

State of California
AIR RESOURCES BOARD

**Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Agency Response**

PUBLIC HEARING TO CONSIDER THE ADOPTION OF CALIFORNIA REGULATION
AND CERTIFICATION PROCEDURES FOR LIGHT-DUTY ENGINE PACKAGES FOR
USE IN NEW LIGHT-DUTY SPECIALLY-PRODUCED MOTOR VEHICLES FOR 2019
AND SUBSEQUENT MODEL YEARS

Public Hearing Date: October 25, 2018
Agenda Item No.: 18-8-3

I. GENERAL

- A.** The Staff Report: Initial Statement of Reasons for Rulemaking (“staff report” or “ISOR”), entitled “Proposed California Regulation and Certification Procedures for Light-Duty Engine Packages for Use In New Light-Duty Specially-Produced Motor Vehicles for 2019 and Subsequent Model Years,” released September 4, 2018, is incorporated by reference herein. The staff report contained a description of the rationale for the proposed amendments. On September 4, 2018, all references relied upon and identified in the staff report were made available to the public.

In this rulemaking, the California Air Resources Board (CARB or the Board) has adopted a new regulation and associated certification procedures for light-duty engine packages for use in a new light-duty specially-produced motor vehicle (SPMV), also referred to as a replica car. The new regulation and associated certification procedures, referred to herein as the “Replica Cars Regulation”, establish optional requirements that will allow manufacturers to certify a light-duty engine package intended for use in an SPMV, complete with emissions control systems (ECS), on-board diagnostics (OBD) equipment, installation instructions, and warranty. SPMV manufacturers could purchase and install a certified engine package into an SPMV, and qualify for a CARB Executive Order (EO), which would enable them to sell those SPMVs to end users in California.

On September 4, 2018, CARB posted a notice for an October 25, 2018, public hearing to consider the proposed regulatory action. The Staff Report was also released on September 4, 2018, and was made available for a public review and comment period beginning September 7, 2018, and ending October 22, 2018. The Staff Report provides the rationale for the proposed amendments. The text of the proposed new regulation in title 13, California Code of Regulations (CCR), sections 2209 through 2209.10, and the incorporated “California Certification Procedures for Light-Duty Engine Packages for Use In New Light-Duty Specially-Produced Motor Vehicles for 2019 and Subsequent Model Years” (incorporated certification procedures) were included as Appendices to the Staff Report. These documents were also posted on CARB’s website for the rulemaking at:

<https://ww2.arb.ca.gov/rulemaking/2018/certification-procedures-light-duty-engine-packages-use-new-light-duty-specially>

On October 25, 2018, the Board conducted a public hearing and received oral and written comments. Staff's presentation to the board included a slide titled "Proposed 15 Day Changes Regulation and Procedures." At the conclusion of the hearing, the Board adopted Resolution 18-45 that covered the proposed adoption of title 13, CCR new sections 2209 through 2209.10 and the incorporated certification procedures that were initially proposed by staff and described in the Notice of Public Hearing (45-Day Public Notice) and Staff Report.

Resolution 18-45 directed the Executive Officer to adopt the new regulation and the incorporated certification procedures, as proposed by staff, and as modified in accordance with staff's slide presentation to Resolution 18-45, and to determine if additional modifications to the originally proposed regulation and incorporated certification procedures were appropriate, and if the Executive Officer so determined, to make the modified regulatory language available for public comment for a period of at least 15 days before taking final action to adopt the regulation. The Executive Officer was also directed to consider such written comments that were submitted during the public comment period; to make such modifications as may be appropriate in light of the comments received, or to present the regulations to the Board for further consideration if warranted in light of the comments.

Subsequent to the hearing, staff proposed modifications to the regulatory text. These post-hearing modifications are: A clarification to the definition of an SPMV, changes to quantity of original historic vehicles produced, a phase in period for the evaporative system purge monitor, capless fuel storage system in lieu of evaporative system leak monitoring, and other nonsubstantive changes.

The text of all the modifications to the originally proposed amendments was made available on April 25, 2019, for a supplemental 15-day comment period by issuance of a "Notice of Public Availability of Modified Text and Availability of Additional Documents." The comment period ended May 10, 2019. The "Notice of Public Availability of Modified Text and Availability of Additional Documents" listed the CARB Internet site from which interested parties could obtain the complete text of the regulation that would be affected by the modifications to the original proposal, with all of the modifications clearly indicated. These documents were also posted on CARB's webpage for this rulemaking: <https://ww2.arb.ca.gov/rulemaking/2018/certification-procedures-light-duty-engine-packages-use-new-light-duty-specially>. One written comment was received during this 15-day comment period.

After considering the comments received during the 15-day comment period and all other documents in the rulemaking record, the Executive Officer issued Executive Order R-19-006, adopting title 13, CCR, sections 2209, 2209.1, 2209.2, 2209.3, 2209.4, 2209.5, 2209.6, 2209.7, 2209.8, 2209.9, and 2209.10, and the incorporated certification procedures.

This Final Statement of Reasons (FSOR) updates the Staff Report by identifying and providing the rationale for the modifications made to the originally proposed regulatory text, including non-substantial modifications and clarifications made after the close of the 15-day comment period. This FSOR also contains a summary of the comments received by the Board on the proposed amendments and the modifications and CARB's responses to those comments.

B. MANDATES AND FISCAL IMPACTS TO LOCAL GOVERNMENTS AND SCHOOL DISTRICTS

The Board has determined that this regulatory action will not result in a mandate to any local agency or school district the costs of which are reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code

C. CONSIDERATION OF ALTERNATIVES

For the reasons set forth in the Staff Report, in staff's comments and responses at the hearing, and in this FSOR, the Board determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed, or would be as effective and less burdensome to affected private persons, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law than the action taken by the Board.

II. MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL

A. MODIFICATIONS PRESENTED AT THE BOARD HEARING AND PROVIDED FOR IN THE 15-DAY COMMENT PERIOD

The following summarizes the substantive modifications and the rationale for making such modifications as released on April 25, 2019 (15-day notice), for public comments.

1. Section 2209.1 (a)(1): Staff removed the definition of "ASTM" as this language is not used in the Replica Cars Regulation and is not necessary. Additional amendments are proposed to reflect the change in numbering of the subsequent definitions.
2. In section 2209.1 (a)(17)(A): Staff clarified the definition of a SPMV. The required original production run (quantity of historic vehicles produced) has been reduced from 500 units to 50 units with the qualification "of a unique body style" added. This means, e.g., that 1964 through 1966 model year Mustangs are considered to be of a "unique body style." The revised styling of the 1967 and 1968 Mustangs would be another "unique body style." Similarly, 1967 through 1969 model year Camaros would be another distinct "unique body style." At least 50 examples would need to

have been historically produced, in consecutive model years, with the final production dating back at least 25 years ago, for any unique body style to be eligible for certification as a SPMV.

This revision from 500 units to 50 units was requested by industry so that popular vehicles with less than 500 examples originally produced like the 427 Cobra, GrandSport Corvette, and the GT-40 would be included. However, note that, for example, the Daytona Coupe with its low production numbers (less than 50 examples) and unique body styling (many difference from the Standard Shelby Cobra) will not qualify under these proposed changes. Limitations on historical production numbers and on design are needed to help CARB staff efficiently and effectively confirm proposed vehicles for certification are actually replica vehicles, rather than one-offs. Without such limitations, staff would need to engage in complex and subjective investigations and determinations regarding the status of each vehicle for which certification is sought. These provisions allow CARB staff to efficiently determine whether vehicles are in fact eligible.

The term “original body lines” was added, with exclusions, to allow for certain customization of the SPMV, while maintaining the recognizable style and proportions of the historically-produced vehicle.

As stated in the ISOR for this rulemaking (ISOR at page 24), CARB staff still expects that the Replica Cars Regulation would result in annual sales of 400 to 500 SPMVs. SPMVs are “lifestyle” vehicles; these vehicles would be expected to displace trips from other vehicles owned. However, they also are expected to be low-mileage vehicles given their limited practicality, and are typically owned more for sport and nostalgia as opposed to daily driving. SPMVs are also expected to be garaged when not on the road.

3. In section 2209.2 (i)(1): Staff has added a new subsection (1) to address the exemption of the evaporative system purge monitoring for the 2019 through 2022 model years.

Engine manufacturers will demonstrate, at the time of certification, that the evaporative purge system is working and that it is durable. Delaying the monitoring requirement will give engine manufacturers more time to develop a suitable strategy. Affected vehicles should be limited based on limited initial demand and lack of production.

