

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
NOTICE OF PROPOSED RULEMAKING
ON
SPECIAL LOCAL DETERMINATIONS
PROCEDURES
FOR
INTERSTATE RAILROAD
NOISE EMISSION STANDARDS
AND
INTERSTATE MOTOR CARRIER
NOISE EMISSION STANDARDS
AND
GUIDELINES FOR STATE AND LOCAL
GOVERNMENTS ON THE FILING AND PROCESSING
OF APPLICATIONS FOR PREEMPTION WAIVER
DETERMINATIONS

NOVEMBER 1976

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ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Part 201]

Railroad Noise Emission Standards

SPECIAL LOCAL DETERMINATIONS

Notice of Proposed Rule Making

The Environmental Protection Agency (EPA) proposes to amend Interstate Railroad Noise Emission Regulations, 40 CFR Part 201, by adding Subpart D relating to waiver by the EPA Administrator of the preemption of certain State and local railroad noise regulations. The amendments proposed herein are intended to clarify the preemptive effect of section 17(c) (1) of the Noise Control Act, 42 U.S.C. Section 4916 (c) (1), and to provide procedures for the implementation of the waiver authority of section 17(c) (2) of the Act.

Section 17(a) of the Noise Control Act required EPA to publish noise emission regulations for surface carriers engaged in interstate commerce by rail. On January 14, 1976 (41 FR 2184), EPA published regulations setting noise emission standards for railcars and locomotives. According to Section 17(c) (1) of the Act, after the effective date of Federal regulations applicable to noise emissions resulting from the operation of any equipment or facility of an interstate rail carrier, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is

identical to the Federal standard prescribed under section 17. Subsection 17(c) (2), however, provides that nothing in section 17 shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation or movement of any product if the Administrator of the Environmental Protection Agency, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under section 17.

The implementation of section 17(c) (2) requires that State and local governments planning to adopt or enforce regulations preempted by the terms of section 17(c) (1) apply to the EPA Administrator for waiver of that preemption. Accordingly, EPA intends by these proposed regulations to: 1) define the precise nature of the preemption imposed by section 17(c) (1) of the Act, so that State and local governments will know what regulations they may no longer adopt or enforce without EPA approval, 2) establish procedures for State and local governments to follow in seeking EPA approval of their adoption or enforcement

of regulations where necessary, as authorized under section 17(c) (2) , and 3) provide guidance as to EPA's interpretation of its authority under Section 17(c) (2) .

Section 201.32 as proposed would provide guidance as to which State and local regulations are subject to preemption by Federal railroad noise regulations. The Agency has interpreted section 17(c) (1) of the Noise Control Act as prohibiting State and local governments from adopting or enforcing any noise control regulation which requires, or has the practical effect of requiring, the physical modification of a facility or piece of equipment which is in compliance with Federal noise emission standards. More specifically, the prohibition would apply to all more stringent numerical noise emission limitations on Federally regulated equipment or facilities and all design or equipment standards, i.e., regulations affecting a Federally regulated facility or piece of equipment which explicitly require modifications in addition to or more stringent than those necessary for the facility or equipment to meet Federal standards. Further, in the case of other regulations enacted or enforced for the purpose of noise control, if compliance can be achieved by physical modification of such facilities or equipment, and no reasonable alternatives exist which do not involve physical modification of such facilities or equipment, the regulations would be preempted and require EPA approval.

EPA has considered other interpretations of section 17(c) . For example, during the public comment period on the railroad noise emission standards, it was suggested to the Agency that EPA's standards would, after their effective date, totally preempt the authority of State and local governments to regulate railroads for noise emission

purposes. A less radical approach considered was that after the effective date of the standards for rail cars and locomotives, the State or local governments could no longer take any action with respect to rail cars or locomotives, whether it involved physical modification or simply control of use, operation, or movement. This approach was represented by EPA's discussion of preemption in the preamble to the final railroad regulations (41 FR 2184). Though less consistent with the plain language of section 17(c) than the approach now proposed, this interpretation was deemed acceptable because of certain ambiguous elements of the legislative history of the Act. After gaining experience with the practical aspects of controlling noise sources in interstate commerce, and after reviewing the legislative history in light of that experience, EPA believes that the intent of the Act is best served by following the plain language of section 17(c).

Proposed Section 201.31 would provide that if a State or local regulation is not in the category of preempted regulations, it may be adopted and enforced without EPA involvement. If a regulation is so preempted, it will require EPA approval. Proposed section 201.33 contains provisions concerning the filing and processing of applications, including a provision allowing the applicant or an affected interstate carrier to request review of EPA's decision. The proposal also provides for consultation between the EPA Administrator and the Secretary of Transportation as required by the Noise Control Act.

As a supplement to the provisions proposed herein, the Agency has prepared and will make available guidelines establishing detailed

procedures to be followed by State and local governments in filing, and by the Agency in processing applications for waiver of preemption. It is important that State and local governments follow the requirements of and utilize the guidance provided by the guidelines as well as the proposed procedures in addressing any questions or issues concerning the preemptive aspects of the EPA's Interstate Railroad Noise Emission Regulation.

Included in such guidelines are procedural requirements as to where applications must be filed and what information must be included in supporting statements necessary for the Administrator to make a determination. Also included are procedures which delineate the manner in which the decision process will be conducted for all applications submitted to the Agency. The determinations will be treated as informal rule making, and interested parties will have the opportunity to participate. The guidelines provide for publication in the Federal Register of applications when received, allowance for a public comment period, and publication of the final determination. The guidelines also contain provisions concerning the Agency's processing of requests for review of final determinations.

Under section 17(c)(2) of the Noise Control Act, the Administrator may waive preemption in any case where he determines that the State or local action is necessitated by special local conditions and is not in conflict with the Federal regulations. This provision was intended to allow flexibility to deal with situations where circumstances surrounding the operations of railroad equipment and facilities within particular communities result in essentially unique local health and welfare problems. Proposed Section 201.34 gives guidance as to EPA's interpretation of this provision of the Act. It defines in a general manner the kinds of factors

which EPA will consider as evidence of a special local condition, and it explains how the Administrator will assess the degree of conflict between the State or local action and the Federal regulations. Finally, it provides that the Administrator will balance these factors against one another taking into account the availability of reasonable alternative means of solving the special local noise problem. Because every community is different, each will present a different set of factors for the Administrator to consider. Thus, it is not possible to develop an exhaustive list of actions he would or would not approve. However, the general rules proposed in section 201.34 are expected to be sufficient guidance to State and local governments as to the limits of the Administrator's authority under section 17(c) (2) of the Act.

The Administrator's grant of an application for waiver of preemption is somewhat limited; it represents an administrative action with the effect that the provisions of Section 17 of the Noise Control Act will no longer be a legal basis upon which to challenge the State or local agency's authority to adopt or enforce the regulation. The Administrator does not believe that this finding represents an approval of the proposed State or local law, or that it affects in any way any other requirements which that standard must meet. Specifically, the Administrator's waiver of preemption with respect to a proposed law or rule does not mean that it may contravene other standards established by law, for example those related to safety; nor, as limited by the Commerce Clause of the U.S. Constitution, may it impose an undue burden on interstate commerce, although some of the factors relevant to that test will already have been determined by the Administrator in assessing conflict with Federal regulations. State and local agencies are encouraged to carefully consider these matters during the development of such proposals.

It is the Agency's intention that the guidance provided State and local governments by the proposed procedures and the supplemental guidelines, when finalized, be augmented where necessary by consultation with the EPA Regional Offices. State and local governments are, therefore, encouraged to freely communicate their questions and concerns on all matters related to prospective applications for preemption waiver determinations, or otherwise concerning the preemptive aspects of the EPA's Interstate Railroad Noise Regulation, to the appropriate EPA Regional Office. This consultation will help ensure that applications for determinations are submitted properly and only when necessary, and will aid in the effective solution of State and local noise problems in the most expeditious manner.

Interested persons are invited to participate in the development of these proposed regulations by submitting their written data, views, and arguments. Communications should identify the regulatory docket number and be submitted with five copies to: Director, Standards and Regulations Division, Office of Noise Abatement and Control (AW-471), Attention: Docket No.: 76-10, U.S. Environmental Protection Agency, Washington, D. C. 20460. To assure that all comments receive adequate consideration, they should reach the Agency no later than 45 days after the date of this notice.

These amendments are proposed under the authority of 42 U.S.C. section 4916(c) and 5 U.S.C. section 552(a) (1) (C), (D).

