No. 12-1243

In the U.S. Court of Appeals for the District of Columbia Circuit

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *and* ROBERT PERCIASEPE,
ACTING ADMINISTRATOR, *in his official capacity,*
Respondents.

Petition for Review of Final Agency Action from the
U.S. Environmental Protection Agency

ADDENDUM TO PETITIONER'S FINAL OPENING BRIEF

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Clean Air Act §110(a)(2)(E)(i), 42 U.S.C. §7410(a)(2)(E)(i)

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

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(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

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(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof),

Clean Air Act §110(a)(5)(C), 42 U.S.C. §7410(a)(5)(C)

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

Clean Air Act §116, 42 U.S.C. §7416

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this

chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

Clean Air Act §177, 42 U.S.C. §7507

Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if--

(1) such standards are identical to the California standards for which a waiver has been granted for such model year, and

(2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).

Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a “third vehicle”) or otherwise create such a “third vehicle”.

Clean Air Act §182(c)(4)(B), 42 U.S.C. §7511a(c)(4)(B)

The Administrator shall approve, as a substitute for all or a portion of the clean-fuel vehicle program prescribed under part C of subchapter II of this chapter, any revision to the relevant applicable implementation plan that in the Administrator’s judgment will achieve long-term reductions in ozone-producing and toxic air emissions equal to those achieved under part C of subchapter II of this chapter, or the percentage thereof attributable to the portion of the clean-fuel vehicle program for which the revision is to substitute. The Administrator may approve such revision only if it consists

exclusively of provisions other than those required under this chapter for the area. Any State seeking approval of such revision must submit the revision to the Administrator within 24 months of November 15, 1990. The Administrator shall approve or disapprove any such revision within 30 months of November 15, 1990. The Administrator shall publish the revision submitted by a State in the Federal Register upon receipt. Such notice shall constitute a notice of proposed rulemaking on whether or not to approve such revision and shall be deemed to comply with the requirements concerning notices of proposed rulemaking contained in sections 553 through 557 of Title 5 (related to notice and comment). Where the Administrator approves such revision for any area, the State need not submit the revision required by subparagraph (A) for the area with respect to the portions of the Federal clean-fuel vehicle program for which the Administrator has approved the revision as a substitute.

Clean Air Act §202(a)(3)(ii), 42 U.S.C. §7521(a)(3)(ii)

In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

Clean Air Act §209, 42 U.S.C. §7543

(a) Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as

applicable Federal standards. No such waiver shall be granted if the Administrator finds that--

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

(c) Certification of vehicle parts or engine parts

Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 7541(a)(2) of this title, no State or political subdivision thereof shall adopt or attempt to enforce any standard or any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part. The preceding sentence shall not apply in the case of a State with respect to which a waiver is in effect under subsection (b) of this section.

(d) Control, regulation, or restrictions on registered or licensed motor vehicles

Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

(e) Nonroad engines or vehicles

(1) Prohibition on certain State standards

No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of

emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter--

(A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.

(B) New locomotives or new engines used in locomotives.

Subsection (b) of this section shall not apply for purposes of this paragraph.

(2) Other nonroad engines or vehicles

(A) In the case of any nonroad vehicles or engines other than those referred to in subparagraph (A) or (B) of paragraph (1), the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that--

(i) the determination of California is arbitrary and capricious,

(ii) California does not need such California standards to meet compelling and extraordinary conditions, or

(iii) California standards and accompanying enforcement procedures are not consistent with this section.

(B) Any State other than California which has plan provisions approved under part D of subchapter I of this chapter may adopt and enforce, after notice to the Administrator, for any period, standards relating to control of emissions from nonroad vehicles or engines (other than those referred to in subparagraph (A) or (B) of paragraph (1)) and take such other actions as are referred to in subparagraph (A) of this paragraph respecting such vehicles or engines if--

(i) such standards and implementation and enforcement are identical, for the period concerned, to the California standards authorized by the Administrator under subparagraph (A), and

(ii) California and such State adopt such standards at least 2 years before commencement of the period for which the standards take effect.

The Administrator shall issue regulations to implement this subsection.

Clean Air Act §213, 42 U.S.C. §7547

(a) Emissions standards

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(3) If the Administrator makes an affirmative determination under paragraph (2) the Administrator shall, within 12 months after completion of the study under paragraph (1), promulgate (and from time to time revise) regulations containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles (other than locomotives or engines used in locomotives) which in the Administrator's judgment cause, or contribute to, such air pollution. Such standards shall achieve the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the engines or vehicles to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology. In determining what degree of reduction will be available, the Administrator shall first consider standards equivalent in stringency to standards for comparable motor vehicles or engines (if any) regulated under section 7521 of this title, taking into account the technological feasibility, costs, safety, noise, and energy factors associated with achieving, as appropriate, standards of such stringency and lead time. The regulations shall apply to the useful life of the engines or vehicles (as determined by the Administrator).

(4) If the Administrator determines that any emissions not referred to in paragraph (2) from new nonroad engines or vehicles significantly contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, the Administrator may promulgate (and from time to time revise) such regulations as the Administrator deems appropriate containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles (other than locomotives or engines used in locomotives) which in the Administrator's judgment cause, or contribute to, such air pollution, taking into account costs, noise, safety, and energy factors associated with the application of technology which the Administrator determines will be available for the engines and vehicles to which such standards apply. The regulations shall apply to the useful life of the engines or vehicles (as determined by the Administrator).

(5) Within 5 years after November 15, 1990, the Administrator shall promulgate regulations containing standards applicable to emissions from new locomotives and new engines used in locomotives. Such standards shall achieve the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the locomotives or engines to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology.

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(d) Enforcement

The standards under this section shall be subject to sections 7525, 7541, 7542, and 7543 of this title, with such modifications of the applicable regulations implementing such sections as the Administrator deems appropriate, and shall be enforced in the same manner as standards prescribed under section 7521 of this title. The Administrator shall revise or promulgate regulations as may be necessary to determine compliance with, and enforce, standards in effect under this section.

Clean Air Act §216, 42 U.S.C. §7550

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(2) The term "motor vehicle" means any self-propelled vehicle designed for transporting persons or property on a street or highway.

(3) Except with respect to vehicles or engines imported or offered for importation, the term "new motor vehicle" means a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser; and the term "new motor vehicle engine" means an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser; and with respect to imported vehicles or engines, such terms mean a motor vehicle and engine, respectively, manufactured after the effective date of a regulation issued under section 7521 of this title which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine had it been manufactured for importation into the United States).

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(10) Nonroad engine

The term "nonroad engine" means an internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under section 7411 of this title or section 7521 of this title.

(11) Nonroad vehicle

The term "nonroad vehicle" means a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.

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Clean Air Act §243(e)(2), 42 U.S.C. §7583(e)(2)

If the State of California promulgates regulations establishing and implementing several different sets of standards applicable in California pursuant to a waiver approved under section 7543 of this title to any category of vehicles referred to in subsection (a), (b), (c), or (d) of this section and each of such sets of California standards is, in the aggregate, at least as protective of public health and welfare as the otherwise applicable standards set forth in section 7582 of this title and subsection (a), (b), (c), or (d) of this section, such standards shall be treated as "qualifying California standards" for purposes of this paragraph. Where more than one set of qualifying standards are established and administered by the State of California, the least stringent set of qualifying California standards shall apply to the clean-fuel vehicles concerned in lieu of the standards otherwise applicable to such vehicles under section 7582 of this title and this section.

Clean Air Act §246, 42 U.S.C. §7586

(a) Fleet program required for certain nonattainment areas

(1) SIP revision

Each State in which there is located all or part of a covered area (as defined in paragraph (2)) shall submit, within 42 months after November 15, 1990, a State implementation plan revision under section 7410 of this title and part D of subchapter I of this chapter to establish a clean-fuel vehicle program for fleets under this section.

(2) Covered areas

For purposes of this subsection, each of the following shall be a "covered area":

(A) Ozone nonattainment areas

Any ozone nonattainment area with a 1980 population of 250,000 or more classified under subpart 2 of part D of subchapter I of this chapter as Serious, Severe, or Extreme based on data for the calendar years 1987, 1988, and 1989. In determining the ozone nonattainment areas to be treated as covered areas pursuant to this subparagraph, the Administrator shall use the most recent interpretation methodology issued by the Administrator prior to November 15, 1990.

