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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

October 18, 2016

Senator Michael Dembrow
900 Court Street NE S407
Salem OR 97301

Re: Diesel emission regulation in Oregon

Dear Senator Dembrow:

You asked three questions related to the regulation of diesel emissions in Oregon. Each of your questions is restated and answered below.

1: Would the State of Oregon, or a local government in Oregon, be prohibited from adopting public contracting requirements that use contract specifications to reduce diesel emissions from construction activities, similar to the City of Chicago Clean Diesel Contracting ordinance?

The State of Oregon and local governments in this state are free to adopt public contracting specifications to reduce diesel emissions from construction activities.

The City of Chicago Clean Diesel Contracting ordinance is one of a number of efforts that have been undertaken by state agencies and state political subdivisions across the country to use public contracting specifications as a means to help reduce the air quality impacts of diesel emissions.[1] In addressing diesel emissions through public contracting, a state or local contracting authority uses its contracting power to specify the conditions under which the authority would be willing to contract with an equally willing vendor, much as any private party might. Even if federal law would preempt a state or local government from including the content of a particular specification in a *regulatory action*, the market participant doctrine may protect the *proprietary actions* of states and their political subdivisions from preemption.[2]

Such is the case here. Because the United States Court of Appeals for the Ninth Circuit decision in *Engine Manufacturers Association v. South Coast Air Quality Maintenance District* is particularly instructive in the context of clean diesel, we discuss it at length. In *Engine Manufacturers,* the United States Supreme Court had determined in an earlier proceeding that a local air quality management district's fleet rules—requiring fleet operators to choose vehicles that met certain emission standards or that contained alternative-fuel engines—were preempted

[1] *See, e.g.*, City of Chicago Rules for Clean Diesel Contracting under section 2-92-595, Municipal Code of Chicago, https://www.cityofchicago.org/content/dam/city/depts/dol/rulesandregs/CleanDieselContracting.pdf (visited October 6, 2016); Northeast Diesel Collaborative, https://www.northeastdiesel.org/construction.html#StateContractRequirements (visited October 17, 2016) (providing examples of other state contract requirements).

[2] *Engine Manufacturers Association v. South Coast Air Quality Maintenance District*, 498 F.3d 1031, 1041 (9th Cir. 2007).

as "standards" under section 209(a) of the Clean Air Act (P.L. 88-206)(CAA). The Supreme Court had remanded, however, for the lower courts to address whether the fleet rules, as applied only to public operators, could be characterized as internal state purchasing decisions and, if so, whether a different standard for preemption would apply.[3]

In affirming the district court's order on remand, the Ninth Circuit upheld application of the fleet rules to public operators as protected from CAA preemption under the market participant doctrine.[4] "The market participant doctrine distinguishes between a state's role as a regulator, on the one hand, and its role as a market participant, on the other."[5] While proprietary actions taken by a state or its political subdivisions generally will not be preempted by federal law, "the market participant doctrine is not a wholly freestanding doctrine, but rather a presumption about congressional intent."[6] "Because congressional intent is the key to preemption analysis," a court will consider whether a federal law contains "any express or implied indication by Congress" that the presumption embodied by the market participant doctrine should not apply to preemption under the federal law.[7]

Applying the principles outlined above, the Ninth Circuit court determined that the market participant doctrine applies with relation to sections 177 and 209(a) of the CAA.[8] "[T]he Clean Air Act expressly reserves to the states their traditional police powers in regulating pollution except in a few limited areas of express preemption."[9] Regarding the CAA preemption provisions at issue in *Engine Manufacturers*, the court could identify nothing in sections 177 or 209(a) of the CAA that conveyed an express or implied intent by Congress that those sections of the CAA should extend to state proprietary action.[10]

The court further concluded that the acquisition of vehicles by state and local governments amounted to proprietary action because they "essentially reflect the [state] entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances."[11] Rejecting an argument that fleet rules were not concerned with "efficient procurement" of services because their goal was to reduce pollution, the court noted that "a state or local governmental entity may have policy goals that it seeks to further through its participation in the market."[12] Those policy goals do not preclude the market participant doctrine's application, so long as the action in question is the state's own market participation.[13] Regarding costs, the court remarked that "efficient does not merely mean cheap. In context, efficient procurement means procurement that serves the state's purposes—which may include purposes other than saving money—just as private entities serve their purposes by taking into account factors other than price in their procurement decisions."[14]

