

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 85

[AMS-FRL-3992-6]

#### Waiver of Preemption to California for Nonroad Engine and Vehicle Standards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This proposed rule sets forth requirements and procedures for EPA authorization of California adoption and enforcement of standards and other requirements relating to the control of emissions from nonroad vehicles or engines under section 209(e) of the Clean Air Act (Act), as amended.

The proposal includes definitions of the new nonroad engines and vehicles that the Act specifies as preempt from state regulation. These definitions of "farm equipment", "construction equipment", and "locomotive" will clarify which nonroad engines and vehicles are not preempt and are thus subject to state regulation. EPA will not, however, in this rulemaking clarify whether certain internal combustion engines are stationary sources and subject to regulations under Title I of the Act or are nonroad engines and therefore potentially subject to nonroad regulations under Title II of the Act. This issue will be addressed in a subsequent nonroad rulemaking. The NPRM also provides procedures by which EPA may authorize California to adopt standards and provides guidance for states that adopt California standards. Finally, the proposal discusses the criteria to be used by EPA in its analysis of California authorization requests. The NPRM will provide guidance to California, other states, and vehicle and engine manufacturers regarding nonroad engine and vehicle preemption.

**DATES:** EPA will conduct a public hearing on this Notice of Proposed Rulemaking on September 20, 1991, from 9 a.m. to 5 p.m. in Washington, DC. Written comments on this notice will be accepted for 30 days following the hearing, until October 21, 1991.

**ADDRESSES:** The public hearing will be held in the Captain's Room of the Channel Inn Hotel, 650 Water Street, SW. (corner of 7th & Maine), Washington, DC. Written comments should be submitted (in duplicate if possible) to: Director, Manufacturers Operations Division (EN-340F), U.S. Environmental Protection Agency, 401 M

Street, SW., Washington, DC 20460. Copies of material relevant to the proposed rule (Docket A-91-18) will be available for public inspection during the working hours of 8:30 a.m. until noon and 1:30 p.m. to 3:30 p.m., Monday through Friday, at: U.S. Environmental Protection Agency, Air Docket (LE-131); room M1500, First Floor Waterside Mall, 401 M Street, SW., Washington, DC 20460 (Telephone (202) 260-7548). A reasonable fee will be charged by EPA for copying docket material.

#### FOR FURTHER INFORMATION CONTACT:

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#### I. Statutory Authority and Background

EPA is required under section 209(e) of the Clean Air Act (Act), as amended, 42 U.S.C. 7543, to "issue regulations to implement" subsection (e). Section 209(e) of the Act addresses the state adoption of emission standards for new nonroad vehicles and engines.

Under section 209(e), all states are preempted from adopting emissions standards for "[n]ew engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower" or for "[n]ew locomotives or new engines used in locomotives". In this regulation, EPA proposes definitions for these preempted categories. For nonroad engines and vehicles not included in the preempted categories, EPA is directed to authorize California, after notice and opportunity for public hearing, to adopt and enforce such standards and other requirements if these meet the criteria set forth in the Act. Several of the criteria to be used for nonroad engine and vehicle authorizations are similar to the requirements applicable to motor

vehicle waivers under section 209(b), which prohibits state adoption of emission standards for motor vehicles and engines. Section 209(b) directs EPA to waive this prohibition for California if certain criteria are met.

Other states may adopt California nonroad vehicle or engine emission standards under section 209(e) if they comply with several requirements. This provision is similar to section 177 which addresses state adoption of California motor vehicle emission standards.

## II. Discussion of Proposed Regulation

### A. Nonroad Engines and Vehicles

EPA acknowledges that it will necessary at some point to clarify whether certain internal combustion engines are stationary sources and subject to regulations under Title I of the Act or are nonroad engines and therefore potentially subject to nonroad regulations under Title II of the Act. EPA will not address this issue, however, in this rulemaking. The issue does not need to be resolved in order for EPA to respond to California's request that EPA authorize California's proposed standards for lawn and garden and utility engine as California's proposal affects only engines smaller than 25 horsepower. EPA believes, because equipment that uses engines smaller than 25 horsepower includes hand-held and portable pieces of equipment, such engines are clearly nonroad engines.