(B) Carbon monoxide nonattainment areas

Any carbon monoxide nonattainment area with a 1980 population of 250,000 or more and a carbon monoxide design value at or above 16.0 parts per million based on data for calendar years 1988 and 1989 (as calculated according to the most recent interpretation methodology issued prior to November 15, 1990, by the United States Environmental Protection Agency), excluding those carbon monoxide nonattainment areas in which mobile sources do not contribute significantly to carbon monoxide exceedances.

(3) Plan revisions for reclassified areas

In the case of ozone nonattainment areas reclassified as Serious, Severe, or Extreme under part D of subchapter I of this chapter with a 1980 population of 250,000 or more, the State shall submit a plan revision meeting the requirements of this subsection within 1 year after reclassification. Such plan revision shall implement the requirements applicable under this subsection at the time of reclassification and thereafter, except that the Administrator may adjust for a limited period the deadlines for compliance where compliance with such deadlines would be infeasible.

(4) Consultation; consideration of factors

Each State required to submit an implementation plan revision under this subsection shall develop such revision in consultation with fleet operators, vehicle manufacturers, fuel producers and distributors, motor vehicle fuel, and other interested parties, taking into consideration operational range, specialty uses, vehicle and fuel availability, costs, safety, resale values of vehicles and equipment and other relevant factors.

* * *

(d) Choice of vehicles and fuel

The plan revision under this subsection shall provide that the choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operator subject to the requirements of this subsection.

(e) Availability of clean alternative fuel

The plan revision shall require fuel providers to make clean alternative fuel available to covered fleet operators at locations at which covered fleet vehicles are centrally fueled.

(f) Credits

(1) Issuance of credits

The State plan revision required under this section shall provide for the issuance by the State of appropriate credits to a fleet operator for any of the following (or any combination thereof):

(A) The purchase of more clean-fuel vehicles than required under this section.

(B) The purchase of clean fuel [FN2] vehicles which meet more stringent standards established by the Administrator pursuant to paragraph (4).

(C) The purchase of vehicles in categories which are not covered by this section but which meet standards established for such vehicles under paragraph (4).

(2) Use of credits; limitations based on weight classes

(A) Use of credits

Credits under this subsection may be used by the person holding such credits to demonstrate compliance with this section or may be traded or sold for use by any other person to demonstrate compliance with other requirements applicable under this section in the same nonattainment area. Credits obtained at any time may be held or banked for use at any later time, and when so used, such credits shall maintain the same value as if used at an earlier date.

(B) Limitations based on weight classes

Credits issued with respect to the purchase of vehicles of up to 8,500 lbs. GVWR may not be used to demonstrate compliance by any person with the requirements applicable under this subsection to vehicles of more than 8,500 lbs. GVWR. Credits issued with respect to the purchase of

vehicles of more than 8,500 lbs. GVWR may not be used to demonstrate compliance by any person with the requirements applicable under this subsection to vehicles weighing up to 8,500 lbs. GVWR.

(C) Weighting

Credits issued for purchase of a clean fuel [FN2] vehicle under this subsection shall be adjusted with appropriate weighting to reflect the level of emission reduction achieved by the vehicle.

(3) Regulations and administration

Within 12 months after November 15, 1990, the Administrator shall promulgate regulations for such credit program. The State shall administer the credit program established under this subsection.

(4) Standards for issuing credits for cleaner vehicles

Solely for purposes of issuing credits under paragraph (1)(B), the Administrator shall establish under this paragraph standards for Ultra-Low Emission Vehicles ("ULEV"s) and Zero Emissions Vehicles ("ZEV"s) which shall be more stringent than those otherwise applicable to clean-fuel vehicles under this part. The Administrator shall certify clean fuel [FN2] vehicles as complying with such more stringent standards, and administer and enforce such more stringent standards, in the same manner as in the case of the otherwise applicable clean-fuel vehicle standards established under this section. The standards established by the Administrator under this paragraph for vehicles under 8,500 lbs. GVWR or greater shall conform as closely as possible to standards which are established by the State of California for ULEV and ZEV vehicles in the same class. For vehicles of 8,500 lbs. GVWR or more, the Administrator shall promulgate comparable standards for purposes of this subsection.

(5) Early fleet credits

The State plan revision shall provide credits under this subsection to fleet operators that purchase vehicles certified to meet clean-fuel vehicle standards under this part during any period after approval of the plan revision and prior to the effective date of the fleet program under this section.

* * *

(h) Transportation control measures

The Administrator shall by rule, within 1 year after November 15, 1990, ensure that certain transportation control measures including time-of-day or day-of-week restrictions, and other similar measures that restrict vehicle usage, do not apply to any clean-fuel vehicle that meets the requirements of this section. This subsection shall apply notwithstanding subchapter I of this chapter.

Clean Air Act §307(b)(1), 42 U.S.C. §7607(b)(1)

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except

that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

Clean Air Act §307(d)(1), 42 U.S.C. §7607(d)(1)

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of

any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

Clean Air Act §307(e), 42 U.S.C. §7607(e)

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

Pub. L. No. 108-199, §428, 118 Stat. 3, 418-19 (2004) ("Bond Amendment")

SEC. 428. REGULATION OF SMALL ENGINES. (a) In considering any request from California to authorize the State to adopt or enforce standards of other requirements relating to the control of emissions from new non-road spark-ignition engines smaller than 50 horsepower, the Administrator shall give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

(b) Not later than December 1, 2004, the Administrator of the Environmental Protection Agency shall propose regulations under the Clean Air Act that shall contain standards to reduce emissions from new nonroad spark-ignition engines smaller than 50 horsepower. Not later than December 31, 2005, the Administrator shall publish in the Federal Register final regulations containing such standards.

(c) No State or any political subdivision thereof may adopt or attempt to enforce any standard or other requirement applicable to spark ignition engines smaller than 50 horsepower.

(d) EXCEPTION FOR CALIFORNIA.--The prohibition in subsection (e) does not apply to or restrict in any way the authority granted to California under section 209(e) of the Clean Air Act (42 U.S.C. 7543(e)).

(e) EXCEPTION FOR OTHER STATES.--The prohibition in subsection (c) does not apply to or restrict the authority of any State under section 209(e)(2)(B) of the Clean Air Act (42 U.S.C. 7543(e)(2)(B)) to enforce standards or other requirements that were adopted by that State before September 1, 2003.

FEDERAL REGULATIONS

40 C.F.R. §85.1602 (1995)

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

* * *

New engine used in a locomotive means new locomotive engine, as defined in 40 CFR 92.2.

New locomotive. The definition of new locomotive specified in 40 CFR 92.2 applies to this subpart.

New means a domestic or imported nonroad vehicle or nonroad engine the equitable or legal title to which has never been transferred to an ultimate purchaser. Where the equitable or legal title to an engine or vehicle is not transferred to an ultimate purchaser until after the engine or vehicle is placed into service, then the engine or vehicle will no longer be new after it is placed into service. A nonroad engine or vehicle is placed into service when it is used for its functional purposes. The term ultimate purchaser means, with respect to any new nonroad vehicle or new nonroad engine, the first person who in good faith purchases such new nonroad vehicle or new nonroad engine for purposes other than resale. This definition of new shall not apply to locomotives or engines used in locomotives.

* * *

40 C.F.R. §85.1603 (1995)

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

(b) States and any political subdivisions thereof are preempted from adopting or enforcing standards or other requirements from new engines smaller than 175 horsepower, that are primarily used in farm or construction equipment or vehicles, as defined in this subpart.

(c)(1) States and any political subdivisions thereof are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives and new engines used in locomotives.

(2) During a period equivalent in length to 133 percent of the useful life, expressed as MW-hrs (or miles where applicable), beginning at the point at which the locomotive or engine becomes new, those standards or other requirements which are preempted include, but are not limited to, the following: emission standards, mandatory fleet average standards, certification requirements, aftermarket equipment requirements, and nonfederal in-use testing requirements. The standards and other requirements specified in the preceding sentence are preempted whether applicable to new or other locomotives or locomotive engines.

(d) No state or any political subdivisions thereof shall enforce any standards or other requirements relating to the control of emissions from nonroad engines or vehicles except as provided for in this subpart.

40 C.F.R. §92.2 (1995)

(a) The definitions of this section apply to this subpart. They also apply to all subparts of this part, except where noted otherwise.

(b) As used in this part, all terms not defined in this section shall have the meaning given them in the Act:

* * *

New locomotive or new locomotive engine means:

(1)(i) A locomotive or locomotive engine the equitable or legal title to which has never been transferred to an ultimate purchaser; or

(ii) A locomotive or locomotive engine which has been remanufactured, but has not been placed back into service.

(2) Where the equitable or legal title to a locomotive or locomotive engine is not transferred prior to its being placed into service, the locomotive or locomotive engine ceases to be new when it is placed into service.

