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ORAL ARGUMENT NOT YET SCHEDULED

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

No. 10-1380
(and consolidated cases)

GROCERY MANUFACTURERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF FINAL ACTIONS BY THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

CORRECTED FINAL BRIEF OF RESPONDENT

IGNACIA S. MORENO
Assistant Attorney General

JESSICA O'DONNELL
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 305-0851

OF COUNSEL:
SUSAN STAHLE
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

October 25, 2011

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent United States Environmental Protection Agency ("EPA") states as follows:

A. Parties, Intervenors, and Amici

All parties and intervenors are identified in petitioners' briefs. The States of Alabama, Alaska, Oklahoma, and Virginia are participating as amici curiae in support of petitioners.

B. Rulings Under Review

Petitioners seek review of two final decisions by EPA: "Partial Grant Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent, Decision of the Administrator," 75 Fed. Reg. 68,094 (Nov. 4, 2010), JA4-61; and "Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent, Decision of the Administrator," 76 Fed. Reg. 4662 (Jan. 26, 2011), JA62-83.

C. Related Cases

This case was not previously before this Court or any other court. All of the cases seeking review of the above-noted agency decisions have been consolidated under case no. 10-1380. On July 25, 2011, EPA issued a final rule, published at 76

Fed. Reg. 44,406, JA1881, which is related to the final decisions at issue in case no. 10-1380. Some of the petitioners in case no. 10-1380 have filed petitions for review of this related rule, which have been docketed as case nos. 11-1334 (consolidated with 11-1344). Petitioners in no. 11-1334 have moved the court, with EPA's support, to hold in abeyance case nos. 11-1334 and 11-1344 pending a decision in case no. 10-1380.[1]

Respectfully submitted,

/s/ *Jessica O'Donnell*
Jessica O'Donnell
United States Department of Justice
Environmental Defense Section
Counsel for Respondent EPA

Dated: October 25, 2011

[1] Petitioners in 11-1334 include the Alliance of Automobile Manufacturers, Association of Global Automakers, Inc., National Marine Manufacturers Association, and Outdoor Power Institute. Petitioner in 11-1344 is the American Petroleum Institute. Growth Energy has moved to intervene in support of EPA. Petitioner American Petroleum Institute takes no position on the motion to hold in abeyance nos. 11-1344 and 11-1344; Growth Energy submitted an opposition to the motion to hold these cases in abeyance.

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GLOSSARY

AAM	Alliance of Automobile Manufacturers
APA	Administrative Procedure Act
API	American Petroleum Institute
CAA	Clean Air Act or Act
CRC	Coordinating Research Council
DOE	Department of Energy
DOE Pilot Study	Effects of Intermediate Ethanol Blends on Legacy Vehicles and Small Non-Road Engines, Report 1 – Updated, Feb. 2009
E0	Gasoline with no ethanol
E10	Gasoline blended with 10% ethanol
E15	Gasoline blended with 15% ethanol
E20	Gasoline blended with 20% ethanol
EISA	Energy Independence and Security Act of 2007
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
Final Misfueling Rule	76 Fed. Reg. 44,406 (July 25, 2011)
First E15 Waiver Decision	75 Fed. Reg. 68,094 (Nov. 4, 2010)

JA	Joint Appendix
MY	Model Year
NLEV	National Low Emission Vehicle
NO_x	Nitrogen Oxides
Proposed Misfueling Rule	75 Fed. Reg. 68,044 (Nov. 4, 2010)
Second E15 Waiver Decision	76 Fed. Reg. 4662 (Jan. 26, 2011)

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JURISDICTION

This Court has jurisdiction to review the timely-filed petitions challenging EPA's decisions under 42 U.S.C. § 7607(b).

ISSUES PRESENTED

1. Whether EPA reasonably interprets Clean Air Act ("CAA") section 211(f)(4), 42 U.S.C. § 7545(f)(4), to authorize a partial, conditional waiver allowing a new fuel or fuel additive to be introduced into commerce for a subset of vehicles or engines.

2. Whether EPA complied with section 211(f)(4)'s procedural requirements.

3. Whether EPA's decision to grant a partial waiver allowing E15 for use in model year ("MY") 2001 and newer light-duty motor vehicles is adequately explained and supported by the record.

STATEMENT OF THE CASE

These petitions seek review of two EPA decisions that together partially grant and partially deny a waiver request by Growth Energy and 54 ethanol manufacturers, under CAA section 211(f)(4), 42 U.S.C. § 7545(f)(4), to allow the introduction into commerce of gasoline containing up to 15% ethanol ("E15"). *See* 75 Fed. Reg. 68,094 (Nov. 4, 2010) (hereinafter "First E15 Waiver Decision"),

JA4-61; 76 Fed. Reg. 4662 (Jan. 26, 2011) (hereinafter "Second E15 Waiver Decision"), JA62-83. EPA's E15 Waiver Decisions do not require that E15 be made, sold, or used, and mark just one of several steps that must occur before E15 may be sold in gas stations.

Congress enacted section 211(f) in 1977, as part of Title II, Emissions Standards for Moving Sources, which mandated increasingly stringent emission controls on mobile sources. Section 211(f) balances two equally important interests: allowing new fuels and fuel additives into the marketplace while protecting the national motor vehicle fleet from new fuels and fuel additives "which may impair emission performance of [motor] vehicles." S. Rep. No. 95-127, at 90 (1977). In 2007, Congress amended section 211, in the Energy Independence and Security Act of 2007 ("EISA"), to require greater amounts of renewable fuels and fuel additives, while still ensuring that affected engines and vehicles meet their emissions standards while using the new fuels and fuel additives. Pub. L. No. 110-140, §§ 201, 202, 251, 121 Stat. 1492 (2007).

As a result of more extensive emissions regulation under Title II, today's mobile source fleet reflects a wider array of emission control systems in more categories of engines, vehicles, and equipment than existed for any prior waiver request. Growth Energy's waiver application is the first request EPA has

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considered since EISA. EPA's decision to partially grant a waiver allowing use of E15 in 2001 and newer light-duty motor vehicles is reasonable and supported by the record, particularly given the advanced emission control systems in newer vehicles. It also strikes the appropriate balance between allowing the use of a new renewable fuel in appropriate motor vehicles, while ensuring that such use will not prevent those vehicles from meeting their emissions standards, consistent with Congress's intent.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

Section 211(f), 42 U.S.C. § 7545(f), is a linchpin of Title II's mobile source pollution control program; it regulates the "introduction into commerce" of any new fuel or fuel additive (hereinafter collectively referred to as "fuel") based on the fuel's impact on a mobile source's ability to meet applicable CAA emission standards. Section 211(f)(1), 42 U.S.C. § 7545(f)(1), prohibits introduction of any new fuel for use in motor vehicles that is not "substantially similar" to fuels used in certifying vehicles or engines as meeting their emissions standards (i.e.,

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"certification fuels")."[2] Section 211(f)(4), 42 U.S.C. § 7545(f)(4), authorizes EPA to waive the section 211(f)(1) prohibition if EPA determines that the fuel:

> will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified.

42 U.S.C. § 7545(f)(4).

II. PROCEEDINGS BEFORE EPA

In March 2009, EPA received Growth Energy's E15 waiver application. E15 is not "substantially similar" to EPA's certification fuels and requires a waiver.[3] The waiver application included information from various test programs regarding the emissions effects of E15, including early stages of a Department of Energy ("DOE") testing program.

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[2] Generally, a fuel is "substantially similar" to certification fuel if it comports with established limits on chemical composition and physical properties, including the amount of alcohols and ethers (oxygenates) that may be added to the gasoline. 73 Fed. Reg. 22,277, 22,281 (Apr. 25, 2008).

[3] E10 (a gasoline-ethanol blend containing 10% ethanol) received a waiver of the section 211(f)(1) prohibition by operation of law under an earlier version of section 211(f)(4). 75 Fed. Reg. 68,099 n.11, JA10.

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A. Public Notice and Stakeholder Involvement

On April 21, 2009, EPA published notice of the application, provided information about the application, and requested public comment on all aspects of the application, including *inter alia*: (1) whether different vehicles and engines can meet their emissions standards while using E15; and (2) all legal and technical aspects of a possible waiver, including the appropriateness of a partial waiver, how to define vehicle or engine subsets for purposes of a partial waiver, and what measures might be needed to ensure that E15 would be used only in approved vehicles or engines. 74 Fed. Reg. 18,228, 18,230 (Apr. 21, 2009), JA1, JA3. EPA asked for data and provided guidance regarding the types of testing and analyses that would be useful in evaluating the application. *Id.*

Additionally, EPA noted several ongoing studies, including a DOE testing program, investigating the impact mid-level gasoline-ethanol blends (blends containing 10-20% ethanol) may have on vehicles and equipment. *Id.* 18,229, JA2. EPA stated that it expected to add to the docket additional data from the DOE study as it became available. *Id.* EPA also advised the public of potential outcomes for the application, including a partial waiver applicable to only a subset of vehicles. *Id.*

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EPA provided an extended 90-day comment period, until July 20, 2009, during which EPA received approximately 78,000 comments. 75 Fed. Reg. 68,099, JA10. After the formal comment period closed, EPA kept the docket open, enabling the public to view the docket and submit comments until its waiver decisions were signed, on October 13, 2010, and January 21, 2011, respectively. Over 300 interested parties submitted comments after the comment period closed.[4] All comments and information received after the formal comment period were included in the docket. EPA's consideration of and response to all of this information is discussed in its First and Second Waiver Decisions. 75 Fed. Reg. 68,094, JA4-61; 76 Fed. Reg. 4662, JA62-83.

Additionally, EPA participated in numerous meetings where stakeholders shared their comments, concerns, and additional data regarding the waiver request. *See, e.g.*, R.13979[5] (Agenda, Alliance Meeting with Margo Oge, EPA, March 25, 2010), JA1035. EPA included information received at these meetings in the docket. *Id.* EPA also kept the public informed through letters to the applicant,

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[4] The docket is available at http://www.regulations.gov/#!searchResults;rpp=10;po=0;s=EPA-HQ-OAR-2009-0211.

[5] Citations to "R._____" refer to the last several digits of the "Document ID" assigned to each document in the certified index to the administrative record.

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stakeholders, and Congress. *See, e.g.*, R.13925.1 (Letter from G. McCarthy, to Gen. W. Clark, and J. Broin, Nov. 30, 2009), JA635-36.

B. EPA's Method of Review

Over more than 30 years of waiver decisions, EPA has established consistent practices and principles for making the determination required by section 211(f)(4), which it employed in adjudicating the E15 waiver. *See generally* 75 Fed. Reg. 68,100, JA11. First, EPA considers four areas of potential emissions impacts: (1) immediate and long-term impacts to the exhaust system; (2) immediate and long-term impacts on measures controlling evaporative emissions (e.g. vapors escaping from the fuel or emissions control system); (3) impacts on the materials used in the emission control system (e.g., fuel lines, rubber seals); and (4) impacts on vehicle driveability and operability (e.g., engine stalls). *See generally id.* 68,100-01, JA11-12.

Second, EPA has allowed an applicant to meet its burden under the statute through one or a combination of two methods. Reliable statistical sampling and fleet testing protocols could be used to demonstrate that the statutory criterion has been met. *Id.* Additionally, an applicant may make the required showing based upon a reasonable theory regarding emissions effects and support these

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engineering judgments with confirmatory testing as an alternative to providing the amount of data necessary to conduct robust statistical analyses. *Id*.

Third, EPA has provided public notice of and an opportunity to comment on the waiver application and additional information. *E.g.*, 43 Fed. Reg. 24,742 (June 7, 1978); 56 Fed. Reg. 36,810 (Aug. 1, 1991). However, since action on a waiver application is an informal adjudication and not a rulemaking, EPA has never proposed or provided its preliminary analyses regarding its decision when seeking public comment on the application. *See e.g.* 43 Fed. Reg. 24,743; 56 Fed. Reg. 36,810.

Fourth, EPA historically has based its decision on a thorough review of all material in the docket, which typically includes data submitted with the application and public comments and data received during the public comment period. *Id*. EPA also may examine applicable data from other sources; such data is also placed in the docket. *Id*. EPA then analyzes all data and information in the docket to ascertain the fuel's emission impacts on the applicable engines and vehicles, consistent with the principles and practices above, and explains the basis for its decision in the Federal Register. *Id*.

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C. The E15 Waiver Decisions

1. Ethanol-related Emissions Effects

Ethanol impacts motor vehicles primarily in two ways. First, ethanol "enleans" the air-to-fuel ratio—i.e., increases the oxygen content in the fuel—which can increase exhaust temperatures and potentially damage the catalyst. 75 Fed. Reg. 68,103, JA14. Second ethanol can cause materials compatibility issues, which may trigger other component failures. *Id.* Either of these impacts may lead to emission increases. *Id.* The question for EPA under section 211(f)(4) is whether emissions increases from E15 may lead to vehicles failing their applicable emissions standards. *Id.* 68,111, JA22.

2. The DOE Catalyst Study

In response to policy initiatives and legislation, including EISA, requiring increased use of renewable fuels, DOE embarked on a testing program evaluating the effects of gasoline containing between 10% and 20% ethanol on vehicles and engines. 75 Fed. Reg. 68,095 n.2, JA6; R.14036, JA1561-62, 1567-69 (Effects of Intermediate Ethanol Blends on Legacy Vehicles and Small Non-Road Engines, Report 1 – Updated ("DOE Pilot Study")). As part of this program, in 2008, DOE initiated the DOE Catalyst Study, designed to provide data about the long-term emissions effects of E15 on MY2001 and newer light-duty vehicles. 75 Fed. Reg.

68,095, JA6; 76 Fed. Reg. 4669, JA69. Because results were expected in September 2010, EPA delayed a decision on Growth Energy's application until DOE completed its testing. 75 Fed. Reg. 68,095, JA6.

The DOE Catalyst Study's purpose was to evaluate the long-term effects on catalyst durability of gasoline blended with no ethanol (E0) as compared to gasoline-ethanol blends containing 10% (E10), 15% (E15), and 20% (E20) ethanol. *Id.* at 68,105, JA16. DOE designed the Study with input from stakeholders, including the industry-sponsored Coordinating Research Council ("CRC"), and EPA. *Id.* As part of this study, DOE tested 19 pairs of "Tier 2" light-duty vehicle models and eight pairs of "pre-Tier 2" light-duty vehicle models selected for their sensitivity to ethanol blends.[6] *Id.*; 76 Fed. Reg. 4665-66, JA65-66. The program also provided other information relevant to EPA's waiver decisions, including materials compatibility, evaporative control system integrity, diagnostic system sensitivity and general drivability. 75 Fed. Reg. 68,105, JA16.

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[6] "Tier 2" emissions standards generally began applying in MY2004 and were fully phased in by MY2007. *See* 75 Fed. Reg. 68,105, JA16. "Pre-tier 2" vehicles include those subject to standards applicable before Tier 2 regulations became effective, including Tier 1 and National Low Emission Vehicle standards. *See* 76 Fed. Reg. 4666-68, JA66-68.

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3. First E15 Waiver Decision: MY2007 and Newer

EPA's First E15 Waiver Decision waived the section 211(f)(1) prohibition for MY2007 and newer light-duty motor vehicles (cars, small pick-up trucks, and SUVs); denied a waiver for MY2000 and older light-duty vehicles, heavy-duty engines and vehicles, motorcycles, and nonroad products; and deferred a decision for MY2001-2006 light-duty vehicles until additional DOE test data became available. 75 Fed. Reg. 68,094, JA5.

As in previous waiver decisions, EPA evaluated all available information regarding the four areas of emissions effects described above. *See supra* 7. The DOE Catalyst Study addressed concerns that E15's heightened oxygen content could cause temperature increases that could prematurely degrade the catalyst and provided strong evidence demonstrating that MY2007 and newer motor vehicles can meet their exhaust emissions standards over their full useful lives while using E15. 75 Fed. Reg. 68,101-109, JA12-20. The DOE Catalyst Study data confirmed EPA's engineering assessment that increasingly stringent emissions standards and other regulatory requirements led manufacturers to develop more robust emission control systems capable of withstanding the higher oxygen content in E15. *Id.* 68,105, JA16.

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Regarding immediate exhaust emissions, EPA considered data from at least four studies, CRC E74-b, the DOE Pilot Study, the DOE Catalyst Study, and the RIT Study, and E10 modeling data from peer-reviewed "EPA Predictive Models." 75 Fed. Reg. 68,109-111, JA20-22. By extrapolation, EPA determined that E15 would likely cause an immediate NOx exhaust emissions increase of 5% to 10% when compared to E0. *Id.* However, EPA further explained that this increase would not "cause or contribute to Tier 2 compliant motor vehicles" exceeding their exhaust emissions standards since these vehicles generally have NOx emissions compliance margins of over 50%. *Id.* at 68,112, JA23.

Regarding evaporative emissions, EPA found that as long as E15 has a volatility level (measured as "Reid Vapor Pressure") no higher than 9.0 psi, vehicles would still meet their evaporative emissions standards. 75 Fed. Reg. 68,112-120, JA23-31. Test data from the CRC E-77 studies confirmed that conclusion for immediate evaporative emissions. 75 Fed. Reg. 68,117-118, JA28-29. For long-term evaporative emissions, EPA noted that due to increasingly stringent emissions standards, newer vehicles were designed to meet evaporative emissions standards when tested using E10. *Id.* 68,119, JA30. Considering this fact and other information in the record, EPA's engineering judgment was that vehicles should be able to meet their evaporative emissions standards when using

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E15 over their full useful lives. *Id.* Data from the DOE Catalyst Study confirmed that vehicles should not show any greater deterioration in evaporative emissions performance on E15 when compared to E0. *Id*.

EPA similarly found that E15 would not produce any degradation of engine, fuel system, or emission control system materials that would cause emissions failures. 75 Fed. Reg. 68,120-122, JA31-33. EPA based its conclusion on its engineering judgment that design changes in response to more stringent emissions standards and more dominant use of E10 made MY2007 and newer vehicles more likely to be compatible with E15. *Id.* Confirmatory data from the DOE Catalyst Study showed no material differences in components upon tear-down and inspection of six of the motor vehicles aged and tested on E15 to the end of their full useful lives. *Id.*

Finally, after reviewing the data, EPA concluded that E15 would not cause driveability or operability issues on properly operated and maintained MY2007 and newer light-duty motor vehicles. 75 Fed. Reg. 68,123-124, JA34-35.

4. Second E15 Waiver Decision: MY2001-2006

In the Second E15 Waiver Decision, EPA concluded based on the DOE Catalyst Study, other information in the record, and EPA's engineering analysis that use of E15 in MY2001-2006 light-duty motor vehicles will not cause or

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contribute to violations of emissions standards for these vehicles. 76 Fed. Reg. 4662, JA62-83. Accordingly, EPA extended the partial waiver to these vehicles. *Id*.

EPA again evaluated all four areas of potential emissions impacts for MY2001-2006 vehicles subject to pre-Tier 2 emissions standards. 76 Fed. Reg. 4666, JA66. Regarding long-term exhaust emissions, EPA considered the advances in exhaust emission control system technologies, the pervasiveness of E10 use, and the substantial emissions compliance margins, and concluded, based on engineering judgment, that MY2001-2006 vehicles would meet their exhaust emissions standards over their useful lives while using E15. 76 Fed. Reg. 4666-72, JA66-72. The DOE Catalyst Study results for MY2001-2006 vehicles showed no significant increases in long-term exhaust emissions when using E15, and no significantly higher emissions from vehicles aged and tested on E15 than from those aged and tested on E0 (fuel with no ethanol); this provided strong confirmation of EPA's engineering judgment. 76 Fed. Reg. 4669-70, JA69-70.

Regarding immediate exhaust emissions, EPA again relied on several studies and data to conclude that E15 was likely to result in NOx emissions increases of approximately 5-10%, which could easily be accommodated by the 65-73% NOx emissions compliance margin that EPA found for these vehicles. 76 Fed. Reg.

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4673, JA73. Data from the DOE Catalyst Study also showed that all MY2001-2006 vehicles tested met their exhaust emissions standards throughout their full useful life while using E15. *Id.* 4671-73, JA71-73. Thus, EPA concluded that the immediate exhaust emissions impacts would not cause or contribute to these vehicles failing to meet their emissions standards.

Regarding evaporative emissions, EPA again concluded that limiting the Reid Vapor Pressure in E15 to 9.0 psi would enable MY2001-2006 motor vehicles to meet their evaporative emissions standards over their full useful lives for the same reasons that applied to MY2007 and newer motor vehicles. While EPA acknowledged that some of these vehicles could *possibly* experience immediate evaporative emissions failures, as further described *infra* 61-64, EPA explained how that remote possibility did not prevent it from finding that the statutory criterion for a waiver was met for these vehicles. 76 Fed. Reg. 4673-80, JA73-80. For long-term evaporative emissions, EPA explained that available information confirmed its engineering assessment that evaporative emission control systems in MY2001-2006 vehicles were designed for long-term exposure to E10, so these vehicles could accommodate E15 without exceeding their evaporative emissions standards. 76 Fed. Reg. 4680-81, JA80-81.

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EPA also concluded that available information confirmed its engineering judgment that E15 would not cause or contribute to emissions failures from degraded emission-control related components. 76 Fed. Reg. 4681, JA81. The design of the emission control systems in these vehicles, data from applicable emissions testing programs, information regarding compliance margins, and DOE Catalyst Study data all confirmed this assessment. *Id*.

Finally, based on its engineering judgment, as confirmed by the DOE Catalyst Study, EPA concluded that MY2001-2006 motor vehicles using E15 would not experience any driveability or operability issues. 76 Fed. Reg. 4681-82, JA81-82.

5. Waiver Conditions

EPA placed conditions on the partial waiver that address fuel quality and the potential for "misfueling," i.e., the use of E15 in vehicles for which it is not approved. 75 Fed. Reg. 68,148, JA59; 76 Fed. Reg. 4682, JA82. These conditions include: (1) the ethanol must meet industry specifications; (2) the E15 must not exceed a Reid Vapor Pressure of 9.0 psi from May 1 through September 15; (3) before introducing E15, manufacturers must obtain EPA approval of and fully implement a plan containing reasonable precautions for ensuring that E15 will only be introduced for use in MY 2001 and later vehicles, including, at minimum: (a)

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pump labeling requirements; (b) participation in a fuel pump labeling and fuel sample compliance survey; (c) proper documentation of ethanol content on product transfer documents; and (d) any other reasonable measures EPA determines are appropriate. 75 Fed. Reg. 68,149-150, JA60-61; 76 Fed. Reg. 4682-83, JA82-83.

STANDARD OF REVIEW

This Court must uphold EPA's action on a section 211(f)(4) waiver unless Petitioners show it is "arbitrary, capricious, an abuse of discretion" or in excess of EPA's "statutory jurisdiction, authority, or limitations." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995).

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009). If EPA "acted within its delegated statutory authority, considered all of the relevant factors, and demonstrated a reasonable connection between the facts on the record and its decision, [the court] will uphold its determination." *Ethyl Corp.*, 51 F.3d at 1064. When an agency's action relies on scientific or technical information involving the agency's area of expertise, a court applies "an extreme degree of deference." *Huls Am. Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996).

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EPA's statutory interpretation must be reviewed pursuant to the standards announced in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the Court first inquires whether Congress "has directly spoken to the precise question at issue," in which case the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* 842-43. If the statute is "silent or ambiguous with respect to the specific issue," the Court must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id*. Particular deference is given to an agency's interpretation of a statute it administers when the statute is complex and within the agency's expertise, such as the CAA. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001); *NRDC v. EPA*, 571 F.3d 1245, 1251 (D.C. Cir. 2009).

ARGUMENT SUMMARY

EPA's decision to grant a waiver allowing the introduction of E15 for use in MY2001 and newer light-duty motor vehicles and deny a waiver for all other vehicles and engines is consistent with its statutory authority, procedurally valid, and amply supported by the record. First, EPA reasonably interprets section 211(f)(4) to authorize a "partial waiver," i.e., a waiver allowing E15 for use in a subset of vehicles. Section 211(f)(4) permits a waiver if the Administrator determines that a new fuel "will not cause or contribute to a failure of any emission

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control device or system … to achieve compliance" with applicable emission standards "*by the vehicle or engine*" in which such device or system is used. 42 U.S.C. § 7545(f)(4). The statute does not specify whether EPA must make this determination for all vehicles and engines as a single class or if it may categorize vehicles in subsets. EPA reasonably concluded that for E15, which has different effects on the emission control systems of different types and model years of vehicles and engines, a partial waiver was appropriate.

