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40 CFR Part 90

Amendments to the Phase 2 Requirements for Spark-Ignition Nonroad Engines at or Below 19 Kilowatts; Direct Final Rule and Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 90

[AMS–FRL–7606–1]

RIN 2060–AL88

Amendments to the Phase 2 Requirements for Spark-Ignition Nonroad Engines at or Below 19 Kilowatts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA adopted Phase 2 requirements for spark-ignition nonroad handheld engines at or below 19 kilowatts in April 2000. The Phase 2 requirements are being phased-in between 2002 and 2007. Based on initial experience with the Phase 2 program for handheld engines, we are adopting several amendments intended to provide additional compliance flexibility to engine manufacturers to smooth the transition to the Phase 2 requirements. The amendments contain two revisions intended to increase flexibility in the averaging, banking, and trading program as it applies to handheld engines. First, the credit discounts and credit bonuses will be eliminated from the program. Second, manufacturers will be allowed to carry limited credit deficits during the phase-in period (through 2007) provided the deficits are made up within a set period of time. The amendments also contain minor changes to the certification requirements intended to help manufacturers respond in a more efficient manner to unexpected variations in the emission levels from production engines while still achieving the required emission objectives.

DATES: This direct final rule is effective on March 12, 2004 without further notice, unless we receive adverse comments by February 11, 2004 or receive a request for a public hearing by January 27, 2004. We are also publishing a notice of proposed rulemaking in the ''Proposed Rules'' section of today's **Federal Register**, which matches the substance of this direct final rule. If we receive any adverse comments on this direct final rule or receive a request for a hearing within the time frame described above, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect. We will then take final action to amend the Phase 2 requirements for spark-ignition nonroad engines at or below 19 kilowatts in a final rule based on the accompanying proposal. We will not institute a second comment period.

ADDRESSES: *Comments:* All comments and materials relevant to this action should be submitted to Public Docket No. OAR–2003–0195 at the following address by the date indicated under **DATES** above.

Docket: Materials relevant to this rulemaking are in Public Dockets A–96–55 and OAR–2003–0195 at the following address: EPA Docket Center (EPA/DC), Public Reading Room, Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, except on government holidays. You can reach the Air Docket by telephone at (202) 566–1742 and by facsimile at (202) 566–1741. You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR part 2.

FOR FURTHER INFORMATION CONTACT: Phil Carlson, Assessment and Standards Division, e-mail *carlson.philip@epa.gov,* voice-mail (734) 214–4636.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Regulated Entities

This action will affect companies and persons that manufacture, sell, or import into the United States spark-ignition nonroad handheld engines at or below 19 kilowatts. Affected categories and entities include the following:

Category	NAICS Code [1]	Examples of potentially affected entities
Industry	333112	Lawn & Garden Equipment Manufacturers.
Industry	336618	Other Engine Equipment Manufacturers.

[1] North American Industry Classification System (NAICS).

This list is not intended to be exhaustive, but rather provides a guide regarding entities likely to be affected by this action. To determine whether particular activities may be affected by this action, you should carefully examine the regulations. You may direct questions regarding the applicability of this action as noted in **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of This Document?

1. *Docket.* EPA has established an official public docket for this action under Air Docket Number OAR–2003–0195. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Air Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

2. *Electronic Access.* This direct final rule is available electronically from the EPA Internet Web site. This service is free of charge, except for any cost incurred for internet connectivity. The electronic version of this final rule is made available on the date of publication on the primary Web site listed below. The EPA Office of Transportation and Air Quality also publishes **Federal Register** notices and related documents on the secondary Web site listed below.

1. *http://www.epa.gov/docs/fedrgstr/EPA-AIR* (either select desired date or use Search features).

2. *http://www.epa.gov/otaq* (look in What's New or under the specific rulemaking topic).

Please note that due to differences between the software used to develop the documents and the software into which the document may be downloaded, format changes may occur.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, by facsimile, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure

that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in Docket ID No. OAR–2003–0195. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to *a-and-r-docket@epa.gov* Attention Air Docket ID No. OAR–2003–0195. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in **ADDRESSES** above. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send two copies of your comments to: Air Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. OAR–2003–0195.

3. *By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center, Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Air Docket ID No. OAR–2003–0195. Such deliveries are only accepted during the Docket's normal hours of operation as identified in **ADDRESSES** above.

4. *By Facsimile.* Fax your comments to: (202) 566–1741, Attention Docket ID No. OAR–2003–0195.

II. Summary of Rule

A. What Is the History of the Phase 2 Handheld Engine Rule?

The development of the Phase 2 regulations for handheld nonroad spark-ignition (SI) engines at or below 19 kilowatts (kW) started in 1992 while the Phase 1 standards were also being developed. Initially, a formal regulatory negotiation process was attempted.

After it became clear that the disparate interests of the multiple parties would not result in an agreement, the regulatory negotiation process concluded without reaching consensus in February 1996. Thereafter, EPA developed the framework for a Phase 2 handheld rule which was described in a Statement of Principles signed by manufacturers representing a significant portion of the United States handheld equipment market and by other stakeholders. The Statement of Principles was issued as part of an Advance Notice of Proposed Rulemaking on March 27, 1997 (*see* 62 FR 14740). The Statement of Principles for handheld engines formed the basis of requirements proposed in the Phase 2 Notice of Proposed Rulemaking (NPRM) on January 27, 1998 (*see* 63 FR 3950). (The January 1998 NPRM proposed standards for both handheld and nonhandheld nonroad SI engines at or below 19 kW. We finalized Phase 2 standards and compliance program requirements for Class I and Class II nonhandheld nonroad SI engines at or below 19 kW in a separate final rulemaking on March 30, 1999 (*see* 64 FR 15208).)

The January 1998 NPRM contained a lengthy discussion of the proposed Phase 2 standards for handheld engines, the expected costs of their implementation, and the technologies that we expected manufacturers would use to meet the standards. The January 1998 NPRM also discussed the potential costs and benefits of adopting more stringent standards such as the second phase of standards that were under consideration by the California Air Resources Board (ARB) at that time.

