waiver determinations has not been raised by commenters in any waiver determination since SBREFA was enacted.

As you have requested, EPA is attaching any documents found in EPA files that address in some manner whether a waiver should be considered a rule. Attachments 1-10 are documents relating to EPA's consideration of California's Low Emission Vehicle (LEV) waiver request. During this proceeding, EPA received a letter from OMB indicating waivers should be submitted to OMB for review under Executive Order 12291. EPA also received a public comment asserting that decisions on waiver requests should be considered "major rules" subject to Executive Order 12291 (requiring submission to OMB for review and the Agency preparation of a Regulatory Impact Analysis). A copy of the letter and the comment, other public comments which responded to it and EPA's response to it comprise this first group of attachments.

The second group of attachments are internal EPA documents. Attachments 11-13 are documents prepared by attorneys in EPA's Office of Mobile Sources which contain discussions of EPA's position as to whether section 209 waiver decisions are rules. Attachments 14 and 15 are draft documents, related to two waiver decisions, containing brief discussions of this issue and comments by attorneys from EPA's Office of General Counsel. Attachments 16A and 16B are two drafts of a table containing information regarding whether certain EPA actions, including waiver decisions under section 209, are rules.

We wish to note that the records in this second group of attachments are deliberative in nature and/or contain material subject to the attorney-client privilege. In providing you with these records, we are not waiving the Agency's ability to invoke exemption 5 under the Freedom of Information Act (FOIA) for deliberative or attorney-client privileged documents or the work product/attorney-client privileges in general. We therefore request that you preserve their confidentiality by refraining from providing privileged records or copies of those records, or from otherwise communicating the contents of those records, to persons other than those with a need to know as part of this Congressional oversight review. We have enclosed with this letter a list of the records that indicates which records are covered by the attorney-client privilege or the deliberative process privilege, or both. Given the particular sensitivity of these privileged documents, we also have marked them "privileged documents."

Question 2. If the answer to the first sentence in question 1 is no, what is the basis for EPA apparently concluding at any time that such waivers are not rules?

Answer: The consideration and granting of waivers under section 209 has the status of adjudication rather than rulemaking. Therefore, the statutory requirements for rules, including the requirements of the RFA and the CRA, are not applicable. The distinction between, and treatment of, adjudications and rulemakings is significant. The Administrative Procedure Act, 5 U.S.C. § 551, distinguishes between “rules” and “adjudications.” It defines each term as follows:

(4) *Rule.* “Rule” means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency... .

(6 and 7) *Order and adjudication.* “Order” means the whole or any part of the final disposition, whether affirmative, negative, injunctive, or declaratory in form, of any agency in any matter other than rule making but including licensing. “Adjudication” means agency process for the formulation of an order.

A rulemaking is generally an agency action which regulates the future conduct of regulated groups or persons and that is essentially “legislative” in nature. It establishes future legal requirements and is primarily concerned with policy considerations. The issues in rulemaking typically do not deal with evidentiary facts, but rather with policy-making conclusions. See *Attorney General’s Manual on the Administrative Procedure Act*, U.S. Department of Justice 14 (1947).

On the other hand, adjudications are concerned with application of specific facts to pre-established discernible criteria, e.g. permitting or licensing proceedings including the grant, denial, suspension, renewal of, for example, radio broadcasting licenses or certificates of public convenience and necessity. *Id.* at 16. They generally involve determining whether particular parties have met specific criteria, rather than determining broad criteria or standards for numerous parties. *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245, 93 S.Ct. 810, 821 (1973) (“While the line dividing them may not always be a bright one, [there is] a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.”)