The issue is complex. The definitions of "stationary source" in section 111(3) and 302(z) of the Act and of "nonroad engine" in section 216(10) of the Act do not make clear under which Title certain internal combustion engines belong. The internal combustion engines in question are those that used in equipment for reasons other than propulsion. Some examples include pumps, generators and compressors.

The delineation of internal combustion engines as stationary or nonroad sources would require EPA to propose criteria to be used to make various determinations. For example, EPA might determine a horsepower cutoff point that would achieve the best air quality benefit. EPA could also provide criteria regarding whether engines are permanent or transportable.

EPA will address this issue in one of the following regulations. Pursuant to section 213 of the Act, the Administrator will "conduct a study of emissions from nonroad engines and nonroad vehicles to determine if such emissions cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." If

the Administrator determines that nonroad emissions are "significant contributors" in more than one ozone or carbon monoxide nonattainment area, the Administrator shall promulgate standards for such nonroad engines. EPA would clarify whether certain internal combustion engines are nonroad engines or stationary sources at that time. The statutory deadline for EPA to issue such standards is twenty-four months from November 15, 1990, the date the Clean Air Act Amendments were enacted. If EPA does not promulgate standards under section 213, the remaining issues pertaining to the distinction between nonroad and stationary sources will be addressed by EPA in a separate rulemaking. Interested parties may choose to comment on this issue at this time. EPA will refer to these comments when the issue is addressed in a later rulemaking.

*B. Definitions of "New" as Used in "New Nonroad Engine", "New Nonroad Vehicle", "New Locomotive" and "New Engine Used in Locomotive"*

In developing a proposed definition for "new," EPA examined the use of the word "new" not only in section 209, but also in sections 213 and 216. Section 213 directs EPA to study emissions from nonroad engines and vehicles, and to promulgate Federal emission standards for certain categories if they are found to contribute significantly to certain pollutants. EPA is also directed to promulgate emission standards for new locomotives and new engines used in locomotives. Amendments to sections 209 and 213, all of which address nonroad engines and vehicles, were combined in section 222 of the 1990 amendments to the Act. Section 216 provides definitions for part A of Title II, including the definitions of "new motor vehicle" and "new motor vehicle engine". EPA believes the word "new" should be similarly interpreted for both sections 209 and 213 and should be consistent with section 216.

Congress did not define "new", but EPA believes it is reasonable to interpret "new" the same way that "new motor vehicle" is defined. That is, these preemptions apply only to new nonroad engines, new nonroad vehicles, new locomotives and new engines used in locomotives and do not apply to in-use engines which were manufactured before, on, or after the effective date of the 1990 Clean Air Act Amendments. Therefore, EPA defines "new" nonroad engine and "new" nonroad vehicle to mean a nonroad engine or a nonroad vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser. Ultimate purchaser

is defined as the first person who in good faith purchases such a new nonroad engine or new nonroad vehicle for purposes other than resale.

Therefore, if under section 213, EPA promulgates emission standards for certain categories of nonroad engines or nonroad vehicles, the standards would apply to "new" engines or vehicles, those to which legal or equitable title has never been transferred. Section 209(e)(1) states that "No state \* \* \* shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions \* \* \*". EPA interprets this to mean that states are only preempted from regulating emissions for the specified categories by adopting standards and other requirements relating to the control of emissions that apply to new engines or vehicles. For engines which are no longer "new", states will be able to adopt regulations such as fuel quality specifications, operational mode limitations, and measures that limit the use of nonroad engines or equipment.

EPA proposes the same definition for "new locomotives" and "new engines used in locomotives". EPA interprets that Congress' intent was to preempt states from regulating emissions or operations of new locomotives and new engines used in locomotives.