Petitioners' argument that "*any* emission control device or system" means *all* emission control devices or systems in *all* vehicles and engines ignores that section 211(f)(4) by its terms refers to the emission control device or system in "the vehicle or engine" in which such device or system is used and does not otherwise constrain EPA's discretion as to how it may categorize vehicles and engines. Petitioners ignore the statute's plain language and otherwise fail to show EPA was unreasonable or inconsistent with the statute.

Second, EPA complied with section 211(f)(4)'s procedural requirements. Petitioners provide no support for their novel argument that EPA cannot consider

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information from sources other than the waiver applicant. EPA reasonably considered the DOE Catalyst Study and other information in the record as they provided useful information regarding E15's potential effect on vehicles and engines meeting their emissions standards. Petitioners further fail to show that EPA failed to provide adequate notice and opportunity to comment. EPA provided notice of the DOE Catalyst Study and that EPA planned to rely on it. Indeed, many Petitioners were involved with the DOE Catalyst Study as members of the industry-sponsored Coordinated Research Council. EPA updated the docket with the Catalyst Study data as it became available and kept the docket open for public comment. Numerous parties, including Petitioners, submitted comments after the close of the comment period. Petitioners also attended meetings with EPA where they shared their views regarding the DOE Catalyst Study. In short, EPA met section 211(f)(4)'s requirements.

Third, EPA's decision to grant a waiver allowing the use of E15 in MY2001 and newer light-duty motor vehicles is amply supported by the record. The DOE Catalyst Study and other information in the record, combined with EPA's engineering judgment, provided the information necessary for EPA to evaluate E15's effects on MY2001 and newer motor vehicles. EPA further rationally explained its analysis of the data, including why Petitioners' alleged "emissions

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failures" are unrelated to E15. Finally, EPA provided a rational basis, drawn from its experience with other fuels, supporting its approach to minimizing misfueling.

Petitioners' arguments that EPA was arbitrary and capricious boil down to disagreements with EPA's reasoned technical judgments. Petitioners disagree with the numbers and types of studies EPA relied on, EPA's interpretation of the data and other information in the record, and the reasonableness of EPA's steps to prevent misfueling. However, where, as here, Petitioners challenge EPA's expert technical judgments in the context of the CAA's technically complex statutory scheme, Petitioners' mere disagreement with EPA's conclusions is insufficient to meet Petitioners' high burden under the arbitrary and capricious standard of review. EPA's waiver decisions are rational, supported by the record, and should be upheld.

ARGUMENT

I. EPA REASONABLY INTERPRETS SECTION 211(f)(4) TO ALLOW A PARTIAL WAIVER FOR A SUBSET OF VEHICLES

In the E15 Waiver Decisions, EPA interpreted section 211(f)(4) to authorize a waiver allowing the introduction of E15 for a subset of vehicles—MY2001 and newer light-duty motor vehicles—while denying it for all other engines and vehicles. 75 Fed. Reg. 68,143-146, JA54-57. Under the applicable standard of review, EPA's interpretation "governs if it is a reasonable interpretation of the

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statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009) (citing *Chevron*, 467 U.S. at 843-44).

EPA's interpretation of section 211(f)(4), 42 U.S.C. § 7545(f)(4), to allow partial waivers is faithful to the CAA's text and reasonable in light of the statutory structure and purposes; it also is reasonable considering the different effects EPA observed E15 could have on different vehicles and engines. Petitioners' arguments fail to show that section 211(f)(4) unambiguously precludes partial waivers or that EPA's interpretation is unreasonable.

A. EPA's Interpretation of Section 211(f)(4) to Allow Partial Waivers is Faithful to the Statutory Text, Structure, and Purposes

Section 211(f)(4) provides that EPA may waive the prohibition in section 211(f)(1) and allow the introduction of new fuels that are not "substantially similar" to certification fuels if EPA determines the new fuel "*will not cause or contribute to a failure of any emission control device or system . . . to achieve compliance by the vehicle or engine*" in which the device or system is used with applicable emissions standards. 42 U.S.C. § 7545(f)(4) (emphasis added). On its face, this language allows EPA to grant a waiver if it determines the statutory criterion has been met—i.e., the new fuel will not cause or contribute to the failure of vehicles or engines to meet applicable emission standards over their useful lives.

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Section 211(f)(4) does not state whether EPA may apply the criterion to a subset of motor vehicles, as it did with E15, or whether EPA must apply the criterion to all vehicles and engines in the national fleet, as Petitioners' argue. In the absence of any language indicating EPA must view all vehicles and engines as a single class, EPA reasonably interpreted this language to allow it to evaluate vehicles and engines as subsets.[7]

The legislative history supports EPA's view. It indicates that Congress intended the term '"emission control device or system' [to] mean[] the entire emission performance of *a vehicle*." H.R. Rep. No. 95-564 (1977), *reprinted in* 1997 U.S.C.C.A.N. 1502, 1542 (emphasis added). Clearly Congress did not mean to require testing of every vehicle or engine potentially covered by section 211(f)(4) and EPA has never interpreted the statute this way. 75 Fed. Reg. 68,145; *see Motor Vehicles Mfrs. Ass'n v. EPA*, 768 F.2d 385, 391-92 (D.C. Cir. 1985). Rather, the statute allows EPA to develop appropriate approaches for evaluating a fuel's emissions impacts, including evaluating impacts in subsets of vehicles or engines.

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[7] Notably, the pre-EISA version of section 211(f)(4) referred to "any emission control device or system" used in "any vehicle." But in amending section 211(f)(4), Congress dropped "any" in the reference to "vehicle" at the same time it expanded that reference to include additional vehicles and engine types.

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EPA's interpretation also honors the statute's structure and purposes. Section 211(f)(1) prohibits new fuels that are not "substantially similar" to those used in certifying vehicles as meeting emissions standards; section 211(f)(4) allows EPA to waive the prohibition if the statutory criterion has been met. Together, sections 211(f)(4) and 211(f)(1) balance two equally important interests: allowing new fuels into commerce while protecting the national mobile source fleet from new fuels that may impair emissions compliance by those vehicles and engines.

The legislative history reflects these dual purposes. Section 211(f)(1) was enacted because of a concern that "a certain fuel additive … was impairing the performance of emission control systems and increasing hydrocarbon emissions in test vehicles." S. Rep. No. 95-127, at 90. At the same time, Congress was concerned about "the increased use of crude oil that would be necessitated by the prohibition in use of [the additive] … and the smaller refineries that would be adversely affected by these provisions." S. Rep. No. 95-127, at 91. Congress added section 211(f)(4) "with these considerations in mind, so that the [section 211(f)(1)] prohibition could be *waived, or conditionally waived, rapidly* if the manufacturer …establishes … that the additive … will not be harmful to the performance of emission control devices or systems." *Id.* (emphasis added). A

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partial, conditional waiver serves section 211(f)'s purposes because it allows the use of E15 in those vehicles for which it will not cause or contribute to emissions failures, while precluding its use in vehicles and engines for which the waiver criterion is not met.

In the E15 Waiver Decisions, EPA considered the wide range of possible emissions impacts on different vehicle and engine types. 75 Fed. Reg. 68,101-138, JA12-49; 76 Fed. Reg. 4665-82, JA65-82. EPA concluded that the evidence in the record demonstrated that E15 would not cause or contribute to emission control system failures in MY2001 and newer light-duty motor vehicles; this demonstration was not made for older motor vehicles, nonroad products, motorcycles, and heavy-duty vehicles and engines. *Id*. Accordingly, EPA granted a partial waiver for MY2001 and newer light-duty motor vehicles and denied it for all other engines and vehicles for which the statutory criterion was not met. In both cases, EPA is reading section 211(f)(4) expansively to mean that a waiver is only appropriate where the record demonstrates that E15 will not cause or contribute to the failure of "any emission control system or device" in the applicable subset of vehicles. EPA's reading gives section 211(f)(4) its plain meaning, while furthering section 211(f)'s dual purposes.

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Additional legislative history shows that Congress broadened section 211's scope as emission control regulation was extended to additional mobile source categories and ambitious renewable fuel requirements were established, further supporting a partial waiver. As enacted in 1977, section 211(f)(1) applied only to fuels for general use in light-duty motor vehicles, and EPA interpreted this to mean motor vehicles using unleaded gasoline. Pub. L. No. 95-95, Title II, § 222, 91 Stat. 762 (1977). In 1990, Congress added section 211(f)(1)(B), extending the prohibition to new fuels for use in "motor vehicles," which encompasses all on-highway vehicles, including heavy-duty trucks. Pub. L. No. 101-549, § 214(a), 104 Stat. 2489 (1990). In 2007, EISA broadened section 211(f)(4) to include nonroad vehicles and engines to reflect that these additional mobile sources had become subject to regulation, and amended section 211(o) to require significantly increased volumes of renewable fuels. Pub. L. No. 110-140, §§ 202, 251, 121 Stat. at 1521-28, 1549.

EPA's interpretation of section 211(f)(4) to allow partial waivers makes sense considering the variety of engines and vehicles now subject to emissions standards, the differences in the stringency of those standards and the emission controls developed to meet them, and EISA's ambitious renewable fuel requirements. This is especially true in the case of E15 and the different effects

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EPA observed on different vehicle and engine types. The record shows that technological advances in newer vehicles, i.e., MY2001 and newer light-duty motor vehicles, make them better able to accommodate E15 without adverse emissions effects. *See, e.g.* 75 Fed. Reg. 68,104-105, 68,112-113, 68,124, JA15-16, JA23-24, JA35; 76 Fed. Reg. 4663, JA63. In contrast, EPA had concerns about potential emissions increases with the use of E15 in MY2000 and older light-duty motor vehicles and appropriately denied a waiver for these vehicles. 75 Fed. Reg. 68,126-129, JA37-40. EPA reached a similar conclusion regarding nonroad products, heavy-duty engines and vehicles, and motorcycles. *Id*. 68,131-132, 68,135, 68,138, JA42-43, JA46, JA49.

Because E15's emissions impacts vary for different subsets of vehicles and engines subject to different emissions standards, Petitioners' "all or nothing" approach to implementing section 211(f)(4) would not fully realize Congress's intent. Additionally, interpreting section 211(f)(4) to preclude a partial waiver would mean that E15 would be unavailable for the large and growing number of vehicles that can use it without adverse impacts on their emission control systems, contrary to Congress's intent.

Finally, a partial waiver is consistent with EPA's longstanding interpretation of section 211(f)(4) to allow conditional waivers. The legislative history indicates

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that Congress intended EPA to grant waivers "under such conditions, or in regard to such concentrations[,] as [EPA] deems appropriate." S. Rep. No. 95-127, at 91. EPA recognized this authority in its first waiver decision, in 1978, noting that it may grant a waiver that includes "conditions on time or other limitations," so long as the statutory criterion is met. *See* 75 Fed. Reg. 68,144 & nn.135, 136, JA55 . Although EPA has not previously issued a "partial" waiver, a partial waiver that limits introduction of a new fuel into commerce to a subset of vehicles functions as a conditional waiver.

EPA determined that E15 could be used in MY2001 and newer light-duty motor vehicles without causing or contributing to emissions violations in those vehicles. Thus, EPA appropriately granted a partial waiver allowing the introduction of E15 where the statutory criterion had been met, denied a waiver where it had not been met, and adopted appropriate conditions addressing the risk E15 might be improperly used in vehicles and engines for which it is not approved. Because EPA's interpretation is faithful to the statutory text, structure, and purposes, it should be upheld.

B. Petitioners' Argument Misreads the Term "Any," Ignores the Statutory Text, and Fails to Show EPA was Unreasonable

Petitioners' contention that the phrase "*any* emission control device or system" unambiguously precludes interpreting section 211(f)(4) to allow a partial

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waiver fails for several reasons. First, the issue is not the meaning of "any," which EPA agrees has expansive meaning. The issue is what "any" modifies. Section 211(f)(4) does not state that EPA may grant a waiver only where the new fuel will not cause or contribute to failure "in any control device or system," as Petitioners argue. *See* Pets. Br. 24. Section 211(f)(4) requires EPA to determine whether the fuel will cause or contribute to the failure of "any emission control device or system (over the useful life of *the [] vehicle … or [] engine in which such device or system is used*) … *to achieve compliance by the vehicle or engine*" with applicable emissions standards. 42 U.S.C. § 7545(f)(4) (emphasis added). While Congress referred expansively to "any emission control device or system," the phrase is textually tied to the vehicle or engine "*in which such device or system is used*" and does not indicate one way or the other whether EPA may evaluate vehicles as a single class or as subsets. *Id.* (emphasis added).

The cases cited by Petitioners to argue that "any" means "all" are inapposite. For example, in *United States v. Gonzales*, 520 U.S. 1, 5 (1997), the statute at issue provided that prison sentences for certain drug offenses could not run concurrently with "any other term of imprisonment." Because "Congress did not add any language limiting the breadth of th[e] word [any] … we must read [the provision] as referring to all 'term[s] of imprisonment." *See also Ford v. Mabus*, 629 F.3d

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198, 206 (D.C. Cir. 2010) (statute stating that all personnel actions must be "free from any discrimination based on age," was broader than discrimination that was the but-for cause of a challenged personnel action); *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008) (CAA provision regulating delisting of "any source category" refers to all source delisting decisions). While the term "any" in section 211(f)(4) may be expansive regarding the vehicle's emission control systems, it has no bearing on the question whether EPA must evaluate all vehicles together or as subsets.

Petitioners' preferred interpretation requires the Court to ignore words that actually appear in section 211(f)(4), while inserting text that does not. For example, Petitioners erroneously argue that EPA must determine the fuel "will not cause or contribute to a failure of *any* emission control device or system [in a vehicle or engine]." Pets. Br. 23 (underscoring added). Petitioners' substitution of "a vehicle or engine" is unfaithful to the statute's text, which plainly requires EPA to consider the effect of the fuel on the "emission control device or system" in "*the motor vehicle … in which [it is] used*." 42 U.S.C. § 7545(f)(4) (emphasis added). Likewise, nothing in section 211(f)(4) states that a waiver is permitted only where the fuel "is suitable for *all* vehicles and engines," Pets. Br. 24, or where EPA has determined that the fuel or additive is "compatible with '*any* emission control

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device or system' used in gasoline-powered vehicles and engines," *id*. (underscoring added). If the statute were as unambiguous as Petitioners contend, one would not need to read in this additional text.

Second, Petitioners acknowledge that sections 211(f)(1) and 211(f)(4) necessarily call for some categorization, but argue that they only permit categories based on fuel type. *See* Pets. Br. 26-29. However, Petitioners fail to point to any language in section 211 that supports their view.[8] Moreover, Petitioners concede that under Title II of the CAA, EPA may establish categories based on narrower or broader subsets of vehicles or engines when establishing emissions standards. 42 U.S.C. §§ 7521(a)(1), 7547(a)(3); *see* Pets. Br. 29. Given that section 211(f)(4) is intended to prevent vehicles and engines from failing their emissions standards and those emission standards may be established based on vehicle and engine categories, EPA's use of categories to implement section 211(f)(4) is entirely consistent with its authority under Title II.

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[8] Although Petitioners find implicit authority to categorize waivers based on fuel type, they argue that since other CAA sections expressly provide for partial waivers, the fact that section 211(f)(4) does not contain similarly express language means that Congress did not intend to confer such authority for fuel waivers. Pets. Br. 30. For the reasons above, Petitioners' argument fails.

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Third, Petitioners misconstrue the relationship between section 211(f) and section 211(c), 42 U.S.C. § 7545(c). Pets. Br. 31. This Court has recognized the "straightforward relationship" between these provisions: "section 211(f) forbids the 'first' introduction of new fuels … into commerce [and] section 211(c) provides for regulation of fuels already in commerce." *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 836 (D.C. Cir. 1984). While section 211(c) authorizes EPA to consider factors not authorized in section 211(f)(4) (i.e., public health concerns), the two provisions provide EPA with complementary authority to address a fuel's emissions impacts. *Ethyl Corp.*, 51 F.3d at 1061.

EPA applied sections 211(f)(4) and 211(c) in such a complementary manner here. In the E15 Waiver Decisions, EPA granted a partial, conditional waiver allowing E15 to be introduced into commerce only for MY2001 and newer light-duty motor vehicles. The waiver is further conditioned on misfueling mitigation measures, applicable to fuel manufacturers, designed to minimize the potential that E15 will be used in vehicles and engines for which it is not approved. 75 Fed. Reg. 68,095. To supplement its waiver decisions, EPA proposed a rule under section 211(c) to regulate E15 lawfully introduced into commerce under the waiver. The rule applies to fuel manufacturers, as well as entities further down the distribution chain, such as retail stations. *See* "Regulation to Mitigate the

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Misfueling of Vehicles and Engines with Gasoline Containing Greater than Ten Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs; Proposed Rule," 75 Fed. Reg. 68,044 (Nov. 4, 2010) ("Misfueling Rule"), JA1832-80; *see also* Final Misfueling Rule, 76 Fed. Reg. 44,406 (July 25, 2011), JA1881-925. EPA's interpretation of sections 211(f)(4) and 211(c) as complementary gives meaning to all provisions of the statute and does not "nullify" section 211(c)'s requirements. *See* Pets. Br. 31.

Finally, Petitioners' suggestion that EPA ignored potential problems of a partial waiver, such as misfueling, is unavailing. EPA adopted "definitive" conditions, *see* Pets. Br. 36, to minimize the potential that E15 will be used in vehicles for which it is not approved. EPA relied on its longstanding practice of issuing conditional waivers to ensure the statutory purposes of section 211(f)(4) are met. The conditions are defined in detail in the E15 Waiver Decisions and any fuel manufacturer wishing to utilize the waiver must obtain EPA approval of and "fully implement" a plan before E15 may be introduced into commerce. 75 Fed. Reg. 68,148-150, JA59-61; 76 Fed. Reg. 4682-83, JA82-83.

As discussed below, in argument III.D, Petitioners fail to show that the misfueling conditions will not work. EPA modeled the conditions after measures used successfully in the introduction of Ultra Low Sulfur Diesel, further supporting

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the reasonableness of EPA's partial waiver. 75 Fed. Reg. 68,148, JA59. Additionally, as noted above, EPA proposed (and finalized) a separate rule under section 211(c) further addressing the potential for misfueling once E15 is introduced. 76 Fed. Reg. 44,406, JA1881-925. In short, EPA recognized the potential problems associated with a partial waiver and took reasonable steps to address those problems.

For the foregoing reasons, EPA's decision to grant a partial waiver for E15 is a reasonable interpretation of the statute, entitled to deference.

II. EPA COMPLIED WITH SECTION 211(f)(4)'S PROCEDURAL REQUIREMENTS

The E15 Waiver Decisions comply with section 211(f)(4)'s minimal procedural requirements. First, EPA committed no procedural error in relying on all available information, including the DOE Catalyst Study. Second, the record shows that EPA provided the notice and opportunity for comment required by the statute and Petitioners had adequate notice of and opportunity to comment on most of the DOE Catalyst Study data. Thus, EPA satisfied the "public notice and comment" requirement.

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A. EPA May Base its Section 211(f)(4) Waiver Decisions on All of the Information in the Record

Petitioners provide no legal support for their novel argument that EPA may not "tak[e] into account all available information" in the record when adjudicating a waiver application, Pets. Br. 39 (quoting *Am. Methyl Corp.*, 749 F.2d at 830); indeed, there is none. In its E15 waiver proceedings, EPA considered all available information, including information submitted by Growth Energy, public comments (by Petitioners and many others), and other available information. The DOE Catalyst Study was one important source of information, which provided data directly relevant to section 211(f)(4)'s statutory criterion—i.e., the possible impacts of E15 on a motor vehicle's ability to meet its emissions standards. 75 Fed. Reg. 68,099, JA10. Given the DOE Study's relevance, EPA was reasonable to consider it.[9]

Nothing in section 211(f)(4) precludes EPA from considering *all* available information. That section 211(f)(4) places the burden on the applicant to

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[9] Contrary to Petitioners' suggestion that EPA "took on the [section 211(f)(4)] burden itself," Pets. Br. 40, the DOE Catalyst Study was not undertaken by EPA or at EPA's behest. DOE embarked on a series of studies in 2008, in consultation with EPA and industry stakeholders (including some of the Petitioners), for "assessing the viability of using intermediate ethanol blends as a way … [of] meeting national goals in the use of renewable fuels." 75 Fed. Reg. 68,095 n.2, JA6; R.14036 at xv, JA1561, (DOE Pilot Study).

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demonstrate the basis for a waiver means that EPA is not *required* to grant a waiver where the applicant fails to provide an adequate technical basis. The burden has been met where EPA's evaluation of the information submitted by the applicant, along with all other relevant information in the record, establishes that the waiver criterion has been satisfied. In other words, placing the burden on the applicant reflects nothing more than an intent to relieve EPA of the time, expense, and effort of generating the information necessary for determining whether section 211(f)(4)'s statutory criterion has been met. However, that does not mean EPA may not consider relevant data and information from other sources.

To the contrary, EPA's past practice and the statute support consideration of all relevant information. EPA historically has provided notice of and solicited public comment on section 211(f)(4) waiver applications[10] and has considered test data and information in addition to that provided by the applicant.[11] In 2007,

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[10] *See, e.g.*, 59 Fed. Reg. 42,227, 42,233 (Aug. 17, 1994) ("EPA reviews all the material in the public docket, including…public comments on the application…."); 43 Fed. Reg. 36,686 (Aug. 18, 1978) ("The purpose of this notice is to announce a public hearing and give interested persons an opportunity to participate in the proceeding by the presentation of data, views, arguments, or other pertinent information….").

[11] *E.g.*, 57 Fed. Reg. 2535, 2540 (Jan. 22, 1992) (regarding waiver application for a manganese-based additive, EPA considered test data developed by motor vehicle manufacturers and by the waiver applicant).

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Congress codified this practice by amending section 211(f)(4) to require "public notice and comment" before EPA grants or denies a waiver application. 42 U.S.C. § 7545(f)(4); Pub. L. No. 110-140, § 202, 121 Stat. 1521. The public notice and comment requirement would be meaningless if EPA could only consider information submitted by the applicant and could not even consider evidence submitted by commenters opposing a waiver.

More fundamentally, invalidating EPA's decision because it relied on information beyond that provided by the applicant would be contrary to basic principles of administrative law. The question for this Court is not whether the applicant has satisfied the statutory criterion, but whether EPA was reasonable in concluding that the criterion was met based on the information in the record. Petitioners essentially argue that EPA should ignore relevant information in the record. Their argument has no basis in section 211(f)(4), is contrary to principles of administrative law, and thus fails.

B. EPA Provided Meaningful Notice of and Opportunity to Comment on the DOE Catalyst Study

EPA complied with section 211(f)(4)'s procedural requirements by providing notice and opportunity to comment on Growth Energy's application and supporting documentation. Contrary to Petitioners' argument, EPA further provided meaningful notice of and opportunity to comment on the DOE Catalyst

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Study, although such process was not required by the statute. Petitioners' argument that EPA should have provided more opportunity to comment is not supported by the law or the facts and would blur the line between adjudication and rulemaking.

Section 211(f)(4), 42 U.S.C. § 7545(f)(4), states that EPA must provide "public notice and comment" before taking action on a waiver application. EPA reasonably interprets this to require simply that it provide notice of and opportunity to comment on the application and supporting information. Section 211(f)(4) waiver proceedings are informal adjudications,[12] which typically are not subject to public notice and comment requirements. *See e.g., Avia Dynamics Inc. v. FAA*, 641 F.3d 515, 520-21 (D.C. Cir. 2011). However, even without a statutory

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[12] Adjudication refers to the "process for the formulation of an order," 5 U.S.C. § 551(7), and an "order" is defined to include agency decisions over any matters "other than rule making but including licensing," *id.* § 551(6). The term license includes "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." *Id.* § 551(8). A section 211(f)(4) waiver exempts a new fuel from the section 211(f)(1) prohibition and thus clearly fits within the definition of a "license." Therefore, EPA's disposition of a section 211(f)(4) waiver application is an adjudication, not a rulemaking. It is an informal adjudication because Congress only required notice and opportunity for comment, not a "hearing." *See id.* § 554(a). Even if this had been a formal adjudication, the statutory requirements are minimal and would not support Petitioners' view that EPA erred. *See id.* § 554(b), (c).

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requirement, EPA historically provided notice of and opportunity to comment on waiver applications and supporting information. *See supra* 36 & n.10. EPA's past choice to solicit public comment during an adjudication does not convert that adjudication into a rulemaking. *E.g.*, *Gen. Am. Transp. v. ICC*, 883 F.2d 1029 (D.C. Cir. 1989). Nor does the statute or legislative history suggest that Congress, in amending section 211(f)(4), intended to do more than codify EPA's past practice or to convert this informal adjudication into a rulemaking.