EPA’s waiver determinations under section 209 are adjudicatory proceedings, rather than rulemakings. A review of the applicable statutory language makes clear that EPA’s determination of whether a waiver is to be granted is an adjudication. First, waivers are not actions of a legislative nature creating general policies based on broad concerns. Instead, waivers are actions applicable to a single party, California, to determine whether a particular portion of the statute can be waived for that party. This is in most respects similar to a licensing or permitting proceeding, where an agency determines whether a party has met the specific requirements to have a particular

action be taken with regard to that party. The fact that the party is another government entity does not change the conclusion that EPA's action is an adjudication. Though the action that California takes in promulgating particular standards is a rulemaking, EPA's narrow review under section 209 is an adjudication.

Moreover, the decision whether to grant a waiver is based on very specific and narrow criteria, expressly set forth by Congress (see section 209(b)(1)(A-C)). This indicates that EPA's assignment under section 209 is to review the particular facts in an individual waiver proceeding and to measure those facts against the specific criteria necessary for a waiver. EPA's assignment, therefore, is not to determine what the best policy should be, but to determine whether the specific requirements of the law have been met in a particular circumstance. Additionally, waivers are "granted," indicating again that the proceeding is similar to a permitting or licensing proceeding.

Further indication that Congress did not require that EPA's determination under section 209 be rules is that, unlike several other sections in the statute, section 209 does not require that EPA take such action "by rule" (see, e.g., CAA sections 110(m), 112(b)(2), 169A(c)(1), 202(i)(3)(A)).

Question 3: As you know, section 310 of the CAA provides that "this Act shall not be construed as superseding or limiting the authorities and responsibilities, under any other provision of law, of the Administrator or any other Federal officer, department, or agency." Do you agree that this would include SBREFA? Do you also agree that there are no provisions in these laws or the CAA that in any way preclude the applicability of SBREFA (including the CRA) to the CAA in general and section 209(b) and (e) waivers in particular? If you answer no to any of these questions, please explain the basis for EPA's position.

Answer: EPA agrees that SBREFA, as well as all other federal statutes, are "other provision[s] of law" for the purposes of CAA section 310. EPA also agrees that no provision of the Clean Air Act generally precludes the applicability of SBREFA to the Clean Air Act. However, in order for particular requirements of SBREFA to apply to a particular action under the Clean Air Act, SBREFA must by its own terms be applicable to that action.

As discussed above, EPA's waiver determinations under section 209(b) and 209(e) of the CAA are adjudicative actions, not rules. As discussed in answer 4 below, the RFA is applicable only to rules for which a general notice of proposed rulemaking is required. Likewise, the CRA is only applicable to rules. Thus, by their own terms, the RFA and the CRA are not applicable to section 209 waiver determinations.

Moreover, EPA may only deny a waiver to California under section 209 if EPA makes one of three narrow findings:

- (A) that California was arbitrary and capricious in determining that its standards will be, in the aggregate, at least as protective as applicable federal standards;
- (B) that California does not need its standards to meet compelling and extraordinary conditions; or
- (C) that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Clean Air Act.

EPA may review only these criteria in determining whether to grant a waiver. *See Motor and Equipment Mfrs. Ass'n v. EPA*, 627 F. 2d 1095, 1111, 1116-1119 ("MEMA"). Though the "consistency with section 202(a)" criteria of section 209(b)(1)(C) requires EPA to determine whether California regulations are "technologically feasible," EPA may not deny a waiver based on a broad review of the economic effects of California regulations on small or other businesses. *Id.* Section 606 of the RFA provides that the RFA's analytical requirements "do not alter in any manner standards otherwise applicable by law to agency action." Therefore, even if the SBREFA were otherwise applicable to waiver determinations under section 209, the language of CAA section 209 and RFA section 606 would preclude EPA from denying a waiver based on the factors to be considered under the RFA.