(3) With respect to imported locomotives or locomotive engines, the term "new locomotive" or "new locomotive engine" means a locomotive or locomotive engine that is not covered by a certificate of conformity under this part at the time of importation, and that was manufactured or remanufactured after the effective date of the emission standards in this part which is applicable to such locomotive or engine (or which would be applicable to such locomotive or engine had it been manufactured or remanufactured for importation into the United States).

(4) Notwithstanding paragraphs (1) through (3) of this definition, locomotives and locomotive engines which were originally manufactured before January 1, 1973 and which have not been upgraded are not new.

(5) Notwithstanding paragraphs (1) through (3) of this definition, locomotives and locomotive engines which are owned by a small railroad and which have never been manufactured or remanufactured into a certified configuration are not new.

* * *

40 C.F.R. §1074.5

The definitions in this section apply to this part. As used in this part, all undefined terms have the meaning the Act gives to them. The definitions follow:

* * *

New has the following meanings:

(1) For locomotives, new has the meaning given in 40 CFR 1033.901.

(2) For engines used in locomotives, new means an engine incorporated in (or intended to be incorporated in) in a new locomotive.

(3) For other nonroad engines and equipment, new means a domestic or imported nonroad engine or nonroad vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser. Where the equitable or legal title to an engine or vehicle is not transferred to an ultimate purchaser until after the engine or vehicle is placed into service, then the engine or vehicle will no longer be new once it is placed into service. A nonroad engine or vehicle is placed into service when it is used for its functional purposes. This paragraph (3) does not apply to locomotives or engines used in locomotives.

* * *

40 C.F.R. §1074.10

(a) States and localities are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new engines smaller than 175 horsepower that are primarily used in farm or construction equipment or vehicles, as defined in this part. For equipment that is used in applications in addition to farming or construction activities,

if the equipment is primarily used as farm and/or construction equipment or vehicles (as defined in this part), it is considered farm or construction equipment or vehicles.

(b) For nonroad engines or vehicles other than those described in paragraph (a) of this section and § 1074.12, States and localities are preempted from enforcing any standards or other requirements relating to control of emissions from nonroad engines or vehicles except as provided in subpart B of this part.

40 C.F.R. §1074.12

(a) States and localities are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives and new engines used in locomotives.

(b) During a period equivalent in length to 133 percent of the useful life, expressed as MW-hrs (or miles where applicable), beginning at the point at which the locomotive or engine becomes new, those standards or other requirements which are preempted include, but are not limited to, the following: emission standards, mandatory fleet average standards, certification requirements, retrofit and aftermarket equipment requirements, and nonfederal in-use testing requirements. The standards and other requirements specified in the preceding sentence are preempted whether applicable to new or other locomotives or locomotive engines.

40 C.F.R. §1033.901

* * *

New, when relating to a locomotive or locomotive engine, has the meaning given in paragraph (1) of this definition, except as specified in paragraph (2) of this definition:

(1) A locomotive or engine is new if its equitable or legal title has never been transferred to an ultimate purchaser. Where the equitable or legal title to a locomotive or engine is not transferred prior to its being placed into service, the locomotive or engine ceases to be new when it is placed into service. A locomotive or engine also becomes new if it is remanufactured or refurbished (as defined in this section). A remanufactured locomotive or engine ceases to be new when placed back into service. With respect to imported locomotives or locomotive engines, the term “new locomotive” or “new locomotive engine” also means a

locomotive or locomotive engine that is not covered by a certificate of conformity under this part or 40 CFR part 92 at the time of importation, and that was manufactured or remanufactured after the effective date of the emission standards in 40 CFR part 92 which would have been applicable to such locomotive or engine had it been manufactured or remanufactured for importation into the United States. Note that replacing an engine in one locomotive with an unremanufactured used engine from a different locomotive does not make a locomotive new.

(2) The provisions of paragraph (1) of this definition do not apply for the following cases:

(i) Locomotives and engines that were originally manufactured before January 1, 1973 are not considered to become new when remanufactured unless they have been upgraded (as defined in this section). The provisions of paragraph (1) of this definition apply for locomotives that have been upgraded.

(ii) Locomotives that are owned and operated by a small railroad and that have never been certified (i.e., manufactured or remanufactured into a certified configuration) are not considered to become new when remanufactured. The provisions of paragraph (1) of this definition apply for locomotives that have previously been remanufactured into a certified configuration.

(iii) Locomotives originally certified under § 1033.150(e) do not become new when remanufactured, except as specified in § 1033.615.

(iv) Locomotives that operate only on non-standard gauge rails do not become new when remanufactured if no certified remanufacturing system is available for them.

* * *

40 C.F.R. pt. 89, App. A

This appendix sets forth the Environmental Protection Agency's (EPA's) interpretation of the Clean Air Act regarding the authority of states to regulate the use and operation of nonroad engines.

EPA believes that states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuel; nor are permits regulating such operations precluded, once the engine is no longer

new. EPA believes that states are precluded from requiring retrofitting of used nonroad engines except that states are permitted to adopt and enforce any such retrofitting requirements identical to California requirements which have been authorized by EPA under section 209 of the Clean Air Act.

STATE AND LOCAL REGULATIONS

13 Cal. Code Regs. §2775. Applicability

(a) General Applicability. This article applies to operators of off-road large spark-ignition (LSI) engine forklifts, sweepers/scrubbers, industrial tow tractors or airport ground support equipment operated within the State of California in the conduct of business with:

(1) 25 horsepower or more (greater than 19 kilowatts for 2005 and later model year engines), and

(2) greater than 1.0 liter displacement.

(b) Exemptions.

(1) Small Fleets as defined in subsection (d).

(2) Rental or leased equipment operated in California no more than 30 aggregated calendar days per year shall be exempt from the requirements of this article.

(3) Off-road military tactical vehicles or equipment exempt from regulation under the federal national security exemption, 40 CFR, subpart J, section 90.908, are exempt from the requirements of this article. Vehicles and equipment covered by the definition of military tactical vehicle that are commercially available and for which a federal certificate of conformity has been issued under 40 CFR Part 90, subpart B, shall also be exempt from the requirements of this article.

(4) In-field equipment shall be exempt from the requirements of this article.

(c) Each part of this article is severable, and in the event that any part of this chapter or article is held to be invalid, the remainder of the article shall remain in full force and effect.

(d) Definitions.The definitions in Section 1900(b), Chapter 1, and Section 2431(a), Chapter 9 of Title 13 of the California Code of Regulations apply to this article. In addition, the following definitions apply to this article:

(1) “Aggregated Operations” means all of an operator's California facilities for which equipment purchasing decisions are centrally made. Facilities that budget and make equipment purchasing decisions independent of a government or corporate headquarters are assumed to be

independent and therefore are not required to be aggregated for the purpose of determining fleet size.

(2) “Agricultural Crop Preparation Services” means packinghouses, cotton gins, nut hullers and processors, dehydrators, feed and grain mills, and other related activities that fall within the United States Census Bureau NAICS (North American Industry Classification System) definition for Industry 115114 - “Postharvest Crop Activities,” as published in the North American Industry Classification System - United States, 2002. For forest operations, “Agricultural Crop Preparation Services” means milling, peeling, producing particleboard and medium density fiberboard, and producing woody landscape materials and other related activities that fall within the United States Census Bureau NAICS definition for Industries 321113 (Sawmills) and 321219 (Reconstituted Wood Product Manufacturing,” as published in the North American Industry Classification System - United States, 2007.

(3) “Agricultural Operations” means (1) the growing or harvesting of crops from soil (including forest operations) and the raising of plants at wholesale nurseries, but not retail nurseries, or the raising of fowl or animals for the primary purpose of making a profit, providing a livelihood, or conducting agricultural research or instruction by an educational institution, or (2) agricultural crop preparation services.

For purposes of this regulation, a piece of equipment that is used by its operator for both agricultural and non-agricultural operations is considered to be a piece of equipment engaged in agricultural operations, only if over half of its annual operating hours are for agricultural operations.

(4) “Airport Ground Support Equipment,” “Ground Service Equipment,” or “GSE” means any large spark-ignition engine or electric motor powered equipment capable of and used for performing the work normally performed by an LSI engine-powered piece of equipment contained in the 24 categories of equipment included in section B.3. of Appendix 2 of the South Coast Ground Support Equipment Memorandum of Understanding, dated November 27, 2002 except that equipment that falls into the “other” category shall not be considered GSE for the purposes of this regulation. Specifically included in this definition are those categories of GSE equipment designed for on-road use, but not licensed for on-road use (“On-Road Equivalent” GSE).