EPA's interpretation of section 211(f)(4) is reasonable for several reasons. Section 211(f)(4) does not identify the procedures EPA must apply, leaving it to EPA to decide the appropriate procedures. In requiring only "public notice and comment," section 211(f)(4) mirrors EPA's traditional practice of providing public notice of and an opportunity to comment on waiver applications. Absent a specific statutory requirement, a reviewing court should not "impose upon the agency its own notion of which procedures are 'best.'" *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 521 (1978). Petitioners' interpretation essentially requires EPA to follow informal rulemaking procedures where Congress did not require them and would place a huge administrative burden on agencies in informal adjudicatory proceedings.

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Moreover, had Congress intended EPA assure certain data and analyses underlying its waiver decision were available during the comment period, it knew how to do so. *See e.g.*, 42 U.S.C. § 7607(d)(3), (d)(4). However, the rulemaking procedures in § 7607(d) are only mandatory for section 211 "regulation[s]," as opposed to section 211(f)(4) waivers. *See* 42 U.S.C. § 7607(d)(1)(E). That section 211(f)(4) adjudications are not subject to § 7607(d) procedures shows that Congress left it to EPA's discretion whether to impose such detailed notice requirements on section 211(f)(4) adjudications.

Even if section 211(f)(4) can be interpreted to require notice and opportunity to comment on the DOE Catalyst Study, Petitioners had ample opportunity to do so. Thus, this case is distinguishable from *Air Transport Ass'n v. Fed. Aviation Admin. ("FAA")*, 169 F.3d 1, 7-8 (D.C. Cir. 1999), where critical information underlying FAA's decision was never made public. The record in this case shows that Petitioners had meaningful notice of and an opportunity to comment on the DOE Catalyst Study.

EPA announced in the public notice that DOE was conducting ongoing testing relevant to EPA's waiver decision and advised interested parties that EPA "expect[ed] that additional data will be added to the docket as it becomes available." 74 Fed. Reg. 18,229, JA2. Again, in an April 20, 2010 letter to

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Petitioner Alliance of Automobile Manufacturers ("AAM"), and in discussions with other interested parties, EPA explained that it would place new data and other information in the docket, continue accepting substantive comments on the waiver, and consider those comments in making a waiver determination. R.14063, JA1831 (Apr. 20, 2010 letter to AAM).

EPA submitted data to the docket from the DOE Catalyst Study beginning on May 21, 2010, five months before the First E15 Waiver Decision. R.13965-13978, JA659-996; R.13988, JA1107-56. Over 90% of the data for MY2007 and newer motor vehicles was available in the docket five weeks before signature of the First E15 Waiver Decision on October 13, 2010. R.14002, JA1186. EPA posted the first two preliminary data sets for the Second Waiver Decision in the docket on October 26, 2010, and November 17, 2010, respectively. R.14035, JA1539-44; R.14045, JA1680-87. The final data set was made available on January 5, 2011 (R.14052, JA1776), and EPA signed its Second Waiver Decision on January 21, 2011. Thus, contrary to Petitioners' argument, this important information was in the docket and available for comment during the waiver proceedings.

Petitioners simply cannot argue that they were "left to guess how EPA intended to use the Study or analyze its data," Pets. Br. 43, because most of them

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were already involved with the Study.[13] Even before EPA received the waiver application, in June 2008, the CRC (an industry group of which several Petitioners are members), led a meeting discussing various testing programs, including durability testing that eventually became the DOE Catalyst Study. R.13998.1, JA1174-76. DOE consulted with CRC, which gave input on the study's design. See R.13970, JA764-836 (CRC Project No. E-87-1 Mid-Level Ethanol Blends Catalyst Durability Study Screening); R.14036, JA1562 (DOE Pilot Study). Additionally, these Petitioners continued receiving updates and information about the DOE Catalyst Study as it progressed. 75 Fed. Reg. 68,146, JA57; *see, e.g.*, R.13993, JA1157-73 (presentation on DOE Catalyst Study to industry stakeholders on May 5, 2010); R.13984, JA1037-69 (E-87-2 and DOE V4 Project Status, Oct. 1, 2009); R.13985, JA1070-91 (E-87-2 and DOE V4 Project Status, May 14, 2009); R.13969, JA1092-1106 (Oak Ridge Meeting Minutes, Nov. 5, 2009).

Further, EPA told parties how it intended to use the DOE Catalyst Study data. In a November 30, 2009 letter to Growth Energy, EPA explained:

> there is an ongoing study being conducted by DOE that will provide critical data on this [durability] issue … [s]hould the test results

[13] Although the food group petitioners were not involved with the DOE Catalyst Study, they had the same access to the information in the public docket regarding the study as the other petitioners.

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> remain supportive and provide the necessary basis, we would be in a position to approve E15 for 2001 and newer vehicles in the mid-year time frame.

R.13925.1, JA635-36 (Letter from G. McCarthy, to Gen. W. Clark, and J. Broin, Nov. 30, 2009). Petitioner American Petroleum Institute ("API") responded with a letter to the docket. R.13925, JA630-34. Given Petitioners' knowledge of and involvement with the DOE Catalyst Study and EPA's statements forecasting exactly how EPA intended to use the data, Petitioners' claim that the late submission of data to the docket did not afford sufficient time to submit comments rings hollow.

In fact, Petitioners submitted detailed comments to EPA, some of which discussed the DOE Catalyst Study. R.2548, JA174-75 (Petitioner AIAM outlining "ongoing [and] existing test plans for mid-level ethanol blends" by DOE and others); R.2550, JA210-211 (Petitioner NPRA discussing various studies, including the DOE Pilot Study and DOE plans for further durability testing); R.2551, JA249 (Petitioner AAM suggesting "EPA consider the data contained in the…DOE Study"). EPA also had numerous meetings with stakeholders, including some of Petitioners, where they shared their comments, concerns and additional data regarding the waiver request. 75 Fed. Reg. 68,146, JA57; *e.g.*, R.13958, JA637 (documenting meeting with API discussing "data that are

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currently under development by the [CRC] and [DOE]"); R.13981, JA1036 (documenting meeting with Petitioner AAM).

Petitioners' argument is further undermined by the fact that Petitioners submitted late comments regarding other issues raised after EPA started submitting the DOE data to the docket. Petitioners API and AAM submitted detailed technical comments in response to a June 7, 2010 letter from Archer Daniels Midland requesting that EPA consider allowing gasoline with 12% ethanol for introduction into commerce for all motor vehicles. *See* 75 Fed. Reg. 68,138-143, JA49-54; R.14000, JA1177-85 (API Comments); R.14004, JA1234-44 (AAM Comments). Evidently, Petitioners were closely following information submitted to the docket and were able to review it and submit detailed comments in a compressed timeframe. Although Petitioners had a similar opportunity to comment on the DOE Catalyst Study data, they chose not to do so.

Against this backdrop, Petitioners can hardly claim prejudice as a result of the procedures EPA followed in deciding this application. Therefore, even if this Court considered notice and comment requirements similar to those in APA or CAA rulemakings, the court must take "due account … of the rule of prejudicial error." 5 U.S.C. § 706; *see also* 42 U.S.C. §§ 7607(d)(8), (d)(9). Petitioners had ample opportunity to address the DOE Catalyst Study and, as demonstrated in

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argument III, *infra*, EPA addressed Petitioners' concerns. Accordingly, any procedural error resulting from the later availability of the DOE Catalyst Study data is harmless.

In short, EPA satisfied its "public notice and comment" requirements by providing Petitioners a "meaningful opportunity" for commenting on all aspects of the E15 waiver application, including the DOE Catalyst Study.

III. EPA'S GRANT OF A PARTIAL WAIVER FOR MY2001 AND NEWER MOTOR VEHICLES IS RATIONALLY SUPPORTED AND ENTITLED TO DEFERENCE

The record demonstrates that EPA carefully considered the relevant data and information concerning the emissions impacts of E15 and reasonably concluded that E15 would not cause or contribute to emissions failures in MY2001 and newer light-duty motor vehicles.

The essence of Petitioners' substantive challenge to EPA's waiver decisions is that EPA did not do things the way Petitioners would have done them: EPA did not rely on the studies and tests favored by Petitioners; EPA did not analyze the data the way Petitioners prefer; and, according to Petitioners, EPA did not come to the right conclusions. However, Petitioners' mere disagreement with EPA's judgments is insufficient to meet their burden under the "arbitrary and capricious" standard of review. Moreover, where, as here, Petitioners attack scientific or

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technical judgments made within the agency's area of expertise, courts apply "extreme" deference. *Huls Am. Inc.*, 83 F.3d at 452. For the following reasons, the Court should uphold EPA's waiver decisions.

A. The Data and Information in the Record Support EPA's Decisions

Petitioners challenge EPA's data on three baseless grounds. First, EPA's relied upon a robust collection of data and information on the potential emissions effects of E15 that supports use of E15 in MY2001 and newer vehicles. Second, the vehicles tested in the DOE Catalyst Study were selected based, in part, on input from CRC (an industry group that includes several Petitioners) and included many vehicles potentially "sensitive" to E15. Third, EPA properly analyzed the data and explained why emissions failures cited by Petitioners were unrelated to E15.

1. EPA Had Sufficient Data and Information to Make its Waiver Decisions

Petitioners' argument that EPA relied on "just one test," Pets. Br. 45, grossly mischaracterizes the data and information EPA relied upon in making its decisions and understates the value of the DOE Catalyst Study. The record demonstrates that, consistent with its past waiver decisions, EPA considered numerous studies and information regarding ethanol's impacts on: (1) immediate and long-term exhaust emissions; (2) immediate and long-term evaporative emissions (i.e., vapors

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that escape from the fuel or emission control systems); (3) materials compatibility (e.g., rubber or plastic seals in the emission control system); and (4) vehicle driveability and operability (e.g., engine stalls). 75 Fed. Reg. 68,101-124, JA12-35; 76 Fed. Reg. 4665-82, JA65-82; *see supra* 7. While the DOE Catalyst Study was crucial to EPA's analysis, it was not EPA's only source of information, as is evident from EPA's exhaustive analysis in the decision documents. *See generally* 75 Fed. Reg. 68,101-124, JA12-35; 76 Fed. Reg. 4665-82, JA65-82; *see supra* 11-16.

EPA's reliance on the DOE Catalyst Study was appropriate because it provided robust information about two primary ways ethanol affects motor vehicles: (1) potential catalyst degradation due to higher exhaust temperatures; and (2) potential incompatibility with engine, fuel system, and emissions components that could cause increased exhaust or evaporative emissions. *See supra* 9-10; 75 Fed. Reg. 68,103, JA14. Indeed, the primary purpose of the DOE Catalyst Study was to evaluate the long-term effects of E15 and other gasoline-ethanol blends on the exhaust emission control system, especially the catalyst. 75 Fed. Reg. 68,096, JA7. The DOE Catalyst Study involved full-useful life testing of 19 pairs of MY2005-2009 and eight pairs of MY2000-2003 light-duty cars and trucks which are representative of the national fleet and include 15 potentially "sensitive"

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vehicle models. *Id*. 68,105-109, JA16-20; 76 Fed. Reg. 4669-72, JA69-72; *see infra* 53-55. The results showed *no* emission failures during aging related to E15. 75 Fed. Reg. 68,096, JA7; 76 Fed. Reg. 4670-71, JA70-71. In these circumstances, EPA was reasonable to rely on the Study.

The DOE Catalyst Study also provided information regarding E15's compatibility with engine, emissions system, and fuel system components. DOE performed an "Engine Teardown Analysis" to assess whether the vehicles exhibited any signs of wear or materials incompatibility from E15 that might indicate the potential for increased exhaust or evaporative emissions. 75 Fed. Reg. 68,108, JA19; R.14016, JA1325-505 ("Powertrain Component Inspection from Mid-Level Blends Vehicle Aging Study"). The Catalyst Study also involved evaporative emissions testing on eight vehicles that showed no greater deterioration in evaporative emissions performance on E15 as compared to gasoline with no ethanol (E0). 75 Fed. Reg. 68,119, JA30; R.14015, JA1310-24 ("Vehicle Aging and Comparative Emissions Testing Using E0 and E15 Fuels: Evaporative Emissions Results"). The DOE Catalyst Study and other information in the record, combined with EPA's engineering judgment, provided sufficient data for EPA to make a reasoned decision about E15's emissions effects.

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Petitioners fail to identify what tests it claims EPA "did not follow through on." Pets. Br. 45. EPA never made representations about testing it planned to conduct, as EPA typically does not conduct its own testing for section 211(f)(4) waivers, and it did not perform any testing here. Petitioners cite to a presentation that EPA made to industry stakeholders, before it even received the E15 application, that contain "an experimental framework for an example waiver test program" including "suggestions" for "what a test program MAY look like." R.2559.2, JA496 (ALLSAFE cmt. Ex. I, at 6). Notably, the testing EPA ultimately relied upon for MY2001 and newer vehicles largely followed the experimental framework the presentation described. *Compare* 75 Fed. Reg. 68,101-124, JA12-35; 76 Fed. Reg. 4665-82, JA65-82, *with* R.2559.2 at 5, JA495; *compare* 68,105-107, JA16-18, *with* R.2559.2 at 10, JA500.

Further, EPA considered and addressed other studies cited by commenters, and explained why it was unnecessary to wait for results of on-going studies, particularly given various methodological problems that undermined their utility. *See* Pets. Br. 45 (citing R.13998.1, JA1176); 75 Fed. Reg. 68,109, JA20 (CRC-CM-136-09 (engine durability) study has "limited relevance"); *id.* 68,112, JA23 (results from CRC E-89 would only "reinforce" other information in record); *id*. 68,119, JA30 (AVFL-15 Study "not likely to provide useful information"); *id*.

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68,123, JA34 (addressing CRC-E-90 study); *id*. 68,127, JA38 (addressing CRC-E-87 study; phase 2 of this study became the DOE Catalyst Study); 76 Fed. Reg. 4681, JA81 (addressing CRC-91).

Petitioners' argument that DOE's testing procedures were "relaxed" also fails. Contrary to Petitioners' assertions, Pets. Br. 45-46, the testing *procedures* DOE followed were the same as those in EPA's in-use testing regulations, which require aging vehicles using the Standard Road Cycle, 40 C.F.R. § 86.1823-08(c)(1) (referencing 40 C.F.R. Part 86, Appendix V), and measuring emissions using the Federal Test Procedure, described in 40 C.F.R. Part 86, Subpart B. *See* 75 Fed. Reg. 68,106-107, JA17-18. DOE's testing program did differ from the in-use testing regulations Petitioners cite, 40 C.F.R. § 86.1845-04, in the *number* of vehicles tested. This difference is entirely appropriate considering the very different purposes of the two testing programs.

For section 211(f)(4) testing purposes, DOE tested 54 vehicles (27 vehicle models, two vehicles per model - one on E0, one on E15) so that the program would be representative of the entire national fleet of MY2001 and newer light-duty motor vehicles. For in-use testing purposes, EPA regulations allow large-volume manufacturers testing low-mileage vehicles to group similar models into test groups and then test just four randomly selected vehicles from those test

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groups to demonstrate compliance for all the models in the test group. *Id*. § 86.1845-04(b)(3). Both testing programs are designed to produce reliable results but for very different purposes. DOE's testing conformed to the experimental framework EPA suggested for making the necessary comparison between different fuel types needed for evaluating long-term emissions effects of E15 on the national fleet of MY2001 and newer vehicles as compared to E0—a key inquiry under section 211(f)(4). 75 Fed. Reg. 68,105, JA16. Notably, no commenter suggested that fuel waiver testing must be conducted on four vehicles for each of the models tested. Thus, DOE appropriately determined the number of vehicles and vehicle models to be tested for the DOE Catalyst Study and its results are not flawed for having deviated from the in-use testing regulations in this regard.

Petitioners' further contention that EPA did not support its conclusion that Tier 2 motor vehicles have a sufficient compliance margin to accommodate increases in NOx emissions is wrong. EPA relied on DOE Catalyst Study data showing that immediate exhaust emissions impacts did not cause or contribute to NOx emissions failures. *See supra* 12, 14-15. EPA also considered at least four other studies, none of which indicated NOx emissions failures as a result of the immediate emission impacts of gasoline-ethanol blends. *See supra* 12, 14. EPA further assessed the potential for vehicles exceeding their NOx emissions standards

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by extrapolating from the four studies of immediate emissions impacts and using EPA's peer-reviewed "Predictive Models" to conclude that E15 use would likely cause a 5-10% increase in NOx emissions. *Id.* 68,111, JA22. EPA then reviewed a survey of official EPA certification data showing the average compliance margin for NOx was *over 50%*. *Id*. 68,111 & n.56, JA22. EPA also considered results from the manufacturer-run In-use Verification Program, showing an average *60% compliance margin*. *Id.* 68,112, JA23. Thus, EPA reasonably concluded that available compliance data[14] provided further confirmation that E15 would not result in NOx emissions failures.

Petitioners further fail to show that EPA did not determine the extent to which E15 might "contribute" to potential emissions violations. Pets. Br. 47-48. Petitioners essentially argue that any emissions increase justifies denial of a waiver. But the test under section 211(f)(4) is whether E15 will cause or contribute to an emissions "failure." Since none of the appropriately designed testing of vehicles on E15 showed an E15-related emissions failure, there is no basis for determining that E15 will contribute to, much less cause, emissions violations. Moreover, under EPA's long-standing interpretation of section

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[14] The relevant data is available at http://www.epa.gov/otaq/crttst.htm and http://iaspub.epa.gov/otaqpub/.

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211(f)(4), the appropriate inquiry is whether such immediate increases by themselves, or in combination with long-term effects, would cause or contribute to motor vehicles exceeding their certified emissions standards. *Motor Vehicles Mfrs. Ass'n*, 768 F.2d at 390. The Court should uphold EPA's decision to grant a partial waiver since the record contains strong evidence that E15 will not cause or contribute to emissions violations, even recognizing that some emissions increases will occur.

2. The DOE Catalyst Study Included "Sensitive" Vehicles

Petitioners' argument that the DOE Catalyst Study excluded "sensitive" vehicles and thus contained data gaps is simply false. Petitioners admit that several criteria were used to select vehicle models for the study, including whether a vehicle model failed to apply "learned fuel trim [] at wide-open throttle." *See* Pets. Br. 48.[15] This criterion was intended to identify vehicles with the potential

[15] More recent model-year vehicles are designed to run on a "closed-loop" system that senses and then compensates for the higher oxygen content. 75 Fed. Reg. 68,103, JA14. Some vehicles run on a "closed-loop" under all conditions, while some run on an "open-loop" during "wide-open throttle" conditions (e.g., when the gas pedal in the vehicle is pushed to the floor). *Id.* "Learned-fuel trim" refers to a vehicle's ability to adjust to higher oxygen content, even during "open-loop" operation (i.e., when the vehicle sensors are not providing data to the engine to adjust the fuel quantity). *Id.* 68,102, JA13. However, the failure to apply learned fuel trim creates "only the potential for temperature problems to occur, and

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for catalyst deterioration when operated on E15. Accordingly, more than half of the 27 vehicle models tested in the Catalyst Study (nine of the 19 "Tier 2" models and six of the eight "pre-Tier 2" models) met this criterion. 75 Fed. Reg. 68,107, JA18; R.13986 (slide 6), JA1097; *see supra* 10 n.6 (explaining "Tier 2" and "pre-Tier 2"). However, the failure to apply learned fuel trim creates "only the potential for catalyst deterioration." *Id*. 68,105, JA16. The results of the DOE Catalyst Study showed that *none* of the vehicles failing to apply learned fuel trim showed E15-related exhaust emissions failures during their full useful life. 75 Fed. Reg. 68,107-108, JA18-19; 76 Fed. Reg. 4671-72, JA71-72.

Petitioners' argument is particularly unavailing given that DOE consulted with CRC (including some Petitioners) regarding vehicle selection and considered data from screening studies cited by Petitioners (including CRC E-87-1), highlighting the potential concern regarding E15's effects on vehicles that fail to apply learned fuel trim. Pets. Br. 49; 75 Fed. Reg. 68,106, JA17. In fact, the DOE Catalyst Study included six of the 10 "sensitive" vehicles identified in CRC E-87-1 (2002 Nissan Frontier, 2000 Ford Focus, 2000 Honda Accord, 2002 Dodge Durango, 2006 Chevrolet Cobalt and 2006 Nissan Quest), and a 2008 Nissan

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elevated temperatures only indicate the potential for catalyst deterioration." *Id*. 68,105, JA16.

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Altima, which represented a later model year of another "sensitive" vehicle as identified by CRC E-87-1 R.13970, JA764-836 (E-87-1 Study); 75 Fed. Reg. 68,106, JA17 (Table IV.A-1). Thus, the DOE Catalyst Study did not ignore or exclude "sensitive" vehicles.

3. EPA Properly Analyzed Test Data

EPA properly analyzed the test data in concluding that E15 did not cause or contribute to emissions failures in the MY2001 and newer vehicles. 75 Fed. Reg. 68,124, JA35; 76 Fed. Reg. 4682, JA82. EPA addressed each of the alleged "emissions failures" cited by Petitioners and rationally explained why the data supported its conclusion that E15 met the statutory criterion for MY2001 and newer vehicles.

First, EPA explained that the "emissions failures" Petitioners cite were unrelated to E15. The 2000 Accord exceeded the non-methane organic gas standard when tested on E15 and gasoline without ethanol (E0). 76 Fed. Reg. 4670, JA70. Given that this model failed this test on E0 as well as E15, it was both reasonable for EPA to conclude that the emissions failure was due to something other than E15 and unnecessary for EPA to identify the precise cause of the failures as Petitioners argue. Pets. Br. 50-51 n.16.

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Petitioners acknowledge that the 2002 Frontier tested on E15 met its emissions standards under the testing protocol, but erroneously challenge EPA's use of averaging in assessing the test results. Pets. Br. 51. As explained below in argument III.B., averaging is an appropriate way to evaluate the test results given the inherent variability of testing and other factors; thus, EPA properly concluded that E15 would not cause this vehicle to exceed its emissions standards.

The two vehicles that failed emissions tests in the CRC E-87-1 study, Pets. Br. 51-52, were tested using E0; neither vehicle was tested on E15. R.2553.1, at 8-9, 13-14, JA325-26, JA330-31. Moreover, in contrast to the DOE Catalyst Study, which provided data on the actual emissions impacts of E15, the CRC E-87-1 study was only a screening study designed to identify vehicles that might be "sensitive" to E15. R.2553.1, at 1, 37, JA318, JA354 *; see supra* 53-54 n.15. Accordingly, EPA rationally concluded that the two emissions failures in the CRC E-87-1 study have no bearing on the E15 waiver decisions.

Second, Petitioners' contention that EPA failed to explain why reliance on the 2006 Quest test data was reasonable even though the testing procedure was changed part way through the test cycle is unsupported. Pets. Br. 52. EPA explained why it included the 2006 Quest data in the pass/fail statistical analyses, but not in the deterioration analysis. R.14019 at 10-11, JA1529-30 ("Technical

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Summary of DOE Study on E15 Impacts on Tier 2 Vehicles and Southwest Research Teardown Report" ("EPA Technical Summary")). EPA also explained that including the 2006 Quest data in the pass/fail analyses had no impact on the results because the number of vehicles failing their emissions standards on E0 was greater than or equal to the number of vehicles that failed on E15. *Id.* at 10, JA1529.[16] Given these circumstances, the change in testing procedure was irrelevant to EPA's decision.

As demonstrated above, the record amply supports EPA's determination that E15 will not cause or contribute to emissions failures in MY2001 and newer vehicles.

B. EPA Properly Averaged Emissions Test Results

EPA appropriately used averaging in analyzing DOE Catalyst Study data and concluding that E15 would not cause emissions failures in test vehicles. The issue under section 211(f)(4) is whether E15 will "cause or contribute" to vehicles failing to meet their emissions standards over their useful lives. To determine

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[16] EPA notes that the Federal Register Notice announcing the First Waiver Decision incorrectly states that the 2006 Quest failed its NOx emissions standards. 75 Fed. Reg. 68,107, JA18. However, EPA's technical analysis of the DOE test data accurately reflects that the 2006 Quest passed its NOx emissions standards. R.14019, at 7-9, JA1526-28 (EPA Technical Summary); R.14017, JA1510-11 (DOE V4 Data). Because EPA's analysis relies on the correct data, the error is harmless.

