ORAL ARGUMENT NOT YET SCHEDULED

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

No. 10-1092, and consolidated cases (Complex)

COALITION FOR RESPONSIBLE REGULATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LISA P. JACKSON, ADMINISTRATOR, and
THE NATIONAL HIGHWAY AND TRAFFIC SAFETY ADMINISTRATION

Respondents.

ON CONSOLIDATED PETITIONS FOR REVIEW OF FINAL RULES
BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
NATIONAL HIGHWAY AND TRAFFIC SAFETY ADMINISTRAITON

BRIEF FOR RESPONDENTS

IGNACIA S. MORENO
Assistant Attorney General
ERIC G. HOSTETLER
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 305-2326

OF COUNSEL

JOHN HANNON
STEVEN SILVERMAN
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

DATED: September 1, 2011 (Initial Brief)

RESPONDENTS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit R. 28(a)(1), Respondents United States Environmental Protection Agency ("EPA"), Lisa P. Jackson, Administrator of EPA, and the National highway Traffic Safety Administration ("NHTSA") submit this certificate as to parties, rulings and related cases.

(A) Parties and amici: With one exception, the parties and amici to this action are those set forth in the certificate filed with the Joint Opening Brief of Non-State Petitioners. The exception is on August 5, 2011, the Court granted the Commonwealth of Pennsylvania's motion to withdraw as an Intervenor.

(B) Ruling under review: This case is a set of consolidated petitions for review of EPA and NHTSA's final rules entitled "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 75 Fed. Reg. 25,324 (May 7, 2010).

(C) Related cases: Each of the petitions for review consolidated under No. 10-1092 is related. In addition, pursuant to this Court's prior orders, this case (No. 10-1092) will be argued before the same panel as the consolidated actions in Nos. 09-1322, 10-1167, and 10-1073.

DATED: September 1, 2011

/s/ Eric G. Hostetler
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

*Authorities upon which we chiefly reply upon are marked with asterisks.

Statutes

Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q:

Federal Register

GLOSSARY

BACT	Best Available Control Technology
CAA	Clean Air Act or the Act
CAFE	Corporate Average Fuel Economy
CH_4	Methane
CO_2e	Carbon dioxide equivalent
CO_2	Carbon dioxide
EPA	Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
FLRA	Federal Labor Relations Authority
HFCs	Hydrofluorocarbons
MEMA	Motor & Equip. Mfrs. Ass'n
N_20	Nitrous oxide
NHTSA	National Highway Traffic Safety Administration
NRDC	Natural Resources Defense Council
OMB	Office of Management and Budget
PFCs	Perfluorocarbons
PRA	Paperwork Reduction Act
PSD	Prevention of significant deterioration
RFA	Regulatory Flexibility Act
RIA	Regulatory Impact Analysis

RTC	Response to Comments
SF_6	Sulfur hexafluoride
TSD	Technical Support Document
UMRA	Unfunded Mandates Reform Act

JURISDICTION

The consolidated petitions for review of the Clean Air Act regulations at issue were timely filed pursuant to 42 U.S.C. §7607(b). The Court does not need to scrutinize the standing of all Petitioners since at least some Petitioners appear to have adequately alleged standing based on asserted injuries as fleet purchasers of motor vehicles. *See* Ind. Br. at 10, State Br. at 13-14.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are set forth in the addendum.

STATEMENT OF ISSUES

Section 202(a)(1) of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7521(a)(1), provides that EPA "shall" promulgate standards for emissions of pollutants from new motor vehicles if the EPA Administrator finds that such emissions contribute to air pollution that may "reasonably be anticipated to endanger public health or welfare." EPA has found that emissions of greenhouse gases from new motor vehicles contribute to air pollution that may "reasonably be anticipated to endanger public health or welfare." *See generally* "Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding") [JA XX]. Against that background, this case raises the following issues:

1. Whether EPA appropriately prescribed standards for greenhouse gas

emissions from new motor vehicles following its Endangerment Finding, when Section 202(a) of the Act provides that EPA "shall" promulgate such standards if such a finding is made?

2. Whether EPA had discretion, based on the triggering of separate CAA programs (such as prevention-of-significant deterioration) that apply automatically to stationary sources of any pollutant subject to regulation under the Act, to refuse to comply with the CAA's requirement that the Agency promulgate standards for greenhouse gas emissions from new motor vehicles once endangerment was found?

3. Whether EPA had discretion, based on the relative *amount* of the endangerment that may be averted through promulgation of vehicle standards alone, to refuse to comply with the CAA's requirement to issue standards for greenhouse gas emissions from new motor vehicles once endangerment was found?

4. Whether EPA had discretion, based on the authority of the National Highway Traffic and Safety Administration ("NHTSA") to set fuel economy standards under the Energy Policy and Conservation Act ("EPCA"), to refuse to comply with the CAA's separate and independent direction to promulgate greenhouse gas emission standards for new motor vehicles once endangerment was

found?

5. Whether EPA reasonably promulgated greenhouse gas emission standards for new model year 2012-2016 light-duty vehicles in coordination with NHTSA's promulgation of fuel economy standards under EPCA, so as to ensure consistent federal and state requirements concerning light-duty vehicle greenhouse gas emissions and fuel economy?

STATEMENT OF THE CASE

I. Nature of the Case

This case concerns consolidated challenges to the first-ever national regulatory program to reduce greenhouse gas emissions from new motor vehicles. Elevated concentrations of greenhouse gases in the atmosphere are causing changes in the Earth's climate. Climate change is one of the most significant and profound threats to public health and the environment. *See generally* Endangerment Finding, 74 Fed. Reg. at 66,516-36 [JA XX-XX]. The key risks and effects of climate change projected to occur for current and future generations include, but are not limited to, more frequent and intense heat waves, degraded air quality, heavier and more intense storms and flooding, increased drought, greater sea level rise, ocean acidification, harm to agriculture, and harm to wildlife and ecosystems. *Id.*

Section 202 of the CAA *requires* EPA to prescribe standards for air pollutant emissions from new motor vehicles where EPA finds that such emissions contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7521. Such a finding is commonly referred to as an "endangerment finding."

After EPA initially denied in 2003 a petition for rulemaking to regulate greenhouse gas emissions from new motor vehicles based on an alleged lack of statutory authority and various policy grounds, the Supreme Court ruled that EPA's denial of the petition was arbitrary and capricious. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("*Massachusetts*"). The Court held that greenhouse gases are air pollutants regulated by the Act and directed EPA to make an endangerment determination based on the available science or to explain why it could not do so. *Id*. at 533. The Court further affirmed that Section 202(a) imposes a nondiscretionary duty upon EPA to promulgate greenhouse gas emission standards for new motor vehicles should EPA make a positive endangerment finding. *Id*.

In response to *Massachusetts*, EPA determined, based on an exhaustive review and analysis of the science, that emissions of greenhouse gases from new motor vehicles do contribute to air pollution that is reasonably anticipated to endanger the public health and welfare of current and future generations in the

United States. *See* Endangerment Finding. After making its Endangerment Finding, EPA promulgated the emission standards at issue for new model year 2012-2016 light-duty vehicles (cars and light trucks). 75 Fed. Reg. 25,324 (May 7, 2010) ("the Vehicle Rule") [JA XX]. These standards will result in significant reductions in greenhouse gas emissions from these vehicles.

The light-duty vehicle standards were promulgated in coordination with NHTSA's promulgation of fuel economy standards under EPCA to ensure that the standards are consistent with one another, as well as consistent with a separate set of California standards previously adopted by 13 States and the District of Columbia.

EPA's Vehicle Rule is challenged by business interests, certain States, and some public interest groups.[1] Other business interests, States, and public interest groups have intervened in support of EPA. Not one vehicle manufacturer actually subject to the challenged standards has sought or supported judicial review of the Vehicle Rule. In fact, vehicle manufacturers who are subject to the challenged standards have intervened *in support* of EPA's Vehicle Rule. The petitioners do not contest the *content* of the vehicle emission standards in any respect, but instead

1 NHTSA has been identified as a Respondent in petitions for review, but Petitioners have made clear they do not challenge any aspect of NHTSA's fuel economy standards under EPCA. These standards should therefore be summarily affirmed.

seek to topple the Vehicle Rule solely to prevent regulation of *stationary sources* of greenhouse gases pursuant to separate CAA programs that automatically apply once greenhouse gases are regulated anywhere under the Act.

II. Statutory Background

A. The Clean Air Act

The purpose of the CAA, 42 U.S.C. §§ 7401-7671q, is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," 42 U.S.C. § 7401(b).

1. Regulation of Mobile Sources

Title II of the CAA, 42 U.S.C. §§ 7521-7590, establishes a regulatory framework for controlling air pollution from motor vehicles and other mobile sources. Under section 202(a), EPA "shall" prescribe regulations establishing standards for "the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a). Once EPA makes such an "endangerment finding," the Act *requires* EPA to issue emission standards for new motor vehicles and engines, after considering the time necessary to develop and apply the requisite technology to meet the standards, and the cost of

compliance with the standards within the set time period. *Id.* § 7521(a)(2).

States are generally preempted from adopting their own motor vehicle standards. CAA Section 209(a), 42 U.S.C. § 7543(a). However, Section 209(b) of the Act allows EPA to waive preemption for the State of California. 42 U.S.C. § 7543(b). In making a Section 209(b) waiver determination, EPA must consider whether California standards are in the aggregate at least as protective as federal standards, address extraordinary and compelling conditions in the State, and are otherwise consistent with the CAA. *Id*. Pursuant to Section 177 of the Act, other States may then adopt standards identical to California's standards. 42 U.S.C. § 7507.

2. Stationary Sources of Air Pollutants

Stationary sources of air pollutants – as opposed to mobile sources – are not regulated under CAA Title II, but are regulated through separate statutory programs. Among these programs, Congress added the prevention-of-significant-deterioration ("PSD") program to Title I of the Act when it amended the Act in 1977. 42 U.S.C. §§ 7470-92. The primary requirement of the PSD program is a pre-construction permit requirement for certain stationary sources of air pollutants, under which the source is obligated to install and operate pollution controls. 42 U.S.C. § 7475. Generally speaking, a "major emitting facility" may not be

constructed or modified without first obtaining a PSD permit. 42 U.S.C. § 7475(a). The Act defines a "major emitting facility" as a stationary source that emits or has the potential to emit more than 100 or 250 tons (depending on the type of source involved) per year of "any air pollutant." 42 U.S.C. § 7479(1). A modification of an existing major emitting facility is defined by statute as a physical change or change in the method of operation that results in an increase in the amount of any air pollutant. 42 U.S.C. §§ 7479(2)(C); 7411(a)(4).

Consistent with these statutory provisions and applicable case law (*see Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)), under longstanding EPA regulations the PSD permit requirement is triggered, *inter alia*, by greater-than-threshold emissions of "[a]ny pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. §§ 52.21(b)(50)(iv); 52.21(a)(1)-(2); *see also id.* § 51.166(a)(49)(iv); 51.166(a)(1). Once the PSD permit requirement is triggered, the substantive requirements of the permitting program then apply to "*each* pollutant subject to regulation" under the Act. 42 U.S.C. § 7475(a)(4) (emphasis added) (facility must use "best available control technology" ("BACT") for "each pollutant subject to regulation under [the Act]").

Determinations as to what constitutes BACT for particular facilities are made by the relevant state or federal permitting authority on a case-by-case basis.

42 U.S.C. § 7475(a); 40 C.F.R. §§ 52.21(a)(2), (j). BACT determinations must take into account, among other things, economic impacts and other costs. 42 U.S.C. § 7479(3).

Title V of the Act, 42 U.S.C. §§ 7661-61f, establishes an operating permit program covering stationary sources of air pollution. Under this "Title V" permit program, all CAA requirements applicable to a particular source are consolidated in a single, comprehensive permit. The permit requirement applies to, among others, any "major source" within the meaning of section 501(2) of the Act, 42 U.S.C. § 7661(2), which includes, *inter alia*, stationary sources that emit or have the potential to emit 100 tons per year of any air pollutant. CAA § 302(j), 42 U.S.C. § 7602(j).

B. The Energy Policy and Conservation Act

The Energy Policy and Conservation Act ("EPCA") has different purposes than the CAA: while the CAA is directed at reducing air pollution, EPCA's purpose is conservation of fuel. EPCA as amended, among other things, directs the Secretary of Transportation to prescribe corporate average fuel economy ("CAFE") standards for new automobiles. 49 U.S.C. § 32902(a). The Secretary has delegated that authority to NHTSA.

NHTSA promulgates average fuel economy standards applicable to each

manufacturer's fleet of vehicles. CAFE standards "shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in [a] model year." 49 U.S.C. § 32902(a). Separate CAFE standards for passenger cars and light trucks must be set by regulation for each model year, and must be promulgated "[a]t least 18 months before the beginning of each model year." *Id*.

III. Regulatory Background

A. The Supreme Court's Decision in *Massachusetts*

In 1999, EPA received a petition for rulemaking which contended that EPA must regulate greenhouse gas emissions from new motor vehicles under CAA Section 202. *Massachusetts*, 549 U.S. at 510. EPA denied that request in 2003, concluding that the CAA did not authorize EPA to regulate greenhouse gases to address global climate change, and that even if it had the authority, it would be unwise for a variety of policy reasons to exercise that authority. *Id.* at 511. In *Massachusetts*, the Supreme Court rejected these arguments and concluded that EPA had improperly denied the petition. The Court held that greenhouse gases are air pollutants within the meaning of the Act and directed EPA to make an endangerment determination based on its consideration of the science or explain why it could not do so. 549 U.S. at 528-35. The Court explained that if EPA were

to make a finding of endangerment, then "the [CAA] *requires* the Agency to regulate emissions [of greenhouse gases] from new motor vehicles." 549 U.S. 533 (emphasis added).

In denying the petition for rulemaking, EPA had contended, among other things, that it should not regulate greenhouse gas emissions from motor vehicles because doing so would require it to tighten fuel economy standards, a task assigned to NHTSA pursuant to EPCA. *Id*. at 531-32. The Supreme Court rejected this basis for refusing to engage in section 202(a) rulemaking. The Court explained that NHTSA's authority under EPCA "in no way licenses EPA to shirk its environmental responsibilities," and that EPA's obligations under the CAA are "wholly independent of [NHTSA's] mandate to promote energy efficiency." *Id*. at 532. The Court noted that while "[t]he two obligations may overlap, there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Id.*

B. The Endangerment Finding

Acting in accordance with the Supreme Court's instructions, EPA conducted an exhaustive review of the relevant science and published findings concerning whether greenhouse gas emissions from motor vehicles contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. 74 Fed.

Reg. 66,496 [JA XX]. EPA began by defining the "air pollution" referenced in section 202(a) to be the atmospheric mix of six long-lived and directly-emitted greenhouse gases: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). *Id.* at 66,497, 66,516-22 [JA XX, XX-XX]. EPA then found that this air pollution may "reasonably be anticipated both to endanger public health and to endanger public welfare." *Id.* at 66,497 [JA XX]. EPA concluded, among other things, that anthropogenic emissions of greenhouse gases are causing atmospheric levels of greenhouse gases in our atmosphere to rise to levels essentially unprecedented in human history and that the accumulation of greenhouse gases in our atmosphere is unequivocally exerting a warming effect on the climate. *Id*. at 66,517 [JA XX]. EPA further concluded that the adverse risks and effects of climate change projected to occur for current and future generations include, but are not limited to, more frequent and intense heat waves, degraded air quality, more intense storms, increased drought, greater sea level rise, harm to agriculture, and harm to wildlife and ecosystems. *Id*. at 66,497-99, 66,516-36 [JA XX-XX, XX-XX].

EPA then made findings pertaining to the "cause or contribute" criterion in section 202(a). EPA defined the relevant "air pollutant" as "the aggregate group of

the same six long-lived and directly-emitted greenhouse gases . . . ." 74 Fed. Reg. at 66,536 [JA XX]. EPA found that emissions of this "air pollutant" from new motor vehicles and new motor vehicle engines "contribute" to the "air pollution" for which the endangerment finding was made. *Id.* at 66,499, 66,537-45 [JA XX, XX-XX]. Collectively, EPA's effects and contribution findings are referred to as the "Endangerment Finding." Numerous parties have challenged the Endangerment Finding. These challenges have been consolidated under Case No. 09-1322. They are the subject of separate briefing, but will be heard together with this case.

C. The Vehicle Rule

Once EPA makes a positive endangerment finding for particular pollutants, CAA sections 202(a)(1) and (2) *require* EPA to issue emission standards for motor vehicles addressing emissions of those pollutants. 42 U.S.C. § 7521(a)(1), (2). Having made its Endangerment Finding for greenhouse gases, EPA accordingly promulgated greenhouse gas emission standards for new light-duty vehicles for model years 2012–2016. 75 Fed. Reg. 25,324 (May 7, 2010) ("the Vehicle Rule") [JA XX]. EPA did so as part of a joint rulemaking with NHTSA, which simultaneously promulgated fuel economy standards under EPCA for the same vehicles. As part of that joint rulemaking, EPA and NHTSA developed a joint

technical analysis of (among other things) available technologies and their costs and effectiveness. *Id.* at 25,348-96 [JA XX-XX]; Joint Technical Support Document (JA XX). Each agency then developed final standards under its separate and independent statutory authority.

Promulgating the greenhouse gas standards as part of a joint rulemaking with NHTSA furthered a carefully designed federal policy of establishing consistent, harmonized, and streamlined federal and state requirements that will reduce greenhouse gas emissions and improve fuel economy for light-duty vehicles sold in the United States, while allowing automakers to sell a single fleet of light-duty vehicles nationally. 75 Fed. Reg. at 25,326/2 [JA XX]; 74 Fed. Reg. 24,007 (May 22, 2009) [JA XX]. This policy is commonly referred to as the "National Program."[2]

The National Program recognizes the close relationship between improving fuel economy and reducing greenhouse gas emissions. 75 Fed. Reg. at 25,327/1 [JA XX]. The amount of carbon dioxide tailpipe emissions is generally constant

2 State Petitioners assert that the "reason EPA joined NHTSA in promulgating [the Vehicle Rule] was to trigger its authority to regulate stationary sources." *See* State Br. at 17. Their assertion, however, lacks any record foundation and grossly mischaracterizes the purpose of the National Program. As stated above, the sole intent and purpose of the National Program was to establish consistent, harmonized, and streamlined federal and state requirements related to *motor vehicle* fuel efficiency and greenhouse gas emissions and to allow automakers to produce one single fleet of light-duty vehicles nationally.

per gallon combusted of a given type of fuel. *Id.* Thus, the more fuel efficient a vehicle is, the less fuel it burns to travel a given distance. *Id.* The less fuel it burns, the less carbon dioxide it emits in traveling that distance. *Id.* Therefore, the same technologies that reduce fuel consumption also reduce tailpipe carbon dioxide emissions. *Id.*

The Vehicle Rule greenhouse gas emission standards are consistent with, but are separate from, NHTSA's fuel economy standards. As a result of certain differences between the CAA and EPCA, EPA's standards are projected to result in 47 percent greater overall greenhouse gas emission reductions over the lifetime of model year 2012-2016 vehicles compared with the corresponding NHTSA fuel economy standards. 75 Fed. Reg. at 25,490, Table III.F.1-2 [JA XX]; 75 Fed. Reg. at 25,636, Table IV.G.1-4 [JA XX]. One important difference is that the Vehicle Rule standards encompass reductions in greenhouse gases that can be achieved by air-conditioning system improvements, which NHTSA did not believe it had statutory authority to address in establishing fuel economy standards. *Id.* at 25,342/2 [JA XX]. In addition, the CAA allows various compliance flexibilities (among them certain credit generating and unlimited transferring mechanisms) not present in EPCA. *Id.* at 25,339-51 and 25,331. n.24 [JA XX-XX]. Conversely, EPCA allows a manufacturer to pay a defined civil penalty in lieu of meeting

CAFE standards, while the CAA does not allow similar departures from Section 202 emission standards. 75 Fed. Reg. at 25,342 [JA XX].

EPA's Vehicle Rule generally requires each manufacturer to meet its own fleet-wide emission standard for cars, and separately, for light trucks, based on the vehicles the manufacturer chooses to produce each year. *Id.* at 25,405 [JA XX]. These fleet-wide standards are based on a carbon dioxide ("CO_2") emissions target for each vehicle in a manufacturer's fleet, with the vehicle-specific targets calculated based on the size of each vehicle, and with larger vehicles having larger CO_2 targets. *Id*. at 25,336-37, 25,686 (40 C.F.R. § 86.1818-12) [JA XX-XX, XX]. The fleet-wide standard is then set as a production-weighted average of each manufacturer's vehicle fleet. The Rule also sets separate standards to cap tailpipe emissions of the potent greenhouse gases nitrous oxide and methane. *Id.* at 25,421-24 [JA XX-XX].

The standards provide a number of compliance flexibilities to manufacturers intended to reduce the overall cost of the program without compromising overall environmental objectives. 75 Fed. Reg. at 25,338-41 [JA XX-XX]. Manufacturers may earn credits toward meeting their fleet-wide standards by, among other things, improving air conditioning systems to increase system efficiency and reduce

hydrofluorocarbon[3] refrigerant leakages, utilizing certain innovative technologies, and generating early credits based on improved performance in model years 2009-2011 (the model years before the standards apply). *Id.* at 25,424-44 [JA XX-XX].

EPA expects that automobile manufacturers will be able to meet the light-duty vehicle greenhouse gas standards by utilizing already available technologies more broadly across the light-duty fleet. 75 Fed. Reg. at 25,328 [JA XX]. These technologies include improvements to engines, transmissions, and vehicles, including improvements in air conditioning systems, and increased use of hybrids. *Id.*

D. California Greenhouse Gas Standards and the Alternative Compliance Option

Prior to promulgation of EPA's Vehicle Rule, the State of California in 2004 approved greenhouse gas standards for new light-duty vehicles sold in California for model years 2009 through 2016. In July 2009, EPA granted California's request under CAA section 209(b), 42 U.S.C. § 7543(b), for a waiver of CAA preemption for these state standards. 74 Fed. Reg. 32,744 (July 8, 2009) [JA XX].[4]

---

3 Hydrofluorocarbons are potent greenhouse gases that are used as a refrigerant in vehicle air conditioners. NHTSA had no authority to address them under EPCA. *See* 75 Fed. Reg. at 25,424-25 [JA XX-XX], 74 Fed. Reg. 49,454, 49,459/3 (Sept. 28, 2009) [JA XX].

4 Petitions for review of EPA's waiver decision were denied by this Court on standing and mootness grounds. *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011).

Thirteen States and the District of Columbia, comprising approximately 40 percent of the U.S. light-duty vehicle market, have adopted California's standards, as they are permitted to do by CAA section 177, 42 U.S.C. § 7507. 75 Fed. Reg. at 25,327 [JA XX].

In May 2009, California announced its commitment to take several actions in support of the National Program, including revising its program for model year 2012-2016 standards to provide that compliance with the EPA model year 2012-2016 greenhouse gas standards would be deemed compliance with California's corresponding greenhouse gas standards. *Id*. at 25,327-28 [JA XX-XX]. This "alternative compliance option" would allow automakers to meet the two Federal programs (EPA's greenhouse gas standards and NHTSA's fuel economy standards), and California's requirements as well, through a single national fleet of vehicles. California proceeded to revise its 2004 regulations in accordance with this commitment. Cal. Code Regs. Tit. 13, § 1961.1 [JA XX].

Without EPA's Vehicle Rule, California would not have offered this alternative compliance option. 75 Fed. Reg. at 25,402/1-2 [JA XX]; February 23, 2010 Letter, Docket No. EPA-HQ-OAR-2009-0472-11400 [JA XX]. Absent the alternative compliance option, each auto manufacturer would have been faced with the costly prospect of manufacturing at least two fleets of vehicles (and possibly

more) for domestic sale, one that met California's more stringent standards for sale in California and in each of the States that adopted California standards, and a national fleet that met the less stringent national CAFE standards. 75 Fed. Reg. at 25,326/2 [JA XX].[5]

E. Forthcoming EPA Section 202 Rulemakings Addressing Greenhouse Gas Emissions from New Motor Vehicles

Beyond the Vehicle Rule, EPA has been engaged in two additional Section 202(a)(1) rulemaking efforts addressing greenhouse gas emissions from new motor vehicles, consistent with its mandatory legal obligations having made the Endangerment Finding. In furtherance of the National Program, these rulemaking efforts have been conducted jointly with NHTSA's establishment of fuel economy standards.

First, on August 9, 2011, EPA and NHTSA signed final greenhouse gas emission and fuel economy standards for medium and heavy-duty vehicles for model years 2014 through 2018, and for new engines installed in those vehicles. [____] Fed. Reg. [____] [JA XX]. These medium and heavy-duty vehicles include the largest pickup trucks and vans, and all types of work trucks and buses. Second,

5 Among other differences between California and CAFE standards, California standards are not expressed as attribute-based, manufacturer-specific standards determined by a manufacturer's fleet of vehicles, and do not recognize credits for use of flexible fuel vehicles that are available under EPCA and the CAFE standards. Cal. Code Regs. Tit. 13, § 1961.1 [JA XX]; 75 Fed. Reg. at 25,546/3, 25,665-66 [JA XX, XX-XX].

EPA and NHTSA have announced their intent to conduct a joint rulemaking to establish greenhouse gas emissions and fuel economy standards for light-duty vehicles for model years 2017 through 2025. 75 Fed. Reg. 62,739 (Oct. 13, 2010) [JA XX]; 76 Fed. Reg. 48,754 (Aug. 9, 2011) [JA XX]. The agencies intend to propose greenhouse gas emissions reductions and fuel economy improvements that go well beyond what is achieved by the model year 2012-2016 standards challenged here.[6] In other words, the Vehicle Rule represents only EPA's first step in reducing motor vehicle greenhouse gas emissions. Thus, the cumulative greenhouse gas emission reductions that will follow from EPA's positive Section 202(a) endangerment finding will ultimately be far greater than the reductions achieved just by the present Vehicle Rule.

F. EPA Actions Concerning the Stationary Source PSD Program

Once a pollutant becomes subject to regulation under any provision of the CAA (including the Act's mobile source provisions), the Act's PSD requirements become automatically applicable to stationary sources' emissions of those pollutants as well. 42 U.S.C. §§ 7475(a)(4), 7479(1); 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002). Thus, promulgation of the Vehicle Rule indirectly triggered

6 EPA currently intends to propose standards that would be projected to achieve, on an average industry fleet-wide basis, greenhouse gas reductions that would be equivalent to 54.5 miles per gallon if all of the CO_2 emission reductions were achieved with fuel economy technology. 75 Fed. Reg. at 48,759/3 [JA XX].

regulation of greenhouse gas emissions by stationary sources under this separate statutory program, as it marked the first time that greenhouse gases became subject to regulation under the Act. *See* 75 Fed. Reg. 17,004, 17,019/3 [JA XX] (Apr. 2, 2010) ("the Timing Decision"). Likewise, once greenhouse gases became a pollutant subject to regulation under the Act, major sources of greenhouse gases became subject to CAA Title V. 42 U.S.C. §§ 7661(2), 7661a.

