

**Comments of the American Fuel & Petrochemical Manufacturers on the U.S.  
Environmental Protection Agency's Request for Comment on The Safer Affordable Fuel-  
Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light  
Trucks**

**Proposed Rule  
Docket No. EPA-HQ-OAR-2018-0283  
83 Fed. Reg. 42,986 (Aug. 24, 2018)**

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## **I. Introduction and Summary**

The American Fuel & Petrochemical Manufacturers (“AFPM”) respectfully submits these comments in response to the request for comment on the proposed Safer Affordable Fuel-Efficient (“SAFE”) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks issued by the National Highway Traffic Safety Administration (“NHTSA”) and the U.S. Environmental Protection Agency (“EPA”) (collectively, the “Agencies”).

AFPM is a national trade association representing virtually all U.S. refining and petrochemical manufacturing capacity. These companies provide jobs, directly and indirectly, to some four million Americans, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the United States.

AFPM supports the Agencies’ preferred alternative of recognizing the significant fuel economy improvements that have been mandated to date and maintaining the model year (“MY”) 2020 Corporate Average Fuel Economy Standards (“CAFE”) and tailpipe carbon dioxide (“CO<sub>2</sub>”) standards through model year 2026. That preferred alternative properly reflects the statutory factors that the Agencies must consider, including safety, consumer acceptance, technical feasibility, national security, and economic practicability. AFPM supports free market solutions driven by consumer choice. The consumer stands in the best position to determine how much efficiency should factor into vehicle selection.

The existing standards through MY 2025 were set in the 2012 Rule, which depended on several complex predictions, assumptions, and conclusions.<sup>1</sup> Any standard setting exercise that

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<sup>1</sup>EPA & NHTSA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012) (“2012 Rule”).

reaches out more than a decade into the future will inevitably bump up against uncertainties, missed forecasts, and technological changes that were simply unpredictable.<sup>2</sup> The Proposed Rule simply updates and corrects the standards based on new information and new analyses on key issues such as safety, consumer costs and acceptance, and fleet turnover.

AFPM supports NHTSA's proposal to find that California's Zero Emission Vehicle ("ZEV") mandate is preempted by the Energy Policy and Conservation Act ("EPCA")<sup>3</sup> as regulating in a field reserved exclusively for the federal government and conflicting with NHTSA's authority and findings under EPCA. We also support EPA's proposal to withdraw the Clean Air Act preemption waiver issued for the ZEV mandate in 2013.<sup>4</sup> That waiver was improperly granted and ignored the statutory framework designed to allow Original Equipment Manufacturers ("OEMs") to choose the appropriate mix of vehicles to address consumer preferences. The special treatment Congress afforded California to establish its own tailpipe emissions standards to address the State's unique air quality issues was never intended as a backdoor for California to introduce its own fuel economy standards. Indeed, Congress believed

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<sup>2</sup> See, e.g., OMB Circular A-4, available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A94/a094.pdf> ("Estimates of benefits and costs are typically uncertain because of imprecision in both underlying data and modeling assumptions. Because such uncertainty is basic to many analyses, its effects should be analyzed and reported. Useful information in such a report would include the key sources of uncertainty; expected value estimates of outcomes; the sensitivity of results to important sources of uncertainty; and where possible, the probability distributions of benefits, costs, and net benefits."); National Research Council, *Estimating the Public Health Benefits of Proposed Air Pollution Regulations* (2002), available at <https://www.nap.edu/catalog/10511/estimating-the-public-health-benefits-of-proposed-air-pollution-regulations> ("EPA should begin to move the assessment of uncertainties from its ancillary analyses to its primary analyses. This shift will require the specification of a probability distribution for each uncertainty source that is added to the primary analysis and, as necessary, the specification of joint distributions for the uncertainty sources that are not independent of each other. Expert judgment, as well as data, will be required to specify these distributions. Although the effect on the mean of the resulting probability distribution might increase, decrease, or remain the same, the effect on the spread of the distribution will be a predictable widening and, therefore, a more realistic depiction of the overall uncertainty in the analysis.").

<sup>3</sup>Pub. L. 94-163, 89 Stat. 871.

<sup>4</sup>EPA has granted Section 209(b) preemption waivers to California for several other automotive standards to address local criteria pollution concerns. AFPM takes no positions on these waivers.

that a national unified fuel economy standard was imperative to avoid a regulatory patchwork of confusion and waste. It never intended for California, in combination with a handful of other States, to maintain multiple and inconsistent fuel economy standards.

As for the standards proposed in the Agencies' preferred alternative, AFPM commends the Agencies for taking a realistic view of consumer acceptance of electrified vehicles, including hybrid electric vehicles ("HEVs"), plug-in hybrid electric vehicles ("PHEVs"), and battery electric vehicles ("BEVs").<sup>5</sup> The 2012 Rule set standards so stringent that it would have required 58% of new vehicle sales to be electrified,<sup>6</sup> even though current sales hover around 3%.<sup>7</sup> These electrified vehicles are more expensive, which would have resulted in consumers continuing to drive older cars longer, thereby delaying the safety and environmental benefits of new cars.

There are additional factors that support the Proposed Rule and that might lead to even lower standards than the preferred alternative. For example, the Agencies' willingness-to-pay analysis overstates the amount consumers are actually willing to pay for electrified vehicles. By focusing on consumers who actually purchased these vehicles, the analysis fails to consider that the overwhelming majority of consumers are still unwilling to pay for these vehicles despite the significant subsidies offered.

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<sup>5</sup>These comments refer collectively to HEVs, PHEVs, and BEVs as electrified vehicles. The Agencies also analyzed hydrogen vehicles (i.e., fuel cell vehicles), but ultimately concluded that both the 2012 Rule and preferred alternative resulted in no market penetration of these vehicles. See Preliminary Regulatory Impact Analysis, Table 7-6, at 554; *id.* Table 7-27, at 581.

<sup>6</sup>83 Fed. Reg. at 43,229.

<sup>7</sup> EIA, *Electrified Vehicles Continue to See Slow Growth and Less Use than Conventional Vehicles* (May 22, 2018) ("EIA, 2018 Electrified Vehicle Sales") ("The BEV share of total light-duty vehicle sales has grown the most since 2012 but only accounted for 0.6% of 2017 sales. The PHEV share grew from 0.1% to 0.5% and non-plug-in hybrid electrics declined from 3.0% to 1.9% of total light-duty vehicle sales between 2012 and 2017, based on Wards Automotive sales data."), available at, <https://www.eia.gov/todayinenergy/detail.php?id=36312&src=email>.

In evaluating the Proposed Rule, the Agencies should consider that liquid fuels and internal combustion engines have an exceptional history of delivering increased efficiency and reduced emissions. As EPA has reported, from model year 2004 to model year 2016, the average vehicle delivered 5.4 MPG better fuel economy while also increasing horsepower by 9.2%.<sup>8</sup> Only 0.1 MPG of this benefit came from alternative fuel vehicles.<sup>9</sup> These reductions are part of a larger trend that have seen CO<sub>2</sub> emissions drop by approximately 45% from model year 1976 to 2017.<sup>10</sup> This trend continues as automakers innovate to develop cost-effective means of delivering more performance with smaller engines and less fuel. This is a great outcome for consumers and the country.

## **II. EPA Should Defer to NHTSA's Expertise on the Wide Range of Policy and Technical Issues Relevant to Setting Fuel Economy Standards**

EPA's CO<sub>2</sub> tail pipe standards are the functional equivalent of fuel economy standards. The Congressional Research Service has observed that EPA's greenhouse gas ("GHG") standards and NHTSA's CAFE standards "are closely linked" because "[t]he vast majority of vehicle GHG emissions result from the burning of petroleum products, so reducing fuel consumption is the most direct means of reducing emissions."<sup>11</sup> As NHTSA has concluded, "CO<sub>2</sub> emissions are always and directly linked to fuel consumption because CO<sub>2</sub> is the ultimate end product of burning gasoline."<sup>12</sup> Indeed, for purposes of CAFE standards compliance, automobile manufacturers use

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<sup>8</sup>EPA, Light-Duty Automotive Technology, Carbon Dioxide Emissions, and Fuel Economy Trends: 1975 Through 2017 (Jan. 2018) at 9, Table 2-2.

<sup>9</sup>*Id.* at 53.

<sup>10</sup>*Id.* at 6, Figure 2.1.

<sup>11</sup>Congressional Research Service, Automobile and Truck Fuel Economy (CAFE) and Greenhouse Gas Standards, at 1 (Sept. 11, 2012), available at, <https://fas.org/sgp/crs/misc/R42721.pdf>

<sup>12</sup>71 Fed. Reg. 17,566, 17,654, 17,659 (Apr. 6, 2006).

a formula developed by EPA, which “calculates fuel economy based on carbonaceous emissions from the vehicle.”<sup>13</sup> In light of that reality, *Massachusetts v. EPA* made clear that EPA should administer and interpret its authority over GHG vehicle emissions in a manner consistent with NHTSA.<sup>14</sup> EPA should coordinate with, but ultimately defer to, NHTSA regarding GHG tailpipe emissions.

EPCA’s statutory text and structure demonstrate that Congress intended NHTSA to take the lead role in setting and coordinating fuel economy standards. Before establishing CAFE standards, EPCA requires NHTSA to consult with EPA and the Department of Energy.<sup>15</sup> EPCA forces boundary conditions on NHTSA’s standard-setting authority, requiring NHTSA to set the “maximum feasible average fuel economy” in light of “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need for the United States to conserve energy.”<sup>16</sup> None of these express procedural and substantive checks on setting fuel economy standards would have any meaning if EPA could simply circumvent them by unilaterally issuing a CO<sub>2</sub> standard that it found to be “appropriate” under Section 202(a) of the Clean Air Act.<sup>17</sup>

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<sup>13</sup>*Id.* at 17,660. See also Proof Brief for the United States as Amicus Curiae, *Green Mountain Chrysler-Plymouth Dodge v. Tori*, No. 07-4342-cv (L), 2008 WL 8045716, at \*14-\*18 (Apr. 17, 2008) (explaining that NHTSA interprets CO<sub>2</sub> tailpipe limits as *de facto* fuel economy standards).

<sup>14</sup>*Massachusetts v. EPA*, 529 U.S. 497 (2007) (“[T]here is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”). Note that *Massachusetts v. EPA* did not touch upon whether EPCA pre-empted state fuel economy standards.

<sup>15</sup>49 U.S.C. § 32902(b)(1).

<sup>16</sup>*Id.* §§ 32902(a), (f).

<sup>17</sup> 42 U.S.C. § 7521(a).

The legislative history of EPCA confirms that Congress envisioned NHTSA as the lead agency on fuel economy. The negotiations over the legislation suggest that environmental groups wished to have EPA regulate fuel economy, while the regulated community preferred the Department of Energy to perform that role. Congress compromised by granting NHTSA primacy over fuel economy, a legislative judgment that would be unwound if EPA could “go it alone” on standard-setting.

Unfortunately, the gaps between the Agencies’ programs continue to widen. The automakers filed a petition last year to harmonize several aspects of CAFE and the GHG programs, a request that continues to await a decision at EPA.<sup>18</sup> Similarly, a bipartisan group of Senators have sponsored the Fuel Economy Harmonization Act to address the growing discrepancies between NHTSA and EPA.<sup>19</sup>

EPA should defer to NHTSA taking the lead role in setting fuel economy in keeping with Congressional intent and that agency’s decades of expertise in evaluating safety, consumer preferences, and other key issues relevant to setting fuel economy standards. To be sure, following EPA’s issuance of an endangerment finding for mobile sources, it has acted to address GHG emissions from light-duty vehicles. But nothing in that finding, *Massachusetts v. EPA*, or the Clean Air Act precludes EPA from assessing and ultimately deferring to NHTSA’s fuel economy standards to address GHGs. Fuel economy and GHG emissions from vehicles are essentially

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<sup>18</sup><https://www.epa.gov/aboutepa/petition-direct-final-rule-regard-various-aspects-corporate-average-fuel-economy-program>

<sup>19</sup>Fuel Economy Harmonization Act, S.1273, 115th Cong. (2017), available at, <https://www.congress.gov/bill/115th-congress/senate-bill/1273>

equivalent. Squeezing two separate agencies into the same regulatory space creates uncertainty, unnecessary costs, and wastes scarce government resources.<sup>20</sup>

### **III. The Preferred Alternative in the Proposal Encourages New Car Purchases, Creating Environmental and Safety Benefits from “Scrappage” of Older Used Vehicles**

New CAFE and CO<sub>2</sub> tailpipe standards may have the unintended consequence of deterring consumers from purchasing new cars because the standards make cars more expensive.<sup>21</sup> The Agencies account for this effect by using “scrappage rate” models that estimate how vehicle prices might affect consumers’ decisions to discard an older vehicle and buy a new one.<sup>22</sup>

AFPM agrees with the Agencies that the 2012 Rule did not accurately and fully account for the impact of the standards on scrappage rates.<sup>23</sup> This failure to adequately consider scrappage rates likely led to a significant overestimation of the existing standard’s benefits with respect to fuel and air pollutant emission reductions and an underestimation of safety risks and societal costs. Accordingly, we support the development of statistically based scrappage rate models using the most current data as they help the Agencies improve their understanding of the implications of the proposed alternatives.

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<sup>20</sup>There is ample room for EPA to consider means for reducing automotive GHG emissions without the potential for interference with NHTSA’s statutory directive. For instance, EPA is already considering rules for automotive air conditioning refrigerant leakage. Other areas of potential GHG emission savings include the use of reflective glass, coatings, and paints to reduce air conditioning usage. Such measures could yield meaningful GHG emission reductions without creating conflicts with NHTSA’s fuel economy standards.

<sup>21</sup> See, e.g., Sanya Carley, *et al.*, A Macroeconomic Study of Federal and State Automotive Regulations, Indiana University School of Public and Environmental Affairs (Mar. 2017) at 71, available at, <https://spea.indiana.edu/doc/research/working-groups/auto-report-032017.pdf> (estimating that CAFE standards would impose between \$1,226 and \$2,468 in direct manufacturing costs on new cars and trucks by 2025).

<sup>22</sup>This is also sometimes referred to as “fleet turnover” in the economics literature and regulatory documents.

<sup>23</sup>77 Fed. Reg. at 62,949.

A. Accounting for Scrappage and the Rebound Effect More Accurately Predicts Fuel Usage and Emissions

The used car market represents 94% of the U.S. vehicle fleet. It is well established that increased new car prices, in turn, lead to higher used car prices.<sup>24</sup> When both new and used car prices increase, the scrappage rate of used cars decreases and older, less fuel efficient vehicles stay on the road longer. This is known as the Gruenspecht effect.<sup>25</sup> Jacobsen and van Benthem estimated that increased car prices create a 13% to 16% loss of expected gasoline savings.<sup>26</sup> Bento, Roth, and Zuo found that using outdated scrappage rates can lead to significant overestimation of emissions reductions achieved by the 2012 Rule.<sup>27</sup> More current data shows that the 2012 Rule's emission estimates under-predicted actual vehicle CO<sub>2</sub> production by about 8% with approximately 90 million more tons of CO<sub>2</sub> released than expected.<sup>28</sup> This previously unaccounted for result (under the 2012 Rule) combined with the rebound effect (10% to 20% according to Su 2012) could reduce the Rule's effectiveness by as much as 40%.<sup>29</sup> The Proposed Rule's incorporation of more realistic scrappage rates and the use of a 20% rebound effect accounts for these efficiency losses, thereby improving the accuracy of fleet fuel efficiency predictions.

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<sup>24</sup>Jacobsen, M. and van Benthem, A., "Vehicle Scrappage and Gasoline Policy", American Economic Review (2015) Vol. 105, No. 3, 1312-1338 ("Vehicle Scrappage")

<sup>25</sup>Gruenspecht, Howard "Differentiated Regulation: The Case of Auto Emissions Standards", American Economic Review, (1982) Vol. 72(2):328-31.

<sup>26</sup>Jacobsen and van Benthem, "Vehicle Scrappage."

<sup>27</sup>Bento, A., *et al.*, 2018. "Vehicle Lifetime Trends and Scrappage Behavior in the U.S. Used Car Market." The Energy Journal, International Association for Energy Economics, vol. 39, no. 1 ("Vehicle Lifetime Trends").

<sup>28</sup>*Id.*

<sup>29</sup> *Id.*; Su, Quing, "A quantile regression analysis of the rebound effect: Evidence from the 2009 National Household Transportation Survey in the United States", Energy Policy (2012) Vol. 45, 368-377.

B. AFPM Supports NHTSA’s Accounting for Increased Vehicle Retention

Vehicle reliability has increased over recent decades. Therefore, vehicles are being kept on the road for longer periods of time. Longer vehicle retention delays the influence of gasoline efficiency standards. The used car market has shown an increase in average age of the U.S. fleet over time from 12.2 years in the 1970s to 15.6 years in the 2000s.<sup>30</sup> Overall, average vehicle lifetime has increased by almost 27% from 1969 to 2014.<sup>31</sup> AFPM supports the inclusion of these revised fleet ages in the scrappage models.

AFPM also supports the use of updated vehicle miles traveled data based on odometer readings.<sup>32</sup> This data is not only more recent but replaces the far less reliable self-reported data.<sup>33</sup> AFPM agrees that using newer data sets with updated average fleet ages by vehicle type in the scrappage models is more accurate and appropriate.

C. Accurate Scrappage Rates Illustrate the Safety Consequences of Keeping Older Vehicles on the Road

AFPM believes that understanding the interactions between the new and used car markets through NHTSA’s scrappage models will improve the accuracy of predictions of the CAFE standards’ impacts on public health and safety. In the 2012 Rule, public safety estimates did not consider the increased risk to public health associated with older cars being driven for a longer period than they would have without the rule. As vehicle replacement slows due to higher new and used vehicle prices, or other economic constraints, the rate of introduction of new safety features

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<sup>30</sup>Bento, A., *et al.*, “Vehicle Lifetime Trends.”

<sup>31</sup>*Id.*

<sup>32</sup>83 Fed. Reg. at 43,092.

<sup>33</sup>*Id.*

declines. Recently introduced safety features include blind spot monitoring, lane departure warning, and electronic stability control. By 2020, NHTSA estimated an 8% reduction in fatality rates from vehicle crashes due to the introduction of electronic stability control alone.<sup>34</sup> Two recent studies from the Insurance Institute for Highway Safety (“IIHS”) found significantly lower crash rates for vehicles equipped with blind spot monitoring or lane departure warning. It found that cars equipped with lane departure warning are 24% less likely to be involved in accidents with injuries and 86% less likely to be involved in fatal accidents.<sup>35</sup> Cars with blind spot detection are 23% less likely to be involved in lane-change accidents with injuries.<sup>36</sup> Increased new vehicle prices will reduce the rate at which these technologies are introduced into the current on-road fleet.

NHTSA’s National Center for Statistics and Analysis (“NCSA”) has extensively studied the effect of vehicle age on vehicle driver and occupant safety. According to NCSA, a driver of a vehicle that is four to seven years old is 10% more likely to be killed in a crash than the driver of a vehicle zero to three years old. This risk increases with vehicle age up to the point where they predict that a driver of a vehicle 18 years or older is 71% more likely to be killed in a crash than a driver of a new vehicle.<sup>37</sup> In addition to increased driver risk, a recent NHTSA study finds that older cars also pose a substantially higher risk to all vehicle occupants. For example, for fatal accidents involving cars zero to three years old, 27% of occupants are killed compared to over

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<sup>34</sup>Blincoe, L. and Shankar, U., “The Impact of Safety Standards and Behavioral Trends on Motor Vehicle Fatality Rates,” National Highway Traffic Safety Administration, DOT HS 810 777, Washington, D.C., Jan. 2007.

<sup>35</sup>Cicchino, J. “Effects of lane departure warning on police-reported crash rates”. *Journal of Safety Research*, September 2018.

<sup>36</sup>Cicchino, J. “Effects of blind spot monitoring systems on police-reported lane-change crashes” Insurance Institute for Highway Safety, August 2017.

<sup>37</sup>NHTSA National Center for Statistics and Analysis, “Research Note: How Vehicle Age and Model Year Relate to Driver Injury Severity in Fatal Crashes”, DOT HS 811 825, August 2013.

40% of occupants in vehicles that are 12 years or older.<sup>38</sup> The adoption of air bags and curtains, antilock brakes and stability control in newer model years has significantly increased vehicle safety. IIHS compared driver deaths for new vehicles (one to three years old) manufactured in 2005 with those manufactured in 2015. It found that, for newer vehicles, driver deaths decreased 56% for the mini-car category, 57% in small cars, 46% in midsize cars, 28% in large sedans, 60% in small sport utility vehicles (“SUVs”), 68% in medium SUVs, 71% in large SUVs, 78% in small trucks and 63% in large trucks.<sup>39</sup>

Although these studies measure fatal accidents, NHTSA should also consider the substantial costs of non-fatal vehicle accidents. NHTSA noted that, in 2010, there were 100 times as many people injured in vehicle crashes as killed (3.9 million people injured vs. 32,999 people killed).<sup>40</sup> It found the total costs of both fatal and nonfatal crashes in 2010 alone to be \$242 billion, or 1.6% of the real US Gross Domestic Product for 2010.<sup>41</sup> The cost components they consider include lost productivity and workplace losses (32% of total), property damage (31%), congestion and excess fuel consumption (12%), medical costs (10%), emergency medical services, and legal and court costs.<sup>42</sup> Further, consumers show a preference for heavier and more powerful used

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<sup>38</sup>NHTSA, Passenger Vehicle Occupant Injury Severity by Vehicle Age and Model Year in Fatal Crashes, DOTHS812528, April 2018.

<sup>39</sup>Edmunds data referring to IIHS analyses of one to three year old vehicles in 2005 compared to 2015. (<https://www.edmunds.com/car-safety/are-smaller-cars-as-safe-as-large-cars.html> and <https://www.iihs.org/iihs/topics/t/general-statistics/fatalityfacts/passenger-vehicles/2015>).

<sup>40</sup>Blincoe, L. J., *et al.* “The economic and societal impact of motor vehicle crashes” (Revised), Report No. DOT HS 812 013, National Highway Traffic Safety Administration (May 2015).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

vehicles, which typically have lower gas efficiencies<sup>43</sup> and increased safety risks to drivers and passengers of smaller and lighter vehicles.

D. Keeping Vehicles on the Road Longer Delays the Introduction of Refrigerants with Lower Global Warming Potential

In addition to the delayed rollout of new safety features, the introduction of other technological innovations to the fleet are also delayed when consumers defer replacing older vehicles. For example, in 2012 vehicle manufacturers began to roll out a more climate friendly refrigerant alternative. The new refrigerant, HFO-1234yf (hydrofluoroolefin) replaces hydrofluorocarbon refrigerants that have high global warming potential. As of 2018, 50% of new vehicles in the U.S. have transitioned to the climate-friendly alternative.<sup>44</sup> However, increasing new vehicle prices will keep hydrofluorocarbon refrigerants in use for a longer period of time than would otherwise occur if new vehicle prices are dependent on market forces.

**IV. The Proposed Rule Properly Recognizes that Weak Consumer Interest in Electrified Vehicles Will Continue for the Foreseeable Future**

The cornerstone of the 2012 Rule was the Agencies' speculation that electrified vehicle sales would grow exponentially in a few years, reaching 58% of the sales in the market in model year 2030.<sup>45</sup> Contrary to these lofty predictions, PHEVs and BEVs remain confined to niche markets, representing about 1% of sales, while overall electrified vehicle sales (HEVs, PHEVs, and BEVs) hover at 3%.<sup>46</sup> In other words, the 2012 Rule depends on a nearly twenty-fold increase in electrification of vehicle sales within the next twelve years. Sales of electrified vehicles have

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<sup>43</sup> Jacobsen and van Benthem, "Vehicle Scrappage."

<sup>44</sup> EPA, Transitioning to Low-GWP Alternatives in Motor Vehicle Air Conditioning, EPA 430-F-15-029 (Dec. 2016).

<sup>45</sup>83 Fed. Reg. at 43,229.

<sup>46</sup>EIA, 2018 Electrified Vehicle Sales.

stalled despite increasing federal, state, and industry subsidies, and are now primarily driven by the ZEV mandates adopted in 10 states.<sup>47</sup> The Agencies understand that consumers have largely rejected these vehicles and there is no plausible reason to believe that electrified vehicles will see the enormous sales increases that the 2012 Rule optimistically projected.