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whether E15 met this standard, EPA compared emissions results from vehicles tested on E15 to emissions results from matching vehicle models tested on gasoline without ethanol (E0). Due to factors including testing variability and differences in vehicle performance across models, a small number of emissions failures can be expected across the national fleet, regardless of fuel type. *See* R.14019 at 10, JA1529 (EPA Technical Summary). To separate out the fuel's effects from test variability and other factors, for each vehicle tested on E15 or E0, EPA averaged multiple emissions measurements taken at given mileage points. *See id.* at 8-9, JA1527-29 (Table 2); 75 Fed. Reg. 68,107-108, JA18-19 (Tables IV.A-2, IV.A-3).

Here, where the goal of EPA's analysis is to isolate the effects of E15 on the test vehicles' emissions compliance, EPA's methodological approach is rational and entitled to the heightened deference due matters involving the agency's technical judgment. Contrary to Petitioners' assertion, EPA did not "manipulate" data or "dismiss admitted test failures"; EPA performed the same analysis on the results of every test vehicle, whether it was tested on E15 or E0. Had EPA not averaged test results in evaluating whether vehicles passed or failed their emissions standards, as Petitioners suggest, two additional vehicles would have failed their emissions tests on E0. 75 Fed. Reg. 68,107, JA18 (Table IV.A-2; 2009 Odyssey); 76 Fed. Reg. 4672, JA72 (Table IV.A-3; 2000 Focus). When compared to the

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single emissions failure in the data set for E15 vehicles (the 2002 Nissan Frontier), the two failures on E0 tend to suggest that something other than ethanol caused the emissions failures, further supporting EPA's conclusion that E15 would not cause or contribute to emissions failures.

Petitioners' reliance on the vehicle certification regulations is unavailing because these regulations do not govern section 211(f)(4) waiver decisions. The certification regulations are intended to determine whether a particular test group of new vehicles manufactured by a single manufacturer may be certified as meeting its emissions standards. This is a different question from what is required by section 211(f)(4), which asks whether the proposed new fuel would cause or contribute to in-use vehicles failing to meet their emissions standards. Therefore, EPA's departure from the certification regulations is appropriate.

Moreover, Petitioners' contention that test averaging is inconsistent with EPA's certification regulations is overbroad and refuted by Petitioners' own admission that the regulations allow averaging in certain circumstances. *See* Pets. Br. 54 n.18; 40 C.F.R. § 86.1823.08(f)(1)(A) ("[m]ultiple tests … are averaged"). Further, although 40 C.F.R. § 86.1841-01(b)-(d) of the certification regulations requires "every test vehicle" to meet its emissions standards, the regulations permit a retest in the event of a test failure. *See e.g.* 40 C.F.R. § 86.1835-01 (confirmatory

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certification testing). Thus, even under the certification regulations, a single test failure may not prevent a manufacturer from showing that its vehicles meet applicable emissions standards. In short, Petitioners fail to show EPA's analysis of the test data was arbitrary or inconsistent with EPA's regulations.

C. EPA Reasonably Considered the Emission Benefit of E15 Potentially Replacing E10

Petitioners fail to show that EPA acted arbitrarily or contrary to the statute in considering the likely emission reductions that would result if E15 replaces E10. Petitioners' argument references EPA's conclusions in the Second Waiver Decision regarding evaporative emissions from permeation.[17] At the outset, it is important to note that EPA did not conclude, as Petitioners assert, that E15 "would likely contribute to [evaporative] emissions failures." Pets. Br. 55. EPA concluded, based on its engineering judgment and its analysis of the available test data, that E15 would not cause or contribute to evaporative emissions failures in the MY2001-2006 vehicle models reflected in the test data EPA considered. 76

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[17] Permeation, one of five components of evaporative emissions addressed by emissions standards, means evaporative emissions that come through the walls of rubber seals in the fuel system. 76 Fed. Reg. 4673, JA73. For all five components, EPA concluded that MY2001-2006 light-duty motor vehicles operated on E15 would generally continue complying with evaporative emission standards and would likely achieve evaporative emission levels somewhat lower than currently experienced when operated on in-use fuel. *Id.*

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Fed. Reg. 4674-79, JA74-79. EPA's conclusion is reasonable and supported by the record. *Id.*

Petitioners do not refute EPA's engineering judgment or its analysis of the test data. Petitioners attempt to fault EPA for recognizing that the test programs it considered were not fully representative of all MY2001-2006 vehicles and thus there is the *possibility* that some of the vehicles for which EPA did not have data could exceed their evaporative emissions standards when using E15. *Id.* 4679-80, JA79-80. However, EPA's recognition of the mere possibility of exceedances in vehicles not represented by the relevant test programs does not render EPA's decision-making arbitrary. Rather, that EPA considered this possibility and addressed it demonstrates reasoned decision-making.

Moreover, Petitioners fail to show that EPA's decision to grant the waiver, notwithstanding "the possibility of, at most, limited emission standard exceedances," 76 Fed. Reg. 4680, JA80, deviates from past practice. EPA has stated that an applicant may use reliable statistical sampling and fleet testing protocols to demonstrate that a new fuel would not cause or contribute to a significant failure of emissions standards by vehicles in the national fleet. *Id*. These statistical tests are intended to identify failures of a statistically significant number of motor vehicles resulting from the new fuel, as opposed to other non-fuel

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related causes. *Id.* 4679, JA79. Inherent in this practice of relying on statistical sampling is the potential for a limited number of emissions violations "by an amount smaller than the statistical tests were designed to confidently discern." *Id.* Nonetheless, EPA has concluded that the possibility of such emissions exceedances would not bar a waiver. *Id.* Similarly, EPA's recognition of the possibility of a limited number of evaporative emissions exceedances should not bar a waiver for E15. [18]

Even if EPA's rationale could be considered a deviation from past practice, EPA's conclusion that replacing E10, which is now pervasive, with E15 would reduce overall evaporative emissions is a rational justification. *See Motor Vehicle Mfrs. Ass'n*, 768 F.2d at 399 (recognizing EPA may be justified from deviating from established criteria where the agency is able to "articulate a reasoned explanation" for doing so); *accord FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).[19] First, EPA concluded that its analysis of the available data showed

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[18] EPA also explained that the possibility of a limited number of exceedances would not jeopardize vehicle manufacturers' compliance status because any effect of E15 on immediate evaporative emissions would not affect results of compliance testing, which is conducted on E0. *See* 76 Fed. Reg. 4680 n.36, JA80

[19] In *Motor Vehicle Mfrs. Ass'n*, 768 F.2d at 398-99, the court rejected EPA's decision to grant a waiver where the fuel failed EPA's established test criteria and EPA did not articulate a reasonable explanation for granting a waiver despite this

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only the remote possibility of a very limited number of MY2001-2006 vehicles exceeding their evaporative emissions standards when using E15. 76 Fed. Reg. 4680, JA80. Second, EPA noted that E15 would result in fewer evaporative emissions exceedances than were already occurring with E10. *Id.* EPA explained that, if E15 ultimately is sold, it likely will replace E10 as the pervasive fuel in the market. *Id.* Therefore, EPA concluded that E15 would actually reduce in-use vehicle evaporative emissions, which weighed in favor of granting a partial waiver. *Id.* [20]

EPA did not compare E15 to E10 in the manner Petitioners assert. EPA's decision to grant a partial waiver for MY2001-2006 motor vehicles was based on vehicle emissions performance on E15 as compared to E0 because E0 is the fuel used to certify vehicles and engines. *See* 76 Fed. Reg. 4680 n.37, JA80. However, EPA did consider that E10 is the predominant fuel in most of the country, and if manufacturers elect to introduce E15 into the market, E15 would likely replace

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evidence. The instant case is distinguishable from *Motor Vehicle Mfrs.* for at least two reasons. First, EPA did not have evidence of E15-related emissions failures. 76 Fed. Reg. 4679, JA79. Second, EPA provided a reasonable explanation for its decision to grant a partial waiver for E15 notwithstanding the *possibility* of limited emissions failures. *Id.* 4679-80, JA79-80.

[20] EPA also appropriately considered that its approach would further Congress's goals in EISA to increase the use of renewable fuels. 76 Fed. Reg. 4680.

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E10. 76 Fed. Reg. 4680 & n.35, JA80. In light of these unique circumstances, EPA appropriately considered the real-world benefit of the evaporative emissions reductions that would result from the introduction of E15 when considering whether to grant E15 a partial waiver.

D. EPA Acknowledged and Reasonably Addressed the Possibility of Misfueling

Petitioners admit that EPA recognized and addressed the potential for misfueling. Pets. Br. 57-58. Petitioners' argument rests on the unsupported assertion that the steps taken "might not" prevent misfueling. Petitioners' argument does not carry their high burden under the "arbitrary and capricious" standard of review.

Petitioners' first argument, that the misfueling conditions will be ineffective because they do not apply to downstream parties, ignores that manufacturers wishing to use the waiver must have and implement an EPA-approved plan showing the manufacturer has taken all reasonable precautions to control actions of downstream parties. 75 Fed. Reg. 68,146, JA57. Additionally, EPA proposed a separate rule under section 211(c) to regulate the sale and use of E15 by downstream parties. *Id*. 68,146, JA57. Now final, the "Misfueling Rule" prohibits the use of E15 in vehicles, engines, and equipment not covered by the E15 Waiver Decisions, requires gasoline retail stations and other facilities that sell E15 to

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properly label their E15 pumps, and contains other requirements designed to minimize the potential that consumers will use E15 in vehicles for which it is not approved. 76 Fed. Reg. 44,411, JA1886. The prohibition on misfueling in the Misfueling Rule is enforceable all the way down to the consumer, 40 C.F.R. § 80.1504, thus rendering moot Petitioners' argument that the waiver conditions are unenforceable against consumers. *See* 76 Fed. Reg. 44,408-409, JA1883-84.

Petitioners' second argument, that conditions imposed have been shown to be ineffective in other situations, fares no better. In fact, EPA modeled the E15 Waiver conditions on measures proven effective in the introduction of Ultra Low Sulfur Diesel. 75 Fed. Reg. 68,148, JA59. EPA also included a condition authorizing it to impose "any other reasonable measures EPA determines are appropriate," which enables EPA to require additional misfueling mitigation measures, if necessary, beyond those included in the waiver decision. *Id.*

Accordingly, the record demonstrates that EPA did not ignore an important aspect of the problem. EPA acknowledged and reasonably addressed the potential for misfueling. Petitioners' unsupported claim that the E15 waiver conditions are "potentially ineffective" does not show that EPA was arbitrary and capricious.

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CONCLUSION

For the foregoing reasons, the Court should deny the petitions.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

/s/ Jessica O'Donnell
JESSICA O'DONNELL
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 305-0851 (o)
E mail: jessica.odonnell@usdoj.gov

OF COUNSEL:
SUSAN STAHLE
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Counsel for Respondent EPA

Dated: October 25, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and exclusive of the components of the brief excluded from the word limit pursuant to Fed. R. App. P. 32(a)(7)(B)(iii), I hereby certify that the foregoing brief contains 13,950 words, in 14 point Times New Roman typeface as counted by the word count feature of Microsoft Office Word 2007, which is under the number of words permitted for Respondent's brief under the Court's May 25, 2011 Order.

Dated: October 25, 2011

/s/ Jessica O'Donnell
Jessica O'Donnell
Counsel for Respondent EPA

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2011, a copy of the foregoing was served electronically through the court's CM/ECF system on all registered counsel.

Dated: October 25, 2011

/s/ *Jessica O'Donnell*
Jessica O'Donnell
Counsel for Respondent EPA

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STATUTORY AND REGULATORY

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or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 381; Pub. L. 94–409, § 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 103–272, § 5(a), July 5, 1994, 108 Stat. 1373.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
(1)	5 U.S.C. 1001(a).	June 11, 1946, ch. 324, § 2(a), 60 Stat. 237. Aug. 8, 1946, ch. 870, § 302, 60 Stat. 918. Aug. 10, 1946, ch. 951, § 601, 60 Stat. 893. Mar. 31, 1947, ch. 30, § 6(a), 61 Stat. 37. June 30, 1947, ch. 163, § 210, 61 Stat. 201. Mar. 30, 1948, ch. 161, § 301, 62 Stat. 99.
(2)–(13)	5 U.S.C. 1001 (less (a)).	June 11, 1946, ch. 324, § 2 (less (a)), 60 Stat. 237.

In paragraph (1), the sentence "Nothing in this Act shall be construed to repeal delegations of authority as provided by law." is omitted as surplusage since there is nothing in the Act which could reasonably be so construed.

In paragraph (1)(G), the words "or naval" are omitted as included in "military".

In paragraph (1)(H), the words "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947" are omitted as executed. Reference to the "Selective Training and Service Act of 1940" is omitted as that Act expired Mar. 31, 1947. Reference to the "Sugar Control Extension Act of 1947" is omitted as that Act expired on Mar. 31, 1948. References to the "Housing and Rent Act of 1947, as amended" and the "Veterans' Emergency Housing Act of 1946" have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by § 111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87–256, 75 Stat. 538, since § 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87–256.

In paragraph (2), the words "of any character" are omitted as surplusage.

In paragraph (3), the words "and a person or agency admitted by an agency as a party for limited purposes" are substituted for "but nothing herein shall be con-

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§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1003.	June 11, 1946, ch. 324, § 4, 60 Stat. 238.

In subsection (a)(1), the words "or naval" are omitted as included in "military".

In subsection (b), the word "when" is substituted for "in any situation in which".

In subsection (c), the words "for oral presentation" are substituted for "to present the same orally in any manner". The words "sections 556 and 557 of this title apply instead of this subsection" are substituted for "the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection".

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 553 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2245 of Title 7, Agriculture.

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this

[1] So in original.

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prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions 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;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, § 10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
802. Congressional disapproval procedure.

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SUBCHAPTER II—EMISSION STANDARDS FOR MOVING SOURCES

PART A—MOTOR VEHICLE EMISSION AND FUEL STANDARDS

§ 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.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NO_x) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

(C) LEAD TIME AND STABILITY.—Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

(D) REBUILDING PRACTICES.—The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

(E) MOTORCYCLES.—For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525(f)(1)[1] of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) of this section applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4)(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any

[1] See References in Text note below.

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1970—Pub. L. 91-604, § 10(b), substituted provisions authorizing the Administrator to make grants to appropriate State agencies for the development and maintenance of effective vehicle emission devices and systems inspection and emission testing and control programs, for provisions authorizing the Secretary to make grants to appropriate State air pollution control agencies for the development of meaningful uniform motor vehicle emission device inspection and emission testing programs.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-95 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.

§ 7545. Regulation of fuels

(a) Authority of Administrator to regulate

The Administrator may by regulation designate any fuel or fuel additive (including any fuel or fuel additive used exclusively in nonroad engines or nonroad vehicles) and, after such date or dates as may be prescribed by him, no manufacturer or processor of any such fuel or additive may sell, offer for sale, or introduce into commerce such fuel or additive unless the Administrator has registered such fuel or additive in accordance with subsection (b) of this section.

(b) Registration requirement

(1) For the purpose of registration of fuels and fuel additives, the Administrator shall require—

(A) the manufacturer of any fuel to notify him as to the commercial identifying name and manufacturer of any additive contained in such fuel; the range of concentration of any additive in the fuel; and the purpose-in-use of any such additive; and

(B) the manufacturer of any additive to notify him as to the chemical composition of such additive.

(2) For the purpose of registration of fuels and fuel additives, the Administrator shall, on a regular basis, require the manufacturer of any fuel or fuel additive—

(A) to conduct tests to determine potential public health and environmental effects of the fuel or additive (including carcinogenic, teratogenic, or mutagenic effects); and

(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.

(4) STUDY ON CERTAIN FUEL ADDITIVES AND BLENDSTOCKS.—

(A) IN GENERAL.—Not later than 2 years after August 8, 2005, the Administrator shall—

(i) conduct a study on the effects on public health (including the effects on children, pregnant women, minority or low-income communities, and other sensitive populations), air quality, and water resources of increased use of, and the feasibility of using as substitutes for methyl tertiary butyl ether in gasoline—

(I) ethyl tertiary butyl ether;
(II) tertiary amyl methyl ether;
(III) di-isopropyl ether;
(IV) tertiary butyl alcohol;
(V) other ethers and heavy alcohols, as determined by then[1] Administrator;
(VI) ethanol;
(VII) iso-octane; and
(VIII) alkylates; and

(ii) conduct a study on the effects on public health (including the effects on children, pregnant women, minority or low-income communities, and other sensitive populations), air quality, and water resources of the adjustment for ethanol-blended reformulated gasoline to the volatile organic compounds performance requirements that are applicable under paragraphs (1) and (3) of subsection (k) of this section; and

(iii) submit to the Committee on Environment and Public Works of the Senate and the Committee on Energy and Commerce of the House of Representatives a report describing the results of the studies under clauses (i) and (ii).

(B) CONTRACTS FOR STUDY.—In carrying out this paragraph, the Administrator may enter into one or more contracts with nongovernmental entities such as—

(i) the national energy laboratories; and

(ii) institutions of higher education (as defined in section 1001 of title 20).

(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

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

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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 or prohibition with emission control devices or systems which are or will be in general use and do not require the proposed control or prohibition. On request of a manufacturer of motor vehicles, motor vehicle engines, fuels, or fuel additives submitted within 10 days of notice of proposed rulemaking, the Administrator shall hold a public hearing and publish findings with respect to any matter he is required to consider under this subparagraph. Such findings shall be published at the time of promulgation of final regulations.

(C) No fuel or fuel additive may be prohibited by the Administrator under paragraph (1) unless he finds, and publishes such finding, that in his judgment such prohibition will not cause the use of any other fuel or fuel additive which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the fuel or fuel additive proposed to be prohibited.

(3)(A) For the purpose of obtaining evidence and data to carry out paragraph (2), the Administrator may require the manufacturer of any motor vehicle or motor vehicle engine to furnish any information which has been developed concerning the emissions from motor vehicles resulting from the use of any fuel or fuel additive, or the effect of such use on the performance of any emission control device or system.

(B) In obtaining information under subparagraph (A), section 7607(a) of this title (relating to subpenas) shall be applicable.

(4)(A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine—

(i) if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 7543(a) of this title has at any time been waived under section 7543(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

(C)(i) A State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 7410 of this title so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements. The Administrator may find that a State control or prohibition is necessary to achieve that standard if no other measures that would bring about timely attainment exist, or if other measures exist and are technically possible to implement, but are unreasonable or impracticable. The Administrator may make a finding of necessity under this subparagraph even if the plan for the area does not contain an approved demonstration of timely attainment.

(ii) The Administrator may temporarily waive a control or prohibition respecting the use of a fuel or fuel additive required or regulated by the Administrator pursuant to subsection (c), (h), (i), (k), or (m) of this section or prescribed in an applicable implementation plan under section 7410 of this title approved by the Administrator under clause (i) of this subparagraph if, after consultation with, and concurrence by, the Secretary of Energy, the Administrator determines that—

(I) extreme and unusual fuel or fuel additive supply circumstances exist in a State or region of the Nation which prevent the distribution of an adequate supply of the fuel or fuel additive to consumers;

(II) such extreme and unusual fuel and fuel additive supply circumstances are the result of a natural disaster, an Act of God, a pipeline or refinery equipment failure, or another event that could not reasonably have been foreseen or prevented and not the lack of prudent planning on the part of the suppliers of the fuel or fuel additive to such State or region; and

(III) it is in the public interest to grant the waiver (for example, when a waiver is necessary to meet projected temporary shortfalls in the supply of the fuel or fuel additive in a State or region of the Nation which cannot otherwise be compensated for).

(iii) If the Administrator makes the determinations required under clause (ii), such a temporary extreme and unusual fuel and fuel additive supply circumstances waiver shall be permitted only if—

(I) the waiver applies to the smallest geographic area necessary to address the extreme and unusual fuel and fuel additive supply circumstances;

(II) the waiver is effective for a period of 20 calendar days or, if the Administrator determines that a shorter waiver period is adequate, for the shortest practicable time period

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necessary to permit the correction of the extreme and unusual fuel and fuel additive supply circumstances and to mitigate impact on air quality;

(III) the waiver permits a transitional period, the exact duration of which shall be determined by the Administrator (but which shall be for the shortest practicable period), after the termination of the temporary waiver to permit wholesalers and retailers to blend down their wholesale and retail inventory;

(IV) the waiver applies to all persons in the motor fuel distribution system; and

(V) the Administrator has given public notice to all parties in the motor fuel distribution system, and local and State regulators, in the State or region to be covered by the waiver.

The term "motor fuel distribution system" as used in this clause shall be defined by the Administrator through rulemaking.

(iv) Within 180 days of August 8, 2005, the Administrator shall promulgate regulations to implement clauses (ii) and (iii).

(v)[2] Nothing in this subparagraph shall—

(I) limit or otherwise affect the application of any other waiver authority of the Administrator pursuant to this section or pursuant to a regulation promulgated pursuant to this section; and

(II) subject any State or person to an enforcement action, penalties, or liability solely arising from actions taken pursuant to the issuance of a waiver under this subparagraph.

(v)(I)[2] The Administrator shall have no authority, when considering a State implementation plan or a State implementation plan revision, to approve under this paragraph any fuel included in such plan or revision if the effect of such approval increases the total number of fuels approved under this paragraph as of September 1, 2004, in all State implementation plans.

(II) The Administrator, in consultation with the Secretary of Energy, shall determine the total number of fuels approved under this paragraph as of September 1, 2004, in all State implementation plans and shall publish a list of such fuels, including the States and Petroleum Administration for Defense District in which they are used, in the Federal Register for public review and comment no later than 90 days after August 8, 2005.

(III) The Administrator shall remove a fuel from the list published under subclause (II) if a fuel ceases to be included in a State implementation plan or if a fuel in a State implementation plan is identical to a Federal fuel formulation implemented by the Administrator, but the Administrator shall not reduce the total number of fuels authorized under the list published under subclause (II).

(IV) Subclause (I) shall not limit the Administrator's authority to approve a control or prohibition respecting any new fuel under this paragraph in a State implementation plan or revision to a State implementation plan if such new fuel—

(aa) completely replaces a fuel on the list published under subclause (II); or

(bb) does not increase the total number of fuels on the list published under subclause (II) as of September 1, 2004.

In the event that the total number of fuels on the list published under subclause (II) at the time of the Administrator's consideration of a control or prohibition respecting a new fuel is lower than the total number of fuels on such list as of September 1, 2004, the Administrator may approve a control or prohibition respecting a new fuel under this subclause if the Administrator, after consultation with the Secretary of Energy, publishes in the Federal Register after notice and comment a finding that, in the Administrator's judgment, such control or prohibition respecting a new fuel will not cause fuel supply or distribution interruptions or have a significant adverse impact on fuel producibility in the affected area or contiguous areas.

(V) The Administrator shall have no authority under this paragraph, when considering any particular State's implementation plan or a revision to that State's implementation plan, to approve any fuel unless that fuel was, as of the date of such consideration, approved in at least one State implementation plan in the applicable Petroleum Administration for Defense District. However, the Administrator may approve as part of a State implementation plan or State implementation plan revision a fuel with a summertime Reid Vapor Pressure of 7.0 psi. In no event shall such approval by the Administrator cause an increase in the total number of fuels on the list published under subclause (II).

(VI) Nothing in this clause shall be construed to have any effect regarding any available authority of States to require the use of any fuel additive registered in accordance with subsection (b) of this section, including any fuel additive registered in accordance with subsection (b) of this section after August 8, 2005.

(d) Penalties and injunctions

(1) Civil penalties

Any person who violates subsection (a), (f), (g), (k), (*l*), (m), (n), or (*o*) of this section or the regulations prescribed under subsection (c), (h), (i), (k), (*l*), (m), (n), or (*o*) of this section or who fails to furnish any information or conduct any tests required by the Administrator under subsection (b) of this section shall be liable to the United States for a civil penalty of not more than the sum of $25,000 for every day of such violation and the amount of economic benefit or savings resulting from the violation. Any violation with respect to a regulation prescribed under subsection (c), (k), (*l*), (m), or (*o*) of this section which establishes a regulatory standard based upon a multiday averaging period shall constitute a separate day of violation for each and every day in the averaging period. Civil penalties shall be assessed in accordance with subsections (b) and (c) of section 7524 of this title.

(2) Injunctive authority

The district courts of the United States shall have jurisdiction to restrain violations of subsections (a), (f), (g), (k), (*l*), (m), (n), and

[2] So in original. Two cls. (v) have been enacted.