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[3] *Engine Manufacturers Association v. South Coast Air Quality Management District,* 541 U.S. 246, 259 (2004).
[4] *Engine Manufacturers Association v. South Coast Air Quality Management District*, 2005 U.S. Dist. LEXIS 45389 (2005); *Engine Manufacturers*, 498 F.3d at 1039.
[5] *Engine Manufacturers,* 498 F.3d at 1040.
[6] *Id.* at 1042.
[7] *Id., quoting Building and Construction Trades Council v. Associated Builders,* 507 U.S. 218, 231 (1993).
[8] *Engine Manufacturers,* 498 F.3d at 1043. Sections 177 and 209 of the CAA are codified at 42 U.S.C. 7507 and 7543.
[9] *Id.* at 1045
[10] *Id.* at 1044-1045.
[11] *Id.* at 1045, *quoting Cardinal Towing v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999).
[12] *Engine Manufacturers,* 498 F.3d at 1046.
[13] *Id.*
[14] *Id.* (internal quotations omitted).

Although not discussed in the opinion, the Ninth Circuit's analysis in *Engine Manufacturers* applies equally to section 209(e) of the CAA—a preemption provision that, as substantive to this question, largely mimics language in sections 177 and 209(a) to preempt state adoption of emissions standards for nonroad vehicles. As stated in *Engine Manufacturers*, nothing in the preemption provisions of the CAA related to diesel emissions conveyed an express or implied intent by congress that those sections of the CAA should extend to state proprietary action. The reasoning in the *Engine Manufacturers* cases shows that a state or local government's clean diesel contract specifications will not be considered preempted emissions standards under the CAA, so long as it is clear that the contract specifications are in furtherance of the state or local government's own market participation.

Clean diesel contract specifications are not prohibited by any other provision of federal or Oregon law. In considering any proposed clean diesel contract specifications, however, it may be important to note ORS 279C.305 and 279C.345. ORS 279C.305 (1) sets a state policy for pursuing the least-cost alternative for constructing public improvements. ORS 279C.345 does not constrain a contracting agency from including any specification it needs, but provides that a specification in a public improvement contract cannot identify a particular brand or trademark unless the contracting agency receives an exemption from this prohibition.

Finally, although the Legislative Assembly could adopt a statute encouraging the use of clean diesel specifications,[15] encouraging clean diesel specifications in public contracts would not require any additional legislation. To implement his Green Chemistry Innovation Initiative, for example, Governor John Kitzhaber issued Executive Order No. 12-05 in 2012, directing state agencies to reduce the amount of toxic chemicals contained in products used by state agencies by writing "green chemistry" requirements into state contract specifications. In absence of any affirmative legislation or an executive order, state agencies and local governments have explicit authority under the Public Contracting Code to draft specifications for the goods and services they acquire, including the authority to include specifications for clean diesel in their contracts.[16]

2: What constraints would Article IX, section 3a, of the Oregon Constitution, place on proposing a statutory requirement that one percent of certain public improvement contracts be reserved for performing repowers or retrofits of diesel engines that will be used in the course of performing the contract?

Article IX, section 3a, of the Oregon Constitution, would prohibit any portion of state highway funds from being reserved in a public improvement contract to perform repowers or retrofits of diesel engines used in performance of the contract. However, a statutory one percent for clean diesel in public improvement contracts requirement could be drafted in a way that avoids conflict with Article IX, section 3a.

Article IX, section 3a, in pertinent part, dedicates state highway funds to:

> be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state. [17]

[15] *See, e.g.,* ORS 279B.275 (requiring revision of procurement procedures and specifications to encourage procurement of recycled polyethylene material); ORS 279B.280 (generally requiring development of procurement specifications that encourage use of recycled products whenever economically feasible).
[16] ORS 279B.200, 279B.205.
[17] Article IX, section 3a, Oregon Constitution.

Public improvement contracts are public contracts for "public improvements," which in general means projects for the "construction, reconstruction or major renovation on real property by or for a contracting agency."[18] Many public improvement contracts will not involve any financing with state highway funds. However, for public improvement contracts in which state highway funds are implicated, use of the funds must comply with Article IX, section 3a. Your question requires us to determine whether Article IX, section 3a, would allow for a portion of any state highway funds allotted to financing a public improvement contract to be reserved for the purpose of repowering or retrofitting diesel engines. The answer is no.