A. Contrary to the Predictions in the 2012 Rule, Consumers Have Not Embraced Electrified Vehicles

After 20 years on the market, “[s]trong hybrid and other advanced electrification technologies” have achieved “relatively low” sales “on the order of two to three percent per year for strong hybrids”<sup>48</sup> - not the levels necessary to meet the current model year 2021-25 standards. Historic marketing campaigns, tax subsidies, and benefits for various special privileges, including the use of HOV lanes and preferred parking spots, failed to generate significant consumer interest. This can only lead one to conclude that, despite all of the incentives, consumers simply do not accept these vehicles in a proportion required to meet either the existing MY 2021-25 standards or the other alternatives. Accordingly, the existing standards are not feasible.

Reasons for consumers’ lack of interest in PHEVs and BEVs are evident from a number of practical factors, including high costs, range restrictions (or range uncertainty, such as the diminution of range when using defrosters, heaters, air conditioning, or electronics), regional limitations (*e.g.*, poor battery performance in certain climates), the need for home charging infrastructure and other charging infrastructure inadequacies, as well as safety concerns (such as the battery fires discussed below).

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<sup>47</sup> See Auto Alliance, Advanced Technology Vehicle Sales Dashboard, available at, <https://autoalliance.org/energy-environment/advanced-technology-vehicle-sales-dashboard/>.

<sup>48</sup>83 Fed. Reg. at 43,231.

Consumers are well informed on fuel economy when making decisions. Although the Agencies are required to issue fuel economy standards, there is no evidence that buyers actually “undervalue” fuel economy or are ignorant of it. For decades, mile per gallon ratings, annual fuel costs, and fuel costs in excess of the average new vehicle have been prominently displayed on every new car on a dealership lot. Consumers understand the value of fuel economy but tend to rank that attribute lower when compared to other features. Therefore, consumers accurately express their “willingness-to-pay” for better fuel economy with every actual purchase. A standard is not “feasible” if consumers decline to pay for it.<sup>49</sup>

Manufacturers have always produced models that are responsive to consumer needs whether those involve performance, passenger capacity, towing capacity, aesthetics, safety, or computerization options. There is no reason to believe that manufacturers refuse to respond to consumer demand with respect to fuel economy.

#### B. PHEV and BEV Market Penetration Depends on Tax Subsidies

Market penetration of PHEV and BEV vehicles generally fare worse than HEVs and have not moved far beyond the rather narrow demographic groups associated with early adopters. For example, electrified vehicle owners continue to be much wealthier than non-owners and they tend to live in single family homes with easier access to charging.<sup>50</sup> As of 2017, combined sales of

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<sup>49</sup>*Id.* at 43,073-74 (discussing recent peer-reviewed literature on consumer valuation of fuel economy in vehicle purchasing decisions).

<sup>50</sup> Davis, L.W., Evidence of a Homeowner-Renter Gap for Electric Vehicles, Energy Institute WP 291 (July 2018), available at, <https://ei.haas.berkeley.edu/research/papers/WP291.pdf>; Kurani, K.S., Gender Imbalance in the Plug-In Electric Vehicle Market Threatens to Slow Future Market Growth, National Center for Sustainable Transportation (May 2018), available at, <https://ncst.ucdavis.edu/wp-content/uploads/2018/05/Kurani-UC-Davis-Gender-Imbalance-in-EV-Market.pdf>; Chris Woodyard, Study: Electric car buyers are younger but richer, *USA Today* (May 4, 2015).

electrified vehicles still make up only 3% of total new car sales in the U.S.<sup>51</sup> Recent research suggests that even when only non-cost factors of BEVS are considered (*e.g.*, lack of charging infrastructure, battery range, charging time) penetration will still only be around 5% by 2050.<sup>52</sup>

Electrified vehicles continue to be concentrated in those places where government subsidies and mandates are the highest. Several recent studies find that tax incentives continue to be the most important factor for electrified vehicle adoption.<sup>53</sup> Even with these incentives in place, market penetration has been much lower than projected (as of 2017, electrified vehicle sales still account for about 1% of total new car sales).<sup>54</sup> That demand continues to be driven by available incentives, and not by consumer choice, suggests that future sales will plateau or falter as incentives are phased out over the next few years – the \$7,500 federal tax credit will be phased out over the next year for both General Motors and Tesla as they reach their manufacturer tax subsidy sales limits. Declining sales without tax subsidies are already being witnessed in a few instances already.

Georgia, which provided tax subsidies for electrified vehicles, and subsequently withdrew those incentives, provides an empirical example of how subsidies drive the sale of these vehicles at their current prices. Georgia discontinued its \$5,000 incentive program for electrified vehicles

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<sup>51</sup>See, *e.g.*, EIA, 2018 Electrified Vehicle Sales; Russ Mitchell, Electric cars edge forward in 2017 but still have a long way to go, *Los Angeles Times* (Dec. 28, 2017).

<sup>52</sup> Barter, G., *et al.*, Implications of Modeling Range and Infrastructure Barriers to Adoption of Battery Electric Vehicles, *Transportation Research Record: Journal of the Transportation Research Board* (2015) 2502, 80-88.

<sup>53</sup>See, *e.g.*, Narassimhan & Johnson. (2018). The role of demand-side incentives and charging infrastructure on plug-in electric vehicle adoption: analysis of United States. *Environmental Research Letters*, Volume 13, Number 7.

<sup>54</sup> Stone. (2018). Electrified vehicles continue to see slow growth and less use than conventional vehicles. (2018). US Energy Information Administration; Russ Mitchell, Electric cars edge forward in 2017 but still have a long way to go, *Los Angeles Times* (Dec. 28, 2017).

on July 1, 2015. Sales subsequently fell by 88.9% in the following months.<sup>55</sup> The trend of diminished sales in Georgia has continued since. In June 2015, just before the state subsidy expired, Georgians purchased 1,284 BEVs.<sup>56</sup> Georgians subsequently purchased 1,536 BEVs for *all of 2016*.<sup>57</sup> This phenomenon is not limited to the United States. When British Columbia's C\$5,500 BEV incentive program expired, sales there plummeted by more than half.<sup>58</sup>

C. Consumers that Own PHEVs and BEVs Tend to Buy Larger Second Cars, Wiping Out 60% of any Fuel Efficiency Savings

According to recent research by professors from Yale, MIT, and the University of California-Davis, even consumers that have already bought electrified vehicles are less likely to choose another electrified vehicle as a second car.<sup>59</sup> Through the use of long-term data tracking households over several vehicle replacements, it found that “attribute substitution” is a common phenomenon where households buy a second vehicle with very different attributes than the first vehicle (the “kept vehicle”).<sup>60</sup> For example, a household may choose to prioritize cargo space or the need to be able to travel long distances over fuel economy if it already owns an electric car. This phenomenon of attribute substitution has “a large countervailing effect on the fuel economy of the newly purchased vehicle. For example, in our preferred specification, *increasing* the fuel

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<sup>55</sup>Stephen Edelstein, Georgia Electric-Car Sales Plummet After Incentive Replaced by Tax, *Green Car Reports* (Nov. 4, 2015). This is not a perfect example in that Georgia imposed a new \$200 registration fee on electrified vehicles concurrently with the discontinuance of the tax subsidy.

<sup>56</sup> Auto Alliance, Advanced Technology Vehicle Sales Dashboard, *available at*, <https://autoalliance.org/energy-environment/advanced-technology-vehicle-sales-dashboard/>.

<sup>57</sup>*Id.*

<sup>58</sup>Matthew Klippenstein, When Electric Car Incentives Expire: A Case Study in Canada, *Green Car Reports* (Sept. 18, 2014).

<sup>59</sup>Archsmith, Gillingham, Knittel & Rapson. (2017). Attribute Substitution in Household Vehicle Portfolios. NBER Working Paper No. 23856.

<sup>60</sup> *Id.* at 2, 4-5.

economy of the kept vehicle by 10 percent results in a 4.8 percent *decrease* in the fuel economy of the purchased vehicle.”<sup>61</sup> The authors observed “significant changes in usage patterns that further reduce the net fuel savings” through increases in mileage for both vehicles that “erodes over 60% of the fuel savings from the fuel economy increase of the kept vehicle on net....”<sup>62</sup> Attribute substitution introduces a new and previously unaccounted for phenomenon that reduces the effectiveness of higher fuel economy standards. The Agencies should consider this research in gauging the assumed benefits of the 2012 Rule.

#### D. Cross-Subsidies Inflate Vehicle Prices and Hinder New Vehicle Sales

It is common practice for manufacturers to cross-subsidize vehicle models in their lineups to recoup costs, particularly for those models where manufacturing costs cannot be passed on to consumers directly.<sup>63</sup> As the Agencies found in the Proposed Rule, the significant “technology cost burden” of electrified vehicles requires cross-subsidization, inflating the prices of pick-up trucks, SUVs, and other conventional vehicles.<sup>64</sup> One former auto executive explained that the cost of SUVs has risen significantly because OEMs are “trying to recover what they're losing at the other end with what I call compliance vehicles, which are Chevy Volts, Bolts, plug-in Cadillacs and fuel cell vehicles ....”<sup>65</sup>

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<sup>61</sup> *Id.* at 5.

<sup>62</sup> *Id.* at 5-6; *see also* Laura Bliss, Why Gas-Efficient Cars Can't Save the Climate: New Research Reveals Unintended Consequences, *City Lab* (Oct. 5, 2017), available at, <https://www.citylab.com/transportation/2017/10/why-gas-efficient-cars-cant-save-the-climate/541992/> (“In a new white paper, scientists at Yale University, University of California, Davis, and the Massachusetts Institute of Technology reveal an unintended consequence of tighter fuel standards: When a two-car household goes to replace one of its vehicles, a household that already owns a fuel-efficient car tends to buy a gas hog for its second car. This decision-making erodes more than 60 percent of the fuel savings that first car should have yielded, they found.”).

<sup>63</sup> 83 Fed. Reg. at 43,224.

<sup>64</sup>83 Fed. Reg. at 43,084-85.

<sup>65</sup>Six Superstars Ponder the Future of an ‘Irrational’ Auto Industry, *Automotive News* (Aug. 3, 2015), available at, [http://www.autonews.com/article/20150803/INDUSTRY\\_ON\\_TRIAL/308039971/six-superstars-ponder-the-future-](http://www.autonews.com/article/20150803/INDUSTRY_ON_TRIAL/308039971/six-superstars-ponder-the-future-)

This means that even those who are completely unwilling to pay for these vehicles still pay for them in part by absorbing a markup on internal combustion vehicle costs.<sup>66</sup> Although this does not directly impinge on NHTSA’s long-standing prohibition against dictating specific technologies to meet fuel economy or emission standards, requiring *all* vehicle consumers to pay for specific control technologies used by a very few certainly violates the spirit of that prohibition.<sup>67</sup> These cross-subsidies are effectively a tax imposed on all those choosing not to purchase electrified vehicles and the Agencies are correct in proposing not to require manufacturers to exacerbate that tax by setting standards so onerous they effectively dictate the sale of more of those vehicles. Further, imposing cross-subsidies on new vehicle purchasers shoulders states who choose not to adopt California’s ZEV mandate with a significant portion of the mandate’s cost. Those states lack any power to reduce or block the cross-subsidies imposed on their citizens that are necessary to comply with California regulations. Nor will they have any power to control future California actions, such as increasing the magnitude of the ZEV mandate. Should California and the opt-in states mandate more stringent ZEV requirements (as California hopes to do),<sup>68</sup> this will only exacerbate cross-subsidies already imposed on new vehicle purchasers without any political recourse absent federal intervention.

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[of-an-irrational-auto-industry](#) (“I don’t know if anybody noticed, but full-size sport-utilities used to be — just a few years ago used to be \$42,000, all in, fully equipped. You can’t touch a Chevy Tahoe for under about \$65 [thousand] now. Yukons are in the \$70 [thousands]. The Escalade comfortably hits \$100 [thousand]. Three or four years ago they were about \$60,000. What this is, is companies trying to recover what they’re losing at the other end with what I call compliance vehicles, which are Chevy Volts, Bolts, plug-in Cadillacs and fuel cell vehicles.”) (quoting Bob Lutz, former Vice Chairman of GM).

<sup>66</sup>83 Fed. Reg. at 43,085.

<sup>67</sup>*See id.* at 43,230 (noting “the agency’s goal of providing sufficient manufacturer flexibility to meet consumer needs and consumer choice preferences”).

<sup>68</sup> *See* Executive Order B-48-18 (requiring California government entities “to put at least 5 million zero-emission vehicles on California roads by 2030.”).

E. Willingness-to-Pay Surveys Overestimate the Value of Fuel-Saving Technologies by Consumers

Although AFPM has reservations regarding willingness-to-pay analyses, as actual sales figures are better estimates of what consumers want, the willingness-to-pay analysis provided in the Proposed Rule is far more informative than in the 2012 Rule. The 2012 Rule's willingness-to-pay studies ignored the attribute trade-offs that are inherent in purchasing an electrified vehicle by simply asking consumers what they would pay for improved fuel economy.<sup>69</sup> This inherently assumes that consumers would lose nothing in the form of performance, passenger or towing capacity, or aesthetics while disguising the inconveniences, and impracticalities of actually purchasing an existing electrified vehicle model.

The Proposed Rule's willingness-to-pay analysis at least compared internal combustion vehicles with their electrified counterparts, allowing many of the attributes of those respective models to be held constant, or near constant.<sup>70</sup> The result, however, is that consumers are willing to pay far less for electrified vehicles (\$2,000 to \$3,000) than the actual price premium (\$18,000 for BEVs), resulting in the "technology cost burden."<sup>71</sup>

Even this estimate, however, overestimates the willingness-to-pay by new vehicle consumers. The dataset used includes only actual sales of hybrids and some BEVs,<sup>72</sup> but this biases the analysis by excluding consumers who rejected these types of vehicles. Surveys indicate

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<sup>69</sup> Greene, David, and Jin-Tan Liu (1988). "Automotive Fuel Economy Improvements and Consumers' Surplus." *Transportation Research A* 22A(3): 203-218. Docket EPA-HQ-OAR-2010-0799-0703; Greene, David (2010). "How Consumers Value Fuel Economy: A Literature Review." EPA-420-R-10-008. Docket EPA-HQ-OAR-2010-0799-0711.

<sup>70</sup>83 Fed. Reg. at 43,083.

<sup>71</sup>*Id.* at 43,084.

<sup>72</sup> *Id.* at 43,083.

that most consumers are *not* willing to pay any additional upfront cost for electrified vehicles and the revised analysis ignores this fact. Only about 10% are willing to pay an extra \$2,000, which is well below the typical incremental cost for these types of vehicles.<sup>73</sup> Data drawn from only the customers who purchased electrified vehicles provides little information regarding the 97% to 99% of new vehicle consumers who did not buy these vehicles. Put another way, market share data at least captures the percentage of new vehicle consumers that are unwilling to pay for electrified vehicles at current prices (including available benefits, such as tax subsidies, free or subsidized charging, and HOV lane privileges). What neither market share data nor the Agencies' willingness-to-pay analysis examines are the new vehicle purchasers who would refuse to pay for electrified vehicles even if they were steeply discounted below current sales prices. This negative willingness-to-pay figure is not accounted for in the Agencies' analysis.<sup>74</sup>

Existing PHEV/BEV owners are finding that there are unanticipated costs of ownership such as the installation of a home charger, and electric ratepayers must fund the upgrade of electrical infrastructure, *e.g.*, replacement of 12,000 transformers across a mid-sized city, that are passed on in the form of higher electrical rates.<sup>75</sup> Researchers from Argonne National Laboratory, Case Western Reserve University, and the University of Wisconsin, Milwaukee performed

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<sup>73</sup> Krupa, J. S., *et al.*, Analysis of consumer survey on plug-in hybrid electric vehicles. Transportation Research Part A. (2014) Vol. 64, 14 – 31; Kodjak, Drew. Consumer Acceptance of Electric Vehicles in the US. (2012). Mobile Source Technical Review Subcommittee. The International Council on Clean Transportation..

<sup>74</sup> Moreover, neither market share data nor the Agencies' willingness-to-pay analysis examines how few buyers would be willing to purchase unsubsidized electrified vehicles at their true market price.

<sup>75</sup> The True Cost of Powering an Electric Car. (2018). Edmunds.com; Black & Veatch; Smart Electric Power Alliance. "Beyond the Meter: Planning the Distributed Energy Future Volume II: A Case Study Of Integrated DER Planning by Sacramento Municipal Utility District," May 2017.

predictive modeling of electric vehicle battery capacity loss over five years.<sup>76</sup> The researchers modeled electric vehicle battery degradation by U.S. state, considering average highway and local driving conditions and ambient temperature.<sup>77</sup> They found that states with higher ambient temperatures demonstrated significantly faster battery degradation, with electric vehicle batteries in Florida reaching 30% degradation within 5.2 years.<sup>78</sup> Electric vehicle batteries in Georgia, Hawaii, Louisiana, and Texas would all reach 30% degradation between five and six years.<sup>79</sup>

Nissan is already rolling out a program to supply LEAF owners with new batteries as the company's 30 kWh Leaf models suffered from much faster battery degradation rates than expected (annual mean rate of 9.9% per year).<sup>80</sup> To date, Nissan has only introduced the program in Japan, however, consumers would be required to purchase expensive replacement battery packs that range from approximately \$2,850 for refabricated packs to approximately \$7,800 for new 40 kWh packs.<sup>81</sup> Thus, while some state officials in California and the opt-in States<sup>82</sup> believe that consumers do not accept electrified vehicle technologies due to ignorance about their advantages,

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<sup>76</sup> Yang, F., *et al.*, Predictive modeling of battery degradation and greenhouse gas emissions from U.S. state-level electric vehicle operation, *Nature Communications* (2018) 9, 2429.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* Importantly, the authors found that, at 30% degradation, electric vehicle battery energy consumption increases between 11.5 to 16.2%.

<sup>79</sup> *Id.*

<sup>80</sup> Myall, D., Ivanov, D, Larason, W., Nixon, M., Moller, H., Accelerated Reported Battery Capacity Loss in 30 kWh Variants of the Nissan Leaf, *Preprints* 2018, 2018030122.

<sup>81</sup> Fred Lambert, Nissan starts new program to replace old LEAF battery packs, *Electrek* (July 26, 2018), *available at*, <https://electrek.co/2018/03/26/nissan-leaf-battery-pack-replacement-program/>.

<sup>82</sup> *See* ZEV Task Force, Multi-State ZEV Action Plan for 2018-2021 at 11 (claiming that “the vast majority of consumers still have little understanding and many misconceptions about the capabilities and advantages of ZEVs” and stating that a major “consumer education and outreach” initiative is required to increase consumer acceptance). The ZEV Task Force includes representatives from California, Connecticut, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Vermont. *Id.* at 35.

there is also a case that new vehicle consumers which *do* accept these technologies do so without a full understanding of the additional costs involved.

## V. The Proposed Rule Enhances Safety

AFPM agrees with the Proposed Rule’s assessment of safety benefits stemming from reduced new vehicle costs.<sup>83</sup> As noted, the 2012 Rule would increase new vehicle costs, resulting in less frequent turnover of older vehicles that are less safe and lack the most modern safety equipment.<sup>84</sup> Indeed, higher vehicle prices resulting from the 2012 Rule incentivize consumers to hold onto their older cars, longer delaying the deployment of new safety technologies, such as automatic braking, lane departure alerts, and rear view cameras.<sup>85</sup>

The Agencies also must consider the costs that flow from the implementation of new emergency response protocols to address vehicle fires involving large lithium-ion batteries that are incentivized to varying degrees under the various regulatory alternatives presented in the Proposed Rule. The 2012 Rule, for example, would require 46% of passenger cars by model year 2021 to consist of electrified vehicles, compared to 4% for the preferred alternative in the Proposal.<sup>86</sup> The National Traffic Safety Board (“NTSB”) has initiated three investigations into EV fires.<sup>87</sup> Fires

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<sup>83</sup>83 Fed. Reg. at 43,135.

<sup>84</sup> To illustrate the difference between safety features in new vehicles versus older vehicles, the Australasian New Car Assessment Program (“ANCAP”), the vehicle safety commission for Australia and New Zealand, performed head-on crash tests where a 1998 Toyota Corolla collided with a 2015 Corolla. ANCAP, New Analysis: Fatality rate four times higher in older vehicles (May 12, 2017) (providing videos of the crash tests), *available at*, <http://www.ancap.com.au/media-and-gallery/releases/new-analysis-fatality-rate-four-times-higher-in-an-older-vehicle-0e2f9e>. Aside from noting the over-representation of older cars in fatal crashes, ANCAP found that the “older car sustained catastrophic structural failure with dummy readings showing an extremely high risk of serious head, chest and leg injury to the driver ... In contrast, the current model performed very well with a five star level of protection.” *Id.*

<sup>85</sup>83 Fed. Reg. at 43,139-40.

<sup>86</sup>*Id.* at 43,218, Table V-1.

<sup>87</sup> See <https://www.nts.gov/investigations/SitePages/dms.aspx>. NTSB, Preliminary Report, HWY18FH011 (June 7, 2018) (after first responders used water and foam to extinguish the fire, with the assistance of fire safety experts from

involving large lithium-ion batteries present new safety challenges, including the difficulty of extinguishing them, the potential for re-ignition after the vehicle is removed from the accident scene, the potential release of toxic gases, and hazardous waste management requirements.<sup>88</sup> The Agencies must consider the costs that flow from these new safety challenges, such as the costs associated with increased congestion resulting from significantly longer road closures<sup>89</sup> and potential new costs for emergency responders, including supplemental training, additional personal protective equipment, and fire-fighting equipment.<sup>90</sup> These costs raise significant

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Tesla, the vehicle was transported to an impound lot and the battery re-ignited five days later); NTSB, Preliminary Report, HWY18FH013 (June 26, 2018) (after first responders extinguished the fire with water and foam, the vehicle burst into flames again while it was being loaded for transport. Once first responders extinguished the second fire, the Tesla was transported to a storage yard where it ignited for a third time); NTSB, Preliminary Report, HWY18FH014 (Sept. 4, 2018) (vehicle ignited without being involved in a collision; local fire department extinguished the fire with water and foam; the battery continued to smolder, requiring the fire department to don self-contained breathing apparatuses and disassemble portions of the vehicle to access the battery; a Tesla representative warned that the re-ignition was a risk until the battery was completely cooled). Other Tesla fires not investigated by NTSB include an October 2013 Tesla Model S fire in Kent, Washington, where the car ignited after the driver hit debris, Christopher Jensen, Tesla says car fire started in battery, *The New York Times* (Oct. 2, 2013), a November 2013 Tesla Model S fire in Murfreesboro, Tennessee, again, after running over debris, Tesla's third Model S fire brings call for U.S. inquiry, *Bloomberg.com* (Nov. 7, 2013). Days later, another Tesla Model S burst into flames while charging in an Irvine, California garage. Eric Loveday, In response to garage fire, Tesla Model S owners will receive upgraded charging adapter, *InsideEVs* (Jan. 10, 2014). The Murfreesboro fire resulted in a NHTSA investigation. Bill Vlasic & Jaelyn Trop, After 3 fires, safety agency opens inquiry into Tesla Model S, *New York Times* (Nov. 19, 2013). Tesla is not the sole manufacturer confronting battery fires. Nearly every manufacturer has wrestled with the problem in recent years. See, e.g., Angela Greiling Keane, Fisker Karma fire in Texas garage being probed by NHTSA, *Automotive News* (May 18, 2012); NHTSA, ODI Resume, Investigation No. PE 11-037 (Jan. 20, 2012) (describing Chevy Volt that spontaneously combusted three weeks after NHTSA side impact and rollover testing), available at, <https://static.nhtsa.gov/odi/inv/2011/INCLA-PE11037-8445.PDF>; Josie Garthwaite, Mystery at Port Newark: Why did 17 plug-in cars burn?, *The New York Times* (Nov. 2, 2012) (16 Karma Fiskers and one Toyota Prius spontaneously combusted after being subject to flood waters; two other Toyota Prius vehicles were found smoldering); Jay Cole, Nissan LEAF fire in Flower Mound, Texas, *InsideEVs* (Sept. 4, 2015).

<sup>88</sup> Aylin Woodward, Why the Fire that Incinerated a Tesla was Such a Nightmare to Put Out, *Live Science* (Mar. 30, 2018), <https://www.livescience.com/62179-tesla-fire-cleanup-danger.html>; Alan Levin, Electric-Car Era Threaten Firefighters with New Road Risks, *Bloomberg* (May 15, 2018), <https://www.bloomberg.com/news/articles/2018-05-15/electric-car-era-threatens-firefighters-with-new-roadside-risks>.