NOV 18 1976

Dated



John R. Quarles, Jr.
Acting Administrator

It is proposed to amend 40 CFR Part 201 by adding the following subpart:

Subpart C - State and Local Authority

S201.30 Definitions

S201.31 General Rules

S201.32 Preemption

S201.33 Filing and Processing of Applications

S201.34 Basis for Determinations

201.30 Definitions

(a) Administrator

As used in this subpart, the term Administrator shall refer to the Administrator of the Environmental Protection Agency or any person who performs any act on his behalf.

(b) Federally Regulated Equipment

Any piece of equipment of an interstate rail carrier to which a standard is in effect under 40 CFR Part 201, including any item which is an integral element or component of such equipment and any item whose interaction contributes to the noise measured when operating under the conditions specified in such regulations for compliance measurement. Included among such items are refrigeration units, or auxiliary engines on locomotives or rail cars, and track. Items excluded from the applicability of the Federal standards by 40 CFR Section 201.10 are not Federally regulated equipment.

(c) Non-Federally Regulated Equipment

Any piece of equipment of an interstate rail carrier which is not Federally regulated equipment as defined in Section 201.30(b).

(d) Design or Equipment Standards

Those actions taken by States or political subdivisions thereof which expressly require for the purpose of noise control the installation of sound attenuation equipment or other hardware, or the implementation of design changes, in addition to or more stringent than those necessary for equipment or facilities to meet the Federal standards.

(e) General Environmental Noise Standards

Those actions taken by States or political subdivisions thereof which establish allowable ambient noise levels or receiving land use noise level standards which focus on the identity of the land receiving the sound rather than the identity of noise sources.

(f) Use, Operation, or Movement Controls

Those actions taken by States or political subdivisions thereof which attempt to regulate the time, manner, nature, or frequency of the operation of particular equipment or facilities of interstate rail carriers for the purpose of noise control.

(g) Action which effectively requires physical modification of
Federally-regulated equipment or facilities

Any action imposing a requirement such that compliance can be achieved by physical modification of Federally-regulated equipment or facilities, and no reasonable alternative exists which does not involve physical modification of Federally-regulated equipment or facilities.

(h) Physical modification of Federally regulated equipment or
facilities.

Physical modifications in addition to or more stringent than those necessary for the equipment or facilities to meet the Federal standards.

(i) Agency Guidelines on the Filing and Processing of
Applications

Procedural guidelines prepared and published by the EPA as a supplement to the provisions of this subpart which establish the procedures to be followed by State and local governments in filing, and by the EPA in processing applications for waiver of preemption under Section 17(c) (2) of the Noise Control Act of 1972.

201.31 General Rules

(a) No State or local government shall adopt or enforce any regulation which is preempted, according to the rules in Section 201.32, unless an application has been submitted to the EPA in the manner prescribed in Sections 201.33(a) and (b) and in the Agency's guidelines on the filing and processing of applications; and a final determination approving such application in whole or in part under Section 201.33(c) or Section 201.33(d) has become effective.

(b) Any regulation which is not preempted under Section 201.32 may be adopted and enforced without EPA approval.

(c) The State and local government shall itself, or through consultation with the appropriate EPA Regional Office, decide whether a regulation which it proposes to adopt or enforce is preempted under Section 201.32.

(d) Where the Agency finds that EPA approval is not required because an application relates to a regulation which is not preempted, such decision will not constitute EPA approval or disapproval of the proposed State or local regulation.

(e) Any final determination under Section 201.33(c) or Section 201.33(d) may approve in part and disapprove in part the adoption or enforcement of the regulation to which an application relates. In any such case, that part of the regulation disapproved may not be adopted or enforced.

(f) Any final determination approving the adoption or enforcement of a regulation, or any part thereof, under Section 201.33(c) or Section 201.33(d) will specify an effective date before which such adoption or enforcement may not take place. The effective date of a final determination under Section 201.33(c) will normally be 30 days from the date of publication of such determination, or, if reviewed pursuant to Section 201.33(d), the date of issuance of final approval under Section 201.33(d), whichever comes later.

201.32 Preemption

(a) The Federal interstate rail carrier noise emission regulations under 40 CFR Part 201 preempt, after their effective dates, the authority of States and political subdivisions thereof to adopt or enforce any standard applicable to noise emissions resulting from operation of the same facilities or equipment covered by such Federal regulations unless such standard is identical to the Federal standard. Therefore, before taking any such preempted action, as defined in (b) through (d) of this section, States or political subdivisions thereof are required to obtain a determination by the Administrator of the EPA in accordance with these provisions.

(b) A State or local action shall be deemed to be a preempted standard applicable to noise emissions resulting from operation of Federally regulated facilities or equipment if, for the purpose of noise control, it:

- (1) Establishes a numerical noise emission limitation on Federally regulated equipment or facilities which is more stringent than the Federal standard applicable to such equipment or facilities; or
- (2) By its terms requires the physical modification of Federally regulated equipment or facilities; or
- (3) It is neither (1) nor (2) above, but it effectively requires the physical modification of Federally regulated equipment or facilities (as defined in Section 202.30 (g) and (h)).

(c) Preempted Actions as to Adoption or Enforcement. A determination according to this subpart is required regarding the adoption or enforcement of the following types of regulations which are considered to be preempted:

- (1) Regulations which establish noise emission standards for Federally regulated equipment which are more stringent than the Federal standards.
- (2) Regulations which establish design or equipment standards for Federally regulated equipment.

- (3) Regulations establishing use, operation, or movement controls on Federally regulated equipment for the purpose of noise control which require the physical modification of the Federally regulated equipment. Regulations in this category include those which attempt to restrict the use, operation, or movement of Federally regulated equipment that emit more than a specified number of decibels, or that are not equipped with mufflers or other specified noise abatement equipment.
- (4) Regulations establishing noise emission standards for non-Federally regulated facilities of interstate rail carriers which effectively require the physical modification of Federally regulated equipment operating within the facility.
- (5) Regulations establishing use or operation controls for non-Federally regulated facilities of interstate rail carriers which effectively require the physical modification of Federally regulated equipment operating within the facility.

(d) Preempted Actions as to Enforcement only. A determination according to this subpart is required with respect to regulations establishing general environmental noise standards only at such time

as a State or political subdivision thereof proposes to enforce such standards against interstate rail carriers, and only if compliance would effectively require the physical modification of Federally regulated equipment or facilities.

(e) Nonpreempted Actions. A determination according to this subpart is not required regarding the adoption or enforcement of the following types of regulations which are considered to be not preempted:

- (1) Regulations establishing noise emission standards which are identical to the Federal noise emission standards for interstate rail carriers.
- (2) Regulations establishing noise emission standards for Federally regulated equipment which are less stringent than the Federal standards.
 - (i) Such less stringent regulations must ensure that virtually each piece of equipment found in violation of those regulations would if tested be found in violation of the Federal standards.
 - (ii) Such less stringent regulations can specify testing conditions less rigorous than those specified in the Federal regulations if the level of the standard is relaxed so as to only identify equipment which would violate the Federal standards.

- (iii) Such less stringent regulations can be used under less than ideal testing conditions to identify "gross violations"; i.e., equipment that violates the Federal standards by a substantial amount.
- (3) Regulations establishing use, operation, or movement controls for Federally regulated equipment of interstate rail carriers, compliance with which does not effectively require physical modification of such Federally regulated equipment.
- (4) Regulations establishing the following for non-Federally regulated equipment of interstate rail carriers:
 - (i) noise emission standards
 - (ii) use, operation or movement controls,
 - (iii) design or equipment standards.
- (5) Regulations establishing noise emission standards for non-Federally regulated facilities of interstate rail carriers which do not effectively require the physical modification of Federally regulated equipment operating within the facility.
- (6) Regulations establishing use or operation controls on non-Federally regulated facilities of interstate rail carriers which do not effectively require the physical

modification of Federally regulated equipment operating within the facility.

- (7) Regulations establishing design or equipment standards for non-Federally regulated facilities of interstate rail carriers. Examples of such regulations would include regulations requiring installation of quiet retarders or noise barriers around retarders in railroad hump yards, or installation of noise barriers along selected sections of railroad rights-of-way.
- (8) Regulations establishing general environmental noise level standards where either the operations of interstate rail carriers are not among the noise sources causing a violation of the regulation, or if such operations are among the noise sources causing a violation, such regulations do not effectively require the physical modification of the Federally regulated equipment of interstate rail carriers.
- (9) Regulations establishing use controls which prohibit or restrict the use of warning devices such as horns, whistles, or bells. An example of such a control would be an ordinance which prohibited the sounding of a locomotive horn except as a necessary warning signal.