(5) “Baseline Inventory” means an inventory of equipment as defined in this subdivision that reflects all equipment operated at the time of the inventory.

(6) “Boneyard” means a grouping of decommissioned or retired pieces of equipment at a location geographically separated from operational fleets subject to the fleet average requirements and intended for transfer, sale, spare parts, or scrap. These pieces of equipment are not generally operational.

(7) “Certification Standard” means the level to which an LSI engine is certified, in grams per kilowatt-hour of hydrocarbon and oxides of nitrogen, combined, as identified in an Executive Order (EO) issued by the Executive Officer of the California Air Resources Board.

(8) “Dehydrators” means sun drying of fruits, vegetables, tomatoes, dates, prunes, raisins and olives, or artificially drying and dehydrating fruits, vegetables, tomatoes, dates, prunes, raisins, grapes, and olives.

(9) “Emission Control System” means any device or system employed with a new or in-use off-road LSI-engine powered piece of equipment that is intended to reduce emissions. Examples of LSI emission control systems include, but are not limited to, closed-loop fuel control systems, fuel injection systems, three-way catalysts, and combinations of the above.

(10) “Equipment” or “Pieces of Equipment” means one or more forklifts, industrial tow tractors, sweeper/scrubbers, or pieces of airport ground support equipment as defined in this section powered by an LSI engine or electric motor.

(11) “Executive Officer” means the Executive Officer of the California Air Resources Board, or his or her delegate.

(12) “Executive Order” means a document signed by the Executive Officer that specifies the standard to which a new LSI engine is certified or the level to which an LSI retrofit emission control system is verified.

(13) “Facility” means any structure, appurtenance, installation, and improvement on land that operates and/or garages one or more pieces of equipment.

(14) “Facility Sample” means the selection of one or more individual facilities from an operator's California facilities for comparison to the operator's aggregate fleet inventory for fleet average calculation.

(15) “Fleet Average Emission Level” means the arithmetic mean of the combined hydrocarbon plus oxides of nitrogen emissions certification standard or verification absolute emissions level for each applicable LSI engine with an emission control system and the default emission rate for each uncontrolled LSI engine comprising an operator's fleet. LSI engines installed in equipment meeting the boneyard or retired equipment definitions shall not be included in fleet average emission level compliance calculations. For the purposes of calculating the fleet average, electric motor powered equipment shall be considered to have combined hydrocarbon plus oxides of nitrogen emissions level of zero (0). Electric motor powered equipment of less than 19 kilowatts shall be allowed to be included in the fleet average calculation provided that it meets the airport ground support equipment, forklift, industrial tow tractor, or sweeper/scrubber definition and performs, with similar efficiency, the same function as an LSI engine-powered piece of equipment. For the purposes of calculating the fleet average for a non-forklift fleet, each piece of On-Road Equivalent GSE shall be considered to have a combined hydrocarbon plus oxides of nitrogen emissions level as follows: 1.1 g/bhp-hr (1.5 g/kW-hr) for purposes of determining compliance with the 1/1/2009 standard; 0.8 g/bhp-hr (1.1 g/kW-hr) for purposes of determining compliance with the 1/1/2011 standard; and 0.7 g/bhp-hr (0.9 g/kW-hr) for purposes of determining compliance with the 1/1/2013 standard. For the purpose of calculating the fleet average, fleet operators shall be permitted to exclude at their discretion any electric motor powered equipment that could otherwise be used to lower the LSI fleet's average emission level.

(16) “Forest operations” means (A) forest fire prevention activities performed by public agencies, including but not limited to construction and maintenance of roads, fuel breaks, firebreaks, and fire hazard abatement or (B) cutting or removal or both of timber, other solid wood products, including Christmas trees, and biomass from forestlands for commercial purposes, together with all the work incidental thereto, including but not limited to, construction and maintenance of roads, fuel breaks, firebreaks, stream crossings, landings, skid trails, beds for falling trees, fire hazard abatement, and site preparation that involves disturbance of soil or burning of vegetation following forest removal activities. Forest operations include the cutting or removal of trees, tops, limbs and or brush which is processed into lumber and other wood products, and or for landscaping materials, or biomass for electrical power generation. Forest operations do not include

conversion of forestlands to other land uses such as residential or commercial developments.

(17) “Forklift” means an electric motor powered Class 1 or 2 rider truck or a large spark-ignition engine-powered Class 4 or 5 rider truck as defined by the Industrial Truck Association. Electric Class 3 trucks are not forklifts for the purposes of this regulation.

(18) “Industrial Tow Tractor” means an electric motor powered or large spark-ignition engine-powered Class 6 truck as defined by the Industrial Truck Association. Industrial tow tractors are designed primarily to push or pull non-powered trucks, trailers, or other mobile loads on roadways or improved surfaces. Industrial tow tractors are commonly referred to as tow motors or tugs. Industrial tow tractors are distinct from airport ground support equipment tugs for the purposes of this regulation.

(19) “In-field equipment” means agricultural operations or forest operations equipment that is used no more than half of its annual operating hours in agricultural crop preparation services.

(20) “Label” means a permanent material that is welded, riveted or otherwise permanently attached to the engine block or other major component in such a way that it will be readily visible after installation of the engine in the equipment. If the equipment obscures the label on the engine, the equipment manufacturer must attach a supplemental label such that it is readily visible. The label will state the emission standard or verification absolute emissions level to which the engine was certified.

(21) “Large Fleet” means an operator's aggregated operations in California of 26 or more pieces of equipment.

(22) “Leased forklift” for use in agricultural crop preparation services means a forklift under a contract or agreement for a term or period of one year or more that may include an option to purchase the forklift.

(23) “Limited Hours of Use equipment or LHU equipment” means a piece of equipment that, on a year-by-year basis, was operated in California fewer hours than the prescribed threshold established for the preceding calendar year (the 12-month period running from January 1 to December 31). The threshold for the 2010 calendar year is 251 hours. The threshold for 2011 and subsequent calendar years is 200 hours. For example, an operator would only consider that a piece of equipment had met the requirements of the LHU provisions for exclusion from a fleet average emission level calculation performed in 2014 if the piece of equipment

were used fewer than 200 hours between January 1, 2013 and December 31, 2013.

(24) “LSI Retrofit Emission Control System” means an emission control system employed exclusively with an in-use LSI engine powered piece of equipment.

(25) “Manufacturer” means the manufacturer granted new engine certification or retrofit emission control system verification.

(26) “Medium Fleet” means an operator's aggregated operations in California of 4 to 25 pieces of equipment.

(27) “Memorandum of Understanding Signatories” or “MOU Signatories” means any of the airlines that entered into the South Coast Ground Support Equipment Memorandum of Understanding, dated November 27, 2002.

(28) “Military tactical vehicles or equipment” means vehicles or pieces of equipment that meet military specifications, are owned by the U.S. Department of Defense and/or the U.S. military services or its allies, and are used in combat, combat support, combat service support, tactical or relief operations, or training for such operations.

(29) [“Model Year” means the manufacturer's annual production period, which includes January 1 of a calendar year or, if the manufacturer has no annual production period, the calendar year.] 1

(30) [“New Engine” means an engine's ownership has not been transferred to the ultimate consumer.]

(31) “Non-forklift fleet” means an operator's aggregated operations in California of four (4) or more sweeper/scrubbers, industrial tow tractors, or pieces of airport ground support equipment, alone or in combination.

(32) “Nut hullers and processors” means facilities where nuts are received, hulled, aspirated, shelled, sized, stored, packaged and shipped. Facilities that blanch, slice, dice, roast, salt, or smoke nuts or nut meats are not included in the “nut hullers and processors” definition.

(33) [“Off-Road Large Spark-ignition Engines” or “LSI Engines” means any engine that produces a gross horsepower of 25 horsepower or greater (greater than 19 kilowatts for 2005 and later model years) or is designed (e.g., through fueling, engine calibrations, valve timing, engine speed modifications, etc.) to produce 25 horsepower or greater (greater than 19 kilowatts for 2005 and later model years). If an engine family has

models at or above 25 horsepower (greater than 19 kilowatts) and models below 25 horsepower (at or below 19 kilowatts), only the models at or above 25 horsepower (above 19 kilowatts) would be considered LSI engines. The engine's operating characteristics are significantly similar to the theoretical Otto combustion cycle with the engine's primary means of controlling power output being to limit the amount of air that is throttled into the combustion chamber of the engine. LSI engines or alternate fuel-powered LSI internal combustion engines are designed for powering, but not limited to powering, forklift trucks, sweepers, generators, and industrial equipment and other miscellaneous applications. All engines and equipment that fall within the scope of the preemption of Section 209(e)(1)(A) of the Federal Clean Air Act, as amended, and as defined by regulation of the Environmental Protection Agency, are specifically excluded from this category. Specifically excluded from this category are: 1) engines operated on or in any device used exclusively upon stationary rails or tracks; 2) engines used to propel marine vessels; 3) internal combustion engines attached to a foundation at a location for at least 12 months; 4) off-road recreational vehicles and snowmobiles; and 5) stationary or transportable gas turbines for power generation.]