<sup>89</sup> See e.g., ABC 7 News, Tesla driver killed in fiery crash on Highway 101 in Mountain View identified (Mar. 26, 2018); ABC 7 News, Fire chief: Tesla crash shows electric car fires could strain department resources (Mar. 26, 2018) (“The crash shut down a carpool ramp and two lanes on the freeway for almost 6 hours – twice as long as most accidents of this type ... Mountain View’s Fire Department typically puts out a car fire in minutes.”).

<sup>90</sup> Tesla published an Emergency Response Guide for first responders reacting to Model X fires. [https://www.tesla.com/sites/default/files/downloads/2016\\_Model\\_X\\_Emergency\\_Response\\_Guide\\_en.pdf](https://www.tesla.com/sites/default/files/downloads/2016_Model_X_Emergency_Response_Guide_en.pdf) (“burning or heated battery releases toxic vapors” “[first responders should] always protect themselves with full PPE, including

concerns that mandating electrified vehicles, directly or indirectly, potentially represents an unfunded mandate on state and local emergency responders. Taken together, these considerations support NHTSA's decision to forgo the inclusion of electrified vehicles in calculating maximum feasible fuel economy.

## **VI. The Proposed Rule Enhances Energy Security**

The Proposal appropriately level-sets the CAFE and CO<sub>2</sub> tailpipe standards based on the United States' newly emerging energy dominance and security concerns arising from promoting a dependence on rare earth minerals needed for battery technologies.<sup>91</sup>

### **A. The 2012 Rule Never Accounted for the Shale Revolution**

The Agencies' discussion of energy security in the 2012 Rule now looks outdated. That discussion focused on the Agencies' belief at the time that "energy security risks exist due to the possibility of tension over oil supplies" because "[m]uch of the world's oil and gas supplies are located in countries facing social, economic, and demographic challenges" that make "them even more vulnerable to potential local instability."<sup>92</sup> Much of the purported benefits of the 2012 Rule was "eliminating the nation's dependence on foreign oil ...."<sup>93</sup>

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a SCBA" and use "fog streams or positive-pressure ventilation fans" to "protect civilians downwind from the incident.").

<sup>91</sup> "Rare earth minerals" is a phrase used to describe 17 elements, including neodymium. Cobalt, lithium, and manganese are minerals critical to battery manufacturing that we include in the phrase "rare earth minerals" for ease of reference throughout these comments. While these materials may not technically be described as rare earth minerals, their supply chains create long-term national security risks.

<sup>92</sup>77 Fed. Reg. at 63,001.

<sup>93</sup> *Id.* Notably, the Agencies failed to identify any location where the U.S. military was deployed for the sole, or even primary, purpose of guarding foreign oil supplies to the United States. Even if they did, the Agencies admitted that they have no means of estimating the value of these purported benefits. *Id.* at 63,001-2.

Today, America’s energy security concerns with respect to crude oil are quite different. On September 12, 2018, the U.S. Energy Information Administration (“EIA”) declared that the “United States likely surpassed Russia and Saudi Arabia to become the world’s largest crude oil producer earlier this year....”<sup>94</sup> United States crude production is averaging 10.9 million barrels per day, as of September 2018, and is predicted to reach 11.5 million barrels per day next year.<sup>95</sup> This is up dramatically from 6.5 million barrels per day in 2012.<sup>96</sup> The U.S. is now exporting approximately 1.76 million barrels of crude oil per day.<sup>97</sup>

Although the U.S. still imports crude oil, Canada is, by far, the largest source of imports. EIA estimated that the U.S. imported over four million barrels of crude oil per day from Canada in 2017.<sup>98</sup> This is more than four times the volume imported from Saudi Arabia and greater than imports from all OPEC nations combined (3.3 million barrels per day).<sup>99</sup>

**B. The Proposal Promotes Energy Independence, a Key Objective of EPCA, By Avoiding Dependence on Foreign Sources of Rare Earth Minerals**

The 2012 Rule dictated a shift to battery-dependent vehicles. These vehicles require an increased dependence on certain minerals, such as lithium, nickel, graphite, and cobalt, to manufacture their batteries and motors. For instance, although the United States produces roughly

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<sup>94</sup>EIA, The United States is now the largest global oil producer (Sept. 12, 2018), *available at*, <https://www.eia.gov/todayinenergy/detail.php?id=37053>.

<sup>95</sup>EIA, Short-Term Energy Outlook (Sept. 2018), *available at*, [https://www.eia.gov/outlooks/steo/pdf/steo\\_full.pdf](https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf).

<sup>96</sup> EIA, Petroleum & Other Liquids, U.S. Field Production of Crude Oil, *available at*, <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=A>

<sup>97</sup>EIA, Crude oil was the largest U.S. petroleum export in the first half of 2018 (Sept. 24, 2018), *available at*, <https://www.eia.gov/todayinenergy/detail.php?id=37092>.

<sup>98</sup>EIA, Total Energy, Petroleum Trade: Imports from Non-OPEC Countries, *available at*, <https://www.eia.gov/totalenergy/data/browser/?tbl=T03.03D#/?f=A>.

<sup>99</sup>EIA, Total Energy, Petroleum Trade: Imports from OPEC Countries, *available at*, <https://www.eia.gov/totalenergy/data/browser/?tbl=T03.03C#/?f=A>.

half of its lithium supply, it currently has a *single* lithium production operation in Nevada.<sup>100</sup> Of the lithium that the United States imports, 97% of imports are sourced from two countries, Chile and Argentina.<sup>101</sup> However, as the United Auto Workers have pointed out, regardless of the source of lithium feedstock, the United States will produce only 14 percent of the world’s lithium-ion batteries by 2021.<sup>102</sup>

The chart below shows the types of minerals required to produce battery dependent vehicles, how much the United States imports, and the major sources of those imports.<sup>103</sup>

<b>Mineral</b>	<b>% Imported</b>	<b>Major Sources of Imports</b>
Aluminum	61%	Canada (56%), China, Russia, United Arab Emirates
Cobalt	72%	China, Finland, Japan, Norway (16%)
Copper	33%	Canada, Chile (46%), Mexico
Graphite	100%	Brazil, Canada, China (35%), Mexico
Lithium	> 50%	Argentina, Chile (49%), China
Manganese	100%	Australia, Gabon (73%), Georgia, South Africa
Nickel	59%	Australia, Canada (42%), Norway, Russia

Domestic production for each of these minerals are fragile as they typically rely on only a few sources to off-set imports or are seeing declining production. For instance, the U.S. Geological Service reported that domestic primary aluminum production in 2017 (740,000 metric tons) was

<sup>100</sup> U.S. Geological Survey, Mineral Commodity Summaries 2018 at 98, available at, <https://minerals.usgs.gov/minerals/pubs/mcs/2018/mcs2018.pdf>

<sup>101</sup> *Id.*

<sup>102</sup> Comments of United Auto Workers, Dkt No. DOC-2018-0002-1866 (June 28, 2018).

<sup>103</sup> U.S. Geological Survey, Mineral Commodity Summaries 2018 at 6. Percentages are supplied for the largest single source of imports.

nearly a third of domestic production in 2013 (1,946,000 metric tons).<sup>104</sup> China, however, possesses over half of the entire world's aluminum smelting capacity.<sup>105</sup> Cobalt has seen domestic mining production decline (760,000 tons in 2015 compared to 650,000 tons in 2017).<sup>106</sup> Secondary cobalt production has largely remained flat over the same span while imports have increased (11,400,000 tons to 12,100,000 tons).<sup>107</sup>

The United States imports all its graphite and manganese, having no domestic production of these minerals. China produces 67% of the world's graphite,<sup>108</sup> while Gabon, a politically unstable country, provides 73% of the United States' manganese.<sup>109</sup> For any one of these minerals, the 2012 Rule puts the United States into a situation resembling the 1970s oil embargo, where foreign actors control the supply and costs of critical battery and motor components. Indeed, China has a dominant position in the global supply chain for battery production.<sup>110</sup> These types of supply shortages and price shocks were the very thing that EPCA was enacted to prevent.

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<sup>104</sup>*Id.* at 20.

<sup>105</sup> *Id.* at 21.

<sup>106</sup>*Id.* at 50.

<sup>107</sup>*Id.*

<sup>108</sup>*id.* at 72.

<sup>109</sup> *Id.* at 6.

<sup>110</sup> Scott Patterson & Russell Gold, *There's a Global Race to Control Batteries – and China is Winning*, Wall Street Journal (Feb. 11, 2018); *Implications of Emerging Vehicle Technologies on Rare Earth Supply and Demand in the United States*, Resources 2018 Department of Interior.

C. The Proposal is Consistent with the Defense Production Act Because It Preserves the Market Supply of Rare Earth Minerals Used for Defense Applications

The Defense Production Act of 1950<sup>111</sup> provides the President with, among others, the power to “control the general distribution” of “material [that] is a scarce and critical material essential to the national defense.”<sup>112</sup> These powers are to be exercised in accordance with Congress’s findings and statements of policy that include the ability to “respond to actions taken outside of the United States that could result in reduced supplies of strategic and critical materials.”<sup>113</sup>

Here, Neodymium is one of these rare earth minerals that is vital to both electric vehicle magnetic motors and national defense applications. Tesla, which once resisted the use of neodymium in its magnetic motors, is now using it for its Model 3 Long Range vehicle, putting “pressure on already strained supplies of a rare earth metal that had for years been shunned because of an export ban by top producer China.”<sup>114</sup> The company’s shift to neodymium adds to a demand that was already “rising at a compound annual growth rate of 8.5 percent between 2010 and 2017.”<sup>115</sup> Although China lifted its export ban in 2015, it still enforces export quotas.<sup>116</sup>

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<sup>111</sup> 50 U.S.C., Appx. §§ 2061, *et seq.*

<sup>112</sup> *Id.* § 2071(b)(1).

<sup>113</sup> *Id.* §§ 2062(a)(2)(D), (b)(1) (“to ensure the adequacy of product capacity and supply ... specifically evaluating the availability of adequate production sources”).

<sup>114</sup> Pratima Desai, Tesla’s electric motor shift to spur demand for rare earth neodymium, *Reuters* (Mar. 12, 2018).

<sup>115</sup> *Id.* Neodymium is also a key element in magnets used for low-speed/ direct-drive wind turbines. Pavel, C., *et al.*, Substitution strategies for reducing the use of rare earths in wind turbines, *Resources Policy* (2017) Vol. 52, 349-357, available at, <https://www.sciencedirect.com/science/article/pii/S0301420717300077>. With the imposition of state renewable portfolio standards, wind turbine demand for neodymium supplies is expected to increase.

<sup>116</sup> Pratima Desai, Tesla’s electric motor shift to spur demand for rare earth neodymium, *Reuters* (Mar. 12, 2018).

Neodymium is vital for a wide array of critical military applications, including “jet fighter engines, missile guidance systems, antimissile defense, space-based satellites and communication systems.”<sup>117</sup> Both the Office of the Undersecretary of Defense for Acquisition, Technology, and Logistics and the Defense Logistics Agency have identified Neodymium as a critical rare earth element.<sup>118</sup> Despite the necessity of neodymium, the United States “over the past 15 years has become 100% reliant on imports, primarily from China, because of lower-cost operations.”<sup>119</sup> China, however, restricts the export of neodymium in order to ensure it has the supplies necessary for its own domestic manufacture of consumer electronics and wind turbine magnets.<sup>120</sup> As a result, China has “a dominant position that could affect worldwide supply and prices.”<sup>121</sup>

The Agencies should consider the effect of the 2012 Rule’s current push towards electrification – and the ZEV mandate’s requirement to introduce more electrified vehicles into commerce – on national security policy. Specifically, they should be wary of regulations that divert scarce and expensive neodymium supplies away from critical defense uses in contravention of Congress’s stated national defense policy and making the President’s need to exercise extraordinary powers over the general distribution of commerce more likely.

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<sup>117</sup> Marc Humphries, Congressional Research Service, *Rare Earth Elements: The Global Supply Chain* (Dec. 16, 2013) at 2 (“CRS Report”).

<sup>118</sup> GAO, *Rare Earth Materials, Developing a Comprehensive Approach Could Help DOD Better Manage National Security Risks in the Supply Chain* (Feb. 2016) (“GAO Report”) at 11, Table 4.

<sup>119</sup> CRS Report at 1.

<sup>120</sup> *Id.* at 17.

<sup>121</sup> GAO Report at iii.

D. The Proposal Should Reject the 2012 Rule’s Claimed Benefits from Avoided Military Operations

The Agencies should more explicitly reject the 2012 Rule’s reference to military operations as a benefit of fuel economy standards. The Agencies never should have claimed that the CAFE standards “would provide an opportunity to reduce military activities that are dedicated to the purposes of securing oil supplies in unstable regions of the globe, and protecting international transportation routes.”<sup>122</sup> As noted above, the 2012 Rule provided no evidence that United States invades and occupies countries to take custody of crude oil reserves, much less that an increase in automotive fuel efficiency would be a determining factor for such foreign policy activities. Unfortunately, the Proposed Rule appears to entertain the idea that “[i]f U.S. demand for imported petroleum increases, it is also possible that increased military spending to secure larger oil supplies from unstable regions of the globe will be necessary.”<sup>123</sup> Yet, the Proposed Rule also appears to take the opposite position, stating that “securing global access to petroleum supplies ... is neither the primary nor the sole mission of U.S. forces overseas” and that “the scale of oil consumption reductions associated with CAFE standards would be insufficient to alter any existing military missions focused on ensuring the safe and expedient production and transportation of oil around the globe.”<sup>124</sup> Due to the multitude of goals behind any overseas military deployment and the Agencies’ lack of expertise in military operations, they should make it clear that military expenditures should not be considered in calculating the costs or benefits of any fuel economy standard.

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<sup>122</sup>77 Fed. Reg. at 63,002.

<sup>123</sup>83 Fed. Reg. at 43,106.

<sup>124</sup>*Id.* at 43,211, n.426.

## VII. EPA Should Rescind California's Waiver for GHGs and the ZEV Program

AFPM strongly supports the proposal to withdraw the Clean Air Act waiver of preemption for California's ZEV mandate and GHG tailpipe standards.<sup>125</sup> When viewed in its proper historical and legal context, it becomes evident that Congress never intended California to enjoy plenary authority over the U.S. automotive industry to address global phenomena such as GHG concentrations in the atmosphere.

The record clearly shows that neither global GHG emissions nor their causes present any "compelling or extraordinary conditions" unique to California. Similarly, California does not "need" its ZEV mandate to ameliorate global GHG emissions. This is evident by California's own concession that the mandate is incapable of limiting either global GHG emissions or any of their potential effects.<sup>126</sup> Nor can California create inconsistent fuel economy standards by claiming that the ZEV mandate is needed to reduce criteria pollutants. Any incidental reductions of criteria pollutants through the ZEV mandate's fuel economy standard is miniscule and cannot, in and of themselves, be "needed" under § 209(b). Further, EPA should take this opportunity to change how it reviews California waiver applications. Specifically, EPA should review each new set of California regulations to determine if they individually meet CAA § 209 criteria instead of simply considering whether California needs a separate motor vehicle program as a whole. EPA must consider the costs that California's ZEV mandate imposes on car buyers outside of California and the opt-in states. No such analysis was conducted prior to EPA's 2013 grant of a preemption

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<sup>125</sup>83 Fed. Reg. at 42,999.

<sup>126</sup> See, e.g., CARB, Final Statement of Reasons, Regulations to Control Greenhouse Gases from Motor Vehicles (Aug. 4, 2005) at 376 ("the reductions in climate change associated with individual policies or the actions of individual reasons will not be identifiable...."); CARB, Final Statement of Reasons for Rulemaking, Mandatory Reporting of Greenhouse Gas Emissions (Dec. 6, 2007) at 136 ("GHG emissions have global rather than local impacts....").

waiver for the ZEV mandate even though it imposes significant costs on new car buyers throughout the United States.

A. Congress Intended the California Waiver to Address Compelling and Extraordinary Local Air Quality Conditions

CAA § 202(a)<sup>127</sup> provides EPA with the exclusive authority to promulgate standards “applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines” for their full useful life. With one exception, all state regulation over motor vehicle tailpipe emissions is preempted.<sup>128</sup> The one exception is that EPA may issue a preemption waiver to California under CAA § 209(b)(1) to establish its own motor vehicle emission standards if certain conditions are met. If EPA grants a waiver, other states may adopt and enforce California’s emission standards under CAA § 177.<sup>129</sup>

EPA must grant a California waiver request if “the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”<sup>130</sup> EPA may deny a waiver application if it makes one or more of three findings:

- (1) California’s determination regarding its state standards is arbitrary and capricious;
- (2) California does not need its standards to meet “compelling and extraordinary conditions;” or
- (3) California standards and accompanying enforcement procedures are not consistent with 42 U.S.C. § 7521(a).<sup>131</sup>

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<sup>127</sup>42 U.S.C. §7521(a).

<sup>128</sup>*Id.* § 7543.

<sup>129</sup>*Id.* § 7507.

<sup>130</sup>*Id.* §7543(b)(1).

<sup>131</sup>*Id.* §§7543(b)(1)(A)-(C).

The purpose of preemption is to prevent a “patchwork quilt” of state vehicle emissions standards that would frustrate and impede the ability of automakers to build a uniform vehicle for sales into the U.S. market.

Here, EPA is correct to propose withdrawing California’s Clean Air Act preemption waiver. California cannot demonstrate that it has compelling and extraordinary conditions unique to the state to regulate GHG emissions. Nor can it show that its ZEV mandate is “needed” to limit GHG emissions, either on a state or global scale, or to provide incidental criteria pollutant emission reductions substantial enough to meet CAA § 209(b)’s standard.

B. Global GHG Emissions are Not a Compelling and Extraordinary Condition for California

EPA’s 2008 determination that “California does not need its greenhouse gas standards for new motor vehicles to meet compelling and extraordinary conditions” was correct.<sup>132</sup> EPA correctly found that § 209(b)(1)(B) was intended to “address pollution problems that are local or regional,” instead of global in nature, and that neither the effects nor causes of GHG emissions in California are “compelling and extraordinary conditions.”<sup>133</sup>

EPA’s interpretation of “compelling and extraordinary conditions” must be read in light of Congress’s purpose for implementing the waiver provision when it was adopted in 1967. The waiver provision was intended to address California’s unique geography and criteria pollutants. As EPA previously noted, “[t]he total” California “program for control of automotive emissions

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<sup>132</sup> 73 Fed. Reg. at 12,156. The comments submitted by AFPM, then known as the National Petrochemical and Refiners Association, in support of EPA’s reconsideration of its previous denial of a waiver of preemption, EPA-HQ-OAR-0173-8915, are hereby incorporated by reference.

<sup>133</sup> *Id.* at 12,156-12,160

is expected to include [in addition to hydrocarbons and nitrogen oxides] carbon monoxide, lead and particulate matter.”<sup>134</sup>

Congress recognized that, with respect to these criteria pollutants, California faced “unique problems ... as a result of numerous thermal inversions that occur within that state because of its geography and prevailing wind patterns.”<sup>135</sup> “These geographical and climatic factors were cited as ‘compelling and extraordinary’ factors time and time again during” during Congressional debate.<sup>136</sup> California’s “local or regional air pollution problems” is the *sine qua non* of § 209(b). In the absence of California’s unique state air quality issues, the section would not even exist. For purposes of a preemption waiver determination, EPA has found “that ‘compelling and extraordinary conditions’ does not refer to levels of pollution directly, but primarily to the factors that tend to produce them: geographical and climatic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems.”<sup>137</sup> The “question” for any preemption waiver decision is “whether these fundamental conditions continue to exist.”<sup>138</sup>

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<sup>134</sup> 40 Fed. Reg. 18,887, 18890 n. 30 (quoting 113 Cong. Rec. 30,951 (Nov. 2, 1967)) (remarks of Rep. Herlong) (alterations in original) (emphasis deleted).

<sup>135</sup> *Id.* at 18,890 (citing 113 Cong. Rec. 30,948 (Nov. 2, 1967)).

<sup>136</sup> *Id.* (footnote omitted); *see also* 40 Fed. Reg. 23,102, 23,103 (May 28, 1975) (“At the time the California waiver provision was adopted, Congress believed that ‘compelling and extraordinary conditions’ existed in California) (citing Congressional Record statements); *id.* at 23,104 (“Compelling and extraordinary conditions continue to exist” as “oxidant pollution” in the “South Coast Air Basin, continues to be the worst in the nation.”); *id.* (“The data presented demonstrates that the National Ambient Air Quality Standard for photo-chemical oxidant has been violated in the South Coast region at a substantially greater frequency and at significantly higher levels of concentration than in other metropolitan areas of the country... California is struggling with an air pollution problem of unique proportions....”); 49 Fed. Reg. 18,887, 18,890 (May 3, 1984) (California faces “unique [pollution] problems ... as a result of numerous thermal inversions that occur within that state because of its geography and prevailing wind patterns.”) (citing 113 Cong. Rec. 30,948 (Nov. 2, 1967)).

<sup>137</sup> *Id.* at 18,890

<sup>138</sup> *Id.*

Congress’s use of the term “compelling and extraordinary” denotes the highest possible burden on California. These terms were routinely used to indicate occurrences that are especially rare and grave.<sup>139</sup> There is little ambiguity in this term allowing EPA to interpret it to mean something similar to “routine,” “as a matter of course,” or “perfunctory” as it did in its 2009 and 2013 waiver decisions.<sup>140</sup> Instead of requiring a showing of grave or paramount concern, these waiver decisions transformed the term “compelling and extraordinary” into a rubber stamp, burdening *opponents* of the waiver, instead of California, with disproving a nearly non-rebuttal presumption of “compelling and extraordinary conditions.”<sup>141</sup>

EPA cannot simply presume that the same “compelling and extraordinary conditions” and causes that Congress found with respect to criteria pollutants applies to global GHG concentrations.<sup>142</sup> California must make that showing in its waiver application. Yet, it has not, and cannot, meet that burden under the statute. It is undisputed that, “[i]n contrast to local or regional air pollution problems, the atmospheric concentrations of these greenhouse gases is basically uniform across the globe....”<sup>143</sup> “The factors looked at in the past – the geography and climate of California, and the large motor vehicle population in California ... no longer perform

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<sup>139</sup> Cf. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (a “compelling state interest” is not a “showing merely of a rational relationship to some colorable state interest” but involves “the gravest abuses, endangering paramount interests’ ....”) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)); *Ex parte Fahey*, 332 U.S. 258, 260 (1947) (writs of *mandamus* are “extraordinary remedies ... reserved for really extraordinary causes.”).

<sup>140</sup> 74 Fed. Reg. at 32,746; 78 Fed. Reg. at 2,126-28.

<sup>141</sup> 74 Fed. Reg. at 32,746; 78 Fed. Reg. at 2,116.

<sup>142</sup> Both the 2009 and 2013 waiver decisions insist on referring to their presumption that GHG emissions present “compelling and extraordinary conditions” to California as EPA’s “traditional interpretation.” See, e.g., 74 Fed. Reg. at 32,745; 78 Fed. Reg. at 2,125. This is absurd. The first time that EPA performed the “compelling and extraordinary conditions” analysis regarding the effects and causes of GHG emissions in California was in 2008. The view espoused in the 2009 and 2013 waiver decisions only further illustrate how unsuited GHG emissions are for a preemption waiver determination under CAA § 209(b).

<sup>143</sup> 73 Fed. Reg. at 12,160.

the same causal function”<sup>144</sup> given the worldwide contribution to GHG emissions.<sup>145</sup> The contribution of GHG emissions “bears no more relation to the levels of greenhouse gases in the atmosphere over California than any other comparable source or group of sources of greenhouse gases anywhere in the world.”<sup>146</sup>

Nor does California face any “compelling or extraordinary conditions” with respect to the effects of GHG emissions. No impact of a changing climate would be unique to California in any way. It is well established that many states claim that they are, or will be, facing the same impacts from global GHG emissions as California.<sup>147</sup> In granting the ZEV mandate waiver, EPA did not identify any record evidence that California would experience harms from global GHG emissions that would be different from any other coastal state.<sup>148</sup>

C. The California ZEV Mandate is Not “Needed” to Address any “Compelling and Extraordinary Conditions” Created by GHG Emissions

Even assuming, *arguendo*, that global GHG emissions are “compelling and extraordinary conditions” unique to California, the ZEV mandate is not “needed” under CAA § 209(b)(1)(B) as it would do nothing to alleviate the problem. GHG emissions are global in nature. Even if

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<sup>144</sup> *Id.*

<sup>145</sup> *See, e.g.*, European Commission, JRC Science for Policy Report, Fossil CO<sub>2</sub> & GHG Emissions for All World Countries (2017) at 58, 217 (China emitted twice as much CO<sub>2</sub> as the United States in 2016).

<sup>146</sup> 73 Fed. Reg. at 12,160.