- (10) Regulations which impose use, operation or movement controls on the equipment or facilities of interstate rail carriers for purposes unrelated to noise control. Examples of such regulations would be ordinances which prohibit the transport of hazardous freight within populous areas by interstate rail carriers.
- (11) Regulations used for identifying interstate rail carrier equipment that is in probable violation of Federal standards, provided that ultimate non-compliance be based upon the failure to meet standards no more stringent than those specified in Federal regulations. Such regulations are sometimes called "screening tests" and serve to identify probable violators of Federal standards so that voluntary corrective action might be taken without resort to a test according to Federally authorized procedures, or so that probable violators can be instructed to have a test performed according to Federally authorized procedures with compliance based on meeting standards either identical to Federal standards, or otherwise approved under this Subpart.

201.33 Filing and Processing of Applications

(a) An application for a determination by the Administrator approving the adoption or enforcement of a regulation which is preempted according to Section 201.32 may be submitted only by a State or local governmental office or agency which has the authority to adopt or enforce such regulation.

(b) Each applicant shall have published in a newspaper of general circulation within its jurisdiction, notice of its intent to file an application with the EPA for a special local determination under this Subpart.

(c) The Administrator after consultation with the Secretary of Transportation or his delegate, will, within 180 days of the Agency's receipt of an application, issue a final determination approving or disapproving the application or any part thereof, and will publish such determination in the Federal Register along with an explanation of the basis for his determination. Subject to subsection (d), such determination will constitute final agency action on the application.

(d) Within 30 days after such publication, the applicant or any affected interstate rail carrier may request that the Administrator review the final determination published under subsection (c), upon which such final determination may be either affirmed, overruled, or held for further consideration.

201.34 Basis for Determinations

(a) The Administrator, after consultation with the Secretary of Transportation or his delegate, will permit the adoption and enforcement

of any preempted State or local regulation which he determines is necessitated by special local conditions and is not in conflict with the regulations in this Part.

(b) In making any determination under subsection (a) of this section, the Administrator will balance the following factors:

- (1) The nature and extent of the special local condition upon which the application is based.
- (2) The degree to which the State or local action would conflict with the Federal regulatory scheme.
- (3) The availability of solutions other than those proposed which could provide the necessary relief yet conflicting to a lesser degree with the Federal regulatory scheme.

(c) In assessing the severity of the special local condition upon which the application is based, the Administrator will consider the degree to which denying the application would be inconsistent with the policy of the Noise Control Act of providing an environment free from noise that jeopardizes the public health and welfare.

- (1) In general the Administrator will consider whether there exist geographical, topographical or demographic conditions which render Federal noise emission standards inadequate to protect public health and welfare. Such factors as the proximity of noise-sensitive populations to noise sources, or conditions which increase either the duration or intensity of noise will be considered relevant.

- (2) In particular, the following are considered illustrative examples of the kinds of conditions which may cause or contribute to a special local condition:
 - (i) Steep upgrades or downgrades which cause Federally regulated locomotives to operate for sustained periods at or near full throttle.
 - (ii) The location of hospitals, nursing homes, retirement homes, or other institutions for the recuperation of the sick or elderly near a heavily used railroad facility or right-of-way.
 - (iii) The location of large numbers of residential structures near a heavily used railroad facility or right-of-way.
 - (iv) The location of schools, churches, or other educational facilities near a heavily used railroad facility or right-of-way.
- (3) The following factors will be considered relevant but not determinative in and of themselves as to the question of the existence of a special local condition:
 - (i) Public concern for noise control.
 - (ii) Enactment of noise control regulations prior to the promulgation of the Federal Railroad Noise Emission Standards.

(d) In assessing the degree to which the State or local action would conflict with the Federal regulatory scheme, the Administrator will consider the degree to which granting the application would be inconsistent with the policy of the Noise Control Act of providing Federal standards for sources of noise in commerce which require national uniformity of treatment. The following factors will be considered relevant to assessing the degree of conflict with the Federal regulatory scheme:

- (1) The number of pieces of railroad equipment that would be affected by the action.
- (2) The degree to which equipment affected by the State or local action operate in localities other than that of the State or local government which proposed to regulate them.
- (3) Whether the State or local action would impose testing requirements or procedures which are different from those imposed by Federal regulations and which constitute a significant burden on interstate rail carriers.
- (4) The degree to which the free flow of interstate commerce would be impeded by compliance with the State or local regulation.

Guidelines for State and Local Governments on the
Filing and Processing of Applications for Preemption
Waiver Determinations under Section 17 (c) (2) of the
Noise Control Act of 1972

Section 1. Introduction

Section 2. Definitions

Section 3. Filing of Applications

Section 4. Processing of Applications

Section 1. Introduction

These guidelines are to act as a supplement to the provisions of Subpart D of 40 CFR 201, which contain the detailed delineation of the United States Environmental Protection Agency's view of the preemptive effect of the Interstate Railroad Noise Emission Regulation and establish the basis upon which determinations for waivers of preemption with respect to that regulation will be made by the Agency.

The guidelines set out below contain the procedures to be followed by State and local governments in filing, and by the EPA in processing applications for waiver of preemption. Included are procedural requirements as to where applications must be filed and what information must be included in supporting statements necessary for the Administrator of the EPA to make a determination, as well as procedures delineating the manner in which the decision process will be conducted for all applications submitted to the Agency.

It is important that State and local governments follow the requirements of and utilize the guidance provided by both these guidelines and the procedures of Subpart D of 40 CFR 201 in addressing any questions or issues associated with the preemptive aspects of the EPA's Interstate Railroad Noise Emission Regulation.

Section 2. Definitions

(a) The definitions of 40 CFR 201, Subpart D, Section 201.30 are applicable to these guidelines.

(b) Deputy Assistant Administrator for Noise Abatement and Control.

An official of the Environmental Protection Agency designated by and acting for the Administrator in making determinations under 40 CFR 201, Subpart D.

(c) Assistant Administrator for Air and Waste Management.

An official of the Environmental Protection Agency designated by and acting for the Administrator in making determinations under 40 CFR 201, Subpart D.

Section 3. Filing of Applications

(a) An application for a determination by the Administrator approving the adoption or enforcement of a regulation which is preempted according to 40 CFR 201, Subpart D, Section 201.32 may be submitted only by any State or local governmental office or agency which has the authority to adopt or enforce such regulation.

(b) All requests, applications, submittals and other communications to the Administrator pursuant to the procedures of 40 CFR 201, Subpart D shall be submitted and addressed to the appropriate Regional Office of the Environmental Protection Agency. All such correspondence shall be filed in triplicate.

Addresses for all EPA Regional Offices are:

U. S. EPA Regional Administrator
Attention: Noise Office, Special Local Determinations

- (1) Region I, Environmental Protection Agency, Room 2303,
John F. Kennedy Federal Building, Boston, Massachusetts
02203. (Connecticut, Maine, Massachusetts, New Hampshire,
Rhode Island and Vermont).
- (2) Region II, Environmental Protection Agency, Room 847,
26 Federal Plaza, New York, New York 10007. (New
Jersey, New York, Puerto Rico, and the Virgin Islands).
- (3) Region III, Environmental Protection Agency, Curtis
Building, Sixth and Walnut Street, Philadelphia,
Pennsylvania 19106. (Delaware, Maryland, Pennsylvania,
Virginia, West Virginia, and the District of Columbia).
- (4) Region IV, Environmental Protection Agency, Suite
300, 1421 Peachtree Street, N. E., Atlanta, Georgia
30309. (Alabama, Florida, Georgia, Kentucky, Missis-
sippi, North Carolina, South Carolina, and Tennessee).
- (5) Region V, Environmental Protection Agency, One North
Wacker Drive, Chicago, Illinois 60606. (Illinois,
Indiana, Michigan, Minnesota, Ohio, and Wisconsin).
- (6) Region VI, Environmental Protection Agency, Room 1125,
1600 Patterson Street, Dallas, Texas 75201. (Arkansas,
Louisiana, New Mexico, Oklahoma, and Texas).
- (7) Region VII, Environmental Protection Agency, 1735
Baltimore Avenue, Kansas City, Missouri 64108.
(Iowa, Kansas, Missouri, and Nebraska).