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(*o*) of this section and of the regulations prescribed under subsections (c), (h), (i), (k), (*l*), (m), (n), and (*o*) of this section, to award other appropriate relief, and to compel the furnishing of information and the conduct of tests required by the Administrator under subsection (b) of this section. Actions to restrain such violations and compel such actions shall be brought by and in the name of the United States. In any such action, subpoenas for witnesses who are required to attend a district court in any district may run into any other district.

(e) Testing of fuels and fuel additives

(1) Not later than one year after August 7, 1977, and after notice and opportunity for a public hearing, the Administrator shall promulgate regulations which implement the authority under subsection (b)(2)(A) and (B) of this section with respect to each fuel or fuel additive which is registered on the date of promulgation of such regulations and with respect to each fuel or fuel additive for which an application for registration is filed thereafter.

(2) Regulations under subsection (b) of this section to carry out this subsection shall require that the requisite information be provided to the Administrator by each such manufacturer—

(A) prior to registration, in the case of any fuel or fuel additive which is not registered on the date of promulgation of such regulations; or

(B) not later than three years after the date of promulgation of such regulations, in the case of any fuel or fuel additive which is registered on such date.

(3) In promulgating such regulations, the Administrator may—

(A) exempt any small business (as defined in such regulations) from or defer or modify the requirements of, such regulations with respect to any such small business;

(B) provide for cost-sharing with respect to the testing of any fuel or fuel additive which is manufactured or processed by two or more persons or otherwise provide for shared responsibility to meet the requirements of this section without duplication; or

(C) exempt any person from such regulations with respect to a particular fuel or fuel additive upon a finding that any additional testing of such fuel or fuel additive would be duplicative of adequate existing testing.

(f) New fuels and fuel additives

(1)(A) Effective upon March 31, 1977, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for general use in light duty motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 7525 of this title.

(B) Effective upon November 15, 1990, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for use by any person in motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 7525 of this title.

(2) Effective November 30, 1977, it shall be unlawful for any manufacturer of any fuel to introduce into commerce any gasoline which contains a concentration of manganese in excess of .0625 grams per gallon of fuel, except as otherwise provided pursuant to a waiver under paragraph (4).

(3) Any manufacturer of any fuel or fuel additive which prior to March 31, 1977, and after January 1, 1974, first introduced into commerce or increased the concentration in use of a fuel or fuel additive that would otherwise have been prohibited under paragraph (1)(A) if introduced on or after March 31, 1977 shall, not later than September 15, 1978, cease to distribute such fuel or fuel additive in commerce. During the period beginning 180 days after August 7, 1977, and before September 15, 1978, the Administrator shall prohibit, or restrict the concentration of any fuel additive which he determines will cause or contribute to the failure of an emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified under section 7525 of this title.

(4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this subsection or the limitation specified in paragraph (2) of this subsection, if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 7525 of this title. If the Administrator has not acted to grant or deny an application under this paragraph within one hundred and eighty days of receipt of such application, the waiver authorized by this paragraph shall be treated as granted.

(5) No action of the Administrator under this section may be stayed by any court pending judicial review of such action.

(g) Misfueling

(1) No person shall introduce, or cause or allow the introduction of, leaded gasoline into any motor vehicle which is labeled "unleaded gasoline only," which is equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, which is a 1990 or later model year motor vehicle, or which such person knows or should know is a vehicle designed solely for the use of unleaded gasoline.

(2) Beginning October 1, 1993, no person shall introduce or cause or allow the introduction into any motor vehicle of diesel fuel which such

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(b) To implement this order and further the policy set forth in section 1, the Director of the Office of Management and Budget may require the heads of the agencies to submit reports to, and coordinate with, such Office on matters related to this order.

SEC. 6. *General Provisions.* (a) This order shall be implemented in accordance with applicable law and subject to the availability of appropriations.

(b) This order shall not be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budget, administrative, and legislative proposals.

(c) This order is not intended to, and does not, create any right, benefit or privilege, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

GEORGE W. BUSH.

§ 7545. Regulation of fuels

[See main edition for text of (a) and (b)]

(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 if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or (B)[2] 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.

[See main edition for text of (2) to (4); (d) and (e)]

(f) New fuels and fuel additives

[See main edition for text of (1) to (3)]

(4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this subsection or the limitation specified in paragraph (2) of this subsection, if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or fuel additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified pursuant to sections 7525 and 7547(a) of this title. The Administrator shall take final action to grant or deny an application submitted under this paragraph, after public notice and comment, within 270 days of the receipt of such an application.

[See main edition for text of (5); (g) to (n)]

(o) Renewable fuel program

(1) Definitions

In this section:

(A) Additional renewable fuel

The term "additional renewable fuel" means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.

(B) Advanced biofuel

(i) In general

The term "advanced biofuel" means renewable fuel, other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

(ii) Inclusions

The types of fuels eligible for consideration as "advanced biofuel" may include any of the following:

(I) Ethanol derived from cellulose, hemicellulose, or lignin.

(II) Ethanol derived from sugar or starch (other than corn starch).

(III) Ethanol derived from waste material, including crop residue, other vegetative waste material, animal waste, and food waste and yard waste.

(IV) Biomass-based diesel.

(V) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.

(VI) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass.

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

The term "baseline lifecycle greenhouse gas emissions" means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

(D) Biomass-based diesel

The term "biomass-based diesel" means renewable fuel that is biodiesel as defined in section 13220(f) of this title and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwith-

[2] So in original. Par. (1) does not contain a cl. (A).

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(B) uses cellulosic biomass feedstocks derived from agricultural residues or municipal solid waste.

(3) Authorization of appropriations

There is authorized to be appropriated to carry out this subsection—

(A) $250,000,000 for fiscal year 2006; and

(B) $400,000,000 for fiscal year 2007.

(July 14, 1955, ch. 360, title II, § 212, as added Pub. L. 109–58, title XV, § 1511, Aug. 8, 2005, 119 Stat. 1086.)

REFERENCES IN TEXT

The Federal Credit Reform Act of 1990, referred to in subsec. (b)(1), is title V of Pub. L. 93–344, as added by Pub. L. 101–508, title XIII, § 13201(a), Nov. 5, 1990, 104 Stat. 1388–609, as amended, which is classified generally to subchapter III (§ 661 et seq.) of chapter 17A of Title 2, The Congress. For complete classification of this Act to the Code, see Short Title note set out under section 621 of Title 2 and Tables.

The Energy Policy Act, referred to in subsec. (b)(1), probably means the Energy Policy Act of 2005, Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 594. Title XIV of the Act probably should be a reference to title XV of the Act which relates to ethanol and motor fuels and enacted subchapter XIV (§ 16501 et seq.) of chapter 149 of this title and sections 6991i to 6991m and 7546 of this title, amended sections 6991 to 6991f, 6991h, 1991i, 7135, 7545, and 13220 of this title, and enacted provisions set out as notes under section 7545 of this title. Title XIV of the Act, which contains miscellaneous provisions, is classified principally to subchapter XIII (§ 16491 et seq.) of chapter 149 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of this title and Tables.

PRIOR PROVISIONS

A prior section 7546, act July 14, 1955, ch. 360, title II, § 212, as added Dec. 31, 1970, Pub. L. 91–604, § 10(c), 84 Stat. 1700; amended Dec. 31, 1970, Pub. L. 91–605, § 202(a), 84 Stat. 1739; Apr. 9, 1973, Pub. L. 93–15, § 1(b), 87 Stat. 11; June 22, 1974, Pub. L. 93–319, § 13(b), 88 Stat. 265, related to low-emission vehicles, prior to repeal by Pub. L. 101–549, title II, § 230(10), Nov. 15, 1990, 104 Stat. 2529.

A prior section 212 of act July 14, 1955, was renumbered section 213 by Pub. L. 91–604, renumbered section 214 by Pub. L. 93–319, and renumbered section 216 by Pub. L. 95–95, and is classified to section 7550 of this title.

§ 7547. Nonroad engines and vehicles

(a) Emissions standards

(1) The Administrator shall conduct a study of emissions from nonroad engines and nonroad vehicles (other than locomotives or engines used in locomotives) to determine if such emissions cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such study shall be completed within 12 months of November 15, 1990.

(2) After notice and opportunity for public hearing, the Administrator shall determine within 12 months after completion of the study under paragraph (1), based upon the results of such study, whether emissions of carbon monoxide, oxides of nitrogen, and volatile organic compounds from new and existing nonroad engines or nonroad vehicles (other than locomotives or engines used in locomotives) are significant contributors to ozone or carbon monoxide concentrations in more than 1 area which has failed to attain the national ambient air quality standards for ozone or carbon monoxide. Such determination shall be included in the regulations under paragraph (3).

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

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

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

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closed 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,[4] 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)[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,,[6] 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[7] 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,

[4] So in original. Probably should be "subsection,".

[5] See References in Text note below.

[6] So in original.

[7] So in original. The word "to" probably should not appear.

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(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

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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.

(e) Other methods of judicial review not authorized

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

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of

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"(1) Environmental issues, including air quality, effects on hypoxia, pesticides, sediment, nutrient and pathogen levels in waters, acreage and function of waters, and soil environmental quality.

"(2) Resource conservation issues, including soil conservation, water availability, and ecosystem health and biodiversity, including impacts on forests, grasslands, and wetlands.

"(3) The growth and use of cultivated invasive or noxious plants and their impacts on the environment and agriculture.

In advance of preparing the report required by this subsection, the Administrator may seek the views of the National Academy of Sciences or another appropriate independent research institute. The report shall include the annual volume of imported renewable fuels and feedstocks for renewable fuels, and the environmental impacts outside the United States of producing such fuels and feedstocks. The report required by this subsection shall include recommendations for actions to address any adverse impacts found.

"(b) EFFECT ON AIR QUALITY AND OTHER ENVIRONMENTAL REQUIREMENTS.—Except as provided in section 211(*o*)(12) of the Clean Air Act [42 U.S.C. 7545(*o*)(12)], nothing in the amendments made by this title to section 211(*o*) of the Clean Air Act shall be construed as superseding, or limiting, any more environmentally protective requirement under the Clean Air Act [42 U.S.C. 7401 et seq.], or under any other provision of State or Federal law or regulation, including any environmental law or regulation."

TRANSITION RULES

Pub. L. 110–140, title II, § 210(a), Dec. 19, 2007, 121 Stat. 1532, provided that:

"(1) For calendar year 2008, transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), that is produced from facilities that commence construction after the date of enactment of this Act [Dec. 19, 2007] shall be treated as renewable fuel within the meaning of section 211(*o*) of the Clean Air Act [42 U.S.C. 7545(*o*)] only if it achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions. For calendar years 2008 and 2009, any ethanol plant that is fired with natural gas, biomass, or any combination thereof is deemed to be in compliance with such 20 percent reduction requirement and with the 20 percent reduction requirement of section 211(*o*)(1) of the Clean Air Act. The terms used in this subsection shall have the same meaning as provided in the amendment made by this Act to section 211(*o*) of the Clean Air Act.

"(2) Until January 1, 2009, the Administrator of the Environmental Protection Agency shall implement section 211(*o*) of the Clean Air Act and the rules promulgated under that section in accordance with the provisions of that section as in effect before the enactment of this Act and in accordance with the rules promulgated before the enactment of this Act, except that for calendar year 2008, the number '9.0' shall be substituted for the number '5.4' in the table in section 211(*o*)(2)(B) and in the corresponding rules promulgated to carry out those provisions. The Administrator is authorized to take such other actions as may be necessary to carry out this paragraph notwithstanding any other provision of law."

SUBCHAPTER III—GENERAL PROVISIONS

§ 7607. Administrative proceedings and judicial review

[See main edition for text of (a)]

(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,,[3] 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)[4] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

[See main edition for text of (2); (c) to (h); credits]

CODIFICATION

Subsec. (b)(1) is set out in this supplement to correct errors appearing in the main edition.

AMENDMENTS

1990—Subsec. (b)(1). Pub. L. 101–549, § 706(2), which directed amendment of second sentence by striking "under section 7413(d) of this title" immediately before

[3] So in original.

[4] See References in Text note below.

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Ante, p. 757.

(b) Section 203(a) of such Act, as amended by section 211 of this Act, is amended by adding the following at the end thereof: "Nothing in paragraph (3) shall be construed to require the use of manufacturer parts in maintaining or repairing any motor vehicle or motor vehicle engine. For the purposes of the preceding sentence, the term 'manufacturer parts' means, with respect to a motor vehicle engine, parts produced or sold by the manufacturer of the motor vehicle or motor vehicle engine.".

"Manufacturer parts."

(c) Section 205 of such Act is amended to read as follows:

"PENALTIES

42 USC 7524.
Ante, pp. 755, 761.
42 USC 7522.

"SEC. 205. Any person who violates paragraph (1), (2), or (4) of section 203(a) or any manufacturer, dealer, or other person who violates paragraph (3)(A) of section 203(a) shall be subject to a civil penalty of not more than $10,000. Any person who violates paragraph (3)(B) of such section 203(a) shall be subject to a civil penalty of not more than $2,500. Any such violation with respect to paragraph (1), (3), or (4) of section 203(a) shall constitute a separate offense with respect to each motor vehicle or motor vehicle engine.".

TESTING BY SMALL MANUFACTURERS

Regulations.
42 USC 7525.

SEC. 220. Section 206(a)(1) of the Clean Air Act is amended by adding at the end thereof the following: "In the case of any manufacturer of vehicles or vehicle engines whose projected sales in the United States for any model year (as determined by the Administrator) will not exceed three hundred, the regulations prescribed by the Administrator concerning testing by the manufacturer for purposes of determining compliance with regulations under section 202 for the useful life of the vehicle or engine shall not require operation of any vehicle or engine manufactured during such model year for more than five thousand miles or one hundred and sixty hours, respectively, but the Administrator shall apply such adjustment factors as he deems appropriate to assure that each such vehicle or engine will comply during its useful life (as determined under section 202(d)) with the regulations prescribed under section 202 of this Act.".

Ante, pp. 702, 751-753, 758-761; *Post*, pp. 765, 767, 769, 791.

PARTS STANDARDS; PREEMPTION OF STATE LAW

42 USC 7543.

SEC. 221. Section 209 of the Clean Air Act (relating to State standards) is amended by redesignating subsection (c) as (d) and by inserting after subsection (b) the following new subsection:

"(c) Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 207(a)(2), 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).".

Ante, p. 756.

TESTING OF FUELS AND FUEL ADDITIVES

Regulations.
42 USC 7545.

SEC. 222. (a) Section 211 of the Clean Air Act is amended by adding the following new subsections at the end thereof:

"(e)(1) Not later than one year after the date of enactment of this subsection and after notice and opportunity for a public hearing, the

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Administrator shall promulgate regulations which implement the authority under subsection (b)(2) (A) and (B) with respect to each fuel or fuel additive which is registered on the date of promulgation of such regulations and with respect to each fuel or fuel additive for which an application for registration is filed thereafter.

"(2) Regulations under subsection (b) to carry out this subsection shall require that the requisite information be provided to the Administrator by each such manufacturer—

Manufacturer reporting requirements.

"(A) prior to registration, in the case of any fuel or fuel additive which is not registered on the date of promulgation of such regulations; or

"(B) not later than three years after the date of promulgation of such regulations, in the case of any fuel or fuel additive which is registered on such date.

"(3) In promulgating such regulations, the Administrator may—

Exemptions and cost-sharing.

"(A) exempt any small business (as defined in such regulations) from or defer or modify the requirements of, such regulations with respect to any such small business;

"(B) provide for cost-sharing with respect to the testing of any fuel or fuel additive which is manufactured or processed by two or more persons or otherwise provide for shared responsibility to meet the requirements of this section without duplication; or

"(C) exempt any person from such regulations with respect to a particular fuel or fuel additive upon a finding that any additional testing of such fuel or fuel additive would be duplicative of adequate existing testing.

"(f)(1) Effective upon March 31, 1977, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for general use in light duty motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 206.

New fuel and fuel additive content.

Ante, pp. 758–760, 762; *Post*, p. 768.

"(2) Effective November 30, 1977, it shall be unlawful for any manufacturer of any fuel to first introduce into commerce any gasoline which contains a concentration of manganese in excess of .0625 grams per gallon of fuel.

Gasoline content.

"(3) Any manufacturer of any fuel or fuel additive which prior to March 31, 1977, and after January 1, 1974, first introduced into commerce or increased the concentration in use of a fuel or fuel additive that would otherwise have been prohibited under paragraph (1) if introduced on or after March 31, 1977 shall, not later than September 15, 1978, cease to distribute such fuel or fuel additive in commerce. During the period beginning 180 days after the date of the enactment of this subsection and before September 15, 1978, the Administrator shall prohibit, or restrict the concentration of any fuel additive which he determines will cause or contribute to the failure of an emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified under section 206.

Fuel additives, concentration restrictions.

"(4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this subsection if he determines that the applicant has established that such fuel or fuel additive or a specified

Waiver of fuel and fuel additive prohibitions.

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concentration thereof, and the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 206. If the Administrator has not acted to grant or deny an application under this paragraph within one hundred and eighty days of receipt of such application, the waiver authorized by this paragraph shall be treated as granted.

Ante, pp. 758-760, 762; *Post*, p. 768.

Judicial review.

"(5) No action of the Administrator under this section may be stayed by any court pending judicial review of such action.".

42 USC 7545.

(b) Section 211(d) of such Act is amended by inserting "or (f) after "(a)".

SMALL REFINERIES

SEC. 223. Section 211 of the Clean Air Act is amended by adding the following new subsection at the end thereof:

Definitions.

"(g)(1) For the purposes of this subsection:

"(A) The terms 'gasoline' and 'refinery' have the meaning provided under regulations of the Administrator promulgated under this section.

"(B) The term 'small refinery' means a refinery or a portion of refinery producing gasoline—

"(i) the gasoline producing capacity of which was in operation or under construction at any time during the one-year period immediately preceding October 1, 1976, and

"(ii) which has a crude oil or bona fide feed stock capacity (as determined by the Administrator) of 50,000 barrels per day or less, and

"(iii) which is owned or controlled by a refiner with a total combined crude oil or bona fide feed stock capacity (as determined by the Administrator) of 137,500 barrels per day or less.

Lead additives, restrictions.

"(2) No regulations of the Administrator under this section (or any amendment or revision thereof) respecting the control or prohibition of lead additives in gasoline shall require a small refinery prior to October 1, 1982, to reduce the average lead content per gallon of gasoline refined at such refinery below the applicable amount specified in the table below:

"If the average gasoline production of the small refinery for the immediately preceding calendar year (or, in the case of refineries under construction, half the designed crude oil capacity) was (in barrels per day):	The applicable amount is (in grams per gallon)
5,000 or under	2.65.
5,001 to 10,000	2.15.
10,001 to 15,000	1.65.
15,001 to 20,000	1.30.
20,001 to 25,000	.80.
25,001 or over	as prescribed by the Administrator, but not greater than 0.80.

Regulations.

The Administrator may promulgate such regulations as he deems appropriate with respect to the reduction of the average lead content of gasoline refined by small refineries on and after October 1, 1982, taking into account the experience under the preceding provisions of this paragraph.

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finding of necessity under this subparagraph even if the plan for the area does not contain an approved demonstration of timely attainment.".

SEC. 214. FUEL WAIVERS.

(a) COVERAGE.—Section 211(f)(1) of the Clean Air Act (42 U.S.C. 7545(f)(1) is amended by inserting "(A)" immediately after "(1)" and by adding the following new subparagraph at the end thereof:

"(B) Effective upon the date of the enactment of the Clean Air Act Amendments of 1990, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for use by any person in motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 206.".

(b) CONFORMING AMENDMENT.—Section 211(f)(3) of the Clean Air Act (42 U.S.C. 7545(f)(3)) is amended by inserting "(A)" immediately after "(1)".

SEC. 215. MISFUELING.

Section 211(g) of the Clean Air Act (42 U.S.C. 7545(g)) is amended to read as follows:

"(g) MISFUELING.—(1) No person shall introduce, or cause or allow the introduction of, leaded gasoline into any motor vehicle which is labeled 'unleaded gasoline only,' which is equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, which is a 1990 or later model year motor vehicle, or which such person knows or should know is a vehicle designed solely for the use of unleaded gasoline.

"(2) Beginning October 1, 1993, no person shall introduce or cause or allow the introduction into any motor vehicle of diesel fuel which such person knows or should know contains a concentration of sulfur in excess of 0.05 percent (by weight) or which fails to meet a cetane index minimum of 40 or such equivalent alternative aromatic level as prescribed by the Administrator under subsection (i)(2).".

SEC. 216. FUEL VOLATILITY.

Section 211 of the Clean Air Act (42 U.S.C. 7545) is amended by adding the following new subsection at the end thereof:

"(h) REID VAPOR PRESSURE REQUIREMENTS.—

"(1) PROHIBITION.—Not later than 6 months after the date of the enactment of the Clean Air Act Amendments of 1990, the Administrator shall promulgate regulations making it unlawful for any person during the high ozone season (as defined by the Administrator) to sell, offer for sale, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with a Reid Vapor Pressure in excess of 9.0 pounds per square inch (psi). Such regulations shall also establish more stringent Reid Vapor Pressure standards in a nonattainment area as the Administrator finds necessary to generally achieve comparable evaporative emissions (on a per-vehicle basis) in nonattainment areas, taking into consideration the enforceability of such standards, the need of an area for emission control, and economic factors. Regulations.

"(2) ATTAINMENT AREAS.—The regulations under this subsection shall not make it unlawful for any person to sell, offer for

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specified in the plan, to meet the required petroleum reduction levels and the alternative fuel consumption increases, including the milestones specified by the Secretary.

"(B) INCLUSIONS.—The plan shall—

"(i) identify the specific measures the agency will use to meet the requirements of subsection (a)(2); and

"(ii) quantify the reductions in petroleum consumption or increases in alternative fuel consumption projected to be achieved by each measure each year.

"(2) MEASURES.—The plan may allow an agency to meet the required petroleum reduction level through—

"(A) the use of alternative fuels;

"(B) the acquisition of vehicles with higher fuel economy, including hybrid vehicles, neighborhood electric vehicles, electric vehicles, and plug-in hybrid vehicles if the vehicles are commercially available;

"(C) the substitution of cars for light trucks;

"(D) an increase in vehicle load factors;

"(E) a decrease in vehicle miles traveled;

"(F) a decrease in fleet size; and

"(G) other measures.".

TITLE II—ENERGY SECURITY THROUGH INCREASED PRODUCTION OF BIOFUELS

Subtitle A—Renewable Fuel Standard

SEC. 201. DEFINITIONS.

Section 211(o)(1) of the Clean Air Act (42 U.S.C. 7545(o)) is amended to read as follows:

"(1) DEFINITIONS.—In this section:

"(A) ADDITIONAL RENEWABLE FUEL.—The term 'additional renewable fuel' means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.

"(B) ADVANCED BIOFUEL.—

"(i) IN GENERAL.—The term 'advanced biofuel' means renewable fuel, other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

"(ii) INCLUSIONS.—The types of fuels eligible for consideration as 'advanced biofuel' may include any of the following:

"(I) Ethanol derived from cellulose, hemicellulose, or lignin.

"(II) Ethanol derived from sugar or starch (other than corn starch).

"(III) Ethanol derived from waste material, including crop residue, other vegetative waste material, animal waste, and food waste and yard waste.

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"(IV) Biomass-based diesel.

"(V) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.

"(VI) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass.

"(VII) Other fuel derived from cellulosic biomass.

"(C) BASELINE LIFECYCLE GREENHOUSE GAS EMISSIONS.—The term 'baseline lifecycle greenhouse gas emissions' means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

Notice.

"(D) BIOMASS-BASED DIESEL.—The term 'biomass-based diesel' means renewable fuel that is biodiesel as defined in section 312(f) of the Energy Policy Act of 1992 (42 U.S.C. 13220(f)) and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwithstanding the preceding sentence, renewable fuel derived from co-processing biomass with a petroleum feedstock shall be advanced biofuel if it meets the requirements of subparagraph (B), but is not biomass-based diesel.

"(E) CELLULOSIC BIOFUEL.—The term 'cellulosic biofuel' means renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.

"(F) CONVENTIONAL BIOFUEL.—The term 'conventional biofuel' means renewable fuel that is ethanol derived from corn starch.

"(G) GREENHOUSE GAS.—The term 'greenhouse gas' means carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, sulfur hexafluoride. The Administrator may include any other anthropogenically-emitted gas that is determined by the Administrator, after notice and comment, to contribute to global warming.