In interpreting a constitutional amendment approved after legislative referral, the Oregon Supreme Court applies the same method used to interpret constitutional provisions adopted through the initiative process.[19]

> [The] task is to discern the intent of the voters. The best evidence of the voters' intent is the text of the provision itself. The context of the language of the ballot measure may also be considered; however, if the intent is clear based on the text and context of the constitutional provision, the court does not look further.[20]

"In determining the meaning of the text of a statute, words of common usage that are not defined in the statute typically are to be given their plain, natural, and ordinary meaning."[21]

Under *Oregon Telecommunications Association v. Oregon Department of Transportation*, the Oregon Supreme Court applied the following textual analysis of Article IX, section 3a, in identifying a proper expenditure of state highway funds:

> When given a straightforward reading, Article IX, section 3a, limits the use of highway funds exclusively to a list of processes or activities ("construction," "reconstruction," etc.) that bear a relation to public highways defined by the preposition "of." In context, the term "of" requires that the process or activity be "with reference to," "relating to," or "about" the public highway.[22]

"[T]he focus of the text," the court reasoned, "is on the connection between the process or activity and the public highway, not the connection between the process or activity and motor vehicle traffic that may from time to time use the public highway."[23] The court held that Article IX, section 3a, authorized the Oregon Department of Transportation (ODOT) to use state highway funds to pay administrative expenses that ODOT incurred in requiring utility facilities that were buried under highway rights-of-way to be relocated in conjunction with two highway improvement projects.[24] If the plaintiff utilities did not relocate their utility facilities during the road improvement projects, future repairs to the utility facilities would disrupt travel on the roads. The planning and administration activities of ODOT regarding the relocation of the utility

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[18] ORS 279A.010 (1)(z) (defining "public contract"; ORS 279A.010 (1)(cc) (defining "public improvement"); ORS 279A.010 (1)(dd) (defining "public improvement contract").
[19] *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38 (2000).
[20] *Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or. 551, 559 (1994), *quoting Roseburg School District v. City of Roseburg*, 316 Or. 374, 378 (1993).
[21] *Ecumenical Ministries*, 318 Or. at 560, *citing PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611 (1993).
[22] *Oregon Telecommunications Association v. Oregon Department of Transportation,* 341 Or. 418, 430 (2006).
[23] *Id.*
[24] *Id.* at 432.

facilities, the court stated, were therefore an important aspect and a component part of the reconstruction and improvement of the roads in question by ODOT.[25]

The Oregon Supreme Court has also looked to the history of the 1980 adoption by the people of Article IX, section 3a, to observe that the provision was intended to "stop the raid" on state highway funds by eliminating expenditures for so-called highway-related programs, such as state police and parks.[26] In *Rogers v. Lane County*, the court reasoned that expenditures of state highways funds to build an airport parking lot and adjacent covered walkway were primarily for the operational convenience of an airport, and thus not within the intended scope of authorized uses of state highway funds under Article IX, section 3a.

Based on the case law described above, a court would conclude that using state highway funds to finance repowering or retrofitting of diesel engines violates Article IX, section 3a. This would be true even if the state highway funds are used only to finance repowers or retrofits of diesel engines used in the course of completing an activity or project that is otherwise permissibly financed by state highway funds. Like the expenditures at issue in *Rogers*, expending moneys to repower or retrofit a diesel engine is done primarily for the benefit of something other than highways;[27] repowering or retrofitting diesel engines is done primarily to benefit air quality through reducing diesel emissions. The activity is therefore more akin to the type of "highway-related programs" that the voters were disavowing when they adopted Article IX, section 3a. Unlike the administrative expenses in *Oregon Telecommunications*, furthermore, the expenses incurred in repowering or retrofitting diesel engines would likely not be considered an important aspect or component to a construction, reconstruction, improvement, repair or maintenance project. Reducing diesel emissions is not a necessary action to be taken toward completion of a project within the context of Article IX, section 3a, because the project will result in the same amount of utility to a highway regardless of whether clean diesel engines are used. Applying the language used in *Oregon Telecommunications*, the activity is not with reference to, related to or about highways. The activity, rather, is with reference to, related to or about the diesel emissions produced by a process or activity that is related to highways. We believe that a court would find such an activity to be too attenuated from the authorized uses listed in Article IX, section 3a (1), to be a proper use of state highway funds.