- (8) Region VIII, Environmental Protection Agency, Lincoln Tower, 1860 Lincoln Street, Denver, Colorado 80203. (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming).
- (9) Region IX, Environmental Protection Agency, 100 California Street, San Francisco, California 94111. (Arizona, California, Hawaii, Nevada, American Samoa, Guam, Trust Territories of Pacific Islands, and Wake Island).
- (10) Region X, Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington, 98101. (Alaska, Idaho, Oregon, and Washington).

(c) Each application under 40 CFR 201, Subpart D shall include a supporting statement designed to establish that the State or local standard, control, license, regulation or restriction in question is necessitated by special local conditions and is not in conflict with the Federal interstate rail carrier noise emission regulations. The following information shall be included in each supporting statement:

- (1) The name and address of the state or local government agency or office making the request; the name of the official heading that agency or office; and the name, address, and phone number of the principal contact person regarding the request.
- (2) The complete text of the regulation sought to be established or enforced.

- (3) Information to permit the Agency to fully assess the nature of the local noise problem which the State or local regulation is attempting to solve. Information which applicants are encouraged to provide includes the following:

(i) A detailed description of the geographical area for which a determination is being requested. Included should be an accurate, up-to-date map indicating the boundaries of the area concerned, and capable of reasonably accurate scaling for the determination of distances; identification of the positions or boundaries of all affected noise sources and any land areas or locations for which classification as noise receivers is appropriate relative to the request; a description of the approximate heights of buildings, walls, barriers, or embankments adjacent to identified noise sources or receivers; and a description of any unusual topographical or climatological conditions which render the area concerned more or less sensitive to noise.

ii) A detailed description of the applicable zoning laws of the area concerned, including zoning exceptions whose identification is appropriate relative to the request, either as noise sources or receivers.

(iii) A detailed description, within the area concerned, of the population impacted by the affected rail carrier noise sources during both daytime (7am - 10pm) and nighttime (10pm - 7am) hours. Included shall be the size and approximate distribution of such impacted population and the nature of the associated land use, such as residential, commercial, industrial, or recreational.

- (4) A detailed statement of the nature and extent of the special local condition which is alleged to necessitate the adoption or enforcement of the State or local regulation. This should include references to information submitted under paragraph (3) of this subsection.
- (5) Information to provide the Agency with a full understanding of the type of rail carrier equipment and/or facilities to which the regulation would apply and the nature of the rail carrier operations

involved. Information which applicants are encouraged to provide includes the following, as appropriate:

- (i) The types of locomotives affected by the local regulation (diesel-electric, electric, gas turbine, freight, passenger, or switchers).
- (ii) Whether auxiliary equipment on locomotives or railcars, such as air conditioning, refrigeration, or auxiliary power units, is affected.
- (iii) Whether facilities such as marshalling yards, humping yards, or maintenance shops are affected.
- (iv) The nature and frequency of the operations of the equipment and facilities affected and the times at which such operations occur, such as: the volume flow per hour (trains/hour) as a function of the time of day; the speeds of the trains; the average train length; the number and type of locomotives operating within affected facilities; the type of operations taking place within affected facilities and the time of day at which such operations occur.

- (6) A description of alternative means of compliance available to affected interstate rail carriers; including information as to the technical availability of and the costs associated with each alternative means; and detailed data indicating to what extent each alternative means will achieve compliance with the local regulation. Where an alternative means of compliance involves an operator-oriented requirement, a description must be included describing how an operator of regulated equipment can be expected to know what mode of operation will satisfy the requirement.
- (7) Information or data indicating to what extent full compliance with the local regulation either necessarily or optionally involves the abatement of noise from sources other than interstate rail carrier equipment or facilities.
- (8) A description of any alternative means of solving the local noise problem available to the jurisdiction making the application which do not involve the noise abatement of Federally regulated equipment or facilities, and a discussion of the reasons why these means are inadequate or impractical.
- (9) A one page summary of the particular application which the EPA can publish in the Federal Register according to Section 4(c) of these guidelines.

Such summary shall include a description of: (1) the regulation sought to be established or enforced, (2) the particular local noise problem requiring action, and (3) the rail carrier equipment, facilities, and operations to which the regulation would be applicable.

(10) Other suggested information which applicants are encouraged to provide includes the following:

(i) Information as to the number and nature of recorded complaints received from the population within the area concerned relative to noise generated by affected rail carrier equipment or facilities.

(ii) A description of the benefits expected to result from compliance with the State or local regulation. This information should include the number of people whose exposure to noise is expected to be reduced with such exposure expressed in terms of equivalent sound levels (L_{eq}), day-night equivalent sound levels (L_{dn}), or some other generally accepted means of measuring population exposure to noise; and the degree of such reduction

relative to the approximate distribution of the benefitted population throughout the area concerned. Other benefits to the health and welfare of the impacted population may also be presented.

(d) Information and data presented in the supporting statement(s) shall be referenced by giving the source from or procedure by which such information or data was derived. All noise measurements shall include a description of the methodology used in obtaining such measurements.

(e) Each supporting statement shall include a certification as to the accuracy and validity of its contents and shall be signed by the official who heads the State or local agency or office submitting the application.

(f) With each application the applicant shall provide the Agency with evidence that it has published in a newspaper of general circulation within its jurisdiction, notice of its intent to file an application with the EPA for a special local determination under 40 CFR 201, Subpart D. Such notice shall include a description of: (1) the regulation sought to be established or enforced, (2) the particular local noise problem requiring action, and (3) the railroad equipment, facilities, or operations to which the regulation would be applicable.

Section 4. Processing of Applications

(a) The Regional Administrator with whom applications are filed will review each application and will return any application which lacks any information required by Section 3. The Regional Administrator will also consult informally with the corresponding regional office of the

Department of Transportation and the applicant to assure wherever necessary that other related transportation regulations concerning safety or the routing of hazardous materials have been properly considered. The Regional Administrator will forward to the Deputy Assistant Administrator for Noise Abatement and Control all applications which he adjudges to contain the required information under Section 3. In addition, where he deems appropriate, the Regional Administrator may also prepare and forward recommended determinations concerning individual applications.

(b) The Deputy Assistant Administrator for Noise Abatement and Control will upon receipt of an application make an initial decision as to whether the proposed State or local action is preempted according to 40 CFR 201, Subpart D, Section 201.32.

- (1) The procedures in subsections (c) - (f) of this section will be followed with respect to any application which is determined by the Deputy Assistant Administrator to relate to the adoption or enforcement of a preempted regulation.
- (2) The Deputy Assistant Administrator will return to the applicant any application which by his determination relates to a regulation which is not preempted, and will take no further action on such application.

(c) The EPA will publish in the Federal Register each application which is determined by the Deputy Assistant Administrator to relate to the adoption or enforcement of a preempted regulation.

(d) Following publication of each application under subsection (c) of this section, interested persons will be given an opportunity to file written comments for a period of not less than 30 days as to whether the Administrator should approve or disapprove such application.

(e) As soon as practicable after the close of the period allowed for comments under subsection (d) of this section, the Deputy Assistant Administrator will consider the comments received and consult with the Secretary of Transportation or his delegate.

(f) The Deputy Assistant Administrator, after consultation with the Secretary of Transportation or his delegate, will, within 180 days of the Agency's receipt of an application, issue a final determination approving or disapproving the application or any part thereof, and will publish such determination in the Federal Register along with an explanation of the basis for his determination. Subject to subsection (g), such determination will constitute final agency action on the application.

(g) The applicant or any affected interstate rail carrier may request that the Assistant Administrator for Air and Waste Management review the final determination of the Deputy Assistant Administrator published under subsection (f).

- (1) Any such request must be filed in writing and must be received by the Assistant Administrator for Air and Waste Management within 30 days after publication of the notice in the Federal Register under subsection (f).
- (2) After receipt of a request for review, which was submitted in a timely manner, the Assistant Administrator for Air and Waste Management will consult informally with the Secretary of Transportation or his delegate and will either affirm the decision of the Deputy Assistant Administrator, or overrule such decision, or refer the matter back to the Deputy Assistant Administrator for further consideration.
- (3) Any determination of the Deputy Assistant Administrator after reconsideration under paragraph (g) (2) will be subject to the notice requirement of subsection (f) and the right of appeal under subsection (g).
- (4) Any decision by the Assistant Administrator affirming or overruling a determination of the Deputy Assistant Administrator will constitute final agency action on the application.