Upon reviewing information supplied during and after the comment period for the January 1998 NPRM, we determined that it was desirable to get further details regarding the technological feasibility, cost and lead time implications of meeting handheld engine standards more stringent than those contained in the January 1998 NPRM. For the purpose of gaining additional information on feasibility, cost and lead time implications of more stringent standards, we had several meetings, phone conversations, and written correspondence with specific engine manufacturers, with industry associations representing engine and equipment manufacturers, with developers of emission control technologies and suppliers of emission control hardware, with representatives of state regulatory associations, and with members of Congress. We published a Notice of Availability on December 1, 1998 (*see* 63 FR 66081) highlighting the additional information gathered in response to the January 1998 NPRM and continued having discussions with various parties regarding low emission technologies for the small SI handheld engine market.

After the publication of the Phase 2 NPRM in January 1998, members of the industry provided data to EPA which indicated that rapid advances in emission reduction technologies for handheld engines were in the offing. After having reviewed the most up-to-date information available on these new technologies, we believed the information supported Phase 2 standards for handheld engines that were significantly more stringent than those proposed in the January 1998 NPRM and even more stringent than the second phase of standards that, by that time, had been adopted by the California ARB. In light of this new information, and in the interest of providing an opportunity for public comment on the stringent levels being considered for the Phase 2 handheld engine emission standards and the potential technologies available for meeting such standards, we reproposed Phase 2 regulations for handheld engines in a July 28, 1999 Supplemental NPRM (*see* 64 FR 40940). The July 1999

Supplemental NPRM proposed Phase 2 hydrocarbon plus oxides of nitrogen ($HC+NO_X$) standards of 50 grams per kilowatt-hour (g/kW-hr) for Class III and Class IV engines and of 72 g/kW-hr for Class V engines, phased in over several years. The reproposal also proposed to include handheld engines in an averaging, banking, and trading program for all nonroad small SI engines that had been adopted in the separate March 1999 final rule for nonhandheld engines. The July 1999 Supplemental NPRM also proposed revised compliance program requirements for handheld engines, including requirements for a production line testing program. Most of the proposed compliance program changes were intended to make the handheld engine compliance program the same as the requirements finalized for nonhandheld engines in March 1999 and to establish a consistent approach to compliance for all nonroad small SI engines.

The Phase 2 final rule for Class III, Class IV, and Class V handheld engines was finalized on April 25, 2000 (*see* 65 FR 24268). Table 1 summarizes the Phase 2 $HC+NO_X$ emission standards adopted for Class III, Class IV, and Class V handheld engines and when the standards are scheduled to take effect. In response to comments submitted on the July 1999 Supplemental NPRM, the standards and implementation schedule contained in the Phase 2 final rule for handheld engines reflected a four year phase in schedule instead of a five year phase in schedule as proposed in the Supplemental NPRM. When fully phased in, these Phase 2 standards were projected to result in an estimated 70 percent annual reduction in combined $HC+NO_X$ emissions from small SI handheld engines compared to the Phase 1 emission requirements for such engines.

TABLE 1.—PHASE 2 $HC+NO_X$ EMISSION STANDARDS FOR HANDHELD ENGINES

Engine class	$HC+NO_X$ standards (g/kW-hr) by model year					
	2002	2003	2004	2005	2006	2007 and later
Class III	238	175	113	50	50	50
Class IV	196	148	99	50	50	50
Class V	.....	.....	143	119	96	72

Table 2 summarizes the technologies we concluded were capable of meeting the newly adopted Phase 2 standards for handheld engines by engine class. The compression wave technology and the stratified scavenging with lean combustion design are based on 2-stroke engine designs which are used to power the great majority handheld applications.

TABLE 2.—POTENTIAL TECHNOLOGIES FOR MEETING THE PHASE 2 STANDARDS FOR HANDHELD ENGINES

Engine class	Technologies
III	—Compression wave technology + low-medium efficiency catalyst. —Stratified scavenging with lean combustion + medium-high efficiency catalyst. —4-Stroke.
IV	—Compression wave technology. —Compression wave technology + low efficiency catalyst. —Stratified scavenging with lean combustion + medium efficiency catalyst. —4-Stroke.
V	—Compression wave technology. —Stratified scavenging with lean combustion. —4-Stroke (on certain applications).

To help engine manufacturers meet the Phase 2 $HC+NO_X$ standards, we adopted provisions to include Phase 2 handheld engines in the averaging, banking and trading (ABT) program, previously adopted in the March 1999 final rule for Phase 2 nonhandheld engines. The combination of the declining Phase 2 handheld standards and the ABT program were intended to help manufacturers make an orderly and efficient transition from their existing Phase 1 engine designs and technologies to those able to meet the Phase 2 requirements and to provide an incentive for the early introduction of clean engines. The basic framework of the ABT program adopted for handheld engines is the same as the program previously adopted for nonhandheld engines. However, to address comments submitted on the July 1999 Supplemental NPRM relating to the stringency of the phase-in standards and the periods, we adopted a number of unique provisions for handheld engines.

The ABT program is an integral part of the Phase 2 $HC+NO_X$ standards adopted for handheld engines. Averaging means the exchange of emission credits among engine families within a given engine manufacturer's product line. Averaging allows a manufacturer to certify one or more engine families to Family Emissions Limits (FELs) above the applicable emission standard. However, the increased emissions have to be offset by one or more engine families certified to FELs below the same emission standard, such that the average emissions in a given model year from all of the manufacturer's families (weighted by various parameters including engine power, useful life, and number of engines produced) are at or below the level of the emission standard. Banking means the retention of emission credits by the engine manufacturer generating the credits for use in future model year averaging or trading. Trading means the exchange of emission credits between engine manufacturers which then can be used for averaging purposes, banked for future use, or traded to another engine manufacturer.

Under the April 2000 rule's ABT provisions for handheld engines (those promulgated in §§ 90.201 through 90.220), manufacturers are able to select

from two options for the purpose of generating credits. One we refer to as the ''Normal'' program, the second as the ''Optional Transition Year Program.'' These two programs have some significantly different design parameters, so credits from the two programs may be used only in the program in which they are generated.

Under the ''Normal'' credit program of the April 2000 rule, manufacturers certifying Class III or IV engine families with FELs at or below 72 g/kW-hr and Class V engine families with FELs at or below 87 g/kW-hr may generate credits that have an unlimited credit life. Such credits are available to the manufacturer for the duration of the Phase 2 program and are not discounted in any manner. Under the ''Normal Credit'' program, credits generated by Class III or IV engine families certified with FELs above 72 g/kW-hr and Class V engine families with FELs above 87 g/kW-hr can be used by a manufacturer in the model year in which they are generated for its own averaging purposes, or traded to another manufacturer to be used for averaging purposes in that model year. However, such credits may not be carried over to the next model year (*i.e.*, the credits cannot be banked), including when traded to another manufacturer.