A one percent for clean diesel requirement, however, could still be drafted in a way that avoids designating state highway funds to be used for nonhighway purposes. The proposal could allow for contracting agencies to choose an alternative method from the one percent reservation that does not conflict with Article IX, section 3a, or it could exempt from the one percent reservation those projects where the reserved moneys would otherwise need to come out of state highway funds. Senate Bill 824 (2015), as introduced, provides an example of a one percent for clean diesel public contracting requirement capable of being implemented without conflicting with Article IX, section 3a.

Sections 1 to 6 of SB 824 required one percent of the amount of certain public contracts[28] to be set aside for the purpose of performing qualifying repowers or retrofits of

[25] *Id.* at 431.
[26] *Rogers v. Lane County,* 307 Or. 534, 542 (1989).
[27] For the purposes of this opinion, we use the term "highways" as shorthand for "public highways, roads, streets and roadside rest areas," as referred to in Article IX, section 3a (1), of the Oregon Constitution.
[28] For the first two implementation years of the program, sections 1 to 3 of SB 824 provided that the clean diesel in public contracting requirements would apply to public improvements contracts for which federal funds from congestion mitigation and air quality (CMAQ) grants are a source of funding. CMAQ grants are, generally, a source of federal moneys for transportation projects. Beginning in year three of implementation, the clean diesel requirements

Oregon diesel engines[29] that would be used in the course of performing the contract.[30] Any amount reserved in the public improvement contract under the one percent reservation requirement that remained unexpended after completion of and final payment for the public improvement contract would have been required to be placed in the Clean Diesel Engine Fund established under ORS 468A.801.[31]

The bill also allowed the Department of Environmental Quality to adopt model minimum contract specifications for clean diesel use in public improvement contracts.[32] As an alternative to the one percent reservation, a contracting agency could include the department's model minimum contract specifications for clean diesel in a public improvement contract, and thus avoid the one percent reservation requirement.[33]

Although the bill did not include any specific exemptions for public improvement contracts funded by moneys subject to Article IX, section 3a, the model minimum contracting specifications procedures would allow for contracting agencies to comply with the law in a manner that does not present a conflict with Article IX, section 3a. In an instance where the only sources of funding for a public improvement contract covered by the clean diesel provisions are moneys subject to Article IX, section 3a, the contract could include the model contract specifications instead of the one percent reservation. While the language in SB 824 could be strengthened in certain respects, the bill, if adopted, would have created a one percent clean diesel requirement facially consistent with the requirements of Article IX, section 3a.

3: If the Legislative Assembly or the Environmental Quality Commission adopt emission standards for nonroad diesel vehicles and equipment, how must implementation of the standards be structured in order to comply with the requirement, under the federal Clean Air Act, that the "standards and implementation and enforcement" be "identical" to the nonroad diesel emission standards adopted by California?

No court has addressed what is required by section 209(e)(2)(B) of the CAA, which allows states to adopt standards identical to California's standards for nonroad diesel emissions. Although a number of inquiries could be raised under that provision, we understand you to be primarily interested in two: the standards Oregon would need to adopt to satisfy the "identical" requirement, and if Oregon could implement the standards pursuant to a delayed timeline compared to California's and still comply with the CAA.

Looking to the text of the provision and judicial interpretation of related provisions in the CAA, we believe that to satisfy section 209(e)(2)(B), a state adopting California's standards for nonroad diesel emissions must adopt the standards exactly as promulgated by California and as reflected in California's request to the United States Environmental Protection Agency (EPA) for

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would have applied to CMAQ-funded projects as well as public improvement projects by state contracting agencies and local contracting agencies (other than small special districts as defined by the Environmental Quality Commission) with a value of $2 million or more and for which state funds constitute 30 percent or more of the value of the contract.

[29] Section 2 (1) of SB 824 provided that for purposes of the one percent set-aside provisions, "Oregon diesel engine" has the meaning given that term in ORS 468A.795, i.e., "an engine at least 50 percent of the use of which, as measured by miles driven or hours operated, will occur in Oregon for the three years following the repowering or retrofitting of the engine."

[30] Section 2 (2), SB 824.

[31] Section 2 (3), SB 824.

[32] Section 2 (4), SB 824.

[33] Section 2 (4), SB 824.

authorization of its regulation. In response to the second inquiry, the answer is no. Under the CAA, we believe that for any period in which a state plans to implement and enforce California's standards, implementation and enforcement of the standards will need to apply in the exact same manner in that state as in California *during that same period*. Thus, for example, if Oregon adopts California's standards to first apply for a period beginning January 1, 2021, Oregon must implement and enforce the standards such that fleets operating in California and in Oregon during the 2021 calendar year are subject to the exact same requirements.