"(H) LIFECYCLE GREENHOUSE GAS EMISSIONS.—The term 'lifecycle greenhouse gas emissions' means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

"(I) RENEWABLE BIOMASS.—The term 'renewable biomass' means each of the following:

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"(i) Planted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to the enactment of this sentence that is either actively managed or fallow, and nonforested.

"(ii) Planted trees and tree residue from actively managed tree plantations on non-federal land cleared at any time prior to enactment of this sentence, including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.

"(iii) Animal waste material and animal byproducts.

"(iv) Slash and pre-commercial thinnings that are from non-federal forestlands, including forestlands belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States, but not forests or forestlands that are ecological communities with a global or State ranking of critically imperiled, imperiled, or rare pursuant to a State Natural Heritage Program, old growth forest, or late successional forest.

"(v) Biomass obtained from the immediate vicinity of buildings and other areas regularly occupied by people, or of public infrastructure, at risk from wildfire.

"(vi) Algae.

"(vii) Separated yard waste or food waste, including recycled cooking and trap grease.

"(J) RENEWABLE FUEL.—The term 'renewable fuel' means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.

"(K) SMALL REFINERY.—The term 'small refinery' means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

"(L) TRANSPORTATION FUEL.—The term 'transportation fuel' means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).".

SEC. 202. RENEWABLE FUEL STANDARD.

(a) RENEWABLE FUEL PROGRAM.—Paragraph (2) of section 211(o) (42 U.S.C. 7545(o)(2)) of the Clean Air Act is amended as follows:

(1) REGULATIONS.—Clause (i) of subparagraph (A) is amended by adding the following at the end thereof: "Not later than 1 year after the date of enactment of this sentence, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined

Deadline.

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in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after the date of enactment of this sentence, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.".

(2) APPLICABLE VOLUMES OF RENEWABLE FUEL.—Subparagraph (B) is amended to read as follows:

"(B) APPLICABLE VOLUMES.—

"(i) CALENDAR YEARS AFTER 2005.—

"(I) RENEWABLE FUEL.—For the purpose of subparagraph (A), the applicable volume of renewable fuel for the calendar years 2006 through 2022 shall be determined in accordance with the following table:

"Calendar year:	Applicable volume of renewable fuel (in billions of gallons):
2006	4.0
2007	4.7
2008	9.0
2009	11.1
2010	12.95
2011	13.95
2012	15.2
2013	16.55
2014	18.15
2015	20.5
2016	22.25
2017	24.0
2018	26.0
2019	28.0
2020	30.0
2021	33.0
2022	36.0

"(II) ADVANCED BIOFUEL.—For the purpose of subparagraph (A), of the volume of renewable fuel required under subclause (I), the applicable volume of advanced biofuel for the calendar years 2009 through 2022 shall be determined in accordance with the following table:

"Calendar year:	Applicable volume of advanced biofuel (in billions of gallons):
2009	0.6
2010	0.95
2011	1.35
2012	2.0
2013	2.75
2014	3.75
2015	5.5
2016	7.25
2017	9.0
2018	11.0
2019	13.0
2020	15.0
2021	18.0
2022	21.0

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"(III) CELLULOSIC BIOFUEL.—For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of cellulosic biofuel for the calendar years 2010 through 2022 shall be determined in accordance with the following table:

"Calendar year:	Applicable volume of cellulosic biofuel (in billions of gallons):
2010	0.1
2011	0.25
2012	0.5
2013	1.0
2014	1.75
2015	3.0
2016	4.25
2017	5.5
2018	7.0
2019	8.5
2020	10.5
2021	13.5
2022	16.0

"(IV) BIOMASS-BASED DIESEL.—For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of biomass-based diesel for the calendar years 2009 through 2012 shall be determined in accordance with the following table:

"Calendar year:	Applicable volume of biomass-based diesel (in billions of gallons):
2009	0.5
2010	0.65
2011	0.80
2012	1.0

"(ii) OTHER CALENDAR YEARS.—For the purposes of subparagraph (A), the applicable volumes of each fuel specified in the tables in clause (i) for calendar years after the calendar years specified in the tables shall be determined by the Administrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the implementation of the program during calendar years specified in the tables, and an analysis of—

"(I) the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;

"(II) the impact of renewable fuels on the energy security of the United States;

"(III) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);

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"(IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;

"(V) the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and

"(VI) the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

Regulations. Deadline.

The Administrator shall promulgate rules establishing the applicable volumes under this clause no later than 14 months before the first year for which such applicable volume will apply.

"(iii) APPLICABLE VOLUME OF ADVANCED BIOFUEL.—For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of advanced biofuel shall be at least the same percentage of the applicable volume of renewable fuel as in calendar year 2022.

"(iv) APPLICABLE VOLUME OF CELLULOSIC BIOFUEL.—For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of cellulosic biofuel established by the Administrator shall be based on the assumption that the Administrator will not need to issue a waiver for such years under paragraph (7)(D).

"(v) MINIMUM APPLICABLE VOLUME OF BIOMASS-BASED DIESEL.—For the purpose of making the determinations in clause (ii), the applicable volume of biomass-based diesel shall not be less than the applicable volume listed in clause (i)(IV) for calendar year 2012.".

(b) APPLICABLE PERCENTAGES.—Paragraph (3) of section 211(o) of the Clean Air Act (42 U.S.C. 7545(o)(3)) is amended as follows:

(1) In subparagraph (A), by striking "2011" and inserting "2021".

(2) In subparagraph (A), by striking "gasoline" and inserting "transportation fuel, biomass-based diesel, and cellulosic biofuel".

(3) In subparagraph (B), by striking "2012" and inserting "2021" in clause (i).

(4) In subparagraph (B), by striking "gasoline" and inserting "transportation fuel" in clause (ii)(II).

(c) MODIFICATION OF GREENHOUSE GAS PERCENTAGES.—Paragraph (4) of section 211(o) of the Clean Air Act (42 U.S.C. 7545(o)(4)) is amended to read as follows:

"(4) MODIFICATION OF GREENHOUSE GAS REDUCTION PERCENTAGES.—

"(A) IN GENERAL.—The Administrator may, in the regulations under the last sentence of paragraph (2)(A)(i), adjust the 20 percent, 50 percent, and 60 percent reductions in lifecycle greenhouse gas emissions specified in paragraphs (2)(A)(i) (relating to renewable fuel), (1)(D) (relating to biomass-based diesel), (1)(B)(i) (relating to advanced biofuel),

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and (1)(E) (relating to cellulosic biofuel) to a lower percentage. For the 50 and 60 percent reductions, the Administrator may make such an adjustment only if he determines that generally such reduction is not commercially feasible for fuels made using a variety of feedstocks, technologies, and processes to meet the applicable reduction.

"(B) AMOUNT OF ADJUSTMENT.—In promulgating regulations under this paragraph, the specified 50 percent reduction in greenhouse gas emissions from advanced biofuel and in biomass-based diesel may not be reduced below 40 percent. The specified 20 percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below 10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

"(C) ADJUSTED REDUCTION LEVELS.—An adjustment under this paragraph to a percent less than the specified 20 percent greenhouse gas reduction for renewable fuel shall be the minimum possible adjustment, and the adjusted greenhouse gas reduction shall be established by the Administrator at the maximum achievable level, taking cost in consideration, for natural gas fired corn-based ethanol plants, allowing for the use of a variety of technologies and processes. An adjustment in the 50 or 60 percent greenhouse gas levels shall be the minimum possible adjustment for the fuel or fuels concerned, and the adjusted greenhouse gas reduction shall be established at the maximum achievable level, taking cost in consideration, allowing for the use of a variety of feedstocks, technologies, and processes.

"(D) 5-YEAR REVIEW.—Whenever the Administrator makes any adjustment under this paragraph, not later than 5 years thereafter he shall review and revise (based upon the same criteria and standards as required for the initial adjustment) the regulations establishing the adjusted level. Deadline.

"(E) SUBSEQUENT ADJUSTMENTS.—After the Administrator has promulgated a final rule under the last sentence of paragraph (2)(A)(i) with respect to the method of determining lifecycle greenhouse gas emissions, except as provided in subparagraph (D), the Administrator may not adjust the percent greenhouse gas reduction levels unless he determines that there has been a significant change in the analytical methodology used for determining the lifecycle greenhouse gas emissions. If he makes such determination, he may adjust the 20, 50, or 60 percent reduction levels through rulemaking using the criteria and standards set forth in this paragraph.

"(F) LIMIT ON UPWARD ADJUSTMENTS.—If, under subparagraph (D) or (E), the Administrator revises a percent level adjusted as provided in subparagraphs (A), (B), and (C) to a higher percent, such higher percent may not exceed the applicable percent specified in paragraph (2)(A)(i), (1)(D), (1)(B)(i), or (1)(E).

"(G) APPLICABILITY OF ADJUSTMENTS.—If the Administrator adjusts, or revises, a percent level referred to in

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this paragraph or makes a change in the analytical methodology used for determining the lifecycle greenhouse gas emissions, such adjustment, revision, or change (or any combination thereof) shall only apply to renewable fuel from new facilities that commence construction after the effective date of such adjustment, revision, or change.".

(d) CREDITS FOR ADDITIONAL RENEWABLE FUEL.—Paragraph (5) of section 211(o) of the Clean Air Act (42 U.S.C. 7545(o)(5)) is amended by adding the following new subparagraph at the end thereof:

"(E) CREDITS FOR ADDITIONAL RENEWABLE FUEL.—The Administrator may issue regulations providing: (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports additional renewable fuels specified by the Administrator; and (ii) for the use of such credits by the generator, or the transfer of all or a portion of the credits to another person, for the purpose of complying with paragraph (2).".

(e) WAIVERS.—

(1) IN GENERAL.—Paragraph (7)(A) of section 211(o) of the Clean Air Act (42 U.S.C. 7545(o)(7)(A)) is amended by inserting ", by any person subject to the requirements of this subsection, or by the Administrator on his own motion" after "one or more States" in subparagraph (A) and by striking out "State" in subparagraph (B).

(2) CELLULOSIC BIOFUEL.—Paragraph (7) of section 211(o) of the Clean Air Act (42 U.S.C. 7545(o)(7)) is amended by adding the following at the end thereof:

Deadline.

"(D) CELLULOSIC BIOFUEL.—(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

"(ii) Whenever the Administrator reduces the minimum cellulosic biofuel volume under this subparagraph, the Administrator shall make available for sale cellulosic biofuel credits at the higher of $0.25 per gallon or the amount by which $3.00 per gallon exceeds the average wholesale price of a gallon of gasoline in the United States. Such amounts shall be adjusted for inflation by the Administrator for years after 2008.

Deadline.
Regulations.

"(iii) Eighteen months after the date of enactment of this subparagraph, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations

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shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.".

(3) BIOMASS-BASED DIESEL.—Paragraph (7) of section 211(o) of the Clean Air Act (42 U.S.C. 7545(o)(7)) is amended by adding the following at the end thereof:

"(E) BIOMASS-BASED DIESEL.—

"(i) MARKET EVALUATION.—The Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall periodically evaluate the impact of the biomass-based diesel requirements established under this paragraph on the price of diesel fuel.

"(ii) WAIVER.—If the Administrator determines that there is a significant renewable feedstock disruption or other market circumstances that would make the price of biomass-based diesel fuel increase significantly, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall issue an order to reduce, for up to a 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomass-based diesel. For any calendar year in which the Administrator makes a reduction under this subparagraph, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

"(iii) EXTENSIONS.—If the Administrator determines that the feedstock disruption or circumstances described in clause (ii) is continuing beyond the 60-day period described in clause (ii) or this clause, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, may issue an order to reduce, for up to an additional 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed an additional 15 percent of the applicable annual requirement for biomass-based diesel.

"(F) MODIFICATION OF APPLICABLE VOLUMES.—For any of the tables in paragraph (2)(B), if the Administrator waives— Regulations. Deadline.

"(i) at least 20 percent of the applicable volume requirement set forth in any such table for 2 consecutive years; or

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"(ii) at least 50 percent of such volume requirement for a single year,

the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).".

SEC. 203. STUDY OF IMPACT OF RENEWABLE FUEL STANDARD.

Contracts.

(a) IN GENERAL.—The Secretary of Energy, in consultation with the Secretary of Agriculture and the Administrator of the Environmental Protection Agency, shall enter into an arrangement with the National Academy of Sciences under which the Academy shall conduct a study to assess the impact of the requirements described in section 211(o) of the Clean Air Act on each industry relating to the production of feed grains, livestock, food, forest products, and energy.

(b) PARTICIPATION.—In conducting the study under this section, the National Academy of Sciences shall seek the participation, and consider the input, of—

(1) producers of feed grains;

(2) producers of livestock, poultry, and pork products;

(3) producers of food and food products;

(4) producers of energy;

(5) individuals and entities interested in issues relating to conservation, the environment, and nutrition;

(6) users and consumers of renewable fuels;

(7) producers and users of biomass feedstocks; and

(8) land grant universities.

(c) CONSIDERATIONS.—In conducting the study, the National Academy of Sciences shall consider—

(1) the likely impact on domestic animal agriculture feedstocks that, in any crop year, are significantly below current projections;

(2) policy options to alleviate the impact on domestic animal agriculture feedstocks that are significantly below current projections; and

(3) policy options to maintain regional agricultural and silvicultural capability.

(d) COMPONENTS.—The study shall include—

(1) a description of the conditions under which the requirements described in section 211(o) of the Clean Air Act should be suspended or reduced to prevent adverse impacts to domestic animal agriculture feedstocks described in subsection (c)(2) or regional agricultural and silvicultural capability described in subsection (c)(3); and

(2) recommendations for the means by which the Federal Government could prevent or minimize adverse economic hardships and impacts.

Reports.

(e) DEADLINE FOR COMPLETION OF STUDY.—Not later than 18 months after the date of enactment of this Act, the Secretary shall submit to Congress a report that describes the results of the study under this section.

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"(2) Unless the American Society for Testing and Materials has adopted a standard for diesel fuel containing 5 percent biodiesel (commonly known as 'B5') within 1 year after the date of enactment of this subsection, the Administrator shall initiate a rulemaking to establish a uniform per gallon fuel standard for such fuel and designate an identification so that vehicle manufacturers are able to design engines to use fuel meeting such standard.

"(3) Whenever the Administrator is required to initiate a rulemaking under paragraph (1) or (2), the Administrator shall promulgate a final rule within 18 months after the date of the enactment of this subsection.

"(4) Not later than 180 days after the enactment of this subsection, the Administrator shall establish an annual inspection and enforcement program to ensure that diesel fuel containing biodiesel sold or distributed in interstate commerce meets the standards established under regulations under this section, including testing and certification for compliance with applicable standards of the American Society for Testing and Materials. There are authorized to be appropriated to carry out the inspection and enforcement program under this paragraph $3,000,000 for each of fiscal years 2008 through 2010.

Appropriation authorization.

"(5) For purposes of this subsection, the term 'biodiesel' has the meaning provided by section 312(f) of Energy Policy Act of 1992 (42 U.S.C. 13220(f)).".

42 USC 17054.

SEC. 248. BIOFUELS DISTRIBUTION AND ADVANCED BIOFUELS INFRASTRUCTURE.

(a) IN GENERAL.—The Secretary, in coordination with the Secretary of Transportation and in consultation with the Administrator of the Environmental Protection Agency, shall carry out a program of research, development, and demonstration relating to existing transportation fuel distribution infrastructure and new alternative distribution infrastructure.

(b) FOCUS.—The program described in subsection (a) shall focus on the physical and chemical properties of biofuels and efforts to prevent or mitigate against adverse impacts of those properties in the areas of—

(1) corrosion of metal, plastic, rubber, cork, fiberglass, glues, or any other material used in pipes and storage tanks;

(2) dissolving of storage tank sediments;

(3) clogging of filters;

(4) contamination from water or other adulterants or pollutants;

(5) poor flow properties related to low temperatures;

(6) oxidative and thermal instability in long-term storage and uses;

(7) microbial contamination;

(8) problems associated with electrical conductivity; and

(9) such other areas as the Secretary considers appropriate.

Subtitle D—Environmental Safeguards

SEC. 251. WAIVER FOR FUEL OR FUEL ADDITIVES.

Section 211(f)(4) of the Clean Air Act (42 U.S.C. 7545(f)) is amended to read as follows:

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"(4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this subsection or the limitation specified in paragraph (2) of this subsection, if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or fuel additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified pursuant to sections 206 and 213(a). The Administrator shall take final action to grant or deny an application submitted under this paragraph, after public notice and comment, within 270 days of the receipt of such an application.". Notice. Deadline.

TITLE III—ENERGY SAVINGS THROUGH IMPROVED STANDARDS FOR APPLIANCE AND LIGHTING

Subtitle A—Appliance Energy Efficiency

SEC. 301. EXTERNAL POWER SUPPLY EFFICIENCY STANDARDS.

(a) DEFINITIONS.—Section 321 of the Energy Policy and Conservation Act (42 U.S.C. 6291) is amended—

(1) in paragraph (36)—

(A) by striking "(36) The" and inserting the following: "(36) EXTERNAL POWER SUPPLY.—

"(A) IN GENERAL.—The"; and

(B) by adding at the end the following:

"(B) ACTIVE MODE.—The term 'active mode' means the mode of operation when an external power supply is connected to the main electricity supply and the output is connected to a load.

"(C) CLASS A EXTERNAL POWER SUPPLY.—

"(i) IN GENERAL.—The term 'class A external power supply' means a device that—

"(I) is designed to convert line voltage AC input into lower voltage AC or DC output;

"(II) is able to convert to only 1 AC or DC output voltage at a time;

"(III) is sold with, or intended to be used with, a separate end-use product that constitutes the primary load;

"(IV) is contained in a separate physical enclosure from the end-use product;

"(V) is connected to the end-use product via a removable or hard-wired male/female electrical connection, cable, cord, or other wiring; and

"(VI) has nameplate output power that is less than or equal to 250 watts.

"(ii) EXCLUSIONS.—The term 'class A external power supply' does not include any device that—

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C

Effective: August 24, 2011

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 80. Regulation of Fuels and Fuel Additives (Refs & Annos)
Subpart N. Additional Provisions for Gasoline–Ethanol Blends (Refs & Annos)
§ 80.1504 What acts are prohibited under this subpart?

No person shall--

(a)(1) Sell, introduce, cause or permit the sale or introduction of gasoline containing greater than 10.0 volume percent ethanol (i.e., greater than E10) into any model year 2000 or older light-duty gasoline motor vehicle, any heavy-duty gasoline motor vehicle or engine, any highway or off-highway motorcycle, or any gasoline-powered nonroad engines, vehicles or equipment.

(2) Manufacture or introduce into commerce E15 in any calendar year for use in an area prior to commencement of a survey approved under 80.1502 for that area.

(3) Notwithstanding paragraphs (a)(1) and (a)(2) of this section, no person shall be prohibited from manufacturing, selling, introducing, or causing or allowing the sale or introduction of gasoline containing greater than 10.0 volume percent ethanol into any flex-fuel vehicle.

(b) Sell, offer for sale, dispense, or otherwise make available at a retail or wholesale purchaser-consumer facility E15 that is not correctly labeled in accordance with § 80.1501;

(c) Fail to fully or timely implement, or cause a failure to fully or timely implement, an approved survey required under § 80.1502;

(d) Fail to generate, use, transfer and maintain product transfer documents that accurately reflect the type of product, ethanol content, maximum RVP, and other information required under § 80.1503;

(e) Improperly blend, or cause the improper blending of, ethanol into conventional blendstock for oxygenate blending, gasoline or gasoline already containing ethanol, in a manner inconsistent with the information on the product transfer document under § 80.1503(a)(1)(vi) or § 80.1503(b)(1)(vi);

(f) For gasoline during the regulatory control periods, combine any gasoline or conventional blendstock for oxygenate blending intended for blending with E10 that qualifies for the 1 psi allowance under the special regulatory treatment as provided by § 80.27(d) applicable to 9–10 volume percent gasoline-ethanol blends with any gasoline or conventional blendstock for oxygenate blending intended for blending with E15, unless the resultant combination is designated, in its entirety, as an E10 blendstock for oxygenate blending.

(g) For gasoline during the regulatory control periods, combine any gasoline-ethanol blend containing E10 that qualifies for the 1 psi allowance under the special regulatory treatment as provided by § 80.27(d) applicable to 9–10 volume percent gasoline-ethanol blends, with any gasoline containing E0 or any gasoline blend containing E15.

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(h) Fail to meet any other requirement of this subpart.

(i) Cause another person to commit an act in violation of paragraphs (a) through (h) of this section.

SOURCE: 38 FR 1255, Jan. 10, 1973; 54 FR 11883 , March 22, 1989; 56 FR 64710, Dec. 12, 1991; 58 FR 16019, March 24, 1993; 62 FR 7167, Feb. 18, 1997; 62 FR 30270, June 3, 1997; 64 FR 10371, March 3, 1999; 66 FR 5135, Jan. 18, 2001; 66 FR 17262, March 29, 2001; 71 FR 31959, June 2, 2006; 72 FR 8542, Feb. 26, 2007; 76 FR 44444, July 25, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7414, 7521(1), 7545 and 7601(a).

40 C. F. R. § 80.1504, 40 CFR § 80.1504

Current through September 1; 76 FR 54687

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(d) *Data reporting requirements.* Data reporting requirements are contained in § 86.1844–01.

(e) *Emission component durability.* The manufacturer shall use good engineering judgment to determine that all emission-related components are designed to operate properly for the full useful life of the vehicles in actual use.

(f) *In-use verification.* The durability program must meet the requirements of § 86.1845–01.

(g) The manufacturer shall apply the approved durability process to a durability group, including durability groups in future model years, if the durability process will effectively predict (or alternatively, overstate) the deterioration of emissions in actual use over the full and intermediate useful life of candidate in-use vehicles. The manufacturer shall use good engineering judgment in determining the applicability of the durability program to a durability group.

(1) The manufacturer may make modifications to an approved durability process using good engineering judgment for the purpose of ensuring that the modified process will effectively predict, (or alternatively, overstate) the deterioration of emissions in actual use over the full and intermediate useful life of candidate in-use vehicles.

(2) The manufacturer shall notify the Administrator of its determination to use an approved (or modified) durability program on particular test groups and durability groups prior to emission data vehicle testing for the affected test groups (preferably at an annual preview meeting scheduled before the manufacturer begins certification activities for the model year).

(3) Prior to certification, the Administrator may reject the manufacturer's determination in paragraph (g) of this section if it is not made using good engineering judgment or it fails to properly consider data collected under the provisions of §§ 86.1845–01, 86.1846–01, and 86.1847–01 or other information if the Administrator determines that the durability process has not been shown to effectively predict emission levels or compliance with the standards in use on candidate vehicles for particular test groups which the manufacturers plan to cover with the durability process.

(h) The Administrator may withdraw approval to use a durability process or require modifications to a durability process based on the data collected under §§ 86.1845–01, 86.1846–01, and 86.1847–01 or other information if the Administrator determines that the durability processes have not been shown to accurately predict emission levels or compliance with the standards (or FEL, as applicable) in use on candidate vehicles (provided the inaccuracy could result in a lack of compliance with the standards for a test group covered by this durability process). Such withdrawals shall apply to future applications for certification and to the portion of the manufacturer's product line (or the entire product line) that the Administrator determines to be affected. Prior to such a withdrawal the Administrator shall give the manufacturer a preliminary notice at least 60 days prior to the final decision. During this period, the manufacturer may submit technical discussion, statistical analyses, additional data, or other information which is relevant to the decision. The Administrator will consider all information submitted by the deadline before reaching a final decision.

(i) Any manufacturer may request a hearing on the Administrator's withdrawal of approval in paragraph (h) of this section. The request shall be in writing and shall include a statement specifying the manufacturer's objections to the Administrator's determinations, and data in support of such objection. If, after review of the request and supporting data, the Administrator finds that the request raises a substantial factual issue, she/he shall provide the manufacturer a hearing in accordance with § 86.1853–01 with respect to such issue.

[64 FR 23925, May 4, 1999, as amended at 65 FR 59974, Oct. 6, 2000; 72 FR 8566, Feb. 26, 2007]

§ 86.1823–08 Durability demonstration procedures for exhaust emissions.

This section applies to all 2008 and later model year vehicles which meet the applicability provisions of § 86.1801. Optionally, a manufacturer may elect to use this section for earlier model

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year vehicles which meet the applicability provisions of § 86.1801. Eligible small volume manufacturers or small volume test groups may optionally meet the requirements of §§ 86.1838–01 and 86.1826–01 in lieu of the requirements of this section. A separate durability demonstration is required for each durability group.