If, on the other hand, EPA were to interpret "new" to mean "other than existing nonroad engines and vehicles", the preemption would apply to all nonroad engines and vehicles manufactured after the effective date of the Clean Air Act Amendments, that is, November 15, 1990. This would mean that nonroad engines and vehicles manufactured after that date would never be subject to any kind of state regulation.

For purposes of imported nonroad engines, the proposed definition states that new nonroad engine means a nonroad engine manufactured after the effective date of a regulation issued under section 213 which would be applicable to such engine had it been manufactured for importation into the United States. In practice, this means that an imported nonroad engine will be considered as new at the time of importation if the engine was manufactured after the effective date of standards promulgated under section 213 regardless of whether the engine had already been sold to an ultimate purchaser.

EPA invites comment on this interpretation of "new".

*C. Definition of "Farm Equipment"*

EPA proposes that *farm equipment* means any internal combustion engine-

powered machine primarily used in the commercial production and/or harvesting of food, fiber, wood, or commercial organic products.

Section 209(e)(1) prohibits states from adopting emission standards for "[n]ew engines which are used in \* \* \* farm equipment or vehicles and which are smaller than 175 horsepower." Neither the Act nor its legislative history define or provide additional detail regarding this preemption. EPA has previously addressed, however, the preemption of farm equipment when it published a proposed Federal Implementation Plan (FIP) for the California South Coast Air Quality Management District on September 5, 1990 (55 FR 36458). The proposal included control of volatile organic compounds (VOC) and carbon monoxide (CO) emissions from off-highway mobile sources. EPA proposed to exempt commercial farm vehicles and equipment from the category requiring emission controls regardless of engine size or type. In the FIP, "commercial farm vehicles" meant that the vehicle or equipment was unsuitable for home use or commercial groundskeeping. (*Id.* at 36529.)

In developing a proposed definition of "farm equipment or vehicles" for this proposed rulemaking EPA used as guidance definitions of "agricultural field equipment" and "farmstead equipment" prepared by the Society of Automotive Engineers (SAE) and the American Society of Agricultural Engineers (ASAE). EPA's proposed definition of "farm equipment or vehicles" is based on the interpretation that farming, and therefore farm equipment, includes both production and/or harvesting. The proposed definition would include such activities as forestry, agriculture, horticulture, and aquaculture.

EPA has also consulted definitions of agriculture found in EPA and other Federal statutes and regulations. An EPA Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulation (40 CFR 171.2(a)(5)) regarding the certification of pesticide applicators defines "agricultural commodity" broadly. The FIFRA definition includes the same things as the proposed definition, including forestry. The United States Department of Agriculture ("USDA") Crop Insurance Act, 7 U.S.C. 1518, defined "agricultural commodity" to include forestry.

The last agricultural operation using farm equipment is harvesting. Harvesting is meant to include only those operations relating to actually gathering the crop at the site where it is grown. Such operations might include

cutting, trimming, separating, and baling. Additional processing after the crop has been harvested, such as freezing or canning, would not be harvesting.

EPA invites comment on this definition of farm equipment and vehicles.

#### D. Definition of "Construction Equipment"

EPA proposes that *construction equipment* means any internal combustion engine-powered machine primarily used on commercial construction sites.

Section 209(e)(1) prohibits states from adopting emission standards from "[n]ew engines which are used \* \* \* construction equipment or vehicles and which are smaller than 175 horsepower." As with farm equipment, neither the Act nor the legislative history define or provide additional specificity related to this preemption.

Again, EPA reviewed the SAE definition of construction equipment in developing this proposed definition. EPA also consulted the Department of Commerce Standard Industrial Codes ("SIC"). Construction machines include both earthmoving and non-earthmoving equipment. The former are designed to move earth and other material and are often employed on projects such as roads, dams, open pit excavation, trenching and building sites. Loaders, graders, tractor-scrappers, and backhoe loaders are indicative of the equipment in this category. The non-earthmoving equipment are typically used on unimproved surfaces and include machines such as cranes, pavers, and rollers/compactors. (See SAE Recommended Practice J 1116, June 1986 for a more complete listing of machines.)