4. In section 2209.2 (i)(2): Staff added an option to substitute the incorporation of a capless fuel storage system for evaporative system leak monitoring.

Staff had initially proposed an evaporative system leak monitor that was capable of detecting a leak greater than or equal to a leak caused by a missing fuel cap. Engine manufacturers were concerned that an evaporative system leak monitor could not be designed into the software

of the stand-alone engine package where fuel tank size, location, construction material, and configuration were all unknowns. A capless fuel storage system would eliminate the possibility of a missing fuel cap. SPMV manufacturers, at the time of certification, will have to demonstrate their capless fuel storage system is sealed and durable, either by providing durability data or documentation that demonstrates that proposed capless fuel storage system has been or is currently used on California certified on-road vehicles.

5. Section 2209.4(a): Correctly identify the respective roles of the National Highway Traffic and Safety Administration and the United States Environmental Protection Agency relating to regulating SPMV manufacturers.
6. Section 2209.9(b): “A engine manufacturer” is changed to “An engine manufacturer” in the first sentence.
7. In section 2209.9 (c): Staff added this new subsection to address exclusions to the OBD Enforcement Procedures. Section 2209.9 (c)(1) exempts the readiness status for the gasoline evaporative system. Section 2209.9 (c)(2) exempts the gas cap off leak monitor.

These subsections have been added to protect consumers during a smog check inspection, if these monitors have not completed, a smog check technician will not fail the vehicle based on these subsections.

8. In California Certification Procedures for Light-Duty Engine Packages for Use in New Light-Duty Specially-Produced Motor Vehicles for 2019 and Subsequent Model Years, staff is incorporating by reference ASTM E 29-67. This ASTM procedure was referenced, but erroneously left un-incorporated.

B. NON-SUBSTANTIAL MODIFICATIONS

Subsequent to the 15-day public comment period mentioned above, staff identified the following additional non-substantive changes to the regulation:

1. In section 2209.4(b), staffed changed the Division name from “Emissions Compliance, Automotive Regulations and Science Division” to “Emissions Certification and Compliance Division”.
2. In the California Certification Procedures for Light-Duty Engine Packages for Use in New Light-Duty Specially-Produced Motor Vehicles for 2019 and Subsequent Model Year, page 11, section 10, subsection a), staff corrected the respective roles of the National Highway Traffic and Safety Administration and the United States Environmental Protection Agency to be consistent with the corresponding change identified in the 15-day Notice (see 5. Section 2209.4(a) above).

3. In section 2209.5(c)(5), staff removed the sentence “The documentation is not required for certified engine packages certified before July 15, 2019.” This sentence is unclear, and was errantly included in the regulation text.

The above described modifications constitute non-substantial changes to the regulatory text because they more accurately reflect the numbering of a section and correct spelling and grammatical errors, but do not materially alter the requirements or conditions of the proposed rulemaking action.

C. UPDATE OF THE INFORMATION IN THE INITIAL STATEMENT OF REASONS

In the interest of completeness, CARB would like to provide additional necessity for the following regulatory provision:

- Section 2209.10(b)(1) – Affidavit. Confirmation under penalty of perjury for the affidavit for certification that the engine package has been installed into an SPMV per the engine manufacturer’s written instructions, is necessary to be consistent with the certification requirements found in the Specially Constructed Vehicles regulation, section 2218(b)(1), title 13 CCR.

III. DOCUMENTS INCORPORATED BY REFERENCE

The regulation and the incorporated certification procedures adopted by the Executive Officer incorporate by reference the following documents:

1. "California Certification Procedures for Light-Duty Engine Packages for Use in New Light-Duty Specially-Produced Motor Vehicles for 2019 and Subsequent Model Years" as adopted June 17, 2019.
2. California 2015 and Subsequent Model Criteria Pollutant Exhaust Emission Standards and Test Procedures and 2017 and Subsequent Model Greenhouse Gas Exhaust Emission Standards and Test Procedures for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles" as last amended September 2, 2015.
3. California Evaporative Emission Standards and Test Procedures for 2001 and Subsequent Model Motor Vehicles," last amended September 2, 2015.
4. California Exhaust Emission Standards and Test Procedures for 2018 and Subsequent Model Zero-Emission Vehicles and Hybrid Electric Vehicles, in the Passenger Car, Light-Duty Truck and Medium-Duty Vehicle Classes," last amended September 3, 2015.
5. California Non-Methane Organic Gas Test Procedures for 2017 and Subsequent Model Year Vehicles," adopted September 2, 2015.
6. American Society of Testing and Materials. "ASTM E 29-67 Standard Recommended Practice for Indicating Which Places of Figure are to be Considered Significant in Specified Limiting Values," effective November 1, 1967 (Reapproved 1973). Incorporated by reference in California Certification Procedures for Light-Duty Engine Packages for Use in New Light-Duty Specially-Produced Motor Vehicles for 2019 and Subsequent Model Years.
7. Title 40, Code of Federal Regulations, section 86.1827-01, last amended May 7, 2010.
8. Title 40 Code of Federal Regulations, section 86.1821-01, last amended April 28, 2014.
9. Title 40, Code of Federal Regulations, section 86.1828-01, last amended April 28, 2014.
10. Title 40 Code of Federal Regulations, section 1051.130, last amended July 13, 2005.

These documents were incorporated by reference because it would be cumbersome, unduly expensive, and otherwise impractical to publish them in the California Code of Regulations. In addition, some of the documents are copyrighted, and cannot be reprinted or distributed without violating the licensing agreements. The documents are

lengthy and highly technical test methods and engineering documents that would add unnecessary additional volume to the regulation. Distribution to all recipients of the California Code of Regulations is not needed because the interested audience for these documents is limited to the technical staff at a portion of reporting facilities, most of whom are already familiar with these methods and documents. Also, the incorporated documents were made available by CARB upon request during the rulemaking action and will continue to be available in the future. The documents are also available from college and public libraries, or may be purchased directly from the publishers.

IV. SUMMARY OF COMMENTS AND AGENCY RESPONSE

Below is a list of those who submitted comments during the 45-day comment period, at the October 25, 2018 board Hearing, or gave oral testimony at the Board Hearing:

Commenter	Affiliation
Jesse Glickenhau [*]	Scuderia Cameron Glickenhau
Stuart Gosswein [*]	Specialty Equipment Market Association
Braden Liberg [*]	Edelbrock, LLC
Peter Treydte	Specialty Equipment Market Association
Lance Stander	Superformance
Cameron Wynne	DeLorean Motor Company

The commenter listed above with a single asterisks (*) submitted written comments and gave oral testimony at the October 25, 2018 Board Hearing. During the 15-day supplemental comment period, the Board received written comments from:

Commenter	Affiliation
Jesse Glickenhau	Scuderia Cameron Glickenhau

Set forth below is a summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. Only objections or recommendations directed at the agency’s proposed action or the procedures followed by the agency in proposing or adopting the action are summarized as permitted by Code of California Regulations, title 2, section 11346.9. Repetitive or irrelevant comments have been aggregated and summarized as a group. A comment is “irrelevant” if it is not specifically directed at the agency’s proposed action or to the procedures followed by the agency in proposing or adopting the action. The comments have been grouped by topic whenever applicable.

All comments are taken verbatim from documents submitted during the 45-day and 15-day comment periods, or from the October 25, 2018 Board Hearing transcript.

A. COMMENTS AND TESTIMONY PRESENTED DURING THE 45 DAY PUBLIC COMMENT PERIOD, OR AT THE OCTOBER 25, 2018 HEARING

1. Comments of Support

Comment

In support (Jesse Glickenhau, Scuderia Cameron Glickenhau): A slide presentation was given during the Board hearing that highlighted the following: Scuderia Cameron Glickenhau (SCG) was described as a National Highway Traffic and Safety Administration (NHTSA) approved low volume manufacturer, NHTSA has approved SCG low volume replica models such as the Baja Boot, the objectives of the California Air Resources Board to align with the federal FAST Act were not achieved with the proposed regulation, "CARB's proposed replica definition differs significantly from the FAST Act's definition." The Baja Boot meets the FAST Act definition of a replica. SCG proposed two solutions: The California Air Resources Board replica definition = FAST Act replica definition or add the following to the California replica definition "or any vehicle which has, by the time of the adoption of this regulation, been approved by NHTSA as a replica, as evidenced by the vehicle's identification in a NHTSA-Approved low volume manufacturer's VIN decoder." If changes are adopted: SCG commits to spend at least \$500,000 over the next 12 months in the state to design, engineer, fabricate, build, and test a replica Baja Boot and to spend an estimated \$10 to \$12 million each year for the next several years in the state to manufacturer and build replica Baja Boots.