Alternatively under the April 2000 regulations, a manufacturer may choose to have a family participate in the ''Optional Transition Year'' credit program. Under this program, any family with FELs below the applicable phase-in standards shown in Table 1 is eligible to generate credits. However, these credits are progressively discounted the higher the family's FEL is compared to the final standards for that class. For example, in Class IV, a family with an FEL of 87 g/kW-hr or higher in model year 2002 would have its credits discounted by 75 percent if they are to be banked for use in future model years. If the family's FEL was equal to 72 g/kW-hr but less than 87 g/kW-hr, its credits would be discounted by 50 percent before being banked for use in future model years. This combination of ability to generate credits with families of higher emission levels but discounting the credits for these higher-emitting engines was intended to provide an increased incentive for manufacturers to make interim emission improvements while preserving the environmental benefits of the Phase 2 program. The ''Optional Transition Year'' program also provides an additional incentive for manufacturers to produce especially clean equipment by providing a 25 percent credit bonus for engines certified with an FEL below specified levels in the first two years of the phase-in period.

''Optional Transition Year'' credits have a limited life and application under the April 2000 regulations. They may be used without limitation through the 2007 model year. For model years 2008 through 2010, they may also be used, but only if the manufacturer's production- and power-weighted average $HC+NO_X$ emission level is below an emission level determined by production-weighting the manufacturer's product line assuming emission levels of 72 g/kW-hr for Class III and IV engines and 87 g/kW-hr for Class V engines. The ''Optional Transition Year'' program expires at the end of the 2010 model year, under the April 2000 rules.

The provisions related to credit generation in these two programs were revised in the April 2000 final rule in response to comments on the Supplemental NPRM. At the time, we believed the approach adopted in the final rule was necessary to ensure that the ABT program did not contribute to a significant delay in implementation of the low-emitting technologies envisioned under the Phase 2 program, a risk under the proposed program which commenters raised to us in comments on the Supplemental NPRM. Without the limitations on credit generation, we were concerned that manufacturers could certify marginally cleaner engines, especially during the first years of the phase in period when the fleet average standards were the highest, and generate enough credits to significantly delay implementation of technologies meeting the long term standards (*i.e.*, 50 g/kW-hr for Classes III and IV and 72 g/kW-hr for Class V) for a significant portion of the fleet. We noted that generation of a significant amount of credits through short-term engine improvements that would not result in compliance with either California's standards or the final Phase 2 standards was an unacceptable outcome if it caused delay of the ultimate transition to cleaner technology.

We also adopted a Production Line Testing (PLT) program for Phase 2 handheld engines. The intent of the PLT program is to require a sample of production line engines to be tested for emission performance to assure that the certified emissions levels demonstrated on production prototypes are being achieved in mass production. The amount of PLT testing required by the manufacturer depends on how close the test results from the initial engines tested are to the applicable standards. If the initial test results indicate the design is well below the applicable standards, few engines need to be tested. For those designs where the test results indicate emission levels are very close to the applicable standards, additional tests are required to make sure the design is being produced with acceptable emission performance. The PLT program requires manufacturers to conduct testing on each of their engine families (unless they have been relieved of this requirement under a small-volume flexibility provision). The maximum sample size required for each engine family is 30 engines or 1 percent of a family's projected production, whichever is smaller. However, the actual number of tests ultimately required is determined by the testing results.

In adopting the Phase 2 standards for handheld engines, we concluded that the standards adopted, considering the lead time provided and other flexibility provisions such as averaging, banking, and trading, were technologically feasible for the handheld industry and appropriate under section 213 of the Clean Air Act. At the same time, we recognized that certain manufacturers who would be subject to the Phase 2 provisions believed that the standards may not be technologically feasible for them. This issue was most clearly raised with respect to the Class V standards. While EPA's adoption of the standards reflected our view that the Class V standards were achievable, we also believed that it was appropriate in responding to the manufacturers' comments and concerns to invite all members of the regulated industry as well as other interested parties to continue to explore the issue of technological feasibility of the Class V standards as industry made progress in moving towards implementation of the Phase 2 program. Therefore, in the April 2000 final rule, we stated our intent to perform a study of the technological feasibility of the Phase 2 Class V standards, to be completed by the end of 2002. We noted that the intent of the technology study was to focus on availability of technology, certification data, in-use performance, and other factors of interest.

Shortly after the April 2000 final rule was published, two members of the industry sued EPA over the Phase 2 handheld engine requirements. There were three main points in the lawsuit. First, they claimed that the Phase 2 standards did not meet the Clean Air Act requirement to provide the best balance of factors. Second, they claimed the standards were not supported by substantial evidence in the record. Last,

they claimed that we did not follow proper procedural requirements of the Clean Air Act with regard to changes made between the Supplemental NPRM and the FRM, specifically citing the 4-year phase-in period and the significantly revised ABT programs. In June, 2001, the United States Court of Appeals for the District of Columbia Circuit rejected all of industry's substantive and procedural challenges to the Phase 2 rule, and upheld EPA's rules as reasonably supported by substantial evidence. *Husqvarna AB* v. *EPA,* 254 F.3d 195 (DC Cir. 2001).

In the Fall of 2001, EPA began preliminary investigation of industry's progress in complying with the fully phased-in Class V emission standard of 72 g/kW-hr $HC+NO_X$. (As noted earlier, as part of the April 2000 FRM we committed to perform a study of the technological feasibility of the Phase 2 Class V standards.) The investigation focused on certification information for engines currently certified to meet the Phase 2 standards and on discussions with certain manufacturers regarding promising Phase 2 technologies.

The results of the preliminary investigation showed that manufacturers were focusing their Phase 2 development efforts primarily on Class IV engines. (As noted earlier in Table 1, the Phase 2 standards for Class IV engines took effect in 2002—two years before the Class V standards—and become more stringent each year until 2005.) The investigation also showed that while a small number of Class V engine families were certified with $HC+NO_X$ levels below 72 g/kW-hr, little work had been done with regard to the majority of Class V engines. Given the limited information available on Class V engines, we drafted a memorandum and placed it in the small engine Phase 2 docket (EPA Air Docket A–96–55) in early 2002 noting that it would be premature to initiate the Class V feasibility study described in the April 2000 final rule. We also noted that we would continue to monitor the status of technology development for handheld engines and make further progress in conducting the Class V technology review during 2002.