Mining machinery are less frequently involved in operations associated with building or assembling structures or use on road or dam projects. Instead, these machines are used in mining, excavation, tunneling, and for the removal, transport, and processing of ore, coal, earth and other mineral substances. Such machines include continuous miners, roof drills, cutting machines, loading machines, and rock dusting machines. Although the proposed definition is broad, EPA is proposing to exclude mining equipment for the following reasons. Both SAE and SIC have a separate category for mining equipment; these organizations considered mining sufficiently distinct not to include it as construction equipment. Further, as noted above, mining equipment is not usually associated with the activities generally considered as construction. For equipment that is used both for mining

and construction, the "primary use" test discussed below will determine if the equipment may be considered "construction equipment or vehicle" under the definition. Nonetheless, EPA invites comment on whether mining equipment should be included in the construction equipment definition.

#### E. Definition of "Locomotive"

EPA is proposing a definition of *locomotive* based on the definition contained in a regulation promulgated under the Locomotive Inspection Act, 49 CFR 229.5(j). Please see the proposed definition later in this document.

#### F. Application/Scope of Definitions—"Used In"

Under EPA's proposed definitions of "farm equipment" and "construction equipment", many types of equipment will undoubtedly be used solely within the category and be preempted. There are, however, equipment types that are used for many applications, including farm or construction activities. For such "multiple use" equipment, EPA proposes a "primary use" test that assesses whether such equipment is primarily used as farm or construction equipment; if so, it will be considered farm or construction equipment, as defined.

The proposed rule states that if it is determined that the primary use of the equipment is in a preempted category the individual engine used in that piece of equipment will be preempted from state regulation. Similarly, if it is determined that the primary use of the equipment is not in a preempted category, then the individual engine used in that piece of equipment would then be subject to state regulation. In other words, once an equipment type has been judged farm or construction, no other judgments regarding the engine in that equipment need be made. For equipment which is determined to be other than farm or construction, however, its engine may be regulated by the state even if that engine is also used in a preempted class of equipment.

For example, a farm tractor would undoubtedly be judged to be a piece of farm equipment. Thus, any engine used in such tractor would be preempted from state regulations. Conversely, a lawn mower would more than likely not be farm or construction equipment and would not be preempted. Any engines used in lawnmowers would be subject to state regulation. For a multiple-use piece of equipment the determination is a bit more difficult but no less straightforward. Assume that, for example, after examination of sales data it was determined that chainsaws were not farm or construction equipment.

Therefore, the engines used in chainsaws would not be preempted, and they would have to meet state regulations. Further assume that the engine used in one chainsaw was also used in a cutoff saw and that a cutoff saw had been judged to be construction equipment. The engine in the cutoff saw would be preempted from state regulation, notwithstanding that the same engine, used in a chainsaw, is not preempted. As these examples show, the determinant in each case is the type of equipment—not the various uses of an engine.

In determining "primary use", the individual manufacturer or a manufacturer's association would present national sales data to the California Air Resources Board (CARB) to show that an equipment type was or was not used in commercial farming or construction. When CARB requested EPA to authorize its proposed regulations, EPA would review California's decision regarding the primary use of particular equipment in commercial activities.

The key issue will be the number of units sold for each application. If 51 percent or more of the units sold in an equipment category went to farming applications, that category would be designated as primarily used in farming, and the engines installed would be preempted from state regulation. Similarly, if 51 percent or more of the units sold in another equipment category went to construction applications, that equipment category would be designated as primarily used in construction, and the engines used would be preempted. The limit could also be reached by adding farm and construction equipment sales together. If the sum was 51 percent or more that category would be farm and construction equipment and the engines used therein would be preempted.

EPA requests comments, with examples and possible suggestions, in cases in which a piece of equipment that appears clearly to be farm or construction equipment may not meet the 51 percent "primary use" test.