<sup>147</sup> *See, e.g., Mass. v. EPA*, 549 U.S. 497, 521 (2006) (group of 12 states including California alleging the same losses of coastal property, reduced snowpack and other harms alleged by California); 73 Fed. Reg. at 12,164-65 (comments by states supporting California claimed that they are subject to the same or similar effects of GHG emissions as California); *id.* at 12,167 (“California is expected to experience many of the key risks and impacts” from global GHG emissions as “the U.S. as a whole.”).

<sup>148</sup> 78 Fed. Reg. at 2,129. EPA’s analysis of the effects of global GHG emissions was provided as an alternative analysis. 83 Fed. Reg. at 43,421. EPA should be wary of providing any detailed analysis of such effects as it will be difficult, if not impossible, to separate the effects of global GHG emissions on natural resources, such as water availability or wildfires, from any adverse effects stemming from California’s management of those resources, which has been subject to long-standing criticism.

California were to revert to a completely pre-industrial society, it would have virtually no effect on global GHG emissions or their effects. As discussed below, California has admitted that its GHG regulations, which include the ZEV mandate, can have no practical effect on global GHG emissions.<sup>149</sup>

Under CAA § 209(b)(1)(B), the EPA Administrator “shall” deny a preemption waiver if California “does not need such State standards to meet compelling and extraordinary conditions....”<sup>150</sup> EPA originally determined that California “does not need” CO<sub>2</sub> emission standards to meet any “compelling and extraordinary conditions,”<sup>151</sup> and the rationale behind that determination is still valid today. In reversing its prior denial and granting California’s waiver request in 2009, the Administrator stated that California should be granted “the broadest possible discretion in adopting the kind of standards in its motor vehicle program that California determines are appropriate *to address air pollution problems and protect the health and welfare of its citizens.*”<sup>152</sup> Even under such a deferential standard, however, California’s waiver application should have been denied.

Courts have already held that emissions from sources within a single state cannot alleviate any harms from global GHG emissions.<sup>153</sup> In denying standing to an environmental group alleging harm from Washington state agencies’ failure to regulate GHG emissions from in-state petroleum

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<sup>149</sup>See, e.g., CARB, Final Statement of Reasons, Regulations to Control Greenhouse Gases from Motor Vehicles (Aug. 4, 2005) at 376 (“the reductions in climate change associated with individual policies or the actions of individual reasons will not be identifiable....”); CARB, Final Statement of Reasons for Rulemaking, Mandatory Reporting of Greenhouse Gas Emissions (Dec. 6, 2007) at 136 (“GHG emissions have global rather than local impacts....”).

<sup>150</sup> 42 U.S.C. § 7543(b)(1)(B).

<sup>151</sup> 73 Fed. Reg. at 12,156.

<sup>152</sup> 74 Fed. Reg. at 32,746 (emphasis added).

<sup>153</sup> *WEC v. Bellon*, 732 F.3d 1131 (9th Cir. 2013); *Barnes v. DOT*, 655 F.3d 1124 (9th Cir. 2011).

refineries, the Ninth Circuit held that “[w]hile Plaintiffs need not connect each molecule [of carbon dioxide] to their injuries, simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way to some undefined degree) to their injuries, relies on an attenuated chain of conjecture insufficient to support standing.”<sup>154</sup> The court also held:

This is so because there is a natural disjunction between Plaintiffs’ localized injuries and the greenhouse effect. Greenhouse gases, once emitted from a specific source, quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime ... But there is limited scientific capability in assessing, detecting, or measuring the relationship between a certain GHG emission source and localized climate impacts in a given region. As the U.S. Geological Survey observed, “[i]t is currently beyond the scope of existing science to identify a specific source of CO<sub>2</sub> emissions and designate it as the cause of specific climate impacts at an exact location.”<sup>155</sup>

Although the letter relied upon by the *Bellon* court is now ten years old, California has never attempted to argue that scientific evidence has now evolved to demonstrate how the ZEV mandate will actually alleviate an injury to California. On the contrary, California has acknowledged that its regulations were never designed to alleviate either global GHG emissions or their asserted effects.<sup>156</sup> EPA itself has concurred, acknowledging that “elevated concentrations

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<sup>154</sup> *Bellon*, 732 F.3d at 1142-43 (internal quotations omitted).

<sup>155</sup> *Id.* (quoting Letter from Dir., U.S. Geological Survey, to Dir., U.S. Fish & Wildlife Service, The Challenges from Linking Carbon Emissions, Atmospheric Greenhouse Gas Concentrations, Global Warming, and Consequential Impacts (May 14, 2008)).

<sup>156</sup> *See, e.g.*, CARB, Final Statement of Reasons, Regulations to Control Greenhouse Gases from Motor Vehicles (Aug. 4, 2005) at 376 (“the reductions in climate change associated with individual policies or the actions of individual reasons will not be identifiable....”); CARB, Final Statement of Reasons for Rulemaking, Mandatory Reporting of Greenhouse Gas Emissions (Dec. 6, 2007) at 136 (“GHG emissions have global rather than local impacts....”).

of greenhouse gases” is “a global air pollution problem” that is not caused by California emissions and cannot be resolved by California regulations.<sup>157</sup>

D. California Cannot Justify the Waiver Based on Emissions of Criteria Pollutants

To defend the preemption waiver for the ZEV mandate, California may argue that the waiver is necessary to address local air quality issues for criteria pollutants such as ozone and particulate matter (“PM”). Re-packaging the ZEV mandate as a local air quality measure fails.

The ZEV Program mandates the electrification of vehicles, necessarily regulating vehicle fuel economy in contravention of EPCA, as discussed below. The purpose of the ZEV program is irrelevant to the EPCA preemption analysis because Congress broadly preempted any state or local laws “related to” fuel economy.<sup>158</sup>

In any case, California has acknowledged that, in the context of the 2013 preemption waiver, the primary purpose and effect of the ZEV mandate is to attempt to address global climate change. The mandate grew out of a CARB Resolution issued shortly after the enactment of the California Global Warming Solutions Act of 2006, more commonly known as “A.B. 32.” CARB’s “Initial Statement of Reasons”<sup>159</sup> to adopt its revised ZEV mandate (packaged as part of an “Advanced Clean Car” program), is dedicated almost exclusively to GHGs, and even boasts of California’s impact on federal agency policies. It is not until page 13 that CARB makes passing reference to other air quality issues and there, it only lumps the ZEV mandate in with its discussion

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<sup>157</sup> 74 Fed. Reg. at 32,763.

<sup>158</sup> California enjoys a vast array of policy options to address tailpipe emissions that are wholly unrelated to fuel economy. For example, its vehicle emission standards have resulted in the implementation of control technologies such as catalytic converters, exhaust gas recirculation, particulate filters, and selective catalytic reduction.

<sup>159</sup> CARB, “Staff Report: Initial Statement Of Reasons For Rulemaking. Proposed Amendments to New Passenger Motor Vehicle Greenhouse Gas Emission Standards For Model Years 2017-2025 To Permit Compliance Based On Federal Greenhouse Gas Emission Standards And Additional Minor Revisions to the LEV III and ZEV Regulations.” (Sept. 2012) <https://www.arb.ca.gov/regact/2012/leviiidtc12/dtcisor.pdf>

of unrelated Low Emission Vehicle (“LEV”) standards.<sup>160</sup> The document never connects the ZEV mandate independently to any improvement of PM or ozone; in fact, it writes the opposite, stating: “The ZEV element of the Advanced Clean Cars program also fulfills California’s third commitment towards the development of the 2017 through 2025 model year national greenhouse gas program.”<sup>161</sup> CARB also outlines how the ZEV mandate will use credit multipliers, *i.e.*, create credits *on paper* for dramatically more GHG emission reductions than they actually achieve, conceding: “The impact of these additional provisions in the *national* program for advanced technology vehicles results in a slight decrease in accumulated CO<sub>2</sub> reductions in California in 2025.”<sup>162</sup>

Similar to the Initial Statement of Reasons, CARB’s Final Statement of Reasons<sup>163</sup> never connects the ZEV mandate with air quality. In response to numerous public comments, CARB repeatedly states: “The purpose of these regulatory changes is merely to allow manufacturers to demonstrate compliance with the final national passenger motor vehicle greenhouse gas regulations for the 2017 through 2025 model years, as an alternative option to achieve compliance with California’s regulations and to make specified minor corrections to the LEV III criteria pollutant and ZEV regulations.”<sup>164</sup> Any discussion of air quality in the document is limited to their admittedly “minor” changes to their LEV standards. Consistent with that purpose, California

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<sup>160</sup> *Id.* at 13.

<sup>161</sup> *Id.* at 4.

<sup>162</sup> *Id.* at 6.

<sup>163</sup> CARB, “Final Statement of Reasons: Amendments to New Passenger Motor Vehicle Greenhouse Gas Emission Standards for Model Years 2017-2025 to Permit Compliance Based on Federal Greenhouse Gas Emission Standards and Additional Minor Revisions to the LEV III and ZEV Regulations.” <https://www.arb.ca.gov/regact/2012/leviiidtc12/leviiifsorrev.pdf> (Dec. 2012).

<sup>164</sup> *Id.* at 8-11.

conceded in its waiver application to EPA for the ZEV program that “[t]here is no criteria emissions benefit from including the ZEV proposal in terms of vehicle (tank to-wheel or TTW) emissions. The LEV III criteria pollutant fleet standard is responsible for those emission reductions in the fleet; the fleet would become cleaner regardless of the ZEV regulation because manufacturers would adjust their compliance response to the standard by making less polluting conventional vehicles.”<sup>165</sup>

California, nonetheless, claims that the ZEV mandate will induce net upstream criteria pollutant emission reductions through reduced refining activity, port emissions, and gasoline truck distribution. But Congress never granted California this wide-ranging authority to set tailpipe standards based on anticipated indirect emissions effects on stationary sources. Section 209(b) authorizes California “standards” for the “control of emissions *from new motor vehicles* ....”<sup>166</sup> Those standards must be “at least as stringent as the comparable” EPA standard,<sup>167</sup> which have *never* been set based on the impact on criteria pollutant emissions from upstream sources. In 2008, EPA initially denied California’s waiver application, in part, because CAA § 209(b) only permits a waiver for regulations that control emissions from motor vehicles, not “indirect reductions caused by the expected actions of stationary sources.”<sup>168</sup> EPA should re-affirm its 2008 rationale, holding that using the Title II preemption waiver mechanism to impose unnecessary and indirect

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<sup>165</sup>Clean Air Act § 209(b) Waiver Support Document Submitted by the California Air Resources Board, 15-16 (May 2012) (emphasis added).

<sup>166</sup>42 U.S.C. § 7543(b)(1) (emphasis added).

<sup>167</sup>*Id.* § 7543(b)(2).

<sup>168</sup>73 Fed. Reg. at 12,163. EPA reversed its 2008 denial of California’s waiver as part of the “One National Program” settlement with EPA, NHTSA and OEMs that led to harmonized federal and California standards.

regulations on stationary sources is not supported by the plain text of CAA § 209(b) or Congressional intent.

In fact, given the significant price premiums for electric vehicles, it is all but certain that, per dollar invested, replacing older gasoline and diesel vehicles with newer models that meet federal standards and produce dramatically lower emissions of criteria pollutants (and pre-cursors) is a much wiser and effective strategy for improving air quality, when compared to spending those dollars on a smaller number of more expensive electric vehicles.

The structure of the ZEV mandate further demonstrates that the program is unnecessary to address extraordinary and compelling air quality conditions for criteria pollutants *in California*. The ZEV mandate provides credits to large and intermediate volume manufacturers for ZEVs sold in Section 177 states.<sup>169</sup> The fact that California's ZEV mandate provides OEMs with credit for *out-of-state* sales demonstrates the disconnect between California's ZEV mandate and any purported "compelling and extraordinary conditions" in California. In 2008, EPA determined that, despite a lengthy list of future effects from elevated GHG emissions, "California does not link these [GHG] emission standards with such effects."<sup>170</sup> The same is true with the ZEV mandate. Therefore, California does not "need" the ZEV mandate even if "compelling and extraordinary conditions" existed.

To the extent that any doubt exists about whether Congress intended to grant California authority over GHGs, Section 209(b) should be interpreted to cover only criteria pollutants to avoid

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<sup>169</sup>*See id.* §§ 1962.2(d)(5)(E)(1) (credits for hydrogen fuel cell vehicles "delivered for sale and placed in service in California or in a Section 177 state"); 1962.2(d)(5)(E)(2) ("Optional Section 177 Compliance Path" providing up to 50% credits for certain types of ZEVs sold in Section 177 states).

<sup>170</sup>73 Fed. Reg. at 12,162.

serious constitutional questions.<sup>171</sup> The “presumption against extra-territoriality” is a canon of statutory construction that requires courts to interpret federal statutes to avoid extra-territorial application absent a clear congressional statement to the contrary. That canon reflects the common sense notion that Congress is “primarily concerned with domestic conditions”<sup>172</sup> and seeks to guard against clashes with foreign laws.<sup>173</sup> In a related vein, courts have held preempted state laws and regulations that attempt to intrude upon the Executive Branch’s authority over foreign affairs.<sup>174</sup> For example, the Supreme Court struck down a California law that attempted to regulate companies that sold insurance in Germany during World War II, finding that the law intruded into the President’s conduct of foreign affairs.<sup>175</sup>

California’s view of its waiver authority shreds these prudent constraints. Any global issue – including climate change – would be fair game for California to address through its auto standard-setting authority. Indeed, California has touted the ZEV Program as a key policy “to show the world how to meet” the Paris Climate Accord,<sup>176</sup> even though the President chose to withdraw from that treaty.<sup>177</sup> California has even entered into formal partnership agreements with

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<sup>171</sup> See, e.g., *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) (applying the doctrine of constitutional avoidance, which “resolve[s] statutory questions at the outset where to do so might obviate the need to consider a constitutional issue.”).

<sup>172</sup> *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

<sup>173</sup> *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016).

<sup>174</sup> *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434, 449 (1979) (negative Foreign Commerce Clause protects the National Government's ability to speak with "one voice" in regulating commerce with foreign countries).

<sup>175</sup> *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003)

<sup>176</sup> California Plans to Show the World How to Meet the California Climate Target, *The Guardian* (Sept. 17, 2018), available at <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/sep/17/california-plans-to-show-the-world-how-to-meet-the-paris-climate-target>

<sup>177</sup> Statement by President Trump on the Paris Climate Accord (June 1, 2017), available at <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>

foreign governments in order to implement its ZEV mandate, stating “[w]e aren’t going to get there until Chinese business people, Chinese government leaders make it a priority to develop batteries and electric cars. And we will too.”<sup>178</sup> Congress never envisioned that Section 209(b)’s grant of authority to address *local* air quality would empower California to regulate *global* issues and disrupt the orderly conduct of the nation’s foreign affairs.

E. EPA Should Avoid Automatically Granting Waiver Applications Under CAA § 209(b)

In several determinations granting California preemption waiver applications, EPA has unnecessarily limited the scope of its review while providing unwarranted deference to the state. These limitations include at least two self-imposed restraints that lack any support in the Clean Air Act and operate to remove the burden on California to justify the departure from national standards and demonstrate that a unique state standard is necessary to address compelling and extraordinary conditions.

*First*, EPA has declared that it will only perform a limited review of California waiver applications because it believed that Congress did not want “the federal government” to “second-guess state policy choices.”<sup>179</sup> This has resulted in a reversal of the burden of proof required under CAA § 209(b) so that anyone opposed to a California waiver application must produce “‘clear and compelling’ evidence to show that the proposed procedures undermine the protectiveness of

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<sup>178</sup>Jessica Meyers, Governor Jerry Brown Says California Wants China’s Help on Electric Vehicles, *Los Angeles Times* (June 5, 2017), available at <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-gov-jerry-brown-says-california-wants-1496685564-htmlstory.html>

<sup>179</sup> 78 Fed. Reg. 44,111, 44,114 (July 23, 2013) (California Urban Bus standards); *id.* at 44,115 (EPA will “afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”).

California standards.”<sup>180</sup> This heightened burden *in favor* of approval not only contravenes CAA § 209(b) but imposes a standard on challenging parties that is inconsistent with the Administrative Procedure Act.<sup>181</sup> In addition, such deferential review, at least in the case of EPA’s approval of the 2013 ZEV mandate waiver, does not comply with Executive Order 12866’s requirement to conduct a cost-benefit analysis for significant rulemakings.<sup>182</sup> Nothing in Executive Order 12866 exempts EPA’s evaluation of California waiver applications from its responsibilities to perform a cost-benefit analysis, however, EPA did not perform one in issuing the 2013 ZEV mandate waiver.<sup>183</sup> The ZEV mandate imposes substantial costs, well exceeding \$100 million, on all new vehicle purchasers, not just on new vehicle purchasers in California and states that choose to adopt the ZEV mandate.

*Second*, EPA has traditionally declined to review the actual regulations that are the subject of a California waiver application. Instead, it only reviews the question of whether California requires a separate motor vehicle emissions control program instead of reviewing the actual substance of the regulations. This creates a perpetual bootstrap approval where prior waivers automatically justify departures from federal standards and converts the Administrator’s duty to review California preemption waiver applications into a *pro forma* rubber stamp. EPA should use

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<sup>180</sup>77 Fed. Reg. 9,239, 9,241 (Feb. 16, 2012) (approval of waiver for California non-road engine standards and truck idling requirements) (citing *Motor & Equip. Mfrs. Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979)).

<sup>181</sup> See 5 U.S.C. § 706 (barring agency action that is unlawful, arbitrary and capricious, or an abuse of discretion).

<sup>182</sup> The 2013 waiver decision incorrectly asserted that granting a Clean Air Act preemption waiver for the ZEV mandate was not a “rule” as defined under the Regulatory Flexibility Act. 5 U.S.C. § 601(2). See 78 Fed. Reg. at 2,145. The 2013 waiver does not fall under any exemption to the definition of a “rule” identified in the Regulatory Flexibility Act. Further, due to the costs imposed by the ZEV mandate on new vehicle purchasers nationwide, it should be considered a “significant regulatory action” subject to Executive Order 12866’s requirements.

<sup>183</sup> Nor did the 2013 ZEV mandate waiver undergo inter-agency or Small Business Administration review under Executive Order 12866 and the Regulatory Flexibility Act.

this opportunity to change the way it reviews California preemption waiver applications by adhering to the language of CAA § 209(b).

1. The Clean Air Act Does Not Permit EPA to Defer to California on Whether it May Deny an Application

Section 209(b)(1) states that “[n]o such waiver shall be granted if the *Administrator* finds that” California “does not need such State standards to meet compelling and extraordinary conditions....”<sup>184</sup> Instead of taking up this statutory duty, the Administrator has often deferred to California on whether there are grounds to deny its own application,<sup>185</sup> as well as “on ambiguous and controversial matters of public policy.”<sup>186</sup> Further, whenever there is any question of whether the Administrator should find that the grounds for denial under CAA § 209(b)(1) are present, it has *reversed* the burden of proof by placing it upon objectors.<sup>187</sup> There is nothing in the statute even hinting at either policy and that is no ambiguity in the statutory language that justifies EPA creating such an interpretation.

Nothing in the Clean Air Act supports deference to California regarding the criteria listed in CAA § 209(b)(1)(A)-(C). The language unambiguously charges “the Administrator” with “find[ing]” whether or not any of the listed grounds exist. Despite claiming “that the text, [and] structure ... of the California waiver provision” demand deference to California,<sup>188</sup> EPA has never actually identified any aspect of the text or structure supporting this claim. Instead, it has always relied on a statement in a House Committee report as an indication of Congressional intent for the

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<sup>184</sup> 42 U.S.C. § 7543(b)(1)(B) (emphasis added).

<sup>185</sup> 78 Fed. Reg. at 2,115-16.

<sup>186</sup> 73 Fed. Reg. at 12,158.

<sup>187</sup> 78 Fed. Reg. at 2,116.

<sup>188</sup> *Id.* at 2,115.

Administrator “to afford California the broadest possible discretion” in approving preemption waiver applications.<sup>189</sup> Yet, EPA has never identified any ambiguity in CAA § 209(b)(1) allowing it to resort to the legislative history in the first place.<sup>190</sup> Here, the statute unambiguously commands the “Administrator” to “find[ ]” whether there are grounds to deny a preemption waiver application, not California.

Such deference is precluded as a matter of law, but it should also be precluded for more practical reasons. Contrary to EPA’s frequent claims, the California regulations subject to preemption waivers are not merely “mechanisms” that California “chooses to use to address its air pollution problems,”<sup>191</sup> but have national character and effect. Under CAA § 177, other states may adopt those standards to comply with National Ambient Air Quality Standards. In this case, nine other states representing approximately 30% of the automotive market have also adopted California’s ZEV mandate. This means that California is not merely making policy for itself regarding “the importance, value, or benefit for California that might be derived from a specific set of GHG standards....”<sup>192</sup> As a *de facto* national automotive emissions regulator, California’s regulations require the Administrator to, at the very least, make independent judgments regarding CAA § 209(b)’s criteria for denial, as the statutory text requires.<sup>193</sup>

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<sup>189</sup>*Id.* at 2,115-16.

<sup>190</sup>*See Dept’ of Housing & Urban Devel. v. Rucker*, 535 U.S. 125, 132-133 (2002) (“reference to legislative history is inappropriate when the text of the statute is unambiguous.”); *Chicago v. Env’tl Defense Fund*, 511 U.S. 328, 337 (1994) (“But it is the statute, and not the Committee Report, which is the authoritative expression of the law”).

<sup>191</sup>74 Fed. Reg. at 32,763.

<sup>192</sup>73 Fed. Reg. at 12,158.

<sup>193</sup> With respect to GHG emissions, heightened review is even more appropriate due to the effects of domestic GHG regulations on foreign policy and international relations.

2. EPA Should Review the Standards Subject to a Preemption Waiver Application, not Just the “Program as a Whole”

In prior reviews of California applications for preemption waivers, EPA has interpreted its duty under CAA § 209(b) as determining whether California needs its own motor vehicle emissions control *program* to meet compelling and extraordinary conditions, not whether a particular emissions standard is needed to meet compelling and extraordinary conditions related to state air quality concerns.<sup>194</sup> This approach of evaluating whether California needs its “program as a whole,”<sup>195</sup> instead of the individual emission standard at issue, is wrong for at least two reasons.

First, evaluating California’s “program as a whole” defies the text of the Clean Air Act. Section 209(b) speaks only of waiving Clean Air Act preemption for “standards.” The Administrator shall “waive application of this section to any State which has adopted *standards* ... for the control of emissions from new motor vehicles or new motor vehicle engines ... if the State determines that the State *standards* will be ... at least as protective of public health and welfare as applicable Federal *standards*.”<sup>196</sup> (emphases added). The Administrator shall deny a waiver application if “such State does not need such State *standards*” or “such State *standards* and accompanying enforcement procedures are not consistent with section 7521(a)...”<sup>197</sup> The word “program” is not found anywhere in CAA § 209(b). Further, the Clean Air Act defines “emission

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<sup>194</sup>73 Fed. Reg. at 12,159; *see also* 74 Fed. Reg. at 32,759 (question is “whether California needs a separate motor vehicle program to meet compelling and extraordinary conditions.”); 49 Fed. Reg. at 18,889 (question is whether “California needs its own motor vehicle pollution control program to meet compelling and extraordinary conditions, and not whether any given standard (*e.g.*, the instant particulate standards) is necessary to meet such conditions.”) (footnote omitted).

<sup>195</sup> 73 Fed. Reg. at 12,160.

<sup>196</sup> 42 U.S.C. § 7543(b)(1).

<sup>197</sup> *Id.* §§ 7543(b)(1)(B)-(C) (emphases added)

standard” as a discrete “requirement established by the State ... which limits the quantity, rate, or concentration of air pollutants on a continuous basis...”<sup>198</sup> This definition applies to “any requirement ... promulgated under this chapter,” including Title II.<sup>199</sup> EPA has never identified any ambiguity in either CAA § 209(b) or the Clean Air Act’s definition of “emission standard” that would allow it to interpret a discrete “standard” as being synonymous with an entire portfolio of individual standards administered as a “program.”

Second, that the question of whether California needs its own motor vehicle pollution control program was already answered in the affirmative by Congress. The entire purpose of the waiver program is to create a mechanism for California to retain and further develop its own motor vehicle pollution control program, but only to the extent necessary to address a compelling and extraordinary local pollution problem. By shifting EPA’s responsibilities under CAA § 209(b) from reviewing the preemption waiver applicability for individual standards to considering merely whether California should have *any type* of motor vehicle emission control program renders all of CAA § 209(b) surplusage. EPA will, and until 2008 EPA has, provided the same answer for over 40 years: California needs its own motor vehicle emission control program. No other answer is possible under EPA’s “program as a whole” interpretation, as once EPA has determined that California requires a “program,” there is nothing left to evaluate under further preemption waiver applications. The statute requires the Administrator to undertake a substantive evaluation of “standards.” The “program as a whole” approach is an abdication of that statutory duty and allows EPA to bootstrap *any* new CARB regulation based on EPA’s prior approval of the program.