EPA has taken certain actions to address the general implementation of PSD and Title V requirements for greenhouse gases, once such regulation is triggered by operation of the statute. While these actions are independent of the Vehicle Rule itself, some understanding of these actions is useful for context.

First, in 2008, EPA issued an interpretive memorandum concerning *when* a pollutant is considered "subject to regulation" under the Act for purposes of determining when the PSD program applies to emissions of that pollutant.[7] Congress explicitly stated in the Act, and EPA regulations have accordingly long provided, that the PSD program and its provisions apply to emissions of "any air pollutant" that is subject to regulation under the Act. 42 U.S.C. §§ 7475(a), 7475(a)(4), 7479; 40 C.F.R. § 52.21(b)(1), (b)(2), (b)(50)(iv), (j)(2)-(3). In the

7 *See* Memorandum from Stephen L. Johnson, Administrator, EPA, dated December 18, 2008, entitled "EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program."

PSD Interpretive Memo, EPA explained that mere monitoring and reporting requirements under the Act were insufficient to make a pollutant "subject to regulation" and that a pollutant is not "regulated" within the meaning of the Act unless it is covered by an EPA regulation that requires *actual control* of emissions. The Agency ultimately concluded in a 2010 refinement of that interpretation, after reconsideration, that greenhouse gases will become "subject to regulation" under the Act for the first time when the limitations on greenhouse gas emissions adopted in the Vehicle Rule actually take effect on January 2, 2011. *See* Timing Decision, 75 Fed. Reg. 17,004 [JA XX]. Thus, pursuant to the Act and as explained in the Timing Decision, greenhouse gas emissions would be "subject to regulation" for purposes of PSD applicability on that date. 75 Fed. Reg. at 17,019/3 [JA XX].

EPA recognized that immediately implementing PSD (as well as Title V) permit requirements for all new or modified stationary sources emitting major amounts of greenhouse gases (at the statutory thresholds of 100 and 250 tons per year) would be administratively impracticable due to the enormous number of sources that emit more than the threshold volumes of greenhouse gases. Following consideration of extensive public comments, EPA thus promulgated the "Tailoring Rule" to establish an effective process by which permit requirements for greenhouse gases can be phased in over time. 75 Fed. Reg. 31,514 (June 3, 2010)

[JA XX]. Petitions for review challenging the Tailoring Rule and Timing Decision have been consolidated under No. 10-1073 and will be briefed separately but heard with this case.

Both the Tailoring Rule and the Timing Decision are palliative actions: they postpone regulatory burdens that would exist absent their promulgation. In the Tailoring Rule, EPA reduced the initial burdens on the regulated community that result from the statutorily-mandated application of PSD and Title V to greenhouse gases by administratively raising the thresholds at which these programs would otherwise apply to sources that emit greenhouse gases. In the Timing Decision, EPA interpreted the term "subject to regulation" conservatively, such that the PSD and Title V programs were not considered triggered by either longstanding reporting and monitoring requirements for greenhouse gases or immediately upon the promulgation of the Vehicle Rule; rather, EPA determined that greenhouse gases would not become "subject to regulation" until the date on which the first model year 2012 cars became subject to the standards in the Vehicle Rule – January 2, 2011.

STANDARD OF REVIEW

Challenged portions of a final rule under the CAA may not be set aside unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law" or are in excess of EPA's "statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9).

This standard presumes the validity of agency action, and a reviewing court is to uphold an agency action if it satisfies minimum standards of rationality. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court is not "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Judicial deference also extends to an agency's interpretation of a statute it administers. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). Under *Chevron*, if Congress has "directly spoken to the precise question at issue," that intent must be given effect. 467 U.S. at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Judicial review of certain CAA rules, including the one at issue, must be

premised "exclusively" on the administrative record underlying the rule. 42 U.S.C. § 7607(d)(7)(A).

SUMMARY OF ARGUMENT

EPA's greenhouse gas emission standards for light-duty vehicles fully comport with the requirements of Section 202 of the Clean Air Act and the Supreme Court's ruling in *Massachusetts*. These landmark standards will achieve significant greenhouse gas reductions from one of the largest domestic source categories for these pollutants. Atmospheric concentrations of greenhouse gases endanger public health and welfare by causing or contributing to climate change. EPA reasonably promulgated vehicle greenhouse gas emission standards in coordination with NHTSA's promulgation of fuel economy standards under EPCA to ensure consistent federal and state requirements for mobile sources relating to fuel economy and greenhouse gases.

Petitioners themselves are not subject to these standards and do not challenge any substantive aspect of them. Instead, they contend that EPA should have declined to promulgate *any* vehicle emission standards because separate statutory programs automatically impose permitting requirements on *stationary* sources once greenhouse gases are subject to regulation anywhere under the Act. This argument lacks merit and ignores that Section 202 unequivocally directs EPA

to set greenhouse gas vehicle emission standards following an endangerment finding.

EPA did consider, and appropriately rejected, Petitioners' suggestion that EPA conduct assessments, as part of the vehicle standard rulemaking, of the burdens on stationary sources associated with having to comply with separate statutory programs. As EPA explained, such analyses were not required by Section 202 and would not have provided EPA with any information relevant to the statutory criteria or applicable content of the vehicle emission standards that EPA had a nondiscretionary duty to promulgate. EPA further indicated that it would consider Petitioners' concerns related to burdens of complying with separate Clean Air Act programs in other administrative proceedings focused specifically on the implementation of those programs. EPA subsequently did just that in the Tailoring Rule.

Contrary to Petitioners' characterizations, EPA's vehicle standards will achieve significant and important reductions of greenhouse gas emissions. In any event, EPA did not have discretion to decline to promulgate any emission standards at all once it found endangerment. Likewise, EPA had no discretion to decline to promulgate standards based upon NHTSA's independent authority to set vehicle fuel economy standards under EPCA. Indeed, the Supreme Court made

this clear in *Massachusetts*.

Petitioners' brief also contains attacks on EPA's Endangerment Finding and EPA's separate actions implementing PSD program requirements. These challenges are not properly brought in this case. We address the substance of Petitioners' arguments with respect to these separate EPA actions in the appropriate cases, which have been procedurally coordinated with this one.

In short, Petitioners have identified no defect whatsoever in EPA's vehicle emission standards. These important and required standards should be upheld.

ARGUMENT

I. EPA's Vehicle Rule Comports With Congress' Direction.

CAA Section 202 establishes a two-step path governing regulation of emissions from new motor vehicles. 42 U.S.C. § 7521. In the first step, pursuant to Section 202(a)(1), EPA is to determine whether, in the Administrator's "judgment," emissions of "any air pollutant" from motor vehicles "cause or contribute" to "air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). In the second step, if the Administrator determines that such an endangerment to health or welfare exists, EPA is *required* to issue standards for such emissions, *id.*, taking into account the

cost and technological factors set forth separately in subsection 202(a)(2), 42 U.S.C. § 7521(a)(2).

Prior to promulgating the Vehicle Rule, EPA determined that greenhouse gases may "reasonably be anticipated both to endanger public health and to endanger public welfare," and that emissions of these greenhouse gases from new motor vehicles "contribute" to the air pollution that may be reasonably anticipated to endanger public health and welfare. 74 Fed. Reg. at 66,497-99, 66,523-45 [JA XX-XX, XX-XX].

Having made this positive Endangerment Finding, EPA had a nondiscretionary duty under Section 202(a) to promulgate standards for the vehicle emissions contributing to the endangerment. EPA's Vehicle Rule fulfills EPA's nondiscretionary duty to promulgate such standards with respect to model year 2012-2016 light-duty vehicles. These standards will provide significant cost-effective reductions in greenhouse gases, and automobile manufacturers will be able to meet these standards using already available technologies. 75 Fed. Reg. at 25,328, 25,535-36 [JA XX, XX-XX]. No automobile manufacturer has challenged the Vehicle Rule.

A. EPA Appropriately Promulgated Emission Standards That It Had a Nondiscretionary Duty to Promulgate.

Petitioners mount no challenge to any substantive aspect of the vehicle

emission standards EPA has promulgated. Instead, they contend that EPA should have declined to establish *any* emission standards for vehicles, because once greenhouse gas emissions from mobile sources are regulated under CAA Section 202, then stationary sources of greenhouse gases will automatically become subject to the Act's PSD and Title V permitting requirements by operation of statute. *See* Ind. Br. at 17.

Nothing in Section 202 of the Act, however, provides EPA with discretion to decline to set emission standards for mobile sources of air pollutants that EPA has found contribute to the air pollution that endangers public health and welfare, based on consequences for stationary sources under separate statutory programs also intended to protect public health and welfare. Congress' direction in Section 202 is unambiguous. Congress specified that EPA "*shall*" promulgate emission standards once it makes an Endangerment Finding. The word "shall" is a command that admits of no discretion. *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Put simply, once a positive endangerment finding is made, EPA then has a nondiscretionary obligation to promulgate emission standards.

To the extent there was any doubt that Section 202 means what it says, the Supreme Court specifically addressed the scope of Section 202 in *Massachusetts*

and confirmed the nondiscretionary nature of EPA's duty to promulgate emission standards following an endangerment finding: "If EPA makes a finding of endangerment, the [CAA] *requires* the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." 549 U.S. at 533 (emphasis added). In the Tailoring Rule case, State Petitioners themselves concede this point. *See* State Petitioners' Brief in Case Nos. 10-1073 et al. at 12-13 (quoting relevant passage in *Massachusetts* and conceding that "if EPA makes a finding of endangerment, the [CAA] *requires* the Agency to regulate emissions of the deleterious pollutant from new motor vehicles.") (emphasis added).

EPA did not "misunderstand" (Ind. Br. at 12) *Massachusetts* in promulgating emission standards that the Supreme Court confirmed EPA was "required" to promulgate. 549 U.S. at 533. Industry Petitioners emphasize that *Massachusetts* did leave open the possibility that EPA would be unable to make an endangerment finding for reasons grounded in the statute or based on scientific uncertainties. Ind. Br. at 13. But EPA has now made an endangerment finding for reasons grounded in the statute and the science. Having made its endangerment finding, EPA had no discretion to decline to promulgate emission standards.

In short, Section 202 unequivocally directs EPA to promulgate emissions standards following an endangerment finding. Petitioners' position that

promulgating Section 202 standards following an endangerment finding somehow "violates . . . statutory requirements" is nonsensical and stands Section 202 on its head. *See* Ind. Br. at 11.

B. CAA Section 202(a)(2) Does Not Require EPA to Assess Indirect Stationary Source Impacts Arising From the Automatic Implementation of Other Statutory Programs.

Petitioners contend that EPA should at least have assessed, prior to promulgating the Vehicle Rule, indirect burdens to stationary sources of air pollution or to permitting authorities that would arise in connection with the automatic application of separate PSD and Title V permitting requirements, once greenhouse gases became subject to regulation under the Act through promulgation of vehicle standards. State Br. at 15-18; Ind. Br. at 19. But nothing in the Act requires EPA to assess such costs as part of a Section 202 rulemaking.

Petitioners purport to find an obligation (s*ee* State Br. at 15-16) for EPA to assess indirect burdens on stationary sources in CAA section 202(a)(2), which provides in relevant part that vehicle emission standards shall take effect "after providing such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." As this Court has previously made clear, "the cost of compliance within such period" phrase in

section 202(a)(2), connected as it is with the requirement that EPA provide sufficient lead time to allow technological development, refers to the costs to *vehicle manufacturers* associated with implementing technology to meet vehicle standards within the period of compliance, and does not refer to indirect costs that might be incurred by other persons (such as stationary sources) as a result of required vehicle standards. *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1115-20 (D.C. Cir. 1979) ("*MEMA*").

In *MEMA*, associations representing automotive parts and services industries challenged EPA's decision under CAA Section 209, 42 U.S.C. § 7543, to waive federal preemption for California regulations limiting the amount of maintenance that a manufacturer can require of motor vehicle purchasers in the written instructions that accompany new motor vehicles sold in that State. The petitioners contended that EPA had a duty, arising in part out of CAA Section 202's requirement that EPA give appropriate consideration to the "cost of compliance," to consider petitioners' claims that California's regulations were anticompetitive because they were designed to reduce the business available to the automotive parts and services industry. This Court rejected petitioners' argument, explaining that "Section 202's cost of compliance concern, juxtaposed as it is with the requirement that the Administrator provide the lead time to allow technological

developments, refers to the economic costs of motor vehicle emission standards and accompanying enforcement procedures," and does not encompass indirect costs that might be incurred by the automotive parts and services industries as a result of such standards. 627 F.2d at 1118. The Court, citing pertinent legislative history, explained that:

> Congress wanted to avoid undue economic disruption to the *automotive manufacturing industry* and also sought to avoid doubling or tripling the cost of motor vehicles to purchasers. It therefore requires that [motor vehicle] emission regulations be technologically feasible within economic parameters. Therein lies the intent of the 'cost of compliance' requirement.

Id. (emphasis added). Thus, to the extent there was any doubt as to the proper scope of Section 202(a)(2), this Court's well-reasoned analysis of that subsection in *MEMA* removes it.

Indeed, the costs to stationary sources associated with PSD permitting requirements that are of concern to petitioners here are even *less* linked to the content of motor vehicle emission standards than were the indirect costs at issue in *MEMA*. There, the economic injury to the automotive parts and services industry at issue at least flowed from the content of the motor vehicle emission standards themselves. In contrast, Petitioners' alleged economic injury here does not turn *at all* on the content of the motor vehicle emission standards challenged.

Consistent with Section 202(a)(2), EPA *did* assess costs to vehicle manufacturers and the time necessary to permit the development and application of the requisite technology. 75 Fed. Reg. at 25,513-20 [JA XX]; Regulatory Impact Analysis ("RIA"), Chapters 1, 2, 4 and 6 [JA XX-XX, XX-XX]; Joint Technical Support Document ("TSD"), Chapter 3 [JA XX-XX]. Vehicle manufacturers have intervened in support of EPA's rule and have not contested this cost analysis.

C. EPA Addressed Petitioners' Comments Regarding Indirect Burdens to Stationary Sources.

Although Section 202(a)(2) does not direct EPA to consider the indirect burdens to stationary sources that would be triggered following promulgation of vehicle standards, EPA did respond to Petitioners' comments suggesting that EPA, within the vehicle rulemaking, conduct analyses of costs arising from implementation of the Act's PSD and Title V permitting programs once greenhouse gas emissions became subject to regulation. Response to Comments ("RTC") at 7-66 [JA XX]. As EPA explained, it appropriately declined to do so as part of the vehicle rulemaking because doing so would not have provided EPA with any relevant information related to the content of the required vehicle emission standards. *Id.* The indirect impacts on stationary sources that would ensue by operation of separate provisions of the statute simply bore no relevance to any of the issues EPA was directed by statute to consider in determining the content of the

required vehicle standards. *Id.*

EPA additionally explained that it intended to (and that it was appropriate to) address concerns about stationary source permitting requirements in separate administrative actions focused specifically on the implementation of the PSD program. RTC 7-66 [JA XX]; 75 Fed. Reg. at 25,402/1 [JA XX]. In fact, EPA did assess in the Tailoring Rule costs and burdens to both stationary sources and permitting authorities arising from the application of PSD and Title V programs to greenhouse gases. 75 Fed. Reg. at 31,533-41 [JA XX-XX], 31,595-602 [JA XX-XX]; Tailoring Rule Regulatory Impact Analysis [JA XX-XX].

Petitioners suggest that if EPA had conducted analyses of stationary source permitting costs as part of the vehicle rulemaking, as opposed to in a separate action focused on implementation of the PSD program, it could have used such analyses as an excuse for declining to comply with Congress' direction in Section 202 that EPA promulgate mobile source emission standards once it finds endangerment. Ind. Br. at 17, 19. But EPA had no such discretion. EPA instead had a clear nondiscretionary duty under Section 202 to promulgate vehicle emission standards in view of its Endangerment Determination. Moreover, the Supreme Court in *Massachusetts* had already directed EPA to comply with its obligations under Section 202 and rejected EPA's initial decision to decline to

promulgate standards on policy grounds such as those now advanced by Petitioners.

Petitioners' real complaint here, of course, is not with any aspect of EPA's Section 202 light-duty vehicle emission standards, but instead with the preconstruction permitting requirements that Congress itself imposed elsewhere in the Act on major stationary sources of pollution. *See* 42 U.S.C. § 7475(a). *Congress*, not EPA, elected to impose these obligations on stationary sources of pollutants to protect public health and welfare. Petitioners' dissatisfaction with statutory requirements may be genuine, but their dissatisfaction with the Act is not a basis for this Court to void Section 202 motor vehicle emission standards that have been properly promulgated by EPA.

While not material to resolution of Petitioners' argument, we note that Industry Petitioners mischaracterize EPA's Tailoring Rule in suggesting that EPA did not consider and address any stationary source permitting costs in that rulemaking. *See* State Br. at 11 (asserting that EPA "avoided considering stationary-source costs" in Tailoring Rule); Ind. Br. at 20 (asserting that EPA "refused to address" stationary source impacts in Tailoring Rule). EPA did evaluate and consider within the Tailoring Rule costs to both regulated sources and permitting authorities associated with obtaining and processing PSD and Title V

permits for greenhouse gas emissions. 75 Fed. Reg. at 31,533-41 [JA XX-XX], 31,595-602 [JA XX-XX]; Tailoring Rule RIA (JA XX-XX). EPA then tailored the applicability criteria for PSD and Title V permitting requirements, based in part on these cost analyses, to reduce the initial burdens to regulated sources and permitting authorities that otherwise would ensue immediately by operation of the statute.[8]

D. EPA Appropriately Promulgated Required Greenhouse Gas Standards in Conjunction With NHTSA's Fuel Economy Standards To Ensure a Consistent Set of Federal and State Standards.

EPA also considered and reasonably responded to comments in the vehicle rulemaking suggesting that EPA should indefinitely delay setting required greenhouse gas standards for new motor vehicles to avoid triggering any stationary source regulation under other provisions of the Act. To begin with, EPA noted that while it had some discretion over the *timing* of its regulations, its discretion even in that regard was not unlimited, and EPA had an ongoing duty to promulgate standards. RTC 7-67 [JA XX]. EPA pointed out that three years had

8 In the Tailoring Rule, EPA was unable to project the costs associated with implementing best available control technology (BACT) because of the difficulty of predicting the results of the BACT process as applied to new pollutants and classes of sources. 75 Fed. Reg. at 31,598 [JA XX]. BACT generally is decided for stationary sources by the permitting authority on a case-by-case basis taking into account, among other things, economic impacts and costs. 42 U.S.C. § 7479(3). Thus, BACT economic impacts and costs are considered prior to issuance of any permit.

already passed since the Supreme Court's decision in *Massachusetts*, so there had been considerable delay already.

EPA then explained that any additional delay in setting motor vehicle standards would thwart implementation of the carefully-crafted National Program for regulation of motor vehicles, resulting in substantial prejudice to vehicle manufacturers and consumers. 75 Fed. Reg. at 25,402 [JA XX]; RTC 7-67 to 7-68 [JA XX-XX]. In particular, California had indicated that it would support the National Program by accepting compliance with EPA's greenhouse gas standards as an alternative means of compliance with California's standards (adopted by 13 other States and the District of Columbia). However, California would not offer a compliance option based on federal CAFE standards in the absence of EPA's greenhouse gas standards. 75 Fed. Reg. at 25,402 [JA XX]; February 23, 2010 Letter, Docket No. EPA-HQ-OAR-2009-0472-11400 [JA XX]. Accordingly, if EPA had delayed setting national greenhouse gas emission standards until sometime after the CAFE standards were promulgated, vehicle manufacturers would then have been compelled to comply with three separate federal and state regulatory regimes: NHTSA's CAFE standards, California's greenhouse gas standards (in California and all States that have adopted California standards), and EPA's greenhouse gas standards (when later promulgated), as opposed to being

able to comply with one consistent set of federal greenhouse gas and fuel economy standards across the entire nation. For this reason, the automakers who are actually subject to EPA's greenhouse gas standards strongly *supported* EPA's decision to promulgate emission standards in conjunction with NHTSA's standards. *See*, *e.g.*, Comments of Alliance of Automobile Manufacturers, Docket No. EPA-HQ-OAR-2009-0472-6952.1 [JA XX], Comments of Association of International Automobile Manufacturers, Docket No. EPA-HQ-OAR-2009-0472-7123.1 [JA XX]. Automobile manufacturers commented that the absence of the National Program would "present a myriad of problems for the auto industry in terms of product planning, vehicle distribution, adverse economic impacts, and most importantly, adverse consequences for dealers and consumers." March 17, 2010 Letter, Docket No. EPA-HQ-OAR-2009-0472-11400 [JA XX].

EPA also noted in response to comments that additional delay in promulgating required greenhouse gas standards would result in a loss of some of the important environmental benefits associated with its standards.[9] EPA further explained that it intended to consider and address commenters' concerns about burdens associated with stationary source permitting in other EPA actions focused specifically on implementation of the PSD program. 75 Fed. Reg. at 25,402 [JA

9 EPA's standards achieve significant greenhouse gas reductions beyond those achieved by NHTSA fuel economy standards alone. *See* discussion, *infra*, at 58-61.

XX]. As discussed above, EPA did just that in the Tailoring Rule.

In short, EPA provided compelling reasons for electing to proceed to fulfill its nondiscretionary duty to promulgate Section 202 vehicle emission standards in conjunction with NHTSA's promulgation of fuel economy standards under EPCA. Regardless, EPA acted well within its discretion in promulgating emission standards that it was statutorily required to issue. An agency's compliance with a nondiscretionary statutory duty does not and cannot constitute an abuse of discretion.

E. EPA Complied with Applicable Procedural Requirements.

Industry Petitioners' scattershot and undeveloped arguments concerning compliance with the procedural requirements in various cited statutes and executive orders also lack merit. *See* Ind. Br. at 21-24. EPA fully complied with the requirements of all of the cited provisions, none of which imposes any duty upon EPA to assess stationary source compliance costs in the context of promulgating motor vehicle emission standards under Section 202. Furthermore, claims premised on most of the provisions cited are not even reviewable by this Court. We briefly address each of these provisions below.

CAA Section 317: CAA Section 317, 42 U.S.C. § 7617, directs EPA to prepare an economic impact assessment with respect to vehicle emission standards,

including assessment of a rule's compliance costs. Here, EPA prepared a Section 317 economic impact assessment, 75 Fed. Reg. at 25,509-38 [JA XX-XX], and RIA (assessing, among other things, costs of the vehicle program, impacts and assessments of standards both more and less stringent than those adopted, vehicle sales impacts, consumer lifetime savings on new vehicle purchases, energy use impacts, and small business impacts) [JA XX-XX]. *See also* RTC at 5-456 ("EPA believes that its RIA satisfies the requirements of section 317 of the Act, which calls for an analysis of the impacts of the requirements imposed by this rule, not indirect effects that flow from it") [JA XX].

In any event, EPA's compliance with Section 317 is not subject to judicial review. Section 317(e) provides:

> Nothing in this section shall be construed . . . to authorize or require any judicial review of any such standard or regulation; or any stay or injunction of the proposal, promulgation, or effectiveness of such standard or regulation on the basis of failure to comply with this section.

42 U.S.C. § 7617(e). Accordingly, by its plain terms Section 317 cannot be a basis for vacating the Vehicle Rule.

The Regulatory Flexibility Act ("RFA"): The RFA, 5 U.S.C. §§ 601-12, generally requires an agency to identify the potential economic impact of rules on small entities that will be subject to the rule's requirements, but a small entity

analysis is not required if the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. *Id.* §§ 603, 605(b). When considering whether a rule should be certified, the RFA requires an agency to look only at the "small entities to which the proposed rule will apply" and which will be "subject to the requirement" of the specific rule in question. *Id.*; *see also Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) ("Reading section 605 in light of section 603, we conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are *subject to the requirements of the rule*.") (emphasis added).

Here, EPA properly certified that the Vehicle Rule would not have a significant economic impact on a substantial number of small entities directly subject to the Rule. 75 Fed. Reg. at 25,540-41 [JA XX-XX]; RTC at 5-454 to 5-456 [JA XX-XX]. The Vehicle Rule regulates exclusively large motor vehicle manufacturers. Small vehicle manufacturers are specifically exempted from the standards. 75 Fed. Reg. at 25,540 [JA XX].

Contrary to Industry Petitioners' position (Ind. Br. at 23; State Br. at 16-17), this Court "has consistently rejected the contention that the RFA applies to small

businesses *indirectly* affected by the regulation of other entities." *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (emphasis added). Thus, EPA was not required to consider the indirect impact on stationary sources that would become subject to permitting requirements through the automatic application of separate statutory programs following promulgation of the Vehicle Rule. As this Court explained in *Cement Kiln*, even where a rule will "doubtless have economic impacts in many sectors of the economy," an agency is not required to assess the impact on small businesses not directly regulated by the rule because to do so would "convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected." 255 F.3d at 869. *See also Motor & Equip. Mfrs. Ass'n v. Nichols* ("*MEMA*"), 142 F.3d 449, 467 (D.C. Cir. 1998) (EPA only obliged to consider, in context of CAA regulation concerning on-board diagnostic devices, impact on small automobile manufacturers subject to rule); *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1043-45 (D.C. Cir. 1999) (finding EPA's conclusion that national ambient air quality standards do not impose any direct regulation upon small entities more persuasive than contrary interpretation of Small Business Administration).[10]

10 Although EPA properly certified that the Vehicle Rule would have no significant economic impact on a substantial number of small entities, EPA also recognized the concerns of small entities regarding the potential impacts of the statutory imposition of PSD requirements for greenhouse gas emissions. Thus, in

Unfunded Mandates Reform Act ("UMRA"): UMRA generally requires Federal agencies to assess the effects of their regulatory actions on state, local and tribal governments and the private sector. Under Section 202(a) of UMRA, 2 U.S.C. § 1532(a), EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to the private sector of $100 million or more. Here, EPA determined that the Vehicle Rule contains a Federal mandate that may result in expenditures of $100 million or more and prepared an UMRA cost-benefit analysis. 75 Fed. Reg. at 25,541 [JA XX], RIA, Chapters 5-8 [JA XX-XX]. In doing so, EPA properly focused its analysis on the direct impacts of the Vehicle Rule itself. RTC at 5-456 (JA XX) ("[C]ompliance with UMRA and Executive Order 13132 are properly focused on the impacts of this rule on States, not the impacts of indirect effects that flow from this rule.").