Agency Response A.1.a: The California Air Resources Board appreciates the support of Scuderia Cameron Glickenhau and the informative presentation given at the Board hearing. The intent of the SPMV regulation for California was to provide for the recreation of past vehicle models (i.e., on-road, light-duty production vehicles which were sold to the public at least 25 years ago). During the 15-day comment period, staff proposed modifications to the definition of an SPMV according to the slide presentation during the hearing. These changes allow popular models, such as the 427 Cobra, GrandSport Corvette, and the GT-40 to be included in the California program; manufacturers will also have the ability to customize their recreations, to a certain extent, given revisions to the definition. "Unique body style" and consecutive model years was also added to the definition to keep with the intent of the regulation, which was the recreation of production heritage classics. Since the SPMV regulation has been written for the recreation of production heritage classics, as defined in section 2209.1 (a)(17)(A) of the regulation, show vehicles, concept vehicles, custom vehicles, medium and heavy duty vehicles, off-road vehicles, and other similar types of vehicles that were never meant to be sold to the public do not qualify for this program. The California Air Resources Board has no oversight over the FAST Act and how it will be implemented, nor does the California Air Resources Board have any role vis a vis NHTSA and its safety-related approval processes. The California Air Resources Board is ready to work with SCG on future heritage recreations that meet the intent of the regulation. The California Air

Resources Board's On-Road New Vehicle & Engine Certification Program may be another option for SCG.

Comment

In support (Stuart Gosswein, Specialty Equipment Market Association (SEMA))

Highlights from submitted comments, verbal comments at the hearing and a brief background of SEMA and the Fixing America's Surface Transportation (FAST) Act were of support.

SEMA is pleased to support the SPMV regulation, contingent on the inclusion of the proposed CARB-staff's revisions.

SEMA-supported, CARB staff's proposed changes to the SPMV regulations that would address technical and cost challenges for an evaporative emissions monitoring system.

SEMA welcomes CARB's proposed option to address leak check, delaying the purge check and granting flexibility of On-Board Diagnostics (OBD) readiness status.

SEMA-supported, CARB staff's proposed changes to the SPMV regulation to define SPMV and reduce the threshold for demonstrating that a vehicle had been commercially produced, from 500 to 50 units. SEMA also supported the definition that includes the word "resemble" which recognizes that a SPMV is not necessarily a mere "replication" of an iconic vehicle.

SEMA urges CARB to reconsider its decision and permit credits to be earned as an additional incentive for the incorporation of an electric vehicle engine packages.

Agency Response A.1.b: The California Air Resources Board appreciates the involvement and support it has received from SEMA, from the first workshop to all the work group meetings. Staff and SEMA stayed focus on the goal which was new clean vehicles meant to replicate old classics. The 15-day changes incorporated the following: Use of a capless fuel storage system instead of evaporative monitoring, changes to the SPMV definition, allowing for customization within a limited scope, reduced qualified units produced from 500 to 50 commercially produced, and the evaporative readiness monitor "not complete" allowance. The evaporative system purge monitoring was not eliminated but phased in to give engine manufacturers more time to develop this monitor. Staff did not include credits as part of the 15-day changes.

Comment: In support (Braden Liberg, Edelbrock, LLC)

Edelbrock requested the following changes be incorporated into the proposal: use of a capless fuel fill pipe instead of evaporative leak monitoring, eliminate evaporative system purge monitoring, evaporative readiness monitor “not complete” allowance, eliminate diagnostic requirements for controllers not used, allow for engine hardware changes to address fitment issues in an SPMV, use of OEM engine manufacturer’s confidential documentation, and changes in the SPMV definition with qualified units produced. Highlights from submitted comments and verbal comments at the hearing were of support and a brief background of the Edelbrock company.

Agency Response A.1.c: The California Air Resources Board appreciates the involvement and support from Braden Liberg of Edelbrock. Staff’s 15-day changes incorporated the following: Use of a capless fuel storage system instead of evaporative monitoring, changes to the SPMV definition and qualified units produced from 500 to 50 commercially produced, and the evaporative readiness monitor “not complete” allowance. The evaporative system purge monitoring was not eliminated but phased in to give engine manufacturers more time to develop this monitor. Other requests such as fitment, decontaining the controller for unused diagnostics, and the use of an OEM’s confidential documentation can all be handled at the time of certification, which currently has a process for those requests.

Comment: In support (Lance Stander, CEO, Superformance)

“We support this initiative,” verbal comment given at hearing

Agency Response A.1.d: The California Air Resources Board appreciates the involvement and support of Superformance, we look forward to a long working relationship with those innovative people at Superformance.

Comment: In support (Cameron Wynne, General Manager, DeLorean Motor Company)

“As a company we intended to take advantage of the low volume manufacturing legislation,” “California was DeLorean’s biggest market,” verbal comments given at hearing

Agency Response A.1.e: The California Air Resources Board appreciates the participation and support from the DeLorean Motor Company during our regulatory process.

2. Comments Stating the Regulation Is Not Needed

Comment: “[N]o additional CARB regulations are required in order for a SPMV to produce a CARB-emissions compliant and California legal SPMV under the FAST

Act.” (GLICKENHAUS 1-1)

Comment: “If this proposed regulation does not pass, we believe that NHTSA-approved Low-Volume Manufacturers (SPMV manufacturers) could create CARB-compliant SPMVs by using an engine from a current model year, that has a CARB Executive Order, as long as the engine was installed with written instructions from the engine manufacturer and included any evaporative emissions monitoring equipment required under the Executive Order.” (GLICKENHAUS 1.)

Comment: “Under the FAST Act of 2015, if a Low-Volume Manufacturer installs an engine which “is covered by an Executive order subject to regulations promulgated by the California Air Resources Board for the model year in which the exempted specially produced motor vehicle is produced,” and that manufacturer installs the engine in compliance with written instructions from the Engine Manufacturer that includes evaporative emissions equipment and monitoring. that Low-Volume Manufacture's vehicle has met its requirements under the Clean Air Act and under CARB. (FAST Act §. 24405(b) (as long as the Manufacturer meets the additional requirements listed for how the engine must be installed, etc.))” (GLICKENHAUS 1-5.)

Comment: “The lack of Congressional direction for that CARB “shall” or “may” promulgate new regulations strongly implies that CARB's existing Executive Orders for engines are sufficient to meet Air Quality regulations under the FAST Act.” (GLICKENHAUS 1-5.)

Comment: “Furthermore, the FAST Act states that the necessary CARB Executive Order was “subject to regulations promulgated by the California Air Resources Board for the model year in which the exempted specially produced motor vehicle is produced,” (FAST Act §. 24405(6)). The past tense of the verb “promulgated” implies that CARB regulations and Executive Orders that already existed could be used by SPMV manufacturers to create a federally compliant SPMV.” (GLICKENHAUS 1-5.)

Agency Response A.2.a: This is incorrect. Under California law, all new vehicles sold in California must be certified by CARB.¹ CARB may only certify vehicles for sale using an established CARB certification process.² CARB has certification processes for traditional on-road light-duty vehicle

¹ See Health & Safety Code §§ 43150-43155.

² See *id.*

manufacturers,³ heavy-duty vehicles,⁴ off-highway recreational vehicles,⁵ motorcycles,⁶ engines used in specially-constructed vehicles,⁷ and other types of vehicle certification programs. Section 44017.4(c) of the Health & Safety Code also allows registration of up to 500 specially constructed vehicles per year in California. All new vehicles in California which are not “specially-constructed vehicles” under section 44017.4(c) must be certified by CARB using one of the established certification pathways.⁸

There simply is no other mechanism under existing California law for certification of a replica vehicle that does not qualify under these pathways. That was the impetus for this rulemaking, as recognized by the Initial Statement of Reasons.⁹ This rulemaking provides a targeted legal pathway for SPMV manufacturers to certify new vehicles for sale in California – a pathway which would not exist absent this rulemaking.

3. Comments Regarding Consistency with the FAST Act Definition of Replica

Comment: “[A] minor but crucial change is that the CARB proposed definition of SPMV as defined under proposed Regulation § 2209.1(17)-(A) should be identical with the first section of the Federal Fixing America's Surface Transportation Act's (FAST Act) definition.” (GLICKENHAUS 1-2.)

Comment: “The proposed regulation's definition of SPMV is more restrictive than the FAST Act's definition and this more restrictive definition prevents the proposed regulation from fully achieving its stated goals. By making the proposed regulation's definition identical to the FAST Act's definition, the proposed regulation will more fully achieve its stated goals.” (GLICKENHAUS 1-6.)