(34) “Operations equipment” as used in the “Operator” definition means equipment that is operated by a person whose usual and customary business is the rental, leasing, or sale of equipment and is used more than 50 percent of the time for rental or lease, or is designated for sale.

(35) “Operator” means a person with legal right of possession and use of a piece of equipment including a person whose usual and customary business is the rental, leasing, or sale of equipment as provided below:

A person whose usual and customary business is the rental, leasing, or sale of equipment will be deemed an operator of:

(A) all service equipment (as defined in section 2775(d)(40) regardless of hours of operation, and

(B) any operations equipment (as defined in section 2775(d)(33) they use more than 50 hours per year.

(36) “Rental forklift” for use in agricultural crop preparation services means a forklift under a contract or agreement for a term or period of less than one year that may include an option to renew the contract or agreement.

(37) “Repower” means a new or remanufactured engine and parts offered by the OEM or by a non-OEM rebuilder that has been demonstrated to the ARB to be functionally equivalent from a durability standpoint to the OEM engine and components being replaced.

(38) “Retired equipment” means equipment with an operational non-resettable hour meter that has been removed from service and rendered inoperable using the following procedures:

(A) Remove fuel and the starter battery from the piece of equipment. For propane-fueled LSI engines, the operator may simply remove the fuel canister.

(B) Remove the steering wheel from the piece of equipment.

(C) Store the retired equipment at a central location, apart from operational equipment, either within the facility or elsewhere, and employ lockout/tagout controls. At a minimum, place a lockout box on either the propane connector or the positive cable to the starter battery. Operators planning to scrap a piece of equipment need not use a lockout box, but may instead sever the positive battery cable more than six inches from the connector.

(D) Record the initial hour meter reading at the time of decommission and write the date of decommission and the initial meter reading in permanent ink in a readily visible location on a non-removable surface of the piece of equipment. Additionally, record the hour meter serial number, if available. Continue to record meter readings at quarterly intervals (every three months), and sign under penalty of perjury. Retain records in accordance with the LSI record keeping requirements in section 2775.2.

(E) Develop an inventory for all retired pieces of equipment at the date of first retirement and sign, under penalty of perjury, that the equipment is retired for the purposes of the LSI Fleet Regulation.

Retired equipment may remain at the facility for up to one year. After one year, the retired equipment must either be removed from the facility or reentered into FAEL standards calculations.

(39) “Retrofit” means the application of an emission control system to a non-new LSI engine.

(40) “Serial Number” means an engine serial number and date of engine manufacture (month and year) that are stamped on the engine block

or stamped on a metal label riveted or permanently attached to the engine block. Engine manufacturers must keep records such that the engine serial number can easily be used to determine if an engine was certified for the applicable model year, and beginning January 1, 2007, the standard to which the engine was certified.

(41) “Service equipment” as used in the “Operator” definition means equipment that is operated by a person whose usual and customary business is the rental, leasing, or sale of equipment and is used more than 50 percent of the time for yard operations necessary to support the equipment rental, leasing, or sales business.

(42) “Small Fleet” means an operator's aggregated operations in California of 1 to 3 forklifts and/or 1 to 3 pieces of non-forklift equipment.

(43) “Sweeper/scrubber” means an electric motor powered or large spark-ignition engine-powered piece of industrial floor cleaning equipment designed to brush and vacuum up small debris and litter or scrub and squeegee the floor, or both.

(44) “Specialty Equipment” means a piece of equipment with unique or specialized performance capabilities that allow it to perform prescribed tasks and as approved by the Executive Officer.

(45) [“Ultimate Purchaser” means the first person who in good faith purchases a new LSI engine or equipment using such engine for purposes other than resale.]

(46) “Uncontrolled LSI Engine” means pre-2001 uncertified engines and 2001-2003 certified uncontrolled LSI engines. The default emission rate for an uncontrolled LSI engine is 12.0 grams per brake horsepower-hour (16.0 grams per kilowatt-hour) of hydrocarbon plus oxides of nitrogen.

(47) “Verification” means a determination by the Executive Officer that the LSI emission control system meets the requirements of this Procedure. This determination is based on both data submitted or otherwise known to the Executive Officer and engineering judgement.

(48) “Verification Level” means one of four emission reduction classifications that apply to the performance capability of retrofit emission control systems as described in Title 13, California Code of Regulations, Section 2782(f), Table 1, as set forth in Table 1:

Table 1. LSI Engine Retrofit System Verification Levels

Classification	*Percentage Reduction (HC+NOx)*	*Absolute Emissions (HC+NOx)*
LSI Level 1[(1)]	> 25%[(2)]	Not Applicable
LSI Level 2[(1)]	> 75%[(3)]	3.0 g/bhp-hr[(3)] (4.0 g/kW-hr)
LSI Level 3a[(1)]	> 85%[(4)]	0.5, 1.0, 1.5, 2.0, 2.5 g/bhp-hr (0.7, 1.3, 2.0, 2.7, 3.4 g/kW-hr)
LSI Level 3b[(5)]	Not Applicable	0.5, 1.0, 1.5, 2.0 g/bhp-hr (0.7, 1.3, 2.0, 2.7 g/kW-hr)

Notes:

[(1)] Applicable to uncontrolled engines only

[(2)] The allowed verified emissions reduction is capped at 25% regardless of actual emission test values

[(3)] The allowed verified reduction for LSI Level 2 is capped at 75% or 3.0 g/bhp-hr (4.0 g/kW-hr) regardless of actual emission test values

[(4)] Verified in 5% increments, applicable to LSI Level 3a classifications only

[(5)] Applicable to emission-controlled engines only

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[1] Bracketed definitions are replicated for ease of use and presentation clarity from Section 1900(b), Chapter 1, or Section 2431(a), Chapter 9, of Title 13 of the California Code of Regulations.

13 Cal. Code Regs. §2775.1. Standards

(a) Operators of forklift and/or non-forklift fleets shall first determine the size of their fleets, using the equipment definitions in Section 2775. Equipment meeting the boneyard and retired equipment definitions shall not be included in fleet size determinations. Then, except as provided in subdivisions (c), (d), (e), and (f), operators of medium and large forklift fleets and operators of non-forklift fleets with more than three pieces of equipment shall comply with the fleet average emission level standards in Table 2 by the specified compliance dates.

Table 2: Fleet Average Emission Level Standards
in grams per kilowatt-hour (brake-horsepower-hour)
of hydrocarbons plus oxides of nitrogen

	Initial Compliance Date		
Fleet Type	*1/1/2009*	*1/1/2011*	*1/1/2013*
Large Forklift Fleet	3.2 (2.4)	2.3 (1.7)	1.5 (1.1)
Medium Forklift Fleet	3.5 (2.6)	2.7 (2.0)	1.9 (1.4)
Non-forklift Fleet	4.0 (3.0)	3.6 (2.7)	3.4 (2.5)

(1) Fleet operators subject to the fleet average provisions shall include in their fleet average calculations any piece of equipment that the operator has rented or leased or reasonably expects to rent or lease for a period of one year or more.

(2) Fleet operators may exclude from the fleet average calculation uncontrolled 2003 and 2004 model year rental equipment (if the equipment is rented for a period of less than one year) until January 1, 2010.

(3) In addition to the provisions of (a)(2) above, fleet operators may exclude from the fleet average calculation rental or leased equipment if:

(A) the rental or lease is for a period of less than one year, and

(B) the rental or lease component comprises no more than 20 percent of the operator's equipment at any time, and

(C) the equipment rented or leased during the period from January 1, 2009 through December 31, 2010 is controlled to a 4.0 g/kW-hr (3.0 g/bhp-hr) standard or better and equipment rented or leased on or after January 1, 2011 is controlled to a 2.7 g/kW-hr (2.0 g/bhp-hr) standard or better.

