

standard of our January 18, 2001 highway rule (66 FR 5088) would not apply to these territories.

Compliance with this proposal would result in major economic burden. All three of these territories lack internal petroleum supplies and refining capabilities and rely on long distance imports. Given their remote location from Hawaii and the U.S. mainland, most petroleum products are imported from East rim nations, particularly Singapore. Although Australia, the Philippines, and certain other Asian countries have or will soon require low sulfur diesel fuel, their sulfur limit is 500 ppm, not the new 15 ppm sulfur limit established for highway diesel fuel by the January 18, 2001, highway rule or this proposal for nonroad diesel fuel beginning in 2010 for the United States. Compliance with new 15 ppm sulfur requirements for highway diesel fuel beginning in 2006 and the proposed 15 ppm sulfur requirements for nonroad diesel fuel beginning in 2010 (or the proposed 500 ppm sulfur requirements for NRLM diesel fuel beginning 2007) would require construction of separate storage and handling facilities for a unique grade of diesel fuel for highway and nonroad purposes, or use of 15 ppm diesel fuel for all purposes to avoid segregation. Either of these alternatives would require importation of 500 and 15 ppm sulfur diesel fuel from Hawaii or the U.S. mainland, and would significantly add to the already high cost of diesel fuel in these territories, which rely heavily on United States support for their economies. At the same time, it is not clear that the environmental benefits in these areas would warrant this cost. Therefore, we are not proposing to apply the fuel and engine standards to these territories, but seek comment on this.

#### *E. How Are State Diesel Fuel Programs Affected by the Sulfur Diesel Program?*

Section 211(c)(4)(A) of the CAA prohibits states and political subdivisions of states from prescribing or attempting to enforce, for purposes of motor vehicle emission control, "any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine," if EPA has prescribed "a control or prohibition applicable to such characteristic or component of the fuel or fuel additive" under section 211(c)(1). This prohibition applies to all states except California, as explained in section 211(c)(4)(B). This express preemption provision in section 211(c)(4)(A) applies only to controls or prohibitions respecting any characteristics or components of fuels or

fuel additives for motor vehicles or motor vehicle engines, that is, highway vehicles. It does not apply to controls or prohibitions respecting any characteristics or components of fuels or fuel additives for nonroad engines or nonroad vehicles.<sup>255</sup>

Section 211(c)(4)(A) specifically mentions only controls respecting characteristics or components of fuel or fuel additives in a "motor vehicle or motor vehicle engine," adopted "for purposes of motor vehicle emissions control," and the definitions of motor vehicle and nonroad engines and vehicles in CAA section 216 are mutually exclusive. This is in contrast to section 211(a) and (b), which specifically mention application to fuels or fuel additives used in nonroad engines or nonroad vehicles, and with section 211(c)(1) which refers to fuel used in motor vehicles or engines or nonroad engines or vehicles.

Thus, this proposal would not preempt state controls or prohibitions respecting characteristics or components of fuel or fuel additives used in nonroad engines or nonroad vehicles under the provisions of section 211(c)(4)(A). At the same time, a state control that regulates both highway fuel and nonroad fuel is preempted to the extent the state control respects a characteristic or component of highway fuel regulated by EPA under section 211(c)(1).

A court could consider whether a state control for fuels or fuel additives used in nonroad engines or nonroad vehicles is implicitly preempted under the Supremacy Clause of the U.S. Constitution. Courts have determined that a state law is preempted by federal law where the state requirement actually conflicts with federal law by preventing compliance with the federal requirement, or by standing as an obstacle to accomplishment of Congressional objectives. A court could thus consider whether a given state standard for sulfur in nonroad, locomotive or marine diesel fuel is preempted if it places such significant cost and investment burdens on refiners that refiners cannot meet both state and

federal requirements in time, or if the state control would otherwise meet the criteria for conflict preemption.

#### *F. Technological Feasibility of the 500 and 15 ppm sulfur Diesel Fuel Program*

This section describes the nonroad, locomotive and marine diesel fuel market and how these fuels differ from current highway diesel fuel, whose sulfur content is already controlled to no more than 500 ppm sulfur. This section then summarizes our assessment of the feasibility of refining and distributing NRLM diesel fuel with a sulfur content of no more than 500 ppm and, for nonroad fuel only, of 15 ppm. Based on this evaluation, we believe it is technologically feasible for refiners and distributors to meet both sulfur standards in the lead time provided. We are only summarizing our analysis here and we refer the reader to the Draft RIA for more details.

##### 1. What is the Nonroad, Locomotive and Marine Diesel Fuel Market Today

Nonroad, locomotive and marine diesel fuel comprise part of what is generally called the distillate fuel market. Other fuels in this market are highway diesel fuel and heating oil, which is used in furnaces and boilers as well as in stationary diesel engines to generate power. Nonroad diesel fuel comprises about 15% of all number 2 distillate fuel, while locomotive and marine diesel fuel comprise about 9% of all number 2 distillate fuel (see Draft RIA).

ASTM defines three number 2 distillate fuels: (1) low sulfur No. 2-D (which includes the 500 ppm sulfur cap for fuel used in highway diesel vehicles), (2) high sulfur No. 2-D, and (3) No. 2 fuel oil (commonly referred to as heating oil).<sup>256</sup> Low sulfur No. 2-D fuel must contain no more than 500 ppm sulfur, have a minimum cetane number of 40, and have a minimum aromatic content of 35 volume percent). This fuel meets EPA's requirements for current highway diesel vehicle fuel. Both high sulfur No. 2-D and No. 2 fuel oil must contain no more than 5000 ppm sulfur.<sup>257</sup> The ASTM standards for high sulfur No. 2-D fuel also include a minimum cetane number specification of 40. Practically, since most No. 2 fuel oil meets the minimum cetane number specification, pipelines which ship fuel fungibly need only carry one high sulfur

<sup>255</sup> See 66 FR 36543 (July 12, 2001) (Notice proposing approval of Houston SIP revisions). See also letter from Carl Edlund, Director, Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, Region VI, to Jeffrey Saitas, Executive Director, Texas Natural Resources Conservation Commission, dated September 25, 2000, providing comments on proposed revisions to the Texas State Implementation Plan for the control of ozone, specifically the Post 99 Rate of Progress Plan and Attainment Demonstration for the Houston/Galveston area. This letter noted that preemption under section 211(c)(4) did not apply to controls on nonroad diesel fuel.

<sup>256</sup> "Standard Specification for Diesel Fuel Oils," ASTM D 975-98b and "Standard Specification for Fuel Oils," ASTM D 396-98.

<sup>257</sup> Some states, particularly those in the Northeast, limit the sulfur content of No. 2 fuel oil to 2000-3000 ppm.