³ Various regulations comprise the certification requirements for these vehicles, including the California Low-Emission Vehicle Regulations for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles, including all or portions of Sections 1900, 1956.8, 1960.1, 1960.5, 1961, 1961.1, 1961.2, 1961.3, 1962, 1962.1, 1962.2, 1962.3, 1965, 1976, 1978, 2062, and 2101, Title 13, California Code of Regulations, and the certification and test procedures adopted thereunder. See <https://ww3.arb.ca.gov/msprog/onroad/cert/ldctp/ldctp.htm> for more information.

⁴ Various regulations comprise the certification requirements for these vehicles, including 13 CCR 1956.8. Exhaust Emissions Standards and Test Procedures - 1985 and Subsequent Model Heavy-Duty Engines and Vehicles. See <https://ww3.arb.ca.gov/msprog/cihd/cihd.htm#regulations>.

⁵ Various regulations comprise the certification requirements for motorcycles, including the evaporative emissions regulations in 13 CCR § 1976. See <https://ww3.arb.ca.gov/msprog/onroad/cert/hmccp/hmccp.htm>.

⁶ See 13 CCR §§ 2410-2415.

⁷ See 13 CCR § 2210 et seq.

⁸ See Health & Safety Code §§ 43150-43155.

⁹ See ISOR at 16. See also August 21, 2018 Notice at 3 (available at https://www.arb.ca.gov/regact/2018/spmv2018/spmvnotice.pdf?_ga=2.160645694.2061076505.1559768673-1590124318.1525112280). See also January 11, 2017 letter from SEMA to CARB (requesting that CARB undertake this rulemaking to authorize certification of replica vehicles in California).

Comment: “CARB' s proposed definition of a replica (SPMV) is clearly more restrictive than the definition in the FAST Act. ("resembles" for CARB vs "intended to resemble" for the FAST Act; CARB's additional restrictions of: "on-road"; "on an overall 1 :1 scale(+/- 10 percent)"; "commercially"; "for sale"; "not less than 25 years ago,"; and "with a production run of at least 500 units,")” (GLICKENHAUS 1-7.)

Comment: “CARB's proposed replica definition differs significantly from the FAST Act's definition.” (GLICKENHAUS 2.)

Comment: “CARB's proposed definition blocks several vehicles that have already been approved by NHTSA under the FAST Act.” (GLICKENHAUS 2.)

Comment: The commenter recommends that CARB either align its definition for a SPMV with the FAST Act’s replica definition, or include the following language in its definition: “Or any vehicle which has, by the time of the adoption of this regulation, been approved by NHTSA as a replica, as evidenced by the vehicle's identification in a NHTSA-Approved Low Volume Manufacturer's VIN Decoder.” (GLICKENHAUS 2.)

Comment: “If the CARB proposed regulation's definition of SPMV differs and is more restrictive than the definition under the FAST Act, SPMV manufacturers may have 49-state legal SPMV s with no mechanism to make these vehicles legal in California.” (GLICKENHAUS 1.)

Agency Response A.3.a: The commenter is correct that the proposed definition for “specially produced motor vehicle” is more restrictive than the FAST Act’s definition. As noted in Agency Response A.2.a, above, there is currently no legal path for SPMVs to be certified and sold new in California. In developing a new legal path (in the form of the SPMV Regulation), CARB has broad statutory authority to address vehicular air pollution. In addition to the broad authority to reduce vehicular emissions,¹⁰ CARB also has authority to “do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law.”¹¹ CARB also has authority to adopt regulations “necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and any other provision of law.”¹²

We understand the commenter is concerned that the vehicle they produce and wish to sell in California, the “Baja Boot,” may not be eligible for certification under the Regulation. Indeed, replica vehicles are not currently eligible for certification in California, regardless, unless they pursue some other established California certification pathway. As stated, the primary

¹⁰ Health & Safety Code § 43013.

¹¹ Health & Safety Code § 39600.

¹² Health & Safety Code § 39601.

objective of the Replica Cars Regulation is to create a direct path for SPMV manufacturers to sell low emitting SPMVs in California as new vehicles.¹³ To enable CARB to implement such a program, CARB explained that “[l]imitations on historical production numbers and on design are needed to help CARB staff efficiently and effectively confirm proposed vehicles for certification are actually replica vehicles, rather than one-offs. Without such limitations, staff would need to engage in complex and subjective investigations and determinations regarding the status of each vehicle for which certification is sought. These provisions allow CARB staff to efficiently determine whether vehicles are in fact eligible.”¹⁴ From the start of this rulemaking, CARB determined that limitations to the definition are necessary to enable staff to efficiently and accurately verify whether a vehicle is in the category of vehicles which are eligible for the program. This is expressly allowed as a necessary act for the proper execution of the powers and duties granted to CARB.¹⁵

4. Comments Regarding Scope of Definitions

Comment: “CARB's proposed definition means the regulations are prevented from fully achieving the stated objective.” (GLICKENHAUS 1-8.)

Comment: “This more restrictive definition prevents CARB from achieving its goals. Here are two case studies of why. CARB has used the example of a SPMV who wishes to make Ford GT40s (Initial Statement of Reasons, 1; Notice of Public Hearing, 3.) The Ford GT40s clearly fit the FAST Act's definition (and intention of the Act) but do not meet CARB's more restrictive definition. Ford only manufactured 87 Ford GT40s in the 1960s: Ford manufactured nowhere close to the 500 cars required by the proposed regulation's definition. (Keeshin, Ben, "Watch This Le Mans-Winning Ford GT40 Being Restored to Perfection," The Drive June 7, 2016, <http://www.thedrive.com/vintage/3859/watch-this-le-mans-winning-ford-gt40-being-restored-to-perfection>.) It is also arguable about whether or not they were manufactured "for sale" as required by the proposed CARB definition. Most were manufactured for racing, and although approximately 30 road-legal versions were produced, it was more for the requirement of meeting the homologation racing rules than for the purposes of producing them for sale. When they were produced, Ford had difficulty selling any. Yet the Ford GT40s clearly meet the FAST Act's definition (without the requirements of "manufactured for sale," without the restriction on the "1: 1 scale (+/- 10 percent)", and without the restriction of "with a production run of at least 500 units".” (GLICKENHAUS 1.)

¹³ ISOR at 21.

¹⁴ See April 25, 2019 15-day notice at 3 (available at https://www.arb.ca.gov/regact/2018/spmv2018/15daynotice.pdf?_ga=2.215717845.317752157.1560188653-1590124318.1525112280).

¹⁵ See Health & Safety Code § 39601.

Comment: “Here is another example of the proposed regulation's more restrictive definition preventing NHTSA-approved/ NHTSA compliant SPMV's from being certified and sold in California. Scuderia Cameron Glickenhaus LLC is a NHTSA-approved SPMV Manufacturer (Low Volume Manufacturer) whose models have already been accepted and approved by NHTSA in our application and also in our NHTSA-approved VIN decoder and other documents, (NHTSA, [https://vpic.nhtsa.dot.gov/MfrPortal/Manufacturers/SubmissionDetails/6361 ?h= 1](https://vpic.nhtsa.dot.gov/MfrPortal/Manufacturers/SubmissionDetails/6361?h=1)) but whose models might not meet the proposed CARB regulation's SPMV definition.” (GLICKENHAUS 1.)

Comment: “For example, our new Baja Boot is based off and "intended to visually resemble" the original 1967 General Motors Baja Boot, and meets the FAST Act's replica definition. We are prepared to immediately begin manufacturing this SPMV in California and offering it for sale in California as soon as it meets CARB regulations. However, the vehicle would not meet CARB's proposed regulations because the original manufacturer did not produce 500 units.” (GLICKENHAUS 1.)

Agency Response A.4.a: Note that the definition has been revised via 15 day changes to require 50 units, rather than 500, to have been originally sold.¹⁶

As the commenter notes, a primary objective of the Replica Cars Regulation is to create a path for manufacturers to sell low emitting replica cars in California as new vehicles.¹⁷ CARB disagrees, however, that this means CARB must adopt the definition that the commenter desires. Nor does CARB agree that this means CARB cannot adopt a definition that allows its staff to efficiently and effectively verify the historicity of a proposed new vehicle, and to ensure the certification pathway is not used by types of vehicles for which it was not designed. CARB has extensive experience in certifying vehicles, and has used its expertise to craft a workable definition that is acceptable to the rest of the industry. (Note that CARB did not receive opposition to the definition set forth in its 15 day comments by any entity other than the commenter.)