In any event, the Court lacks jurisdiction to consider any challenge to the Vehicle Rule based on the adequacy of the UMRA analysis. UMRA provides that the inadequacy of a required statement under UMRA "shall not be used as a basis

---

the Vehicle Rule, EPA noted that in the proposed Tailoring Rule EPA used the discretion afforded to it under section 609(c) of the RFA to consult with the Small Business Administration, with input from outreach to small entities, regarding the potential impacts of statutorily imposed PSD requirements on small entities, and placed a summary of that consultation and outreach in the Tailoring Rule docket. 75 Fed. Reg. 25,541; RTC at 5-455 (JA XX, XX).

for staying, enjoining, invalidating, or otherwise affecting [an] agency rule," 2 U.S.C. § 1571(a)(3). *See also Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 81, n.22 (D.C. Cir. 2000) (failure to prepare UMRA cost-benefit analysis may not be a basis for invalidating rule).

The Paperwork Reduction Act ("PRA"): Pursuant to the PRA, federal agencies may not collect information unless the Office of Management and Budget ("OMB") has approved the collection and issued a control number. 44 U.S.C. § 3507(a)(2), (3). Here, EPA submitted the information collection requirements in the Vehicle Rule for approval to OMB, and these requirements were assigned an OMB control number. Thus, EPA complied with PRA procedural requirements. 75 Fed. Reg. at 25,539-40 [JA XX-XX]. Furthermore, an agency's failure to comply with procedural requirements of the PRA does not render a rule invalid, but can be raised only as a defense to an action seeking to enforce information collection requirements. 44 U.S.C. § 3512; *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1405 (D.C. Cir. 1996). *See also Tozzi v. EPA*, 148 F. Supp. 2d 35, 43-48 (D.D.C. 2001) (holding court lacked subject matter jurisdiction to consider claim alleging EPA violation of procedural requirements of PRA).

Executive Order 12898: Executive Order 12898 directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental

justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their actions on minority populations and low-income populations. 59 Fed. Reg. 7629 (Feb. 11, 1994) [JA XX]. Here, EPA properly determined that the Vehicle Rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations. 75 Fed. Reg. at 25,542 [JA XX]. Moreover, compliance with Executive Order 12898 is not subject to judicial review. 59 Fed. Reg. 7629.

Executive Order 13211: Executive Order 13211 directs federal agencies to submit a statement of adverse effects for certain agency actions that are likely to have a significant adverse effect on energy supply, distribution, or use. 66 Fed. Reg. 28,355 (May 18, 2001) [JA XX]. Here, EPA assessed the energy effects of the vehicle greenhouse emission standards and concluded that they do not have any adverse energy effects as they result in significant fuel savings. 75 Fed. Reg. at 25,542 [JA XX]. Compliance with Executive Order 13211 is also not subject to judicial review. 66 Fed. Reg. at 28,356.

F. EPA's Standards Will Achieve Important Greenhouse Gas Emission Reductions, and EPA Lacked Discretion to Decline to Promulgate Standards Based Upon the Degree of Climate Change That Could Be Ameliorated or Based Upon NHTSA's Separate Authority Over Fuel Economy.

Industry Petitioners next contend that EPA should have declined to promulgate any greenhouse gas vehicle emission standards because, in Petitioners' view, such standards will not do *enough* to prevent global climate change. Ind. Br. at 14, 34-39. To begin with, Petitioners understate the significance of the emission reductions achieved by EPA's standards. In fact, as discussed below, EPA's light-duty vehicle emission standards will achieve very large and important emission reductions of greenhouse gases. Further, the degree to which the Vehicle Rule will, in and of itself, prevent or ameliorate climate change does not alter the scope of EPA's nondiscretionary duty under Section 202 to promulgate standards once endangerment is found. Section 202 *requires* EPA to promulgate emission standards for air pollutants that contribute to an endangerment, regardless of the degree to which the endangerment can be ameliorated through required standards.

1. EPA's Standards Will Materially Reduce Greenhouse Gas Emissions.

Contrary to Petitioners' characterizations, EPA's Vehicle Rule will achieve large and important reductions in greenhouse gases from one of the most significant source categories for these pollutants. Mobile sources emitted 31

percent of all greenhouse gas emissions in the United States in 2007 and have been the fastest-growing source of United States greenhouse gas emissions since 1990. RIA 5-1 [JA XX]. Light-duty vehicles are responsible for nearly 60 percent of all mobile source greenhouse gases. *Id.*

EPA projects that the Vehicle Rule standards will generate CO_2e reductions of 962 million metric tons over the lifetime of model year 2012-2016 vehicles. 75 Fed. Reg. at 25,490, Table III.F.1-2 [JA XX].[11] Assuming the standards continue through later model years, by 2050 the CO_2e reductions will constitute a 22.8 percent reduction from the levels of CO_2e estimated to be emitted from the U.S. transportation sector without the rule, a 6 percent reduction of CO_2e emitted from *all domestic activities* over the same period without the rule, and a 0.8 percent reduction of CO_2e emitted from the *entire world's activities* over the same period without the standards. 75 Fed. Reg. at 25,489, Table III F.1-1 [JA XX]. EPA further determined through modeling that the standards promulgated will themselves result in measurable reductions in global atmospheric CO_2

11 CO_2e is a metric that allows non-CO_2 greenhouse gases (such as hydrofluorocarbons) to be expressed as an equivalent mass (*i.e.*, corrected for relative global warming potency) of CO_2 emissions. 75 Fed. Reg. at 25,399 [JA XX].

concentrations, mean surface temperature, sea level rise, and ocean acidifying effects. 75 Fed. Reg. at 25,496, Table III.F.3-1 [JA XX].[12]

EPA also projected that the standards will result in significant reductions in emissions of many other air pollutants, due largely to refineries operating less due to reductions in gasoline demand as a result of the rule. 75 Fed. Reg. at 25,507/2 [JA XX]. For example, EPA estimated that by 2030, the Rule would result in reductions of 4,564 short tons of fine particulate matter, 27,443 short tons of sulfur dioxide, 115,542 short tons of volatile organic compounds, and 21,763 tons of nitrogen oxide. 75 Fed. Reg. at 25,497 (Table III.G-1) [JA XX].

EPA further determined that beyond reducing greenhouse gases and other air pollutants, the Vehicle Rule will provide significant benefits in the form of energy security. The Rule will significantly reduce petroleum imports, thus reducing financial and strategic risks caused by potential supply disruptions. 75 Fed. Reg. at 25,497, 25,531-34, Tables III.G-1, III.H.8-1-2 [JA XX, XX-XX].

---

12 Industry Petitioners refer to a NHTSA analysis of proposed CAFE standards. *See* Ind. Br. 38 (citing NHTSA preamble discussion at 74 Fed. Reg. 49,744). But the cited NHTSA analysis does not support Petitioners' suggestion that vehicle emission standards will have no climate change benefits with respect to natural resources. In the passage cited, NHTSA listed a host of adverse effects on natural resources related to climate change and concluded that there were "enormous resource values at stake" that could be affected by its proposed CAFE standards, as "small percentages of huge numbers can still yield substantial results." 74 Fed. Reg. 49,744/2 [JA XX].

EPA quantitatively assessed the costs and benefits of the vehicle emission standards, including increased vehicle costs, fuel savings, and the benefits associated with reduced carbon dioxide emissions. 75 Fed. Reg. at 25,535-40 [JA XX-XX], RIA Chapters 6-8 [JA XX-XX]. EPA concluded that over the lifetime of 2012-2016 model year vehicles, the standards' net present value (*i.e.*, benefits minus costs) is over $643 billion and maybe as much as $2 trillion. 75 Fed. Reg. at 25,535-37 & Table III.H.10-3 [JA XX-XX]. In short, the record reflects that the 2012-2016 light-duty model year vehicle emission standards will produce meaningful and substantial reductions in greenhouse gas emissions along with other air pollutants, will result in significant energy security benefits, and will be highly cost-effective.

EPA certainly recognizes that climate change is a global phenomenon and that no single greenhouse gas mitigation action, such as the Vehicle Rule, will, in and of itself, eliminate climate change threats. RTC 5-390 [JA XX]. However, the vehicle standards at issue make a significant contribution towards addressing the challenge by producing substantial reductions in greenhouse gas emissions from a particularly large and important source of emissions. As the Supreme Court recognized in *Massachusetts*, "Agencies, like legislatures, do not generally resolve massive problems" like climate change "in one fell regulatory swoop." 549 U.S. at

524. They "instead whittle away at them over time." *Id.* The Supreme Court additionally emphasized that "reducing domestic automobile [greenhouse gas] emissions is hardly a tentative step" towards addressing climate change, inasmuch as "the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere." *Id*. Thus, "[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations." *Id* at 525.

Furthermore, the substantial greenhouse gas reductions achieved by the Vehicle Rule will hardly constitute the sole effort by this Nation to address climate change. For example, as discussed above, EPA has been engaged in two additional CAA Section 202 rulemakings, one addressing heavy-duty vehicles and one addressing model year 2017-2025 light-duty vehicles, both of which can be expected to lead to *additional* climate change benefits beyond those achieved by the Vehicle Rule. 75 Fed. Reg. 74,152 (Nov. 30, 2010) [JA XX]; 75 Fed. Reg. 62,739 (Oct. 13, 2010) [JA XX] . EPA has also commenced a rulemaking under Section 111 of the Act, 42 U.S.C. § 7411, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants – another particularly important source of emissions. See 75 Fed. Reg. 82,392 (Dec. 30,

2010). Implementation of automatic PSD permitting requirements will achieve additional greenhouse gas reductions.

2. Section 202 Required EPA to Promulgate Greenhouse Gas Emission Standards Regardless of the Degree of the Hazard That May Be Ameliorated.

Regardless of the degree to which EPA's Vehicle Rule will, in and of itself, ameliorate global climate change, EPA had a clear obligation under Section 202 to promulgate emission standards following its positive endangerment finding. Section 202 does not spell out any minimum level of effectiveness for standards. Section 202 instead directs EPA to set the standards at a level that is reasonable in light of applicable compliance cost and technology considerations, 42 U.S.C. § 7521(a)(2).

Petitioners contend that, beyond a positive endangerment finding, EPA must additionally make a determination that the endangerment is capable of being "meaningfully mitigated" by particular standards prior to their promulgation. Ind. Br. 35. But this argument amounts to nothing more than an effort to rewrite the statute.

Further, Petitioners are not suggesting that, given the profound magnitude of climate change threats, EPA should have set vehicle standards at some even more stringent level so as to achieve even greater greenhouse gas reductions. Petitioners

instead are contending that EPA should have thrown up its hands and declined to promulgate *any* emission standards in view of the magnitude of the threat and the inability to address it comprehensively through this single rule. But this position is entirely at odds with the statutory text and with the fundamental purpose of the CAA to protect public health and welfare. *See* 42 U.S.C. § 7401(b)(1). Moreover, in *Massachusetts* the Supreme Court rejected the proposition that the effectiveness (or lack thereof) of motor vehicle standards or other control measures could justify a decision not to regulate emissions under Section 202. 549 U.S. at 533 (characterizing whether curtailing motor vehicle emissions would reflect an "inefficient, piecemeal approach to address the climate change issue" as having "nothing to do with whether greenhouse gas emissions contribute to climate change").

Unable to find any statutory text that supports their position that EPA could have declined to promulgate standards, Industry Petitioners resort to relying on a footnote in *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), and construing that footnote as establishing that any EPA Section 202 standards must "fruitfully" attack a found endangerment. Ind. Br. 34. *Ethyl* does not establish any such limitation.

Ethyl generally addressed the scope of EPA's separate authority under a former version of CAA Section 211(c)(1)(A), 42 U.S.C. § 7545(c)(1)(A), to regulate fuel additives. The version of CAA Section 211(c)(1)(A) at issue in that case provided that EPA "may" promulgate regulations that control fuel additives for use in motor vehicles if such fuel additives "will endanger the public health or welfare." 541 F.2d at 11. Manufacturers of lead additives and refiners of gasoline challenged EPA's endangerment determination with respect to lead additives under Section 211(c)(1)(A), and the Court upheld EPA's determination. In the portion of *Ethyl* specifically cited by Petitioners, this Court upheld EPA's decision to consider the cumulative impact of lead automobile emissions and other sources of environmental lead in finding that lead additives "will endanger" the public health or welfare. 541 F.3d at 31 & n.62. That discussion of EPA's consideration of cumulative impacts in making a Section 211 endangerment determination has no bearing on the emission standards at issue here. EPA's threshold Section 202 Endangerment Determination is not at issue in this case, and, as we discuss in our brief in the Endangerment Finding case (*see* EPA Brief pages 30-34, 85-87), the analysis in *Ethyl* supports EPA's Endangerment Determination.

Further, Petitioners overlook important textual differences between Section 202 and former Section 211 with respect to the scope of EPA's discretion to

promulgate standards *following* an endangerment determination. Unlike former Section 211, Section 202 creates a two-step regulatory approach to regulation of motor vehicle emissions, and provides that once EPA makes a determination that motor vehicle emissions may reasonably be anticipated to cause or contribute to pollution which may reasonably be anticipated to endanger public health or welfare, EPA "*shall*" promulgate emission standards (emphasis added). Former Section 211 did not contain a similar two-step regulatory approach and provided only that EPA "*may*" regulate fuel additives that "*will* endanger" public health and welfare (emphasis added). Accordingly, EPA had some discretion under the version of Section 211 addressed in *Ethyl* to decline to regulate fuel additives notwithstanding even a definitively positive endangerment determination. EPA has no such discretion under Section 202.

Industry Petitioners' citation (Ind. Br. at 34) to *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983), is likewise unavailing. In *Small Refiner*, this Court upheld an EPA regulation setting Section 211 lead-content limits for leaded gasoline produced by small refiners. In so doing, this Court addressed the level of justification required to set one numerical standard level as opposed to another. This Court noted that EPA's choice of a particular numerical level is entitled to deference and should be upheld so long as it is

"within a zone of reasonableness." 705 F.2d at 525 (quotations omitted). Here, the particular emission standard level set by the Vehicle Rule falls within the zone of reasonableness and indeed is *uncontested* by anyone. Petitioners do not identify any different numerical standard level that they believe should have been set applying the applicable Section 202(a)(2) criteria. Indeed, they make clear that they believe NHTSA's fuel economy standards should be left in place, and those standards are premised on essentially the same technologies, cost-effectiveness, and compliance time frames as EPA's standards. Rather, Petitioners contend that EPA should have declined to promulgate any Section 202 greenhouse gas emission standards *at all* -- a position that cannot be reconciled with the statutory text or with the ultimate purpose of the statute to protect public health and welfare.[13]

3. EPA Cannot Decline to Promulgate Vehicle Emission Standards Based on NHTSA's Separate Authority to Set Fuel Economy Standards.

Petitioners' related argument – that EPA should have declined to regulate greenhouse gas emissions from motor vehicles in view of NHTSA's separate

13 The two cases cited by Industry Petitioners at page 38 of their brief addressing EPA's implementation of the interstate pollutant transport provisions of CAA Title I are readily distinguishable. Those cases addressed different language in CAA Section 110 relating to transboundary air pollution and upheld EPA determinations concerning whether transboundary pollution at issue in those cases would "prevent attainment or maintenance of any . . . national ambient air quality standard in [any other State]." *See Connecticut v. EPA*, 696 F.2d 147, 156, 163-65 (2d Cir. 1982).

statutory authority under EPCA to set fuel economy standards – similarly is profoundly flawed. Ind. Br. at 33, 35-36; State Br. at 17. Indeed, this position has already been specifically considered and rejected by the Supreme Court in *Massachusetts*. EPA contended in *Massachusetts*, just as Petitioners now contend, that the Agency could properly decline to promulgate any greenhouse gas regulation under Section 202 in view of NHTSA's separate authority to adopt fuel economy standards under EPCA. The Supreme Court considered and squarely rejected this position, explaining:

> [T]hat [NHTSA] sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare," 42 U.S.C. § 7521(a)(1), a statutory obligation *wholly independent* of [NHTSA's] mandate to promote energy efficiency . . . . The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

549 U.S. at 532 (emphasis added).

Thus, the Supreme Court has already considered the fact that EPA's authority to regulate mobile sources under CAA Section 202 overlaps with NHTSA's authority to regulate fuel economy under EPCA, and it has made clear that notwithstanding this overlap, EPA has a "wholly independent" obligation to promulgate vehicle emission standards for greenhouse gases if such emissions

cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Tellingly, Industry Petitioners do not even acknowledge, much less purport to distinguish, this controlling portion of the Supreme Court's decision in *Massachusetts*.

Although not material to the disposition of Petitioners' argument, EPA explained the benefits achieved by issuing greenhouse gas emission standards together with NHTSA CAFE standards. First, in the absence of EPA's greenhouse gas standards, California would not have offered the alternative compliance option to automakers, so the substantial benefits of harmonized federal and state standards would have been lost. *See* discussion, *supra*, at 38-40. In addition, EPA's Vehicle Rule will achieve significant greenhouse gas reductions *beyond* the reductions that would have been achieved solely through the CAFE standards. 75 Fed. Reg. at 25,402, 25,490, Table III.F.1-2, 25,636, Table IV.G.1-4 [JA XX, XX, XX].

Industry Petitioners ignore important differences between EPA's greenhouse gas standards and NHTSA's CAFE standards arising from the differences in the two agencies' respective authorities under the CAA and EPCA. One important difference is that EPA's greenhouse gas standards encompass reductions in greenhouse gases that can be achieved by improved fuel efficiency through air-conditioning system improvements and reductions in greenhouse gas emissions

attributable to air conditioning leakage. The 2012-2016 CAFE standards do not address these effects of vehicle air conditioners. 75 Fed. Reg. at 25,327/2 [JA XX]. EPA's standards under section 202(a) also control emissions of the potent greenhouse gases methane and nitrous oxide, comprising (along with hydrofluorocarbons) approximately five to eight percent of vehicle greenhouse gas emissions that are not CO_2, which NHTSA had no statutory authority to address under EPCA since they are not directly related to fuel economy. 74 Fed. Reg. at 49,458-59 [JA XX].

Another important difference is that various compliance flexibilities permitted by the CAA (among them certain credit generating and trading mechanisms) afforded EPA the opportunity to promulgate more stringent standards with lower overall compliance costs than would have been possible under EPCA alone. 75 Fed. Reg. at 25,339 and 25,331, n.24 [JA XX]; 74 Fed. Reg. at 49,465 [JA XX]. *See also* 49 U.S.C. § 32902(h), 49 U.S.C. § 32903(g) (NHTSA may allow averaging, banking and trading flexibilities but there are statutory limits on a manufacturer's ability to transfer credits between car and truck fleets, and NHTSA is prohibited from considering such averaging, banking and trading flexibilities when setting the standard). The CAA also allows EPA to consider and incentivize the most advanced technologies in setting future vehicle standards, such as electric

vehicles. By contrast, NHTSA is statutorily prohibited from considering the fuel economy benefits of electric vehicles and other dedicated alternative fuel vehicles when setting CAFE standards. 49 U.S.C. § 32902(h)(1).

Also significant is the fact that manufacturers may opt to pay a civil penalty in lieu of actually meeting CAFE standards, but they cannot pay a fine to avoid complying with EPA's greenhouse gas emission standards. 75 Fed. Reg. at 25,331, n.24; 25,342 [JA XX]. Some manufacturers have traditionally paid CAFE penalties instead of complying with the CAFE standards. 75 Fed. Reg. at 25,414/3; 25,666/2-3 [JA XX, XX].

The upshot of all the differences in the two programs is that EPA's vehicle greenhouse gas emission standards are projected to result in 47 percent greater greenhouse gas reductions over the lives of model year 2012-2016 vehicles than projected under the CAFE standards alone. Specifically, EPA's standards are projected to avoid the emission of 962 million metric tons of carbon dioxide over the lives of model year 2012-2016 vehicles, whereas CAFE standards are projected to avoid the emission of 655 million metric tons. 75 Fed. Reg. at 25,490, Table III.F.1-2 [JA XX]; 75 Fed. Reg. at 25,636, Table IV.G.1-4 [JA XX]. If the greenhouse gas standards were to be achieved by manufacturers through fuel efficiency improvements alone, then they would result in an average fuel

efficiency of 35.5 miles per gallon for model year 2016, compared to the 32.7 miles per gallon estimated achieved levels for the CAFE program. 75 Fed. Reg. at 25,330-31, Table I.B. 2-2 [JA XX-XX].[14]

In any event, EPA had a nondiscretionary obligation to promulgate greenhouse gas standards for light-duty vehicles following its Endangerment Finding, and EPA was not free to "shirk" this obligation based on NHTSA's separate legal authority to establish fuel economy standards. *Massachusetts*, 549 U.S. at 532. Just as NHTSA could not refuse to promulgate EPCA fuel economy standards based on EPA's CAA authority to issue greenhouse gas standards, EPA could not refuse to promulgate greenhouse gas emission standards based on NHTSA's EPCA authority. *See* Ind. Br. at 36 (conceding that "NHTSA had no option . . . but to issue new fuel-economy standards" but then failing to concede the similarly nondiscretionary nature of EPA's obligations). EPA did, however, carefully coordinate with NHTSA in promulgating standards so that the agencies' two sets of standards are consistent, and so that automakers could meet both

14 EPA recognizes that manufacturers are likely to achieve some of the additional reductions in greenhouse gases by reducing leakage of hydrofluorocarbons from air conditioners, rather than by increasing the vehicles' fuel efficiency, but the EPA standards will nonetheless result in substantial fuel efficiency improvements compared to the CAFE program. EPA's program, over the lives of model- year 2012-2016 vehicles is estimated to save approximately 77.7 billion gallons of fuel, whereas CAFE standards are projected to save 61 billion gallons. 75 Fed. Reg. at 25,490 Table III.F.1-2; 75 Fed. Reg. at 25,636, Table IV.G.1-3.

NHTSA and EPA requirements with a single national vehicle fleet, greatly simplifying the industry's technology, investment and compliance strategies. 75 Fed. Reg. at 25,329 [JA XX].

II. Petitioners' Challenges to EPA's Endangerment Finding and Actions Concerning Stationary Sources Are Not Properly Raised in This Case.

The remainder of Petitioners' arguments are devoted to challenges to other EPA actions beyond EPA's Vehicle Rule. State Br. at 19-20, Ind. Br. at 25-32. These claims are not properly raised in this case, and must instead be pursued in the appropriate cases challenging the actions at issue.

A. Challenges to EPA's Endangerment Finding Are Not Properly Brought in This Case.

First, State Petitioners contend that EPA did not make a proper endangerment finding and that, therefore, the Vehicle Rule is invalid. State Br. at 19-20. Although we agree that EPA's Vehicle Rule is dependent upon the validity of EPA's separate Endangerment Finding, challenges to the substance of that finding are not properly brought in the instant case, which solely addresses the Vehicle Rule. For the reasons set forth in our brief in Case No. 09-1322, EPA's Endangerment Finding is premised on a sound and appropriate construction of the CAA and a wealth of scientific information compellingly supports that Finding.

B. Challenges to EPA's Actions Concerning the PSD Program Are Not Properly Brought in This Case.

Next, Industry Petitioners expend a full seven pages of their brief contesting EPA actions or interpretations concerning the statutory PSD program. Ind. Br. at 25-32. To the extent Petitioners are challenging whether PSD requirements should, in general, be automatically triggered by emissions of any pollutant subject to regulation under the Act, that challenge contests the requirements of the statute itself and EPA's long-standing regulations enacted pursuant to those statutory provisions; accordingly, these claims can only be raised, if at all, in the context of Petitioners' "grounds arising after" challenge to EPA's PSD regulations in No. 10-1167. To the extent Petitioners are challenging precisely *when* this automatic triggering effect occurred, that claim may only be raised in No. 10-1073, the consolidated challenge to the Timing Decision and Tailoring Rule.

C. The Administrative Records Associated With Distinct EPA Actions under the CAA Are Not Interchangeable

Finally, we note that Industry Petitioners repeatedly endeavor in their brief to have the Court rely upon extra-record materials from EPA's separate actions concerning implementation of the PSD program (*see* Ind. Br. at 5, 8, 15, 16, 18, 20, 23, 26, 31). Petitioners overlook that the CAA's judicial review provision limits the record for judicial review in this case "exclusively" to the Vehicle Rule's

administrative record. 42 U.S.C. § 7607(d)(7)(A). *Id*. Making matters worse, Industry Petitioners often do not clarify for the Court when they are citing to a different administrative action and record, thereby creating the misleading impression that EPA made determinations or characterizations in connection with EPA's promulgation of the Vehicle Rule that EPA did not, in fact, make. *See, e.g.*, Ind. Br. at 8, 15, 16, 18, 26 (citing to either the Tailoring Rule or Timing Decision but implying cited findings were made by EPA in connection with promulgation of the Vehicle Rule). Petitioners' reliance on extra-record materials is clearly impermissible under the applicable CAA judicial review provision, but even should any of these extra-record materials be considered, Petitioners have identified nothing therein that undermines the Vehicle Rule.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

/s/ Eric G. Hostetler
ERIC G. HOSTETLER
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 23986
Washington D.C. 20026-3986
Tel: (202) 305-2326
Fax: (202) 514-8865

Counsel for Respondent EPA

OF COUNSEL:

JOHN HANNON
STEVEN SILVERMAN
Office of General Counsel
U.S. Environmental Protection Agency
Ariel Rios Building,
1200 Pennsylvania Avenue, N.W.
Mail Code: 2344A
Washington, D.C. 20460

RESPONDENTS' CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION AND TYPEFACE REQUIREMENTS

Respondents United States Environmental Protection Agency ("EPA") and Lisa P. Jackson, Administrator of EPA, hereby represent that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the briefing format adopted by the Court for this case because it contains 13,870 words, as counted by Microsoft Word, excluding the signature block and the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

DATED: September 1, 2011

/s/ Eric Hostetler
Counsel for Respondents

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q:

Energy Policy and Conservation Act ("EPCA"):

STATE STATUTES

CODE OF FEDERAL REGULATIONS

LIBRARY REFERENCES

American Digest System

Environmental Law ⇐263.
Key Number System Topic No. 149E.