It is anticipated that the number of groups of equipment might be quite limited. Unless there was a very clear delineation, all similar pieces of equipment would remain together in one group rather than being split into sub-groups. For example, there would probably be just one group comprising lawnmowers rather than one group of mowers with engines from zero to two horsepower, another group with engines from two to four horsepower, and another group of mowers which are self-

propelled. EPA invites comment on whether sub-categories should be created for certain types of equipment.

#### C. Labeling Requirement

EPA proposes that engine manufacturers be required to label new engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. The proposal requires that the label state which standard or standards, that is, Federal, California, or both, for which the engine is certified. The labeling requirement provides an enforcement mechanism for Federal or State authorities to ascertain if a piece of equipment contains the properly certified engine. For example an inspector could look at a piece of farm equipment to determine if the engine has been certified to meet Federal standards (states are preempted from setting standards for farm equipment). Or, if an inspector looked at a piece of equipment that was not preempted from state regulation, the engine could be labeled that it met a California standard only (if in California) or a Federal standard (if not used in California) or both California and Federal standards.

#### H. Authorization Criteria and Procedures

Section 209(e) preempts all states from adopting and enforcing emission standards and other requirements for specific categories of nonroad engines and vehicles. If certain criteria are met, EPA is required to "authorize" California to adopt standards for other categories of nonroad engines and vehicles. Other states may then adopt California standards if they comply with requirements enumerated in section 209(e). The concept of Congress providing a mechanism for California to adopt emission standards and enforcement procedures different from Federal standards and enforcement procedures is not new. EPA has been granting "waivers" of federal preemption for California for motor vehicle standards and enforcement procedures under section 209(b) of the Act since 1967. The criteria for section 209(b) and the new section 209(e) are similar. EPA believes it is appropriate to interpret the parallel language of sections 209 (b) and (e) consistently. EPA invites comment on the proposed interpretation.

In 1967, section 208 was added to the Clean Air Act. It expressly preempted states' authority to adopt or enforce emission standards for new motor vehicles. Paragraph (b), however, directed EPA to waive this preemption

for California if certain criteria were met. (Pub. L. 90-148, section 2, 81 Stat. 485 (November 21, 1967).)

In 1970, Congress renumbered section 208 as section 209. (Pub. L. 91-604, section 8, 84 Stat. 1676 (December 31, 1979).) In 1977, Congress amended section 209(b) by deleting the requirement that individual state standards be at least as protective as the federal standards, requiring instead that the California standards be as protective "in the aggregate". (Pub. L. 95-95, section 207, 91 Stat. 685 (August 7, 1977).) Since the 1977 amendment, EPA has granted approximately forty waivers to California. In granting these waivers, EPA has interpreted the waiver criteria provided in section 209(b). (See 55 FR 43028, October 25, 1990.) Section 209(e)(2) directs EPA to "authorize" California to adopt emission standards if certain criteria are met. These criteria are similar to section 209(b) and will be similarly interpreted. The differences and similarities are discussed below. EPA invites comment on its proposed interpretation of the criteria to be used in determining whether an authorization should be granted.

One difference between sections 209 (b) and (e) is the point at which EPA grants a waiver or authorizes California to adopt and enforce emission standards. Under section 209(b) CARB completes most of its regulatory process and adopts the proposed regulations before submitting a waiver request to EPA. Section 209(e), however, states, in pertinent part, that EPA shall " \* \* \* authorize California to adopt and enforce \* \* \* ". EPA is interpreting this language to mean that for nonroad standards and other requirements relating to the control of emissions, California must request and receive authorization from EPA before adoption.

Given this interpretation, California submitted its first nonroad engine request for EPA authorization on December 27, 1990, for nonroad utility and lawn and garden engines. California awaits the regulation discussed in this proposal and, accordingly, EPA's authorization decision before it adopts its proposed regulations.

Both subsections 209 (b) and (e) requires that EPA provide notice and opportunity for hearing. Both require that California determine that its " \* \* \* standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."