As described in Agency Response B.2.b, below, CARB's definition is needed to make the program implementable. It is allowed under CARB's statutory authority. And as described in Agency Response A.5.a, below, nothing in the FAST Act or any other federal law requires CARB to adopt the FAST Act's definition verbatim. As discussed in Agency Responses A.2.a and A.5.a, California has broad authority to develop its own air quality laws and certification pathways, consistent with section 209(b) of the Clean Air Act.

¹⁶ See proposed section 2209.1(a)(16)(A).

¹⁷ See ISOR at 16. See also August 21, 2018 Notice at 3 (available at https://www.arb.ca.gov/regact/2018/spmv2018/spmvnotice.pdf?_ga=2.160645694.2061076505.1559768673-1590124318.1525112280).

5. Comments Relating to Authority and Other Legal Concerns

Comment: The second problem with CARB's more restrictive definition of SPMV is CARB lacks the statutory authority to regulate the number of vehicles originally produced, how precisely the replica scales to the original, or anything else about the appearance or definition of the replica that differs in any way from the FAST Act's definition. (FAST Act§. 24405(b), the only mention of the California Air Resources Board).” (GLICKENHAUS 1.)

Comment: “CARB' s authority under the FAST Act is limited to establishing procedures to create an EO/CARB-certified replica as allowed under the FAST Act.” (GLICKENHAUS 1.)

Agency Response A.5.a: Commenter is factually and legally incorrect. CARB is uncertain how the commenter has concluded that the FAST Act limits CARB's authority. As noted in Agency Response A.2.a, California has a statutory mandate to only allow new vehicles which have been certified pursuant to CARB standards – not to federal standards alone.¹⁸ CARB has broad authority to regulate mobile source emissions, and to do all things which are necessary and proper to allow regulation of such sources.¹⁹ Furthermore, CARB has federal authority to adopt its own standards for the control of emissions from new motor vehicles where the state determines that the state standards would be at least as protective of public health and welfare as applicable Federal standards.²⁰ Here, California's standards would be at least as protective of public health and welfare as applicable Federal standards, as demonstrated during this rulemaking process, and by the fact that CARB's definition for a SPMV is narrower than the definition in the FAST Act, as acknowledged by the commenter.

6. Comments Relating to EPA Certification Related Provisions

Comment: “The second minor but crucial change is to remove the requirement under the proposed Regulation § 2209.4(a) that the SPMV manufacturer is registered and approved by the Environmental Protection Agency: As a low volume manufacturer that produces fewer than 5,000 vehicles per year, such EPA registration and approval is not required by the EPA itself.” (GLICKENHAUS 1-3.)

Comment: “[T]here are no requirements for the SPMV or the SPMV manufacturer to become certified by the Environmental Protection Agency. Under the 2015 Federal Legislation, which CARB's proposed regulation is seeking to address (Initial Statement of Reasons, 1), as a low volume manufacturer that produces fewer than 5,000 vehicles per year, such EPA registration and approval is not required by the EPA itself.

¹⁸ See Health & Safety Code §§ 43150-43155

¹⁹ Health & Safety Code §§ 39601, 43013.

²⁰ Section 209(e) of the Clean Air Act, codified at 42 U.S.C. § 7543.

“CARB should not require EPA certification that the EPA itself does not require. While we will use EPA certified engines as required by the FAST Act, we are not required as low volume manufacturers producing fewer than 5,000 cars per year to undergo EPA certification as a vehicle manufacturer using engines produced by other manufacturers.” (GLICKENHAUS 1.)

Comment: “Proposed CARB regulation language stating that SPMV manufacturers show an EPA certification that is not required by the EPA or the FAST Act produces an unnecessary financial and regulatory hurdle for SPMV manufacturers.” (GLICKENHAUS 1.)

Comment: “The second issue with the proposed regulation's requirement for SPMV manufacturers to show their EPA certification is that it is unclear whether CARB has the statutory authority to require this EPA certification when no Federal legislation requires such certification.” (GLICKENHAUS 1.)

Agency response A.6.a: The Replica Cars Regulation does not require any “certification” from EPA. The relevant section, as revised during the 15 day changes, provides: “A SPMV manufacturer must be currently approved by the National Highway Traffic and Safety Administration and registered with the United States Environmental Protection Agency to produce for the current model year of the SPMV certification application.” No certification by U.S. EPA is required. CARB notes, by way of background, that all light-duty vehicle manufacturers register with U.S. EPA to receive their unique manufacturer’s code and ensure no duplication of codes. The code is used to identify the manufacturer’s designate test group names.

CARB also notes that it is unsure how the National Highway Traffic and Safety Administration will process these vehicles and the term “approved” is used broadly as a term to cover whatever action the National Highway Traffic and Safety Administration takes on these vehicles. The National Highway Traffic and Safety Administration has yet to clarify its process. Glickenhau submitted documentation to CARB which purported to show that the National Highway Traffic and Safety Administration has “approved” Scuderia Cameron Glickenhau as a low volume manufacturer.

7. Miscellaneous Comments

Comment: “We are prepared, if our proposed changes are accepted, to immediately begin manufacturing SPMV in the State of California, buying components and contracting for services from many small businesses and local suppliers. We are prepared to spend over \$500,000 during the next 12 months starting immediately, all within the State of California to engineer and build the first run of these vehicles. We anticipate our investments related to our SPMVs and could easily top \$10 million dollars per year spent in the State of California alone starting in 2020. Additionally, we currently have two dealers outside the State of California who are willing to open

up dealerships in California, or partner with existing dealerships in California as soon as our vehicles are certified by CARB. We are prepared, if our changes are accepted, to manufacture up to 100 SPMV per year in the State of California, which we would sell in California and around the United States through our dealer networks. If CARB makes these minor changes, it will allow the regulation to more fully meet its goals and provide the added benefit of creating jobs in California.” (GLICKENHAUS 1-4.)

Comment: “If CARB adopts this proposed regulation...

- SCG immediately commits to spend at least \$500,000 over the next 12 months in the State of California to design, engineer, fabricate, build, and test a replica Baja Boot.
- SCG will spend an estimated \$10-12 million each year for the next several years in the State of California to manufacture and build replica boots in California.
- SCG will use Verified Carbon Offsets to more than offset the anticipated lifetime emissions from the vehicle's driving so that each vehicle sold in California will be net carbon negative.
- SCG will use our best efforts to license dealers in the State of California to sell, service, and repair the Boots so they stay safe and clean.”

(GLICKENHAUS 2.)

Comment: “We are a NHTSA-Approved Low Volume Manufacturer who is eager to work with CARB to create CARB-compliant SPMVs for manufacture and sale in the State of California and also for sale outside of California. We are ready to begin producing these vehicles in California immediately, as soon as we are approved by CARB. We will be working with many local businesses and suppliers and creating jobs in California.

“In order for this to happen, we have two minor but crucial recommendations for the proposed regulations. The regulation's definition of SPMV should be identical to the definition of "replica" in the FAST Act. Also, the regulation should not require the SPMV manufacturer to be EPA certified if neither the FAST Act nor EPA have such a requirement.

“We hope CARB will consider these minor but crucial changes to allow us to immediately start. If CARB accepts our proposed changes, we are prepared to spend over \$500,000 over the next 12 months starting immediately, all within the State of California to engineer and build the first run of these vehicles. We anticipate our investments and spending to manufacture, develop, test, and build these vehicles could easily top \$10 million dollars per year spent in the State of California alone starting in 2020.” (Cover transmittal for GLICKENHAUS 1.)

Agency response A.7.a: CARB thanks the commenter for their support in this statement, and commends the commenter for its offer to offset the lifetime

emissions from its vehicles via carbon offsets. While CARB has not made the changes the commenter has requested to the regulation text, CARB hopes the commenter incorporates the carbon offsetting component into its business model moving forward.

See Agency Responses A.3.a and A.4.a for CARB's response to the comment stating that the regulation's definition of SPMV should be identical to the definition of "replica" in the FAST Act.

See Agency Response A.6.a for CARB's response to the comment stating that the regulation should not require the SPMV manufacturer to be EPA certified if neither the FAST Act nor EPA have such a requirement.