Encyclopedias

59 Am. Jur. 2d Parties § 40.
61B Am. Jur. 2d Pollution Control § 680.

Forms

9 Fed. Proc. Forms L Ed Environmental Protection §§ 29:86, 29:91, 29:92.

Texts and Treatises

Business and Commercial Litigation in Federal Courts § 80.8 (Robert L. Haig ed.) (West Group & ABA 1998).
2 Fed. Proc. L Ed Administrative Procedure § 2:33.
11 Fed. Proc. L Ed Environmental Protection §§ 32:384, 32:388, 32:628, 32:745, 32:764.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

Control requirements 1

1. Control requirements

Massachusetts regulation that applied to ventilation systems did not come within Clean Air Act amendments' savings clause that sought to forbid states from softening preamendment control requirements in areas that had not attained national air quality standard for pollutant, even assuming savings clause would prevent weakening of state implementation plan, absent showing that previous regulations applied to such systems. Sierra Club v. Larson, C.A.1 (Mass.) 1993, 2 F.3d 462.

City's commitment to implement mitigating circumstances or attainment of carbon monoxide quality standards, under revised state implementation plan, constituted "control requirement" under Clean Air Act which remained continuing obligation, even though attainment date was extended by amendment to Act itself. Coalition Against Columbus Center v. City of New York, C.A.2 (N.Y.) 1992, 967 F.2d 764.

SUBCHAPTER II—EMISSION STANDARDS FOR MOVING SOURCES

PART A—MOTOR VEHICLE EMISSION AND FUEL STANDARDS

CROSS REFERENCES

Inclusion of new urban buses as defined under this subchapter in fleet requirement program for purposes of use of replacement and alternative fuels, see 42 USCA § 13257.

§ 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this

section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A) In general

(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(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.

(B) Revised standards for heavy duty trucks

(i) On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

(July 14, 1955, c. 360, Title I, § 101, formerly § 1, as added Dec. 17, 1963, Pub.L. 88–206, § 1, 77 Stat. 392, and renumbered § 101 and amended Oct. 20, 1965, Pub.L. 89–272, Title I, § 101(2), (3), 79 Stat. 992; Nov. 21, 1967, Pub.L. 90–148, § 2, 81 Stat. 485; Nov. 15, 1990, Pub.L. 101–549, Title I, § 108(k), 104 Stat. 2468.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1963 Acts. House Report No. 508 and Conference Report No. 1003, see 1963 U.S. Code Cong. and Adm. News, p. 1260.

1965 Acts. House Report No. 899, see 1965 U.S. Code Cong. and Adm. News, p. 3608.

1967 Acts. House Report No. 728 and Conference Report No. 916, see 1967 U.S. Code Cong. and Adm. News, p. 1938.

1990 Acts. Senate Report No. 101–228, House Conference Report No. 101–952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Codifications

Section was formerly classified to section 1857 of this title.

Amendments

1990 Amendments. Subsec. (a)(3). Pub.L. 101–549, § 108(k)(1), inserted parenthetical reference to the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source.

Subsec. (b)(4). Pub.L. 101–549, § 108(k)(2), substituted "air pollution prevention and control" for "air pollution control".

Subsec. (c). Pub.L. 101–549, § 108(k)(3), added subsec. (c).

1967 Amendments. Subsec. (b)(1). Pub.L. 90–148 inserted "and enhance the quality of" following "to protect".

1965 Amendments. Subsec. (b). Pub.L. 89–272, substituted "this title" for "this Act," which for purposes of codification has been changed to "this subchapter".

Note 116

utility company to raise before a court its claims of economic and technological impossibility, Supreme Court could not resolve electric utility's contention that due process clause of the U.S.C.A. Const. Amend. 5 demanded that at some time it be afforded opportunity to raise before a court its claims of economic and technological impossibility. Union Elec. Co. v. E.P.A., U.S.1976, 96 S.Ct. 2518, 427 U.S. 246, 49 L.Ed.2d 474, rehearing denied 97 S.Ct. 189, 429 U.S. 873, 50 L.Ed.2d 154. Environmental Law ⇐ 683

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

Forms

9 Fed. Proc. Forms L Ed Environmental Protection §§ 29:86, 29:91, 29:92.

Law Review and Journal Commentaries

"Not in my state's Indian reservation"—A legislative fix to close an environmental law loophole. 47 Vand.L.Rev. 1863 (1994).

Redesignating tribal trust land under section 164(c) of the Clean Air Act. Ann Juliano, 35 Tulsa L.J. 37 (1999).

Treating tribes as states under federal statutes in the environmental arena: Where laws of nature and natural law collide. Richard A. Monette, 21 Vt.L.Rev. 111 (1996).

Texts and Treatises

Business and Commercial Litigation in Federal Courts § 80.8 (Robert L. Haig ed.) (West Group & ABA 1998).

2 Fed. Proc. L Ed Administrative Procedure § 2:33.

11 Fed. Proc. L Ed Environmental Protection §§ 32:281, 32:356, 32:384, 32:388, 32:628, 32:745, 32:764.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

1. Prerequisites

Environmental Protection Agency (EPA) reasonably interpreted Clean Air Act (CAA) to impose relatively low threshold in requiring that there be "satisfactory description and analysis" before EPA could approve redesignation of Indian land as non-Federal "Class I" area under program for prevention of significant deterioration (PSD), particularly in light of CAA's failure to assign any weight or priority to individual effects of redesignation to be analyzed by Tribe. Administrator, State of Ariz. v. U.S.E.P.A., C.A.9 1998, 151 F.3d 1205, opinion amended on denial of rehearing 170 F.3d 870. Environmental Law ⇐ 264

Under amendments to this chapter requiring that federal land manager consult with appropriate states before making a recommendation as to changes in air quality designations of federal lands, federal recommendation is not a prerequisite to redesignation by the states, and states can act independently of and inconsistent with federal land manager's recommendation. Kerr-McGee Chemical Corp. v. U.S. Dept. of Interior, C.A.9 (Cal.) 1983, 709 F.2d 597.

2. Persons entitled to maintain action

Recommendation by Department of Interior that state redesignate air quality designation of federal lands within state did not cause injury to corporation, which had pending a permit application to expand a chemical processing plant near the boundary of the federal lands, sufficient to give the corporation standing to challenge Department's recommendation, and corporation's claim was not ripe for decision. Kerr-McGee Chemical Corp. v. U.S. Dept. of Interior, C.A.9 (Cal.) 1983, 709 F.2d 597.

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1977 Acts. House Report No. 95–294 and House Conference Report No. 95–564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

House Report No. 95–338, see 1977 U.S. Code Cong. and Adm. News, p. 3648.

Amendments

1977 Amendments. Subsec. (b). Pub.L. 95–190 substituted "(in accordance with the definition of 'commenced' in section 7479(2) of this title)" for "in accordance with this definition".

Effective and Applicability Provisions

1977 Acts. Section effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub.L. 95–95, set out as a note under section 7401 of this title.

LIBRARY REFERENCES

American Digest System

Environmental Law ⇐264.
Key Number System Topic No. 149E.

Encyclopedias

59 Am. Jur. 2d Parties § 40.
61B Am. Jur. 2d Pollution Control §§ 258, 680.

Forms

9 Fed. Proc. Forms L Ed Environmental Protection §§ 29:86, 29:91, 29:92.

Texts and Treatises

Business and Commercial Litigation in Federal Courts § 80.8 (Robert L. Haig ed.) (West Group & ABA 1998).
2 Fed. Proc. L Ed Administrative Procedure § 2:33.
11 Fed. Proc. L Ed Environmental Protection §§ 32:281, 32:384, 32:388, 32:628, 32:745, 32:764.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

Prevention of significant deterioration 1

---

1. Prevention of significant deterioration

Interpretive rule by which Agency incorporated into its regulations the immediately effective PSD (prevention of significant deterioration) requirements identified in subsec. (b) of this section was not plainly erroneous or inconsistent with this section. Citizens to Save Spencer County v. U. S. Environmental Protection Agency, C.A.D.C.1979, 600 F.2d 844, 195 U.S.App.D.C. 30. Environmental Law ⇐ 254

§ 7479. Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal

cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and tech-

niques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

(July 14, 1955, c. 360, Title I, § 169, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 127(a), 91 Stat. 740, and amended Nov. 16, 1977, Pub.L. 95–190, § 14(a)(54), 91 Stat. 1402; Nov. 15, 1990, Pub.L. 101–549, Title III, § 305(b), Title IV, § 403(d), 104 Stat. 2583, 2631.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1977 Acts. House Report No. 95–294 and House Conference Report No. 95–564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

House Report No. 95–338, see 1977 U.S. Code Cong. and Adm. News, p. 3648.

1990 Acts. Senate Report No. 101–228, House Conference Report No. 101–952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Amendments

1990 Amendments. Par. (1). Pub.L. 101–549, § 305(b), struck out "two hundred and" after "municipal incinerators capable of charging more than".

Par. (3). Pub.L. 101–549, § 403(d), directed the insertion of ", clean fuels," after "including fuel cleaning,", which was executed by making the insertion after "including fuel cleaning" to reflect the probable intent of Congress, and inserted at end "Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Clean Air Act Amendments of 1990."

Limitations on Congressional power to establish interstate mechanisms of governance: The unconstitutionality of the ozone transport region created under section 184 of the Clean Air Act. 11 J.L. & Pol. 381 (1995).

The application and adequacy of the Clean Air Act in addressing interstate ozone transport. Karl James Simon, 5 Envtl. Law. 129 (1998).

Texts and Treatises

2 Fed. Proc. L Ed Administrative Procedure § 2:33.

11 Fed. Proc. L Ed Environmental Protection §§ 32:244, 32:250, 32:369, 32:384, 32:388, 32:626 to 32:628, 32:745, 32:764.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

Generally 1

---

1. Generally

Clean Air Act (CAA) did not require Environmental Protection Agency (EPA) to establish transport commission before calling for revision of upwind states' implementation plans (SIPs) to reduce transported nitrogen oxide (NO_x) in order to mitigate downwind states' nonattainment of ozone levels; although CAA required EPA to establish transport commission if it exercised its discretion to create interstate air pollution transport region, CAA did not require EPA to establish commission if EPA chose not to create transport region. Michigan v. U.S. E.P.A., C.A.D.C.2000, 213 F.3d 663, 341 U.S.App.D.C. 306. Environmental Law ⇦ 290

§ 7507. New motor vehicle emission standards in nonattainment areas

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".

(July 14, 1955, c. 360, Title I, § 177, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 129(b), 91 Stat. 750, and amended Nov. 15, 1990, Pub.L. 101–549, Title II, § 232, 104 Stat. 2529.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1977 Acts. House Report No. 95–294 and House Conference Report No. 95–564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

1990 Acts. Senate Report No. 101–228, House Conference Report No. 101–952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Amendments

1990 Amendments. Pub.L. 101–549, § 232, added provisions prohibiting States from limiting or prohibiting the sale or manufacture of new vehicles or engines that have been certified in California as having met California standards and from taking any actions where the effect of those actions would be to create a "third vehicle".

Effective and Applicability Provisions

1990 Acts. Amendment by Pub.L. 101–549 effective Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101–549, set out as a note under section 7401 of this title.

1977 Acts. Section effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub.L. 95–95, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101–549, except as otherwise provided for, see section 711(a) of Pub.L. 101–549, set out as a note under section 7401 of this title.

LIBRARY REFERENCES

Administrative Law

Implementation plans, requirements, see 40 CFR § 51.40 et seq.

American Digest System

Environmental Law ⇐273.
Key Number System Topic No. 149E.

Encyclopedias

59 Am. Jur. 2d Parties § 40.
61B Am. Jur. 2d Pollution Control §§ 186, 205, 569, 680.

Forms

9 Fed. Proc. Forms L Ed Environmental Protection §§ 29:86, 29:91, 29:92.

Law Review and Journal Commentaries

Federal environmental citizen provisions: Obstacles and incentives on the road to environmental justice. Eileen Gauna, 22 Ecology L.Q. 1 (1995).

Texts and Treatises

Business and Commercial Litigation in Federal Courts § 80.8 (Robert L. Haig ed.) (West Group & ABA 1998).
2 Fed. Proc. L Ed Administrative Procedure § 2:33.
11 Fed. Proc. L Ed Environmental Protection §§ 32:250, 32:369, 32:384, 32:388, 32:628, 32:634, 32:745, 32:764.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

American Digest System
Environmental Law ⇦273, 295.
Records ⇦30, 59.
Key Number System Topic Nos. 149E, 326.

Corpus Juris Secundum
C.J.S. Records §§ 60, 62 to 63, 65, 93, 95, 106.

Encyclopedias
37A Am. Jur. 2d Freedom of Information Acts § 178.
59 Am. Jur. 2d Parties § 40.
61B Am. Jur. 2d Pollution Control §§ 260, 509, 549.

Forms
9 Fed. Proc. Forms L Ed Environmental Protection §§ 29:85, 29:86, 29:91,29:92, 29:162.

Texts and Treatises
Business and Commercial Litigation in Federal Courts § 80.8 (Robert L. Haig ed.) (West Group & ABA 1998).
2 Fed. Proc. L Ed Administrative Procedure § 2:33.
11 Fed. Proc. L Ed Environmental Protection §§ 32:283, 32:384, 32:388, 32:574, 32:614, 32:628, 32:764.
11 Fed. Proc. L Ed Environmental Protection § 38:147.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

1. **Availability to public**

Under requirement of this chapter that state air pollution implementation plan provide for periodic reports on nature and amount of stationary source emissions and for availability of such reports at reasonable times for public inspection, in all cases of conflict between demands of confidentiality and public disclosure, disclosure should prevail. Natural Resources Defense Council, Inc. v. U.S. E.P.A., C.A.2 (N.Y.) 1974, 494 F.2d 519. Records ⇦ 30

§ 7543. State standards

(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—

(B) to furnish the description of any analytical technique that can be used to detect and measure any additive in such fuel, the recommended range of concentration of such additive, and the recommended purpose-in-use of such additive, and such other information as is reasonable and necessary to determine the emissions resulting from the use of the fuel or additive contained in such fuel, the effect of such fuel or additive on the emission control performance of any vehicle, vehicle engine, nonroad engine or nonroad vehicle, or the extent to which such emissions affect the public health or welfare.

Tests under subparagraph (A) shall be conducted in conformity with test procedures and protocols established by the Administrator. The result of such tests shall not be considered confidential.

(3) Upon compliance with the provision of this subsection, including assurances that the Administrator will receive changes in the information required, the Administrator shall register such fuel or fuel additive.

(c) Offending fuels and fuel additives; control; prohibition

(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle (A) if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

(2)(A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 7521 of this title.

(B) No fuel or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (B) of paragraph (1) except after consideration of available scientific and economic data, including a cost benefit analysis comparing emission control devices or systems which are or will be in general use and require the proposed control

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term "interstate air pollution control agency" means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term "Federal land manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more

of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter..[1]

(l) The term "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term "primary standard attainment date" means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(o) The term "delayed compliance order" means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term "schedule and timetable of compliance" means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this chapter, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) Indian tribe.—The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [1] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),,[2] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(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,,[2] 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.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after

notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to [3] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(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.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the

rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

LIBRARY REFERENCES

American Digest System

Environmental Law ⇐254.
United States ⇐82(2).
Key Number System Topic Nos. 149E, 393.

Encyclopedias

59 Am. Jur. 2d Parties § 40.

Forms

9 Fed. Proc. Forms L Ed Environmental Protection §§ 29:86, 29:91, 29:92.

Texts and Treatises

Business and Commercial Litigation in Federal Courts § 80.8 (Robert L. Haig ed.) (West Group & ABA 1998).
2 Fed. Proc. L Ed Administrative Procedure § 2:33.
11 Fed. Proc. L Ed Environmental Protection §§ 32:384, 32:388, 32:628, 32:764.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 7617. Economic impact assessment

(a) Notice of proposed rulemaking; substantial revisions

This section applies to action of the Administrator in promulgating or revising—

(1) any new source standard of performance under section 7411 of this title,

(2) any regulation under section 7411(d) of this title,

(3) any regulation under part B of subchapter I of this chapter (relating to ozone and stratosphere protection),

(4) any regulation under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality),

(5) any regulation establishing emission standards under section 7521 of this title and any other regulation promulgated under that section,

(6) any regulation controlling or prohibiting any fuel or fuel additive under section 7545(c) of this title, and

(7) any aircraft emission standard under section 7571 of this title.

Nothing in this section shall apply to any standard or regulation described in paragraphs (1) through (7) of this subsection unless the notice of proposed rulemaking in connection with such standard or regulation is published in the Federal Register after the date ninety days after August 7, 1977. In the case of revisions of such standards or regulations, this section shall apply only to revisions which the Administrator determines to be substantial revisions.

(b) Preparation of assessment by Administrator

Before publication of notice of proposed rulemaking with respect to any standard or regulation to which this section applies, the Administrator shall prepare an economic impact assessment respecting such standard or regulation. Such assessment shall be included in the docket required under section 7607(d)(2) of this title and shall be available to the public as provided in section 7607(d)(4) of this title. Notice of proposed rulemaking shall include notice of such availability together with an explanation of the extent and manner in which the Administrator has considered the analysis contained in such economic impact assessment in proposing the action. The Administrator shall also provide such an explanation in his notice of promulgation of any regulation or standard referred to in subsection (a) of this section. Each such explanation shall be part of the statements of basis and purpose required under sections 7607(d)(3) and 7607(d)(6) of this title.

(c) Analysis

Subject to subsection (d) of this section, the assessment required under this section with respect to any standard or regulation shall contain an analysis of—

(1) the costs of compliance with any such standard or regulation, including extent to which the costs of compliance will vary depending on (A) the effective date of the standard or regulation, and (B) the development of less expensive, more efficient means or methods of compliance with the standard or regulation;

(2) the potential inflationary or recessionary effects of the standard or regulation;

(3) the effects on competition of the standard or regulation with respect to small business;

(4) the effects of the standard or regulation on consumer costs; and

(5) the effects of the standard or regulation on energy use.

Nothing in this section shall be construed to provide that the analysis of the factors specified in this subsection affects or alters the factors which the Administrator is required to consider in taking any action referred to in subsection (a) of this section.

(d) Extensiveness of assessment

The assessment required under this section shall be as extensive as practicable, in the judgment of the Administrator taking into account the time and resources available to the Environmental Protection Agency and other duties and authorities which the Administrator is required to carry out under this chapter.

(e) Limitations on construction of section

Nothing in this section shall be construed—

(1) to alter the basis on which a standard or regulation is promulgated under this chapter;

(2) to preclude the Administrator from carrying out his responsibility under this chapter to protect public health and welfare; or

(3) to authorize or require any judicial review of any such standard or regulation, or any stay or injunction of the proposal, promulgation, or effectiveness of such standard or regulation on the basis of failure to comply with this section.

(f) Citizen suits

The requirements imposed on the Administrator under this section shall be treated as nondiscretionary duties for purposes of section 7604(a)(2) of this title, relating to citizen suits. The sole method for enforcement of the Administrator's duty under this section shall be by bringing a citizen suit under such section 7604(a)(2) for a court order to compel the Administrator to perform such duty. Violation of any such order shall subject the Administrator to penalties for contempt of court.

(g) Costs

In the case of any provision of this chapter in which costs are expressly required to be taken into account, the adequacy or inadequacy of any assessment required under this section may be taken into consideration, but shall not be treated for purposes of judicial review of any such provision as conclusive with respect to compliance or noncompliance with the requirement of such provision to take cost into account.

(July 14, 1955, c. 360, Title III, § 317, as added Aug. 7, 1977, Pub.L. 95–95, Title III, § 307, 91 Stat. 778, and amended Nov. 9, 1978, Pub.L. 95–623, § 13(d), 92 Stat. 3458.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1977 Acts. House Report No. 95–294 and House Conference Report No. 95–564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

1978 Acts. Senate Report No. 95–839 and House Conference Report No. 95–1783, see 1978 U.S. Code Cong. and Adm. News, p. 9088.

References in Text

Part B of subchapter I of this chapter, referred to in subsec. (a)(3), was repealed by Pub.L. 101–549, Title VI, § 601, Nov. 15, 1990, 104 Stat. 2648. See subchapter VI (section 7671 et seq.) of this chapter.

Codifications

Another section 317 of Act July 14, 1955, is set out as a Short Title of 1955 Acts note under section 7401 of this title.

Amendments

1978 Amendments. Subsec. (a)(1). Pub.L. 95–623 substituted section "7411" for "7411(b)".

mentation plan, emission standard, emission limitation, or emission prohibition.

(4) Permitting authority

The term "permitting authority" means the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter.

(July 14, 1955, c. 360, Title V, § 501, as added Nov. 15, 1990, Pub.L. 101–549, Title V, § 501, 104 Stat. 2635.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. Senate Report No. 101–228, House Conference Report No. 101–952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Effective and Applicability Provisions

1990 Acts. Section effective Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101–549, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101–549, except as otherwise provided for, see section 711(a) of Pub.L. 101–549, set out as a note under section 7401 of this title.

LIBRARY REFERENCES

American Digest System

Environmental Law ⇐265.
Key Number System Topic No. 149E.

Encyclopedias

61B Am. Jur. 2d Pollution Control §§ 232, 252, 262, 271, 276, 288, 290, 291, 321, 497, 558.

Law Review and Journal Commentaries

A Guide to Air Quality Operating Permits. Mary A. Throne, 31 Land & Water L.Rev. 713 (1996).

Operational flexibility under the Clean Air Act Title V operating permits. John Cabell Acree, III, 3 Environmental Lawyer 37 (1996).

Pressure or compulsion? Federal highway fund sanctions of the Clean Air Act Amendments of 1990. 29 Rutgers L.J. 855 (1995).

Texts and Treatises

2 Fed. Proc. L Ed Administrative Procedure § 2:33.

11 Fed. Proc. L Ed Environmental Protection §§ 32:255, 32:275, 32:285, 32:294, 32:299, 32:311, 32:313, 32:314, 32:344, 32:562, 32:623.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 7661a. Permit programs

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to

violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV–A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts [1] C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

(b) Regulations

The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:

(1) Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of applications.

(2) Monitoring and reporting requirements.

(3)(A) A requirement under State or local law or interstate compact that the owner or operator of all sources subject to the requirement to obtain a permit under this subchapter pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this subchapter, including section 7661f of this title, including the reasonable costs of—

(i) reviewing and acting upon any application for such a permit,

(ii) if the owner or operator receives a permit for such source, whether before or after November 15, 1990, implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

(iii) emissions and ambient monitoring,

(iv) preparing generally applicable regulations, or guidance,

(v) modeling, analyses, and demonstrations, and

(vi) preparing inventories and tracking emissions.

(B) The total amount of fees collected by the permitting authority shall conform to the following requirements:

(i) The Administrator shall not approve a program as meeting the requirements of this paragraph unless the State demonstrates that, except as otherwise provided in subparagraphs (ii) through (v) of this subparagraph, the program will result in the collection, in the aggregate, from all sources subject to subparagraph (A), of an amount not less than $25 per ton of each regulated pollutant, or such other amount as the Administrator may determine adequately reflects the reasonable costs of the permit program.

(ii) As used in this subparagraph, the term "regulated pollutant" shall mean (I) a volatile organic compound; (II) each pollutant regulated under section 7411 or 7412 of this title; and (III) each pollutant for which a national primary ambient air quality standard has been promulgated (except that carbon monoxide shall be excluded from this reference).

(iii) In determining the amount under clause (i), the permitting authority is not required to include any amount of regulated pollutant emitted by any source in excess of 4,000 tons per year of that regulated pollutant.

(iv) The requirements of clause (i) shall not apply if the permitting authority demonstrates that collecting an amount less than the amount specified under clause (i) will meet the requirements of subparagraph (A).

(v) The fee calculated under clause (i) shall be increased (consistent with the need to cover the reasonable costs authorized by subparagraph (A)) in each year beginning after 1990, by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989. For purposes of this clause—

(I) the Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12–month period ending on August 31 of each calendar year, and

(II) the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1989 shall be used.

(C)(i) If the Administrator determines, under subsection (d) of this section, that the fee provisions of the operating permit program do not meet the requirements of this paragraph, or if the Administrator makes a determination, under subsection (i) of this section, that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under this subchapter, collect reasonable fees from the sources identified under subparagraph (A). Such fees shall be designed solely to cover the Administrator's costs of administering the provisions of the permit program promulgated by the Administrator.

(ii) Any source that fails to pay fees lawfully imposed by the Administrator under this subparagraph shall pay a penalty of 50 percent of the fee amount, plus interest on the fee amount computed in accordance with section 6621(a)(2) of Title 26 (relating to computation of interest on underpayment of Federal taxes).

(iii) Any fees, penalties, and interest collected under this subparagraph shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the Agency's activities for which the fees were collected. Any fee required to be collected by a State, local, or interstate agency under this subsection shall be utilized solely to cover all reasonable (direct and indirect) costs required to support the permit program as set forth in subparagraph (A).

(4) Requirements for adequate personnel and funding to administer the program.

(5) A requirement that the permitting authority have adequate authority to:

(A) issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter;

(B) issue permits for a fixed term, not to exceed 5 years;

(C) assure that upon issuance or renewal permits incorporate emission limitations and other requirements in an applicable implementation plan;

(D) terminate, modify, or revoke and reissue permits for cause;

(E) enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties; and

(F) assure that no permit will be issued if the Administrator objects to its issuance in a timely manner under this subchapter.

(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

(7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in section 7661b of this title or, as appropriate, subchapter IV–A of this chapter) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

(8) Authority, and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title.

(9) A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this chapter after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revi-

sion shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this subchapter regarding renewals.

(10) Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions:[2] *Provided*, That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.

(c) Single permit

A single permit may be issued for a facility with multiple sources.

(d) Submission and approval

(1) Not later than 3 years after November 15, 1990, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this subchapter. In addition, the Governor shall submit a legal opinion from the attorney general (or the attorney for those State air pollution control agencies that have independent legal counsel), or from the chief legal officer of an interstate agency, that the laws of the State, locality, or the interstate compact provide adequate authority to carry out the program. Not later than 1 year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part. The Administrator may approve a program to the extent that the program meets the requirements of this chapter, including the regulations issued under subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval. The Governor shall revise and resubmit the program for review under this section within 180 days after receiving notification.

(2)(A) If the Governor does not submit a program as required under paragraph (1) or if the Administrator disapproves a program submitted by the Governor under paragraph (1), in whole or in part, the Administrator may, prior to the expiration of the 18–month period referred to in subparagraph (B), in the Administrator's discre-

tion, apply any of the sanctions specified in section 7509(b) of this title.

(B) If the Governor does not submit a program as required under paragraph (1), or if the Administrator disapproves any such program submitted by the Governor under paragraph (1), in whole or in part, 18 months after the date required for such submittal or the date of such disapproval, as the case may be, the Administrator shall apply sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(C) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this paragraph in any area unless the failure to submit or the disapproval referred to in subparagraph (A) or (B) relates to an air pollutant for which such area has been designated a nonattainment area (as defined in part D of subchapter I of this chapter).

