

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 80**

[EPA-HQ-OAR-2006-0224; FRL-8161-8]

RIN 2060-AN78

**Technical Amendments to the Highway and Nonroad Diesel Regulations****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to correct, amend, and revise certain provisions of the Highway Diesel Rule, and the Nonroad Diesel Rule. This action proposes to correct additional errors and omissions from the previous rules, and make minor changes to the regulations to assist entities with regulatory compliance. Further, this action also proposes technical amendments resulting from discussions with various diesel stakeholders. These technical amendments would: provide a temporary increase in the sulfur testing tolerance, revise the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board's diesel fuel standards, and amend the alternative defense provisions to account for conductivity additives and red dye. This proposed action is intended to help facilitate compliance with the diesel fuel regulations and ensure a smooth transition to ultra low sulfur diesel fuel.

**DATES:** Comments must be received on or before May 31, 2006. If a hearing is requested, the request must be received by May 16, 2006. If we receive a request for a public hearing, we will publish information related to the timing and location of the hearing and the timing of a new deadline for public comments.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2006-0224 by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- E-mail: [Sutton.tia@epa.gov](mailto:Sutton.tia@epa.gov).

- Fax: (734) 214-4816.

- Mail: Air Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

- Hand Delivery: EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-HQ-OAR-2006-0224. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the 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:** Tia Sutton, U.S. EPA, National Vehicle and Fuels Emission Laboratory, Assessment and Standards Division, 2000 Traverwood Dr., Ann Arbor, MI 48105; telephone (734) 214-4018, fax (734) 214-4816, e-mail [sutton.tia@epa.gov](mailto:sutton.tia@epa.gov).

**SUPPLEMENTARY INFORMATION:****I. General Information***A. Does This Action Apply to Me?*

This action will affect companies and persons that produce, import, distribute, or sell highway and/or nonroad diesel fuel. Affected Categories and entities include the following:

Category	NAICS Code <sup>a</sup>	Examples of potentially affected entities
Industry	324110	Petroleum refiners.
Industry	422710	Diesel fuel marketers and distributors.
Industry	484220	Diesel fuel carriers.

<sup>a</sup>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. What Should I Consider as I Prepare My Comments for EPA?*

1. **Submitting CBI.** Do not submit this information to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. **Tips for Preparing Your Comments.** When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

• Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

• Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

• Describe any assumptions and provide any technical information and/or data that you used.

• Provide specific examples to illustrate your concerns, and suggest alternatives.

• Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

• Make sure to submit your comments by the comment period deadline identified.

### C. How Can I Get Copies of This Document?

See the direct final rule EPA has published in the “Rules and Regulations” section of this **Federal Register** for information about accessing these documents. The direct final rule also includes detailed instructions for sending comments to EPA.

## II. Summary of Rule

The Highway Diesel rule, published on January 18, 2001 (66 FR 5002), is a comprehensive national program that will greatly reduce emissions from diesel engines by integrating engine and fuel controls as a system to gain the greatest air quality benefits. The Nonroad Diesel Rule was subsequently published on June 29, 2004 (69 FR 38958). The Nonroad Diesel Rule took a similar approach, covering nonroad diesel equipment and fuel to further the goal of decreasing harmful emissions. In 2005, we published two additional direct final rulemakings (70 FR 40889 was published on July 15, 2005 and 70 FR 70498 was published on November 22, 2005) to make technical amendments to those rules. We have chosen to propose a third action to correct additional errors and omissions from the previous rules, as well as include amendments developed following discussions with stakeholders throughout the diesel fuel industry. These discussions resulted in the following changes that are being proposed today, such as: (1) Providing a temporary increase in the sulfur testing tolerance; (2) revising the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board’s diesel fuel standards; and, (3) amending the alternative defense provisions to account for conductivity additives and

red dye. The proposed clarifications and corrections include: The allowance for early motor vehicle diesel credits to be traded across Credit Trading Areas, the assignment of Puerto Rico and the U.S. Virgin Islands to CTA 1, the allowance of shorter statements on product transfer documents (with EPA approval), the clarification that approved small refiners who have elected to use the “gas-for-diesel” small refiner option (§ 80.553 and § 80.554) may designate 15 ppm diesel fuel as motor vehicle diesel fuel or nonroad, locomotive, and marine diesel fuel, and other minor corrections to help facilitate compliance with EPA’s diesel fuel regulations.

For further discussion on all of the proposed changes contained in this action, see the direct final rule EPA has published in the “Rules and Regulations” section of this **Federal Register**. This proposal incorporates by reference all of the reasoning, explanation, and regulatory text from the direct final rule.

Because EPA views the provisions of the action as noncontroversial and does not expect adverse comment, we are publishing a direct final rule in the “Rules and Regulations” section of this **Federal Register**. However, we are publishing this notice of proposed rulemaking to serve as the proposal to adopt the provisions in the direct final rule if adverse comments are filed. If we receive adverse comment on one or more distinct amendment, paragraphs, or sections of the direct final rulemaking, or receive a request for a hearing within the time frame described above, we will publish a timely withdrawal of the proposed direct final rule in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment. We will address all public comments received in a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Any distinct amendment, paragraph, or section of the direct final rulemaking for which we do not receive adverse comment will become effective according to the **DATES** section in the direct final rule, notwithstanding any adverse comment on any other distinct amendment, paragraph, or section of the rule.