Question 4: In light of the enactment of SBREFA, please explain what actions EPA has taken to determine whether or not such waivers are subject to the provisions of SBREFA, taking into consideration the definition of the term "rule" as used in connection with SBREFA and Regulatory Flexibility Act of 1980. If none, please explain why. In this regard, we note that the GAO found that a plan for the Tongass National Forest Land and Resource Management, issued by the U.S. Forest Service, is a "rule" subject to SBREFA, and it is not "procedural." GAO Testimony at 4. The GAO told the Senate Committee last July that to "conclude otherwise could effectively frustrate the SBREFA congressional review mechanism." *Id.* It is my understanding that the Forest Service's plan, unlike waivers under section 209 of the CAA, did not include substantial trappings of a rulemaking. Please consider the GAO testimony in your reply.

Answer: As discussed above, EPA has held for many years that its waiver determinations are not rules. The RFA applies only to rules for which a notice of proposed rulemaking is required under Administrative Procedure Act (APA) section 503 or any other statute. As waiver determinations under section 209 are not rules under the APA or the CAA, the RFA is not applicable to them. Similarly, the CRA applies only to rules, as defined in the APA (with certain exclusions), and thus is not applicable to waiver determinations under section 209.

Regarding the testimony of the GAO regarding the Forest Service's plan for the Tongass National Forest Land, EPA notes that waivers appear to be distinguishable from the plan in that, as discussed above, waivers are not "agency statement[s] of general ... applicability and future effect designed to implement, interpret, or prescribe law or policy," but instead are adjudications,

akin to permitting or licensing proceedings. The Agency, when it determines whether or not to issue a waiver, does not engage in decision-making regarding essentially legislative issues of broad policy, as is typical for rules, but instead merely applies the particular facts presented in the proceeding to the narrow and specific criteria established by Congress under section 209.

Regarding the requirement of section 209 that EPA provide notice and opportunity for public hearing prior to issuing a decision, this procedural requirement is consistent with adjudicatory proceedings. Further indication that Congress did not require such proceedings to be conducted through rulemaking is the fact that section 209 does not require notice and comment rulemaking and that Congress, in listing particular Agency actions subject to rulemaking procedures under CAA section 307(d), omitted any mention of section 209 waiver proceedings, while including numerous other Title II actions.

Question 5: Section 209(e) requires regulations to "implement" that section. Please provide a copy of such regulations.

Answer: A copy of these regulations as of July 1, 1997 is attached. Also attached is a Direct Final Rule, dated December 30, 1997, making minor revisions to these regulations.

Question 6: Please provide a table showing (1) the date of all waiver applications and revisions or amendments thereto under section 209(b) since 1977 and (2) the date of the Federal Register notice of each application and EPA's request for comment and opportunity for public hearing. Please indicate on this table when and where a hearing was held and the action taken by EPA on such application and include a copy of the Federal Register pages regarding such notice and action. Please provide a second table providing the same information regarding any waivers under section 209(e) since 1990. In each table, please show what laws and Executive Orders (other than the CAA) have been identified each time in the Federal Register documents as being applicable or inapplicable to each waiver application, including any reference to SBREFA and the CRA.

Answer: The requested tables are attached. EPA has filled in as much responsive information as it has in its files.

Question 7: Is there any reason to believe in the case of both sections 209(b) and (e) that it would not be in the public interest to perform the analyses required under SBREFA in order to ensure the protection of small entities and consumers affected by any California applications and EPA waiver determination? If you believe there is a reason that it is not in the public interest, please set forth that reason and the basis for it.

Answer: There appear to be several reasons for finding that it would not be in the public interest for EPA to conduct its own independent small business analyses of California's rules in the process of determining whether a waiver shall be issued under section 209. In promulgating section 209, Congress intended that California be granted substantial freedom to promulgate its