(3) If a program meeting the requirements of this subchapter has not been approved in whole for any State, the Administrator shall, 2 years after the date required for submission of such a program under paragraph (1), promulgate, administer, and enforce a program under this subchapter for that State.

(e) Suspension

The Administrator shall suspend the issuance of permits promptly upon publication of notice of approval of a permit program under this section, but may, in such notice, retain jurisdiction over permits that have been federally issued, but for which the administrative or judicial review process is not complete. The Administrator shall continue to administer and enforce federally issued permits under this subchapter until they are replaced by a permit issued by a permitting program. Nothing in this subsection should be construed to limit the Administrator's ability to enforce permits issued by a State.

(f) Prohibition

No partial permit program shall be approved unless, at a minimum, it applies, and ensures compliance with, this subchapter and each of the following:

(1) All requirements established under subchapter IV–A of this chapter applicable to "affected sources".

(2) All requirements established under section 7412 of this title applicable to "major sources", "area sources," and "new sources".

(3) All requirements of subchapter I of this chapter (other than section 7412 of this title) applicable to sources required to have a permit under this subchapter.

Approval of a partial program shall not relieve the State of its obligation to submit a complete program, nor from the application of any sanctions under this chapter for failure to submit an approvable permit program.

(g) Interim approval

If a program (including a partial permit program) submitted under this subchapter substantially meets the requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed. For the period of any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

(h) Effective date

The effective date of a permit program, or partial or interim program, approved under this subchapter, shall be the effective date of approval by the Administrator. The effective date of a permit program, or partial permit program, promulgated by the Administrator shall be the date of promulgation.

(i) Administration and enforcement

(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, prior to the expiration of the 18–month period referred to in paragraph (2), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(2) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, 18 months after the date of the notice under paragraph (1), the Administrator shall apply the sanctions under section 7509(b) of this title in the same manner and subject to the same

deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(3) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this subsection in any area unless the failure to adequately enforce and administer the program relates to an air pollutant for which such area has been designated a nonattainment area.

(4) Whenever the Administrator has made a finding under paragraph (1) with respect to any State, unless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such finding, promulgate, administer, and enforce a program under this subchapter for that State. Nothing in this paragraph shall be construed to affect the validity of a program which has been approved under this subchapter or the authority of any permitting authority acting under such program until such time as such program is promulgated by the Administrator under this paragraph.

(July 14, 1955, c. 360, Title V, § 502, as added Nov. 15, 1990, Pub.L. 101–549, Title V, § 501, 104 Stat. 2635.)

[1] So in original. Probably should be "part".

[2] So in original. A closing parenthesis probably should precede the colon.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. Senate Report No. 101–228, House Conference Report No. 101–952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Effective and Applicability Provisions

1990 Acts. Section effective Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101–549, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101–549, except as otherwise provided for, see section 711(a) of Pub.L. 101–549, set out as a note under section 7401 of this title.

LIBRARY REFERENCES

American Digest System

Environmental Law ⇐265.
Key Number System Topic No. 149E.

Encyclopedias

61B Am. Jur. 2d Pollution Control §§ 232, 252, 262, 271, 276, 288, 290, 291, 321, 346, 497, 499, 501, 558.

Law Review and Journal Commentaries

Consultation provision of Section 7(a)(2) of the Endangered Species Act and its application to delegable federal programs. John W. Steiger, 21 Ecology L.Q. 243 (1994).

Effective and Applicability Provisions

1990 Acts. Section effective Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101–549, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101–549, except as otherwise provided for, see section 711(a) of Pub.L. 101–549, set out as a note under section 7401 of this title.

LIBRARY REFERENCES

American Digest System

Environmental Law ⇐279 to 281.
Key Number System Topic No. 149E.

Encyclopedias

61B Am. Jur. 2d Pollution Control §§ 365, 379.

Texts and Treatises

2 Fed. Proc. L Ed Administrative Procedure § 2:33.
11 Fed. Proc. L Ed Environmental Protection §§ 32:429, 32:443.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

SUBCHAPTER V—PERMITS

LAW REVIEW AND JOURNAL COMMENTARIES

Compliance under Title V: Yes, no, or I don't know? D.R. van der Vaart and John C. Evans, 21 Va.Envt'l. L.J. 1 (2002).

§ 7661. Definitions

As used in this subchapter—

(1) Affected source

The term "affected source" shall have the meaning given such term in subchapter IV–A of this chapter.

(2) Major source

The term "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

(A) A major source as defined in section 7412 of this title.

(B) A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.

(3) Schedule of compliance

The term "schedule of compliance" means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable imple-

§ 1532. Statements to accompany significant regulatory actions

(a) In general

Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement containing—

(1) an identification of the provision of Federal law under which the rule is being promulgated;

(2) a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as the effect of the Federal mandate on health, safety, and the natural environment and such an assessment shall include—

(A) an analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance (or otherwise paid for by the Federal Government); and

(B) the extent to which there are available Federal resources to carry out the intergovernmental mandate;

(3) estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of—

(A) the future compliance costs of the Federal mandate; and

(B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector;

(4) estimates by the agency of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material; and

(5)(A) a description of the extent of the agency's prior consultation with elected representatives (under section 1534 of this title) of the affected State, local, and tribal governments;

(B) a summary of the comments and concerns that were presented by State, local, or tribal governments either orally or in writing to the agency; and

(C) a summary of the agency's evaluation of those comments and concerns.

(b) Promulgation

In promulgating a general notice of proposed rulemaking or a final rule for which a statement under subsection (a) of this section is required, the agency shall include in the promulgation a summary of the information contained in the statement.

(c) Preparation in conjunction with other statement

Any agency may prepare any statement required under subsection (a) of this section in conjunction with or as a part of any other statement or analysis, provided that the statement or analysis satisfies the provisions of subsection (a) of this section.

(Pub.L. 104–4, Title II, § 202, Mar. 22, 1995, 109 Stat. 64.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1995 Acts. Senate Report Nos. 104–1 and 104–2, and House Conference Report No. 104–76, see 1995 U.S. Code Cong. and Adm. News, p. 4.

Effective and Applicability Provisions

1995 Acts. Section effective Mar. 22, 1995, see section 209 of Pub.L. 104–4, set out as a note under section 1531 of this title.

CROSS REFERENCES

Congressional review of agency rulemaking, see 5 USCA § 801.

LIBRARY REFERENCES

American Digest System

Administrative Law and Procedure ⇐392.1.
United States ⇐41, 79.
Key Number System Topic Nos. 15A, 393.

Research References

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 2:415, Introduction.
Federal Procedure, Lawyers Edition § 2:416, Application of Other Federal Law; Statute of Limitations and Record on Review.
Federal Procedure, Lawyers Edition § 2:417, Limitation of Remedies.
West's Federal Administrative Practice § 7588, Impact Analysis-Analysis of Other Types of Impact.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

SUBCHAPTER IV—JUDICIAL REVIEW

§ 1571. Judicial review

(a) Agency statements on significant regulatory actions

(1) In general

Compliance or noncompliance by any agency with the provisions of sections 1532 and 1533(a)(1) and (2) of this title shall be subject to judicial review only in accordance with this section.

(2) Limited review of agency compliance or noncompliance

(A) Agency compliance or noncompliance with the provisions of sections 1532 and 1533(a)(1) and (2) of this title shall be subject to judicial review only under section 706(1) of Title 5, and only as provided under subparagraph (B).

(B) If an agency fails to prepare the written statement (including the preparation of the estimates, analyses, statements, or descriptions) under section 1532 of this title or the written plan under section 1533(a)(1) and (2) of this title, a court may compel the agency to prepare such written statement.

(3) Review of agency rules

In any judicial review under any other Federal law of an agency rule for which a written statement or plan is required under sections 1532 and 1533(a)(1) and (2) of this title, the inadequacy or failure to prepare such statement (including the inadequacy or failure to prepare any estimate, analysis, statement or description) or written plan shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule.

(4) Certain information as part of record

Any information generated under sections 1532 and 1533(a)(1) and (2) of this title that is part of the rulemaking record for judicial review under the provisions of any other Federal law may be considered as part of the record for judicial review conducted under such other provisions of Federal law.

(5) Application of other Federal law

For any petition under paragraph (2) the provisions of such other Federal law shall control all other matters, such as exhaustion of administrative remedies, the time for and manner of seeking review and venue, except that if such other Federal law does not provide a limitation on the time for filing a petition for judicial review that is less than 180 days, such limitation shall be

direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

(Added Pub.L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1166.)

[1] So in original. The comma probably should be a semicolon.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1980 Acts. Senate Report No. 96–878, see 1980 U.S. Code Cong. and Adm. News, p. 2788.

Effective and Applicability Provisions 1980 Acts. Section effective Jan. 1, 1981, see section 4 of Pub.L. 96–354, set out as a note under section 601 of this title.

CODE OF FEDERAL REGULATIONS

Emergency management and assistance, see 44 CFR §§ 1.1 et seq., 18.100 et seq.
National defense, see 32 CFR § 519.51 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

Legislative oversight of administrative agencies in Minnesota. Neil W. Hamilton and J. David Prince, 1986, 12 Wm.Mitchell L.Rev. 223.

LIBRARY REFERENCES

American Digest System
Administrative Law and Procedure ⇐394.
Key Number System Topic No. 15A.

Research References

Encyclopedias
Am. Jur. 2d Job Discrimination § 1638, Regulatory Flexibility Act.

Treatises and Practice Aids
West's Federal Administrative Practice § 7537, Notice -- Regulatory Agenda.

WESTLAW ELECTRONIC RESEARCH

See Westlaw guide following the Explanation pages of this volume.

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public

comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain—

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(Added Pub.L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1166, and amended Pub.L. 104–121, Title II, § 241(a)(1), Mar. 29, 1996, 110 Stat. 864.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1980 Acts. Senate Report No. 96–878, see 1980 U.S. Code Cong. and Adm. News, p. 2788.

References in Text

The internal revenue laws of the United States, referred to in subsec. (a), are classified generally to Title 26, Internal Revenue Code.

Amendments

1996 Amendments. Subsec. (a). Pub.L. 104–121, § 241(a)(1), inserted "; or publishes a notice of proposed rulemaking for an interpretive rule involving the internal revenue laws of the United States" following "proposed rule", and added provisions relating to applicability of chapter to interpretive rules involving internal revenue laws.

Effective and Applicability Provisions

1996 Acts. Amendment by Pub.L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, except as otherwise provided, see section 245 of Pub.L. 104–121, set out as a note under section 601 of this title.

1980 Acts. Requirements of this section applicable only to rules for which a notice of proposed rulemaking is issued on or after Jan. 1, 1981, see section 4 of Pub.L. 96–354, set out as a note under section 601 of this title.

CROSS REFERENCES

Congressional review of agency rulemaking, see 5 USCA § 801.

Medicare and Medicaid initial regulatory impact analysis to set forth matters required under this section with respect to small rural hospitals, see 42 USCA § 1302.

CODE OF FEDERAL REGULATIONS

Emergency management and assistance, see 44 CFR §§ 1.1 et seq., 18.100 et seq.

Legislative use of cost/benefit analysis, see Koch, Administrative Law and Practice § 4.35.

National defense, see 32 CFR § 519.51 et seq.

LIBRARY REFERENCES

American Digest System

Administrative Law and Procedure ⇐392.1.
Key Number System Topic No. 15A.

Corpus Juris Secundum

CJS Public Administrative Law and Procedure § 187, Notice of Proposed Federal Rules -- Initial Regulatory Flexibility Analysis.

Research References

ALR Library

197 ALR, Fed. 519, Construction and Application of Regulatory Flexibility Act, 5 U.S.C.A. §§ 601 et seq.

Encyclopedias

Am. Jur. 2d Job Discrimination § 1638, Regulatory Flexibility Act.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 42:2333, Small Business Exemptions.

Note 5

torily required level within statutorily required time. A.M.L. Intern., Inc. v. Daley, D.Mass.2000, 107 F.Supp.2d 90. Fish ⇐ 12

Under law in effect on May 31, 1996, Secretary of Commerce adequately performed final regulatory flexibility analysis under Regulatory Flexibility Act (RFA) in promulgating amendment to northeast multispecies fishery management plan that placed tougher restrictions on fishing vessels than amendment designed to avoid further depletion of groundfish stocks, despite claims that Secretary failed to examine effect of amendment on small businesses, particularly trawlers and other small fishing boats, and that Secretary failed to identify and examine alternatives that would reduce burden on those entities. Associated Fisheries of Maine, Inc. v. Daley, D.Me.1997, 954 F.Supp. 383, affirmed 127 F.3d 104. Fish ⇐ 12

6. Review

Failure to raise issue during rulemaking of whether Federal Communications Commission's (FCC) final regulatory flexibility analysis (FRFA) for specialized mobile radio (SMR) licensing scheme failed to adequately describe steps taken to minimize economic impact on small licensees precluded judicial review of issue, even though failure was understandable in view of FCC's admission that its initial SMR orders were unclear on when incumbent licensees would be reimbursed for relocation costs. Small Business in Telecommunications v. F.C.C., C.A.D.C. 2001, 251 F.3d 1015, 346 U.S.App.D.C. 200. Telecommunications ⇐ 1055

7. Injunction

Likelihood of success on merits requirement was satisfied, in suit seeking preliminary injunction barring rule allowing for importation of Canadian beef and cattle, after importation was banned due to concern over spread of Bovine Spongiform Encephalopathy (Mad Cow Disease), by claim that Department of Agriculture violated Regulatory Flexibility Act (RFA) by not carefully considering impact of importation allowance on small ranchers and not evaluating alternatives that might protect ranchers, such as requiring country of origin labeling on meat and inspection. Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agriculture, Animal and Plant Health Inspection Service, D.Mont.2005, 359 F.Supp.2d 1058, affirmed 143 Fed.Appx. 751, 2005 WL 1719211, reversed 415 F.3d 1078, as amended. Injunction ⇐ 138.48

§ 605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

Notes of Decisions

1. Construction with other laws

Government's obligation, under Electronic Freedom of Information Act Amendments of 1996 and Paperwork Reduction Act, to make public documents available over Internet did not conflict with requirement that it do so by contracting function out to private sector if that would be more economical. Information Handling Services, Inc. v. Defense Automated Printing Services, C.A.D.C.2003, 338 F.3d 1024, 358 U.S.App.D.C. 37. Records ⇐ 30; Records ⇐ 62; Telecommunications ⇐ 1329

§ 3507. Public information collection activities; submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information—

(1) the agency has—

(A) conducted the review established under section 3506(c)(1);

(B) evaluated the public comments received under section 3506(c)(2);

(C) submitted to the Director the certification required under section 3506(c)(3), the proposed collection of information, copies of pertinent statutory authority, regulations, and other related materials as the Director may specify; and

(D) published a notice in the Federal Register—

(i) stating that the agency has made such submission; and

(ii) setting forth—

(I) a title for the collection of information;

(II) a summary of the collection of information;

(III) a brief description of the need for the information and the proposed use of the information;

(IV) a description of the likely respondents and proposed frequency of response to the collection of information;

(V) an estimate of the burden that shall result from the collection of information; and

(VI) notice that comments may be submitted to the agency and Director;

(2) the Director has approved the proposed collection of information or approval has been inferred, under the provisions of this section; and

(3) the agency has obtained from the Director a control number to be displayed upon the collection of information.

(b) The Director shall provide at least 30 days for public comment prior to making a decision under subsection (c), (d), or (h), except as provided under subsection (j).

(c)(1) For any proposed collection of information not contained in a proposed rule, the Director shall notify the agency involved of the decision to approve or disapprove the proposed collection of information.

(2) The Director shall provide the notification under paragraph (1), within 60 days after receipt or publication of the notice under subsection (a)(1)(D), whichever is later.

(3) If the Director does not notify the agency of a denial or approval within the 60-day period described under paragraph (2)—

(A) the approval may be inferred;

(B) a control number shall be assigned without further delay; and

(C) the agency may collect the information for not more than 1 year.

(d)(1) For any proposed collection of information contained in a proposed rule—

(A) as soon as practicable, but no later than the date of publication of a notice of proposed rulemaking in the Federal Register, each agency shall forward to the Director a copy of any proposed rule which contains a collection of information and any information requested by the Director necessary to make the determination required under this subsection; and

(B) within 60 days after the notice of proposed rulemaking is published in the Federal Register, the Director may file public comments pursuant to the standards set forth in section 3508 on the collection of information contained in the proposed rule;

(2) When a final rule is published in the Federal Register, the agency shall explain—

(A) how any collection of information contained in the final rule responds to the comments, if any, filed by the Director or the public; or

(B) the reasons such comments were rejected.

(3) If the Director has received notice and failed to comment on an agency rule within 60 days after the notice of proposed rulemaking, the Director may not disapprove any collection of information specifically contained in an agency rule.

United States ⇐40, 41, 57.
Key Number System Topic Nos. 326, 393.

Research References

ALR Library
200 ALR, Fed. 173, Construction and Application of Paperwork Reduction Act of 1980 (PRA), 44 U.S.C.A. §§ 3501 et seq.

WESTLAW ELECTRONIC RESEARCH

See Westlaw guide following the Explanation pages of this volume.

§ 3512. Public protection

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if—

(1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

(Added Pub.L. 104–13, § 2, May 22, 1995, 109 Stat. 181, and amended Pub.L. 106–398, § 1 [Div. A, Title X, § 1064(b)], Oct. 30, 2000, 114 Stat. 1654, 1654A–275.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1995 Acts. House Report No. 104–37 and House Conference Report No. 104–99, see 1995 U.S. Code Cong. and Adm. News, p. 164.

2000 Acts. House Conference Report No. 106–945 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 1516.

Amendments

2000 Amendments. Pub.L. 106–398 [Div. A, Title I, § 1064(b)], struck out "chapter" and inserted "subchapter" wherever appearing.

Effective and Applicability Provisions

2000 Acts. Pub.L. 106–398, § 1 [Div. A, Title X, § 1065], Oct. 30, 2000, 114 Stat. 1654, 1654A–275, provided that the amendment to this section by Pub.L. 106–398, § 1, [Div. A, Title X, Subtitle G [§§ 1061 to 1065]], Oct. 30, 2000, 114 Stat. 1654, 1654A–266, shall take effect 30 days after Oct. 30, 2000. See note set out under section 3531 of this title.

1995 Acts. Section effective Oct. 1, 1995, except as otherwise provided, see section 4 of Pub.L. 104–13, set out as a note under section 3501 of this title.

Prior Provisions

A prior section 3512, added Pub.L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2822, relating to public protection, was omitted in the general revision of this chapter by Pub.L. 104–13.

Another prior section 3512, added Pub.L. 93–153, Title IV, § 409(b), Nov. 16, 1973, 87 Stat. 593, which related to

information for independent regulatory agencies, was omitted in the general revision of this chapter by section 2(a) of Pub.L. 96–511.

Delayed Application of 1995 Revision

Pursuant to section 4(c) of Pub.L. 104–13, set out as a note under section 3501 of this title, prior section 3512, as in effect on September 30, 1995, shall continue to apply to the collection of information for which there is in effect on September 30, 1995, a control number issued by the Office of Management and Budget under this chapter, and shall continue so to apply until the earlier of (1) the first renewal or modification of that collection of information after September 30, 1995, or (2) the expiration of its control number after September 30, 1995.

Prior section 3512, as in effect on September 30, 1995, reads as follows:

"Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."

CROSS REFERENCES

Administrative remedies for false claims and statements, provisions of this section not superceded, see 31 USCA § 3811.

Disclosure to Federal agency of disaggregated information obtained in accordance with this section, see 15 USCA § 57b–2.

LIBRARY REFERENCES

American Digest System

Fraud ⇐68.10.

United States ⇐40, 57.

Key Number System Topic Nos. 184, 393.

Corpus Juris Secundum

CJS Aliens § 1640, Sale of, or False Statements in Applying for, Entry Document.

Research References

ALR Library

9 ALR, Fed. 2nd Series 711, Construction and Application of Emergency Planning and Community Right-to-Know Act of 1986 and Regulations Promulgated Thereunder.

200 ALR, Fed. 173, Construction and Application of Paperwork Reduction Act of 1980 (PRA), 44 U.S.C.A. §§ 3501 et seq.

139 ALR, Fed. 225, What Constitutes "Trade Secrets and Commercial or Financial Information Obtained from Person and Privileged or Confidential," Exempt from Disclosure Under Freedom of Information Act (5 U.S.C.A. § 552(B)(4)) (FOIA).

111 ALR, Fed. 295, Giving False Information to Federal Department or Agency as Violation of 18 U.S.C.A. § 1001, Making It Criminal Offense to Make False Statements in Any Matter Under Jurisdiction of Department or Agency of United States.

Encyclopedias

Am. Jur. 2d Freedom of Information Acts § 145, Effect of Voluntariness of Submission.

Am. Jur. 2d Job Discrimination § 1641, Paperwork Reduction Act.

50 Am. Jur. Trials 407, Litigation Under the Freedom of Information Act.

Treatises and Practice Aids

Callmann on Unfair Compet., TMs, & Monopolies App 5 § 5:15, Federal Trade Commission Improvements Act of 1980.

Federal Information Disclosure § 6:2, Federal Register Publication.

Federal Procedure, Lawyers Edition § 75:87, When Disclosure Is Permitted.

Effective: December 20, 2007

United States Code Annotated Currentness
Title 49. Transportation (Refs & Annos)
Subtitle VI. Motor Vehicle and Driver Programs
Part C. Information, Standards, and Requirements (Refs & Annos)
Chapter 329. Automobile Fuel Economy (Refs & Annos)
→ **§ 32902. Average fuel economy standards**

(a) Prescription of standards by regulation.--At least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.

(b) Standards for automobiles and certain other vehicles.--

(1) In general.--The Secretary of Transportation, after consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall prescribe separate average fuel economy standards for--

(A) passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection;

(B) non-passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection; and

(C) work trucks and commercial medium-duty or heavy-duty on-highway vehicles in accordance with subsection (k).

(2) Fuel economy standards for automobiles.--

(A) Automobile fuel economy average for model years 2011 through 2020.--The Secretary shall prescribe a separate average fuel economy standard for passenger automobiles and a separate average fuel economy standard for non-passenger automobiles for each model year beginning with model year 2011 to achieve a combined fuel economy average for model year 2020 of at least 35 miles per gallon for the total fleet of passenger and non-passenger automobiles manufactured for sale in the United States for that model year.

(B) Automobile fuel economy average for model years 2021 through 2030.--For model years 2021 through 2030, the average fuel economy required to be attained by each fleet of passenger and non-passenger automobiles manufactured for sale in the United States shall be the maximum feasible average fuel economy standard for each fleet for that model year.

(C) Progress toward standard required.--In prescribing average fuel economy standards under subparagraph (A), the Secretary shall prescribe annual fuel economy standard increases that increase the applicable average fuel eco-

nomy standard ratably beginning with model year 2011 and ending with model year 2020.

(3) Authority of the Secretary.--The Secretary shall--

(A) prescribe by regulation separate average fuel economy standards for passenger and non-passenger automobiles based on 1 or more vehicle attributes related to fuel economy and express each standard in the form of a mathematical function; and

(B) issue regulations under this title prescribing average fuel economy standards for at least 1, but not more than 5, model years.

(4) Minimum standard.--In addition to any standard prescribed pursuant to paragraph (3), each manufacturer shall also meet the minimum standard for domestically manufactured passenger automobiles, which shall be the greater of--

(A) 27.5 miles per gallon; or

(B) 92 percent of the average fuel economy projected by the Secretary for the combined domestic and non-domestic passenger automobile fleets manufactured for sale in the United States by all manufacturers in the model year, which projection shall be published in the Federal Register when the standard for that model year is promulgated in accordance with this section.

(c) Amending passenger automobile standards.--The Secretary of Transportation may prescribe regulations amending the standard under subsection (b) of this section for a model year to a level that the Secretary decides is the maximum feasible average fuel economy level for that model year. Section 553 of title 5 applies to a proceeding to amend the standard. However, any interested person may make an oral presentation and a transcript shall be taken of that presenta- tion.

(d) Exemptions.--(1) Except as provided in paragraph (3) of this subsection, on application of a manufacturer that manufactured (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year 2 years before the model year for which the application is made, the Secretary of Transportation may exempt by regulation the manufacturer from a standard under subsection (b) or (c) of this section. An exemption for a model year applies only if the manufacturer manufactures (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year. The Secretary may exempt a manufacturer only if the Secretary--

(A) finds that the applicable standard under those subsections is more stringent than the maximum feasible average fuel economy level that the manufacturer can achieve; and

(B) prescribes by regulation an alternative average fuel economy standard for the passenger automobiles manufactured by the exempted manufacturer that the Secretary decides is the maximum feasible average fuel economy level for the manufacturers to which the alternative standard applies.

(2) An alternative average fuel economy standard the Secretary of Transportation prescribes under paragraph (1)(B) of this subsection may apply to an individually exempted manufacturer, to all automobiles to which this subsection applies, or to classes of passenger automobiles, as defined under regulations of the Secretary, manufactured by exempted manufacturers.

(3) Notwithstanding paragraph (1) of this subsection, an importer registered under section 30141(c) of this title may not be exempted as a manufacturer under paragraph (1) for a motor vehicle that the importer--

(A) imports; or

(B) brings into compliance with applicable motor vehicle safety standards prescribed under chapter 301 of this title for an individual under section 30142 of this title.

(4) The Secretary of Transportation may prescribe the contents of an application for an exemption.

(e) Emergency vehicles.--(1) In this subsection, "emergency vehicle" means an automobile manufactured primarily for use--

(A) as an ambulance or combination ambulance-hearse;

(B) by the United States Government or a State or local government for law enforcement; or

(C) for other emergency uses prescribed by regulation by the Secretary of Transportation.

(2) A manufacturer may elect to have the fuel economy of an emergency vehicle excluded in applying a fuel economy standard under subsection (a), (b), (c), or (d) of this section. The election is made by providing written notice to the Secretary of Transportation and to the Administrator of the Environmental Protection Agency.

(f) Considerations on decisions on maximum feasible average fuel economy.--When deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.

(g) Requirements for other amendments.--(1) The Secretary of Transportation may prescribe regulations amending an average fuel economy standard prescribed under subsection (a) or (d) of this section if the amended standard meets the requirements of subsection (a) or (d), as appropriate.

(2) When the Secretary of Transportation prescribes an amendment under this section that makes an average fuel economy standard more stringent, the Secretary shall prescribe the amendment (and submit the amendment to Congress when required under subsection (c)(2) of this section) at least 18 months before the beginning of the model year to which the amendment applies.

(h) Limitations.--In carrying out subsections (c), (f), and (g) of this section, the Secretary of Transportation--

(1) may not consider the fuel economy of dedicated automobiles;

(2) shall consider dual fueled automobiles to be operated only on gasoline or diesel fuel; and

(3) may not consider, when prescribing a fuel economy standard, the trading, transferring, or availability of credits under section 32903.