Subsections (b) and (e) also state that no waiver or authorization shall be granted if the Administrator of EPA finds that any one of three conditions

exist. First, no waiver or authorization shall be granted if California's above-mentioned determination is arbitrary and capricious. Second, no waiver or authorization shall be granted if California does not need such standards to meet compelling and extraordinary conditions. EPA has applied these two criteria in motor vehicles and proposes to apply the criteria the same way in the authorization of nonroad vehicle and engine standards.

The language in subsections (b) and (e) differs for the third criterion. Section 209(b) states that no waiver shall be granted if "such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part." Section 209(e), on the other hand, states that no such authorization shall be granted if "California standards and accompanying enforcement procedures are not consistent with this section."

Under the section 209(b) interpretation, California standards and enforcement procedures are inconsistent with section 202(a) if there is adequate lead time to permit development of the necessary technology, given the cost of compliance within that time period, or if the Federal and State test procedures impose inconsistent certification requirements. While section 209(b) refers to section 202(a), the language in section 209(e) refers to "this section" rather than to another section. EPA proposes an interpretation of this language that is different from the consistency criterion in section 209(b). "This section" is literally section 209. For California standards and accompanying enforcement procedures to be consistent with section 209, EPA proposes that the following criteria would have to be met. First, the California standards and enforcement procedures must be consistent with section 209(a), which prohibits states from adopting or enforcing emission standards for new motor vehicles or engines. That is, California's proposed nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. Second, California's proposed nonroad regulations must be consistent with section 209(e)(1), which identifies the categories preempted from state regulation. Thus, California's proposed emission regulations would be considered inconsistent if they applied to the preempted categories. EPA invites comment on this proposed interpretation of section 209(e)(2)(A)(iii).

### *I. State Adoption of California Standards*

Section 209(e)(2)(B) provides the opportunity for states to adopt and enforce California's nonroad standards and other requirements under certain circumstances. This provision is similar to section 177, which provides the opportunity for states to adopt and enforce California standards for motor vehicles and take other actions referred to in section 209(a). EPA proposes to interpret this provision consistently with its interpretation of section 177 to the extent the sections are similar. Both section 177 and section 209(e) require that only states "with plan provisions approved under part D of title I" may adopt California standards. EPA proposes to interpret this to mean that some portion of a state's plan must be approved by EPA.

Section 209(e)(2)(B) says that any state may adopt and enforce standards "and take such other actions as are referred to in subparagraph (A) of this paragraph respecting such vehicles or engines." EPA believes that "other actions" refers to the language in subparagraph (A) that says that EPA shall authorize California to adopt and enforce standards " \* \* \* and other requirements relating to the control of emissions \* \* \*". These "other requirements" that California may adopt (and that states may in turn adopt as "other actions") are requirements that are not "standards" or "enforcement procedures" as interpreted in section 209(b) waiver decisions in accordance with *Motor and Equipment Manufacturers Association, Inc. v. Environmental Protection Agency*, 627 F.2d 1095 (D.C. Cir. 1979), cert. denied 446 U.S. 952 (1980) ("*MEMA I*"). They are thus referred to as approvals relating to the control of emissions as conditions precedent to the initial retail sale, titling, or registration of engines or equipment. (See Section 209(a)) Examples of such motor vehicle requirements are tune-up labeling requirements and certification fees.

Under section 209(e)(2)(B), states must meet two criteria in order to adopt California standards. The first is that the state standards be identical to the California standards authorized by EPA under section 209(e)(2)(A). Further, the regulations governing the activities which put the standards into effect and the enforcement activities must be the same in all material respects to the California regulations. (Section 177 requires only that state standards be identical to California.) The second criterion is that California and the adopting state adopt the standards at

least two years before commencement of the period for which the standards take effect.

### **III. Public Participation**

#### *A. Comments and the Public Docket*

EPA requests comments on any aspect of this proposed rulemaking. Persons making comments are especially encouraged to provide suggestions for modification of any aspects of the proposal that they find objectionable. All comments should be directed to the Air Docket, Docket No. A-91-18 (see "**ADDRESSES**").