Beginning in 2002, the Phase 2 requirements for Classes III and IV began to take effect. As noted earlier in Table 1, the Phase 2 standards are based on a declining average over four years in each class. (The Phase 2 standards for Class V engines do not start until 2004.) As expected, manufacturers have certified a number of different technologies with a wide range in emission levels with certification levels ranging from 16 g/kW-hr $HC+NO_X$ on a 4-stroke engine to 245 g/kW-hr $HC+NO_X$ on a 2-stroke engine. (This range is based on Class IV certification information; for Classes III–V, most industry sales are in Class IV.) The technologies being used currently are mostly 2-stroke engines with a limited number of 4-stroke engines as well. For the 2-stroke engines, there are a number of stratified scavenging designs as well as a number of engines equipped with catalysts.

With regard to the ABT program, manufacturers are using the program primarily for averaging purposes. Contrary to our earlier concerns about manufacturers certifying marginally-cleaner engines and earning significant credits which could delay the transition to the final Phase 2 standards, the sales-weighted certification levels for individual manufacturers in model year 2002 and 2003 have been near the required average standard. Because most manufacturer's average emission are near the phase-in standards, there has been only limited use of the banking provisions.

In April and November of 2002, the Outdoor Power Equipment Institute (OPEI), a trade organization that represents most of the manufacturers of handheld engines in the United States, met with EPA to raise concerns about a number of the Phase 2 provisions for handheld engines. EUROMOT, a trade organization that represents European handheld engine manufacturers also met with EPA in August 2002 to discuss their concerns with the Phase 2 program for handheld engines. OPEI and EUROMOT highlighted similar areas of concern in the meetings. First, they noted concerns over the Class V schedule of emission standards, indicating that the Phase II standards were more challenging than first thought and that they were pushing hard to meet the Class III and IV requirements with the hope and expectation that this experience would enhance their Class V compliance. Second, they noted their desire to revise the two ABT programs for handheld engines into one program without the discounting provisions of the current programs. They provided data which showed that there were relatively few credits being generated (compared to EPA's original concern) and they claimed that in some cases the provisions of the two ABT programs created a disincentive to introduce clean technology as soon as otherwise possible. Finally, they noted their interest in gaining some flexibility in the PLT program, especially with regard to the procedure for revising Family Emission Limits (FELs).

In follow-up to the meetings with OPEI and EUROMOT, we held individual discussions with eight handheld engine manufacturers to explore the status of each manufacturer's progress on the Phase 2 program and to better understand each manufacturer's perspective on the issues highlighted by OPEI and EUROMOT. The eight manufacturers represent over 90 percent of total handheld engine sales in the United States. Although each manufacturer's situation is different, there were several common themes raised during our discussions about the Phase 2 program. A summary of our findings is presented below.

With regard to the Phase 2 standards, we found that all of the manufacturers expect to be able to comply with the ultimate standards of 50/50/72 g/kW-hr $HC+NO_X$ for Classes III/IV/V, respectively, although, as noted below, several raised concerns about being able to comply with the timing of the phase-in. Manufacturers view the emission standards and ABT program as an inter-related package. Since the declining average emission standard is expected to be met on a power/life/sales weighted average basis for all families in Classes III–V, it is important that the ABT program be structured such that it maximizes the opportunity to gain extra and early emission reductions. The manufacturers stressed the technological and practical challenges of meeting the emission standards in all of their different engines/equipment and emphasized the need for an ABT program which functioned as intended in order to meet the declining average emission standards.

It appears that the technology to be used most widely for complying with the final Phase 2 standards will be the stratified scavenging 2-stroke design, with or without a catalyst. There will also be a number of 4-stroke engine designs and limited engines equipped with the compression wave technology. While the compression wave technology was touted by some as a simple solution to meeting the Phase 2 standards during the rulemaking, it is not expected to see widespread use.

Based on their experience to date in developing technologies for Phase 2, manufacturers raised concerns about their ability to comply with the set of declining average phase-in standards, especially in the later years of the phase in and in Class V. Manufacturers have been focusing their design efforts on Class III and IV engines because the Phase 2 standards for those classes took effect first. Manufacturers are finding it more challenging than expected to develop their Phase 2 designs for all of

their engine families across the wide range of applications in which they are used. Many engines are used in multiple types of equipment applications, resulting in significant design challenges as the manufacturers need to ensure compliance with the emission standards while maintaining acceptable operating characteristics, including temperature issues and the need for additional cooling associated with the use of catalysts. There are approximately 275 Class III–V engine families and many of these are used in multiple equipment designs and cover both residential and commercial applications.

Because of the need to focus on Class III and IV engines and the challenges of applying new designs across their entire product mix, manufacturers of Class V engines (all of which are heavily involved in Class III and IV as well) have not focused as much effort on their Class V engines designs which are scheduled to begin to phase in during 2004. While Class V manufacturers expect to use the same basic technologies as they are employing in Class III and IV, they are still addressing the technical challenges facing Class V engines.

Unlike most Class III and IV engines which are used primarily in residential applications, Class V engines are used almost exclusively in commercial applications. Commercial equipment is operated under much more rigorous conditions than residential equipment and is operated for much longer periods of time by professionals in forestry and lawn care operations. Class V engines, which have the largest displacement of all handheld engines, also have the largest volume of exhaust. Manufacturers expect to use catalysts on at least some of their Class V designs. Manufacturers are still working to address the best way to incorporate catalysts on such large engines, while maintaining current levels of performance and addressing weight concerns and temperature issues with the need for upgraded cooling.