(a) *Durability program objective.* The durability program must predict an expected in-use emission deterioration rate and emission level that effectively represents a significant majority of the distribution of emission levels and deterioration in actual use over the full and intermediate useful life of candidate in-use vehicles of each vehicle design which uses the durability program.

(b) *Required durability demonstration.* Manufacturers must conduct a durability demonstration for each durability group using a procedure specified in either paragraph (c), (d), or (e) of this section.

(c) *Standard whole-vehicle durability procedure.* This procedure consists of conducting mileage accumulation and periodic testing on the durability data vehicle, selected under the provisions of § 86.1822 described as follows:

(1) Mileage accumulation must be conducted using the standard road cycle (SRC). The SRC is described in appendix V of this part.

(i) Mileage accumulation on the SRC may be conducted on a track or on a chassis mileage accumulation dynamometer. Alternatively, the entire engine and emission control system may be aged on an engine dynamometer using methods that will replicate the aging that occurs on the road for that vehicle following the SRC.

(ii) The fuel used for mileage accumulation must comply with the mileage accumulation fuel provisions of § 86.113 for the applicable fuel type (e.g., gasoline or diesel fuel).

(iii) The DDV must be ballasted to a minimum of the loaded vehicle weight for light-duty vehicles and light light-duty trucks and a minimum of the ALVW for all other vehicles.

(iv) The mileage accumulation dynamometer must be setup as follows:

(A) The simulated test weight will be the equivalent test weight specified in § 86.129 using a weight basis of the loaded vehicle weight for light-duty vehicles and ALVW for all other vehicles.

(B) The road force simulation will be determined according to the provisions of § 86.129.

(C) The manufacturer will control the vehicle, engine, and/or dynamometer as appropriate to follow the SRC using good engineering judgement.

(2) Mileage accumulation must be conducted for at least 75% of the applicable full useful life mileage period specified in § 86.1805. If the mileage accumulation is less than 100% of the full useful life mileage, then the DF calculated according to the procedures of paragraph (f)(1)(ii) of this section must be based upon a line projected to the full-useful life mileage using the upper 80 percent statistical confidence limit calculated from the emission data.

(3) If a manufacturer elects to calculate a DF pursuant to paragraph (f)(1) of this section, then it must conduct at least one FTP emission test at each of five different mileage points selected using good engineering judgement. Additional testing may be conducted by the manufacturer using good engineering judgement. The required testing must include testing at 5,000 miles and at the highest mileage point run during mileage accumulation (e.g. the full useful life mileage). Different testing plans may be used providing that the manufacturer determines, using good engineering judgement, that the alternative plan would result in an equivalent or superior level of confidence in the accuracy of the DF calculation compared to the testing plan specified in this paragraph.

(d) *Standard bench-aging durability procedure.* This procedure is not applicable to diesel fueled vehicles or vehicles which do not use a catalyst as the principle after-treatment emission control device. This procedure requires installation of the catalyst-plus-oxygen-sensor system on a catalyst aging bench. Aging on the bench is conducted by following the standard bench cycle (SBC) for the period of time calculated from the bench aging time (BAT) equation. The BAT equation requires, as input, catalyst time-at-temperature data measured on the SRC.

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that the durability objective of paragraph (a) of this section is properly achieved regardless of the use of worst-case fuel, in which case the approval criteria for those changes would apply.

(v) An approved customized/alternative road cycle may be used to develop catalyst temperature histograms for use in the BAT equation without additional EPA approval beyond the original approval necessary to use that cycle for mileage accumulation.

(vi) A different bench cycle than the SBC may be used during bench aging with prior EPA approval. To obtain approval the manufacturer must demonstrate that bench aging for the appropriate time on the new bench cycle provides the same or larger amount of emission deterioration as the associated road cycle.

(vii) A different method to calculate bench aging time may be used with prior EPA approval. To obtain approval the manufacturer must demonstrate that bench aging for the time calculated by the alternative method results in the same or larger amount of emission deterioration as the associated road cycle.

(f) *Use of deterioration program to determine compliance with the standard.* A manufacturer may select from two methods for using the results of the deterioration program to determine compliance with the applicable emission standards. Either a deterioration factor (DF) is calculated and applied to the emission data vehicle (EDV) emission results or aged components are installed on the EDV prior to emission testing.

(1) *Deterioration factors.* (i) Deterioration factors are calculated using all FTP emission test data generated during the durability testing program except as noted:

(A) Multiple tests at a given mileage point are averaged together unless the same number of tests are conducted at each mileage point.

(B) Before and after maintenance test results are averaged together.

(C) Zero-mile test results are excluded from the calculation.

(D) Total hydrocarbon (THC) test points beyond the 50,000-mile (useful life) test point are excluded from the intermediate useful life deterioration factor calculation.

(E) A procedure may be employed to identify and remove from the DF calculation those test results determined to be statistical outliers providing that the outlier procedure is consistently applied to all vehicles and data points and is approved in advance by the Administrator.

(ii) The deterioration factor must be based on a linear regression, or another regression technique approved in advance by the Administrator. The deterioration must be a multiplicative or additive factor. Separate factors will be calculated for each regulated emission constituent and for the full and intermediate useful life periods as applicable. Separate DF's are calculated for each durability group except as provided in §86.1839.

(A) A multiplicative DF will be calculated by taking the ratio of the full or intermediate useful life mileage level, as appropriate (rounded to four decimal places), divided by the stabilized mileage (reference §86.1831–01(c), e.g., 4000-mile) level (rounded to four decimal places) from the regression analysis. The result must be rounded to three-decimal places of accuracy. The rounding required in this paragraph must be conducted in accordance with §86.1837. Calculated DF values of less than one must be changed to one for the purposes of this paragraph.

(B) An additive DF will be calculated to be the difference between the full or intermediate useful life mileage level (as appropriate) minus the stabilized mileage (reference §86.1831–01(c), e.g. 4000-mile) level from the regression analysis. The full useful life regressed emission value, the stabilized mileage regressed emission value, and the DF result must be rounded to the same precision and using the same procedures as the raw emission results according to the provisions of §86.1837–01. Calculated DF values of less than zero must be changed to zero for the purposes of this paragraph.

(iii) The DF calculated by these procedures will be used for determining full and intermediate useful life compliance with FTP exhaust emission standards, SFTP exhaust emission

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(g) Complete emission tests (see §§86.106–96 through 86.145–82) are required, unless waived by the Administrator, before and after scheduled maintenance approved for durability data vehicles. The manufacturer may perform emission tests before unscheduled maintenance. Complete emission tests are required after unscheduled maintenance which may reasonably be expected to affect emissions. The Administrator may waive the requirement to test after unscheduled maintenance. These test data may be submitted weekly to the Administrator, but shall be air posted or delivered within 7 days after completion of the tests, along with a complete record of all pertinent maintenance, including a preliminary engineering report of any malfunction diagnosis and the corrective action taken. A complete engineering report shall be delivered to the Administrator concurrently with the manufacturer's application for certification.

(h) When air conditioning SFTP exhaust emission tests are required, the manufacturer must document that the vehicle's air conditioning system is operating properly and in a representative condition. Required air conditioning system maintenance is performed as unscheduled maintenance and does not require the Administrator's approval.

[64 FR 23925, May 4, 1999, as amended at 65 FR 59975, Oct. 6, 2000; 70 FR 40443, July 13, 2005]

§86.1835–01 Confirmatory certification testing.

(a) *Testing by the Administrator.* (1) The Administrator may require that any one or more of the test vehicles be submitted to the Agency, at such place or places as the Agency may designate, for the purposes of conducting emissions tests. The Administrator may specify that such testing be conducted at the manufacturer's facility, in which case instrumentation and equipment specified by the Administrator shall be made available by the manufacturer for test operations. Any testing conducted at a manufacturer's facility pursuant to this paragraph shall be scheduled by the manufacturer as promptly as possible.

(i) The Administrator may adjust or cause to be adjusted any adjustable parameter of an emission-data vehicle which the Administrator has determined to be subject to adjustment for certification testing in accordance with §86.1833–01(a)(1), to any setting within the physically adjustable range of that parameter, as determined by the Administrator in accordance with §86.1833–01(a)(3), prior to the performance of any tests to determine whether such vehicle or engine conforms to applicable emission standards, including tests performed by the manufacturer under §86.1829–01(b). However, if the idle speed parameter is one which the Administrator has determined to be subject to adjustment, the Administrator shall not adjust it to a setting which causes a higher engine idle speed than would have been possible within the physically adjustable range of the idle speed parameter on the engine before it accumulated any dynamometer service, all other parameters being identically adjusted for the purpose of the comparison. The Administrator, in making or specifying such adjustments, will consider the effect of the deviation from the manufacturer's recommended setting on emissions performance characteristics as well as the likelihood that similar settings will occur on in-use light-duty vehicles, light-duty trucks, or complete heavy-duty vehicles. In determining likelihood, the Administrator will consider factors such as, but not limited to, the effect of the adjustment on vehicle performance characteristics and surveillance information from similar in-use vehicles.

(ii) For those vehicles parameters which the Administrator has not determined to be subject to adjustment during testing in accordance with §86.1833–01(a)(1), the vehicle presented to the Administrator for testing shall be calibrated within the production tolerances applicable to the manufacturer's specifications to be shown on the vehicle label (see §86.1807–01) as specified in the application for certification. If the Administrator determines that a vehicle is not within such tolerances, the vehicle will be adjusted, at the facility designated by the Administrator, prior to the test and an engineering report

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shall be submitted to the Administrator describing the corrective action taken. Based on the engineering report, the Administrator will determine if the vehicle will be used as an emission data vehicle.

(2) If the Administrator determines that the test data developed on an emission data vehicle under paragraph (a)(1) of this section would cause that vehicle to fail under the provisions of § 86.1841–01, then the following procedure shall be observed:

(i) The manufacturer may request a retest. Before the retest, those vehicle or engine parameters which the Administrator has not determined to be subject to adjustment for certification testing in accordance with § 86.1833-01(a)(1) may be readjusted to manufacturer's specification, if these adjustments were made incorrectly prior to the first test. The Administrator may adjust or cause to be adjusted any parameter which the Administrator has determined to be subject to adjustment to any setting within the physically adjustable range of that parameter, as determined by the Administrator in accordance with § 86.1833–01(a)(3). Other maintenance or repairs may be performed in accordance with § 86.1834–01. All work on the vehicle shall be done at such location and under such conditions as the Administrator may prescribe.

(ii) The vehicle will be retested by the Administrator and the results of this test shall comprise the official data for the emission-data vehicle.

(3) If sufficient durability data are not available at the time of any emission test conducted under paragraph (a)(1) of this section to enable the Administrator to determine whether an emission-data vehicle would fail, the manufacturer may request a retest in accordance with the provisions of paragraph (a)(2) of this section. If the manufacturer does not promptly make such request, he shall be deemed to have waived the right to a retest. A request for retest must be made before the manufacturer removes the vehicle from the test premises.

(4) Retesting for fuel economy reasons may be conducted under the provisions of 40 CFR 600.008–01.

(b) *Manufacturer-conducted confirmatory testing.* (1) If the Administrator determines not to conduct a confirmatory test under the provisions of paragraph (a) of this section, light-duty vehicle and light-duty truck manufacturers will conduct a confirmatory test at their facility after submitting the original test data to the Administrator whenever any of the conditions listed in paragraphs (b)(1)(i) through (v) of this section exist, and complete heavy-duty vehicles manufacturers will conduct a confirmatory test at their facility after submitting the original test data to the Administrator whenever the conditions listed in paragraph (b)(1)(i) or (b)(1)(ii) of this section exist, as follows:

(i) The vehicle configuration has previously failed an emission standard;

(ii) The test exhibits high emission levels determined by exceeding a percentage of the standards specified by the Administrator for that model year;

(iii) The fuel economy value of the test as measured in accordance with the procedures in 40 CFR part 600 is higher than expected based on procedures approved by the Administrator;

(iv) The fuel economy value as measured in accordance with the procedures in part 600 of this title, is close to a Gas Guzzler Tax threshold value based on tolerances established by the Administrator for that model year; or

(v) The fuel economy value as measured in accordance with the procedures in part 600 of this title, is a potential fuel economy leader for a class of vehicles based on Administrator provided cut points for that model year.

(2) If the Administrator selects the vehicle for confirmatory testing based on the manufacturer's original test results, the testing shall be conducted as ordered by the Administrator. In this case, the manufacturer-conducted confirmatory testing specified under paragraph (b)(1) of this section would not be required.

(3) For light-duty vehicles, and light-duty trucks, the manufacturer shall conduct a retest of the FTP or highway test if the difference between the fuel economy of the confirmatory test and the original manufacturer's test equals or exceeds three percent (or such lower percentage to be applied consistently

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to all manufacturer conducted confirmatory testing as requested by the manufacturer and approved by the Administrator).

(i) For use in the fuel economy program described in 40 CFR part 600, the manufacturer may, in lieu of conducting a retest, accept as official the lower of the original and confirmatory test fuel economy results.

(ii) The manufacturer shall conduct a second retest of the FTP or highway test if the fuel economy difference between the second confirmatory test and the original manufacturer test equals or exceeds three percent (or such lower percentage as requested by the manufacturer and approved by the Administrator) and the fuel economy difference between the second confirmatory test and the first confirmatory test equals or exceeds three percent (or such lower percentage as requested by the manufacturer and approved by the Administrator). In lieu of conducting a second retest, the manufacturer may accept as official (for use in the fuel economy program) the lowest of the original test, the first confirmatory test, and the second confirmatory test fuel economy results.

(c) *Official test determination.* (1) Whenever the Administrator or the manufacturer conducts a confirmatory test segment on a test vehicle, the results of that test segment, unless subsequently invalidated by the Administrator, shall comprise the official data for that test segment for the vehicle at the prescribed test point and the manufacturer's original test data for that test segment for that prescribed test point shall not be used in determining compliance with emission standards.

(i) If the Administrator or the manufacturer conducts more than one passing, valid, confirmatory test, the results from the first passing, valid confirmatory test shall be considered official and used in determining compliance with emission standards.

(ii) Official test results for fuel economy purposes are determined in accordance with the provisions of 40 CFR 600.008-01.

(iii) The Administrator may stop a test after any evaporative test segment and use as official data any valid results obtained up to that point in the test, as described in subpart B of this part.

(2) Whenever the Administrator or the manufacturer does not conduct a confirmatory test on a test vehicle at a test point, the manufacturer's original test data will be accepted as the official data for that point.

(i) If the Administrator makes a determination based on testing under paragraph (a) of this section (or other appropriate correlation test data), that there is a lack of correlation between the manufacturer's test equipment or procedures and the test equipment or procedures used by the Administrator, no manufacturer's test data will be accepted for purposes of certification until the reasons for the lack of correlation are determined and the validity of the data is established by the manufacturer.

(ii) If the Administrator has reasonable basis to believe that any test data submitted by the manufacturer is not accurate or has been obtained in violation of any provisions of this subpart, the Administrator may refuse to accept that data as the official data pending retesting or submission of further information.

(iii) If the manufacturer conducts more than one test on an emission data vehicle in the same configuration (excluding confirmatory tests run under paragraph (b) of this section), the data from the last test in that series of tests on that vehicle, will constitute the official data.

(d) Upon request of the manufacturer, the Administrator may issue a conditional certificate of conformity for a test group which has not completed the Administrator testing required under paragraph (a) of this section. Such a certificate will be issued based upon the condition that the confirmatory testing be completed in an expedited manner and that the results of the testing be in compliance with all standards and procedures.

(1) If, based on this testing or any other information, the Administrator later determines that the vehicles included in this test group do not meet the applicable standards, the Administrator will notify the manufacturer that the certificate is suspended. The certificate may be suspended in whole

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or in part as determined by the Administrator. Upon such a notification, the manufacturer must immediately cease the introduction of the affected vehicles into commerce. The manufacturer may request a hearing to appeal the Administrators decision using the provisions of § 86.1853–01.

(2) Production of vehicles by a manufacturer under the terms of this paragraph (d) will be deemed to be a consent to recall all vehicles in the test group which the Administrator determines do not meet applicable standards, and to cause such nonconformity to be remedied at no expense to the owner.

[64 FR 23925, May 4, 1999, as amended at 65 FR 59976, Oct. 6, 2000; 66 FR 19310, Apr. 13, 2001]

EFFECTIVE DATE NOTE: At 75 FR 25689, May 7, 2010, § 86.1835–01 was amended by revising paragraphs (a)(4), (b)(1) introductory text, (b)(3), and (c)(1)(ii) and by adding paragraph (b)(1)(vi), effective July 6, 2010. For the convenience of the user, the added and revised text is set forth as follows:

§ 86.1835–01 Confirmatory certification testing.

(a) * * *

(4) Retesting for fuel economy reasons or for compliance with greenhouse gas exhaust emission standards in § 86.181–12 may be conducted under the provisions of § 600.008–08 of this chapter.

(b) * * *

(1) If the Administrator determines not to conduct a confirmatory test under the provisions of paragraph (a) of this section, manufacturers of light-duty vehicles, light-duty trucks, and/or medium-duty passenger vehicles will conduct a confirmatory test at their facility after submitting the original test data to the Administrator whenever any of the conditions listed in paragraphs (b)(1)(i) through (vi) of this section exist, and complete heavy-duty vehicles manufacturers will conduct a confirmatory test at their facility after submitting the original test data to the Administrator whenever the conditions listed in paragraph (b)(1)(i) or (b)(1)(ii) of this section exist, as follows:

* * * * *

(vi) The exhaust carbon-related exhaust emissions of the test as measured in accordance with the procedures in 40 CFR part 600 are lower than expected based on procedures approved by the Administrator.

* * * * *

(3) For light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles the manufacturer shall conduct a retest of the FTP or highway test if the difference between the fuel economy of the confirmatory test and the original manufacturer's test equals or exceeds three percent (or such lower percentage to be applied consistently to all manufacturer conducted confirmatory testing as requested by the manufacturer and approved by the Administrator).

(i) For use in the fuel economy and exhaust greenhouse gas fleet averaging program described in 40 CFR parts 86 and 600, the manufacturer may, in lieu of conducting a retest, accept as official the lower of the original and confirmatory test fuel economy results, and by doing so will also accept as official the calculated CREE value associated with the lower fuel economy test results.

(ii) The manufacturer shall conduct a second retest of the FTP or highway test if the fuel economy difference between the second confirmatory test and the original manufacturer test equals or exceeds three percent (or such lower percentage as requested by the manufacturer and approved by the Administrator) and the fuel economy difference between the second confirmatory test and the first confirmatory test equals or exceeds three percent (or such lower percentage as requested by the manufacturer and approved by the Administrator). In lieu of conducting a second retest, the manufacturer may accept as official (for use in the fuel economy program and the exhaust greenhouse gas fleet averaging program) the lowest fuel economy of the original test, the first confirmatory test, and the second confirmatory test fuel economy results, and by doing so will also accept as official the calculated CREE value associated with the lowest fuel economy test results.

(c) * * *

(1) * * *

(ii) Official test results for fuel economy and exhaust CO_2 emission purposes are determined in accordance with the provisions of § 600.008–08 of this chapter.

* * * * *

§ 86.1836–01 Manufacturer-supplied production vehicles for testing.

Any manufacturer obtaining certification under this subpart shall supply to the Administrator, upon request, a reasonable number of production vehicles selected by the Administrator which are representative of the engines, emission control systems, fuel systems, and transmission offered and typical of production models available for sale under the certificate. These vehicles shall be supplied for testing at

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emission constituents compared to the configuration selected for durability demonstration.

(i) Prior to certification, the Administrator may require the manufacturer to provide data showing that the distribution of catalyst temperatures of the selected durability configuration is effectively equivalent or lower than the distribution of catalyst temperatures of the vehicle configuration which is the source of the previously generated data.

(ii) For the 2001, 2002, and 2003 model years only, paragraph (a)(1) of this section does not apply to the use of exhaust emission deterioration factors meeting the requirements of §86.1823-01(c)(2).

(2) In the case of emission data, the manufacturer must determine that the previously generated emissions data represent a worst case or equivalent level of emissions for all applicable emission constituents compared to the configuration selected for emission compliance demonstration.

(b) In lieu of using newly aged hardware on an EDV as allowed under the provisions of §86.1823-08(f)(2), a manufacturer may use similar hardware aged for an EDV previously submitted, provided that the manufacturer determines that the previously aged hardware represents a worst case or equivalent rate of deterioration for all applicable emission constituents for durability demonstration.

[64 FR 23925, May 4, 1999, as amended at 71 FR 2836, Jan. 17, 2006]

§86.1840-01 Special test procedures.

(a) The Administrator may, on the basis of written application by a manufacturer, prescribe test procedures, other than those set forth in this part, for any light-duty vehicle, light-duty truck, or complete heavy-duty vehicle which the Administrator determines is not susceptible to satisfactory testing by the procedures set forth in this part.

(b) If the manufacturer does not submit a written application for use of special test procedures but the Administrator determines that a light-duty vehicle, light-duty truck, or complete heavy-duty vehicle is not susceptible to satisfactory testing by the procedures set forth in this part, the Administrator shall notify the manufacturer in writing and set forth the reasons for such rejection in accordance with the provisions of §86.1848(a)(2).

(c) Manufacturers of vehicles equipped with periodically regenerating trap oxidizer systems must propose a procedure for testing and certifying such vehicles including SFTP testing for the review and approval of the Administrator. The manufacturer must submit its proposal before it begins any service accumulation or emission testing. The manufacturer must provide with its submittal, sufficient documentation and data for the Administrator to fully evaluate the operation of the trap oxidizer system and the proposed certification and testing procedure.

(d) The provisions of paragraph (a) and (b) of this section also apply to MDPVs.

[65 FR 59976, Oct. 6, 2000, as amended at 71 FR 51488, Aug. 30, 2006]

§86.1841-01 Compliance with emission standards for the purpose of certification.

(a) Certification levels of a test vehicle will be calculated for each emission constituent applicable to the test group for both full and intermediate useful life as appropriate.

(1) If the durability demonstration procedure used by the manufacturer under the provisions of §86.1823, §86.1824, or §86.1825 requires a DF to be calculated, the DF shall be applied to the official test results determined in §86.1835-01(c) for each regulated emission constituent and for full and intermediate useful life, as appropriate, using the following procedures:

(i) For additive DF's, the DF will be added to the emission result. The sum will be rounded to the same level of precision as the standard for the constituent at full and/or intermediate useful life, as appropriate. This rounded sum is the certification level for that emission constituent and for that useful life mileage.

(ii) For multiplicative DFs, the DF will be multiplied by the emission result for each regulated constituent. The product will be rounded to the same level of precision as the standard

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for the constituent at full and intermediate useful life, as appropriate. This rounded product is the certification level for that emission constituent and for that useful life mileage.

(iii) For the SFTP composite standard of NMHC+NO_X, the measured results of NMHC and NO_X must each be adjusted by their corresponding deterioration factors before the composite NMHC+NO_X certification level is calculated. Where the applicable FTP exhaust hydrocarbon emission standard is an NMOG standard, the applicable NMOG deterioration factor must be used in place of the NMHC deterioration factor, unless otherwise approved by the Administrator.

(2) If the durability demonstration procedure used by the manufacturer under the provisions of § 86.1823, § 86.1824, or § 86.1825, as applicable, requires testing of the EDV with aged emission components, the official results of that testing determined under the provisions of § 86.1835–01(c) shall be rounded to the same level of precision as the standard for each regulated constituent at full and intermediate useful life, as appropriate. This rounded emission value is the certification level for that emission constituent at that useful life mileage.

(3) [Reserved]

(4) The rounding required in paragraph (a) of this section shall be conducted in accordance with the provisions of § 86.1837–01.

(b) To be considered in compliance with the standards for the purposes of certification, the certification levels for the test vehicle calculated in paragraph (a) of this section shall be less than or equal to the standards for all emission constituents to which the test group is subject, at both full and intermediate useful life as appropriate for that test group.

(c) Every test vehicle of a test group must comply with all applicable exhaust emission standards before that test group may be certified.

(d) Every test vehicle of an evaporative/refueling family must comply with all applicable evaporative and/or refueling emission standards before that family may be certified.

(e) Unless otherwise approved by the Administrator, manufacturers must not use Reactivity Adjustment Factors (RAFs) in their calculation of the certification level of any pollutant for any vehicle except for LDVs and LLDTs participating in the National Low Emission Vehicle (NLEV) program described in subpart R of this part, regardless of the fuel used in the test vehicle.