(4) Fleet operators shall comply with the applicable fleet average standard in Table 2 with the following exceptions:

(A) if through business expansion, a fleet meets the definition of a larger size category, the fleet may continue to comply with the applicable fleet standard for the initial size category until the subsequent compliance date, at which time the fleet must meet the applicable fleet standard for the new fleet size category, or

(B) if through retirement or other fleet size reduction mechanism the fleet would otherwise be required to comply with a less stringent fleet standard, then the less stringent fleet standard becomes effective immediately.

(b) Operators of mixed fleets comprised of forklifts and non-forklift equipment shall determine fleet size individually for forklift fleets and non-forklift fleets; a mixed fleet with three or fewer forklifts and three or fewer non-forklift pieces of equipment shall be considered to be a small fleet.

(c) Except as provided in subdivisions (d), (e), and (f), each operator of a forklift fleet used in agricultural crop preparation services shall address emissions from their owned forklifts with uncontrolled LSI engines as follows:

(1) by January 1, 2009, identify that portion of the 1990 and newer LSI engine powered forklift fleet for which retrofit emission control systems have been verified and control 20 percent of that portion as prescribed in subsection (3) below; and

(2) by January 1, 2012, control 100 percent of the 1990 and newer LSI engine powered forklift fleet for which retrofit emission control systems have been verified as prescribed in subsection (3) below.

(3) To comply with subsections (1) and (2) of this section, operators shall retrofit or repower the LSI engine powered forklift to a Level 2 or Level 3 verification level as described in Title 13, California Code of Regulations, Section 2782 (f).

(4) Operators of fleets used in agricultural crop preparation services may exclude from their LSI engine powered forklift fleet:

(A) leased forklifts provided the forklifts meet a 4.0 g/kW-hr (3.0 g/bhp-hr) standard or better. Forklifts under a lease agreement that was initiated prior to May 25, 2006 may also be excluded from the 4.0 g/kW-hr standard for the life of the lease, or until January 1, 2010, whichever is earlier, and

(B) rental forklifts rented on or after January 1, 2009, provided the forklifts meet a 4.0 g/kW-hr standard or better. Forklifts with an uncontrolled 2003 or 2004 model year engine may be excluded from the requirements of this subpart until January 1, 2010.

(d) Limited Hours of Use Provisions.

(1) Forklift and non-forklift equipment in medium and large fleets shall be exempted from the provisions of subdivision (a) of this section provided that:

(A) the equipment meets the limited hours of use equipment definition as defined in section 2775(d)(23), and

(B) the equipment is equipped with an operational non-resettable hours of use meter, and

(C) the operator maintains hours of use records for the piece of equipment at a facility.

(2) Forklifts used in agricultural crop preparation services fleets shall be exempted from the provisions of subdivision (c) of this section provided that they are used, on average over any three year period, less than 251 hours per year and meet the requirements of subdivisions (d)(1)(B) and (d)(1)(C).

(e) Specialty Equipment Exemption.

(1) Forklift and non-forklift specialty equipment shall be exempt from the requirements of subdivisions (a) through (c) of this section provided that:

(A) the replacement cost exceeds the replacement cost of a “typical” piece of equipment from that category by 50 percent or the retrofit cost exceeds the “typical” retrofit cost of a piece of equipment from that category by 100 percent, and

(B) they are used, on average over any three year period, less than 251 hours per year and meet the requirements of subdivisions (d)(1)(B) and (d)(1)(C), and

(C) the Executive Officer approves the listing of the piece of equipment as specialty equipment.

(f) Alternate Compliance Option for Operators of Fleets used in Agricultural Crop Preparation Services.

(1) Operators of forklift fleets used in agricultural crop preparation services shall be exempted from the provisions of subdivision (c) of this section provided that the forklift fleet complies with a 4.0 g/kW-hr (3.0 g/bhp-hr) fleet average emission level.

(g) Use of Experimental Emission Control Strategies.

(1) An operator may use an experimental emission control strategy provided by or operated by the manufacturer in no more than ten percent of his total fleet for testing and evaluation purposes. The operator shall keep documentation of this use in records as specified in Section 2775.2(b).

(h) Severability. If any provision of this section or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the section that can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

13 Cal. Code Regs. §2775.2. Compliance Requirements for Fleet Operators

(a) Fleet operators subject to the fleet average emission level requirements contained in Table 2 of section 2775.1(a) shall conduct a baseline inventory of their fleet within six months of May 12, 2007 and shall maintain records at their facilities of their baseline inventory and subsequent inventories indicating accessions and retirements until June 30, 2016.

(b) At a minimum, fleet operators subject to the fleet average emission level requirements contained in Table 2 of section 2775.1(a) shall record and maintain on file for each piece of equipment operated at their facilities, information on the equipment type, make, model, serial number, and emission certification standard or retrofit verification level. Operators that maintain multiple facilities may aggregate the records at a centralized facility or headquarters. Records for all equipment at all facilities shall be made available to the Air Resources Board within 30 calendar days upon request. Compliance staff may then select a facility sample for inspection purposes.

(c) Medium and large fleets shall be required to demonstrate at any time between January 1, 2009 and December 31, 2015, based on actual inventory, and reconciled against inventory records, that they meet the applicable fleet average emission level standard in Section 2775.1(a).

(d) Agricultural crop preparation services fleets shall be required to demonstrate at any time on or after January 1, 2009, based on actual inventory and reconciled against inventory records, that they have addressed their 1990 and newer uncontrolled LSI engines as prescribed in Section 2775.1(c).

(e) Compliance Extensions. An operator may be granted an extension to a compliance deadline specified in Section 2775.1 for one of the following reasons:

(1) Compliance Extension based on No Verified Retrofit Emission Control System.

(A) If the Executive Officer has not verified a retrofit emission control system, or if one is not commercially available for a particular engine and equipment combination, the Executive Officer may grant a two-year extension in compliance if prior to each compliance deadline specified in subsections 2775.1(a), (c), and (d), the Executive Officer finds that insufficient numbers of retrofit emission control systems are projected to be available. If the Executive Officer still finds that insufficient numbers of retrofit emission control systems are projected to be available near the end of the first two-year extension, the Executive Officer may grant a subsequent two-year extension in compliance. At the conclusion of the approved extension(s), the operator must include the LSI piece of equipment in their FAEL standards calculations.

(2) Compliance Extensions for GSE.

(A) Compliance Extension based on no Verified or Commercially Available Retrofit Emission Control Systems for GSE. GSE of model year 1990 or newer with an uncontrolled LSI engine for which there is no verified retrofit as of January 1, 2007, or for which such verified retrofits are not commercially available by that date, shall be excluded from the GSE fleet average emission level standards contained in section 2775.1(a) until January 1, 2011. GSE of model year 1990 or newer with an uncontrolled LSI engine for which there is still no verified retrofit as of January 1, 2009, or for which such verified retrofits are not commercially available by that date, shall be excluded from the GSE fleet average

emission level standards contained in section 2775.1(a) until January 1, 2013.

(B) Other Compliance Extensions for GSE. Operators may apply to the Executive Officer for an initial compliance extension of up to two years and one or more compliance extension renewals of up to one year in circumstances other than those addressed in subsection 2(A) above. The Executive Officer shall grant such applications if the applicant has made a good faith effort to comply with the fleet average emission level standards contained in section 2775.1(a) in advance of the compliance dates contained in the same section and documents either that it meets one of the following criteria independently, or that, when considering any combination of the criteria, the documentation justifies granting the application:

(i) due to conditions beyond the reasonable control of the applicant, sufficient numbers of tested and reliable emission-controlled GSE are not projected to be available at a commercially reasonable cost;

(ii) due to conditions beyond the reasonable control of the applicant, use of available emission-controlled GSE would result in significant operational or safety issues;

(iii) any other criterion that reasonably relates to whether the application should be granted.

(C) Compliance extensions granted under subsections (e)(2)(A) and (e)(2)(B) shall not extend beyond January 1, 2013. After January 1, 2013, all uncontrolled GSE shall be included in calculations for determining compliance with the GSE fleet average emission level standards contained in section 2775.1(a).

(3) If an extension to the compliance deadline is granted by the Executive Officer, the operator shall be deemed to be in compliance as specified by the Executive Officer's authorization.

(f) Continuous Compliance.An operator is required to keep his equipment in compliance with this regulation, once it is in compliance, so long as the operator is operating the equipment in California.

(g) Severability. If any provision of this section or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the section that can be given

effect without the invalid provision or application, and to this end the provisions of this section are severable.

DECLARATIONS

Declaration of Joseph H. Sostaric

The following four pages contain the Declaration of Dave Jenkins.

Declaration of Nick Goldstein

The following five pages contain the Declaration of Nick Goldstein.