With regard to ABT, we found that manufacturers are using the current ABT programs primarily for averaging purposes and are not significantly below the fleet average levels required in Class III and IV in the first two years of the Phase 2 program. There is some banking of credits taking place, but at relatively low levels. This is in stark contrast to the concerns cited in the April 2000 final rule over the potential for significant levels of ''windfall'' credits from marginally cleaner engines. Manufacturers believe the current ABT programs have discouraged the pull ahead of clean technologies because of the steep discounts placed on credits in the program. Because of the high level of competition in the marketplace, especially for residential equipment which makes up the large majority of equipment in Classes III and IV, the incentive to pull ahead cleaner, more expensive engine designs has been removed by applying such high levels of discounting for any engines not meeting very low emission levels. Because most of the residential equipment is sold to large retailers, small differences in price between manufacturers, can result in lost sales. Manufacturers have been unwilling to take the business risk to pull ahead the introduction of any significant number of clean engines especially whenever the ABT program heavily discounts the value of credits that might be earned from these engines. In addition, because of the continuing efforts to address Class V engines discussed above, manufacturers are less certain regarding the ability to rely on the April 2000 rule's ABT programs for help in complying with the Phase 2 standards in Class V.

One final issue raised by manufacturers was related to the production line testing program required under the Phase 2 rules. Manufacturers believe they need additional flexibility beyond that currently allowed in the event that they need to revise the FEL limits because of unexpected variations in production engine emission levels. Manufacturers are allowed to make such changes under the current rules, but must notify EPA and await approval before continuing production of the engine. If approval is not received quickly, a manufacturer is forced to stop production. As manufacturers are making the transition to new technologies to comply with the Phase 2 standards, the potential for producing new designs on an assembly line where the emission levels of production engines (which are tested under the PLT program) are not at the levels expected is increased. Manufacturers would like to be able to revise their FELs, provided they have data to support their changes, without prior EPA approval so that the production of engines is not interrupted.

Shortly after completing our discussions with engine manufacturers, OPEI, on behalf of their members, submitted an administrative ''Petition for Reopening'' the Phase 2 handheld rules to EPA in February 2003. The petition contained a request to modify the Phase 2 program for handheld engines in three areas. First, OPEI requested a delay in the Class V implementation schedule (citing either a one year delay in the phase-in schedule or a change in the level of the standards during the phase-in). Second, OPEI requested that the ''Optional Transition Year'' credit program be eliminated, and that FEL caps that apply for banking credits in the ''Normal Credit'' program be dropped. Finally, OPEI requested that manufacturers be allowed to generate and use credits for averaging purposes in the PLT program in a given model year. A copy of the petition has been placed in the public docket for this rulemaking.

This action is a fulfillment of the technology review concerning the Class V standards and also is responsive to OPEI's request that we reopen the Phase 2 handheld rule. We believe that these amendments sufficiently resolve all issues related to these matters, and expect to take no further action in response to OPEI's petition or in relation to the technology review beyond that in this final rule.

We also note that while OPEI in its petition relied upon section 307(c) of the Clean Air Act, 42 U.S.C. 7607(c), as a basis for its requests, we do not agree that section 307(c) has any applicability to either OPEI's petition or to our action in response. Nor are EPA's rulemakings regarding nonroad engines under CAA section 213 subject to section 553(e) of the Administrative Procedure Act, 5 U.S.C. 553(e), another provision relied upon by OPEI in its request. *See* CAA section 307(d)(1), 42 U.S.C. 7607(d)(1). Finally, we disagree with OPEI's suggestion that, pursuant to section 307(b)(1) of the CAA, 42 U.S.C. 7607(b)(1), OPEI has presented ''grounds arising after [the] sixtieth day'' following publication of the April 2000 final Phase 2 rule, such that a new petition for judicial review of that rule could be filed in the DC Circuit Court of Appeals in the absence of further final regulatory action on EPA's part. As OPEI is aware, in the face of a challenge by one of OPEI's member companies that court has already fully affirmed EPA's Phase 2 handheld regulations, and the court did not retain jurisdiction of the case pending any possible ongoing technology review or discussions with industry. *Husqvarna AB* v. *EPA,* 254 F.3d 195 (D.C. Cir. 2001).

B. What Amendments Are We Adopting Today?

Based on our analysis of the information gathered under the Class V technology review and our assessment of the petition presented by industry, we do not believe it is necessary to revise our April 2000 final rule determination that the Phase II

handheld standards are technologically feasible and otherwise appropriate under the Act. Thus, we are not taking action to revise the standards and phase-in schedule of the Phase II handheld program (Classes III–V) and they remain as promulgated. However, we also believe that several relatively modest changes to the rule are appropriate to ensure an orderly transition to compliance with the Phase 2 standards for the industry as a whole. Toward that end, we are promulgating three changes to the Phase II program. These changes facilitate transition to the Phase 2 standards while retaining all of the long term emission control benefits of the program. Each of these changes is discussed below.

Because EPA views the provisions of the action as noncontroversial and does not expect adverse comment, it is appropriate to proceed by direct final rulemaking. If we receive adverse comment on one or more distinct amendments, paragraphs, or sections of this rulemaking, we will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment. Any distinct amendment, paragraph, or section of today's rulemaking for which we do not receive adverse comment will become effective on the date set out above, notwithstanding any adverse comment on any other distinct amendment, paragraph, or section of today's rule.

1. Averaging Banking, and Trading (ABT)

The first set of changes is related to the certification ABT programs. As discussed above, the April 2000 final rule for handheld engines contained two ABT programs, referred to as the ''Normal'' credit program and the ''Optional Transition Year'' credit program.

Under the ''Normal'' credit program, manufacturers certifying Class III or IV engine families with FELs at or below 72 g/kW-hr and Class V engine families with FELs at or below 87 g/kW-hr may generate credits that have an unlimited credit life and are not discounted in any manner. (We refer to these as the ''credit program trigger levels.'') Under the ''Normal Credit'' program, credits generated by handheld engine families certified with FELs above the credit program trigger levels can be used by a manufacturer in the model year in which they are generated for its own averaging purposes, or traded to another manufacturer to be used for averaging purposes in that model year. However, such credits may not be carried over to the next model year (*i.e.*, banked), including when traded to another manufacturer.

Alternatively under the April 2000 final regulations, a manufacturer may choose to have a family participate in what is referred to as the ''Optional Transition Year'' credit program. Under this program, any engine family with FELs below the applicable phase-in standards shown in Table 1 is eligible to generate credits. However, as is described in 40 CFR 90.216, these credits are progressively discounted or in some cases multiplied depending on the certification FEL. This combination of ability to generate credits with families of higher emission levels for current year averaging but adjusting the credits for these higher/lower-emitting engines for purposes of banking was intended to provide an increased incentive for manufacturers to make interim emission improvements while preserving the environmental benefits of the Phase 2 program. ''Optional Transition Year'' credits have a limited life and application under the April 2000 final regulations. They may be used without limitation through the 2007 model year. For model years 2008 through 2010, they may also be used, but only if, prior to the use of any credits, the manufacturer's production- and power-weighted average emission level is below a level determined by production-weighting the manufacturer's product line by emission levels of 72/72/87 g/kW-hr for Classes III/IV/V. The ''Optional Transition Year'' credit program expires at the end of the 2010 model year, under the April 2000 final rule.