B. COMMENTS SUBMITTED DURING THE 15 DAY PUBLIC COMMENT PERIOD

CARB received only one comment letter during the 15 day comment period. As a threshold matter regarding this comment letter, the Administrative Procedure Act (APA) requires that comments on 15-day changes address *the changes in the modified regulatory proposal*, not the original regulatory proposal.²¹ The comment letter in this case does not focus on the 15-day changes, but instead effectively attempts to belatedly re-open the initial 45 day comment period. CARB therefore objects to the entire comment letter as untimely. CARB is not required to respond to such comments, and they should not serve to exhaust administrative remedies, as the commenter failed to timely raise its issues during the noticed 45-day public comment period. Nevertheless, and without waiving any objections whatsoever based on the untimeliness of the comment, CARB provides the following responses to comments to ensure the record is clear on the issues raised by the commenter.

1. PREEMPTION

Comment: CARB's proposed definition of "replica" is preempted by Federal Motor Vehicle Safety Standards." (GLICKENHAUS 3.)

"The State of California (through the California Air Resource Board) is attempting to prescribe a standard to define "replica" vehicles that differs from the standard already set under the Federal Motor Vehicle Safety Standards. Federal Motor Vehicle Safety Standards preempt California from adopting any standard that is not identical to the standard prescribed by Federal Motor Vehicle Safety Standards." (GLICKENHAUS 3.)

Agency Response B.1.a: As noted above, the APA requires that comments on 15-day changes address *the changes in the modified regulatory proposal*, not the original regulatory proposal.²² The comment letter in this case does not focus on

²¹ See, e.g. Cal. Govt. Code § 11346.8(c).

²² See, e.g. Cal. Govt. Code § 11346.8(c).

the 15-day changes, but instead effectively attempts to belatedly re-open the initial 45 day comment period. CARB therefore objects to the entire comment letter as untimely. CARB is not required to respond to such comments, and they should not serve to exhaust administrative remedies, as the commenter failed to timely raise its issues during the noticed 45-day public comment period. Nevertheless, and without waiving any objections whatsoever based on the untimeliness of the comment, CARB provides the following responses to comments to ensure the record is clear on the issues raised by the commenter.

No change was made in response to this comment. As an initial matter, the Commenter improperly assumes that CARB, in this rulemaking action, promulgated *motor vehicle safety standards* subject to the provisions of 49 U.S.C. § 30103(b). That assumption is incorrect; CARB has instead promulgated *emission standards* and other emission related requirements applicable to new light-duty engines intended for installation in specially-produced motor vehicles (SPMVs). In 2004, the U.S. Supreme Court clarified that the definition of “standard” as it applies to emissions from motor vehicles and motor vehicle engines under Title II of the federal CAA, relates to the emission characteristics of vehicles or engines and includes not only traditional emissions limits for specified pollutants, but also requirements that vehicles and engines be equipped with certain types of pollution-control devices, or incorporate design features related to the control of emissions. *Engine Manufacturers Association v. South Coast Air Quality Management District* (2004) 541 U.S. 246, 253 (“EMA”).

The SPMV regulation clearly promulgates *emissions standards* as defined by the Supreme Court in *EMA*. Section 2209.2(d) specifies the exhaust emission standards, and section 2209.2(e) specifies the evaporative emissions for light-duty engines powering SPMVs. Those standards constitute traditional emissions limits for specified pollutants. Section 2209.2(i) specifies requirements for the on-board diagnostic (OBD) systems in the light-duty engines. Those OBD system requirements mandate that emissions controlled engines not emit more than a specified amount of given pollutants, and further include design features related to the control of emissions, and also clearly meet the Supreme Court’s definition of emissions standard.

The Commenter’s assertion that 49 U.S.C. Chapter 301 preempts the SPMV regulation is further incorrect because it is expressly inconsistent with another section of H.R. 22 that directly recognizes CARB’s ability to adopt emission requirements for new motor vehicle engines. Section 44205(b) of H.R. 22 (42 U.S.C. § 7525(a)) specifies that, in pertinent part “A motor vehicle engine (including all engine emission controls) may be installed in an exempted specially produced motor vehicle if the motor vehicle engine ... is covered by an Executive order subject to regulations promulgated by the California Air Resources Board for the model year in which the exempted specially produced motor vehicle is produced....”²³

²³ 42 U.S.C. § 7525(a)(5)(A).

2. INTERSTATE COMMERCE CLAUSE

Comment: The commenter states that CARB's proposed definition of a specially produced motor vehicle unconstitutionally restricts interstate commerce. (GLICKENHAUS 3-8.)

Agency Response B.2.a: As noted above, the APA requires that comments on 15-day changes address *the changes in the modified regulatory proposal*, not the original regulatory proposal.²⁴ The comment letter in this case does not focus on the 15-day changes, but instead effectively attempts to belatedly re-open the initial 45 day comment period. CARB therefore objects to the entire comment letter as untimely. CARB is not required to respond to such comments, and they should not serve to exhaust administrative remedies, as the commenter failed to timely raise its issues during the noticed 45-day public comment period. Nevertheless, and without waiving any objections whatsoever based on the untimeliness of the comment, CARB provides the following responses to comments to ensure the record is clear on the issues raised by the commenter.

Article I, §8, cl. 3 of the United States Constitution states that Congress has the power “[t]o regulate Commerce ...among the several States.” Courts have long recognized that this affirmative grant of power also includes an implicit or “dormant” limitation on the authority of states to affect interstate commerce.²⁵

The threshold issue to be resolved in a Commerce Clause challenge to a state law is whether Congress has exempted that law from Commerce Clause scrutiny. In this case, Congress' enactment of the federal Clean Air Act (CAA) provisions allowing only California to adopt and enforce new vehicle emission standards in § 209(b), and new and in-use nonroad engine standards and emission-related requirements in § 209(e)(2)(A) of the federal CAA, clearly evidence its intent to exempt California's on and off-road vehicle and engine standards and emission-related requirements from Commerce Clause restrictions. The legislative history of the federal Clean Air Act indicates that Congress was fully aware that allowing states to establish their own motor vehicle emission standards would disrupt interstate commerce, and it therefore preempted the states from establishing their own motor vehicle emission standards. However, *Congress specifically exempted only California from the federal CAA section 209(a) preemption*. “Rather than being faced with 51 different standards, as they had feared, or with only one, as they had sought, manufacturers must cope with two regulatory schemes under the legislative compromise embodied in § 209(a).”²⁶ Congress determined that authorizing California to establish separate and more stringent standards than those applicable to the rest of the nation would not

²⁴ See, e.g. Cal. Govt. Code § 11346.8(c).

²⁵ *United Haulers Ass'n., Inc. v. Onedia-Herkimer Solid Waste Management Authority* (2007) 550 U.S. 330, 338.

²⁶ *Engine Mfrs Ass'n v. U.S.E.P.A.* (1996) 88 F.3d 1075, 1079. See also *Motor and Equipment Mfrs. Ass'n, Inc. v. E.P.A.* (1979) 627 F.2d 1095, 1108 – 1111.

unduly disrupt interstate commerce, but would allow California to continue its pioneering efforts to control emissions from motor vehicles, and to essentially serve as a laboratory for innovation that might lead to new developments in control systems and designs would ultimately benefit the nation.²⁷ Therefore, instead of a Commerce Clause review, Congress enacted in section 209(b) of the federal CAA a procedure requiring the Administrator of the U.S. EPA to review California's regulations and to authorize it to adopt and enforce its unique emission standards and other requirements.²⁸

In the 1990 amendments to the federal Clean Air Act, Congress authorized the U.S. EPA to regulate nonroad sources of emissions. As with motor vehicles, Congress preempted all states but California from regulating nonroad sources. California is authorized to adopt and enforce both new and in-use nonroad emission standards and emission-related requirements, subject to the review of the Administrator of the U.S. EPA in § 209(e)(2)(A) of the federal CAA. In fact, the Court of Appeals for the D.C. Circuit has held that only California is authorized to adopt in-use requirements for nonroad sources.²⁹ Other states that elect to regulate nonroad sources may only adopt regulations identical to those adopted by California, § 209(e)(2)(B) of the federal CAA. Therefore, both the text and history of the motor vehicle and nonroad preemption and waiver provisions of the federal Clean Air Act evidence Congress' intent to exempt the requirements at issue from Commerce Clause scrutiny.

It is also important to note that CARB primarily adopted the SPMV regulation under the authority granted to it by *state law*. CARB is authorized to adopt standards, rules and regulations, and to perform such acts as may be necessary for the proper execution of the powers and duties granted to and imposed upon it by law. California Health & Safety Code §§ 39600 and 39601. Health & Safety Code §§ 39002 and 39003 place the responsibility for controlling air pollution from motor vehicles on CARB. A "motor vehicle" is defined in Health & Safety Code § 39039 (referencing California Vehicle Code section 415) as a vehicle that is self-propelled. A "new motor vehicle" means a motor vehicle, the equitable or legal title to which has never been transferred to the ultimate purchaser (Health & Safety Code § 39042) and a "new motor vehicle engine" means a new engine in a motor vehicle (Health & Safety Code § 49042.5).