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Part 202]

Interstate Motor Carrier Noise Emission Standards

SPECIAL LOCAL DETERMINATIONS

Notice of Proposed Rule Making

The Environmental Protection Agency (EPA) proposes to amend Interstate Motor Carrier Noise Emission Regulations, 40 CFR Part 202, by adding Subpart C relating to waiver by the EPA Administrator of the preemption of certain State and local truck noise regulations. The amendments proposed herein are intended to clarify the preemptive effect of section 18(c) (1) of the Noise Control Act, 42 U.S.C. Section 4917(c) (1), and to provide procedures for the implementation of the waiver authority of section 18(c) (2) of the Act.

Section 18(a) of the Noise Control Act required EPA to publish noise emission regulations for motor carriers engaged in interstate commerce. On October 29, 1974 (39 FR 38208), EPA published regulations setting noise emission standards for vehicles over 10,000 pounds GVWR/GCWR operated by motor carriers engaged in interstate commerce. According to Section 18(c) (1) of the Act, after the effective date of Federal regulations applicable to noise emissions resulting from the operation of any motor carrier engaged in interstate commerce, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the same operation of such motor carrier unless such standard is identical to the Federal

standard prescribed under section 18. Subsection 18(c) (2), however, provides that nothing in section 18 shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation or movement of any product if the Administrator of the Environmental Protection Agency, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under section 18.

The implementation of section 18(c) (2) requires that State and local governments planning to adopt or enforce regulations preempted by the terms of section 18(c) (1) apply to the EPA Administrator for waiver of that preemption. Accordingly, EPA intends by these proposed regulations to: 1) define the precise nature of the preemption imposed by section 18(c) (1) of the Act, so that State and local governments will know what regulations they may no longer adopt or enforce without EPA approval, 2) establish procedures for State and local governments to follow in seeking EPA approval of their adoption or enforcement

of regulations where necessary, as authorized under section 18(c) (2), and 3) provide guidance as to EPA's interpretation of its authority under Section 18(c) (2).

Section 202.32 as proposed would provide guidance as to which State and local regulations are subject to preemption by Federal motor carrier noise regulations. The Agency has interpreted section 18(c) (1) of the Noise Control Act as prohibiting State and local governments from adopting or enforcing any noise control regulation which requires, or has the practical effect of requiring, the physical modification of a facility or piece of equipment which is in compliance with Federal noise emission standards. More specifically, the prohibition would apply to all more stringent numerical noise emission limitations on Federally regulated equipment or facilities and all design or equipment standards, i.e., regulations affecting a Federally regulated facility or piece of equipment which explicitly require modifications in addition to or more stringent than those necessary for the facility or equipment to meet Federal standards. Further, in the case of other regulations enacted or enforced for the purpose of noise control, if compliance can be achieved by physical modification of such facilities or equipment, and no reasonable alternatives exist which do not involve physical modification of such facilities or equipment, the regulations would be preempted and require EPA approval.

EPA has considered other interpretations of section 18(c), such as that where the EPA's standards would, after their effective date, totally preempt the authority of State and local governments to regulate motor carriers for noise emission purposes. A less radical

approach considered was that after the effective date of the standards for vehicles over 10,000 pounds GVWR/GCWR, the State or local governments could no longer take any action with respect to such vehicles, whether it involved physical modification or simply control of use, operation, or movement. This approach was represented by EPA's discussion of preemption in the preamble to the final motor carrier regulation (39 FR 38208). Though less consistent with the plain language of section 18(c) than the approach now proposed, this interpretation was deemed acceptable because of certain ambiguous elements of the legislative history of the Act. After gaining experience with the practical aspects of controlling noise sources in interstate commerce, and after reviewing the legislative history in light of that experience, EPA believes that the intent of the Act is best served by following the plain language of section 18(c).

Proposed Section 202.31 would provide that if a State or local regulation is not in the category of preempted regulations, it may be adopted and enforced without EPA involvement. If a regulation is so preempted, it will require EPA approval. Proposed section 202.33 contains provisions concerning the filing and processing of applications, including a provision allowing the applicant or an affected interstate carrier to request review of EPA's decision. The proposal also provides for consultation between the EPA Administrator and the Secretary of Transportation as required by the Noise Control Act.

As a supplement to the provisions proposed herein, the Agency has prepared and will make available guidelines establishing detailed

procedures to be followed by State and local governments in filing, and by the Agency in processing applications for waiver of preemption. It is important that State and local governments follow the requirements of and utilize the guidance provided by the guidelines as well as the proposed procedures in addressing any questions or issues concerning the preemptive aspects of the EPA's Interstate Motor Carrier Noise Emission Regulation.

Included in such guidelines are procedural requirements as to where applications must be filed and what information must be included in supporting statements necessary for the Administrator to make a determination. Also included are procedures which delineate the manner in which the decision process will be conducted for all applications submitted to the Agency. The determinations will be treated as informal rule making, and interested parties will have the opportunity to participate. The guidelines provide for publication in the Federal Register of applications when received, allowance for a public comment period, and publication of the final determination. The guidelines also contain provisions concerning the Agency's processing of requests for review of final determinations.

Under section 18(c) (2) of the Noise Control Act, the Administrator may waive preemption in any case where he determines that the State or local action is necessitated by special local conditions and is not in conflict with the Federal regulations. This provision was intended to allow flexibility to deal with situations where circumstances surrounding the operations of motor carrier equipment and facilities within particular communities result in essentially unique local health and welfare problems. Proposed Section 202.34 gives guidance as to EPA's interpretation of this provision of the Act. It defines in a general manner the kinds of factors

which EPA will consider as evidence of a special local condition, and it explains how the Administrator will assess the degree of conflict between the State or local action and the Federal regulations. Finally, it provides that the Administrator will balance these factors against one another taking into account the availability of reasonable alternative means of solving the special local noise problem. Because every community is different, each will present a different set of factors for the Administrator to consider. Thus, it is not possible to develop an exhaustive list of actions he would or would not approve. However, the general rules proposed in section 202.34 are expected to be sufficient guidance to State and local governments as to the limits of the Administrator's authority under section 18(c) (2) of the Act.

The Administrator's grant of an application for waiver of preemption is somewhat limited; it represents an administrative action with the effect that the provisions of Section 18 of the Noise Control Act will no longer be a legal basis upon which to challenge the State or local agency's authority to adopt or enforce the regulation. The Administrator does not believe that this finding represents an approval of the proposed State or local law, or that it affects in any way any other requirements which that standard must meet. Specifically, the Administrator's waiver of preemption with respect to a proposed law or rule does not mean that it may contravene other standards established by law, for example those related to safety; nor, as limited by the Commerce Clause of the U.S. Constitution, may it impose an undue burden on interstate commerce, although some of the factors relevant to that test will already have been determined by the Administrator in assessing conflict with Federal regulations. State and local agencies are encouraged to carefully consider these matters during the development of such proposals.

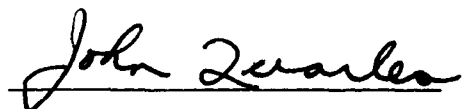
It is the Agency's intention that the guidance provided State and local governments by the proposed procedures and the supplemental guidelines, when finalized, be augmented where necessary by consultation with the EPA Regional Offices. State and local governments are, therefore, encouraged to freely communicate their questions and concerns on all matters related to prospective applications for preemption waiver determinations, or otherwise concerning the preemptive aspects of the EPA's Interstate Railroad Noise Regulation, to the appropriate EPA Regional Office. This consultation will help ensure that applications for determinations are submitted properly and only when necessary, and will aid in the effective solution of State and local noise problems in the most expeditious manner.

Interested persons are invited to participate in the development of these proposed regulations by submitting their written data, views, and arguments. Communications should identify the regulatory docket number and be submitted with five copies to: Director, Standards and Regulations Division, Office of Noise Abatement and Control (AW-471), Attention: Docket No.: 76-~~19~~¹¹, U.S. Environmental Protection Agency, Washington, D. C. 20460. To assure that all comments receive adequate consideration, they should reach the Agency no later than 45 days after the date of this notice.

These amendments are proposed under the authority of 42 U.S.C. section 4916(c) and 5 U.S.C. section 552(a) (1) (C), (D).