When we adopted the April 2000 final rule, we believed the ABT provisions contained therein were necessary to ensure that neither the ''Normal'' credit program nor the ''Optional Transition Year'' credit program would contribute to a significant delay in implementation of the low-emitting technologies envisioned under the Phase 2 program. Without the limitations on credit generation, we were concerned that manufacturers could certify marginally cleaner engines, especially during the first years of the phase in period when the new equipment standards are the highest, and generate enough credits to significantly delay implementation of technologies meeting the long term standards shown in Table 1 for a significant portion of the equipment population.

There have now been several model years of experience with certifying Class III and IV Phase 2 engines. The results indicate that the manufacturers have been able to comply with the declining average $HC+NO_X$ standards, but the certification compliance margins have generally not been large and there have not been a large number of credits generated. The ''windfall'' credit generation concern discussed in the April 2000 final rule has not occurred and would not have occurred even if the ''credit program trigger level'' provisions of the Normal ABT program and the discount and multiplier provisions of the Optional Transition Year program were not in place. Thus, to enable the ABT program to better fulfill its intended purpose and avoid maintaining unnecessary restrictions, EPA is revising the ABT program for 2003 and later model years: ABT credit program trigger levels are eliminated as are the credit discount and multipliers and limits on credit life. Essentially, the program is being revised to follow a simple ABT program such as was discussed in the July 1999 Supplemental NPRM. Provisions related to credits generated in model year 2002 and earlier would not be changed. In assessing the appropriateness of this change, EPA examined the potential future emissions impact of the removing the discounts and multipliers as part of the ABT program changes for 2003 and later. Using 2003 certification information, we have estimated that these ABT changes could potentially result in about 3,000 tons of future new ABT program credits in 2003 and 2004 with the in-use emissions impact spread out over the next five to seven years. This represents less than one percent of the emission reductions from the Phase 2 standards over these years. EPA expects these credits will be used to comply with the Class V standards during the transition years.

2. Class V Credit Deficit Carryforward

Several manufacturers have indicated that the engines used in Class V present the biggest technological challenge and assert that progress in Class V has been slowed by the need to meet the standards in Classes III and IV in earlier model years. Manufacturers are likely to adapt the technologies used in Class IV engines into Class V. They have indicated that they are confident that the long-term standards are feasible for Class V, but that they may need additional transition flexibility. Even with the cross class averaging and the ABT program changes made above, compliance during the transition years may depend on the expected success of technological progress, meeting expected sales goals in other Classes for purposes of credit generation, and a favorable sales mix among the products and Classes. Toward that end, as a

transition tool, we are revising the certification provisions to facilitate compliance for Class V.

Specifically, and only for Class V, we are revising the certification and compliance provisions to allow for credit deficit carryforward flexibility for model years 2004 through 2007. Under these provisions, a manufacturer who certifies Class V equipment during the transition period (model years 2004 through 2007) may run a net accumulated credit deficit within its three Class average (III–V) for a given model year if the deficit is attributable to negative credits from Class V engine families. Such credit deficits are permitted in any model year of the transition, but cannot occur for more than two consecutive model years. Once a deficit occurs, a manufacturer could, in the first subsequent model year, cover it at a 1:1 rate with credits from any or all of the handheld or non-handheld equipment classes. In the second and third following model years the deficit payback rate would be 1.1:1. In the fourth following model year, the deficit payback rate would be 1.2:1. Manufacturers with a credit deficit are prohibited from trading credits to other manufacturers (although manufacturers would be allowed to purchase credits from other manufacturers in trading), and from banking credits for future use. Any positive credit balance must be applied to that deficit. A manufacturer can use banked or traded credits to cover deficits.

As with the April 2000 regulations, two groups of engines are excluded from the ABT program. California certified sales in non pre-empted classes would not be included in the program in any way. Small volume manufacturers and small volume families which have extended compliance dates under the April 2000 final rule (an extra three years beyond the last of the transition years) would not be included, unless the manufacturer opted to pull-ahead certification of such engines for the purpose of generating credits.

EPA implemented a deficit carryforward provision in its Tier 2 automotive rule (65 FR 6867, February 10, 2002) and its recreational vehicle rule (67 FR 68389, November 8, 2002) to address similar concerns in the affected industries. This approach has the benefits of assuring the expected emission reductions are achieved while providing both the industry and EPA the flexibility to attain an orderly transition to the new standards.

3. Production Year FEL Changes

The implementation of new technology often brings with it unexpected emissions variability and performance shortfalls during the transition from prototype to mass production. Manufacturers account for this in setting their FELs, but even so there are times when an FEL adjustment is needed. Under the April 2000 final rule, manufacturers identifying an emissions problem with its production engines must contact EPA to get approval to change its FEL upward and subsequently to implement a certification running change to fix the problem and reduce the FEL. This process is time consuming for EPA and the industry and can result in production line slowdowns and stoppages as manufacturers await EPA approvals. In this rule, we are revising the process to adjust FELs upward and downward during the production year. Specifically, we are streamlining the certification FEL change process (up or down) through a regulatory revision to permit changes without pre-approval. Any changes to FELs must be based on engineering evaluation and emission test data which justifies the new FEL and be submitted to EPA within three working days. Failure to meet these requirements would be a violation of the certificate for any engines produced during the interim period. EPA believes such a provision streamlines both its internal processes and those of the manufacturers without compromising the emission reductions associated with the standards.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 the Agency must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of this Executive Order. The Executive Order defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may:

- Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, Local, or Tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This direct final rule is not a significant regulatory action as it merely amends previously adopted requirements for handheld engines to provide additional compliance flexibility to manufacturers in meeting the Phase 2 requirements. There are no new costs associated with this rule. A Final Regulatory Support Document was prepared in connection with the original Phase 2 regulations for handheld engines as promulgated on April 25, 2000 (65 FR 24268) and we have no reason to believe that our analysis in the original rulemaking is inadequate. The relevant analysis is available in the docket for the Phase 2 rulemaking (A–96–55) and at the following Internet address: *http://www.epa.gov/otaq/equip-ld.htm.* The original action was submitted to the Office of Management and Budget for review under Executive Order 12866.