Declaration of Lawrence J. Joseph

The following five pages contain the Declaration of Lawrence J. Joseph.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	)	No. 12-1243

DECLARATION OF JOSEPH H. SOSTARIC

I, Joseph H. Sostaric, hereby declare and state as follows:

1. I am over 18 years of age, and I reside in Contra Costa County, California.

2. I am the General Manager for Trucking and Pumping with The Conco Companies ("Conco"), headquartered Concord, California.

3. Conco is a member of the Southern California Contractors Association, Inc. ("SCCA"), which I understand to be the Southern California chapter of the American Road & Transportation Builders Association ("ARTBA").

4. Conco's California-based operations have approximately eighteen (18) forklifts subject to the California Air Resources Board's Large Spark-Ignition (LSI) Engines and Fleet Requirements for Users of Off-Road LSI Engines (the "LSI Rule").

5. In my capacity with Conco, I am familiar with Conco's efforts to comply with the LSI Rule and with Conco's fleet of forklifts subject to that rule.

6. The forklifts in question all range around sixty horsepower, and all fall over 25 horsepower and 175 horsepower. Although most are powered by propane, Conco has one electric forklift in its Southern California office in Fontana, within the geographic coverage of the South Coast Air Quality Management District.

7. Conco's efforts to comply with the LSI Rule required Conco to spend more money to turn over the forklift fleet faster than Conco otherwise would have done.

8. Conco's ongoing compliance with the LSI Rule imposes ongoing regulatory burdens and limits the operational flexibility that Conco otherwise would have, in the absence of the LSI Rule.

9. If the LSI Rule were repealed, Conco would have greater operational flexibility, lower regulatory compliance costs, and likely lower long-term operational costs for its forklift fleet, and Conco could seek emission credit for over-compliance with the rules that would apply to its forklift fleet in the absence of the LSI Rule.

I declare under penalty of perjury that the foregoing is true and correct of my personal knowledge, except as to those matters stated on information and belief, which I believe to be true and if called as a witness I would be competent to testify thereto. Executed on this 22nd day of March, 2013.

Joseph H. Sostaric

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	)	No. 11-1256

DECLARATION OF NICK GOLDSTEIN

I, Nick Goldstein, hereby declare and state as follows:

1. I am over 18 years of age, and I reside in Fairfax County, Virginia.

2. I am the Vice President of Environmental & Regulatory Affairs and Assistant General Counsel for petitioner American Road & Transportation Builders Association ("ARTBA"), where my practice focuses on environmental issues. From my capacities at ARTBA, I am familiar with ARTBA's mission, membership, the membership's concerns about the effect of environmental laws and regulations on transportation construction projects, and the transportation construction industry in general.

3. ARTBA is a nonprofit trade federation representing the collective interests of the U.S. transportation construction industry in the Congress, the federal agencies, and the courts. Working through their state chapters, ARTBA's members advocate before state agencies and legislatures. As defined by its mission statement, ARTBA exists to advance the interest of the transportation construction industry, which includes protecting its members from unauthorized and dubious regulations. On the specific subject of emissions from construction equipment, ARTBA intervened in litigation in Texas, reported at *EMA v. Huston*, 190 F.Supp.2d 922 (W.D.

Tex. 2001), to challenge state fleet and in-use controls on construction equipment. Similarly, ARTBA intends this litigation to further ARTBA's mission.

4. Through ARTBA's state chapters and divisions, ARTBA has more than 5,000 members from all sectors and modes of the transportation construction industry, including without limitation, roads, public transit, airports, ports, and waterways. ARTBA has members in every state, without limitation transportation construction firms in California, Connecticut, Georgia, Massachusetts, New York, Texas, and Wisconsin. In California, ARTBA has local chapters that cover major geographic areas within California, such as the United Contractors ("UC") in the San Joaquin Valley and the Southern California Contractors Association ("SCCA") in the Los Angeles area. Through contractors who are members of local ARTBA chapters and through contractors who are members of ARTBA directly, ARTBA's membership includes contactors who regularly operate on projects throughout California with fleets subject to California's Large Spark-Ignition (LSI) Engines and Fleet Requirements for Users of Off-Road LSI Engines, 13 Cal. Code Regs. §§2275-2275.2 (hereinafter, the "LSI Rule").

5. If any of the foregoing states adopt controls on construction-equipment emissions, ARTBA's members (which have engaged in transportation construction and will continue to do so) would be targeted by those controls.

6. States' command-and-control measures on ARTBA members' equipment and operations will have an adverse financial and operational impact on ARTBA's members. In particular, because equipment constitutes a significant portion of ARTBA members' assets, state and local efforts to restrict the use of equipment through fleet turnover controls, retrofit requirements, in-use controls, and other requirements would severely injure most companies

financially and could render many smaller companies unable to stay in business or to compete for projects covered by the state or local restrictions.

7. ARTBA and its members have engaged in negotiations with state and local regulators over construction-equipment controls in several states, including without limitation ongoing negotiations with regulators in California and Texas. In addition, ARTBA anticipates that additional states or localities will consider such controls in the future, either for attainment demonstrations or maintenance plans for nonattainment areas with the federal ozone or particulate-matter standards.

8. When ARTBA or its members negotiate with state regulators over what construction-equipment regulations or policies their agency can or should adopt, the state regulators perceive the federal Environmental Protection Agency ("EPA") Appendix A to Subpart A of 40 C.F.R. pt 89, entitled "State Regulation of Nonroad Internal Combustion Engines," as an authoritative interpretation of the preemption provided by Section 209(e) of the federal Clean Air Act, 42 U.S.C. §7543(e). That Appendix indicates that "EPA believes that states are not precluded under section 209 from regulating the use and operation of nonroad engines."

9. If this Court compelled EPA to negate or repeal its Appendix and to conform its regulations to the views of federal preemption set out in ARTBA's petition dated July 6, 2010, the change in the controlling authoritative view would benefit ARTBA's members in their negotiations with state and local regulators. To the extent that such a regulatory reversal denied states and local government the ability to use fleet rules and in-use controls on construction equipment to demonstrate emission reductions required for federal State Implementation Plan ("SIP") submittals, state and local regulators that wanted to obtain SIP-creditable emission

reductions from the construction sector would need to collaborate with industry to develop voluntary, incentive-based controls that would gain sufficient industry participation to meet the state regulators' emission-reduction goals.

10. Construction projects and construction activity are often opposed or hindered by Not-In-My-Backyard ("NIMBY") groups, anti-transportation advocacy groups, and others, such as excluded unions. Working separately and as part of industry coalitions, ARTBA has participated in litigation nationwide to enable challenged transportation projects to go forward. Because project opponents rely on any available legal mechanism to stop or slow transportation projects, ARTBA and its members will continue to face such litigation, which risks denying ARTBA's members of the financial benefit of construction projects.

11. If an ARTBA victory in this litigation precluded EPA from approving state control measures on construction equipment as SIP revisions, states would be less likely to adopt measures. In any event, for the reasons set out below, even if a state adopted a control measure, EPA's inability to approve that measure as a SIP revision nonetheless would benefit ARTBA's members (*i.e.*, ARTBA's members would prefer state-only measures to joint state-federal measures). Moreover, if the state measure burdened ARTBA's members enough to bring a preemption challenge in federal court, ARTBA's members would prefer to do so with the current EPA interpretation amended as requested in ARTBA's petition dated July 6, 2010.

12. To the extent formally or informally allowed under state law or in the form of enforcement discretion, industry benefits from the flexibility provided by variances and enforcement discretion when unexpected events such as equipment outages or fuel shortages prevent compliance with emission standards.

13. To the extent that SIP approval of state controls on construction equipment renders the transportation construction industry subject to federal citizen suits, heightened civil and criminal penalties under federal law, possible EPA enforcement even when state or local officials decline to enforce, and the burdensome SIP approval process for subsequent state-law variances, ARTBA's members obviously would prefer to work directly and exclusively with their state and local officials, without threat of enforcement by EPA or nongovernmental project opponents, and without the additional burden of SIP approval for state-law variances. Working exclusively with state or local officials would provide ARTBA's members significantly greater flexibility to fashion solutions to any noncompliance issues that arise.

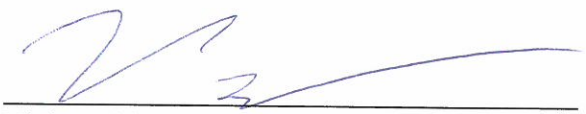
14. For the transportation construction industry, the imposition of highway sanctions under sections 176(c) and 179(b)(1)(A), 42 U.S.C. §§7506(c), 7509(b)(1)(A), and EPA's implementing regulations represents not only debilitating economic loss but also a significant impairment of the affected companies' operating schedules. In particular, because of the leadtime and operational planning required, funding-induced work stoppages on one project cannot necessarily be filled with work on projects unaffected by the highway sanctions. Because of the need to plan projects well in advance of construction, the threat of such highway sanction significantly impairs the financial and operational security of companies involved with construction projects in areas that face potential highway sanctions.