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<sup>198</sup> *Id.* § 7602(k).

<sup>199</sup> *Id.*

F. The Clean Air Act Prohibits Other States From Adopting California’s ZEV Mandate

To date, nine states have adopted California’s ZEV mandate pursuant to CAA § 177, representing approximately 30% of U.S. automotive sales. However, because CAA § 177 is limited to air pollutants subject to National Ambient Air Quality Standards (“NAAQS”), these states are prohibited from adopting the California ZEV mandate even if it was not subject to EPCA preemption (which it is) or if EPA chooses not to rescind California’s Clean Air Act preemption waiver.

Under the Clean Air Act, “any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of new motor vehicles or new motor vehicle engines ... if (1) such standards are identical to the California standards for which a waiver has been granted for such model year....”<sup>200</sup> The “part” referenced in CAA § 177 is Part D, entitled “Nonattainment areas in general.” Therefore, to adopt California standards, there must not only be a NAAQS for the pollutant regulated by the California standard, but that state must be classified as non-attainment for that NAAQS. This is only reinforced by the title of CAA § 177 itself: “New motor vehicle emission standards in nonattainment areas.”<sup>201</sup> There is currently no NAAQS for GHGs. Without a need to come into compliance with an existing GHG NAAQS, States are precluded from adopting California’s ZEV mandate.

**VIII. NHTSA Reasonably Determined that EPCA Preempts California’s GHG Tailpipe Program and ZEV Mandate**

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<sup>200</sup> *Id.* § 7507(1).

<sup>201</sup> See *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1298 n.33 (D.C. Cir. 1979) (“Section 177 applies to states that have not attained compliance with national standards.”); *Motor Vehicle Mfrs. v. New York State Dep’t of Env’tl Conserv.*, 810 F. Supp. 1331, 1338 (N.D.N.Y. 1993) (“§ 177 gives these non-attainment states the option of adopting the California vehicle emissions program to support their efforts to comply with the ozone and carbon monoxide standards.”); see also *Amer. Auto Mfrs. Ass’n v. Cahill*, 973 F. Supp. 288, 310 (N.D.N.Y. 1997) (legislative history shows that Congress adopted § 177 “to enable individual states to address poor air quality.”).

AFPM supports NHTSA’s determination that California’s ZEV mandate is preempted by EPCA. This statute unambiguously vests NHTSA with exclusive authority to regulate motor vehicle fuel economy: “a State or a political subdivision of a State may not adopt or enforce a law or regulation *related to* fuel economy standards.”<sup>202</sup> NHTSA has consistently recognized that the plain language of the statute (“related to”) provides a broad sweep of preemption over any state standard that touches on or effects fuel economy and several courts have agreed. NHTSA is correct in finding that, under EPCA’s plain language, California’s ZEV mandate is both “related to” fuel economy standards and preempted. Even if the statute were ambiguous, NHTSA’s interpretation that GHG tailpipe standards are inextricably “related to” fuel economy standards is a reasonable – and indeed the best – interpretation and a sound policy choice.

A. Statutory Background

EPCA directs the Secretary of Transportation to prescribe CAFE standards for new motor vehicles.<sup>203</sup> The Secretary delegated this authority to NHTSA, which has specialized expertise in automotive technology and safety. Congress was quite clear that, although EPA plays a role in establishing CAFE standards, it is a consultative role only: “The Secretary of Transportation, after consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall prescribe separate average fuel economy standards....”<sup>204</sup> EPCA requires NHTSA to base CAFE standards on “the maximum feasible average fuel economy level that” NHTSA “decides the manufacturers can achieve” in the applicable model year.<sup>205</sup> The “maximum feasible

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<sup>202</sup> 49 U.S.C. § 32919(a) (emphasis added).

<sup>203</sup> *Id.* § 32902.

<sup>204</sup> *See id.* § 32902(b)(1).

<sup>205</sup> *Id.* § 32902(a).

average fuel economy” is based on NHTSA’s review of “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.”<sup>206</sup> Although NHTSA must consider the effect of other governmental regulations, Congress intended that NHTSA would have exclusive authority over a single set of national fuel economy standards.<sup>207</sup> To accomplish that objective, EPCA includes a broad preemption provision stating that “a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel standard under this chapter.”<sup>208</sup> Nothing in EPCA, or any other statute, allows for exemptions to, or waivers of, this preemption provision.

B. EPCA’s “Related to” Provision Preempts State Fuel Economy Regulation

The term “related to” indicates that Congress intended the broadest possible preemptive effect over state law in the field of fuel economy regulation. A State regulation need not directly regulate fuel economy, or directly conflict with NHTSA’s own fuel economy regulations, to trigger the “related to” preemption provision.<sup>209</sup> There can be no doubt that California’s GHG tailpipe standards and ZEV mandate are “related to” fuel economy. That’s their primary purpose.<sup>210</sup>

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<sup>206</sup> *Id.* § 32902(f). Beginning in model year (“MY”) 2011, NHTSA was required to establish standards that could gradually increase towards a goal of 35 miles per gallon for the combined fleet of passenger automobiles and light duty trucks by MY 2020. *Id.* § 32902(b)(2).

<sup>207</sup>NHTSA must consider the effect on fuel economy of EPA’s Title II standards, including the use of catalytic converters, PM traps and other technologies that address emissions and have a fuel economy impact. *See id.* § 32902(f).

<sup>208</sup> *Id.* § 32919(a).

<sup>209</sup>*See, e.g., Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 85, 101-02 (S.D.N.Y. 2009) (finding city ordinance effectively mandating taxi owners to shift fleets to hybrids to be expressly preempted), *aff’d on modified grounds by Metro Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010).

<sup>210</sup>NHTSA itself previously determined that California’s ZEV program conflicted with CAFE standards. *See* 83 Fed. Reg. at 42,999.

Even if the “related to” language were not plain, and Congress’s intent to preempt the field were not evident, the California ZEV mandate actually conflicts with EPCA by imposing an obstacle to Congressional goals under that statute, creating a separate rationale to find it preempted.<sup>211</sup> When it passed EPCA, Congress sought to improve fuel economy but not at the expense of consumer choice and OEM compliance flexibility. The California ZEV mandate undercuts this flexibility by mandating vehicles that OEMs must sell and limiting what consumers may purchase. This is a direct affront to federal CAFE standards. In its CAFE standards, NHTSA strikes a careful balance between maximizing fuel economy and other congressional aims. California’s approach mandates one particular suite of technologies – electric battery and fuel-cell – while stifling the development of other technologies that might accomplish the same energy goals at lesser cost or lesser harm to the environment. Further, as discussed in more detail above, mandating the use of battery-driven vehicles creates a significant dependence on foreign supplies for various metals and other materials. This is the very type of over-dependence on foreign markets that EPCA was created to prevent.

NHTSA first discussed the preemptive effects of the CAFE standards in 2002.<sup>212</sup> Again, in 2006, NHTSA discussed the preemptive effect of the CAFE standards and provided an extensive analysis of proposed California GHG regulations.<sup>213</sup> There, it found that any regulation of CO<sub>2</sub> emissions must be preempted “because it has the direct effect of regulating fuel consumption.”<sup>214</sup>

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<sup>211</sup> See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (state laws that stand as an obstacle to accomplishing or executing the purposes and objectives of Congress is preempted).

<sup>212</sup> 67 Fed. Reg. 77,025 (Dec. 16, 2002).

<sup>213</sup> 71 Fed. Reg. 17,566, 17,654-670 (Apr. 6, 2006).

<sup>214</sup> *Id.* at 17,654.

Specifically, “CO<sub>2</sub> emissions are always and directly linked to fuel consumption because CO<sub>2</sub> is the ultimate end product of burning gasoline. The more fuel a vehicle burns or consumes, the more CO<sub>2</sub> it emits.”<sup>215</sup> NHTSA determined that “the only technologically feasible, practicable way for vehicle manufacturers to reduce CO<sub>2</sub> emissions is to improve fuel economy.”<sup>216</sup> Thus, “a State regulation that requires vehicle manufacturers to reduce those emissions is a ‘regulation related to fuel economy standards or average fuel economy standards.’”<sup>217</sup>

In addition to express preemption, NHTSA also found that state laws regulating CO<sub>2</sub> were subject to conflict preemption.<sup>218</sup> Congress intended for one entity—NHTSA—to regulate fuel economy based on a careful balancing of the relevant factors identified in the statute to effectuate Congress’s interrelated goals for the program.<sup>219</sup> Among the goals cited by NHTSA are “national uniform fuel economy standards ‘[i]n order to avoid any manufacturer being required to comply with differing state and local regulations,’” “avoiding serious adverse economic effects on manufacturers,” and “maintaining a reasonable amount of consumer choice among a variety of vehicles.”<sup>220</sup> Permitting state regulation of automotive CO<sub>2</sub> emissions “would frustrate the objectives of Congress in establishing the CAFE program and conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA.”<sup>221</sup> This

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<sup>215</sup> *Id.* 17,659 (footnotes omitted).

<sup>216</sup> 71 Fed. Reg. at 17,656.

<sup>217</sup> *Id.* (quoting 49 U.S.C. § 32919(a)).

<sup>218</sup> *Id.* at 17,667-70.

<sup>219</sup> *Id.* at 17,667-68.

<sup>220</sup> *Id.* at 17,667.

<sup>221</sup> *Id.*

interpretation supports the central purpose of the preemption provision, which is “to avoid any manufacturer being required to comply with differing State and local regulations with respect to automobile or light-duty truck fuel economy.”<sup>222</sup> Further, Congress did not include any waivers of the EPCA preemption provision, as it did in the Clean Air Act., for new motor vehicle tailpipe emissions of criteria pollutants.<sup>223</sup>

The ZEV mandate depends, in part, upon a complex credit trading system that creates additional preemption issues under EPCA.<sup>224</sup> In addition to being “related to” fuel economy, the ZEV credit program impinges on Congressional authority provided to the Department of Transportation to create a fuel economy credit trading program.<sup>225</sup>

The 2006 rulemaking also addressed arguments against preemption such as claims that it should be read narrowly in light of the Clean Air Act’s waiver provision and the requirement under 49 C.F.R. § 32902 to consider other federal government standards that may affect fuel economy.<sup>226</sup> NHTSA correctly determined that, in light of the broad meaning of “related to,” none of these arguments are persuasive.<sup>227</sup> Based on Supreme Court precedent interpreting such language in other statutes (*e.g.*, ERISA and the Airline Deregulation Act) and EPCA’s legislative history, NHTSA concluded that Congress intended the “related to” preemption provision to be broadly

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<sup>222</sup> *Id.* at 17,657.

<sup>223</sup> *Id.* at 17,656-57.

<sup>224</sup> *See, e.g.*, 13 C.C.R. §§ 1962.1, 1962.2.

<sup>225</sup> 49 U.S.C. § 32903(f)(1).

<sup>226</sup> 71 Fed. Reg. at 17,655. NHTSA must consider the effect on fuel economy of EPA’s Title II standards, including the use of catalytic converters, PM traps and other technologies that address emissions and have a fuel economy impact. *See* 49 U.S.C. § 32902(f).

<sup>227</sup> 71 Fed. Reg. at 17,655-56.

construed in accordance with the ordinary meaning of the term.<sup>228</sup> Preserving state automotive CO<sub>2</sub> regulations would render EPCA’s preemption provision meaningless.<sup>229</sup>

In the model year 2011-2015 average fuel economy standards passenger cars and light trucks, NHTSA revisited its preemption interpretation in light of *Massachusetts v. EPA*.<sup>230</sup> NHTSA affirmed its prior interpretation of EPCA preemption, correctly found that *Massachusetts* “did not consider the issue of preemption under EPCA of state regulations regulating CO<sub>2</sub> tailpipe emissions from automobiles,” and “respectfully disagree[d]” with two district court decisions finding that that state’s automotive CO<sub>2</sub> emission regulations are not “related to” fuel economy standards.<sup>231</sup> NHTSA proposed to codify its preemption interpretation in the Code of Federal Regulations.<sup>232</sup>

When President Obama took office in January 2009, he issued a memorandum directing NHTSA to “consider whether any provisions regarding preemption are consistent with provisions of” the Energy Independence and Security Act and *Massachusetts v. EPA*.<sup>233</sup> NHTSA responded by issuing a notice that it was “reconsidering its views regarding preemption under EPCA of state standards regulating motor vehicle tailpipe emissions of carbon dioxide.”<sup>234</sup> As instructed, NHTSA reconsidered the issue but never reversed its original 2006 interpretation of EPCA’s

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<sup>228</sup> *Id.* at 17,656-57.

<sup>229</sup> *Id.* at 17,669

<sup>230</sup> 549 U.S. 497 (2007); *see* 73 Fed. Reg. 24,352, 24,478 (May 8, 2008).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 24,479.

<sup>233</sup> Memorandum from President Obama to Secretary of Transportation and Administrator of NHTSA. 74 Fed. Reg. 11,993 (Mar. 20, 2009).

<sup>234</sup> 74 Fed. Reg. 11,993, 11,994 (Mar. 20, 2009).

preemption provision. Instead, it has consistently held this interpretation by re-affirming it in 2008 and again in the Proposed Rule.

Most courts agree with NHTSA's broad interpretation of EPCA's "related to" language. The Eastern District of California preliminarily enjoined an earlier version of California's ZEV mandate as impermissibly regulating fuel economy through requirements to sell large numbers of electrified vehicles and limiting consumer choices in contravention of EPCA's purpose.<sup>235</sup> Similarly, courts have found that regulations require hybrid taxis are preempted.<sup>236</sup> Each of these found that requirements to purchase or use hybrid vehicles were "related to" fuel economy, and therefore, preempted under EPCA.

The Second Circuit, in particular, announced a broad test, holding that if a state law references "the preempted subject matter ... or makes the existence of preempted subject matter essential to the law's operation, then that state law is preempted by federal law."<sup>237</sup> In that case, the court held that the challenged law's mere reference to hybrid vehicles "does nothing more than

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<sup>235</sup> *Cent. Valley Chrysler-Plymouth v. CARB*, No. CV-F-02-5017, 2002 WL 34499459, at \*3-5 (E.D. Cal. June 11, 2002). The court also rejected California's claim that it could immunize the ZEV mandate against EPCA preemption by obtaining a preemption under the Clean Air Act. Other courts have prohibited various state or municipal laws on similar grounds. See *Ophir v. City of Boston*, 647 F. Supp. 2d 86, 88-94 (D. Mass. 2009) (municipal ordinance mandating all-hybrid taxi fleet by 2015); *Metro. Taxicab Bd. of Trade v. City of New York*, No. 08-CV-7837, 2008 WL 4866021, at \*9 (S.D.N.Y. Oct. 31, 2008) (granting a preliminary injunction against city ordinance expressly incorporating fuel economy standards and effectively requiring hybrids); see also *Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 85, 101-02 (S.D.N.Y. 2009) (finding city ordinance effectively mandating taxi owners to shift fleets to hybrids to be expressly preempted), *aff'd on modified grounds by Metro Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010).

<sup>236</sup> See *Ophir v. City of Boston*, 647 F. Supp. 2d 86, 88-94 (D. Mass. 2009) (municipal ordinance mandating all-hybrid taxi fleet by 2015); *Metro. Taxicab Bd. of Trade v. City of New York*, No. 08-CV-7837, 2008 WL 4866021, at \*9 (S.D.N.Y. Oct. 31, 2008) (granting a preliminary injunction against city ordinance expressly incorporating fuel economy standards and effectively requiring hybrids); see also *Metro. Taxicab Bd. of Trade*, 633 F. Supp. 2d at 85, 101-02 (S.D.N.Y. 2009) (finding city ordinance effectively mandating taxi owners to shift fleets to hybrids to be expressly preempted).

<sup>237</sup> *Metro Taxicab Bd. Of Trade*, 615 F.3d at 156-157.

draw a distinction between vehicles with greater or lesser fuel-efficiency.”<sup>238</sup> Since EPCA requires NHTSA to consider “electricity” as a form of “alternative fuel,”<sup>239</sup> the court found no plausible way the law could escape EPCA’s “related to” preemption clause.<sup>240</sup>

With respect to California’s ZEV mandate, there is no doubt that it is, and was intended to be, “related to” fuel economy standards. President Obama, at a press event at the White House Rose Garden, announcing the “National Program” agreement, lamented that “the rules governing fuel economy in this country are inadequate, uncertain, and in flux. First, there is the standard for fuel economy administered by the Department of Transportation. On top of that, the Environmental Protection Agency, in response to a decision by the Supreme Court, may have to set limits on greenhouse gas emissions from vehicles – establishing another standard. California has sought permission under the Clean Air Act to require that vehicles sold in California meet yet another even stricter emission rule. And 13 states and the District of Columbia have agreed to adopt California greenhouse gas reductions....”<sup>241</sup> According to President Obama, the California ZEV mandate was not just “related to” fuel economy, but a stand-alone state fuel economy standard. Even under the narrowest view of “related to,” the California ZEV mandate should be preempted.

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<sup>238</sup> *Id.* at 157.

<sup>239</sup> *See* 49 U.S.C. § 32901(a)(1)(J).

<sup>240</sup> 615 F.3d at 157.

<sup>241</sup> The White House, Office of the Press Secretary, Remarks by the President on national fuel efficiency standards (May 19, 2009).

C. Two District Court Cases Declining to Find Preemption Were Incorrectly Decided

Two district court decisions disagreed with NHTSA's views on preemption, although NHTSA was not a party to those cases.<sup>242</sup> Those opinions, however, interpreted the term "related to" in an extraordinarily narrow fashion, and relied on a statutory definition that included California GHG standards receiving a waiver as "federal standards" even though that statute was previously repealed.

In *Green Mountain Chrysler Plymouth Dodge v. Crombie*, the district court denied that Vermont's adoption of California CO<sub>2</sub> standards was "related to" NHTSA's fuel economy standards, despite conceding the practical relationship between them, on the grounds that the two regulatory schemes did not completely overlap.<sup>243</sup> Thus, because the court concluded that "[c]ompliance with the regulation is not achieved *solely* by improving a fleet's fuel economy,"<sup>244</sup> Vermont's adoption of California CO<sub>2</sub> standards cannot be "related to" national fuel economy standards. This conclusion can only be reached through an overly narrow interpretation of "related to" that differs from the plain meaning of the term and Supreme Court case law interpreting the phrase.

Further, the *Green Mountain Chrysler* court failed to recognize that the California CO<sub>2</sub> standard's use of strategies, such as employing alternative fuels and PHEVs are among the

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<sup>242</sup> See *Green Mountain Chrysler Plymouth Dodge v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007); *Central Valley Chrysler-Jeep v. Witherspoon*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

<sup>243</sup> See 508 F. Supp. 2d at 351 ("the GHG regulations embrace much more than a simple requirement to improve fuel economy, cloaked in the rhetoric of reducing carbon dioxide emissions"); *id.* at 352 ("the fact that manufacturers may have to increase fuel economy to some degree in order to comply" with Vermont's adoption of California CO<sub>2</sub> standards "does not *per se* convert an emissions standard to a fuel economy standard"); *id.* at 353 (Vermont's adoption of California CO<sub>2</sub> standards are not "related to" CAFE standards because they "take into account upstream emissions associated with different types of fuels")

<sup>244</sup> *Id.* at 353 (emphasis added).

technological means a manufacture may use to improve the fleet average fuel economy and that they are expressly considered by NHTSA under EPCA.<sup>245</sup> The district court acknowledged that, in formulating the California CO<sub>2</sub> standards, California considered the same factors as NHTSA in setting CAFE standards but came to different conclusions.<sup>246</sup> Yet the court failed to realize that the overlap in considerations, and differences in conclusions, creates a conflict between California's CO<sub>2</sub> standards and the federal regulatory scheme.<sup>247</sup>

The *Green Mountain Chrysler* court also mistakenly believed that an EPA preemption waiver under the Clean Air Act immunizes the California CO<sub>2</sub> standards from EPCA preemption.<sup>248</sup> Specifically, the court erroneously determined that “once EPA issues a waiver for a California emissions standard, it becomes a motor vehicle standard of the government, with the same stature as a federal regulation with regard to determining maximum feasible average fuel economy under EPCA.”<sup>249</sup> Since one federal standard cannot be preempted by another federal standard, the court reasoned, the California CO<sub>2</sub> standards cannot be preempted by EPCA.<sup>250</sup> The

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<sup>245</sup> See, e.g., 49 U.S.C. §§ 32901(a)(1), (10) (defining fuel and alternative fuel), 32904(a)(2) (defining electric vehicle and directing Secretary to calculate equivalent petroleum-based fuel economy values), 32905 (establishing incentives and calculating fuel economy for alternative-fuel vehicles).

<sup>246</sup> See 508 F. Supp. 2d at 338 (“CARB examined virtually the same factors that NHTSA examines when it sets a CAFE standard: technological feasibility and economic impact, including cost to manufacturers, cost to consumers, and job loss”).

<sup>247</sup> See also Proof Brief for the United States as Amicus Curiae, *Green Mountain Chrysler-Plymouth Dodge v. Tori*, No. 07-4342-cv (L), 2008 WL 8045716, at \*14-\*18 (Apr. 17, 2008) (explaining why the district court's EPCA preemption analysis was erroneous); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000) (deferring to DOT's view of Motor Vehicle Safety Act preemption in an *amicus* brief because “Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive.”).

<sup>248</sup> See generally 508 F. Supp. 2d 343-350.

<sup>249</sup> *Id.* at 347.

<sup>250</sup> *Id.* at 350.

court’s reasoning – equating EPA’s waiver of Clean Air Act preemption to the federalization of a state standard – was incorrect for three reasons.

First, Section 209(b) specifically states that EPA’s issue of a preemption waiver “shall be treated as compliance with applicable Federal standards for purposes of this subchapter,”<sup>251</sup> not with any other law, such as EPCA. The *Green Mountain Chrysler* court’s determination would nullify this clear statutory limitation.

Second, unlike with many other standards under the Clean Air Act, Congress never created a mechanism for a California emission standard receiving a waiver to become “a federal regulation,” as the court claimed. California’s automotive CO<sub>2</sub> standards are not included in the various provisions of the Clean Air Act that delegate federal authority to States.<sup>252</sup> Unlike other state-promulgated regulations under the Clean Air Act, California’s automotive CO<sub>2</sub> standards are not federally enforceable.<sup>253</sup> Lacking a federal delegation of authority and federal enforceability, there is no plausible way to characterize a state regulation that is merely shielded from Clean Air Act preemption as a federal law. Thus, California’s automotive CO<sub>2</sub> standards are “regulations “adopt[ed] or enforc[ed]” by “a State or political subdivision of a State,”<sup>254</sup> and are subject to EPCA preemption.

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<sup>251</sup> 42 U.S.C. § 7543(b)(3).

<sup>252</sup> See, e.g., *id.* §§ 7410(a) (state implementation plans with enforceable control measures), 7411(c) (delegation of New Source Performance Standards), 7471 (delegation of Prevention of Significant Deterioration/ New Source Review program), 7491(b)(2)(A) (delegation of regional haze determinations), 7661a (delegation of Title V permitting program).

<sup>253</sup> See *id.* § 7413(a) (delegated standards established by States and approved by EPA are federally enforceable); see also *id.* § 7604 (delegated State regulations and permits are enforceable through the Clean Air Act’s citizen suit provision).

<sup>254</sup> 49 U.S.C. § 32919(a).

Third, the *Green Mountain Chrysler* court offered a separate, independent ground for treating California standards subject to a Clean Air Act waiver as a federalized “motor vehicle standard of the government” based on a repealed statute. The court cited to Section “502(d)(3)(D)(i)” where EPCA formerly provided that “[e]ach of the following is a category of Federal standards; (i) Emission standards under section 202 of the Clean Air Act, and emission standards applicable by reason of section 209(b) of such Act.”<sup>255</sup> However, as the court acknowledged, Congress repealed this section.<sup>256</sup> The court was undeterred, stating that Congress *intended* to re-codify this section “without substantive change” even if it actually failed to re-codify the section at issue.<sup>257</sup> However, this is not the whole story. The Act states that its purpose is to “revise, codify, and enact without substantive change *certain* general and permanent laws ... *and* to make other technical improvements in the Code.”<sup>258</sup>

Contrary to the court’s assumption, Congress did not merely re-codify portions of EPCA. The Act, which established the current 49 U.S.C., Part 329, dramatically changed the automotive fuel economy statutes, including adding, revising, and deleting statutes.<sup>259</sup> In other words, the basis for the court’s treatment of California’s CO<sub>2</sub> regulations as “motor vehicle standard of the

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<sup>255</sup> 508 F. Supp. 2d at 346. The former EPCA section discussed in the *Green Mountain Chrysler* decision was actually EPCA § 302, which amended § 502 of the Motor Vehicle Information and Cost Savings Act, formerly codified at 15 U.S.C. § 2002. This Section was titled “Average Fuel Economy Standards Applicable to Each Manufacturer” and listed average fuel economy standards for passenger automobiles for the model years 1978 to “1985 and thereafter.”