I. Background

The CAA "is one of the most comprehensive pieces of legislation in our nation's history."[34] To better understand the issues raised by your question, some basic history of the development of the relevant provisions is useful. The original CAA, enacted by Congress in 1955, was aimed primarily at increasing federal research and assistance in air pollution prevention, and made no provision for federal motor vehicle emission standards.[35] However, because several states had begun to adopt their own standards, Congress decided that national standards were to be preferred over having each state choose its own approach, "which could result in chaos insofar as manufacturers, dealers, and users are concerned," and enacted federal emission standards for new motor vehicle engines in 1965.[36]

In 1967, Congress amended the CAA to impose federal preemption over motor vehicle emission standards but, over adamant objection from the auto industry, allowed California an exemption from preemption as the only state regulating auto emissions prior to March 30, 1966.[37] "California's Senator Murphy convinced his colleagues that the entire county would benefit from his state's continuing its pioneering efforts, California serving as 'a kind of laboratory for innovation.'"[38] Comprehensive revisions to the CAA in 1970 established national ambient air quality standards and added more stringent uniform emission standards for new motor vehicles. Section 209 of the CAA was also revised to require the EPA to consider California's standards as a package, so that California could seek a waiver from preemption if its standards "in the aggregate" protected public health at least as well as federal standards.[39] The 1977 amendments also added section 177, which permitted other states to opt in to the California standards by adopting identical standards as their own.[40]

It was not until the 1990 amendments that Congress chose to regulate nonroad sources under the CAA. The several provisions relating to regulation of nonroad sources "are but tiny pieces of the 1990 amendments, a legislative feat whose massiveness and complexity 'beggar[] description.'"[41]

> As it had done with respect to motor vehicles, Congress not only authorized the EPA to regulate nonroad sources but also preempted state regulation. The 1990 amendments added § 209(e)(1), which expressly preempted the states from adopting

[34] *Motor Vehicle Mrfs. Ass'n of the United States v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 524 (2nd Cir. 1994).
[35] *Id.*
[36] *Id., quoting* S. Rep. No. 192, 89th Cong., 1st Sess. 5-6 (1965).
[37] *New York State,* 17 F.3d at 525.
[38] *Engine Mfrs. Ass'n, ex rel. Certain of its Members v. United States EPA*, 88 F.3d 1075, 1080 (D.C. Cir. 1996).
[39] *New York State,* 17 F.3d at 525.
[40] *Id.*
[41] *United States EPA*, 88 F.3d at 1080.

> standards or other requirements relating to emissions from two specific categories of nonroad sources. In the case of any nonroad vehicles or engines other than those referred to in § 209(e)(1), the EPA was required in § 209(e)(2) to authorize California to adopt standards and other requirements relating to emissions, under similar conditions to those governing the motor vehicle preemption waiver; again, as with the motor vehicle preemption waiver, other states could then opt in to the California standards.[42]

Your questions require us to specifically consider section 209(e)(2)(B), which provides:

> Any State other than California which has plan provisions approved under part D of [Title I, 42 U.S.C. 7501 et seq.] may adopt and enforce, after notice to the Administrator, for any period, standards relating to control of emissions from nonroad vehicles or engines (other than those referred to in subparagraph (A) or (B) of paragraph (1)) and take such other actions as are referred to in subparagraph (A) of this paragraph respecting such vehicles or engines if—
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> (i) such standards and implementation and enforcement are identical, for the period concerned, to the California standards authorized by the Administrator under subparagraph (A), and
>
> (ii) California and such State adopt such standards at least 2 years before commencement of the period for which the standards take effect.[43]

In September 2013, the EPA granted authorization under the CAA to the California Air Resources Board to enforce all provisions of its In-Use Off-Road Diesel-Fueled Fleets Regulation (Off-Road Regulation).[44] The Off-Road Regulation was originally approved by the board in July 2007, and amended in December 2008, January 2009, July 2009 and December 2010.[45]

The Off-Road Regulation establishes statewide in-use performance standards applicable to any person, business or government agency that owns or operates in-use nonroad diesel vehicles with a maximum power of 25 horsepower or greater, subject to certain exceptions.[46] What requirements will apply to a given fleet under the Off-Road Regulation is a heavily date-dependent question. Effective January 1, 2014, all fleets were banned from adding a vehicle