15. By prohibiting the use of older-tier equipment and requiring the replacement, repowering, and/or retrofitting of construction fleets, fleet-based rules like CARB's ORD and LSI rules will impose multiple compliance burdens on ARTBA's members.

16. Like most construction companies, many of ARTBA's California members rely on their existing equipment's value as collateral both to finance the purchase of new equipment and to bond the work that they perform.

17. By simultaneously devaluing their existing assets and requiring the expensive purchase of new equipment or the expensive retrofitting or repowering of existing equipment, rules like the ORD and LSI rules impose severe operating constraints on many ARTBA members when those rules take effect or even before they take effect, if the market for older-tier equipment drops due to the anticipated regulation.

I declare under penalty of perjury that the foregoing is true and correct of my personal knowledge, which I believe to be true and if called as a witness I would be competent to testify thereto. Executed on this 22nd day of March, 2013.



Nick Goldstein

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	)	No. 12-1243

DECLARATION OF LAWRENCE J. JOSEPH

I, Lawrence J. Joseph, hereby declare and state as follows:

1. I am over 18 years of age, and I reside in McLean, Virginia.

2. I am the counsel for petitioner American Road & Transportation Builders Association ("ARTBA") in the above-captioned action.

3. I represented ARTBA in *Engine Mfrs. Ass'n v. Huston,* Civ. No. A-00-CA-316-SS (W.D. Tex.), reported at 190 F.Supp.2d 922 (W.D. Tex. 2001). Concurrent with that litigation and since then, I have represented and worked with ARTBA, as well as Texas and California members of ARTBA, in various matters related to: (a) the regulation and proposed regulation of construction-equipment emissions by federal, state, and local government, (b) incentive-based alternatives to such regulation (*e.g.,* the Texas Emissions Reduction Plan or "TERP"), and (c) preparation of various attainment demonstrations and State Implementation Plan ("SIP") revisions under the federal Clean Air Act. In the foregoing capacity, I have become familiar with facets of ARTBA's Texas and California membership.

4. In the foregoing *Huston* litigation, ARTBA's litigation costs exceeded $100,000. ARTBA and its members also have paid significant consulting costs in seeking to prevent states such as California from adopting in-use controls and fleet standards, including California's

recently adopted in-use, off-road, diesel rule.

California Rules

5. The California Air Resources Board ("CARB") has adopted and requested a waiver of preemption for an off-road, in-use diesel rule that would regulate in a manner proscribed by the relief that ARTBA has requested in this litigation. *See* 13 Cal. Code Regs. §§2449-2449.3. The relief requested in this litigation would prevent EPA – and thus CARB – from regulating ARTBA's members in the manner contemplated by CARB's rule.

6. Avoiding the application of CARB's rule would save many ARTBA members tens of thousands of dollars (or more) on their equipment costs, both in California itself and in any other states that would adopt the California standards.

7. In its independent statement of reasons (*i.e.*, staff report) for its in-use off-road diesel rule (http://www.arb.ca.gov/regact/2007/ordiesl07/isor.pdf), CARB considered the rule's cost "significant" and estimated the total cumulative cost of the regulation between 2009 and 2030 at between $3.0 and $3.4 billion in 2006 dollars, with the majority of costs occurring between 2010 and 2021, although CARB subsequently deferred the effective dates of the rule. CARB further estimated annual costs between $229 million and $257 million per year, averaging $243 million per year in 2006 dollars.

SCAQMD Rules

8. From representing ARTBA over the years in nonroad preemption matters and as a California-licensed attorney, I have become familiar with the business model and regulatory environment of ARTBA's members in Southern California. Due in part to South Coast rules and in part to the California Environmental Quality Act, ARTBA's members in Southern California include construction contractors that either own or lease sweepers over 14,000 pounds gross

vehicle weight ("GVW") to perform onroad sweeping to limit dust from transportation construction projects. These ARTBA-member construction contractors will continue to be required to use sweepers as part of their ongoing and future construction projects.

9. ARTBA's Southern California membership also includes sweeper companies within the South Coast's jurisdiction that perform – and intend to continue to perform – sweeping operations with sweepers over 14,000 pounds GVW on transportation construction projects for public entities. On information or belief, all major government entities that let such contracts to SCCA members own 15 or more vehicles. Barring very unusual circumstances, it costs more to purchase, rent, and operate "alternative-fuel sweepers" over diesel sweepers.

10. In public filings in matters in which I have served as counsel, SCAQMD has indicated that it needs every emission reduction possible to attain the federal ozone and particulate-matter standards and that, although funding is available for incentive-based programs, that funding is limited, which necessitates SCAQMD's acting via regulation. Similarly, in public filings in matters in which I have served as counsel, SCAQMD has (through counsel) indicated that SCAQMD intended to use its fleet rules (including SCAQMD Rule 1186.1) to demonstrate attainment with National Ambient Air Quality Standards.

Texas Rules

11. The predecessor of the Texas Commission on Environmental Quality ("TCEQ") promulgated the original Texas Low Emission Diesel regulation, 30 Tex. Admin. Code §§114.312-.319 ("TxLED"), for essentially the eastern half of Texas, including the Dallas-Fort Worth, Galveston, Beaumont-Port Arthur, and Houston metropolitan areas. These TxLED-covered areas – particularly Houston and Dallas-Fort Worth – constitute economically critical markets for certain ARTBA members engaged in transportation construction projects.

12. TxLED applies both directly to ARTBA members' operations (in their dispensing, transferring, storing, and holding of diesel in stationary tanks) and indirectly in the purchases that ARTBA's members can make from fuel distribution channels.

13. In the event of outages at refineries or distribution channels, Texas can grant enforcement discretion or a variance as a matter of state law relatively easily. Such actions would allow ARTBA's members access to conventional diesel when TxLED is unavailable. By contrast, the federal program includes more significant burdens and delays under Clean Air Act §211(c)(4)(C) or §110. For example, when Hurricane Rita caused serious damage to large areas of Texas, including diesel refining and distribution capabilities, EPA indicated that it could grant that relief only in increments of 20 days and only for incidents that EPA considered an "extreme and unusual fuel… supply circumstance" under §211(c)(4)(C) of the federal Clean Air Act.

Impact of EPA Rules

14. Both as a matter of general advocacy and as a particular form of relief sought in Clean Air Act litigation over states' failure to demonstrate attainment of Clean Air Act air-quality standards, environmental groups seek to convince or compel states to regulate construction equipment to reduce emissions. If a court or EPA vacated EPA's self-described interpretive rule on in-use controls of nonroad vehicles, these environmental groups could not rely on that rule to advocate (publicly or in court) that states should or must impose such controls on ARTBA's members.

15. If EPA could not approve such fleet standards or in-use controls as SIP revisions because ARTBA establishes that the Clean Air Act preempts them, environmental groups' advocacy and litigation campaigns for states to regulate ARTBA's members would be impaired.

16. If EPA revised its position on federal preemption in any way that precluded

EPA's approving states' nonroad control measures as SIP revisions or counting their emission reductions toward an attainment demonstration, states would have significantly more incentive to negotiate with stakeholders (such as ARTBA's members) to adopt an acceptable voluntary, incentive-based control that could qualify for SIP approval.

17. If EPA could not credit such emission reductions for federal-law purposes, states would have much less incentive to regulate the same categories solely under state law, subject to a legal challenge on federal preemption grounds. ARTBA and its members would prefer to negotiate voluntary emission-reduction programs under those circumstances, which would strengthen their bargaining position.

18. If EPA grants California a waiver of preemption on CARB's in-use, off-road diesel rule, other states apparently intend to adopt some or all of that rule. During the rulemaking, CARB amended its rule to bifurcate the NOx and particulate-matter ("PM") portions of the rule, reportedly to allow other states to opt into it for one pollutant (*e.g.,* NOx only) without adopting the entire regulation (*i.e.,* NOx and PM). Moreover, additional California air districts likely will opt into the "SOON program" associated with the in-use, off-road diesel rule.

I declare under penalty of perjury that the foregoing is true and correct of my personal knowledge, which I believe to be true and if called as a witness I would be competent to testify thereto. Executed on this 22nd day of March, 2013.

Lawrence J. Joseph