<sup>256</sup> 508 F. Supp. 2d at 346 (citing Pub. L. 103-272 § 7(b) (July 5, 1994), 108 Stat. 1388) (listing in chart the repeal of 15 U.S.C. §§ 2001-2002, 2012).

<sup>257</sup> *Id.* (quoting 108 Stat. 745, 745 (1994)).

<sup>258</sup> 108 Stat. 745 (emphases added).

<sup>259</sup> Compare Attachment A, former Subchapter V – Improving Automotive Efficiency, Part A – Automotive Fuel Economy, 15 U.S.C. § 2001, *et seq.* (1976), with Attachment B, Pub. L. No. 103-272. No portion of the former Section 502, previously found at 15 U.S.C. § 2002(d)(3)(D)(i), survived, including its definition of California standards subject to a Clean Air Act preemption waiver as “federal standards.”

government,” is gone. That Congress would work a major update to these statutes, as opposed to merely moving them to another part of the United States Code, makes sense given that the former “Improving Automotive Efficiency” statutes froze fuel economy at 27.5 miles per gallon in 1985. By 1994, when 15 U.S.C. § 2002 was repealed, Congress implemented a substantial overhaul of the automotive fuel economy program. The court’s conclusion that Congress merely re-codified the 1975 “Automotive Efficiency” statutes “without substantive change” is belied by a comparison between the 1975 and the 1994 statutes. Given Congress’s substantial changes to the automotive fuel economy statutes, the court had no basis to presume that the repealed definition of “Federal standards” remains effective.

The only other court to decline a finding of preemption was the Eastern District of California in *Central Valley Chrysler-Jeep v. Witherspoon*.<sup>260</sup> That decision also took an overly narrow view of EPCA’s “related to” language. There, the court held that a state regulation could only be “related to” federal fuel-economy standards if they “are explicitly aimed at establishing fuel economy standards” or if the state regulations are “the *de facto* equivalent of mileage regulation,”<sup>261</sup> meaning there is a “narrow one-to-one correlation between the pollution reduction regulation and the fuel efficiency standard.”<sup>262</sup> The court stated that “[s]tate laws that are granted waiver of preemption under the Clean Air Act that have the effect of requiring even substantial increases in average fuel economy performance are not preempted where the required increase in fuel economy is incidental to the state law’s purpose of assuring protection of public health and

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<sup>260</sup> 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

<sup>261</sup> *id.* at 1175.

<sup>262</sup> *Id.* at 1176.

welfare under the Clean Air Act.”<sup>263</sup> This reasoning is clearly contrary to any common understanding of the term “related to” and Supreme Court decisions interpreting the breadth of that term.

Further, that case adopted *Green Mountain Chrysler*’s mistaken rationale that California CO<sub>2</sub> standards were “federalized” as “other motor vehicle standards of the government” through EPCA § 502(d)(3)(D)(i) without analysis.<sup>264</sup> In fact, the plaintiffs in that case repeatedly declined to dispute this issue.<sup>265</sup> This allowed the *Central Valley Chrysler-Jeep* court to presume that California CO<sub>2</sub> regulations should be treated as if they were promulgated by EPA itself.<sup>266</sup> It then continued on to declare that, in the face of a theoretical conflict between EPA’s obligation to regulate automotive CO<sub>2</sub> emissions and NHTSA’s duty to regulate fuel economy, the Supreme Court’s decision in *Massachusetts v. EPA* required NHTSA to *yield* to EPA, and thus, California. This rationale suffers from multiple flaws: the mistaken belief that California CO<sub>2</sub> regulations were the legal equivalent of EPA regulations;<sup>267</sup> the attempt to adjudicate a hypothetical conflict that did not exist; the resolution of that conflict by holding that one federal statute (EPCA) must yield

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 1172-73.

<sup>265</sup> See 456 F. Supp. 2d 1160, 1171 (E.D. Cal. 2006); *Central Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151, 1165 (E.D. Cal. 2007) (Plaintiff-Intervenor “offers no definitive authority for the proposition that a state regulation granted waiver under section 209 remains a state regulation subject to preemption other than the absence of an explicit statutory provision to the contrary.”); *id.* at 1172 (“Plaintiffs and [Plaintiff-Intervenor] do not directly dispute that a California regulation that has been granted waiver of preemption under section 209 of the Clean Air Act is an ‘other law of the Government’”).

<sup>266</sup> *Id.* at 1165.

<sup>267</sup>At the time of both the *Green Mountain Chrysler* and *Central Valley Chrysler-Jeep* cases, California had not yet received a waiver for its CO<sub>2</sub> regulations and Vermont had not yet adopted them. Neither case was ripe and Plaintiffs could not demonstrate any injury from regulations that had not yet been implemented. Indeed, after these decisions, EPA would *deny* the California waiver application. 73 Fed. Reg. 12,156 (Mar. 6, 2008). Both cases should have been dismissed for lack of standing, making the opinions of both courts unconstitutional advisory opinions.

to another federal statute (the Clean Air Act), contrary to EPCA’s statutory command that EPA be relegated to a consultative role; and the court’s strange reading of *Massachusetts v. EPA*.

This latter error is worth mentioning in more detail. In finding that EPA had a duty to regulate mobile source CO<sub>2</sub> emissions, the Supreme Court made a passing comment that the respective responsibilities of EPA and NHTSA “may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”<sup>268</sup> Despite the Supreme Court optimistically reserving judgment on such a potential conflict, the *Central Valley Chrysler-Jeep* court believed that *Massachusetts* compelled it to *assume* a conflict and then resolve it: “the question to be answered is what happens when EPA, independently fulfilling its duty to regulate emissions that threaten ‘the public’s health and welfare’ imposes a regulatory structure that would result in fuel efficiency standards that are more stringent than the currently-operative CAFE standards?”<sup>269</sup> It then went on to answer this hypothetical question by holding that EPA CO<sub>2</sub> standards *displace* EPCA CAFE standards because it believed that “Congress intended to allocate to EPA the broader scope of authority to regulate vehicle exhaust emissions for the more important purpose of safeguarding the public’s health and welfare” and “[n]othing in the language of *Massachusetts* requires EPA to harmonize its regulation with DOT’s administration of EPCA.”<sup>270</sup> Nothing in the *Massachusetts* opinion even hints at such a conclusion and the court’s reasoning is contrary to 49 U.S.C. § 32902(b)(1).

Congress was quite clear that EPA takes a subordinate consultative role in NHTSA’s establishment of fuel economy standards: “The Secretary of Transportation, after consultation with

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<sup>268</sup> *Massachusetts v. EPA*, 549 U.S. at 532.

<sup>269</sup> 529 F. Supp. 2d at 1179.

<sup>270</sup> *Id.* at 1168.

the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall prescribe separate average fuel economy standards....”<sup>271</sup> The *Central Valley Chrysler-Jeep* court never examined Congress’s actual assignment of the Agencies’ respective roles and reached a conclusion contradicted by EPCA. The Supreme Court’s assumption that the two Agencies could coordinate their respective roles was well founded because Congress had already provided that direction.

### **IX. EPA Lacks Authority to Require the Use of Higher Octane Fuels**

AFPM does not support the potential regulatory requirement for the production or use of higher octane gasoline as a compliance options.<sup>272</sup> EPA lacks the authority to require the use of higher octane fuels under CAA § 211(c)(1)(A).<sup>273</sup> EPA is authorized to “prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle” or “motor vehicle engine” if the Administrator finds that the “fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution ... that may reasonably be anticipated to endanger the public health or welfare.”<sup>274</sup> EPA may also prohibit the use of a fuel or fuel additive if it “will impair to a significant degree the performance of any emission control device or system which is in general use.”<sup>275</sup> An “octane rating” is not a fuel or fuel additive. Octane itself does not cause or contribute to air or water

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<sup>271</sup> 42 U.S.C. § 32902(b)(1).

<sup>272</sup> 83 Fed. Reg. at 43,646.

<sup>273</sup> 42 U.S.C. § 7545(c)(1)(A).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* § 7475(c)(1)(B).

pollution or impair any emission control device. EPA does not have the authority to promulgate regulations related to vehicle or engine performance (*e.g.*, horsepower or torque).

Aside from a lack of legal authority, EPA faces numerous technical, logistical, and legal challenges and uncertainties in requiring the use of higher octane fuels. Any such requirement would need a separate rulemaking dedicated to such a purpose with an extensive technical record in support, including test data on vehicles designed for the higher octane fuel and on the existing fleet with and without higher octane. EPA would have to establish what octane level or levels it would attempt to mandate and address difficult questions about the sources of additives that it would allow or require to boost octane ratings. These could include ethanol, or other chemical additives. Depending on the source, EPA would need to balance the benefits of increased octane ratings (if any) against the substantial capital investments required for new infrastructure to produce and deliver higher octane fuels. EPA also would have to demonstrate that the benefits of increasing octane justify the cost.<sup>276</sup> This transition would take several years to implement. Further, EPA would need to coordinate with the Federal Trade Commission and ASTM International to update and harmonize retail pump labels to avoid misfueling. This would need to be undertaken in conjunction with EPA updating its own regulations to prevent misfueling.

#### **X. High-Ethanol Blends Are Impractical**

AFPM similarly cautions against relying on mid-level ethanol blends (*e.g.*, E30) for any purported efficiency benefits in either the NHTSA or EPA LDV rules. The only vehicles legally permitted to use more than 15 percent ethanol blends are flex-fuel vehicles, which are currently certified to utilize both E10 and E85. Without an alternative certification for an auto manufacturer

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<sup>276</sup> *See id.* § 7545(c)(2)(B).

to build an E30 certified vehicle, which would require extensive testing and certification procedures as well as sufficient market availability of the certification fuel, it would be inappropriate for the Administration to consider such vehicles as a viable option in the 2022-2026 compliance period. In addition, several states, including California, currently prohibit the sale of gasoline with ethanol exceeding 10 percent either directly or indirectly through emission limits on fuels.

The Administration need look no further than the marginal market uptake of E15, which has been a legal fuel since 2011 for model year 2001 and newer light-duty vehicles, to conclude that higher blends are unlikely to materialize in the near-term. EPA has documented repeatedly the real-world constraints on E15, including in the partial waiver decisions on E15.<sup>277</sup> As EPA notes, both the limited number of retail stations that offer E15 as well as the limited number of vehicles that are able to use E15 constrain additional volumes of this fuel. AFPM urges the Administration to ground its analysis in a realistic projection about the composition of the automobile fleet in the MY2021-2026 compliance period.

**XI. NHTSA Should Provide Additional Information Regarding the No Action Alternative and Re-evaluate its Assumptions Regarding Air Emissions.**

The Draft Environmental Impact Statement (“Draft EIS” or “DEIS”) requires additional information regarding the environmental impacts of the No Action Alternative to enable an informed comparison with the Proposed Rule’s preferred alternative and other alternatives. Under the No Action Alternative, there would be a dramatic increase in the use of lithium-ion batteries to accommodate conventional hybrids and electrified vehicles, however, the environmental impacts associated with this aspect of the No Action Alternative require additional analysis.

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<sup>277</sup> See 76 Fed. Reg. 4,662 (Jan. 26, 2011) (MY2001-2006 light-duty vehicles); 75 Fed. Reg. 68,084 (Nov. 4, 2010) (MY 2007 and newer light-duty vehicles).

Further, the Draft EIS appears to make assumptions regarding emissions from future electricity generation and petroleum refinery emissions that are speculative and should be re-evaluated.

A. The Draft EIS Should Include the Environmental Impacts of Vehicle Battery Manufacturing and the Extraction and Transportation of Minerals Necessary for Manufacturing

The Draft EIS includes a life cycle analysis for crude oil extraction and gasoline refining,<sup>278</sup> but a true “apples-to-apples” life cycle comparison between internal combustion engine vehicles and vehicles utilizing lithium-ion batteries requires a life cycle analysis for battery manufacturing as well.<sup>279</sup> The Draft EIS does not include any consideration of air emissions from battery manufacturing,<sup>280</sup> and makes no mention of the mineral extraction and transportation impacts required for battery production.

B. The Draft EIS Should Provide Information Regarding the Environmental Impacts of Mining and Processing Minerals Needed for Battery Manufacturing

Batteries used for electrified vehicles require several different minerals for their manufacture, including aluminum, cobalt, copper, graphite, lithium, manganese, and nickel. Mineral mining and processing operations can have significant environmental impacts, including the emissions of air toxics, criteria pollutants, and GHGs, surface and groundwater impacts, and solid and hazardous waste generation.<sup>281</sup> It is important to provide a full analysis of the environmental impacts of the increased mining and processing operations that will occur under the

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<sup>278</sup> DEIS at 6-6 to 6-9.

<sup>279</sup> The Draft EIS provides some information on lithium-ion batteries, lead acid batteries, and vanadium redox flow batteries. DEIS at 6-44 to 6-47. Since lithium-ion batteries are the preferred batteries for electrified vehicles, *id.* at 6-44, all references to vehicle batteries here are to lithium-ion batteries.

<sup>280</sup> *id.* at 6-14.

<sup>281</sup> See, e.g., EPA, Technical Resource Document, Extraction and Beneficiation of Ores and Minerals, Copper, EPA 530-R-94-301 (Aug. 1994) at 1-63 (summary of environmental effects from copper mining).

No Action Alternative to illustrate the environmental harms that will be avoided under the Proposed Rule's alternatives.

The need to provide further environmental analysis is briefly illustrated through the Draft EIS's discussion of magnesium.<sup>282</sup> Although the Draft EIS considered magnesium as a material that may be used for light-weighting, it provides a basic overview of the energy-intensity of its refining processing as compared to similar materials, GHG emissions from fuel sources and cover gases, air toxics and ozone-depleting emissions from that process, and air emissions associated from magnesium recycling.<sup>283</sup> Although the Draft EIS's review omits environmental impacts from mining and solid and hazardous waste impacts from the refining process, it still provides the public with useful information on the GHGs involved in the process, including the use of sulfur hexafluoride and perfluorocarbons.<sup>284</sup> Only through such a comparison can the reader conclude that using magnesium parts to reduce vehicle weight has far more significant environmental impacts than the use of steel or aluminum parts. A similar review of the environmental impacts of mineral mining and processing for key battery components, as well as more robust review of battery recycling and disposal impacts (discussed below), will allow for a more informed view of the environmental impacts avoided by the Proposed Rule.

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<sup>282</sup> DEIS at 6-41.

<sup>283</sup> *Id.* at 6-44.

<sup>284</sup> *Id.* at 6-42 to 6-43.

C. The Draft EIS’s Discussion of Lithium-Ion Battery Recycling Requires More Details on Environmental Impacts

The Draft EIS provides some information on battery disposal, including recycling or reuse.<sup>285</sup> It notes that pyrometallurgy is the most commonly used battery recycling technology but only gives a single sentence description of that process.<sup>286</sup> Even this sentence, however, reveals that the process likely has serious environmental impacts to the areas surrounding pyrometallurgical recycling operations: “Pyrometallurgy uses a combination of smelting followed by leaching to recover slag and valuable metals.”<sup>287</sup> NHTSA should provide additional information on the smelting process, the air pollutants – particularly hazardous air pollutants such as metals and dioxins – emitted through the process, GHG emissions, the potential environmental impacts of the chemicals used in the leaching process, and the production of solid wastes, such as slag. This will provide a significant improvement in understanding the environmental impacts of the No Action Alternative.

D. The Draft EIS’s Assumptions Regarding GHG Emissions from Electricity Generation Lack Support

The Draft EIS concludes that “[e]lectricity will decline in carbon intensity *if* renewable energy and natural gas replace existing coal power.”<sup>288</sup> This is a big “if.” Although natural gas has exceeded coal as the primary source of fuel for electricity generation, wind and solar power generation continue to play a marginal role. According to the EIA, wind and solar combine to

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<sup>285</sup> DEIS at 4-45 to 4-46.

<sup>286</sup> *Id.* at 6-46.

<sup>287</sup> *Id.*

<sup>288</sup> DEIS at 6-49 (emphasis added).

provide just over 7.5% of the United States' electricity generation.<sup>289</sup> No reasons are provided to support the assumption that wind and solar will come to play the significant role that the Draft EIS imagines by 2050. DEIS at 6-17, Figure 6.2.3-6.

The source of this optimism is an EIA forecast.<sup>290</sup> The EIA provides almost no information supporting these projections other than an assumption that (1) federal production tax credits, which are necessary to support solar and wind power projects, will continue indefinitely, and (2) “[c]ontinued favorable economics relative to other generating technologies” will see nearly 3% annual growth for wind and solar.<sup>291</sup> The second assumption is tied to the first, which is simply not tenable given that renewable energy production tax credits are subject to constant phase-downs for new construction and have only survived through a series of extensions.<sup>292</sup> The current production tax credit for wind energy facilities will expire in January 2020. Neither NHTSA nor EIA can predict whether it will be renewed, or if it is renewed, that it will provide the same level of financial support. These forecasts are, at best, uncertain. NHTSA could better inform the public of future GHG emissions from electricity generation by examining alternative scenarios where wind and solar power showed low growth and electricity generation from natural gas continued to increase. Under such a scenario, GHG emissions from the use of electrified vehicles would be higher and offset, to some degree, any increased GHG emissions under the Proposed Rule.

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<sup>289</sup> EIA, Electricity Explained, Electricity in the United States, *available at*, [https://www.eia.gov/energyexplained/index.php?page=electricity in the united states#tab1](https://www.eia.gov/energyexplained/index.php?page=electricity%20in%20the%20united%20states#tab1). By comparison, natural gas provided 32%, coal provided 30%, and nuclear energy provided 20%. *Id.*

<sup>290</sup> See EIA, 2018 Annual Energy Forecast at 89 (providing the same chart used in Figure 6.2.3-6 of the Draft EIS).

<sup>291</sup> *Id.* at 90.

<sup>292</sup> See Congressional Research Service, The Renewable Electricity Production Tax Credit: In Brief (July 14, 2015) at 4, Table 2 (listing nine extensions since 1992, including periods of brief lapse).

E. The Draft EIS Should Not Assume that Refinery Emissions Will Significantly Increase Under the Proposed Rulemaking

Although the Draft EIS does not provide specific estimates, it assumes that refinery emissions will increase under the Proposed Rule's alternatives when compared to the No Action Alternative.<sup>293</sup> This should not be assumed for two reasons. First, as NHTSA acknowledges, subsequent to the 2012 Rule, EPA promulgated new Petroleum Refinery MACT 1 and MACT 2 standards,<sup>294</sup> estimated to result in a 59% reduction in air toxics emissions.<sup>295</sup> Thus, refinery air toxics emissions will decrease under all alternatives, not solely the No Action Alternative.<sup>296</sup> Second, NHTSA should not assume that refinery emissions would decline under the No Action Alternative due to decreasing *domestic* demand for gasoline. The U.S. refining sector is exceedingly competitive in the global marketplace and is well positioned to excel in markets outside of the United States. As the EIA noted, U.S. exports of gasoline more than doubled between 2010 and 2016, from 335,000 barrels per day to 761,000 barrels per day.<sup>297</sup> There is no reason to assume that U.S. refineries will sit idle instead of simply diverting gasoline to other markets.

**XII. CONCLUSION**

AFPM appreciates the Agencies consideration of its comments on the Proposal. We look forward to working with interested stakeholders and the Agencies on a final rule that promotes

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<sup>293</sup> See DEIS at 4-35, 7-7.

<sup>294</sup> 80 Fed. Reg. 75,158 (Dec. 1, 2015).

<sup>295</sup> DEIS at 7-5.

<sup>296</sup> EPA proposed minor revisions to these standards but, if finalized, they are not expected to have any appreciable impact on the emissions reductions required of the 2015 rulemaking. 83 Fed. Reg. 15,473

<sup>297</sup> EIA, U.S. exports of crude oil and petroleum products have more than doubled since 2010 (Dec. 26, 2017).

environmental protection, consumer choice, safety, and U.S. energy security. Should questions arise on these comments, please contact Richard Moskowitz at 202-844-5474.

# **Attachment A**

such inspections. For the purposes of this section, the term "probable cause" means a valid public interest in the effective enforcement of this subchapter or regulations issued thereunder sufficient to justify administrative inspections of the area, factory, warehouse, establishment, premises, or motor vehicle, or contents thereof, in the circumstances specified in the application for the warrant.

(2) A warrant shall be issued only upon an affidavit of an officer or employee having knowledge of the facts alleged, sworn to before the judge or magistrate and establishing the grounds for issuing the warrant. If the judge or magistrate is satisfied that grounds for the application exist or that there is a reasonable basis for believing they exist, he shall issue a warrant identifying the area, factory, warehouse, establishment, premises, or motor vehicle to be inspected, the purpose of such inspection, and, where appropriate, the type of property to be inspected, if any. The warrant shall—

(A) identify the items or type of property to be impounded, if any;

(B) be directed to a person authorized under section 1990d of this title to execute it;

(C) state the grounds for its issuance and the name of the person or persons whose affidavit has been taken in support thereof;

(D) command the person to whom it is directed to inspect the area, factory, warehouse, establishment, premises, or motor vehicle identified for the purpose specified, and, where appropriate, shall direct the impoundment of the property specified;

(E) direct that it be served during the hours specified in it; and

(F) designate the judge or magistrate to whom it shall be returned.

(3) A warrant issued pursuant to this section must be executed and returned within 10 days of its date unless, upon a showing by the Secretary of a need therefor, the judge or magistrate allows additional time in the warrant. If property is impounded pursuant to a warrant, the person executing the warrant shall give the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(4) The judge or magistrate who has issued a warrant under this section shall attach to the warrant a copy of the return and all papers filed in connection therewith and shall

file them with the clerk of the district court of the United States for the judicial district in which the inspection was made.

(Pub. L. 92-513, title IV, § 415, as added Pub. L. 94-364, title IV, § 408(2), July 14, 1976, 90 Stat. 987.)

#### § 1990f. Compliance with inspection and investigation requirements

No person shall fail to comply with the requirements of section 1990d of this title to maintain records, make reports, provide information, permit access to or copying of records, permit entry or inspection, or permit impounding.

(Pub. L. 92-513, title IV, § 416, as added Pub. L. 94-364, title IV, § 408(2), July 14, 1976, 90 Stat. 988.)

#### § 1990g. Authorization of appropriations

There are authorized to be appropriated to carry out this subchapter \$450,000 for the fiscal year ending June 30, 1976; \$100,000 for the period beginning July 1, 1976, and ending September 30, 1976; \$650,000 for the fiscal year ending September 30, 1977; and \$562,000 for the fiscal year ending September 30, 1978.

(Pub. L. 92-513, title IV, § 417, as added Pub. L. 94-364, title IV, § 408(2), July 14, 1976, 90 Stat. 989.)

#### § 1991. State odometer requirements

This subchapter does not—

(1) annul, alter, or affect the laws of any State with respect to the disconnecting, altering, or tampering with odometers with the intent to defraud, or

(2) exempt any person subject to the provisions of this subchapter from complying with such laws,

except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(Pub. L. 92-513, title IV, § 418, formerly § 411, Oct. 20, 1972, 86 Stat. 963, renumbered Pub. L. 94-364, title IV, § 408(1), July 14, 1976, 90 Stat. 984.)

## SUBCHAPTER V—IMPROVING AUTOMOTIVE EFFICIENCY

### PART A<sup>1</sup>—AUTOMOTIVE FUEL ECONOMY

#### PART REFERRED TO IN OTHER SECTIONS

This part is referred to in section 1901 of this title.

#### § 2001. Definitions

For purposes of this part:

(1) The term "automobile" means any 4-wheeled vehicle propelled by fuel which is manufactured primarily for use on public streets, roads, and highways (except any vehicle operated exclusively on a rail or rails), and

(A) which is rated at 6,000 lbs. gross vehicle weight or less, or

<sup>1</sup> So in original. There are no other parts in this subchapter.