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[42] *Id.* at 1081-1082 (internal quotations omitted).
[43] Section 209(e)(2)(B), CAA.
[44] 78 FR 58091 (September 20, 2013).
[45] *Id.*
[46] *Id.*; In-Use Off-Road Diesel Fueled Fleets Regulation, Overview, Revised October 2016, https://www.arb.ca.gov/msprog/ordiesel/faq/overview_fact_sheet_dec_2010-final.pdf (visited October 17, 2016) (The regulation exempts personal use vehicles, vehicles used solely for agriculture, vehicles that are awaiting sale and vehicles already covered by certain other regulations. Emergency operations vehicles, dedicated snow removal vehicles, low-use vehicles (used under 200 hours per year, as confirmed by a nonresettable hour meter) and vehicles used a majority of the time (but not solely) for agricultural operations must be reported to the California Air Resources Board and labeled, but are exempt from the performance requirements of the Off-Road Regulation.).

with a Tier 0 engine.[47] Limitations on adding older vehicles to a fleet become more restrictive over time, with different restrictions applying in different years, depending on the size of the fleet. By the year 2023, all vehicles added to all fleets must be powered by an engine that is Tier 3 or higher.[48]

Performance requirements for all fleets also phase in over time, according to fleet size as defined by total fleet horsepower.[49] Requirements began July 1, 2014, for large fleets, and begin January 1, 2017, for medium fleets, and January 1, 2019, for small fleets.[50] Fleets have two compliance options. Fleets may either (1) meet fleet average emission targets that become increasingly stringent over a 10-year period, or (2) satisfy best available control technology requirements within a given compliance year.[51]

II. Analysis

To date, no other state has adopted California's Off-Road Regulation. Thus, no court has had the opportunity to interpret what is required for a state to meet the requirement, under section 209(e)(2)(B) of the CAA, that another state's "standards and implementation and enforcement are identical, for the period concerned, to the California standards." That said, we believe the plain text of the statute provides answers to both of your inquiries.

A. Identical standards

We begin by identifying what standards the "identical" requirement in section 209(e)(2)(B) applies to. Again, because no court has had the opportunity to interpret the "identical" requirement in section 209(e)(2)(B) of the CAA related to nonroad vehicles, we look to courts' interpretations of the corollary requirement for other states' adoption of California's new motor vehicle standards under section 177 of the CAA. Under section 177, other states may adopt California's new motor vehicle standards if "such standards are identical to the California standards for which a waiver has been granted."[52]

In *Motor Vehicle Mfrs. Ass'n of the United States v. New York State Dep't of Envtl. Conservation*, the United States Court of Appeals for the Second Circuit was asked to consider whether New York's failure to adopt California's Clean Fuels plan when it adopted California's Low Emission Vehicle (LEV) standards violated section 177."[53] Looking to the plain text of the statute, the court determined that it did not. "The most logical reading of § 177 is that New York may adopt only those standards that, pursuant to § 209(b), California included in its waiver application to the EPA." Because the Clean Fuels standards were not included in the waiver application, New York was not compelled to adopt, and was indeed precluded from adopting, the Clean Fuels standards as part of its own LEV program. New York's program must be "identical to the California standards for which a waiver has been granted," and the waiver only addressed the LEV program.[54]

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[47] The Tier system refers to the United States Environmental Protection Agency Tier standards for nonroad diesel exhaust emissions. *See* https://www3.epa.gov/otaq/nonroad-diesel.htm (visited October 17, 2016).
[48] In-Use Off-Road Diesel Fueled Fleets Regulation, Overview.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Section 177, CAA.
[53] *New York State*, 17 F.3d at 531.
[54] *Id.* at 532.

We believe a court would reach the same conclusion under section 209(e)(2)(B). Under section 209(e), California is required to seek "authorization" to pursue a nonroad emissions program, rather than the "waiver" for a new motor vehicle emissions program that California is required to seek under sections 177 and 209(b). However, the EPA has stated that it evaluates an application for authorization of nonroad vehicle emission standards in light of congressional intent regarding the waiver program generally,[55] which we would understand to include the opt-in provisions of section 177. Like in section 177, section 209(e)(2)(B) allows states to adopt standards "identical . . . to the California standards authorized by the Administrator." We see no discernable difference between that language and the provisions of section 177 that would lead a court to reach a different conclusion regarding the Off-Road Regulation than was reached in *New York State.* We therefore conclude that, when determining whether a state adopted "identical" standards as required by section 209(e)(2)(B), a court will look to see whether the state's standards are identical to those described in California's application to the EPA for authorization of the standards under section 209(e)(2)(A), and as authorized by the EPA.