B. Paperwork Reduction Act

This direct final rule does not include any new collection requirements. The information collection requirements (ICR) for the original Phase 2 rulemaking (65 FR 24268, April 25, 2000) were approved on September 21, 2001 by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

C. Regulatory Flexibility Analysis

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this direct final rule. EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities. For purposes of assessing the impacts of this final rule on small entities, a small entity is defined as: (1) A small business that meets the definition for business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize the

significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on small entities subject to the rule. This direct final rule merely amends the previously adopted Phase 2 requirements for handheld engines to provide additional compliance flexibility to engine manufacturers, including small entities, and will reduce regulatory burden.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation of why such an alternative was adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This rule contains no Federal mandates for State, local, or tribal governments as defined by the provisions of Title II of the UMRA. The rule imposes no enforceable duties on any of these governmental entities. Nothing in the rule would significantly or uniquely affect small governments. EPA has determined that this rule contains no Federal mandates that may result in expenditures of more than $100 million to the private sector in any single year. This direct final rule merely amends previously adopted requirements for Phase 2 handheld engines to provide additional compliance flexibility to manufacturers. The requirements of UMRA therefore do not apply to this action.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under Section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the regulation.

Section 4 of the Executive Order contains additional requirements for rules that preempt State or local law, even if those rules do not have federalism implications (*i.e.*, the rules will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government). Those requirements include providing all affected State and local officials notice and an opportunity for appropriate participation in the development of the regulation. If the preemption is not based on express or implied statutory authority, EPA also must consult, to the extent practicable, with appropriate State and local officials regarding the conflict between State law and Federally protected interests within the agency's area of regulatory responsibility.

This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This direct final rule merely amends previously adopted requirements for Phase 2 handheld engines to provide additional compliance flexibility to manufacturers.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (59 FR 22951, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.''

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. This rule does not uniquely affect the communities of Indian Tribal Governments. Further, no circumstances specific to such communities exist that would cause an impact on these communities beyond those discussed in the other sections of this rule. This direct final rule merely amends previously adopted requirements for Phase 2 handheld engines to provide additional compliance flexibility to manufacturers. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, section 5–501 of the Order directs the Agency to evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to the Executive Order because it is not economically significant, and does not involve decisions on environmental health or safety risks that may disproportionately affect children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This direct final rule merely amends previously adopted requirements for Phase 2 handheld engines to provide additional compliance flexibility to manufacturers.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (such as materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This direct final rule does not involve technical standards. This direct final rule merely amends previously adopted requirements for Phase 2 handheld engines to provide additional compliance flexibility to manufacturers. Thus, we have determined that the requirements of the NTTAA do not apply.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to Congress and the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This direct final rule is effective on March 12, 2004.

K. Statutory Authority

The statutory authority for this action comes from sections 202, 203, 204, 205, 206, 207, 208, 209, 213, 215, 216, and 301(a) of the Clean Air Act as amended (42 U.S.C. 7521, 7522, 7523, 7524, 7525, 7541, 7542, 7543, 7547, 7549, 7550, and 7601(a)). This action is a rulemaking subject to the provisions of Clean Air Act section 307(d). See 42 U.S.C. 7606(d)(1).

List of Subjects in 40 CFR Part 90

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Imports, Labeling, Reporting and recordkeeping requirements, Research, Warranties.

Dated: December 23, 2003

Michael O. Leavitt,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 90—CONTROL OF EMISSIONS FROM NONROAD SPARK-IGNITION ENGINES AT OR BELOW 19 KILOWATTS

■ 1. The authority citation for part 90 continues to read as follows:

Authority: 42 U.S.C. 7521, 7522, 7523, 7524, 7525, 7541, 7542, 7543, 7547, 7549, 7550, and 7601(a).

Subpart B—Emission Standards and Certification Provisions

■ 2. Section 90.122 is amended by revising paragraphs (e)(1) and (e)(2) to read as follows:

§ 90.122 Amending the application and certificate of conformity.

* * * * *

(e)(1) Alternatively, an engine manufacturer may make changes in or additions to production engines concurrently with amending the application for an engine family as set forth in paragraph (a) and (b) of this section. In these circumstances the manufacturer may implement the production change without EPA pre-approval provided the request for change together with all supporting emission test data, related engineering evaluations, and other supporting documentation is received at EPA within three working days of implementing the change. Such changes are ultimately still subject to the provisions of paragraphs (c) and (d) of this section.

(2) If, after a review, the Administrator determines that additional testing or information is required, the engine manufacturer must provide required test data or information within 30 days or cease production of the affected engines.

* * * * *

Subpart C—Certification Averaging, Banking, and Trading Provisions

■ 3. Section 90.203 is amended by revising paragraphs (e)(1), (e)(5), (g)(1), and the second sentence of paragraph (h) to read as follows:

§ 90.203 General provisions.

* * * * *

(e) (1) A manufacturer may certify engine families at Family Emission Limits (FELs) above or below the applicable emission standard subject to the limitation in paragraph (f) of this section, provided the summation of the manufacturer's projected balance of credits from all calculations and credit transactions for all engine classes in a given model year is greater than or equal to zero, as determined under § 90.207. Notwithstanding the previous sentence, a manufacturer may project a negative balance of credits as allowed under § 90.207(c)(2).

* * * * *

(5) In the case of a production line testing (PLT) failure pursuant to subpart H of this part, a manufacturer may revise the FEL based upon production line testing results obtained under

subpart H of this part and upon Administrator approval pursuant to § 90.122(d). The manufacturer may use credits to cover both past production and subsequent production of the engines as needed as allowed under § 90.207(c)(1).

* * * * *

(g)(1) Credits generated in a given model year by an engine family subject to the Phase 2 emission requirements may only be used in averaging, banking or trading, as appropriate, for any other engine family for which the Phase 2 requirements are applicable. Credits generated in one model year may not be used for prior model years, except as allowed under § 90.207(c).