The new light-duty engines powering SPMVs clearly meet the definition of new motor vehicle engines in Health & Safety Code § 49042.5, which CARB is authorized to regulate. CARB is accordingly authorized to adopt and implement emission standards for new motor vehicles that are necessary and technologically feasible (Health & Safety Code § 43101), to adopt test procedures and any other procedures necessary to determine whether vehicles and engines are in compliance with the emissions standards established under Part 5 of the Health & Safety Code (Health & Safety Code

²⁷ *Motor and Equipment Mfrs. Ass'n, Inc. v. E.P.A.*, 627 F.2d at 1109.

²⁸ *People ex rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1345; *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449, 463.

²⁹ *Engine Mfrs Ass'n v. U.S. E.P.A.* (1996) 88 F.3d 1075.

§ 43104), and to not certify a new motor vehicle or motor vehicle engine unless the vehicle or engine meets the emission standards adopted by the ARB pursuant to Part 5 of the Health & Safety Code under test procedures adopted pursuant to section 43104. § 43102.

Even if a court were to determine that a waiver of preemption does not preclude it from determining if a state law impermissibly violates the Commerce Clause, as discussed in Agency Response B.2.b below, this rulemaking does not violate federal interstate commerce law.

Comment: “California’s proposed regulation does not advance a legitimate local purpose that cannot be adequately served by non-discriminatory purposes.” (GLICKENHAUS 3-9.)

Comment: “Even if California presented a legitimate local interest, the regulation unconstitutionally violates interstate commerce because such a purpose could be adequately served by less restrictive means.” (GLICKENHAUS 3-10.)

Agency Response B.2.b: As noted above, the APA requires that comments on 15-day changes address *the changes in the modified regulatory proposal*, not the original regulatory proposal.³⁰ The comment letter in this case does not focus on the 15-day changes, but instead effectively attempts to belatedly re-open the initial 45 day comment period. CARB therefore objects to the entire comment letter as untimely. CARB is not required to respond to such comments, and they should not serve to exhaust administrative remedies, as the commenter failed to timely raise its issues during the noticed 45-day public comment period. Nevertheless, and without waiving any objections whatsoever based on the untimeliness of the comment, CARB provides the following responses to comments to ensure the record is clear on the issues raised by the commenter.

As discussed in Agency Response B.2.a above, both the text and history of the motor vehicle and nonroad preemption and waiver provisions of the federal Clean Air Act evidence Congress’ intent to exempt the requirements at issue from Commerce Clause scrutiny. However, if a court determines that Congress did not expressly exempt a state law from Commerce Clause scrutiny, it will next determine if the law discriminates against interstate commerce, either on its face or in practical effect,³¹ *i.e.*, if the law accords differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Such laws are virtually *per se* invalid,³² and will only survive if they “advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”³³

³⁰ See, e.g. Cal. Govt. Code § 11346.8(c).

³¹ *Hughes v. Oklahoma* (1979) 441 U.S. 322, 336.

³² *United Haulers Ass’n, Inc. v. Onedia-Herkimer Solid Waste Management Authority* (2007) 550 U.S. 330, 338.

³³ *Oregon Waste Systems Inc. v. Department of Environmental Quality of State of Oregon* (1994) 511 U.S. 93, 100-101.

In this case, CARB's SPMV regulation does not facially discriminate or discriminate in practice against interstate commerce, because it establishes uniform requirements that apply to new light-duty engines that power SPMVs – those requirements apply to all such engines, regardless of whether engine manufacturers are based inside or outside of California. CARB accordingly disagrees with the assertion that the regulation discriminates in any manner against interstate commerce.

If a court determines that a state law does not discriminate against interstate commerce, it then balances the law's local benefits against its burdens on interstate commerce to determine if the law violates the federal Commerce Clause.³⁴ The Supreme Court has recognized that state regulations frequently pass muster under the *Pike* test.³⁵ Under this test, the state law will be upheld unless it imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."³⁶ Furthermore, courts will accord a greater presumption of validity to a state's laws where those laws involve protecting the public.³⁷

Courts recognize that preventing air pollution is and has been a traditional local safety concern.³⁸ This recognition is also expressed in the federal Clean Air Act section 101(a)(3), where the U.S. Congress declared that states and local governments are primarily responsible for preventing air pollution, and in California Health & Safety Code sections 39000 and 39001, where the California legislature declared a strong public interest in controlling air pollution to protect the "health, safety, welfare, and sense of well-being" of Californians.

As explained above, CARB disagrees that the SPMV regulation discriminates in any manner against interstate commerce, as it applies equally regardless of whether the vehicles or engines are manufactured in-state or out of state, and it involves local public health considerations.

CARB's definition reflects several logical considerations that are designed to ensure that the regulation is implementable by staff given current resources, and that it is easily applied to all manufacturers – regardless of their location in the United States. As noted in the 15 day notice, "[l]imitations on historical production numbers and on design are needed to help CARB staff efficiently and effectively confirm proposed vehicles for certification are actually replica vehicles, rather than one-offs. Without such limitations, staff would need to

³⁴ *Pike v. Bruce Church* (1970) 397 U.S. 137, 142 ("*Pike*").

³⁵ *Department of Revenue of Ky. v. Davis* (2008) 533 U.S. 328, 339.

³⁶ *Ibid.*

³⁷ See *Pike*, 397 U.S. 137, 143.

³⁸ *Huron Portland Cement Co. v. Detroit* (1960) 362 U.S. 440, 445-446.

engage in complex and subjective investigations and determinations regarding the status of each vehicle for which certification is sought. These provisions allow CARB staff to efficiently determine whether vehicles are in fact eligible.”³⁹ Additionally, the FAST Act’s criteria for establishing whether a vehicle is a “replica motor vehicle” are not as clear as CARB’s definition. For example, what does it mean for a vehicle to be “intended to resemble the body of another motor vehicle”? This “intent” based standard may not meet the clarity requirement of the APA. By contrast, CARB’s definition includes clear objective criteria regarding the vehicle’s appearance. Additionally, what does it mean for a vehicle to have been “manufactured not less than 25 years before the manufacture of the replica motor vehicle”? For example, the Ford Mustang has been manufactured since 1965, so in the abstract, it was clearly “manufactured” not less than 25 years before the replica vehicle. However, does that mean any Mustang can then be certified as a replica? Or must it be a generation of Mustang that was first manufactured more than 25 years prior? Or must the entire Mustang generation’s model run have taken place more than 25 years prior for that generation to be eligible for certification as a replica? These aspects of the FAST Act’s definition are not clear. CARB is governed by the APA, and CARB’s definition was drafted to satisfy the APA’s clarity requirement. CARB’s definition also helps ensure that staff resources are focused on reviewing and certifying vehicles and engines in a manner that does not significantly increase emissions in California, not on nebulous historical research tasks unrelated to CARB’s emissions control mandates.

The commenter proposed alternatives in lieu of adopting CARB’s definition of SPCN, which are (1) running a vehicle’s VIN number through NHTSA’s website to determine whether it was manufactured by a NHTSA-approved manufacturer, and (2) adopting wholesale the FAST Act’s definition of a replica vehicle. CARB has chosen not to pursue these alternatives. With regard to the first alternative, running a simple VIN search in NHTSA’s database does not allow CARB to understand, much less control, the number of replica vehicles which may ultimately be sold in the state. This means CARB would not be able to accurately determine or control potential emissions increases resulting from vehicle quantities and types that were not considered during this rulemaking. The same is true of the second proposed alternative (adopting NHTSA’s definition wholesale). Furthermore, CARB’s definition, which requires a minimum of 50 vehicles historically produced, greatly assists CARB staff in determining a vehicle’s historic status. The 50 vehicle production helps in the clarity and process of the regulation by making it apparent which vehicles are historic and which are not, helping avoid the need for CARB staff to conduct speculative historical research and

³⁹ See April 25, 2019 15-day notice at 3 (available at https://www.arb.ca.gov/regact/2018/spmv2018/15daynotice.pdf?_ga=2.215717845.317752157.1560188653-1590124318.1525112280).

verification, and helping avoid making subjective determinations regarding whether a vehicle is truly a replica of a historic vehicle. The FAST Act's definition would require unspecified and uncertain discussions with applicants regarding the background for their vehicles, given the lack of specificity and clarity in the FAST Act's definition of "replica motor vehicle", coupled with its intent to only allow "replica" vehicles. CARB has exercised its discretion to make the FAST Act's definition implementable, clear, and objective. While these potential alternatives would avoid burdening CARB staff with potentially burdensome research to confirm the historic status of vehicles, that same result is already accomplished by the definition adopted by CARB, and with less potential for unforeseen emissions increases and other unintended consequences.