B. Timing of implementation

We understand your second inquiry under section 209(e)(2)(B) to focus on whether the CAA would allow Oregon to adopt California's Off-Road Regulation but delay the phased schedule. For example, we understand you to ask whether, during Oregon's first year of enforcement (2021, for example) the Off-Road Regulation could apply in Oregon as it did during California's first year of enforcement, 2014, rather than how the regulation is being applied in California during the 2021 enforcement year. The answer is no.

As an initial matter, our answer to the first inquiry somewhat obviates the answer to the second inquiry. Again, California's Off-Road Regulation phases in requirements that place restrictions on adding older vehicles to a fleet and separately phases in fleet performance requirements, with schedules for both regulation components beginning in 2014 and with certain schedules reaching into 2029.[56] California's Off-Road Regulation is highly dependent upon the phasing in of the fleet requirements, as was clearly reflected and considered in California's application to the EPA for authorization of its program, and in the EPA's approval.[57] To say that section 209(e)(2)(B) would allow for Oregon to adopt California's Off-Road Regulation but delay, i.e., change, the phase-in schedule to meet Oregon's particular needs would effectively allow this state to divorce the phase-in schedule from California's Off-Road Regulation. Because the phase-in schedules are key components of the Off-Road Regulation, as that regulation was approved by the EPA, we believe that such an approach would not result in standards that are identical to the California standards authorized by the EPA, as is required by the text of section 209(e)(2)(B) and *New York State*.

Our conclusion is also supported by other aspects of the plain text of section 209(e)(2)(B). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[58] Here, section 209(e)(2)(B) authorizes a state to adopt California's Off-Road Regulation "*for any period*," if "such standards and implementation and enforcement are "identical, *for the period concerned*, to the California standards (emphasis added)."[59]

[55] 78 FR 58113 (September 20, 2013).
[56] In-Use Off-Road Diesel Fueled Fleets Regulation, Overview.
[57] *See* 78 FR 58091.
[58] *Engine Manufacturers*, 541 U.S. at 248-252, *quoting Park N'Fly, Inc. v. Dollar Park & Fly Inc.*, 469 U.S. 189, 194 (1985).
[59] Section 209(e)(2)(B), CAA.

The phrase "for the period concerned" relates back to the period in which a state may apply California's standards—"for any period." Ascribing that text its most logical reading, the provision allows for a state to choose to opt-in to California's standards for any period, whether that period happens to begin at the same time that California begins enforcing the Off-Road Regulation or at some later date. The text indicates, however, that "for the period concerned," i.e., the period chosen, the state's standards, implementation and enforcement must be identical to California's. Thus, if a state opts in to California's Off-Road Regulation for the period beginning January 1, 2021, and ending January 1, 2029, the state's standards, implementation and enforcement must be identical to California's for the period beginning January 1, 2021, and ending January 1, 2029. Today, as in 1990 when section 209(e) became law, "identical" is defined to mean "being the same: having complete identity," or "showing exact likeness: characterized by such entire agreement in qualities and attributes that identity may be assumed."[60] Thus, to meet the identical requirement under section 209(e)(2)(B), we believe that a state's program must show an exact likeness in all respects to the California Off-Road Regulation, including with respect to all phase-in schedules provided for in the Off-Road Regulation.

This reading of the statute also finds support when compared to its corollary provision in section 177, which courts have recognized as setting forth "similar conditions," and providing for "parallel treatment" for motor vehicles as that provided for nonroad vehicles in section 209(e).[61] Section 177, again, allows for states to adopt and enforce "*for any model year* standards relating to control of emissions from new motor vehicles or new motor vehicle engines . . . if . . . such standards are identical to the California standards for which a waiver has been granted *for such model year* (emphasis added)." Section 209(e)(2)(B) was drafted in the 1990 amendments to mirror the construction of section 177 with a few notable differences, including the references in section 209(e)(2)(B) to the period in which standards will apply, rather than the model year. The term "model year" is a term of art within the automotive manufacturing industry that designates all vehicles produced during a manufacturer's annual production period.[62] Thus, the language in section 177 makes clear that if a state adopts California's motor vehicle standards, it must apply the same standards to the same model year as in California. That requirement for identical standards for identical model years is but one provision in section 177 that protects the auto industry from being forced to comply with more than two regulatory standards nationwide.[63]