NOV 18 1976

Dated



John R. Quarles, Jr.
Acting Administrator

It is proposed to amend 40 CFR Part 202 by adding the following subpart:

Subpart C - State and Local Authority

S202.30 Definitions

S202.31 General Rules

S202.32 Preemption

S202.33 Filing and Processing of Applications

S202.34 Basis for Determinations

202.30 Definitions

(a) Administrator

As used in this subpart, the term Administrator shall refer to the Administrator of the Environmental Protection Agency or any person who performs any act on his behalf.

(b) Federally Regulated Equipment

Any piece of equipment of an interstate motor carrier to which a standard is in effect under 40 CFR Part 202, including any item which is an integral element or component of such equipment and any item whose interaction contributes to the noise measured when operating under the conditions specified in such regulations for compliance measurement. Included among such items are refrigeration units. Items excluded from the applicability of the Federal standards by 40 CFR Section 202.12 are not Federally regulated equipment.

(c) Non-Federally Regulated Equipment

Any piece of equipment of an interstate motor carrier which is not Federally regulated equipment as defined in Section 202.30(b).

(d) Design or Equipment Standards

Those actions taken by States or political subdivisions thereof which expressly require for the purpose of noise control the installation of sound attenuation equipment or other hardware, or the implementation of design changes, in addition to or more stringent than those necessary for equipment or facilities to meet the Federal standards.

(e) General Environmental Noise Standards

Those actions taken by States or political subdivisions thereof which establish allowable ambient noise levels or receiving land use noise level standards which focus on the identity of the land receiving the sound rather than the identity of noise sources.

(f) Use, Operation, or Movement Controls

Those actions taken by States or political subdivisions thereof which attempt to regulate the time, manner, nature, or frequency of the operation of particular equipment or facilities of interstate motor carriers for the purpose of noise control.

(g) Action which effectively requires physical modification of
Federally-regulated equipment or facilities

Any action imposing a requirement such that compliance can be achieved by physical modification of Federally-regulated equipment or facilities, and no reasonable alternative exists which does not involve physical modification of Federally-regulated equipment or facilities.

(h) Physical modification of Federally regulated equipment or
facilities.

Physical modifications in addition to or more extensive than those necessary for the equipment or facilities to meet the Federal standards.

(i) Agency Guidelines on the Filing and Processing of
Applications

Procedural guidelines prepared and published by the EPA as a supplement to the provisions of this subpart which establish the procedures to be followed by State and local governments in filing, and by the EPA in processing applications for waiver of preemption under Section 18(c) (2) of the Noise Control Act of 1972.

202.31 General Rules

(a) No State or local government shall adopt or enforce any regulation which is preempted, according to the rules in Section 202.32, unless an application has been submitted to the EPA in the manner prescribed in Sections 202.33(a) and (b) and in the Agency's guidelines on the filing and processing of applications; and a final determination approving such application in whole or in part under Section 202.33(c) or Section 202.33(d) has become effective.

(b) Any regulation which is not preempted under Section 202.32 may be adopted and enforced without EPA approval.

(c) The State and local government shall itself, or through consultation with the appropriate EPA Regional Office, decide whether a regulation which it proposes to adopt or enforce is preempted under Section 202.32.

(d) Where the Agency finds that EPA approval is not required because an application relates to a regulation which is not preempted, such decision will not constitute EPA approval or disapproval of the proposed State or local regulation.

(e) Any final determination under Section 202.33(c) or Section 202.33(d) may approve in part and disapprove in part the adoption or enforcement of the regulation to which an application relates. In any such case, that part of the regulation disapproved may not be adopted or enforced.

(f) Any final determination approving the adoption or enforcement of a regulation, or any part thereof, under Section 202.33(c) or Section 202.33(d) will specify an effective date before which such adoption or enforcement may not take place. The effective date of a final determination under Section 202.33(c) will normally be 30 days from the date of publication of such determination, or, if reviewed pursuant to Section 202.33(d), the date of issuance of final approval under Section 202.33(d), whichever comes later.

202.32 Preemption

(a) The Federal interstate motor carrier noise emission regulations under 40 CFR Part 202 preempt, after their effective dates, the authority of States and political subdivisions thereof to adopt or enforce any standard applicable to noise emissions resulting from the same operation of motor carriers covered by such Federal regulations unless such standard is identical to the Federal standard. Therefore, before taking any such preempted action, as defined in (b) through (d) of this section, States or political subdivisions thereof are required to obtain a determination by the Administrator of the EPA in accordance with these provisions.

(b) A State or local action shall be deemed to be a preempted standard applicable to noise emissions resulting from same operation of motor carriers covered by Federal regulations if, for the purpose of noise control, it:

- (1) Establishes a numerical noise emission limitation on Federally regulated equipment or facilities which is more stringent than the Federal standard applicable to such equipment or facilities; or
- (2) By its terms requires the physical modification of Federally regulated equipment or facilities; or
- (3) It is neither (1) nor (2) above, but it effectively requires the physical modification of Federally regulated equipment or facilities (as defined in Section 202.30(g) and (h)).

(c) Preempted Actions as to Adoption or Enforcement. A determination according to this subpart is required regarding the adoption or enforcement of the following types of regulations which are considered to be preempted:

- (1) Regulations which establish noise emission standards for Federally regulated equipment which are more stringent than the Federal standards.
- (2) Regulations which establish design or equipment standards for Federally regulated equipment.

- (3) Regulations establishing use, operation, or movement controls on Federally regulated equipment for the purpose of noise control which require the physical modification of the Federally regulated equipment. Regulations in this category include those which attempt to restrict the use, operation, or movement of Federally regulated equipment that emit more than a specified number of decibels, or that are not equipped with mufflers or other specified noise abatement equipment.
- (4) Regulations establishing noise emission standards for non-Federally regulated facilities of interstate motor carriers which effectively require the physical modification of Federally regulated equipment operating within the facility.
- (5) Regulations establishing use or operation controls for non-Federally regulated facilities of interstate motor carriers which effectively require the physical modification of Federally regulated equipment operating within the facility.

(d) Preempted Actions as to Enforcement only. A determination according to this subpart is required with respect to regulations establishing general environmental noise standards only at such time as a State or political subdivision thereof proposes to enforce such standards against interstate motor carriers, and only if compliance would

effectively require the physical modification of Federally regulated equipment or facilities.

(e) Nonpreempted Actions. A determination according to this subpart is not required regarding the adoption or enforcement of the following types of regulations which are considered to be not preempted:

(1) Regulations establishing noise emission standards which are identical to the Federal noise emission standards for interstate motor carriers.

(2) Regulations establishing noise emission standards for Federally regulated equipment which are less stringent than the Federal standards.

(i) Such less stringent regulations must ensure that virtually each piece of equipment found in violation of those regulations would if tested be found in violation of the Federal standards.

(ii) Such less stringent regulations can specify testing conditions less rigorous than those specified in the Federal regulations if the level of the standard is relaxed so as to only identify equipment which would violate the Federal standards.

- (iii) Such less stringent regulations can be used under less than ideal testing conditions to identify "gross violations"; i.e., equipment that violates the Federal standards by a substantial amount.
- (3) Regulations establishing use, operation, or movement controls for Federally regulated equipment of interstate motor carriers, compliance with which does not effectively require physical modification of such Federally regulated equipment.
- (4) Regulations establishing the following for non-Federally regulated equipment of interstate motor carriers:
 - (i) noise emission standards
 - (ii) use, operation or movement controls,
 - (iii) design or equipment standards.
- (5) Regulations establishing noise emission standards for non-Federally regulated facilities of interstate motor carriers which do not effectively require the physical modification of Federally regulated equipment operating within the facility.
- (6) Regulations establishing use or operation controls on non-Federally regulated facilities of interstate motor carriers which do not effectively require the physical

modification of Federally regulated equipment operating within the facility.

- (7) Regulations establishing design or equipment standards for non-Federally regulated facilities of interstate motor carriers. Examples of such regulations would include regulations requiring installation of noise barriers at certain locations around motor carrier terminals, or installation of sound insulation in the walls of motor carrier maintenance shops.
- (8) Regulations establishing general environmental noise level standards where either the operations of interstate motor carriers are not among the noise sources causing a violation of the regulation, or if such operations are among the noise sources causing a violation, such regulations do not effectively require the physical modification of the Federally regulated equipment of interstate motor carriers.
- (9) Regulations establishing use controls which prohibit or restrict the use of warning devices such as horns. An example of such a control would be an ordinance which prohibited the sounding of a truck horn except as a necessary warning signal.