[64 FR 23925, May 4, 1999, as amended at 65 FR 6864, Feb. 10, 2000; 66 FR 19310, Apr. 13, 2001; 71 FR 2836, Jan. 17, 2006]

EFFECTIVE DATE NOTE: At 75 FR 25690, May 7, 2010, § 86.1841–01 was amended by adding paragraph (a)(3), and revising paragraph (b), effective July 6, 2010. For the convenience of the user, the added and revised text is set forth as follows:

§ 86.1841–01 Compliance with emission standards for the purpose of certification.

(a) * * *

(3) Compliance with CO_2 exhaust emission standards shall be demonstrated at certification by the certification levels on the FTP and HFET tests for carbon-related exhaust emissions determined according to § 600.113–08 of this chapter.

* * * * *

(b) To be considered in compliance with the standards for the purposes of certification, the certification levels for the test vehicle calculated in paragraph (a) of this section shall be less than or equal to the standards for all emission constituents to which the test group is subject, at both full and intermediate useful life as appropriate for that test group.

* * * * *

§ 86.1842–01 Addition of a vehicle after certification; and changes to a vehicle covered by certification.

(a) *Addition of a car line after certification.* (1) If a manufacturer proposes to add to its product line a new car line of the same test group as vehicles previously certified but which was not described in the application for certification when the test vehicle(s) representing other vehicles of that combination was certified, it shall notify the Administrator. This notification shall include a full description of the vehicle to be added.

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(c)(5)(i) of this section only if the vehicle is also tested for exhaust emissions under the requirements of paragraph (c)(5)(i) of this section.

(6) Each test vehicle not rejected based on the criteria specified in appendix II to this subpart shall be tested in as-received condition.

(7) A manufacturer may conduct subsequent diagnostic maintenance and/or testing on any vehicle. Any such maintenance and/or testing shall be reported to the Agency as specified in §86.1847–01.

(d) *Test vehicle procurement.* (1) Vehicles tested under this section shall be procured pursuant to the provisions of this paragraph (d). Vehicles shall be procured from the group of persons who own or lease vehicles registered in the procurement area.

(2) Vehicles shall be procured from persons which own or lease the vehicle, excluding commercial owners/lessees which are owned or controlled by the vehicle manufacturer, using the procedures described in appendix I to this subpart. See §86.1838(c)(2)(i) for small volume manufacturer requirements.

(3) *Geographical limitations.* (i) Test groups certified to 50-state standards: For low altitude testing no more than fifty percent of the test vehicles may be procured from California. The test vehicles procured from the 49 state area must be procured from a location with a heating degree day 30 year annual average equal to or greater than 4000.

(ii) Test groups certified to 49 state standards: The test vehicles procured from the 49 state area must be procured from a location with a heating degree day 30 year annual average equal to or greater than 4000.

(iii) Vehicles procured for high altitude testing may be procured from any area located above 4000 feet.

(4) Vehicles may be rejected for procurement or testing under this section if they meet one or more of the rejection criteria in appendix II of this subpart. Vehicles may also be rejected after testing under this section if they meet one or more of the rejection criteria in appendix II of this subpart. Any vehicle rejected after testing must be replaced in order that the number of test vehicles in the sample comply with the sample size requirements of this section. Any post-test vehicle rejection and replacement procurement and testing must take place within the testing completion requirements of this section.

(e) *Testing facilities, procedures, quality assurance and quality control*—(1) *Lab equipment and procedural requirements.* The manufacturer shall utilize a test laboratory that is in accordance with the equipment and procedural requirements of subpart B to conduct the testing required by this section.

(2) The manufacturer shall notify the Agency of the name and location of the testing laboratory(s) to be used to conduct testing of vehicles of each model year conducted pursuant to this section. Such notification shall occur at least thirty working days prior to the initiation of testing of the vehicles of that model year.

(3) *Correlation.* The manufacturer shall document correlation traceable to the Environmental Protection Agency's National Vehicle and Fuel Emission Laboratory for its test laboratory utilized to conduct the testing required by this section.

[64 FR 23925, May 4, 1999, as amended at 65 FR 59977, Oct. 6, 2000; 70 FR 72929, Dec. 8, 2005]

§86.1845–04 Manufacturer in-use verification testing requirements.

(a) *General requirements.* (1) A manufacturer of LDVs, LDTs, MDPVs and/or complete HDVs must test, or cause to have tested, a specified number of LDVs, LDTs, MDPVs and complete HDVs. Such testing must be conducted in accordance with the provisions of this section. For purposes of this section, the term vehicle includes light-duty vehicles, light-duty trucks and medium-duty vehicles.

(2) Unless otherwise approved by the Administrator, no emission measurements made under the requirements of this section may be adjusted by Reactivity Adjustment Factors (RAFs).

(3) Upon a manufacturer's written request, prior to in-use testing, that presents information to EPA regarding pre-conditioning procedures designed solely to remove the effects of high sulfur in gasoline from vehicles produced through the 2007 model year, EPA will

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consider allowing such procedures on a case-by-case basis. EPA's decision will apply to manufacturer in-use testing conducted under this section and to any in-use testing conducted by EPA. Such procedures are not available for complete HDVs. After the 2007 model year, this provision can be used only for in-use vehicles in American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands, but this provision only can be used for such vehicles in any of those locations if low sulfur gasoline is determined by the Administrator to be unavailable in that specific location.

(b) *Low-mileage testing*—(1) *Test groups.* Testing must be conducted for each test group.

(2) *Vehicle mileage.* All test vehicles must have a minimum odometer mileage of 10,000 miles.

(3) *Number of test vehicles.* For each test group, the minimum number of vehicles that must be tested is specified in Table S04–06 and Table S04–07 of this paragraph (b)(3). After testing the minimum number of vehicles of a specific test group as specified in Table S04–06 or S04–07 of this paragraph (b)(3), a manufacturer may test additional vehicles upon request and approval by the Agency prior to the initiation of the additional testing. Any additional testing must be completed within the testing completion requirements shown in § 86.1845–04(b)(4). The request and Agency approval (if any) shall apply to test groups on a case by case basis and apply only to testing under this paragraph. Separate approval will be required to test additional vehicles under paragraph (c) of this section. In addition to the testing specified in Table S04–06 and Table S04–07 of this paragraph (b)(3), a manufacturer shall test one vehicle from each evaporative/refueling family for evaporative/refueling emissions. If a manufacturer believes it is unable to procure the test vehicles necessary to test the required number of vehicles in a test group, the manufacturer may request, subject to Administrator approval, a decreased sample size for that test group. The request shall include a description of the methods the manufacturer has used to procure the required number of vehicles. The approval of any such request, and the substitution of an alternative sample size requirement for the test group, will be based on a review of the procurement efforts made by the manufacturer to determine if all reasonable steps have been taken to procure the required test group size. Tables S04–06 and S04–07 follow:

TABLE S04–06—SMALL VOLUME MANUFACTURERS

49 and 50 State total sales [1]	1–5000	5001–14,999
Low Mileage	Voluntary	0
High Mileage	Voluntary	2

[1] Manufacturer's total annual sales.

TABLE S04–07—LARGE VOLUME MANUFACTURERS

49 and 50 State annual sales [1]	1–5000 [2]	5001–14,999 [2]	1–50,000 [3]	50,001–250,000	>250,000
Low Mileage	Voluntary	0	2	3	4
High Mileage	Voluntary	2	4	5	6

[1] Sales by test group.

[2] Total annual production of groups eligible for testing under small volume sampling plan is capped at a maximum of 14,999 vehicle 49 or 50 state annual sales, or a maximum of 4,500 vehicle California only sales per model year, per large volume manufacturer.

[3] Sampling plan applies to all of a manufacturer's remaining groups in this sales volume category when the maximum annual cap on total sales of small groups eligible for the small volume sampling plan is exceeded.

(4) *Completion of testing.* Testing of the vehicles in a test group and evaporative/refueling family must be completed within one year of the end of production of that test group (or evaporative/refueling family) for that model year.

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(5) *Emission testing.* (i) Each test vehicle of a test group shall be tested in accordance with the Federal Test Procedure and the US06 portion of the Supplemental Federal Test Procedure as described in subpart B of this part, when such test vehicle is tested for compliance with applicable exhaust emission standards under this subpart.

(ii) For non-gaseous fueled vehicles, one test vehicle of each evaporative/refueling family shall be tested in accordance with the supplemental 2-diurnal-plus-hot-soak evaporative emission and refueling emission procedures described in subpart B of this part, when such test vehicle is tested for compliance with applicable evaporative emission and refueling standards under this subpart. For gaseous fueled vehicles, one test vehicle of each evaporative/refueling family shall be tested in accordance with the 3-diurnal-plus-hot-soak evaporative emission and refueling emission procedures described in subpart B of this part, when such test vehicle is tested for compliance with applicable evaporative emission and refueling standards under this subpart. The test vehicles tested to fulfill the evaporative/refueling testing requirement of this paragraph (b)(5)(ii) will be counted when determining compliance with the minimum number of vehicles as specified in Table S04–06 and Table S04–07 in paragraph (b)(3) of this section for testing under paragraph (b)(5)(i) of this section only if the vehicle is also tested for exhaust emissions under the requirements of paragraph (b)(5)(i) of this section.

(6) Each test vehicle not rejected based on the criteria specified in appendix II to this subpart shall be tested in as-received condition.

(7) A manufacturer may conduct subsequent diagnostic maintenance and/or testing of any vehicle. Any such maintenance and/or testing shall be reported to the Agency as specified in §86.1847–01.

(c) *High-mileage testing*—(1) *Test groups.* Testing must be conducted for each test group.

(2) Vehicle mileage:

(i) All test vehicles must have a minimum odometer mileage of 50,000 miles. At least one vehicle of each test group must have a minimum odometer mileage of 75 percent of the full useful life mileage. See §86.1838–01(c)(2) for small volume manufacturer mileage requirements; or

(ii) For engine families certified for a useful life of 150,000 miles, at least one vehicle must have a minimum odometer mileage of 105,000 miles. See §86.1838–01(c)(2) for small volume manufacturer mileage requirements.

(3) *Number of test vehicles.* For each test group, the minimum number of vehicles that must be tested is specified in Table S04–06 and Table S04–07 in paragraph (b)(3) of this section. After testing the minimum number of vehicles of a specific test group as specified in Table S04–06 and Table S04–07 in paragraph (b)(3) of this section, a manufacturer may test additional vehicles upon request and approval by the Agency prior to the initiation of the additional testing. Any additional testing must be completed within the testing completion requirements shown in §86.1845–04(c)(4). The request and Agency approval (if any) shall apply to test groups on a case by case basis and apply only to testing under this paragraph (c). In addition to the testing specified in Table S04–06 and Table S04–07 in paragraph (b)(3) of this section, a manufacturer shall test one vehicle from each evaporative/refueling family for evaporative/refueling emissions. If a manufacturer believes it is unable to procure the test vehicles necessary to test the required number of vehicles in a test group as specified in Table S04–06 or Table S04–07 in paragraph (b)(3) of this section, the manufacturer may request, subject to Administrator approval, a decreased sample size for that test group. The request shall include a description of the methods the manufacturer has used to procure the required number of vehicles. The approval of any such request, and the substitution of an alternative sample size requirement for the test group, will be based on a review of the procurement efforts made by the manufacturer to determine if all reasonable steps have been taken to procure the required test group size.

(4) *Initiation and completion of testing.* Testing of a test group (or evaporative refueling family) must commence within 4 years of the end of production of

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LEGISLATIVE HISTORY

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More Study Needed

Those who call for more study, especially on matters like Clean Air Act amendments, are usually branded as foot-draggers. I readily acknowledge that studies are frequently employed as a dilatory tactic. But as I have demonstrated above, the prevention of significant deterioration policy of H.R. 6161 is genuinely in need of further study. We simply cannot predict with any certainty what its impact will be, we cannot predict how it can be rationally enforced, and we cannot predict how it will interrelate with the national energy policy. In view of the fact that we seem willing to absorb the health impact of continued delays in compelling highly polluted nonattainment areas to meet the national standards, I do not believe that a lowering of the national standards for those areas that have the cleanest air can be so urgent that a year delay would cause much damage.

I believe that we must be willing on occasion to junk the product of many hours work and start afresh. Taking account of our limited knowledge of the variables affecting ambient air quality, of the control technology available in the immediate future, of the need to encourage the most efficient overall utilization of our air and energy resources, and of the need for a predictable regulatory policy, I believe that we can devise a policy to protect the public health and welfare from any adverse effects associated with air pollution. But in order to do so, we must first reject the irrational, impractical, and inconsistent approach to the "prevention of significant deterioration" taken by H.R. 6161.

Dave Stockman.

HOUSE CONFERENCE REPORT NO. 95–564

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6161) to amend the Clean Air Act, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

PARTS STANDARDS; PREEMPTION OF STATE LAW

House bill

This section provides that whenever a parts certification program is promulgated by the Administrator, States and political subdivisions will be preempted from adopting or enforcing any parts testing or certification program. This provision does not apply to California if it has received a waiver under section 209(b).

Senate amendment

No comparable provision.

Conference agreement

The Senate concurs in the House amendment (1) with the understanding that the parts preemption does not apply in California so long as it adopts and enforces more stringent emission standards than the Federal requirements; and (2) with clarifying language to indicate that no preemption of safety or other parts is authorized.

FUELS ANE FUEL ADDITIVES

House bill

Makes mandatory the Administrators' existing discretionary authority to require manufacturers of fuels and fuel additives to (1) conduct tests to determine the potential health effects of their products and (2) to supply EPA with information necessary to determine the effect of a substance on emission control performance on public health.

Senate amendment

Prohibits, after March 31, 1977, the introduction into commerce of new fuel additives, and requires the removal, 180 days after enactment, of fuel additives that were introduced after January 1, 1974. The Administrator may waive the prohibition if the applicant establishes

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that the additive will not impair the emission performance of vehicles produce in model year 1975 and subequent years.

Conference agreement

The Senate concurs in the House provision. The House concurs in the Senate amendment with the following amendments:

(1) Any fuel or fuel additive first introduced into commerce or increased in concentration after January 1, 1974 but prior to March 31, 1977 must be removed no later than September 15, 1978; (2) the Administrator shall prohibit such additive or restrict its concentration during the period after 180 days after enactment but prior to September 15, 1978 if he finds that such additive or given concentration of such additive will cause or contribute to the failure over its useful life of an emission control device or system to comply with emission standards to which it has been certified pursuant to section 206; (3) the maximum concentration of manganese in a gallon of gasoline shall be no greater than .0625 grams after November 30, 1977; (4) an applicant for a waiver must demonstrate that such a fuel or fuel additive or a given concentration of it will not cause or contribute to the failure over its useful life of an emission control device or system to comply with

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emission standards to which it has been certified pursuant to section 206; and (5) no action of the Administrator shall be stayed by any court pending judicial review of such action.

In view of the strict time limitation imposed by the September 15, 1978 deadline, it is expected that the Administrator will, if requested, monitor the progress of tests conducted by a manufacturer pursuant to an application for waiver and take such actions as may be reasonably necessary to expedite consideration of such applications.

The conferees intend that in the event the Administrator takes action to prohibit an additive or to restrict its concentration, any vehicle previously certified, or in the process of being certified, which used certification fuel containing such additive need not be recertified for that model year.

The conferees also intend that the words "cause or contribute to the failure of an emission control device or system to meet emission standards over its useful life to which it has been certified pursuant to section 206" mean the noncompliance of an engine or device with emission levels to which it was certified, taking into account the deterioration factors employed in certifying the engine. The term "emission control device or system" means the entire emission performance of a vehicle. Thus, if a fuel or fuel additive causes an increase in engine emissions so as to increase tail pipe emissions or interferes with performance of a specific device or element of emission control so as to cause or contribute to the vehicle's failure to meet the standards at any point in its useful life, the Administrator could not waive the prohibition.

The prohibition of manganese at levels of concentration greater than .0625 grams per gallon of gasoline is not intended to imply that a concentration of .0625 grams per gallon should be required for use in certification fuel, nor is it intended to imply that the required concentration of manganese in certification fuel should restrict, or be corrected with the maximum concentration of manganese in use in gasoline in the field.

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The conferees recognize the right of the State of California under section 211 of existing law to prescribe and enforce a control or prohibition respecting any fuel or fuel additive if the State has received a waiver from Federal preemption of emission standards, under section 209. Nothing in this provision is intended to affect that authority, or to alter any action taken by the State of California under the authority of section 211.

SMALL REFINERIES

House bill

Section 219 establishes relaxed standards on lead levels in gasoline produced by small refineries of crude capacity up to 50,000 barrels per day, owned by refiners with total crude capacity up to 175,000 barrels per day.

Senate bill

Section 40 provides until October 1, 1982, relaxed limits on lead in gasoline produced by small refineries or crude capacity up to 50,000 barrels per day, owned by refiners with total crude capacity up to 100,000 barrels per day.

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Calendar No. 106

95TH CONGRESS 1st Session } SENATE { REPORT No. 95-127

CLEAN AIR AMENDMENTS OF 1977

MAY 10 (legislative day, MAY 9), 1977.—Ordered to be printed

Mr. MUSKIE, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 252]

The Committee on Environment and Public Works, to which was referred the bill (S. 252) a bill to amend the Clean Air Act, as amended, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

PREFACE

The committee has reported a bill which in most respects is similar to the legislation which the Senate passed on August 5, 1976. It includes eight new provisions; significant modifications of five provisions; and minor modifications of others. But, with the exception of the issue which is referred to as "nonattainment", the bill is very similar to last year's Senate-passed bill.

This year the committee held 4 days of hearings and heard 50 witnesses. There are 3,023 pages of printed testimony and 10 sessions were held to mark up this bill. This means that, over the past 3 years, this legislation has been subject, cumulatively, to 18 days of hearings, and 58 days of mark-up sessions, and has been commented on by 138 witnesses, in 9,470 pages of testimony.

The committee has made clarifications in provisions where deemed appropriate. But in the interest of consistency and in the interest of presenting the Senate legislation, the major features of which would be familiar, the committee tried to stay within the bounds of last year's bill.

The committee has agreed that the report on the legislation should also be similar to last year's report, except in those instances in which

Fuel Additives (Sec. 36)

SUMMARY

This provision adds a new subsection (e) to section 211 of existing law. The provision prohibits, after March 31, 1977, the introduction into commerce of new fuel additives, and requires the removal of fuel additives that were introduced after January 1, 1974. The Administrator may waive the prohibition if the applicant establishes that the additive will not impair the emission performance of vehicles produced in model year 1975 and subsequent years.

DISCUSSION

Testimony received by the committee in February, 1977 indicated that a certain fuel additive, MMT, an organomanganese compound, was impairing the performance of emission control systems and increasing hydrocarbon emissions in test vehicles. Testimony also indicated that although MMT has been commercially used since 1958, it has been increasingly used since 1974 in unleaded gasolines, which are required for all catalyst-equipped vehicles. Accordingly, the intention of this new subsection (d) is to prevent the use of any new or recently introduced additive in those unleaded grades of gasoline required to be used in 1975 and subsequent model year automobiles which may impair emission performance of vehicles, but not to limit the use of such additives in the leaded grades of gasoline.

Present law allows the Administrator to designate any fuels or fuel additives that must be registered, and prescribes information which must accompany such registrations. Section 211 allows the Administrator to require the manufacturer of an fuel or fuel additive to provide information that is necessary to determine the effect of such fuel or additive on emission control performance.

The Administrator is also authorized to control or prohibit, by regulation, the introduction into commerce of fuel or fuel additive if the emission products of the fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use. However, the Administrator's prohibition or control of the fuel or fuel additive may only be made after consideration of available scientific and economic data, including a cost benefit analysis. The subparagraph also provides that upon request after notice of proposed rulemaking, the Administrator must hold hearings and publish findings. The section further provides that the Administrator may not prohibit the introduction of a fuel or fuel additive unless he finds that the prohibition will not cause the introduction of another fuel or additive which will endanger the public health or welfare to the same or greater degree than the fuel or additive proposed to be prohibited.

It was the Committee's view that emission systems currently in use could not be adequately protected from possible deterioration by these provisions of existing law due to the delay associated with statutory procedural safeguards of the subsection.

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The new paragraph provides that, effective March 31, 1977, no fuel or fuel additive may be first introduced into commerce, or its concentration increased, for general use in light duty motor vehicles manufactured after model year 1974 unless it is substantially similar to any fuel or fuel additive used in the certification of any model year 1975 or subsequent model year vehicle under section 206.

The committee does not intend that the requirements of paragraphs (2) and (3) apply to consumer additives.

The new paragraph (2) provides for a prohibition on introduction and increased concentration to be effective 180 days after enactment for fuels and fuel additives introduced prior to March 31, 1977. It is intended to prevent the further introduction of the prohibited fuels or fuel additives, but not the distribution or sale of fuels or fuel additives that have left the production facilities, in order to assure that the fuels in the pipeline can be consumed.

The committee was concerned with the increased use of crude oil that would be necessitated by the prohibition in use of MMT or other octane raising agents, and the smaller refineries that would be adversely affected by these provisions when lead phase-down requirements were taken into account. The waiver process of subsection (3) was established with these considerations in mind so that the prohibition could be waived, or conditionally waived, rapidly if the manufacturer of the additive or the fuel establishes to the satisfaction of the Administrator that the additive, whether in certain amounts or under certain conditions, will not be harmful to the performance of emission control devices or systems.

The provisions of subsection (3) allow the Administrator to waive or conditionally waive the prohibitions established by paragraphs (1) and (2) if the applicant has met the requirements of this paragraph. The Administrator's waiver may be under such conditions, or in regard to such concentrations as he deems appropriate consistent with the intent of this section. If the conditional waiver is granted, the manufacturer of the fuel additive, or a fuel using such additive, may only distribute such fuel or fuel additive under the stated conditions. The bill provides that the Administrator may waive the prohibition as to specified concentrations of the additives so that total prohibition will not be the only alternative if it can be established that small concentrations of the fuel or fuel additive do not impair emission performance of vehicles produced in model year 1975 and subsequent years.

The committee was mindful that the Administrator could choose not to act on the waiver application within the 180 days provided for such action. If the Administrator does fail to act under subsection (d) to either grant, conditionally grant, or deny the waiver, it does not diminish the Administrator's power to act against the fuel or fuel additive through the application of the provisions of subsection (c) of this section.

As regards the potential for adverse effects on public health and welfare of new additives, the committee notes that the procedure in existing law has not been adequately implemented. The committee expects the Administrator to require manufacturers to test registered

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additives insofar as they affect health and public welfare under subsections (a), (b) and (c) of this section. Appropriate test protocol should be published as soon as possible.

Sulfur Emissions (Sec. 37)

SUMMARY

This section amends section 211 of existing law. The Administrator shall conduct a 1-year study of the emissions of sulfur compounds from motor vehicles and aircraft. Health and welfare effects of such emissions are to be reviewed and alternative control strategies are to be analyzed. Such study shall be reported to Congress by January 1, 1978.

DISCUSSION

This provision supplements the existing authority of the Administrator under section 211 to regulate and, if necessary, prohibit the manufacture or offering for sale of any fuel or fuel additive whose emission products will endanger the public health or welfare or impair the performance of an emission control device.

Sulfate emissions from catalyst-equipped cars were detected more than 3 years ago, prior to the introduction of 1975 model automobiles equipped with oxidation catalysts. In November 1973, Administrator Russell Train appeared before the committee to report his judgment that the preliminary data available did not warrant a deferral of the 1975 auto emission standards which the auto industry would achieve with oxidation catalysts, or a prohibition on the use of such technology At that time, the Administrator committed the Agency to an accelerated program to develop better sulfate measurement techniques and more accurate estimates of the public health impacts of sulfur compounds.

The committee has mandated this 1-year study to insure that the accelerated standard-setting process to which the Administrator committed the Agency does in fact continue. The committee is concerned that any further delay in the promulgation of a sulfate emission standard, if needed. could have health implications which will limit technological options available for the achievement of the statutory auto emissions standards. To avoid such an effect, the committee expects a comprehensive study on the health and welfare effects of mobile source-related sulfur emissions and all feasible technological alternatives for their control at the source, including aircraft, whose emissions may be a significant addition to sulfate concentrations from catalyst-equipped motor vehicles. Such alternatives shall include, but not be limited to, desulfurization of fuels, short-term allocation of low-sulfur crude oil, and any technological device or engine system which may reduce or eliminate the emission of sulfur compounds from motor vehicles and aircraft. Although the results of the study should be reflected in any sulfate emission standard which is promulgated, it is not intended that this study requirement affect the date of promulgation of a standard if such standard is deemed necessary.

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