Section 209, however, applies to both new and nonnew engines, in nonroad vehicles rather than motor vehicles,[64] and thus it is logical that Congress may have chosen a more expansive term than "model year" to apply to the differing factual situation. Given the otherwise parallel construction, we read the point of asymmetry between sections 177 and 209(e)(2)(B) described above to indicate an intent to apply a parallel standard to a different fact pattern, rather than an intent to apply any different standard with regard to in *what way* other states' standards must be identical to California's. Like in section 177, it is therefore logical to conclude that section 209(e)(2)(B) requires other states' phase-in schedules to be identical to California's. Because California's standards apply not just to fleets that are based in California but to fleets based in other states and used in California as well,[65] our reading also promotes the intent of

[60] *Webster's Third New International Dictionary* at 1122 (1976).
[61] *United States EPA*, 88 F.3d at 1081, 1086.
[62] *New York State*, 17 F.3d at 534.
[63] *United States EPA*, 88 F.3d at 1080.
[64] *United State EPA*, 88 F.3d at 1087-1093.
[65] In-Use Off-Road Diesel Fueled Fleets Regulation, Overview (stating that the Off-Road Regulation applies to vehicles "used in California").

Congress, in subjecting vehicle emissions regulations to principally federal control, to mitigate the "difficulty of subjecting motor vehicles, which readily move across state boundaries, to control by individual states."[66]

Finally, we will note that, depending on the arguments raised in any particular litigation on this issue, a court could determine that reference to the legislative history of section 209(e) is warranted.[67] It would likely be of very little help in this instance. The legislative history of section 209(e)'s adoption as part of the 1990 amendments to the CAA is meticulously detailed in *Engine Mfrs. Ass'n, ex rel. Certain of its Members v. United States EPA*, a case concerning the EPA's rulemaking under the provision. That case explains that the House bill contained a preemption provision; the Senate bill did not.[68] The conference committee produced a version of preemption very different than the one the House had passed and, given the end-of-session haste in which the bill was passed, the conference committee did not produce a section-by-section analysis of the conference bill.[69] "There are, in fact, only a few scattered pieces of evidence about what the conferees intended, or what the members of both Houses thought they were voting for when the bill emerged from conference."[70] One snippet of legislative history that supports our analysis is an October 10, 1990, joint House-Senate staff memorandum stating that "other States would be permitted to opt-in to the California standard using new provisions *analogous* to sections 177 and 209 of the current law (emphasis added)."[71] However, we recognize that staff memoranda generally carry little authoritative weight.

At best, the sheer lack of legislative history, in and of itself, provides some support for our textual interpretation: "In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."[72] Here, the plain text allows a state to adopt California's standards "for any period," so long as "such standards and implementation and enforcement are identical, for the period concerned, to the California standards authorized by the Administrator." We believe that text is consistent with sections 177 and 209(b), and requires a state's nonroad program to be truly "identical" to California's program, in all aspects, in order to escape CAA preemption.

While we recognize that our answer to this inquiry is not free from doubt, in part because we are analyzing theoretical rather than enacted Oregon statutory or regulatory provisions and because there are not court decisions on the issue, we conclude that the identical requirement in section 209 requires an identical program in all aspects. Thus, for another state's "standards and implementation and enforcement" to be identical to California's in the context of section 209, the state's program must apply to fleets in that state for any given enforcement year in the exact same manner that it applies to fleets of the same size in California during that same enforcement year. We believe that to conclude otherwise would contravene the plain text of the statute and Congress' intent to protect industry from being overburdened by a plethora of competing regulatory programs.

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[66] *United State EPA*, 88 F.3d at 1079.
[67] *See*, *e.g.*, *United State EPA*, 88 F.3d at 1088-1089 ("If apparently plain language compels an 'odd result' the court may refer to evidence of legislative intent other than the text itself, such as the legislative history.").
[68] *Id.* at 1087.
[69] *Id.* at 1091-1092.
[70] *Id.* at 1091.
[71] *Id.* at 1103.
[72] *Id.* at 1092, *quoting United States v. Ron Pair,* 489 U.S. 235, 240-241 (1989).

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Very truly yours,

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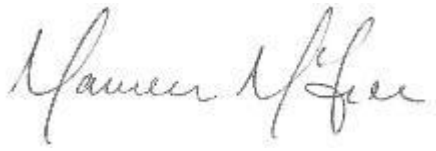

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