(B) which—

(i) is rated at more than 6,000 lbs. gross vehicle weight but less than 10,000 lbs. gross vehicle weight,

(ii) is a type of vehicle for which the Secretary determines, by rule, average fuel economy standards under this part are feasible, and

(iii) is a type of vehicle for which the Secretary determines, by rule, average fuel economy standards will result in significant energy conservation, or is a type of vehicle which the Secretary determines is substantially used for the same purposes as vehicles described in subparagraph (A) of this paragraph.

The Secretary may prescribe such rules as may be necessary to implement this paragraph.

(2) The term "passenger automobile" means any automobile (other than an automobile capable of off-highway operation) which the Secretary determines by rule is manufactured primarily for use in the transportation of not more than 10 individuals.

(3) The term "automobile capable of off-highway operation" means any automobile which the Secretary determines by rule—

(A) has a significant feature (other than 4-wheel drive) which is designed to equip such automobile for off-highway operation, and

(B) either—

(i) is a 4-wheel drive automobile, or

(ii) is rated at more than 6,000 pounds gross vehicle weight.

(4) The term "average fuel economy" means average fuel economy, as determined under section 2003 of this title.

(5) The term "fuel" means gasoline and diesel oil. The Secretary may, by rule, include any other liquid fuel or any gaseous fuel within the meaning of the term "fuel" if he determines that such inclusion is consistent with the need of the Nation to conserve energy.

(6) The term "fuel economy" means the average number of miles traveled by an automobile per gallon of gasoline (or equivalent amount of other fuel) consumed, as determined by the EPA Administrator in accordance with procedures established under section 2002(d) of this title.

(7) The term "average fuel economy standard" means a performance standard which specifies a minimum level of average fuel economy which is applicable to a manufacturer in a model year.

(8) The term "manufacturer" means any person engaged in the business of manufacturing automobiles. The Secretary shall prescribe rules for determining, in cases where more than one person is the manufacturer of an automobile, which person is to be treated as the manufacturer of such automobile for purposes of this part.

(9) The term "manufacturer" (except for purposes of section 2002(c) of this title) means to produce or assemble in the customs territory of the United States, or to import.

(10) The term "import" means to import into the customs territory of the United States.

(11) The term "model type" means a particular class of automobile as determined, by rule, by the EPA Administrator, after consultation and coordination with the Secretary.

(12) The term "model year", with reference to any specific calendar year, means a manufacturer's annual production period (as determined by the EPA Administrator) which includes January 1 of such calendar year. If a manufacturer has no annual production period, the term "model year" means the calendar year.

(13) The term "Secretary" means the Secretary of Transportation.

(14) The term "EPA Administrator" means the Administrator of the Environmental Protection Agency.

(Pub. L. 92-513, title V, § 501, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 901.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2004, 2006, 2012 of this title; title 42 section 6291.

§ 2002. Average fuel economy standards

(a) Standards for passenger vehicles manufactured after 1977; review of standards; report to Congress; standards for passenger automobiles manufactured from 1981 through 1984; amendment of standards

(1) Except as otherwise provided in paragraph (4) or in subsection (c) or (d) of this section, the average fuel economy for passenger automobiles manufactured by any manufacturer in any model year after model year 1977 shall not be less than the number of miles per gallon established for such model year under the following table:

<i>Model year:</i>	<i>Average fuel economy standard (in miles per gallon)</i>
1978.....	18.0.
1979.....	19.0.
1980.....	20.0.
1981.....	Determined by Secretary under paragraph (3) of this subsection.
1982.....	Determined by Secretary under paragraph (3) of this subsection.
1983.....	Determined by Secretary under paragraph (3) of this subsection.
1984.....	Determined by Secretary under paragraph (3) of this subsection.
1985 and thereafter...	27.5.

(2) Not later than January 15 of each year, beginning in 1977, the Secretary shall transmit to each House of Congress, and publish in the Federal Register, a review of average fuel economy standards under this part. The review required to be transmitted not later than January 15, 1979, shall include a comprehensive analysis of the program required by this part. Such analysis shall include an assessment of the ability of manufacturers to meet the average fuel economy standard for model year 1985 as specified in paragraph (1) of this subsection, and any legislative recommendations the Secretary

or the EPA Administrator may have for improving the program required by this part.

(3) Not later than July 1, 1977, the Secretary shall prescribe, by rule, average fuel economy standards for passenger automobiles manufactured in each of the model years 1981 through 1984. Any such standard shall apply to each manufacturer (except as provided in subsection (c) of this section), and shall be set for each such model year at a level which the Secretary determines (A) is the maximum feasible average fuel economy level, and (B) will result in steady progress toward meeting the average fuel economy standard established by or pursuant to this subsection for model year 1985.

(4) The Secretary may, by rule, amend the average fuel economy standard specified in paragraph (1) for model year 1985, or for any subsequent model year, to a level which he determines is the maximum feasible average fuel economy level for such model year, except that any amendment which has the effect of increasing an average fuel economy standard to a level in excess of 27.5 miles per gallon, or of decreasing any such standard to a level below 26.0 miles per gallon, shall be submitted to the Congress in accordance with section 551 of the Energy Policy and Conservation Act [42 U.S.C. 6421], and shall not take effect if either House of the Congress disapproves such amendment in accordance with the procedures specified in such section.

(5) For purposes of considering any modification which is submitted to the Congress under paragraph (4), the 5 calendar days specified in section 551(f)(4)(A) of the Energy Policy and Conservation Act [42 U.S.C. 6421(f)(4)(A)] shall be lengthened to 20 calendar days, and the 15 calendar days specified in section 551(c) and (d) of such Act [42 U.S.C. 6421(c) and (d)] shall be lengthened to 60 calendar days.

(b) Standards for other than passenger automobiles

The Secretary shall, by rule, prescribe average fuel economy standards for automobiles which are not passenger automobiles and which are manufactured by any manufacturer in each model year which begins more than 30 months after December 22, 1975. Such rules may provide for separate standards for different classes of such automobiles (as determined by the Secretary), and shall<sup>1</sup> be set at a level which the Secretary determines is the maximum feasible average fuel economy level which such manufacturers are able to achieve in each model year to which this subsection applies. Any standard applicable to a model year under this subsection shall be prescribed at least 18 months prior to the beginning of such model year.

(c) Exemptions for manufacturers of limited number of cars

On application of a manufacturer who manufactured (whether or not in the United States) fewer than 10,000 passenger automobiles in the second model year preceding the model year for which the application is made, the Secretary may, by rule, exempt such manufacturer from subsection (a) of this section. An application for such an exemption shall be submitted to the Secretary, and shall contain such information

<sup>1</sup> So in original. Probably should be "such standards shall".

as the Secretary may require by rule. Such exemption may only be granted if the Secretary determines that the average fuel economy standard otherwise applicable under subsection (a) of this section is more stringent than the maximum feasible average fuel economy level which such manufacturer can attain. The Secretary may not issue exemptions with respect to a model year unless he establishes, by rule, alternative average fuel economy standards for passenger automobiles manufactured by manufacturers which receive exemptions under this subsection. Such standards may be established for an individual manufacturer, for all automobiles to which this subsection applies, or for such classes of such automobiles as the Secretary may define by rule. Each such standard shall be set at a level which the Secretary determines is the maximum feasible average fuel economy level for the manufacturers to which the standard applies. An exemption under this subsection shall apply to a model year only if the manufacturer manufactures (whether or not in the United States) fewer than 10,000 passenger automobiles in such model year.

(d) Application for modification of standards

(1) Any manufacturer may apply to the Secretary for modification of an average fuel economy standard applicable under subsection (a) of this section to such manufacturer for model year 1978, 1979, or 1980. Such application shall contain such information as the Secretary may require by rule, and shall be submitted to the Secretary within 24 months before the beginning of the model year for which such modification is requested.

(2)(A) If a manufacturer demonstrates and the Secretary finds that—

(i) a Federal standards fuel economy reduction is likely to exist for such manufacturer for the model year to which the application relates, and

(ii) such manufacturer applied a reasonably selected technology,

the Secretary shall, by rule, reduce the average fuel economy standard applicable under subsection (a) of this section to such manufacturer by the amount of such manufacturer's Federal standards fuel economy reduction, rounded off to the nearest one-tenth mile per gallon (in accordance with rules of the Secretary). To the maximum extent practicable, prior to making a finding under this paragraph with respect to an application, the Secretary shall request, and the EPA Administrator shall supply, test results collected pursuant to section 2003(d) of this title for all automobiles covered by such application.

(B)(i) If the Secretary does not find that a Federal standards fuel economy reduction is likely to exist for a manufacturer who filed an application under paragraph (1), he shall deny the application of such manufacturer.

(ii) If the Secretary—

(I) finds that a Federal standards fuel economy reduction is likely to exist for a manufacturer who filed an application under paragraph (1), and

(II) does not find that such manufacturer applied a reasonably selected technology,

the average fuel economy standard applicable under subsection (a) of this section to such manufacturer shall, by rule, be reduced by an amount equal to the Federal standards fuel economy reduction which the Secretary finds would have resulted from the application of a reasonably selected technology.

(3) For purposes of this subsection:

(A) The term "reasonably selected technology" means a technology which the Secretary determines it was reasonable for a manufacturer to select, considering (i) the Nation's need to improve the fuel economy of its automobiles, and (ii) the energy savings, economic costs, and lead-time requirements associated with alternative technologies practicably available to such manufacturer.

(B) The term "Federal standards fuel economy reduction" means the sum of the applicable fuel economy reductions determined under subparagraph (C).

(C) The term "applicable fuel economy reduction" means a number of miles per gallon equal to—

(i) the reduction in a manufacturer's average fuel economy in a model year which results from the application of a category of Federal standards applicable to such model year, and which would not have occurred had Federal standards of such category applicable to model year 1975 remained the only standards of such category in effect, minus

(ii) 0.5 mile per gallon.

(D) Each of the following is a category of Federal standards;

(i) Emissions standards under section 202 of the Clean Air Act [42 U.S.C. 1857f-1] and emissions standards applicable by reason of section 209(b) of such Act [42 U.S.C. 1857f-6a(b)].

(ii) Motor vehicle safety standards under the National Traffic and Motor Vehicle Safety Act of 1966 [15 U.S.C. 1381 et seq.].

(iii) Noise emission standards under section 6 of the Noise Control Act of 1972 [42 U.S.C. 4905].

(iv) Property loss reduction standards under subchapter I of this chapter.

(E) In making the determination under this subparagraph, the Secretary (in accordance with such methods as he shall prescribe by rule) shall assume a production mix for such manufacturer which would have achieved the average fuel economy standard for such model year had standards described in subparagraph (D) applicable to model year 1975 remained the only standards in effect.

(4) The Secretary may, for the purposes of conducting a proceeding under this subsection, consolidate one or more applications filed under this subsection.

(e) Determination of maximum feasible average fuel economy

For purposes of this section, in determining maximum feasible average fuel economy, the Secretary shall consider—

- (1) technological feasibility;
- (2) economic practicability;

(3) the effect of other Federal motor vehicle standards on fuel economy; and

(4) the need of the Nation to conserve energy.

(f) Amendment of average fuel economy standards

(1) The Secretary may, by rule, from time to time, amend any average fuel economy standard prescribed under subsection (a)(3), (b), or (c) of this section, so long as such standard, as amended, meets the requirements of subsection (a)(3), (b), or (c) of this section, as the case may be.

(2) Any amendment prescribed under this section which has the effect of making any average fuel economy standard more stringent shall be—

(A) promulgated, and

(B) if required by paragraph (4) of subsection (a) of this section, submitted to the Congress,

at least 18 months prior to the beginning of the model year to which such amendment will apply.

(g) Application of other laws

Proceedings under subsection (a)(4) or (d) of this section shall be conducted in accordance with section 553 of title 5 except that interested persons shall be entitled to make oral as well as written presentations. A transcript shall be taken of any oral presentations.

(Pub. L. 92-513, title V, § 502, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 902.)

#### REFERENCES IN TEXT

The National Traffic and Motor Vehicle Safety Act of 1966, referred to in subsec. (d)(3)(D)(ii), is Pub. L. 89-563, Sept. 9, 1966, 80 Stat. 718, which is classified to chapter 38 (§ 1381 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1381 of this title and Tables volume.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2001, 2003, 2004, 2005, 2007, 2008, 2010 of this title.

§ 2003. Calculation of average fuel economy

(a) Method of calculation

(1) Average fuel economy for purposes of section 2002(a) and (c) of this title shall be calculated by the EPA Administrator by dividing—

(A) the total number of passenger automobiles manufactured in a given model year by a manufacturer, by

(B) a sum of terms, each term of which is a fraction created by dividing—

(i) the number of passenger automobiles of a given model type manufactured by such manufacturer in such model year, by

(ii) the fuel economy measured for such model type.

(2) Average fuel economy for purposes of section 2002(b) of this title shall be calculated in accordance with rules of the EPA Administrator.

(b) Automobile categories

(1) In calculating average fuel economy under subsection (a)(1) of this section, the EPA Administrator shall separate the total number of

<sup>1</sup> So in original, probably should be "subsection."

passenger automobiles manufactured by a manufacturer into the following two categories:

(A) Passenger automobiles which are domestically manufactured by such manufacturer (plus, in the case of model year 1978 and model year 1979, passenger automobiles which are within the includable base import volume of such manufacturer).

(B) Passenger automobiles which are not domestically manufactured by such manufacturer (and which, in the case of model year 1978 and model year 1979, are not within the includable base import volume of such manufacturer).

The EPA Administrator shall calculate the average fuel economy of each such separate category, and each such category shall be treated as if manufactured by a separate manufacturer for purposes of this part.

(2) For purposes of this subsection:

(A) The term "includable base import volume", with respect to any manufacturer in model year 1978 or 1979, as the case may be, is a number of passenger automobiles which is the lesser of—

(i) the manufacturer's base import volume, or

(ii) the number of passenger automobiles calculated by multiplying—

(I) the quotient obtained by dividing such manufacturer's base import volume by such manufacturer's base production volume, times

(II) the total number of passenger automobiles manufactured by such manufacturer during such model year.

(B) The term "base import volume" means one-half the sum of—

(i) the total number of passenger automobiles which were not domestically manufactured by such manufacturer during model year 1974 and which were imported by such manufacturer during such model year, plus

(ii) 133 percent of the total number of passenger automobiles which were not domestically manufactured by such manufacturer during the first 9 months of model year 1975 and which were imported by such manufacturer during such 9-month period.

(C) The term "base production volume" means one-half the sum of—

(i) the total number of passenger automobiles manufactured by such manufacturer during model year 1974, plus

(ii) 133 percent of the total number of passenger automobiles manufactured by such manufacturer during the first 9 months of model year 1975.

(D) For purposes of subparagraphs (B) and (C) of this paragraph any passenger automobile imported during model year 1976, but prior to July 1, 1975, shall be deemed to have been manufactured (and imported) during the first 9 months of model year 1975.

(E) An automobile shall be considered domestically manufactured in any model year if at least 75 percent of the cost to the manufacturer of such automobile is attributable to value added in the United States or Canada,

unless the assembly of such automobile is completed in Canada and such automobile is not imported into the United States prior to the expiration of 30 days following the end of such model year. The EPA Administrator may prescribe rules for purposes of carrying out this subparagraph.

(F) The fuel economy of each passenger automobile which is imported by a manufacturer in model year 1978 or 1979, as the case may be, and which is not domestically manufactured by such manufacturer, shall be deemed to be equal to the average fuel economy of all such passenger automobiles.

(c) Definition of "automobiles manufactured"

Any reference in this part to automobiles manufactured by a manufacturer shall be deemed—

(1) to include all automobiles manufactured by persons who control, are controlled by, or are under common control with, such manufacturer; and

(2) to exclude all automobiles manufactured (within the meaning of paragraph (1)) during a model year by such manufacturer which are exported prior to the expiration of 30 days following the end of such model year.

(d) Testing and calculation procedures

(1) Fuel economy for any model type shall be measured, and average fuel economy of a manufacturer shall be calculated, in accordance with testing and calculation procedures established by the EPA Administrator, by rule. Procedures so established with respect to passenger automobiles (other than for purposes of section 2006 of this title) shall be the procedures utilized by the EPA Administrator for model year 1975 (weighted 55 percent urban cycle, and 45 percent highway cycle), or procedures which yield comparable results. Procedures under this subsection, to the extent practicable, shall require that fuel economy tests be conducted in conjunction with emissions tests conducted under section 206 of the Clean Air Act [42 U.S.C. 1857f-5]. The EPA Administrator shall report any measurements of fuel economy and any calculations of average fuel economy to the Secretary.

(2) The EPA Administrator shall, by rule, determine that quantity of any other fuel which is the equivalent of one gallon of gasoline.

(3) Testing and calculation procedures applicable to a model year, and any amendment to such procedures (other than a technical or clerical amendment), shall be promulgated not less than 12 months prior to the model year to which such procedures apply.

(e) Rounding off of measurements of fuel economy

For purposes of this part (other than section 2006 of this title), any measurement of fuel economy of a model type, and any calculation of average fuel economy of a manufacturer, shall be rounded off to the nearest one-tenth mile per gallon (in accordance with rules of the EPA Administrator).

(f) Consultation and coordination by Administrator with Secretary

The EPA Administrator shall consult and coordinate with the Secretary in carrying out his duties under this section.

<sup>1</sup> So in original.

(Pub. L. 92-513, title V, § 503, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 906.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2001, 2002, 2004, 2005, 2008 of this title.

#### § 2004. Judicial review

##### (a) Review of rules in courts of appeals

Any person who may be adversely affected by any rule prescribed under section 2001, 2002, 2003, or 2006 of this title may, at any time prior to 60 days after such rule is prescribed (or in the case of an amendment submitted to each House of the Congress under section 2002(a)(4) of this title, at any time prior to 60 days after the expiration of the 60-day period specified in section 2002(a)(5) of this title), file a petition in the United States Court of Appeals for the District of Columbia, or for any circuit wherein such person resides or has his principal place of business, for judicial review of such rule. A copy of the petition shall be forthwith transmitted by the clerk of such court to the officer who prescribed the rule. Such officer shall thereupon cause to be filed in such court the written submissions and other materials in the proceeding upon which such rule was based. Upon the filing of such petition, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5 and to grant appropriate relief as provided in such chapter. Findings of the Secretary under section 2002(d) of this title shall be set aside by the court on review unless such findings are supported by substantial evidence.

##### (b) Additional submissions

If the petitioner applies to the court in a proceeding under subsection (a) of this section for leave to make additional submissions, and shows to the satisfaction of the court that such additional submissions are material and that there were reasonable grounds for the failure to make such submissions in the administrative proceeding, the court may order the Secretary or the EPA Administrator, as the case may be to provide additional opportunity to make such submissions. The Secretary or the EPA Administrator, as the case may be, may modify or set aside the rule involved or prescribe a new rule by reason of the additional submissions, and shall file any such modified or new rule in the court, together with such additional submissions. The court shall thereafter review such new or modified rule.

##### (c) Finality of determination; review by United States Supreme Court

The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

##### (d) Remedy in addition to other remedies provided by law

The remedies provided for in this section shall be in addition to, and not in lieu of, any other remedies provided by law.

(Pub. L. 92-513, title V, § 504, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 908.)

#### § 2005. Information and reports

##### (a) Reports by manufacturers; time; contents

(1) Each manufacturer shall submit a report to the Secretary during the 30-day period preceding the beginning of each model year after model year 1977, and during the 30-day period beginning on the 180th day of each such model year. Each such report shall contain (A) a statement as to whether such manufacturer will comply with average fuel economy standards under section 2002 of this title applicable to the model year for which such report is made; (B) a plan which describes the steps the manufacturer has taken or intends to take in order to comply with such standards; and (C) such other information as the Secretary may require.

(2) Whenever a manufacturer determines that a plan submitted under paragraph (1) which he stated was sufficient to insure compliance with applicable average fuel economy standards is not sufficient to insure such compliance, he shall submit a report to the Secretary containing a revised plan which specifies any additional measures which such manufacturer intends to take in order to comply with such standards, and a statement as to whether such revised plan is sufficient to insure such compliance.

(3) The Secretary shall prescribe rules setting forth the form and content of the reports required under paragraphs (1) and (2).

##### (b) Hearings; evidence

(1) For the purpose of carrying out the provisions of this part, the Secretary or the EPA Administrator, or their duly designated agents, may hold such hearings, take such testimony, sit and act at such times and places, administer such oaths, and require, by subpoena, the attendance and testimony of such witnesses and the production of such books, papers, correspondence, memorandums, contracts, agreements, or other records as the Secretary, the EPA Administrator, or such agents deem advisable. The Secretary or the EPA Administrator may require, by general or special orders that any person—

(A) file, in such form as the Secretary or EPA Administrator may prescribe, reports or answers in writing to specific questions relating to any function of the Secretary or the EPA Administrator under this part, and

(B) provide the Secretary, the EPA Administrator, or their duly designated agents, access to (and for the purpose of examination, the right to copy) any documentary evidence of such person which is relevant to any function of the Secretary or the EPA Administrator under this part.

Such reports and answers shall be made under oath or otherwise, and shall be filed with the Secretary or the EPA Administrator within such reasonable period as either may prescribe.

(2) The district courts of the United States for a judicial district in the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a duly authorized subpoena or order of the Secretary, the

EPA Administrator, or a duly designated agent of either, issued under paragraph (1), issue an order requiring compliance with such subpoena or order. Any failure to obey such an order of the court may be treated by such court as a contempt thereof.

(3) Witnesses summoned pursuant to this subsection shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) Tests, reports, etc., which may be required of manufacturers

(1) Every manufacturer shall establish and maintain such records, make such reports, conduct such tests, and provide such items and information as the Secretary or the EPA Administrator may, by rule, reasonably require to enable the Secretary or the EPA Administrator to carry out their duties under this part and under any rules prescribed pursuant to this part. Such manufacturer shall, upon request of a duly designated agent of the Secretary or the EPA Administrator who presents appropriate credentials, permit such agent, at reasonable times and in a reasonable manner, to enter the premises of such manufacturer to inspect automobiles and appropriate books, papers, records, and documents. Such manufacturer shall make available all of such items and information in accordance with such reasonable rules as the Secretary or the EPA Administrator may prescribe.

(2) The district courts of the United States may, if a manufacturer refuses to accede to any rule or reasonable request made under paragraph (1), issue an order requiring compliance with such requirement or request. Any failure to obey such an order of the court may be treated by such court as a contempt thereof.

(d) Disclosure of information to public

(1) The Secretary and the EPA Administrator shall each disclose any information obtained under this part (other than section 2003(d) of this title) to the public in accordance with section 552 of title 5, except that information may be withheld from disclosure under subsection (b)(4) of such section only if the Secretary or the EPA Administrator, as the case may be, determines that such information, if disclosed, would result in significant competitive damage. Any matter described in section 552(b)(4) [of title 5] relevant to any administrative or judicial proceeding under this part may be disclosed in such proceeding.

(2) Measurements and calculations under section 2003(d) of this title shall be made available to the public in accordance with section 552 of title 5 without regard to subsection (b) of such section.

(Pub. L. 92-513, title V, § 505, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 908.)

#### § 2006. Labeling

(a) Label required on automobile; contents

(1) Except as otherwise provided in paragraph (2), each manufacturer shall cause to be affixed, and each dealer shall cause to be maintained, on each automobile manufactured in any model year after model year 1976, in a prominent place, a label—

(A) indicating—

(i) the fuel economy of such automobile,

(ii) the estimated annual fuel cost associated with the operation of such automobile, and

(iii) the range of fuel economy of comparable automobiles (whether or not manufactured by such manufacturer),

as determined in accordance with rules of the EPA Administrator,

(B) containing a statement that written information (as described in subsection (b)(1) of this section) with respect to the fuel economy of other automobiles manufactured in such model year (whether or not manufactured by such manufacturer) is available from the dealer in order to facilitate comparison among the various model types, and

(C) containing any other information authorized or required by the EPA Administrator which relates to information described in subparagraph (A) or (B).

(2) With respect to automobiles—

(A) for which procedures established in the EPA and FEA Voluntary Fuel Labeling Program for Automobiles exist on December 22, 1975, and

(B) which are manufactured in model year 1976 and at least 90 days after December 22, 1975,

each manufacturer shall cause to be affixed, and each dealer shall cause to be maintained, in a prominent place, a label indicating the fuel economy of such automobile, in accordance with such procedures.

(3) The form and content of the labels required under paragraphs (1) and (2), and the manner in which such labels shall be affixed, shall be prescribed by the EPA Administrator by rule. The EPA Administrator may permit a manufacturer to comply with this paragraph by permitting such manufacturer to disclose the information required under this subsection on the label required by section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232).