## III. Statutory and Executive Order Reviews

### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is “significant” and therefore subject to OMB review and the requirements of the Executive Order. The Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) 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;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a “significant regulatory action” under the terms of Executive Order 12866 and is therefore not subject to OMB review. This action simply corrects errors and omissions, provides a temporary increase in the sulfur testing tolerance, revises the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board’s diesel fuel standards, and amends the alternative defense provisions to account for conductivity additives and red dye. There are no new costs associated with this rule. Therefore, this proposed rule is not subject to the requirements of Executive Order 12866. A Final Regulatory Support Document was prepared in connection with the original regulations for the Highway Diesel Rule and the Nonroad Diesel Rule as promulgated on January 18, 2001 and June 29, 2004, respectively, and we have no reason to believe that our analyses in the original rulemakings were inadequate. The relevant analyses are available in the docket for the January 18, 2001 rulemaking (A-99-061) and the June 29, 2004 rulemaking (OAR-2003-0012 and A-2001-28) and at the following internet address: <http://www.epa.gov/cleandiesel>. The original action was submitted to the Office of Management

and Budget for review under Executive Order 12866.

#### B. Paperwork Reduction Act

This action does not impose any new information collection burden, as it simply corrects errors and omissions, provides a temporary increase in the sulfur testing tolerance, revises the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board's diesel fuel standards, and amends the alternative defense provisions to account for conductivity additives and red dye. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations of the Highway Diesel Rule (66 FR 5002, January 18, 2001) and the Nonroad Diesel Rule (69 FR 38958, June 29, 2004) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060-0308 (EPA ICR #1718). A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Avenue, NW., Washington, DC 20460 or by calling (202) 566-1672.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the

Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, a small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) size standards at 13 CFR 121.201; (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.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule would not impose any new requirements on small entities as it would merely correct errors and omissions, provide a temporary increase in the sulfur testing tolerance, revise the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board's diesel fuel standards, and amend the alternative defense provisions to account for conductivity additives and red dye.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

#### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 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 why that alternative was not 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 (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. 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 proposed rule merely corrects errors and omissions, provides a temporary increase in the sulfur testing tolerance, revises the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board's diesel fuel standards, and amends the alternative defense provisions to account for conductivity additives and red dye.

Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### 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, imposes substantial direct compliance costs, and is not required by statute. However, if 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, these restrictions do not apply. 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 simply corrects errors and omissions, provides a temporary increase in the sulfur testing tolerance, revises the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board's diesel fuel standards, and amends the alternative defense provisions to account for conductivity additives and red dye. Although Section 6 of Executive Order 13132 did not apply to the Highway Diesel Rule (66 FR 5002) or the Nonroad Diesel Rule (69 FR 38958), EPA did consult with

representatives of various State and local governments in developing these rules. For this direct final action, EPA consulted with representatives of the California Air Resources Board and the Western States Petroleum Association (WSPA) for the amendments made which will affect refiners and distributors in California.

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

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 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.” This direct final rule does not have tribal implications as specified in Executive Order 13175. 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 corrects errors and omissions, provides a temporary increase in the sulfur testing tolerance, revises the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board's diesel fuel standards, and amends the alternative defense provisions to account for conductivity additives and red dye. Thus, Executive Order 13175 does not apply to this rule.

#### *G. Executive Order 13045: Children's Health Protection*

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, the Agency must 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 proposed 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 action simply proposes to correct errors and omissions, provide a temporary increase in the sulfur testing tolerance, revise the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board's diesel fuel standards, and amend the alternative defense provisions to account for conductivity additives and red dye.

#### *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, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. This action merely proposes to correct errors and omissions, provide a temporary increase in the sulfur testing tolerance, revise the designate and track provisions to account for non-petroleum diesel fuels (*i.e.*, biodiesel) and fuel that meets the California Air Resources Board's diesel fuel standards, and amend the alternative defense provisions to account for conductivity

additives and red dye. Thus, we have determined that the requirements of the NTTAA do not apply.

#### **IV. Statutory Provisions and Legal Requirements**

The statutory authority for this action comes from sections 211(c) and (i) of the Clean Air Act as amended 42 U.S.C. 7545(c) and (i). This action is a rulemaking subject to the provisions of

Clean Air Act section 307(d). See 42 U.S.C. 7606(d)(1). Additional support for the procedural and enforcement related aspects of the rule comes from sections 144(a) and 301(a) of the Clean Air Act. 42 U.S.C. 7414(a) and 7601(a).

#### **List of Subjects in 40 CFR Part 80**

Fuel additives, Imports, Incorporation by reference, Labeling, Motor vehicle

pollution, Penalties, Reporting and recordkeeping requirements.

Dated: April 20, 2006.

**Stephen L. Johnson,**  
*Administrator.*

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