- (10) Regulations which impose use, operation or movement controls on the equipment or facilities of interstate motor carriers for purposes unrelated to noise control. Examples of such regulations would be ordinances which prohibit the transport of hazardous freight within populous areas by interstate motor carriers.
- (11) Regulations used for identifying interstate motor carrier equipment that is in probable violation of Federal standards, provided that ultimate non-compliance be based upon the failure to meet standards no more stringent than those specified in Federal regulations. Such regulations are sometimes called "screening tests" and serve to identify probable violators of Federal standards so that voluntary corrective action might be taken without resort to a test according to Federally authorized procedures, or so that probable violators can be instructed to have a test performed according to Federally authorized procedures with compliance based on meeting standards either identical to Federal standards, or otherwise approved under this Subpart.

202.33 Filing and Processing of Applications

(a) An application for a determination by the Administrator approving the adoption or enforcement of a regulation which is preempted according to Section 202.32 may be submitted only by a State or local governmental office or agency which has the authority to adopt or enforce such regulation.

(b) Each applicant shall have published in a newspaper of general circulation within its jurisdiction, notice of its intent to file an application with the EPA for a special local determination under this Subpart.

(c) The Administrator after consultation with the Secretary of Transportation or his delegate, will, within 180 days of the Agency's receipt of an application, issue a final determination approving or disapproving the application or any part thereof, and will publish such determination in the Federal Register along with an explanation of the basis for his determination. Subject to subsection (d), such determination will constitute final agency action on the application.

(d) Within 30 days after such publication, the applicant or any affected interstate motor carrier may request that the Administrator review the final determination published under subsection (c), upon which such final determination may be either affirmed, overruled, or held for further consideration.

202.34 Basis for Determinations

(a) The Administrator, after consultation with the Secretary of Transportation or his delegate, will permit the adoption and enforcement

of any preempted State or local regulation which he determines is necessitated by special local conditions and is not in conflict with the regulations in this Part.

(b) In making any determination under subsection (a) of this section, the Administrator will balance the following factors:

- (1) The nature and extent of the special local condition upon which the application is based.
- (2) The degree to which the State or local action would conflict with the Federal regulatory scheme.
- (3) The availability of solutions other than those proposed which could provide the necessary relief yet conflicting to a lesser degree with the Federal regulatory scheme.

(c) In assessing the severity of the special local condition upon which the application is based, the Administrator will consider the degree to which denying the application would be inconsistent with the policy of the Noise Control Act of providing an environment free from noise that jeopardizes the public health and welfare.

- (1) In general the Administrator will consider whether there exist geographical, topographical or demographic conditions which render Federal noise emission standards inadequate to protect public health and welfare. Such factors as the proximity of noise-sensitive populations to noise sources, or conditions which increase either the duration or intensity of noise will be considered relevant.

- (2) In particular, the following are considered illustrative examples of the kinds of conditions which may cause or contribute to a special local condition:
 - (i) Steep upgrades or downgrades which cause Federally regulated vehicles to operate for sustained periods at or near full throttle.
 - (ii) The location of hospitals, nursing homes, retirement homes, or other institutions for the recuperation of the sick or elderly near a heavily used motor carrier facility, highway, or truck route.
 - (iii) The location of large numbers of residential structures near a heavily used motor carrier facility, highway, or truck route.
 - (iv) The location of schools, churches, or other educational facilities near a heavily used motor carrier facility, highway, or truck route.
- (3) The following factors will be considered relevant but not determinative in and of themselves as to the question of the existence of a special local condition:
 - (i) Public concern for noise control.
 - (ii) Enactment of noise control regulations prior to the promulgation of the Federal Motor Carrier Noise Emission Standards.

(d) In assessing the degree to which the State or local action would conflict with the Federal regulatory scheme, the Administrator will consider the degree to which granting the application would be inconsistent with the policy of the Noise Control Act of providing Federal standards for sources of noise in commerce which require national uniformity of treatment. The following factors will be considered relevant to assessing the degree of conflict with the Federal regulatory scheme:

- (1) The number of pieces of motor carrier equipment that would be affected by the action.
- (2) The degree to which equipment affected by the State or local action operate in localities other than that of the State or local government which proposed to regulate them.
- (3) Whether the State or local action would impose testing requirements or procedures which are different from those imposed by Federal regulations and which constitute a significant burden on interstate motor carriers.
- (4) The degree to which the free flow of interstate commerce would be impeded by compliance with the State or local regulation.

Guidelines for State and Local Governments on the
Filing and Processing of Applications for Preemption
Waiver Determinations under Section 18 (c) (2) of the
Noise Control Act of 1972

Section 1. Introduction

Section 2. Definitions

Section 3. Filing of Applications

Section 4. Processing of Applications

Section 1. Introduction

These guidelines are to act as a supplement to the provisions of Subpart C of 40 CFR 202, which contain the detailed delineation of the United States Environmental Protection Agency's view of the preemptive effect of the Interstate Motor Carrier Noise Emission Regulation and establish the basis upon which determinations for waivers of preemption with respect to that regulation will be made by the Agency.

The guidelines set out below contain the procedures to be followed by State and local governments in filing, and by the EPA in processing applications for waiver of preemption. Included are procedural requirements as to where applications must be filed and what information must be included in supporting statements necessary for the Administrator of the EPA to make a determination, as well as procedures delineating the manner in which the decision process will be conducted for all applications submitted to the Agency.

It is important that State and local governments follow the requirements of and utilize the guidance provided by both these guidelines and the procedures of Subpart C of 40 CFR 202 in addressing any questions or issues associated with the preemptive aspects of the EPA's Interstate Railroad Noise Emission Regulation.

Section 2. Definitions

(a) The definitions of 40 CFR 202, Subpart C, Section 202.30 are applicable to these guidelines.

(b) Deputy Assistant Administrator for Noise Abatement and Control.

An official of the Environmental Protection Agency designated by and acting for the Administrator in making determinations under 40 CFR 202, Subpart C.

(c) Assistant Administrator for Air and Waste Management.

An official of the Environmental Protection Agency designated by and acting for the Administrator in making determinations under 40 CFR 202, Subpart C.

Section 3. Filing of Applications

(a) An application for a determination by the Administrator approving the adoption or enforcement of a regulation which is preempted according to 40 CFR 202, Subpart C, Section 202.32 may be submitted only by any State or local governmental office or agency which has the authority to adopt or enforce such regulation.

(b) All requests, applications, submittals and other communications to the Administrator pursuant to the procedures of 40 CFR 202, Subpart C shall be submitted and addressed to the appropriate Regional Office of the Environmental Protection Agency. All such correspondence shall be filed in triplicate.

Addresses for all EPA Regional Offices are:

U. S. EPA Regional Administrator
Attention: Noise Office, Special Local Determinations

- (1) Region I, Environmental Protection Agency, Room 2303,
John F. Kennedy Federal Building, Boston, Massachusetts
02203. (Connecticut, Maine, Massachusetts, New Hampshire,
Rhode Island and Vermont).
- (2) Region II, Environmental Protection Agency, Room 847,
26 Federal Plaza, New York, New York 10007. (New
Jersey, New York, Puerto Rico, and the Virgin Islands).
- (3) Region III, Environmental Protection Agency, Curtis
Building, Sixth and Walnut Street, Philadelphia,
Pennsylvania 19106. (Delaware, Maryland, Pennsylvania,
Virginia, West Virginia, and the District of Columbia).
- (4) Region IV, Environmental Protection Agency, Suite
300, 1421 Peachtree Street, N. E., Atlanta, Georgia
30309. (Alabama, Florida, Georgia, Kentucky, Missis-
sippi, North Carolina, South Carolina, and Tennessee).
- (5) Region V, Environmental Protection Agency, One North
Wacker Drive, Chicago, Illinois 60606. (Illinois,
Indiana, Michigan, Minnesota, Ohio, and Wisconsin).
- (6) Region VI, Environmental Protection Agency, Room 1125,
1600 Patterson Street, Dallas, Texas 75201. (Arkansas,
Louisiana, New Mexico, Oklahoma, and Texas).
- (7) Region VII, Environmental Protection Agency, 1735
Baltimore Avenue, Kansas City, Missouri 64108.
(Iowa, Kansas, Missouri, and Nebraska).