(i) **Consultation.**--The Secretary of Transportation shall consult with the Secretary of Energy in carrying out this section and section 32903 of this title.

(j) **Secretary of Energy comments.**--(1) Before issuing a notice proposing to prescribe or amend an average fuel economy standard under subsection (a), (c), or (g) of this section, the Secretary of Transportation shall give the Secretary of Energy at least 10 days from the receipt of the notice during which the Secretary of Energy may, if the Secretary of Energy concludes that the proposed standard would adversely affect the conservation goals of the Secretary of Energy, provide written comments to the Secretary of Transportation about the impact of the standard on those goals. To the extent the Secretary of Transportation does not revise a proposed standard to take into account comments of the Secretary of Energy on any adverse impact of the standard, the Secretary of Transportation shall include those comments in the notice.

(2) Before taking final action on a standard or an exemption from a standard under this section, the Secretary of Transportation shall notify the Secretary of Energy and provide the Secretary of Energy a reasonable time to comment.

(k) **Commercial medium- and heavy-duty on-highway vehicles and work trucks.**--

(1) **Study.**--Not later than 1 year after the National Academy of Sciences publishes the results of its study under section 108 of the Ten-in-Ten Fuel Economy Act, the Secretary of Transportation, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall examine the fuel efficiency of commercial medium- and heavy-duty on-highway vehicles and work trucks and determine--

(A) the appropriate test procedures and methodologies for measuring the fuel efficiency of such vehicles and work trucks;

(B) the appropriate metric for measuring and expressing commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency performance, taking into consideration, among other things, the work performed by such on-highway vehicles and work trucks and types of operations in which they are used;

(C) the range of factors, including, without limitation, design, functionality, use, duty cycle, infrastructure, and total overall energy consumption and operating costs that affect commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency; and

(D) such other factors and conditions that could have an impact on a program to improve commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency.

(2) **Rulemaking.**--Not later than 24 months after completion of the study required under paragraph (1), the Secretary, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, by regulation, shall determine in a rulemaking proceeding how to implement a commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency improvement program designed to achieve the maximum feasible improvement, and shall adopt and implement appropriate test methods, measurement metrics, fuel economy standards, and compliance and enforcement protocols that are appropriate, cost-effective, and technologically feasible for com-

C

Effective: December 20, 2007

United States Code Annotated Currentness
Title 49. Transportation (Refs & Annos)
Subtitle VI. Motor Vehicle and Driver Programs
Part C. Information, Standards, and Requirements (Refs & Annos)
Chapter 329. Automobile Fuel Economy (Refs & Annos)
→ **§ 32903. Credits for exceeding average fuel economy standards**

(a) Earning and period for applying credits.--When the average fuel economy of passenger automobiles manufactured by a manufacturer in a particular model year exceeds an applicable average fuel economy standard under subsections (a) through (d) of section 32902 (determined by the Secretary of Transportation without regard to credits under this section), the manufacturer earns credits. The credits may be applied to--

(1) any of the 3 consecutive model years immediately before the model year for which the credits are earned; and

(2) to the extent not used under paragraph (1) any of the 5 consecutive model years immediately after the model year for which the credits are earned.

(b) Period of availability and plan for future credits.--(1) Except as provided in paragraph (2) of this subsection, credits under this section are available to a manufacturer at the end of the model year in which earned.

(2)(A) Before the end of a model year, if a manufacturer has reason to believe that its average fuel economy for passenger automobiles will be less than the applicable standard for that model year, the manufacturer may submit a plan to the Secretary of Transportation demonstrating that the manufacturer will earn sufficient credits under this section within the next 3 model years to allow the manufacturer to meet that standard for the model year involved. Unless the Secretary finds that the manufacturer is unlikely to earn sufficient credits under the plan, the Secretary shall approve the plan. Those credits are available for the model year involved if--

(i) the Secretary approves the plan; and

(ii) the manufacturer earns those credits as provided by the plan.

(B) If the average fuel economy of a manufacturer is less than the applicable standard under subsections (a) through (d) of section 32902 after applying credits under subsection (a)(1) of this section, the Secretary of Transportation shall notify the manufacturer and give the manufacturer a reasonable time (of at least 60 days) to submit a plan.

(c) Determining number of credits.--The number of credits a manufacturer earns under this section equals the product of--

(1) the number of tenths of a mile a gallon by which the average fuel economy of the passenger automobiles manufactured by the manufacturer in the model year in which the credits are earned exceeds the applicable average fuel economy standard under subsections (a) through (d) of section 32902; times

(2) the number of passenger automobiles manufactured by the manufacturer during that model year.

(d) Applying credits for passenger automobiles.--The Secretary of Transportation shall apply credits to a model year on the basis of the number of tenths of a mile a gallon by which the manufacturer involved was below the applicable average fuel economy standard for that model year and the number of passenger automobiles manufactured that model year by the manufacturer. Credits applied to a model year are no longer available for another model year. Before applying credits, the Secretary shall give the manufacturer written notice and reasonable opportunity to comment.

(e) Applying credits for non-passenger automobiles.--Credits for a manufacturer of automobiles that are not passenger automobiles are earned and applied to a model year in which the average fuel economy of that class of automobiles is below the applicable average fuel economy standard under section 32902(a) of this title, to the same extent and in the same way as provided in this section for passenger automobiles.

(f) Credit trading among manufacturers.--

(1) In general.--The Secretary of Transportation may establish, by regulation, a fuel economy credit trading program to allow manufacturers whose automobiles exceed the average fuel economy standards prescribed under section 32902 to earn credits to be sold to manufacturers whose automobiles fail to achieve the prescribed standards such that the total oil savings associated with manufacturers that exceed the prescribed standards are preserved when trading credits to manufacturers that fail to achieve the prescribed standards.

(2) Limitation.--The trading of credits by a manufacturer to the category of passenger automobiles manufactured domestically is limited to the extent that the fuel economy level of such automobiles shall comply with the requirements of section 32902(b)(4), without regard to any trading of credits from other manufacturers.

(g) Credit transferring within a manufacturer's fleet.--

(1) In general.--The Secretary of Transportation shall establish by regulation a fuel economy credit transferring program to allow any manufacturer whose automobiles exceed any of the average fuel economy standards prescribed under section 32902 to transfer the credits earned under this section and to apply such credits within that manufacturer's fleet to a compliance category of automobiles that fails to achieve the prescribed standards.

(2) Years for which used.--Credits transferred under this subsection are available to be used in the same model years that the manufacturer could have applied such credits under subsections (a), (b), (d), and (e), as well as for the model year in which the manufacturer earned such credits.

(3) Maximum increase.--The maximum increase in any compliance category attributable to transferred credits is--

(A) for model years 2011 through 2013, 1.0 mile per gallon;

(B) for model years 2014 through 2017, 1.5 miles per gallon; and

(C) for model year 2018 and subsequent model years, 2.0 miles per gallon.

(4) Limitation.--The transfer of credits by a manufacturer to the category of passenger automobiles manufactured domestically is limited to the extent that the fuel economy level of such automobiles shall comply with the requirements under section 32904(b)(4), without regard to any transfer of credits from other categories of automobiles described in paragraph (6)(B).

(5) Years available.--A credit may be transferred under this subsection only if it is earned after model year 2010.

(6) Definitions.--In this subsection:

(A) Fleet.--The term "fleet" means all automobiles manufactured by a manufacturer in a particular model year.

(B) Compliance category of automobiles.--The term "compliance category of automobiles" means any of the following 3 categories of automobiles for which compliance is separately calculated under this chapter:

(i) Passenger automobiles manufactured domestically.

(ii) Passenger automobiles not manufactured domestically.

(iii) Non-passenger automobiles.

(h) Refund of collected penalty.--When a civil penalty has been collected under this chapter from a manufacturer that has earned credits under this section, the Secretary of the Treasury shall refund to the manufacturer the amount of the penalty to the extent the penalty is attributable to credits available under this section.

CREDIT(S)

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1061, and amended Pub.L. 110-140, Title I, § 104(a), Dec. 19, 2007, 121 Stat. 1501.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1994 Acts.

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
32903(a)	15:2002(l)(1)(B), (4).	Oct. 20, 1972, Pub.L. 92-513, 86 Stat. 947, § 502(l); added Oct. 10, 1980, Pub.L. 96-425, § 6(b), 94 Stat. 1826.
32903(b)(1)	15:2002(l)(1)(A).	
32903(b)(2)	15:2002(l)(1)(C).	
32903(c)	15:2002(l)(1)(D).	
32903(d)	15:2002(l)(1)(E).	
32903(e)	15:2002(l)(2).	
32903(f)	15:2002(l)(3).	

Cal. Admin. Code tit. 13, § 1961.1

Barclays Official California Code of Regulations Currentness
Title 13. Motor Vehicles
Division 3. Air Resources Board
Chapter 1. Motor Vehicle Pollution Control Devices
Article 1. General Provisions (Refs & Annos)

§ 1961.1. Greenhouse Gas Exhaust Emission Standards and Test Procedures - 2009 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles.

(a) *Greenhouse Gas Emission Requirements.* The greenhouse gas emission levels from new 2009 and subsequent model year passenger cars, light-duty trucks, and medium-duty passenger vehicles shall not exceed the following requirements. Light-duty trucks from 3751 lbs. LVW - 8500 lbs. GVW that are certified to the Option 1 LEV II NOx Standard in section 1961(a)(1) are exempt from these greenhouse gas emission requirements, however, passenger cars, light-duty trucks 0-3750 lbs. LVW, and medium-duty passenger vehicles are not eligible for this exemption.

(1) *Fleet Average Greenhouse Gas Requirements for Passenger Cars, Light-Duty Trucks, and Medium-Duty Passenger Vehicles.*

(A)(i) The fleet average greenhouse gas exhaust mass emission values from passenger cars, light-duty trucks, and medium-duty passenger vehicles that are produced and delivered for sale in California each model year by a large volume manufacturer shall not exceed:

FLEET AVERAGE GREENHOUSE GAS EXHAUST MASS EMISSION REQUIREMENTS FOR PASSENGER CAR, LIGHT-DUTY TRUCK, AND MEDIUM-DUTY PASSENGER VEHICLE WEIGHT CLASSES[1]

(4,000 mile Durability Vehicle Basis)

	Fleet Average Greenhouse Gas Emissions (grams per mile CO_2 - equivalent	
Model Year	*All PCs; LDTs 0-3750 lbs. LVW*	*LDTs 3751 lbs. LVW - 8500 lbs. GVW; MDPVs*
2009	323	439
2010	301	420
2011	267	390
2012	233	361
2013	227	355

2014	222	350
2015	213	341
2016+	205	332

[1]Each manufacturer shall demonstrate compliance with these values in accordance with section 1961.l(a)(1)(B).

1. For each model year, a manufacturer must demonstrate compliance with the fleet average requirements in this section 1961.1(a)(1)(A) based on one of two options applicable throughout the model year, either:

Option 1: the total number of passenger cars, light-duty trucks, and medium-duty passenger vehicles that are certified to the California exhaust emission standards in this section 1961.1, and are produced and delivered for sale in California; or

Option 2: the total number of passenger cars, light-duty trucks, and medium-duty passenger vehicles that are certified to the California exhaust emission standards in this section 1961.1, and are produced and delivered for sale in California, the District of Columbia, and all states that have adopted California's greenhouse gas emission standards for that model year pursuant to Section 177 of the federal Clean Air Act (42 U.S.C. § 7507).

a. For the 2009 and 2010 model years, a manufacturer that selects compliance Option 2 must notify the Executive Officer of that selection, in writing, within 30 days of the effective date of the amendments to this section (a)(1)(A)1 or must comply with Option 1.

b. For the 2011 and later model years, a manufacturer that selects compliance Option 2 must notify the Executive Officer of that selection, in writing, prior to the start of the applicable model year or must comply with Option 1.

c. When a manufacturer is demonstrating compliance using Option 2 for a given model year, the term "in California" as used in subsections 1961.1(a)(1)(B)3. and 1961.1(b) means California, the District of Columbia, and all states that have adopted California's greenhouse gas emission standards for that model year pursuant to Section 177 of the federal Clean Air Act (42 U.S.C. § 7507).

d. A manufacturer that selects compliance Option 2 must provide to the Executive Officer separate values for the number of vehicles produced and delivered for sale in the District of Columbia and for each individual state within the average.

(A)(ii) For the 2012 through 2016 model years, a manufacturer may elect to demonstrate compliance with this section 1961.1 by demonstrating compliance with the National greenhouse gas program as follows:

1. A manufacturer that selects compliance with this option 1961.1(a)(1)(A)(ii) must notify the Executive Officer of that selection, in writing, prior to the start of the applicable model year or must comply with 1961.1(a)(1)(A)(i).

2. The manufacturer must submit to ARB a copy of the Model Year CAFE report that it submitted to EPA as required under 40 CFR §86.1865-12 (as proposed at 74 Fed.Reg. 49454, 49760 (September 28, 2009) and adopted by EPA on April 1, 2010, 75 Fed.Reg. [insert page] (April [insert date], 2010), for

demonstrating compliance with the National greenhouse gas program and the EPA determination of compliance. These must be submitted within 30 days of receipt of the EPA determination of compliance, for each model year that a manufacturer selects compliance with this option 1961.1(a)(1)(A)(ii). and

3. If a manufacturer has outstanding greenhouse gas debits at the end of the 2011 model year, as calculated in accordance with 1961.1(b), the manufacturer must submit to the Executive Officer a plan for offsetting all outstanding greenhouse gas debits by using greenhouse gas credits earned under the National greenhouse gas program before applying those credits to offset any National greenhouse as program debits. Upon approval of the plan by the Executive Officer, the manufacturer may demonstrate compliance with this section 1961.1 by demonstrating compliance with the National greenhouse gas program. Any California debits not offset by the end of the 2016 model year National greenhouse gas program reporting period are subject to penalties as provided in this Section 1961.1.

(B) *Calculation of Fleet Average Greenhouse Gas Value.*

1. *Basic Calculation.*

a. Option A: Each manufacturer shall calculate both a "city" grams per mile average CO_2-equivalent value for each GHG vehicle test group and a "highway" grams per mile average CO_2-equivalent value for each GHG vehicle test group, including vehicles certified in accordance with section 1960.5 and vehicles certified in accordance with section 1961(a)(14), using the following formula. Option B: For a manufacturer that elects to demonstrate compliance with the greenhouse gas requirements using CAFE data, "GHG vehicle test group" shall mean "subconfiguration" in this subsection 1961.1(a)(1)(B)1.a. Greenhouse Gas emissions used for the "city" CO_2-equivalent value calculation shall be measured using the "FTP" test cycle (40 CFR, Part 86, Subpart B). Greenhouse Gas emissions used for the "highway" CO_2-equivalent value calculation shall be based on emissions measured using the Highway Test Procedures.

CO_2-Equivalent Value = CO_2 + 296 x N_2 0 + 23 x CH_4 - A/C Direct Emissions Allowance - A/C Indirect Emissions Allowance

A manufacturer may use N_2O = 0.006 grams per mile in lieu of measuring N_2O exhaust emissions. A manufacturer that elects to use CAFE data to demonstrate compliance with the greenhouse requirements may substitute the term 1.9 CO_2-equivalent grams per mile for the terms "296 x N_2O + 23 x CH_4" in this equation.

b. *A/C Direct Emissions Allowance.*A manufacturer may use the following A/C Direct Emission Allowances, upon approval of the Executive Officer, if that manufacturer demonstrates that the following requirements are met. Such demonstration shall include specifications of the components used and an engineering evaluation that verifies the estimated lifetime emissions from the components and the system. A manufacturer shall also provide confirmation that the number of fittings and joints has been minimized and components have been optimized to minimize leakage. No A/C Direct Emissions Allowance is permitted if the following requirements are not met.

i. A "low-leak air conditioning system" shall be defined as one that meets all of the following criteria:

A. All pipe and hose connections are equipped with multiple o-rings, seal washers, or metal gaskets only (e.g., no single o-rings);

B. All hoses in contact with the refrigerant must be ultra-low permeability barrier or veneer hose on both the high-pressure and the low-pressure sides of the system (e.g., no rubber hoses); and

C. Only multiple-lip compressor shaft seals shall be used (with either compressor body o-rings or gaskets).

ii. For an air conditioning system that uses HFC-134a as the refrigerant:

A. An A/C Direct Emissions Allowance of 3.0 CO_2-equivalent grams per mile shall apply if the system meets the criteria for a "low-leak air conditioning system."

B. An A/C Direct Emissions Allowance of 3.0 CO_2-equivalent grams per mile shall apply if the manufacturer demonstrates alternative technology that achieves equal or lower direct emissions than a "low-leak air conditioning system."

C. An A/C Direct Emissions Allowance greater than 3.0 CO_2-equivalent grams per mile may apply for an air conditioning system that reduces refrigerant leakage further than would be obtained from a "low-leak air conditioning system." A maximum A/C Direct Emissions Allowance of 6.0 CO_2-equivalent grams per mile may be earned for an air conditioning system that has 100 percent containment of refrigerant during "normal operation." To obtain an A/C Direct Emissions Allowance greater than 3.0 CO_2-equivalent grams per mile, the manufacturer must provide an engineering evaluation that supports the allowance requested.

iii. For an air conditioning system that uses HFC-152a, CO_2 refrigerant, or any refrigerant with a GWP of 150 or less: An A/C Direct Emissions Allowance shall be calculated using the following formula:

$$\text{A/C Direct Emissions Allowance} = A - (B \times C)$$

where: A = 9 CO_2-equivalent grams per mile (the lifetime vehicle emissions expected from an air conditioning system that uses refrigerant HFC-134a);

$$B = 9\ CO_2 - \text{equivalent g/mi} \times \frac{GWP}{1300}$$

where: B is the lifetime vehicle emissions expected from an air conditioning system that uses a refrigerant with a GWP of 150 or less, and

"GWP" means the GWP of this refrigerant; and

C = 1, except for an air conditioning system that meets the criteria of a "low-leak air conditioning system."

For an air conditioning system that meets or exceeds the criteria of a "low-leak air conditioning sys-

tem," the following formula shall apply:

$$C = 1 - (0.12 \times credit)$$

where: "credit" equals 3.0 CO_2-equivalent grams per mile for a "low-leak air conditioning system" that meets the criteria of section 1961.1(a)(1)(B)1.b.i., or

"credit" equals a value greater than 3.0 CO_2-equivalent grams per mile for an air conditioning system that reduces refrigerant leakage further than would be obtained from a "low-leak air conditioning system." A maximum credit of 6.0 CO_2-equivalent grams per mile may be earned for an air conditioning system that has 100 percent containment of refrigerant during normal operation. To obtain a credit greater than 3.0 CO_2-equivalent grams per mile, the manufacturer must provide an engineering evaluation that supports the credit requested.

iv. A manufacturer that elects to use CAFE Program emissions data to demonstrate compliance with the greenhouse requirements shall calculate the A/C Indirect Emissions Allowance for each Vehicle Configuration by calculating the A/C Indirect Emissions Allowance for each air conditioning system used in that Vehicle Configuration and calculating a sales-weighted average for that Vehicle Configuration.

c. *A/C Indirect Emissions Allowance.* A manufacturer may use the following A/C Indirect Emissions Allowances, upon approval of the Executive Officer, if the manufacturer demonstrates using data or an engineering evaluation that the air conditioning system meets the following requirements. A manufacturer may use the following A/C Indirect Emissions Allowances for other technologies, upon approval of the Executive Officer, if that manufacturer demonstrates that the air conditioning system achieves equal or greater CO_2-equivalent grams per mile emissions reductions.

i. An "A/C system with reduced indirect emissions" shall be defined as one that meets all of the following criteria:

A. Has managed outside and recirculated air balance to achieve comfort, demisting, and safety requirements, based on such factors as temperature, humidity, pressure, and level of fresh air in the passenger compartment to minimize compressor usage;

B. Is optimized for energy efficiency by utilizing state-of-the-art high efficiency evaporators, condensors, and other components; and

C. Has an externally controlled compressor (such as an externally controlled variable displacement or variable speed compressor or an externally controlled fully cycling fixed displacement compressor) that adjusts evaporative temperature to minimize the necessity of reheating cold air to satisfy occupant comfort.

ii. For an A/C system that meets all of the criteria for an "A/C system with reduced indirect emissions," the allowance shall be calculated using the following emission factors, up to a maximum allowance of 9.0 CO_2-equivalent grams per mile if the system has one evaporator and up to a maximum allowance of 11.0 CO_2-equivalent grams per mile if the system has two evaporators:

A. 5.0 CO_2-equivalent grams per mile per 100 cc of maximum compressor displacement for a sys-

tem that does not use CO_2 as the refrigerant

B. 27.5 CO_2-equivalent grams per mile per 100 cc of maximum compressor displacement for a system that uses CO_2 as the refrigerant

iii. For an air conditioning system equipped with a refrigerant having a GWP of 150 or less, the allowance shall be calculated using the following emission factors, up to a maximum allowance of 0.5 CO_2-equivalent grams per mile:

A. 0.2 CO_2-equivalent grams per mile per 100cc of maximum compressor displacement for a system that does not use CO_2 as the refrigerant and

B. 1.1 CO_2-equivalent grams per mile per 100cc of maximum compressor displacement for a system that uses CO_2 as the refrigerant.

iv. A manufacturer that elects to use CAFE Program emissions data to demonstrate compliance with the greenhouse requirements shall calculate the A/C Indirect Emissions Allowance for each Vehicle Configuration by calculating the A/C Indirect Emissions Allowance for each air conditioning system used in that Vehicle Configuration and calculating a sales-weighted average for that Vehicle Configuration.

d. *Upstream Greenhouse Gas Emission Adjustment Factors for Alternative Fuel Vehicles.*A grams per mile average CO_2-equivalent value for each GHG vehicle test group certifying on a fuel other than conventional gasoline, including vehicles certified in accordance with section 1960.5 and vehicles certified in accordance with section 1961(a)(14), shall be calculated as follows:

$(CO_2$ + A/C Indirect Emissions) x (Fuel Adjustment Factor) + 296 x N_2O + 23 x CH_4 + A/C Direct Emissions

where:

A/C Indirect Emissions = A - B

where: "A" represents the indirect emissions associated with an A/C system that does not incorporate any of the A/C improvements described in section 1961.1(a)(1)(B)1.c. A is determined by the following emission factors, with a maximum value of 17.0 CO_2-equivalent grams per mile for a system that has one evaporator and a maximum value of 21.0 CO_2-equivalent grams per mile for a system that has two evaporators.

A = 9.6 CO_2-equivalent grams per mile per 100cc of maximum compressor displacement for an A/C system that does not use CO_2 as the refrigerant or

A = 52.8 CO_2-equivalent grams per mile per 100cc of maximum compressor displacement for an A/C system that uses CO_2 as the refrigerant.

B = A/C Indirect Emissions Allowance as calculated per section 1961.1(a)(1)(B)1.c.

A/C Direct Emissions = 9 CO_2 - equivalent grams per mile - A/C Direct Emissions Allowance as calculated per section 1961.1(a)(1)(B)1.b.

The Fuel Adjustment Factors are:

Fuel	*Fuel Adjustment Factor*
Natural Gas	1.03
LPG	0.89
E85	0.74

e. *Calculation of CO_2-Equivalent Emissions for Hydrogen Internal Combustion Engine Vehicles and for Electric and Hydrogen ZEVs.* The grams per mile average CO_2-equivalent value for each GHG vehicle test group certifying to ZEV standards, including vehicles certified in accordance with section 1960.5 and vehicles certified in accordance with section 1961(a)(14), shall be:

A/C Direct Emissions + Upstream Emissions Factor

where: A/C Direct Emissions = 9 CO_2-equivalent grams per mile - A/C Direct Emissions Allowance as calculated per section 1961.1(a)(1)(B)1.b.

The Upstream Emissions Factors are:

Vehicle Type	*Upstream Emissions Factor*[1] *(CO_2-equivalent g/mi)*
Electric ZEV	130
Hydrogen Internal Combustion Engine Vehicle	290
Hydrogen ZEV	210

[1] The Executive Officer may approve use of a lower upstream emissions factor if a manufacturer demonstrates the appropriateness of the lower value by providing information that includes, but is not limited to, the percentage of hydrogen fuel or the percentage of electricity produced for sale in California using a "renewable energy resource."

2. *Calculation of Greenhouse Gas Values for Bi-Fuel Vehicles, Fuel-Flexible Vehicles, Dual-Fuel Vehicles, and Grid-connected Hybrid Electric Vehicles.* For bi-fuel, fuel-flexible, dual-fuel, and grid-connected hybrid, electric vehicles, a manufacturer shall calculate a grams per mile average CO_2-equivalent value for each GHG vehicle test group, in accordance with section 1961.1(a)(1)(B)1., based on exhaust mass emission tests when the vehicle is operating on gasoline.

a. *Optional Alternative Compliance Mechanisms.* Beginning with the 2010 model year, a manufacturer that demonstrates that a bi-fuel, fuel-flexible, dual-fuel, or grid-connected hybrid electric GHG vehicle test group will be operated in use in California on the alternative fuel shall be eligible to certify those

vehicles using this optional alternative compliance procedure, upon approval of the Executive Officer.

i. To demonstrate that bi-fuel, fuel-flexible, dual-fuel, or grid-connected hybrid electric vehicles within a GHG vehicle test group will be operated in use in California on the alternative fuel, the manufacturer shall provide data that shows the previous model year sales of such vehicles to fleets that provide the alternative fuel on-site or, for grid-connected hybrid electric vehicles, to end users with the capability to recharge the vehicle on-site. This data shall include both the total number of vehicles sales that were made to such fleets or end users with the capability to recharge the vehicle on-site and as the percentage of total GHG vehicle test group sales. The manufacturer shall also provide data demonstrating the percentage of total vehicle miles traveled by the bi-fuel, fuel-flexible, dual-fuel, or grid-connected hybrid electric vehicles sold to each fleet or to end users with the capability to recharge the vehicle on-site in the previous model year using the alternative fuel and using gasoline.

ii. For each GHG vehicle test group that receives approval by the Executive Officer under section 1961.1(a)(1)(B)2.a.i., a grams per mile CO_2-equivalent value shall be calculated as follows:

$$CO_2\text{-equivalent value} = [A \times E \times B \times C] + [(1 - (A \times E \times B)) \times D]$$

where: A = the percentage of previous model year vehicles within a GHG vehicle test group that were operated in use in California on the alternative fuel during the previous calendar year;

B = the percentage of miles traveled by "A" during the previous calendar year;

C = the CO_2-equivalent value for the GHG vehicle test group, as calculated in section 1961.1(a)(1)(B)1, when tested using the alternative fuel;

D = the CO_2-equivalent value for the GHG vehicle test group, as calculated in section 1961.1(a)(1)(B)1, when tested using gasoline; and

E = 0.9 for grid-connected hybrid electric vehicles or

E = 1 for bi-fuel, fuel-flexible, and dual-fuel vehicles.