Persons with comments containing proprietary information must distinguish such information from other comments to the greatest possible extent and label it as "Confidential Business Information." To ensure that proprietary information is not inadvertently placed in the docket, submissions containing such information should be sent directly to the contact person listed above and not to the public docket. If a person making comments wants EPA to base the final rule in part on a submission labeled as confidential business information, then a non-confidential version of the document which summarizes the key data or information should be placed in the public docket. Information covered by a claim of confidentiality will be disclosed by EPA only to the extent allowed by the procedures set forth in 40 CFR part 2. If no claim of confidentiality accompanies the submission when it is received by EPA, it may be made available to the public without further notice to the person making comments.

#### *B. Public Participation*

Any person desiring to present testimony regarding this proposal at the public hearing (see "Dates") should, if possible, notify the contact person listed above of such intent at least seven days prior to the opening day of the hearing. The contact person should also be given notification of any need for audio/visual equipment. A sign-up sheet will be available at the registration table the morning of the hearing for scheduling testimony for those who have not notified the contact person. This testimony will be scheduled on a first come, first serve basis to follow the previously scheduled testimony.

EPA suggests that approximately 50 copies of the statement or material to be presented be brought to the hearing for distribution to the audience. In addition, EPA would find it helpful to receive an advance copy of any statement or material to be presented at the hearing at least one week before the scheduled

hearing date, in order to give EPA staff adequate time to review such material before the hearing. Such advance copies should be submitted to the contact person listed previously.

The official records of the hearing will be kept open for 30 days following the hearing to allow submission of rebuttal and supplementary testimony. All such submittals should be directed to the Air Docket, Docket No. A-91-18 (see "Addresses").

Mr. Charles N. Freed, Director of the Manufacturers Operations Division, Office of Mobile Sources, is hereby designated Presiding Officer of the hearing. The hearing will be conducted informally and technical rules of evidence will not apply. A written transcript of the hearing will be placed in the above docket for review. Anyone desiring to purchase a copy of the transcript should make individual arrangements with the court reporter recording the proceeding. The Presiding Officer is authorized to strike from the record statements which he deems irrelevant or repetitious and to impose reasonable limits on the duration of the statement of any witness.

### **IV. Other Statutory Requirements**

#### *A. Executive Order 12291*

Under Executive Order 12291, EPA must judge whether a regulation is "major" and, therefore, subject to the requirement that a Regulatory Impact Analysis (RIA) be prepared. The Agency has determined that this regulation is not "major" because it does not meet any of the criteria set forth and defined in section 1(b) of the Order.

Also, in accordance with Executive Order 12291, the proposed rule was submitted to the Office of Management and Budget (OMB) for review. Any written comments are in the public docket for this rulemaking.

#### *B. Paperwork Reduction Act*

This proposed rule does not contain any additional information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

#### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 required federal agencies to identify potentially adverse impacts of federal regulations upon small entities. In instances where significant impacts are possible on a substantial number of small entities, agencies are required to perform a Regulatory Flexibility Analysis (RFA). EPA has determined that the regulations proposed today would not have a significant impact on a

substantial number of small entities. This regulation would affect manufacturers of nonroad vehicles and nonroad vehicle engines, a group which does not contain a substantial number of small entities.

Therefore, as required under section 605 of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* I certify that this regulation does not have a significant impact on a substantial number of small entities.

Dated: August 28, 1991.

William K. Reilly,  
Administrator.

#### List of Subjects for 40 CFR Part 85

Imports, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements, Research, and Warranties.

Therefore, it is proposed that 40 CFR part 85 be amended as follows:

#### PART 85—CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES AND MOTOR VEHICLE ENGINES

1. The authority citation for part 85 continues to read as follows:

Authority: Secs. 202, 208, and 301(a), Clean Air Act, as amended (42 U.S.C. 7521, 7542, and 7601(a)).

2. Part 85 is amended by adding subpart Q to read as follows:

##### Subpart Q—Preemption of State Standards and Waiver Procedures for Nonroad Engines and Nonroad Vehicles

Sec.