own motor vehicle emission control program, while strictly limiting oversight and interference from the federal government. *See Ford v. EPA*, 606 F. 2d 1293, 1297 (D.C. Cir. 1979) (“Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight”), H.R.Rep. No. 95-294, 95th Cong., 1st Sess. 301-02 (1977) (“The Committee amendment is intended ... to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”). EPA is not permitted to substitute its own judgment for California’s regarding what California regulations are appropriate. H.R.Rep. No. 95-294 at 302. Nor is EPA permitted to deny a waiver based on criteria not found in the statute. *See Ford*, 606 F. 2d at 1301, *MEMA*, 627 F. 2d at 1116-19. Therefore, were EPA to perform the independent analyses of California’s regulations that would be called for under the RFA, then EPA would appear to contradict the intent of Congress, recognized in various judicial determinations interpreting such intent, that EPA keep its oversight of California’s motor vehicle program to a minimum. Under section 209, EPA may only consider impact on businesses, including small businesses, in making the limited determination of whether the specific California standards at issue are technologically feasible. “[T]he burden of proof lies with the parties favoring denial of the waiver.” *MEMA*, 627 F.2d at 1121. The broader analysis under RFA would not be appropriate for making this limited determination.

Such independent federal analyses would be particularly inappropriate given that California itself engages in detailed analyses of economic impact, including impact on businesses, in the course of promulgating its regulations, as is required by the California Administrative Procedures Act. CAL GOV’T CODE §§ 11340 et seq. Sections 11346.3 and 11346.5 require that agencies proposing to adopt regulations assess the economic impact on businesses and individuals; to avoid unnecessary or unreasonable regulations or reporting, record keeping or compliance requirements; and to assess the creation, expansion or elimination of businesses and jobs in the state. Agencies must also assess, when proposing and adopting regulations, whether there is a significant impact on business. If so, the agency must provide detailed information regarding the impact of the proposal on businesses, including the types of businesses affected and the consideration of alternatives that would lessen adverse impact on businesses, and must invite proposals on such considerations, including exemptions and differing compliance or reporting requirements. If the agency determines that there is no adverse impact, the agency must provide the evidence upon which it relies for that finding.

Persons who wish to challenge California’s regulations or who believe California did not follow appropriate procedures, may challenge California’s regulations in California courts. *MEMA*, 627 F.2d at 1105.

By contrast, EPA can only grant or deny a waiver under section 209(b). The Clean Air Act gives EPA no authority to revise California’s standards to take account of small business concerns.

Given the intent of Congress and language of section 209 regarding the limited role of EPA in the section 209 waiver process, and given the extensive economic analysis performed by California, it would be inappropriate and would serve little purpose for EPA to perform such an analysis or to second-guess California's detailed inquiries into these issues. Further, given the limited resources of the Agency, it seems inappropriate for EPA to spend such resources to engage in federal analyses of state action upon which the Agency generally may not rely in deciding whether to grant a waiver to California.

Question 8: Please report to me on EPA's record in notifying Congress pursuant to the CRA of the actions taken granting waivers and on EPA's intentions with respect to future waiver decisions.

Answer: As section 209 waiver decisions are not subject to the requirements of the CRA, EPA has not notified Congress of its final waiver actions. At this time, EPA has no plans to notify Congress with regard to future waiver actions, for the reasons discussed above.

In closing, we believe EPA has made a diligent, good faith effort to identify the Agency records that are responsive to your request. Nevertheless, no process is foolproof. Accordingly, if at a later date we uncover additional records that are responsive, we will notify you immediately and provide a supplemental response. Should you have any further questions or need further information regarding this matter please feel free to contact me or have your staff contact Mr. Dana Ott of our Office of Congressional and Intergovernmental Relations at (202) 260-5466.

Sincerely yours,

**ORIGINAL SIGNED BY  
RICHARD D. WILSON**

Richard D. Wilson  
Acting Assistant Administrator  
for Air and Radiation

Enclosures

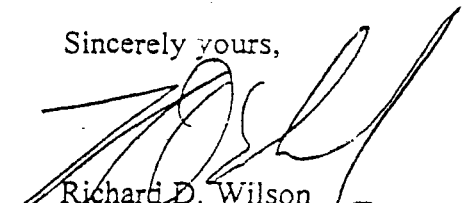
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Sincerely yours,



Richard D. Wilson  
Acting Assistant Administrator  
for Air and Radiation

Enclosures