The Executive Officer may approve use of a higher value for "E" for a grid-connected hybrid electric vehicle GHG vehicle test group if a manufacturer demonstrates that the vehicles can reasonably be expected to maintain more than 90 percent of their original battery capacity over a 200,000 mile vehicle lifetime. The manufacturer may demonstrate the appropriateness of a higher value either by providing data from real world vehicle operation; or by showing that these vehicles are equipped with batteries that do not lose energy storage capacity until after 100,000 miles; or by offering 10

year/150,000 mile warranties on the batteries.

iii. For the first model year in which a grid-connected hybrid electric vehicle model is certified for sale in California, the manufacturer may estimate the sales and percentage of total vehicle miles traveled information requested in section 1961.1(a)(1)(B)2.a.i. in lieu of providing actual data, and provide final sales data and data demonstrating the percentage of total vehicle miles traveled using electricity by no later than March 1 of the calendar year following the close of the model year.

3. *Calculation of Fleet Average Greenhouse Gas Values.*

a. Each manufacturer's PC and LDT1 fleet average Greenhouse Gas value for the total number of PCs and LDT1s produced and delivered for sale in California, including vehicles certified in accordance with section 1960.5 and vehicles certified in accordance with section 1961(a)(14), shall be calculated as follows:

[0.55 x (<<SIGMA>> City Test Group Greenhouse Gas Values) + 0.45 x (<<SIGMA>> Highway Test Group Greenhouse Gas Values)] / Total Number of PCs and LDT1s Produced, Including ZEVs and HEVs

where: City Test Group Greenhouse Gas Value = [(Total Number of Vehicles in a Test Group - <<SIGMA>> Number of Vehicles in Optional GHG Test Vehicle Configurations) x "worst-case" calculated CO_2-equivalent value + <<SIGMA>> (Number of vehicles in Optional GHG Test Vehicle Configurations x applicable calculated CO_2-equivalent value)] measured using the FTP test cycle; and

Highway Test Group Greenhouse Gas Value = [(Total Number of Vehicles in a Test Group - <<SIGMA>> (Number of Vehicles in Optional GHG Test Vehicle Configurations) x "worst-case" calculated CO_2-equivalent value + <<SIGMA>> (Number of vehicles in Optional GHG Test Vehicle Configurations x applicable calculated CO_2-equivalent value)] measured using the Highway Test Procedures.

b. Each manufacturer's LDT2 and MDPV fleet average Greenhouse Gas value for the total number of LDT2s and MDPVs produced and delivered for sale in California, including vehicles certified in accordance with section 1960.5 and vehicles certified in accordance with section 1961(a)(14), shall be calculated as follows:

[0.55 x (<<SIGMA>> City Test Group Greenhouse Gas Values) + 0.45 x (<<SIGMA>> Highway Test Group Greenhouse Gas Values)] / Total Number of LDT2s and MDPVs Produced, Including ZEVs and HEVs

where: City Test Group Greenhouse Gas Value = [(Total Number of Vehicles in a Test Group - <<SIGMA>> Number of Vehicles in Optional GHG Test Vehicle Configurations) x "worst-case" calcu-

lated CO_2-equivalent value + <<SIGMA>> (Number of vehicles in Optional GHG Test Vehicle Configurations x applicable calculated CO_2-equivalent value)] measured using the FTP test cycle; and

Highway Test Group Greenhouse Gas Value = [(Total Number of Vehicles in a Test Group - <<SIGMA>> Number of Vehicles in Optional GHG Test Vehicle Configurations) x "worst-case" calculated CO_2-equivalent value + <<SIGMA>> (Number of vehicles in Optional GHG Test Vehicle Configurations x applicable calculated CO_2-equivalent value)] measured using the Highway Test Procedures.

(C) *Requirements for Intermediate Volume Manufacturers.*

1. Before the 2016 model year, compliance with this section 1961.1 shall be waived for intermediate volume manufacturers.

2. For each intermediate volume manufacturer, the manufacturer's baseline fleet average greenhouse gas value for PCs and LDT1s and baseline fleet average greenhouse gas value for LDT2s and MDPVs shall be calculated, in accordance with section 1961.1(a)(1)(B) using its 2002 model year fleet.

3. In 2016 and subsequent model years, an intermediate volume manufacturer shall either:

a. not exceed a fleet average greenhouse gas emissions value of 233 g/mi for PCs and LDT1s and 361 g/mi for LDT2s and MDPVs, or

b. not exceed a fleet average greenhouse gas value of 0.75 times the baseline fleet average greenhouse gas value for PCs and LDT1s and 0.82 times the baseline fleet average greenhouse gas value for LDT2s and MDPVs, as calculated in section 1961.1(a)(1)(C)2.

4. If a manufacturer's average annual California sales exceed 60,000 units of new PCs, LDTs, MDVs and heavy-duty engines based on the average number of vehicles sold for the three previous consecutive model years, the manufacturer shall no longer be treated as a intermediate volume manufacturer and shall comply with the fleet average requirements applicable to large volume manufacturers as specified in section 1961.1(a)(1) beginning with the fourth model year after the last of the three consecutive model years.

5. If a manufacturer's average annual California sales fall below 60,001 units of new PCs, LDTs, MDVs and heavy-duty engines based on the average number of vehicles sold for the three previous consecutive model years, the manufacturer shall be treated as a intermediate volume manufacturer and shall be subject to the requirements for intermediate volume manufacturers beginning with the next model year.

(D) *Requirements for Small Volume Manufacturers and Independent Low Volume Manufacturers.*

1. Before the 2016 model year, compliance with this section 1961.1 shall be waived for small volume manufacturers and independent low volume manufacturers.

2. At the beginning of the 2013 model year, each small volume manufacturer and independent low volume manufacturer shall identify all 2012 model year vehicle models, certified by a large volume manufacturer that are comparable to that small volume manufacturer or independent low volume manufacturer's 2016 model year vehicle models, based on horsepower and horsepower to weight ratio. The small volume manufacturer and independent low volume manufacturer shall demonstrate to the Executive Officer the appropriateness of each comparable vehicle model selected. Upon approval of the Executive Officer, s/he shall provide to the small volume manufacturer and to the independent low volume manufacturer the CO_2-equivalent value for each 2012 model year vehicle model that is approved. The small volume manufacturer and independent low volume manufacturer shall calculate an average greenhouse gas emissions value for each its greenhouse gas vehicle test groups based on the CO_2-equivalent values provided by the Executive Officer.

3. In the 2016 and subsequent model years, a small volume manufacturer and an independent low volume manufacturer shall either:

a. not exceed the fleet average greenhouse gas emissions value calculated for each GHG vehicle test group for which a comparable vehicle is sold by a large volume manufacturer, in accordance with section 1961.1(a)(1)(D)2; or

b. not exceed a fleet average greenhouse gas emissions value of 233 g/mi for PCs and LDT1s and 361 g/mi for LDT2s and MDPVs; or

c. upon approval of the Executive Officer, if a small volume manufacturer demonstrates a vehicle model uses an engine, transmission, and emission control system that is identical to a configuration certified for sale in California by a large volume manufacturer, those small volume manufacturer vehicle models are exempt from meeting the requirements in paragraphs 3.a. and b. of this section.

4. If a manufacturer's average annual California sales exceed 4,500 units of new PCs, LDTs, MDVs and heavy-duty engines based on the average number of vehicles sold for the three previous consecutive model years, the manufacturer shall no longer be treated as a small volume manufacturer and shall comply with the fleet average requirements applicable to larger volume manufacturers as specified in section 1961.1(a)(1) beginning with the fourth model year after the last of the three consecutive model years.

5. If a manufacturer's average annual California sales exceed 10,000 units of new PCs, LDTs, MDVs and heavy-duty engines based on the average number of vehicles sold for the three previous consecutive model years, the manufacturer shall no longer be treated as an independent low volume manufacturer and shall comply with the fleet average requirements applicable to larger volume manufacturers as specified in section 1961.1(a)(1) beginning with the fourth model year after the last of the three consecutive model years.

6. If a manufacturer's average annual California sales fall below 4,501 units of new PCs, LDTs, MDVs and heavy-duty engines based on the average number of vehicles sold for the three previous consecutive model years, the manufacturer shall be treated as a small volume manufacturer and shall be subject to the requirements for small volume manufacturers beginning with the next model year.

(b) *Calculation of Greenhouse Gas Credits/Debits.*

(1) *Calculation of Greenhouse Gas Credits for Passenger Cars, Light-Duty Trucks, and Medium-Duty Passenger Vehicles.*

(A) In the 2000 through 2008 model years, a manufacturer that achieves fleet average Greenhouse Gas values lower than the fleet average Greenhouse Gas requirement applicable to the 2012 model year shall receive credits for each model year in units of g/mi determined as:

[(Fleet Average Greenhouse Gas Requirement for the 2012 model year) - (Manufacturer's Fleet Average Greenhouse Gas Value)] x (Total No. of Vehicles Produced and Delivered for Sale in California, Including ZEVs and HEVs).

(B) In 2009 and subsequent model years, a manufacturer that achieves fleet average Greenhouse Gas values lower than the fleet average Greenhouse Gas requirement for the corresponding model year shall receive credits in units of g/mi Greenhouse Gas determined as:

[(Fleet Average Greenhouse Gas Requirement) - (Manufacturer's Fleet Average Greenhouse Gas Value)] x (Total No. of Vehicles Produced and Delivered for Sale in California, Including ZEVs and HEVs).

(2) A manufacturer with 2009 and subsequent model year fleet average Greenhouse Gas values greater than the fleet average requirement for the corresponding model year shall receive debits in units of g/mi Greenhouse Gas equal to the amount of negative credits determined by the aforementioned equation. For the 2009 and subsequent model years, the total g/mi Greenhouse Gas credits or debits earned for PCs and LDT1s and for LDT2s and MDPVs shall be summed together. The resulting amount shall constitute the g/mi Greenhouse Gas credits or debits accrued by the manufacturer for the model year.

(3) *Procedure for Offsetting Greenhouse Gas Debits.*

(A) A manufacturer shall equalize Greenhouse Gas emission debits by earning g/mi Greenhouse Gas emission credits in an amount equal to the g/mi Greenhouse Gas debits, or by submitting a commensurate amount of g/mi Greenhouse Gas credits to the Executive Officer that were earned previously or acquired from another manufacturer. A manufacturer shall equalize Greenhouse Gas debits for PCs, LDTs, and MDPVs within five model years after they are earned. If emission debits are not equalized within the specified time period, the manufacturer shall be subject to the Health and Safety Code section 43211 civil penalty applicable to a manufacturer which

sells a new motor vehicle that does not meet the applicable emission standards adopted by the state board. The cause of action shall be deemed to accrue when the emission debits are not equalized by the end of the specified time period. For a manufacturer demonstrating compliance under Option 2 in subsection 1961.1(a)(1)(A)1., the emission debits that are subject to a civil penalty under Health and Safety Code section 43211 shall be calculated separately for California, the District of Columbia, and each individual state that is included in the fleet average greenhouse gas requirements in subsection 1961.1(a)(1)(A)1. These emission debits shall be calculated for each individual state using the formula in subsections 1961.1(b)(1)(B) and 1961.1(b)(2), except that the "Total No. of Vehicles Produced and Delivered for Sale in California, including ZEVs and HEVs" shall be calculated separately for the District of Columbia and each individual state.

For the purposes of Health and Safety Code section 43211, the number of passenger cars and LDT1s not meeting the state board's emission standards shall be determined by dividing the total amount of g/mi Greenhouse Gas emission debits for the model year calculated for California by the g/mi Greenhouse Gas fleet average requirement for PCs and LDTs 0-3750 lbs. LVW applicable for the model year in which the debits were first incurred. For the purposes of Health and Safety Code section 43211, the number of LDT2s and MDPVs not meeting the state board's emission standards shall be determined by dividing the total amount of g/mi Greenhouse Gas emission debits for the model year calculated for California by the g/mi Greenhouse Gas fleet average requirement for LDTs 3751 lbs. LVW - 8500 lbs. GVW and MDPVs applicable for the model year in which the debits were first incurred.

(B) Greenhouse Gas emission credits earned in the 2000 through 2008 model years shall be treated as if they were earned in the 2011 model year and shall retain full value through the 2012 model year. Greenhouse Gas emission credits earned in the 2009 and subsequent model years shall retain full value through the fifth model year after they are earned. The value of any credits earned in the 2000 through 2008 model years that are not used to equalize debits accrued in the 2009 through 2012 model years shall be discounted by 50% at the beginning of the 2013 model year, shall be discounted to 25% of its original value if not used by the beginning of the 2014 model year, and will have no value if not used by the beginning of the 2015 model year. Any credits earned in the 2009 and subsequent model years that are not used by the end of the fifth model year after they are accrued shall be discounted by 50% at the beginning of the sixth model year after being earned, shall be discounted to 25% of its original value if not used by the beginning of the seventh model year after being earned, and will have no value if not used by the beginning of the eighth model year after being earned.

(c) *Test Procedures.* The certification requirements and test procedures for determining compliance with the emission standards in this section are set forth in the "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," incorporated by reference in section 1961(d). In the case of hybrid electric vehicles and on-board fuel-fired heaters, the certification requirements and test procedures for determining compliance with the emission standards in this section are set forth in the "California Exhaust Emission Standards and Test Procedures for 2005 and Subsequent Model Zero-Emission Vehicles, and 2001 and Subsequent Model Hybrid Electric Vehicles, in the Passenger Car, Light-Duty Truck and Medium-Duty Vehicle Classes," incorporated by reference in section 1962.

(d) *Abbreviations.* The following abbreviations are used in this section 1961.1:

"cc" mean cubic centimeters.

"CH_4" means methane.

"CO_2" means carbon dioxide.

"E85" means a blend of 85 percent ethanol and 15 percent gasoline.

"FTP" means Federal Test Procedure.

"GHG" means greenhouse gas.

"g/mi" means grams per mile.

"GVW" means gross vehicle weight.

"GVWR" means gross vehicle weight rating.

"GWP" means the global warming potential.

"HEV" means hybrid-electric vehicle.

"LDT" means light-duty truck.

"LDT1" means a light-duty truck with a loaded vehicle weight of 0-3750 pounds.

"LDT2" means a "LEV II" light-duty truck with a loaded vehicle weight of 3751 pounds to a gross vehicle weight of 8500 pounds.

"LEV" means low-emission vehicle.

"LPG" means liquefied petroleum gas.

"LVW" means loaded vehicle weight.

"MDPV" means medium-duty passenger vehicle.

"MDV" means medium-duty vehicle.

"mg/mi" means milligrams per mile.

"N_2O" means nitrous oxide.

"PC" means passenger car.

"SULEV" means super-ultra-low-emission vehicle.

"ULEV" means ultra-low-emission vehicle.

"ZEV" means zero-emission vehicle.

(e) *Definitions Specific to this Section.* The following definitions apply to this section 1961.1:

(1) "A/C Direct Emissions" means any refrigerant released from a motor vehicle's air conditioning system.

(2) "A/C Indirect Emissions" means any increase in motor vehicle exhaust CO_2 emissions that can be attributed to the operation of the air conditioning system.

(3) "GHG Vehicle Test Group" means vehicles that have an identical test group, vehicle make and model, transmission class and driveline, aspiration method (e.g., naturally aspirated, turbocharged), camshaft configuration, valvetrain configuration, and inertia weight class.

(4) "Greenhouse Gas" means the following gases: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.

(5) "Grid-Connected Hybrid Electric Vehicle" means a hybrid electric vehicle that has the capacity for the battery to be recharged from an off-board source of electricity and has some all-electric range.

(6) "GWP" means the 100-year global warming potential specified in IPCC (Intergovernmental Panel on Climate Change) 2000: Emissions Scenarios. N. Nakicenovic et. al. editors, Special Report of Working Group III of the IPCC, Cambridge University Press, Cambridge UK, ISBN 0-521-80493-0.

(7) "National greenhouse gas program" means the national program that applies to new 2012 through 2016 model year passenger cars, light-duty trucks, and medium-duty passenger vehicles as proposed by the U.S. Environmental Protection Agency at 74 Fed.Reg. 49454 (September 28, 2009) and adopted by EPA on April 1, 2010, 75 Fed.Reg. [insert page], April [insert date], 2010, as incorporated in and amended by the "California Exhaust Emission Stand-

ards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles."

(8) "Normal Operation" of an air conditioning system means typical everyday use of the A/C system to cool a vehicle. "Normal Operation" does not include car accidents, dismantling of an air conditioning system, or any other non-typical events.

(9) "Optional GHG Test Vehicle Configuration" means any GHG vehicle configuration that is selected for testing by the manufacturer as allowed by section G.2.3 of the "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," other than the worst-case configuration.

(10) "Renewable Energy Resource" means a facility that meets all of the criteria set forth in Public Resources Code section 25741(a), except that the facility is not required to be located in California or near the border of California.

(11) "Variable Displacement Compressor" means a compressor in which the mass flow rate of refrigerant is adjusted independently of compressor speed by the control system in response to cooling load demand.

(12) "Variable Speed Compressor" means a compressor in which the mass flow rate of refrigerant can be adjusted by control of the compressor input shaft speed, independent of vehicle engine speed. For example, a variable speed compressor can have electric drive, hydraulic drive, or mechanical drive through a variable speed transmission.

(13) "Worst-Case" means the vehicle configuration within each test group that is expected to have the highest CO_2-equivalent value, as calculated in section 1961.1(a)(1)(B)1.

(f) *Severability.* Each provision of this section is severable, and in the event that any provision of this section is held to be invalid, the remainder of this article remains in full force and effect.

(g) *Effective Date of this Section.* The requirements of this section 1961.1 shall become effective on January 1, 2006.

Note: Authority cited: Sections 39500, 39600, 39601, 43013, 43018, 43018.5, 43101, 43104 and 43105, Health and Safety Code. Reference: Sections 39002, 39003, 39667, 43000, 43009.5, 43013, 43018, 43018.5, 43100, 43101, 43101.5, 43102, 43104, 43105, 43106, 43204, 43205 and 43211, Health and Safety Code.

HISTORY

1. New section filed 9-15-2005; operative 1-1-2006 (Register 2005, No. 37).

2. New subsections (a)(1)(A)1.-(a)(1)(A)1.d., amendment of subsection (a)(1)(B)1.a., new subsections (a)(1)(B)1.b.iv.

and (a)(1)(B)1.c.iv. and amendment of subsection (b)(3)(A) filed 4-1-2010; operative 4-1-2010 pursuant to Government Code section 11343.4 (Register 2010, No. 14).

3. Amendment designating former subsection (a)(1)(A) as subsection (a)(1)(A)(i), new subsections (a)(1)(A)(ii)-(a)(1)(A)(ii)3., new subsection (e)(7) and subsection renumbering filed 4-1-2010; operative 4-1-2010 pursuant to Government Code section 11343.4 (Register 2010, No. 14).

13 CCR § 1961.1, 13 CA ADC § 1961.1

This database is current through 8/12/11 Register 2011, No. 32

END OF DOCUMENT

limitation that has the effect of constraining emissions, that applies to the process unit and that is legally enforceable.

[51 FR 40669, Nov. 7, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §51.165, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

EFFECTIVE DATE NOTE: At 75 FR 16015, Mar. 31, 2010, in §51.165, paragraphs (a)(1)(v)(G), (a)(1)(vi)(C)(*3*), (a)(1)(ix), (a)(1)(xxviii)(B)(*2*), (a)(1)(xxviii)(B)(*4*), (a)(1)(xxxv)(A)(*1*), (a)(1)(xxxv)(B)(*1*), (a)(1)(xxxv)(C), (a)(1)(xxxv)(D), (a)(2)(ii)(B), (a)(6)(iii), (a)(6)(iv), and (f)(4)(i)(D) were stayed, and paragraph (a)(4) was added, effective April 1, 2010 until October 3, 2011.

§51.166 Prevention of significant deterioration of air quality.

(a)(1) *Plan requirements.* In accordance with the policy of section 101(b)(1) of the Act and the purposes of section 160 of the Act, each applicable State Implementation Plan and each applicable Tribal Implementation Plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) *Plan revisions.* If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) *Required plan revision.* If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) *Plan assessment.* The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) *Public participation.* Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in §51.102.

(6) *Amendments.* (i) Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the FEDERAL REGISTER.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(7) *Applicability.* Each plan shall contain procedures that incorporate the requirements in paragraphs (a)(7)(i) through (vi) of this section.

(i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

(*b*) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above an emission limitation that was legally enforceable during the consecutive 24-month period.

(*c*) The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period. However, if an emission limitation is part of a maximum achievable control technology standard that the Administrator proposed or promulgated under part 63 of this chapter, the baseline actual emissions need only be adjusted if the State has taken credit for such emissions reductions in an attainment demonstration or maintenance plan consistent with the requirements of §51.165(a)(3)(ii)(G).

(*d*) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period can be used For each regulated NSR pollutant.

(*e*) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by paragraphs (b)(47)(ii)(b) and (c) of this section.

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(iv) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (b)(47)(i) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (b)(47)(ii) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (b)(47)(iii) of this section, except that fugitive emissions (to the extent quantifiable) shall be included regardless of the source category.

(48) [Reserved]

(49) *Regulated NSR pollutant,* for purposes of this section, means the following:

(i) Any pollutant for which a national ambient air quality standard has been promulgated and any pollutant identified under this paragraph (b)(49)(i) as a constituent or precursor to such pollutant. Precursors identified by the Administrator for purposes of NSR are the following:

(*a*) Volatile organic compounds and nitrogen oxides are precursors to ozone in all attainment and unclassifiable areas.

(*b*) Sulfur dioxide is a precursor to $PM_{2.5}$ in all attainment and unclassifiable areas.

(*c*) Nitrogen oxides are presumed to be precursors to $PM_{2.5}$ in all attainment and unclassifiable areas, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations.

(*d*) Volatile organic compounds are presumed not to be precursors to $PM_{2.5}$ in any attainment or unclassifiable

area, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of volatile organic compounds from sources in a specific area are a significant contributor to that area's ambient $PM_{2.5}$ concentrations.

(ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act;

(iv) Any pollutant that otherwise is subject to regulation under the Act; except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

(v)–(vi) [Reserved]

(50) *Reviewing authority* means the State air pollution control agency, local agency, other State agency, Indian tribe, or other agency authorized by the Administrator to carry out a permit program under § 51.165 and this section, or the Administrator in the case of EPA-implemented permit programs under § 52.21 of this chapter.

(51) *Project* means a physical change in, or change in method of operation of, an existing major stationary source.

(52) *Lowest achievable emission rate (LAER)* is as defined in § 51.165(a)(1)(xiii).

(53)(i) In general, *process unit* means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.

(ii) Pollution control equipment is not part of the process unit, unless it serves a dual function as both process and control equipment. Administrative and warehousing facilities are not part of the process unit.

(iii) For replacement cost purposes, components shared between two or more process units are proportionately allocated based on capacity.

(iv) The following list identifies the process units at specific categories of stationary sources.

(*a*) For a steam electric generating facility, the process unit consists of those portions of the plant that contribute directly to the production of electricity. For example, at a pulverized coal-fired facility, the process unit would generally be the combination of those systems from the coal receiving equipment through the emission stack (excluding post-combustion pollution controls), including the coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler, burners, turbine-generator set, condenser, cooling tower, water treatment system, air preheaters, and operating control systems. Each separate generating unit is a separate process unit.

(*b*) For a petroleum refinery, there are several categories of process units: those that separate and/or distill petroleum feedstocks; those that change molecular structures; petroleum treating processes; auxiliary facilities, such as steam generators and hydrogen production units; and those that load, unload, blend or store intermediate or completed products.

(*c*) For an incinerator, the process unit would consist of components from the feed pit or refuse pit to the stack, including conveyors, combustion devices, heat exchangers and steam generators, quench tanks, and fans.

NOTE TO PARAGRAPH (b)(53): By a court order on December 24, 2003, this paragraph (b)(53) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the FEDERAL REGISTER advising the public of the termination of the stay.

(54) *Functionally equivalent component* means a component that serves the same purpose as the replaced component.

NOTE TO PARAGRAPH (b)(54): By a court order on December 24, 2003, this paragraph (b)(54) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time,

§ 52.18 Abbreviations.

Abbreviations used in this part shall be those set forth in part 60 of this chapter.

[38 FR 12698, May 14, 1973]

§ 52.20 Attainment dates for national standards.

Each subpart contains a section which specifies the latest dates by which national standards are to be attained in each region in the State. An attainment date which only refers to a month and a year (such as July 1975) shall be construed to mean the last day of the month in question. However, the specification of attainment dates for national standards does not relieve any State from the provisions of subpart N of this chapter which require all sources and categories of sources to comply with applicable requirements of the plan—

(a) As expeditiously as practicable where the requirement is part of a control strategy designed to attain a primary standard, and

(b) Within a reasonable time where the requirement is part of a control strategy designed to attain a secondary standard.

[37 FR 19808, Sept. 22, 1972, as amended at 39 FR 34535, Sept. 26, 1974; 51 FR 40676, Nov. 7, 1986]

§ 52.21 Prevention of significant deterioration of air quality.

(a)(1) *Plan disapproval.* The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(2) *Applicability procedures.* (i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements. The Administrator has authority to issue any such permit.

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(*a*) through (*f*) of this section.

(*a*) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(*b*) The procedure for calculating (before beginning actual construction

whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(*c*) *Actual-to-projected-actual applicability test for projects that only involve existing emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(41) of this section) and the baseline actual emissions (as defined in paragraphs (b)(48)(i) and (ii) of this section), for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*d*) *Actual-to-potential test for projects that only involve construction of a new emissions unit(s).* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(48)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*e*) [Reserved]

(*f*) *Hybrid test for projects that involve multiple types of emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(c) through (*d*) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(v) For any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with the requirements under paragraph (aa) of this section.

(b) *Definitions.* For the purposes of this section:

(1)(i) *Major stationary source* means:

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum

storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(*c*) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source, if the changes would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds or NO_X shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants—The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more that 250 million British thermal units per hour heat input, and

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section); and a significant net emissions increase of that pollutant from the major stationary source.