- 85.1601 Applicability.
- 85.1602 Definitions.
- 85.1603 Application of definitions; scope of preemption.
- 85.1604 Labeling Requirement.
- 85.1605 Procedures for California nonroad waiver requests.
- 85.1606 Criteria for granting authorization.
- 85.1607 Adoption of California standards by other states.

##### Subpart Q—Preemption of State Standards and Waiver Procedures for Nonroad Engines and Nonroad Vehicles

###### § 85.1601 Applicability.

The requirements of this subpart are applicable to nonroad engines and nonroad vehicles.

###### § 85.1602 Definitions.

As used in this subpart, all terms not defined shall have the meaning given them in the Clean Air Act, as amended.

*Construction equipment or vehicle* means any internal combustion engine-powered machine primarily used on commercial construction sites. Primarily used means 51 percent or more.

*Farm equipment or vehicle* means any internal combustion engine-powered machine primarily used in the commercial production and harvesting of food, fiber, wood, or commercial organic products. Primarily used means 51 percent or more.

*Locomotive* means a self-propelled piece of on-track equipment (other than equipment designed for operation both on highways and rails, specialized maintenance equipment, and other similar equipment) designed for moving other equipment or carrying freight or passenger traffic or both.

*New engine* means a nonroad vehicle or engine the equitable or legal title to which has never been transferred to an ultimate purchaser. With respect to imported nonroad vehicles or engines, or nonroad vehicles or engines offered for importation such terms mean a nonroad vehicle or engine, respectively, manufactured after the effective date of a regulation issued under section 213 which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine had it been manufactured for importation into the United States).

*Ultimate purchaser* means, with respect to any new nonroad vehicle or new nonroad engine, the first person who in good faith purchases such new nonroad vehicle or new nonroad engine for purposes other than resale.

###### § 85.1603 Application of definitions; Scope of preemption.

(a) For equipment that is used in applications in addition to farming or construction activities, if the equipment is primarily used as farm or construction equipment or vehicles, as defined in this subpart, it is considered farm or construction equipment or vehicles. Primarily used means 51 percent or more.

(b) Engines, when used in farm or construction equipment or vehicles smaller than 175 horsepower, as defined in this subpart, are preempted from state adoption or enforcement of standards or other requirements relating to the control of emissions.

###### § 85.1604 Labeling Requirement.

(a) The engine manufacturer shall label new engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.

(b) The label shall state which standard or standards (Federal, California, or both) for which the engine is certified.

###### § 85.1605 Procedures for California nonroad authorization requests.

(a) California shall request authorization to adopt and enforce standards and other requirements relating to the control of emissions from nonroad vehicles or engines from the Administrator of EPA and provide the record on which the state rulemaking was based.

(b) After receipt of the authorization request, the Administrator shall provide notice and opportunity for a public hearing regarding such requests in accordance with the Administrative Procedure Act.

###### § 85.1606 Criteria for granting authorization.

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

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

- (1) the determination of California is arbitrary and capricious;
- (2) California does not need such California standards to meet compelling and extraordinary conditions, or
- (3) California standards and accompanying enforcement procedures are not consistent with section 209.

###### § 85.1607 Adoption of California standards by other states.

(a) Any state other than California which has plan provisions approved under Part D of Title I may adopt and enforce emission standards, for any period, for nonroad vehicles or engines subject to the following requirements:

- (1) The state must provide notice to the Administrator that it intends to adopt such standards.
- (2) Such standards shall not apply to:
  - (i) new engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower;
  - (ii) new locomotives or new engines used in locomotives.

(3) Such standards and implementation and enforcement shall be identical to the California standards authorized by the Administrator and implementation and enforcement for each period.

(4) The state shall adopt such standards at least two years before commencement of the period for which the standards take effect.

(5) California shall have adopted such standards two years before commencement of the period for which the standards take effect in the state that is adopting under section 209(e)(2)(B).

(b) Reserved.

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