3. Other Legal Claims in 15 Day Comments

Comment: "CARB's proposed definition of replica is inherently arbitrary and capricious." (GLICKENHAUS 3.)

Agency Response B.3.a: As noted above, the APA requires that comments on 15-day changes address *the changes in the modified regulatory proposal*, not the original regulatory proposal.⁴⁰ The comment letter in this case does not focus on the 15-day changes, but instead effectively attempts to belatedly re-open the initial 45 day comment period. CARB therefore objects to the entire comment letter as untimely. CARB is not required to respond to such comments, and they should not serve to exhaust administrative remedies, as the commenter failed to timely raise its issues during the noticed 45-day public comment period. Nevertheless, and without waiving any objections whatsoever based on the

untimeliness of the comment, CARB provides the following responses to comments to ensure the record is clear on the issues raised by the commenter.

As noted in Agency Response B.2.b, CARB's definition reflects several logical considerations that are neither arbitrary nor capricious. As noted in the 15 day notice, "[I]mitations on historical production numbers and on design are needed to help CARB staff efficiently and effectively confirm proposed vehicles for certification are actually replica vehicles, rather than one-offs. Without such limitations, staff would need to engage in complex and subjective investigations and determinations regarding the status of each vehicle for which certification is sought. These provisions allow CARB staff to efficiently determine whether vehicles are in fact eligible."⁴¹ Additionally, the FAST Act's criteria for establishing whether a vehicle is a "replica motor

⁴⁰ See, e.g. Cal. Govt. Code § 11346.8(c).

⁴¹ See April 25, 2019 15-day notice at 3 (available at https://www.arb.ca.gov/regact/2018/spmv2018/15daynotice.pdf?_ga=2.215717845.317752157.1560188653-1590124318.1525112280).

vehicle” are not as clear as CARB’s definition. For example, what does it mean for a vehicle to be “intended to resemble the body of another motor vehicle”? This “intent” based standard may not meet the clarity requirement of the APA. By contrast, CARB’s definition includes clear objective criteria regarding the vehicle’s appearance. Additionally, what does it mean for a vehicle to have been “manufactured not less than 25 years before the manufacture of the replica motor vehicle”? For example, the Ford Mustang has been manufactured since 1965, so in the abstract, it was clearly “manufactured” not less than 25 years before the replica vehicle. However, does that mean any Mustang can then be certified as a replica? Or must it be a generation of Mustang that was first manufactured more than 25 years prior? Or must the entire Mustang generation’s model run have taken place more than 25 years prior for that generation to be eligible for certification as a replica? These aspects of the FAST Act’s definition are not clear. CARB is governed by the APA, and CARB’s definition was drafted to satisfy the APA’s clarity requirement.

The commenter has proposed alternatives, including (1) running a vehicle’s VIN number through NHTSA’s website to determine whether it was manufactured by a NHTSA-approved manufacturer, and (2) adopting wholesale the FAST Act’s definition of a replica vehicle. CARB has chosen not to pursue these alternatives. With regard to the first alternative, running a simple VIN search in NHTSA’s database does not allow CARB to understand, much less control, the number of replica vehicles which may ultimately be sold in the state. This means CARB would not be able to accurately determine or control potential emissions increases resulting from vehicle quantities and types that were not considered during this rulemaking. (See Agency response to B.3.b, below.) The same is true of the second proposed alternative (adopting NHTSA’s definition wholesale). Furthermore, CARB’s definition, which requires a minimum of 50 vehicles historically produced, greatly assists CARB staff in determining a vehicle’s historic status. The 50 vehicle production helps in the clarity and process of the regulation by making it apparent which vehicles are historic and which are not, helping avoid the need for CARB staff to conduct speculative historical research and verification, and helping avoid making subjective determinations regarding whether a vehicle is truly a replica of a historic vehicle. The FAST Act’s definition would require unspecified and uncertain discussions with applicants regarding the background for their vehicles, given the lack of specificity and clarity in the FAST Act’s definition of “replica motor vehicle”, coupled with its intent to only allow “replica” vehicles. CARB has exercised its discretion to make the FAST Act’s definition implementable, clear, and objective. While these potential alternatives would avoid burdening CARB staff with potentially burdensome research to confirm the historic status of vehicles, that same

result is already accomplished by the definition adopted by CARB, and with less potential for unforeseen emissions increases.

Comment: “CARB’s attempt to limit the definition of replica falls completely outside of CARB’s jurisdiction and statutory authority.” (GLICKENHAUS 3-3.)

Comment: “CARB lacks legal authority or jurisdiction to limit the definition of “replica” in this regulation from the definition of replica provided by the federal FAST Act, because the definition has no impact on air pollution in California.” (GLICKENHAUS 3-11.)

Comment: “The definition of replica for this regulation has no impact on air pollution in California, and is therefore outside of CARB’s authority or jurisdiction.” (GLICKENHAUS 3-12.)

Agency response B.3.b: See Agency Response A.5.a, above, regarding CARB’s authority to promulgate this regulation. Also, as noted above, the APA requires that comments on 15-day changes address *the changes in the modified regulatory proposal*, not the original regulatory proposal.⁴² The comment letter in this case does not focus on the 15-day changes, but instead effectively attempts to belatedly re-open the initial 45 day comment period. CARB therefore objects to the entire comment letter as untimely. CARB is not required to respond to such comments, and they should not serve to exhaust administrative remedies, as the commenter failed to timely raise its issues during the noticed 45-day public comment period. Nevertheless, and without waiving any objections whatsoever based on the untimeliness of the comment, CARB provides the following responses to comments to ensure the record is clear on the issues raised by the commenter.

See response to Agency Response A.5.a, regarding CARB’s authority to promulgate regulations which are necessary and proper to accomplish CARB’s goals and mandates. The Commenter cites to portions of staff and CARB Board member testimony in an attempt to support its assertion that the SPMV regulation has no impact on air pollution, but that assertion is expressly contradicted by CARB staff’s analysis that fully compliant SPMVs do in fact have some adverse emissions consequences, particularly if sold in California in high enough numbers. See Section VII.D of the Staff Report: Initial Statement of Reasons for the Public Hearing To Consider Proposed California Regulation and Certification Procedures For Light-Duty Engine Packages For Use In New Light-Duty Specially-Produced Motor Vehicles For 2019 And Subsequent Model Years, and specifically, table 3.6, “Emissions Implications of Not Requiring SPMVs to Meet Evaporative System Leak Monitoring Requirements.” That table contains CARB staff’s worst-case estimates that fully compliant SPMVs will result in a total statewide evaporative emissions of 0.05 tons per year, 0.4 tons per year, and 0.6 tons per year, after one, ten years, and 26 years, respectively, compared to fully compliant light-duty vehicles produced by original equipment manufacturers.

⁴² See, e.g. Cal. Govt. Code § 11346.8(c).

Such emissions increases are attributable to the provision in the regulation that exempts affected engines from the evaporative leak standard that is otherwise required on light-duty vehicles subject to CARB's LEV II and LEV III emission requirements. See also Agency Response B.3.a, above.

As explained in Agency Response A.5.a, above, CARB has broad and extensive authority to regulate new motor vehicles and new motor vehicle engines – that authority is not limited to or conditioned on whether a particular vehicle is categorized or defined as a “replica vehicle” by the FAST act.

Comment: If CARB attempts to adopt their proposed definition of replica despite these substantial legal roadblocks, we will file suit in Federal Court.

Agency response B.3.c: CARB hopes the commenter does not decide to file litigation over this rulemaking. The Replica Cars Regulation would create a new certification pathway, and the commenter is the only entity that has objected to the regulation. Other certification pathways are available to the commenter, and the commenter may develop a vehicle to meet the requirements of the Replica Cars certification pathway. Nevertheless, as described in responses to many of the comments above, if the commenter does bring a legal challenge against the Replica Cars Regulation, CARB expects to prevail on the merits of those claims.

V. Peer Review

Health & Safety Code section 57004 sets forth requirements for peer review of identified portions of rulemakings proposed by entities within the California Environmental Protection Agency, including CARB. Specifically, the scientific basis or scientific portion of a proposed rule may be subject to this peer review process. This rulemaking provides a pathway for the certification of specially-produced motor vehicles using currently available technologies, a peer review is not required.