- (8) Region VIII, Environmental Protection Agency, Lincoln Tower, 1860 Lincoln Street, Denver, Colorado 80203. (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming).
- (9) Region IX, Environmental Protection Agency, 100 California Street, San Francisco, California 94111. (Arizona, California, Hawaii, Nevada, American Samoa, Guam, Trust Territories of Pacific Islands, and Wake Island).
- (10) Region X, Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington, 98101. (Alaska, Idaho, Oregon, and Washington).

(c) Each application under 40 CFR 202, Subpart C shall include a supporting statement designed to establish that the State or local standard, control, license, regulation or restriction in question is necessitated by special local conditions and is not in conflict with the Federal interstate motor carrier noise emission regulations. The following information shall be included in each supporting statement:

- (1) The name and address of the state or local government agency or office making the request; the name of the official heading that agency or office; and the name, address, and phone number of the principal contact person regarding the request.
- (2) The complete text of the regulation sought to be established or enforced.

(3) Information to permit the Agency to fully assess the nature of the local noise problem which the State or local regulation is attempting to solve. Information which applicants are encouraged to provide includes the following:

(i) A detailed description of the geographical area for which a determination is being requested. Included should be an accurate, up-to-date map indicating the boundaries of the area concerned, and capable of reasonably accurate scaling for the determination of distances; identification of the positions or boundaries of all affected noise sources and any land areas or locations for which classification as noise receivers is appropriate relative to the request; a description of the approximate heights of buildings, walls, barriers, or embankments adjacent to identified noise sources or receivers; and a description of any unusual topographical or climatological conditions which render the area concerned more or less sensitive to noise.

- (ii) A detailed description of the applicable zoning laws of the area concerned, including zoning exceptions whose identification is appropriate relative to the request, either as noise sources or receivers.
 - (iii) A detailed description, within the area concerned, of the population impacted by the affected motor carrier noise sources during both daytime (7am - 10pm) and nighttime (10pm - 7am) hours. Included shall be the size and approximate distribution of such impacted population and the nature of the associated land use, such as residential, commercial, industrial, or recreational.
- (4) A detailed statement of the nature and extent of the special local condition which is alleged to necessitate the adoption or enforcement of the State or local regulation. This should include references to information submitted under paragraph (3) of this subsection.
- (5) Information to provide the Agency with a full understanding of the type of motor carrier equipment and/or facilities to which the regulation would apply and the nature of the motor carrier operations

involved. Information which applicants are encouraged to provide includes the following, as appropriate:

(i) The nature and frequency of the operations of interstate motor carrier vehicles over 10,000 lbs. GVWR/GCWR affected by the local regulation, and the times of day at which such operations occur, such as: the volume flow of both Federally regulated vehicles and non-Federally regulated vehicles (vehicles/day) as a function of the time of day, and for the noisiest hour (vehicle/hr.); the average speed and mode of operation (cruise, accelerate, decelerate) of both the Federally regulated and non-Federally regulated vehicles.

(ii) The nature and frequency of the operations of motor carrier facilities affected and the times of day at which such operations occur, such as: the number and type of vehicles and type of operations taking place within affected facilities and the time of day at which such operations occur; in particular, whether auxiliary equipment on motor carrier vehicles, such as refrigeration units, are affected.

- (6) A description of alternative means of compliance available to affected interstate motor carriers; including information as to the technical availability of and the costs associated with each alternative means; and detailed data indicating to what extent each alternative means will achieve compliance with the local regulation. Where an alternative means of compliance involves an operator-oriented requirement, a description must be included describing how an operator of regulated equipment can be expected to know what mode of operation will satisfy the requirement.
- (7) Information or data indicating to what extent full compliance with the local regulation either necessarily or optionally involves the abatement of noise from sources other than interstate motor carrier equipment or facilities.
- (8) A description of any alternative means of solving the local noise problem available to the jurisdiction making the application which do not involve the noise abatement of Federally regulated equipment or facilities, and a discussion of the reasons why these means are inadequate or impractical.
- (9) A one page summary of the particular application which the EPA can publish in the Federal Register according to Section 4(c) of these guidelines.

Such summary shall include a description of: (1) the regulation sought to be established or enforced, (2) the particular local noise problem requiring action, and (3) the motor carrier equipment, facilities, and operations to which the regulation would be applicable.

(10) Other suggested information which applicants are encouraged to provide includes the following:

- (i) Information as to the number and nature of recorded complaints received from the population within the area concerned relative to noise generated by affected motor carrier equipment or facilities.
- (ii) A description of the benefits expected to result from compliance with the State or local regulation. This information should include the number of people whose exposure to noise is expected to be reduced with such exposure expressed in terms of equivalent sound levels (L_{eq}), day-night equivalent sound levels (L_{dn}), or some other generally accepted means of measuring population exposure to noise; and the degree of such reduction

relative to the approximate distribution of the benefitted population throughout the area concerned. Other benefits to the health and welfare of the impacted population may also be presented.

(d) Information and data presented in the supporting statement(s) shall be referenced by giving the source from or procedure by which such information or data was derived. All noise measurements shall include a description of the methodology used in obtaining such measurements.

(e) Each supporting statement shall include a certification as to the accuracy and validity of its contents and shall be signed by the official who heads the State or local agency or office submitting the application.

(f) With each application the applicant shall provide the Agency with evidence that it has published in a newspaper of general circulation within its jurisdiction, notice of its intent to file an application with the EPA for a special local determination under 40 CFR 202, Subpart C. Such notice shall include a description of: (1) the regulation sought to be established or enforced, (2) the particular local noise problem requiring action, and (3) the motor carrier equipment, facilities, or operations to which the regulation would be applicable.

Section 4. Processing of Applications

(a) The Regional Administrator with whom applications are filed will review each application and will return any application which lacks any information required by Section 3. The Regional Administrator will also consult informally with the corresponding regional office of the

Department of Transportation and the applicant to assure wherever necessary that other related transportation regulations concerning safety or the routing of hazardous materials have been properly considered. The Regional Administrator will forward to the Deputy Assistant Administrator for Noise Abatement and Control all applications which he adjudges to contain the required information under Section 3. In addition, where he deems appropriate, the Regional Administrator may also prepare and forward recommended determinations concerning individual applications.

(b) The Deputy Assistant Administrator for Noise Abatement and Control will upon receipt of an application make an initial decision as to whether the proposed State or local action is preempted according to 40 CFR 202, Subpart C, Section 202.32.

- (1) The procedures in subsections (c) - (f) of this section will be followed with respect to any application which is determined by the Deputy Assistant Administrator to relate to the adoption or enforcement of a preempted regulation.
- (2) The Deputy Assistant Administrator will return to the applicant any application which by his determination relates to a regulation which is not preempted, and will take no further action on such application.

(c) The EPA will publish in the Federal Register each application which is determined by the Deputy Assistant Administrator to relate to the adoption or enforcement of a preempted regulation.

(d) Following publication of each application under subsection (c) of this section, interested persons will be given an opportunity to file written comments for a period of not less than 30 days as to whether the Administrator should approve or disapprove such application.

(e) As soon as practicable after the close of the period allowed for comments under subsection (d) of this section, the Deputy Assistant Administrator will consider the comments received and consult with the Secretary of Transportation or his delegate.

(f) The Deputy Assistant Administrator, after consultation with the Secretary of Transportation or his delegate, will, within 180 days of the Agency's receipt of an application, issue a final determination approving or disapproving the application or any part thereof, and will publish such determination in the Federal Register along with an explanation of the basis for his determination. Subject to subsection (g), such determination will constitute final agency action on the application.

(g) The applicant or any affected interstate motor carrier may request that the Assistant Administrator for Air and Waste Management review the final determination of the Deputy Assistant Administrator published under subsection (f).

- (1) Any such request must be filed in writing and must be received by the Assistant Administrator for Air and Waste Management within 30 days after publication of the notice in the Federal Register under subsection (f).
- (2) After receipt of a request for review, which was submitted in a timely manner, the Assistant Administrator for Air and Waste Management will consult informally with the Secretary of Transportation or his delegate and will either affirm the decision of the Deputy Assistant Administrator, or overrule such decision, or refer the matter back to the Deputy Assistant Administrator for further consideration.
- (3) Any determination of the Deputy Assistant Administrator after reconsideration under paragraph (g) (2) will be subject to the notice requirement of subsection (f) and the right of appeal under subsection (g).
- (4) Any decision by the Assistant Administrator affirming or overruling a determination of the Deputy Assistant Administrator will constitute final agency action on the application.