* * * * *

(h) * * * Except as provided in § 90.207(c), an engine family generating negative credits for which the manufacturer does not obtain or generate an adequate number of positive credits by that date from the same or previous model year engines will violate the conditions of the certificate of conformity. * * *

* * * * *

■ 4. Section 90.204 is amended by adding a sentence to the end of paragraph (a) and adding a sentence to paragraph (c) immediately after the first sentence to read as follows:

§ 90.204 Averaging.

(a) * * * A manufacturer may have a negative balance of credits as allowed under § 90.207(c)(2).

* * * * *

(c) * * * Credits generated under the previously available ''Optional transition year averaging, banking, and trading program for Phase 2 handheld engines'' of §§ 90.212 through 90.220, since repealed, may also be used in averaging. * * *

* * * * *

■ 5. Section 90.205 is amended by revising paragraphs (a)(4) and (a)(5) to read as follows:

§ 90.205 Banking.

(a) * * *

(4) For the 2002 model year, a manufacturer of a Class III or Class IV engine family may bank credits for use in future model year averaging and trading from only those Class III or Class IV engine families with an FEL at or below 72 g/kW-hr. Beginning with the 2003 model year, a manufacturer of a Class III or Class IV engine family with an FEL below the applicable emission standard may generate credits for use in future model year averaging and trading.

(5) Beginning with the 2004 model year, a manufacturer of a Class V engine family with an FEL below the applicable emission standard may generate credits for use in future model year averaging and trading.

* * * * *

■ 6. Section 90.206 is amended by revising paragraph (a) to read as follows:

§ 90.206 Trading.

(a) An engine manufacturer may exchange emission credits with other engine manufacturers in trading, subject to the trading restriction specified in § 90.207(c)(2).

* * * * *

■ 7. Section 90.207 is amended by redesignating paragraph (c) as paragraph (c)(1), adding a new paragraph (c)(2), and adding a new paragraph (g) to read as follows:

§ 90.207 Credit calculation and manufacturer compliance with emission standards.

* * * * *

(c)(2) For model years 2004 through 2007, an engine manufacturer who certifies at least one Class V engine family in a given model year may carry forward a credit deficit for four model years, but must not carry such deficit into the fifth year, provided the deficit is attributable to negative credits from its Class V engine families, subject to the following provisions:

(i) Credit deficits are permitted for model years 2004 through 2007 but cannot occur for more than two consecutive model years for a given manufacturer;

(ii)(A) If an engine manufacturer calculates that it has a credit deficit for a given model year, it must obtain sufficient credits from engine families produced by itself or another manufacturer in a model year no later than the fourth model year following the model year for which it calculated the credit deficit. (Example: if a manufacturer calculates that it has a credit deficit for the 2004 model year, it must obtain sufficient credits to offset that deficit from its own production or that of other manufacturers' 2008 or earlier model year engine families.);

(B) An engine manufacturer carrying the deficit into the first model year following the year in which it was generated must generate or obtain credits to offset that deficit and apply them to the deficit at a rate of 1:1. An engine manufacturer carrying the deficit into the second and third model years must generate or obtain credits to offset that deficit and apply them to the deficit at a rate of 1.1:1 (*i.e.*, deficits carried into the second and third model year must be repaid with credits equal to 110 percent of the deficit). Deficits carried into the fourth model year must be offset by credits at a rate of 1.2:1 (*i.e.*, 120 percent of the deficit);

(iii) An engine manufacturer who has a credit deficit may use credits from any class of spark-ignition nonroad engines at or below 19 kilowatts generated or obtained through averaging, banking or trading to offset the credit deficit; and,

(iv) An engine manufacturer must not bank credits for future use or trade credits to another engine manufacturer during a model year in which it has generated a deficit or into which it has carried a deficit.

* * * * *

(g) Credit deficits. (1) Manufacturers must offset any deficits for a given model year by the reporting deadline for the fourth model year following the model year in which the deficits were generated as required in paragraph (c)(2) of this section. Manufacturers may offset deficits by generating credits or acquiring credits generated by another manufacturer.

(2)(i) Failure to meet the requirements of paragraph (c)(2) of this section within the required timeframe for offsetting deficits will be considered to be a failure to satisfy the conditions upon which the certificate(s) was issued and the individual noncomplying engines not covered by the certificate must be determined according to this section.

(ii) If deficits are not offset within the specified time period, the number of engines which could not be covered in the calculation to show compliance with the fleet average $HC+NO_X$ standard in the model year in which the deficit occurred and thus are not covered by the certificate must be calculated using the methodology described in paragraph (g)(2)(iii) of this section.

(iii) EPA will determine the engines for which the condition on the certificate was not satisfied by designating engines in the Class V engine family with the highest $HC+NO_X$ FELs first and continuing progressively downward through the Class V engine families until a number of engines having a credit need, as calculated under paragraph (a) of this section, equal to the remaining deficit is reached. If this calculation determines that only a portion of engines in a Class V engine family contribute to the deficit situation, then EPA will designate a subset of actual engines in that engine family as not covered by the certificate, starting with the last engine produced and counting backwards. EPA may request additional information from the manufacturer that would help identify the actual engine not covered by the certificate.

(iv) In determining the engine count, EPA will calculate the mass of credits based on the factors identified in paragraph (a) of this section.

(3) If a manufacturer is purchased by, merges with or otherwise combines with another manufacturer, the manufacturer continues to be responsible for offsetting any deficits outstanding within the required time period. Any failure to offset the deficits will be considered to be a violation of paragraph (g)(1) of this section and may subject the manufacturer to an enforcement action for sale of engines not covered by a certificate, pursuant to paragraph (g)(2) of this section.

(4) If a manufacturer that has a deficit ceases production of handheld engines, the manufacturer will be considered immediately in violation of paragraph (g)(1) of this section and may be subject to an enforcement action for sale of engines not covered by a certificate, pursuant to paragraph (g)(2) of this section

(5) For purposes of calculating the statute of limitations, a violation of the requirements of paragraph (g)(1) of this section, a failure to satisfy the conditions upon which a certificate(s) was issued and hence a sale of engines not covered by the certificate, all occur upon the expiration of the deadline for offsetting deficits specified in paragraph (g)(1) of this section.

§§90.212, 90.213, 90.214, 90.215, 90.216, 90.217, 90.218, 90.219, 90.220 [REMOVED]

■ 8. Sections 90.212 through 90.220 are removed.

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