(ii) Any significant emissions increase (as defined at paragraph (b)(40) of this section) from any emissions units or net emissions increase (as defined in paragraph (b)(3) of this section) at a major stationary source that is significant for volatile organic compounds or NO_X shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair and replacement. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replacement provisions contained in paragraph (cc) of this section;

NOTE TO PARAGRAPH (b)(2)(iii)(*a*): By court order on December 24, 2003, the second sentence of this paragraph (b)(2)(iii)(a) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the FEDERAL REGISTER advising the public of the termination of the stay.

(*b*) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy

Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plant pursuant to the Federal Power Act;

(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) Use of an alternative fuel or raw material by a stationary source which:

(1) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or 40 CFR 51.166; or

(2) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or 40 CFR 51.166.

(g) Any change in ownership at a stationary source.

(h) [Reserved]

(i) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(1) The State implementation plan for the State in which the project is located, and

(2) Other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(j) The installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis.

(k) The reactivation of a very clean coal-fired electric utility steam generating unit.

(iv) This definition shall not apply with respect to a particular regulated NSR pollutant when the major stationary source is complying with the requirements under paragraph (aa) of this section for a PAL for that pollutant. Instead, the definition at paragraph (aa)(2)(viii) of this section shall apply.

(v) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

(3)(i) *Net emissions increase* means, with respect to any regulated NSR pollutant emitted by a major stationary source, the amount by which the sum of the following exceeds zero:

(a) The increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated pursuant to paragraph (a)(2)(iv) of this section; and

(b) Any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable. Baseline actual emissions for calculating increases and decreases under this paragraph (b)(3)(i)(b) shall be determined as provided in paragraph (b)(48) of this section, except that paragraphs (b)(48)(i)(c) and (b)(48)(ii)(d) of this section shall not apply.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(a) The date five years before construction on the particular change commences; and

(b) The date that the increase from the particular change occurs.(iii) An increase or decrease in actual emissions is creditable only if:

(a) The Administrator or other reviewing authority has not relied on it in issuing a permit for the source under this section, which permit is in effect

month period must be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period can be used For each regulated NSR pollutant.

(*e*) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by paragraphs (b)(48)(ii)(*b*) and (*c*) of this section.

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(iv) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (b)(48)(i) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (b)(48)(ii) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (b)(48)(iii) of this section, except that fugitive emissions (to the extent quantifiable) shall be included regardless of the source category.

(49) [Reserved]

(50) *Regulated NSR pollutant*, for purposes of this section, means the following:

(i) Any pollutant for which a national ambient air quality standard has been promulgated and any pollutant identified under this paragraph (b)(50)(i) as a constituent or precursor for such pollutant. Precursors identified by the Administrator for purposes of NSR are the following:

(*a*) Volatile organic compounds and nitrogen oxides are precursors to ozone in all attainment and unclassifiable areas.

(*b*) Sulfur dioxide is a precursor to $PM_{2.5}$ in all attainment and unclassifiable areas.

(*c*) Nitrogen oxides are presumed to be precursors to $PM_{2.5}$ in all attainment and unclassifiable areas, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations.

(*d*) Volatile organic compounds are presumed not to be precursors to $PM_{2.5}$ in any attainment or unclassifiable area, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of volatile organic compounds from sources in a specific area are a significant contributor to that area's ambient $PM_{2.5}$ concentrations.

(ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act;

(iv) Any pollutant that otherwise is subject to regulation under the Act; except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

(v) [Reserved]

(vi) Particulate matter (PM) emissions, $PM_{2.5}$ emissions and PM_{10} emissions shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures. On or after January 1, 2011 (or any earlier date established in the upcoming rulemaking codifying test methods), such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions

(7)(i) The requirements for air quality monitoring in paragraphs (m)(1) (ii) through (iv) of this section shall not apply to a particular source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete with respect to the requirements of this section other than those in paragraphs (m)(1) (ii) through (iv) of this section, and with respect to the requirements for such analyses at 40 CFR 52.21(m)(2) as in effect on June 19, 1978. Instead, the latter requirements shall apply to any such source or modification.

(ii) The requirements for air quality monitoring in paragraphs (m)(1) (ii) through (iv) of this section shall not apply to a particular source or modification that was not subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements in paragraphs (m)(1) (ii) through (iv).

(8)(i) At the discretion of the Administrator, the requirements for air quality monitoring of PM_{10} in paragraphs (m)(1) (i)–(iv) of this section may not apply to a particular source or modification when the owner or operator of the source or modification submits an application for a permit under this section on or before June 1, 1988 and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements for monitoring particulate matter in paragraphs (m)(1) (i)–(iv).

(ii) The requirements for air quality monitoring pf PM_{10} in paragraphs (m)(1), (ii) and (iv) and (m)(3) of this section shall apply to a particular source or modification if the owner or operator of the source or modification submits an application for a permit under this section after June 1, 1988 and no later than December 1, 1988. The data shall have been gathered over at least the period from February 1, 1988 to the date the application becomes otherwise complete in accordance with the provisions set forth under paragraph (m)(1)(viii) of this section, except that if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than 4 months), the data that paragraph (m)(1)(iii) requires shall have been gathered over a shorter period.

(9) The requirements of paragraph (k)(2) of this section shall not apply to a stationary source or modification with respect to any maximum allowable increase for nitrogen oxides if the owner or operator of the source or modification submitted an application for a permit under this section before the provisions embodying the maximum allowable increase took effect as part of the applicable implementation plan and the Administrator subsequently determined that the application as submitted before that date was complete.

(10) The requirements in paragraph (k)(2) of this section shall not apply to a stationary source or modification with respect to any maximum allowable increase for PM–10 if (i) the owner or operator of the source or modification submitted an application for a permit under this section before the provisions embodying the maximum allowable increases for PM–10 took effect in an implementation plan to which this section applies, and (ii) the Administrator subsequently determined that the application as submitted before that date was otherwise complete. Instead, the requirements in paragraph (k)(2) shall apply with respect to the maximum allowable increases for TSP as in effect on the date the application was submitted.

(j) *Control technology review.* (1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each regulated NSR pollutant for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) *Source impact analysis.* The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

(l) *Air quality models.* (1) All estimates of ambient concentrations required under this paragraph shall be based on applicable air quality models, data bases, and other requirements specified in appendix W of part 51 of this chapter (Guideline on Air Quality Models).

(2) Where an air quality model specified in appendix W of part 51 of this chapter (Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific state program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures developed in accordance with paragraph (q) of this section.

(m) *Air quality analysis*—(1) *Preapplication analysis.* (i) Any application for a permit under this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to omit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) With respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the Administrator determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(iv) In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one year and shall represent at least the year preceding receipt of the application, except that, if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

in the generation and use of the credits.

[65 FR 59971, Oct. 6, 2000, as amended at 71 FR 2830, Jan. 17, 2006]

§ 86.1817-08 Complete heavy-duty vehicle averaging, trading, and banking program.

Section 86.1817-08 includes text that specifies requirements that differ from § 86.1817-05. Where a paragraph in § 86.1817-05 is identical and applicable to § 86.1817-08, this may be indicated by specifying the corresponding paragraph and the statement "[Reserved]. For guidance see § 86.1817-05."

(a) through (o) [Reserved]. For guidance see § 86.1817-05.

(p) The following provisions apply for model year 2008 and later engines. These provisions apply instead of the provisions of paragraphs § 86.1817-05 (a) through (o) to the extent that they are in conflict.

(1) Manufacturers of Otto-cycle vehicles may participate in an NMHC averaging, banking and trading program to show compliance with the standards specified in § 86.1806-08. The generation and use of NMHC credits are subject to the same provisions in paragraphs § 86.1817-05 (a) through (o) that apply for NO_X credits, except as otherwise specified in this section.

(2) NO_X or NMHC (or NO_X plus NMHC) credits may be exchanged between heavy-duty Otto-cycle test groups certified to the engine standards of subpart A of this part and heavy-duty Otto-cycle test groups certified to the chassis standards of this subpart, subject to an 0.8 discount factor (e.g., 100 grams of NO_X credits generated from vehicles would be equivalent to 80 grams of NO_X credits if they are used in the engine program of subpart A of this part, and vice versa). Credits that were previously discounted when they were banked according to § 86.1817-05(c), are subject to an additional discount factor of 0.888 instead of the 0.8 discount factor otherwise required by this paragraph (p)(2). This results in a total discount of 0.8 ($0.9 \times 0.888 = 0.8$).

(3) Credits are to be rounded to the nearest one-hundredth of a Megagram.

(4) To calculate credits relative to the NO_X standards listed in § 86.1816-08 (a)(1)(iv)(A) or (a)(2)(iv)(A) (0.2 or 0.4 grams per mile, respectively) express the standard and FEL to the nearest one-hundredth of a gram per mile prior to calculating the credits. Thus, either 0.20 or 0.40 should be used as the value for "Std".

(5) Credits generated for 2008 and later model year test groups are not discounted (except as specified in § 86.1817-05(c) and paragraph (p)(2) of this section), and do not expire.

(6) For the purpose of using or generating credits during a phase-in of new standards, a manufacturer may elect to split a test group into two subgroups: one which uses credits and one which generates credits. The manufacturer must indicate in the application for certification that the test group is to be split, and may assign the numbers and configurations of vehicles within the respective subfamilies at any time prior to the submission of the end-of-year report described in § 86.1817-05 (i)(3). Manufacturers certifying a split test group may label all of the vehicles within that test group with the same FELs: either with a NO_X FEL and an NMHC FEL, or with a single NO_X+NMHC FEL. The FEL(s) on the label will apply for all SEA or other compliance testing.

(7) Vehicles meeting all of the applicable standards of § 86.1816-08 prior to model year 2008 may generate NMHC credits for use by 2008 or later test groups. Credits are calculated according to § 86.1817-05(c), except that the applicable FEL cap listed in § 86.1816-08(a)(1)(ii)(B) or (2)(ii)(B) applies instead of "Std" (the applicable standard).

[66 FR 5192, Jan. 18, 2001]

§ 86.1818-12 Greenhouse gas emission standards for light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles.

(a) *Applicability.* This section contains standards and other regulations applicable to the emission of the air pollutant defined as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. This section applies to 2012 and later model year LDVs, LDTs and MDPVs, including multi-fuel vehicles, vehicles fueled

with alternative fuels, hybrid electric vehicles, plug-in hybrid electric vehicles, electric vehicles, and fuel cell vehicles. Unless otherwise specified, multi-fuel vehicles must comply with all requirements established for each consumed fuel. The provisions of this section also apply to aftermarket conversion systems, aftermarket conversion installers, and aftermarket conversion certifiers, as those terms are defined in 40 CFR 85.502, of all model year light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles. Manufacturers that qualify as a small business according to the requirements of § 86.1801–12(j) are exempt from the emission standards in this section. Manufacturers that have submitted a declaration for a model year according to the requirements of § 86.1801–12(k) for which approval has been granted by the Administrator are conditionally exempt from the emission standards in paragraphs (c) through (e) of this section for the approved model year.

(b) *Definitions.* For the purposes of this section, the following definitions shall apply:

(1) *Passenger automobile* means a motor vehicle that is a passenger automobile as that term is defined in 49 CFR 523.4.

(2) *Light truck* means a motor vehicle that is a non-passenger automobile as that term is defined in 49 CFR 523.5.

(c) *Fleet average CO_2 standards for passenger automobiles and light trucks.* (1) For a given individual model year's production of passenger automobiles and light trucks, manufacturers must comply with a fleet average CO_2 standard calculated according to the provisions of this paragraph (c). Manufacturers must calculate separate fleet average CO_2 standards for their passenger automobile and light truck fleets, as those terms are defined in this section. Each manufacturer's fleet average CO_2 standards determined in this paragraph (c) shall be expressed in whole grams per mile, in the model year specified as applicable. Manufacturers eligible for and choosing to participate in the Temporary Leadtime Allowance Alternative Standards for qualifying manufacturers specified in paragraph (e) of this section shall not include vehicles subject to the Temporary Leadtime Allowance Alternative Standards in the calculations of their primary passenger automobile or light truck standards determined in this paragraph (c). Manufacturers shall demonstrate compliance with the applicable standards according to the provisions of § 86.1865–12.

(2) *Passenger automobiles*—(i) *Calculation of CO_2 target values for passenger automobiles.* A CO_2 target value shall be determined for each passenger automobile as follows:

(A) For passenger automobiles with a footprint of less than or equal to 41 square feet, the gram/mile CO_2 target value shall be selected for the appropriate model year from the following table:

Model year	CO_2 target value (grams/mile)
2012	244.0
2013	237.0
2014	228.0
2015	217.0
2016 and later	206.0

(B) For passenger automobiles with a footprint of greater than 56 square feet, the gram/mile CO_2 target value shall be selected for the appropriate model year from the following table:

Model year	CO_2 target value (grams/mile)
2012	315.0
2013	307.0
2014	299.0
2015	288.0
2016 and later	277.0

(C) For passenger automobiles with a footprint that is greater than 41 square feet and less than or equal to 56 square feet, the gram/mile CO_2 target value shall be calculated using the following equation and rounded to the nearest 0.1 grams/mile:

$$\text{Target } CO_2 = [4.72 \times f] + b$$

Where:

f is the vehicle footprint, as defined in § 86.1803; and

b is selected from the following table for the appropriate model year:

Model year	b
2012	50.5
2013	43.3
2014	34.8

Model year	b
2015	23.4
2016 and later	12.7

(ii) *Calculation of the fleet average CO_2 standard for passenger automobiles.* In each model year manufacturers must comply with the CO_2 exhaust emission standard for their passenger automobile fleet, calculated for that model year as follows:

(A) A CO_2 target value shall be determined according to paragraph (c)(2)(i) of this section for each unique combination of model type and footprint value.

(B) Each CO_2 target value, determined for each unique combination of model type and footprint value, shall be multiplied by the total production of that model type/footprint combination for the appropriate model year.

(C) The resulting products shall be summed, and that sum shall be divided by the total production of passenger automobiles in that model year. The result shall be rounded to the nearest whole gram per mile. This result shall be the applicable fleet average CO_2 standard for the manufacturer's passenger automobile fleet.

(3) *Light trucks*—(i) *Calculation of CO_2 target values for light trucks.* A CO_2 target value shall be determined for each light truck as follows:

(A) For light trucks with a footprint of less than or equal to 41 square feet, the gram/mile CO_2 target value shall be selected for the appropriate model year from the following table:

Model year	CO_2 target value (grams/mile)
2012	294.0
2013	284.0
2014	275.0
2015	261.0
2016 and later	247.0

(B) For light trucks with a footprint of greater than 66 square feet, the gram/mile CO_2 target value shall be selected for the appropriate model year from the following table:

Model year	CO_2 target value (grams/mile)
2012	395.0
2013	385.0
2014	376.0
2015	362.0
2016 and later	348.0

(C) For light trucks with a footprint that is greater than 41 square feet and less than or equal to 66 square feet, the gram/mile CO_2 target value shall be calculated using the following equation and rounded to the nearest 0.1 grams/mile:

$$\text{Target } CO_2 = (4.04 \times f) + b$$

Where:

f is the footprint, as defined in §86.1803; and b is selected from the following table for the appropriate model year:

Model year	b
2012	128.6
2013	118.7
2014	109.4
2015	95.1
2016 and later	81.1

(ii) *Calculation of fleet average CO_2 standards for light trucks.* In each model year manufacturers must comply with the CO_2 exhaust emission standard for their light truck fleet, calculated for that model year as follows:

(A) A CO_2 target value shall be determined according to paragraph (c)(3)(i) of this section for each unique combination of model type and footprint value.

(B) Each CO_2 target value, which represents a unique combination of model type and footprint value, shall be multiplied by the total production of that model type/footprint combination for the appropriate model year.

(C) The resulting products shall be summed, and that sum shall be divided by the total production of light trucks in that model year. The result shall be rounded to the nearest whole gram per mile. This result shall be the applicable fleet average CO_2 standard for the manufacturer's light truck fleet.

(d) *In-use CO_2 exhaust emission standards.* The in-use exhaust CO_2 emission standard shall be the combined city/highway carbon-related exhaust emission value calculated for the appropriate vehicle carline/subconfiguration according to the provisions of §600.113-08(g)(4) of this chapter multiplied by 1.1 and rounded to the nearest whole gram

ɜr mile. For in-use vehicle carlines/ ıbconfigurations for which a com- ned city/highway carbon-related ex- ıust emission value was not deter- ıined under §600.113(g)(4) of this chap- ɜr, the in-use exhaust CO_2 emission ɜandard shall be the combined city/ ighway carbon-related exhaust emis- on value calculated according to the ɔovisions of §600.208–12 of this chapter ɔr the vehicle model type (except that ɔtal model year production data shall ɜ used instead of sales projections) ıultiplied by 1.1 and rounded to the earest whole gram per mile. For vehi- les that are capable of operating on ıultiple fuels, including but not lim- ɜd to alcohol dual fuel, natural gas ual fuel and plug-in hybrid electric ehicles, a separate in-use standard ıall be determined for each fuel that ıe vehicle is capable of operating on. hese standards apply to in-use testing erformed by the manufacturer pursu- nt to regulations at §86.1845–04 and 3.1846–01 and to in-use testing per- ɔrmed by EPA.

(e) *Temporary Lead Time Allowance Al- ɜrnative Standards.* (1) The interim eet average CO_2 standards in this aragraph (e) are optionally applicable ɔ each qualifying manufacturer, where he terms "sales" or "sold" as used in his paragraph (e) means vehicles pro- uced and delivered for sale (or sold) in he states and territories of the United tates.

(i) A qualifying manufacturer is a ıanufacturer with sales of 2009 model ear combined passenger automobiles nd light trucks of greater than zero nd less than 400,000 vehicles.

(A) If a manufacturer sold less than 00,000 but more than zero 2009 model ear combined passenger automobiles nd light trucks while under the con- rol of another manufacturer, where hose 2009 model year passenger auto- nobiles and light trucks bore the rand of the producing manufacturer, nd where the producing manufacturer ecame independent no later than De- ember 31, 2010, the producing manu- acturer is a qualifying manufacturer.

(B) In the case where two or more ualifying manufacturers combine as he result of merger or the purchase of 0 percent or more of one or more com- ıanies by another company, and if the combined 2009 model year sales of the merged or combined companies is less than 400,000 but more than zero (combined passenger automobiles and light trucks), the corporate entity formed by the combination of two or more qualifying manufacturers shall continue to be a qualifying manufacturer. The total number of vehicles that the corporate entity is allowed to include under the Temporary Leadtime Allowance Alternative Standards shall be determined by paragraph (e)(2) or (e)(3) of this section where sales is the total combined 2009 model year sales of all of the merged or combined companies. Vehicles sold by the companies that combined by merger/acquisition to form the corporate entity that were subject to the Temporary Leadtime Allowance Alternative Standards in paragraph (e)(4) of this section prior to the merger/acquisition shall be combined to determine the remaining number of vehicles that the corporate entity may include under the Temporary Leadtime Allowance Alternative Standards in this paragraph (e).

(C) In the case where two or more manufacturers combine as the result of merger or the purchase of 50 percent or more of one or more companies by another company, and if the combined 2009 model year sales of the merged or combined companies is equal to or greater than 400,000 (combined passenger automobiles and light trucks), the new corporate entity formed by the combination of two or more manufacturers is not a qualifying manufacturer. Such a manufacturer shall meet the emission standards in paragraph (c) of this section beginning with the model year that is numerically two years greater than the calendar year in which the merger/acquisition(s) took place.

(ii) For the purposes of making the determination in paragraph (e)(1)(i) of this section, "manufacturer" shall mean that term as defined at 49 CFR 531.4 and as that definition was applied to the 2009 model year for the purpose of determining compliance with the 2009 corporate average fuel economy standards at 49 CFR parts 531 and 533.

(iii) A qualifying manufacturer may not use these Temporary Leadtime Allowance Alternative Standards until

they have used all available banked credits and/or credits available for transfer accrued under § 86.1865–12(k). A qualifying manufacturer with a net positive credit balance calculated under § 86.1865–12(k) in any model year after considering all available credits either generated, carried forward from a prior model year, transferred from other averaging sets, or obtained from other manufacturers, may not use these Temporary Leadtime Allowance Alternative Standards in such model year.

(2) Qualifying manufacturers may select any combination of 2012 through 2015 model year passenger automobiles and/or light trucks to include under the Temporary Leadtime Allowance Alternative Standards determined in this paragraph (e) up to a cumulative total of 100,000 vehicles. Vehicles selected to comply with these standards shall not be included in the calculations of the manufacturer's fleet average standards under paragraph (c) of this section.

(3) Qualifying manufacturers with sales of 2009 model year combined passenger automobiles and light trucks in the United States of greater than zero and less than 50,000 vehicles may select any combination of 2012 through 2015 model year passenger automobiles and/or light trucks to include under the Temporary Leadtime Allowance Alternative Standards determined in this paragraph (e) up to a cumulative total of 200,000 vehicles, and additionally may select up to 50,000 2016 model year vehicles to include under the Temporary Leadtime Allowance Alternative Standards determined in this paragraph (e). To be eligible for the provisions of this paragraph (e)(3) qualifying manufacturers must provide annual documentation of good-faith efforts made by the manufacturer to purchase credits from other manufacturers. Without such documentation, the manufacturer may use the Temporary Leadtime Allowance Alternative Standards according to the provisions of paragraph (e)(2) of this section, and the provisions of this paragraph (e)(3) shall not apply. Vehicles selected to comply with these standards shall not be included in the calculations of the manufacturer's fleet average standards under paragraph (c) of this section.

(4) To calculate the applicable Temporary Leadtime Allowance Alternative Standards, qualifying manufacturers shall determine the fleet average standard separately for the passenger automobiles and light trucks selected by the manufacturer to be subject to the Temporary Leadtime Allowance Alternative Standards, subject to the limitations expressed in paragraphs (e)(1) through (3) of this section.

(i) The Temporary Leadtime Allowance Alternative Standard applicable to qualified passenger automobiles as defined in § 600.002–08 of this chapter shall be the standard calculated using the provisions of paragraph (c)(2)(ii) of this section for the appropriate model year multiplied by 1.25 and rounded to the nearest whole gram per mile. For the purposes of applying paragraph (c)(2)(ii) of this section to determine the standard, the passenger automobile fleet shall be limited to those passenger automobiles subject to the Temporary Leadtime Allowance Alternative Standard.

(ii) The Temporary Leadtime Allowance Alternative Standard applicable to qualified light trucks (*i.e.* non-passenger automobiles as defined in § 600.002–08 of this chapter) shall be the standard calculated using the provisions of paragraph (c)(3)(ii) of this section for the appropriate model year multiplied by 1.25 and rounded to the nearest whole gram per mile. For the purposes of applying paragraph (c)(3)(ii) of this section to determine the standard, the light truck fleet shall be limited to those light trucks subject to the Temporary Leadtime Allowance Alternative Standard.

(5) Manufacturers choosing to optionally apply these standards are subject to the restrictions on credit banking and trading specified in § 86.1865–12.

(f) *Nitrous oxide (N_2O) and methane (CH_4) exhaust emission standards for passenger automobiles and light trucks.* Each manufacturer's fleet of combined passenger automobile and light trucks must comply with N_2O and CH_4 standards using either the provisions of paragraph (f)(1) of this section or the provisions of paragraph (f)(2) of this section. The manufacturer may not use

the provisions of both paragraphs (f)(1) and (f)(2) of this section in a model year. For example, a manufacturer may not use the provisions of paragraph (f)(1) of this section for their passenger automobile fleet and the provisions of paragraph (f)(2) for their light truck fleet in the same model year.

(1) *Standards applicable to each test group.*

(i) Exhaust emissions of nitrous oxide (N_2O) shall not exceed 0.010 grams per mile at full useful life, as measured according to the Federal Test Procedure (FTP) described in subpart B of this part.

(ii) Exhaust emissions of methane (CH_4) shall not exceed 0.030 grams per mile at full useful life, as measured according to the Federal Test Procedure (FTP) described in subpart B of this part.

(2) *Including N_2O and CH_4 in fleet averaging program.* Manufacturers may elect to not meet the emission standards in paragraph (f)(1) of this section. Manufacturers making this election shall include N_2O and CH_4 emissions in the determination of their fleet average carbon-related exhaust emissions, as calculated in subpart F of part 600 of this chapter. Manufacturers using this option must include both N_2O and CH_4 full useful life values in the fleet average calculations for passenger automobiles and light trucks. Use of this option will account for N_2O and CH_4 emissions within the carbon-related exhaust emission value determined for each model type according to the provisions part 600 of this chapter. This option requires the determination of full useful life emission values for both the Federal Test Procedure and the Highway Fuel Economy Test.

[75 FR 25686, May 7, 2010]

EFFECTIVE DATE NOTE: At 75 FR 25686, May 7, 2010, § 86.1808–12 was added, effective July 6, 2010.

§ 86.1819 [Reserved]

§ 86.1820–01 Durability group determination.

This section applies to the grouping of vehicles into durability groups. Manufacturers shall divide their product line into durability groups based on the following criteria:

(a) The vehicles covered by a certification application shall be divided into groups of vehicles which are expected to have similar emission deterioration and emission component durability characteristics throughout their useful life. Manufacturers shall use good engineering judgment in dividing their vehicles into durability groups. Such groups of vehicles are defined as durability groups.

(b) To be included in the same durability group, vehicles must be identical in all the respects listed in paragraphs (b) (1) through (7) of this section:

(1) Combustion cycle (e.g., two stroke, four stroke, Otto cycle, diesel cycle).

(2) Engine type (e.g., piston, rotary, turbine, air cooled versus water cooled).

(3) Fuel used (e.g., gasoline, diesel, methanol, ethanol, CNG, LPG, flexible fuels).

(4) Basic fuel metering system (e.g., throttle body injection, port injection (including central port injection), carburetor, CNG mixer unit).

(5) Catalyst construction (for example, beads or monolith).

(6) Precious metal composition of the catalyst by the type of principal active material(s) used (e.g., platinum based oxidation catalyst, palladium based oxidation catalyst, platinum and rhodium three-way catalyst, palladium and rhodium three way catalyst, platinum and palladium and rhodium three way catalyst).

(7) The manufacturer must choose one of the following two criteria:

(i) Grouping statistic:

(A) Vehicles are grouped based upon the value of the grouping statistic determined using the following equation:

$$GS = [(Cat\ Vol)/(Disp)] \times Loading\ Rate$$

Where:

GS = Grouping Statistic used to evaluate the range of precious metal loading rates and relative sizing of the catalysts compared to the engine displacement that are allowable within a durability group. The grouping statistic shall be rounded to a tenth of a gram/liter, in accordance with the Rounding-Off Method specified in ASTM E29–93a, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications (incorporated by reference, see § 86.1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for Respondents have been served through the Court's CM/ECF system on all registered counsel this 1st day of September, 2011.

DATED: September 1, 2011

/s/ Eric Hostetler
Counsel for Respondents