(h) Booklet containing fuel economy data; distribution by administrator

(1) The EPA Administrator shall compile and prepare a simple and readily understandable booklet containing data on fuel economy of automobiles manufactured in each model year. Such booklet shall also contain information with respect to estimated annual fuel costs, and may contain information with respect to geographical or other differences in estimated annual fuel costs. The Administrator of the Federal Energy Administration shall publish and distribute such booklets.

(2) The EPA Administrator, not later than July 31, 1976, shall prescribe rules requiring dealers to make available to prospective purchasers information compiled by the EPA Administrator under paragraph (1).

(c) Violations

(1) A violation of subsection (a) shall be treated as a violation of section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232). For purposes of the Federal Trade Commission Act [15 U.S.C. 41 et seq.] (other than sections

5(m) and (18) [15 U.S.C. 45(m) and 57a], a violation of subsection (a) shall be treated as an unfair or deceptive act or practice in or affecting commerce.

(2) As used in this section, the term "dealer" has the same meaning as such term has in section 2(e) of the Automobile Information Disclosure Act (15 U.S.C. 1231(e)) except that in applying such term to this section, the term "automobile" has the same meaning as such term has in section 2001(1) of this title.

**(d) Creation of warranties**

Any disclosure with respect to fuel economy or estimated annual fuel cost which is required to be made under the provisions of this section shall not create an express or implied warranty under State or Federal law that such fuel economy will be achieved, or that such cost will not be exceeded, under conditions of actual use.

**(e) Consultation by Administrator with other agency personnel**

In carrying out his duties under this section, the EPA Administrator shall consult with the Federal Trade Commission, the Secretary, and the Federal Energy Administrator.

(Pub. L. 92-513, title V, § 506, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 910.)

**REFERENCES IN TEXT**

The Federal Trade Commission Act, referred to in subsec. (c)(1), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, which is classified generally to subchapter I (§ 41 et seq.) of chapter 2 of this title. For complete classification of this Act to the Code, see section 58 of this title and Tables volume.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 2003, 2004, 2007, 2009 of this title.

**§ 2007. Unlawful conduct**

The following conduct is unlawful:

(1) the failure of any manufacturer to comply with any average fuel economy standard applicable to such manufacturer under section 2002 of this title (other than section 2002(b) of this title),

(2) the failure of any manufacturer to comply with any average fuel economy standard applicable to such manufacturer under section 2002(b) of this title, or

(3) the failure of any person (A) to comply with any provision of this part applicable to such person (other than section 2002, 2006(a), 2010, or 2011 of this title), or (B) to comply with any standard, rule, or order applicable to such person which is issued pursuant to such a provision.

(Pub. L. 92-513, title V, § 507, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 911.)

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in section 2008 of this title.

**§ 2008. Civil penalty**

**(a) Penalty for violations; credit against penalty**

(1) If average fuel economy calculations reported under section 2003(d) of this title indi-

cate that any manufacturer has violated section 2007(1) or (2) of this title, then (unless further measurements of fuel economy, further calculations of average fuel economy, or other information indicates there is no violation of section 2007(1) or (2) of this title) the Secretary shall commence a proceeding under paragraph (2) of this subsection. The results of such further measurements, further calculations, and any such other information, shall be published in the Federal Register.

(2) If, on the record after opportunity for agency hearing, the Secretary determines that such manufacturer has violated section 2007(1) or (2) of this title, or that any person has violated section 2007(3) of this title, the Secretary shall assess the penalties provided for under subsection (b) of this section. Any interested person may participate in any proceeding under this paragraph.

(3)(A)(i) Whenever the average fuel economy of the passenger automobiles manufactured by a manufacturer in a particular model year exceeds an applicable average fuel economy standard established under section 2002(a) or (c) of this title (determined without regard to any adjustment under section 2002(d) of this title), such manufacturer shall be entitled to a credit, calculated under clause (ii), which shall be—

(I) deducted from the amount of any civil penalty which has been or may be assessed against such manufacturer for a violation of section 2007(1) of this title occurring in the model year immediately prior to the model year in which such manufacturer exceeds such applicable average fuel economy standard, and

(II) to the extent that such credit is not deducted pursuant to subclause (I), deducted from the amount of any civil penalty assessed against such manufacturer for a violation of section 2007(1) of this title occurring in the model year immediately following the model year in which such manufacturer exceeds such applicable average fuel economy standard.

(ii) The amount of credit to which a manufacturer is entitled under clause (i) shall be equal to—

(I) \$5 for each tenth of a mile per gallon by which the average fuel economy of the passenger automobiles manufactured by such manufacturer in the model year in which the credit is earned pursuant to clause (i) exceeds the applicable average fuel economy standard established under section 2002(a) or (c) of this title, multiplied by

(II) the total number of passenger automobiles manufactured by such manufacturer during such model year.

(B)(i) Whenever the average fuel economy of a class of automobiles which are not passenger automobiles and which are manufactured by a manufacturer in a particular model year exceeds an average fuel economy standard applicable to automobiles of such class under section 2002(b) of this title, such manufacturer shall be entitled to a credit, calculated under clause (ii), which shall be—

(I) deducted from the amount of any civil penalty which has been or may be assessed

against such manufacturer for a violation of section 2007(2) of this title, occurring in the model year immediately prior to the model year in which such manufacturer exceeds such applicable average fuel economy standard, and

(I) to the extent that such credit is not deducted pursuant to subclause (I), deducted from the amount of any such civil penalty assessed against such manufacturer for a violation of section 2007(2) of this title occurring in the model year immediately following the model year in which such manufacturer exceeds such applicable average fuel economy standard.

(ii) The amount of credit to which a manufacturer is entitled under clause (i) shall be equal to—

(I) \$5 for each tenth of a mile per gallon by which the average fuel economy of the automobiles of such class manufactured by such manufacturer in the model year in which the credit is earned pursuant to clause (i) exceeds the applicable average fuel economy standard established under section 2002(b) of this title, multiplied by

(II) the total number of automobiles of such class manufactured by such manufacturer during such model year.

(C) Whenever a civil penalty has been assessed and collected under this section from a manufacturer who is entitled to a credit under this paragraph with respect to such civil penalty, the Secretary of the Treasury shall refund to such manufacturer the amount of credit to which such manufacturer is so entitled, except that the amount of such refund shall not exceed the amount of the civil penalty so collected.

(D) The Secretary may prescribe rules for purposes of carrying out the provisions of this paragraph.

(b) Amount of penalty; compromise or modification

(1)(A) Any manufacturer whom the Secretary determines under subsection (a) of this section to have violated a provision of section 2007(1) of this title,<sup>1</sup> shall be liable to the United States for a civil penalty equal to (i) \$5 for each tenth of a mile per gallon by which the average fuel economy of the passenger automobiles manufactured by such manufacturer during such model year is exceeded by the applicable average fuel economy standard established under section 2002(a) and (c) of this title, multiplied by (ii) the total number of passenger automobiles manufactured by such manufacturer during such model year.

(B) Any manufacturer whom the Secretary determines under subsection (a) of this section to have violated section 2007(2) of this title shall be liable to the United States for a civil penalty equal to (i) \$5 for each tenth of a mile per gallon by which the applicable average fuel economy standard exceeds the average fuel economy of automobiles to which such standard applies, and which are manufactured by such manufacturer during the model year in which the violation occurs, multiplied by (ii) the total number of automobiles to which such

standard applies and which are manufactured by such manufacturer during such model year.

(2) Any person whom the Secretary determines under subsection (a) of this section to have violated a provision of section 2007(3) of this title shall be liable to the United States for a civil penalty of not more than \$10,000 for each violation. Each day of a continuing violation shall constitute a separate violation for purposes of this paragraph.

(3) The amount of such civil penalty shall be assessed by the Secretary by written notice. The Secretary shall have the discretion to compromise, modify, or remit, with and without conditions, any civil penalty assessed under this subsection against any person, except that any civil penalty assessed for a violation of section 2007(1) or (2) of this title may be so compromised, modified, or emitted only to the extent—

(A) necessary to prevent the insolvency or bankruptcy of such manufacturer,

(B) such manufacturer shows that the violation of section 2007(1) or (2) of this title resulted from an act of God, a strike, or a fire, or

(C) the Federal Trade Commission has certified that modification of such penalty is necessary to prevent a substantial lessening of competition, as determined under paragraph (4).

The Attorney General shall collect any civil penalty for which a manufacturer is liable under this subsection in a civil action under subsection (c)(2) of this section (unless the manufacturer pays such penalty to the Secretary).

(4) Not later than 30 days after a determination by the Secretary under subsection (a)(2) of this section that a manufacturer has violated section 2007(1) or (2) of this title, such manufacturer may apply to the Federal Trade Commission for a certification under this paragraph. If the manufacturer shows and the Federal Trade Commission determines that modification of the civil penalty for which such manufacturer is otherwise liable is necessary to prevent a substantial lessening of competition in that segment of the automobile industry subject to the standard with respect to which such penalty was assessed, the Commission shall so certify. The certification shall specify the maximum amount that such penalty may be reduced. To the maximum extent practicable, the Commission shall render a decision with respect to an application under this paragraph not later than 90 days after the application is filed with the Commission. A proceeding under this paragraph shall not have the effect of delaying the manufacturer's liability under this section for a civil penalty for more than 90 days after such application is filed, but any payment made before a decision of the Commission under this paragraph becomes final shall be paid to the court in which the penalty is collected, and shall (except as otherwise provided in paragraph (5)), be held by such court, until 90 days after such decision becomes final (at which time it shall be paid into the general fund of the Treasury).

(5) Whenever a civil penalty has been assessed and collected from a manufacturer under this section, and is being held by a court

<sup>1</sup> The words "in a model year" probably should appear immediately preceding the comma.

in accordance with paragraph (4), and the Secretary subsequently determines to modify such civil penalty pursuant to paragraph (3)(C) the Secretary shall direct the court to remit the appropriate amount of such penalty to such manufacturer.

(6) A claim of the United States for a civil penalty assessed against a manufacturer under subsection (b)(1) of this section shall, in the case of the bankruptcy or insolvency of such manufacturer, be subordinate to any claim of a creditor of such manufacturer which arises from an extension of credit before the date on which the judgment in any collection action under this section becomes final (without regard to paragraph (4)).

(c) Review of penalty by interested person

(1) Any interested person may obtain review of a determination (A) of the Secretary pursuant to which a civil penalty has been assessed under subsection (b) of this section, or (B) of the Federal Trade Commission under subsection (b)(4) of this section, in the United States Court of Appeals for the District of Columbia, or for any circuit wherein such person resides or has his principal place of business. Such review may be obtained by filing a notice of appeal in such court within 30 days after the date of such determination, and by simultaneously sending a copy of such notice by certified mail to the Secretary or the Federal Trade Commission, as the case may be. The Secretary or the Commission, as the case may be, shall promptly file in such court a certified copy of the record upon which such determination was made. Any such determination shall be reviewed in accordance with chapter 7 of title 5.

(2) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court of appeals has entered final judgment in favor of the Secretary, the Attorney General shall recover the amount for which the manufacturer is liable in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(Pub. L. 92-513, title V, § 508, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 911.)

§ 2009. State laws

(a) Fuel economy standards

Whenever an average fuel economy standard established under this part is in effect, no State or political subdivision of a State shall have authority to adopt or enforce any law or regulation relating to fuel economy standards or average fuel economy standards applicable to automobiles covered by such Federal standard.

(b) Fuel economy disclosures

Whenever any requirement under section 2006 of this title is in effect with respect to any automobile, no State or political subdivision of a State shall have authority to adopt or enforce any law or regulation with respect to the disclosure of fuel economy of such automobile, or of fuel cost associated with the operation of such

automobile, if such law or regulation is not identical with such requirement.

(c) State or political subdivision automobiles

Nothing in this section shall be construed to prevent any State or political subdivision thereof from establishing requirements with respect to fuel economy of automobiles procured for its own use.

(Pub. L. 92-513, title V, § 509, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 914.)

§ 2010. Use of fuel efficient passenger automobiles by Federal Government

(a) The President shall, within 120 days after December 22, 1975, promulgate rules which shall require that all passenger automobiles acquired by all executive agencies in each fiscal year which begins after December 22, 1975, achieve a fleet average fuel economy for such year not less than—

(1) 18 miles per gallon, or

(2) the average fuel economy standard applicable under section 2002(a) of this title for the model year which includes January 1 of such fiscal year,

whichever is greater.

(b) As used in this section:

(1) The term "fleet average fuel economy" means (A) the total number of passenger automobiles acquired in a fiscal year to which this section applies by all executive agencies (excluding passenger automobiles designed to perform combat related missions for the Armed Forces or designed to be used in law enforcement work or emergency rescue work), divided by (B) a sum of terms, each term of which is a fraction created by dividing—

(i) the number of passenger automobiles so acquired of a given model type, by

(ii) the fuel economy of such model type.

(2) The term "executive agency" has the same meaning as such term has for purposes of section 105 of title 5.

(3) The term "acquired" means leased for a period of 60 continuous days or more, or purchased.

(Pub. L. 92-513, title V, § 510, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 915.)

DELEGATION OF FUNCTIONS

Functions of the President under this section delegated to the Administrator of General Services, see Section 1(a) of Ex. Grd. No. 11912, Apr. 13, 1976, 41 F.R. 15825, set out as a note under section 6201 of Title 42, The Public Health and Welfare.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2007 of this title.

§ 2011. Retrofit devices

(a) Examination of fuel economy representations

The Federal Trade Commission shall establish a program for systematically examining fuel economy representations made with respect to retrofit devices. Whenever the Commission has reason to believe that any such representation may be inaccurate, it shall request

the EPA Administrator to evaluate, in accordance with subsection (b) of this section, the retrofit device with respect to which such representation was made.

**(b) Evaluation of retrofit devices**

(1) Upon application of any manufacturer of a retrofit device (or prototype thereof), upon the request of the Federal Trade Commission pursuant to subsection (a) of this section, or upon his own motion, the EPA Administrator shall evaluate, in accordance with rules prescribed under subsection (d) of this section, any retrofit device to determine whether the retrofit device increases fuel economy and to determine whether the representations (if any) made with respect to such retrofit device are accurate.

(2) If under paragraph (1) the EPA Administrator tests, or causes to be tested, any retrofit device upon the application of a manufacturer of such device, such manufacturer shall supply, at his own expense, one or more samples of such device to the Administrator and shall be liable for the costs of testing which are incurred by the Administrator. The procedures for testing retrofit devices so supplied may include a requirement for preliminary testing by a qualified independent testing laboratory, at the expense of the manufacturer of such device.

**(c) Results of tests; publication in Federal Register**

The EPA Administrator shall publish in the Federal Register a summary of the results of all tests conducted under this section, together with the EPA Administrator's conclusions as to—

- (1) the effect of any retrofit device on fuel economy;
- (2) the effect of any such device on emissions of air pollutants; and
- (3) any other information which the Administrator determines to be relevant in evaluating such device.

Such summary and conclusions shall also be submitted to the Secretary and the Federal Trade Commission.

**(d) Rules establishing tests and procedures for evaluation of retrofit devices**

Within 180 days after December 22, 1975, the EPA Administrator shall, by rule, establish—

- (1) testing and other procedures for evaluating the extent to which retrofit devices affect fuel economy and emissions of air pollutants, and
- (2) criteria for evaluating the accuracy of fuel economy representations made with respect to retrofit devices.

**(e) Definitions**

For purposes of this section the term "retrofit device" means any component, equipment, or other device—

- (1) which is designed to be installed in or on an automobile (as an addition to, as a replacement for, or through alteration or modification of, any original component, equipment, or other device); and
- (2) which any manufacturer, dealer, or distributor of such device represents will provide higher fuel economy than would have result-

ed with the automobile as originally equipped,

as determined under rules of the Administrator. Such term also includes a fuel additive for use in an automobile.

(Pub. L. 92-513, title V, § 511, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 915.)

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in section 2007 of this title.

**§ 2012. Reports to Congress**

(a) Within 180 days after December 22, 1975, the Secretary shall prepare and submit to the Congress and the President a comprehensive report setting forth findings and containing conclusions and recommendations with respect to (1) a requirement that each new automobile be equipped with a fuel flow instrument reading directly in miles per gallon, and (2) the most feasible means of equipping used automobiles with such instruments. Such report shall include an examination of the effectiveness of such instruments in promoting voluntary reductions in fuel consumption, the cost of such instruments, means of encouraging automobile purchasers to voluntarily purchase automobiles equipped with such instruments, and any other factor bearing on the cost and effectiveness of such instruments and their use.

(b)(1) Within 180 days after December 22, 1975, the Secretary shall prepare and submit to the Congress and the President a comprehensive report setting forth findings and containing conclusions and recommendations with respect to whether or not electric vehicles and other vehicles not consuming fuel (as defined in the first sentence of section 2001(5) of this title) should be covered by this part. Such report shall include an examination of the extent to which any such vehicle should be included under the provisions of this part, the manner in which energy requirements of such vehicles may be compared with energy requirements of fuel-consuming vehicles, the extent to which inclusion of such vehicles would stimulate their production and introduction into commerce, and any recommendations for legislative action.

(2) As used in this subsection, the term "electric vehicle" means a vehicle powered primarily by an electric motor drawing current from rechargeable batteries, fuel cells, or other portable sources of electrical current.

(Pub. L. 92-513, title V, § 512, as added Pub. L. 94-163, title III, § 301, Dec. 22, 1975, 89 Stat. 916.)

**CHAPTER 47—CONSUMER PRODUCT SAFETY**

**Sec.**

2051. Congressional findings and declaration of purpose.
2052. Definitions.
2053. Consumer Product Safety Commission.
  - (a) Establishment; Chairman.
  - (b) Term; vacancies.
  - (c) Restrictions on Commissioner's outside activities.

# **Attachment B**

# One Hundred Third Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Tuesday,  
the twenty-fifth day of January, one thousand nine hundred and ninety-four*

## An Act

To revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, as subtitles II, III, and V–X of title 49, United States Code, “Transportation”, and to make other technical improvements in the Code.

*Be it enacted by the Senate and House of Representatives of  
the United States of America in Congress assembled,*

SUBTITLES II, III, AND V–X OF TITLE 49, UNITED STATES CODE

SECTION 1. (a) Certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted by subsections (c)–(e) of this section without substantive change as subtitles II, III, and V–X of title 49, United States Code, “Transportation”. Those laws may be cited as “49 U.S.C. \_\_\_\_\_”.

(b) Title 49, United States Code, is amended by striking the table of subtitles at the beginning of the title and substituting the following new table of subtitles:

“SUBTITLE	Sec.
“I. DEPARTMENT OF TRANSPORTATION .....	101
“II. OTHER GOVERNMENT AGENCIES .....	1101
“III. GENERAL AND INTERMODAL PROGRAMS .....	5101
“IV. INTERSTATE COMMERCE .....	10101
“V. RAIL PROGRAMS .....	20101
“VI. MOTOR VEHICLE AND DRIVER PROGRAMS .....	30101
“VII. AVIATION PROGRAMS .....	40101
“VIII. PIPELINES .....	60101
“IX. COMMERCIAL SPACE TRANSPORTATION .....	70101
“X. MISCELLANEOUS .....	80101”.

(c) Title 49, United States Code, is amended by striking subtitle II, except that chapter 31 (comprising sections 3101–3104) of subtitle II is redesignated and restated as chapter 315 (comprising sections 31501–31504) of subtitle VI of title 49, as enacted by subsection (e) of this section.

(d) Title 49, United States Code, is amended by adding the following immediately after subtitle I:

### **SUBTITLE II—OTHER GOVERNMENT AGENCIES**

CHAPTER	Sec.
11. NATIONAL TRANSPORTATION SAFETY BOARD .....	1101

H. R. 1758—2

**CHAPTER 11—NATIONAL TRANSPORTATION SAFETY BOARD**

SUBCHAPTER I—GENERAL

Sec.  
1101. Definitions.

SUBCHAPTER II—ORGANIZATION AND ADMINISTRATIVE

1111. General organization.  
1112. Special boards of inquiry on air transportation safety.  
1113. Administrative.  
1114. Disclosure, availability, and use of information.  
1115. Training.  
1116. Reports and studies.  
1117. Annual report.  
1118. Authorization of appropriations.

SUBCHAPTER III—AUTHORITY

1131. General authority.  
1132. Civil aircraft accident investigations.  
1133. Review of other agency action.  
1134. Inspections and autopsies.  
1135. Secretary of Transportation's responses to safety recommendations.

SUBCHAPTER IV—ENFORCEMENT AND PENALTIES

1151. Aviation enforcement.  
1152. Joinder and intervention in aviation proceedings.  
1153. Judicial review.  
1154. Discovery and use of cockpit voice and other material.  
1155. Aviation penalties.

SUBCHAPTER I—GENERAL

**§ 1101. Definitions**

Section 40102(a) of this title applies to this chapter.

SUBCHAPTER II—ORGANIZATION AND ADMINISTRATIVE

**§ 1111. General organization**

(a) ORGANIZATION.—The National Transportation Safety Board is an independent establishment of the United States Government.

(b) APPOINTMENT OF MEMBERS.—The Board is composed of 5 members appointed by the President, by and with the advice and consent of the Senate. Not more than 3 members may be appointed from the same political party. At least 3 members shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in accident reconstruction, safety engineering, human factors, transportation safety, or transportation regulation.

(c) TERMS OF OFFICE AND REMOVAL.—The term of office of each member is 5 years. An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, is appointed for the remainder of that term. When the term of office of a member ends, the member may continue to serve until a successor is appointed and qualified. The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.

(d) CHAIRMAN AND VICE CHAIRMAN.—The President shall designate, by and with the advice and consent of the Senate, a Chairman of the Board. The President also shall designate a Vice Chairman of the Board. The terms of office of both the Chairman and

**§ 32711. Relationship to State law**

Except to the extent that State law is inconsistent with this chapter, this chapter does not—

- (1) affect a State law on disconnecting, altering, or tampering with an odometer with intent to defraud; or
- (2) exempt a person from complying with that law.

**CHAPTER 329—AUTOMOBILE FUEL ECONOMY**

Sec.	
32901.	Definitions.
32902.	Average fuel economy standards.
32903.	Credits for exceeding average fuel economy standards.
32904.	Calculation of average fuel economy.
32905.	Manufacturing incentives for alternative fuel automobiles.
32906.	Maximum fuel economy increase for alternative fuel automobiles.
32907.	Reports and tests of manufacturers.
32908.	Fuel economy information.
32909.	Judicial review of regulations.
32910.	Administrative.
32911.	Compliance.
32912.	Civil penalties.
32913.	Compromising and remitting civil penalties.
32914.	Collecting civil penalties.
32915.	Appealing civil penalties.
32916.	Reports to Congress.
32917.	Standards for executive agency automobiles.
32918.	Preemption.

**§ 32901. Definitions**

(a) GENERAL.—In this chapter—

(1) “alternative fuel” means—

- (A) methanol;
- (B) denatured ethanol;
- (C) other alcohols;
- (D) except as provided in subsection (b) of this section, a mixture containing at least 85 percent of methanol, denatured ethanol, and other alcohols by volume with gasoline or other fuels;
- (E) natural gas;
- (F) liquefied petroleum gas;
- (G) hydrogen;
- (H) coal derived liquid fuels;
- (I) fuels (except alcohol) derived from biological materials;
- (J) electricity (including electricity from solar energy);

and

(K) any other fuel the Secretary of Transportation prescribes by regulation that is not substantially petroleum and that would yield substantial energy security and environmental benefits.

(2) “alternative fueled automobile” means an automobile that is a—

- (A) dedicated automobile; or
- (B) dual fueled automobile.

(3) except as provided in section 32908 of this title, “automobile” means a 4-wheeled vehicle that is propelled by fuel, or by alternative fuel, manufactured primarily for use on public streets, roads, and highways (except a vehicle operated only on a rail line), and rated at—

- (A) not more than 6,000 pounds gross vehicle weight;

or

(B) more than 6,000, but less than 10,000, pounds gross vehicle weight, if the Secretary decides by regulation that—

(i) an average fuel economy standard under this chapter for the vehicle is feasible; and

(ii) an average fuel economy standard under this chapter for the vehicle will result in significant energy conservation or the vehicle is substantially used for the same purposes as a vehicle rated at not more than 6,000 pounds gross vehicle weight.

(4) “automobile manufactured by a manufacturer” includes every automobile manufactured by a person that controls, is controlled by, or is under common control with the manufacturer, but does not include an automobile manufactured by the person that is exported not later than 30 days after the end of the model year in which the automobile is manufactured.

(5) “average fuel economy” means average fuel economy determined under section 32904 of this title.

(6) “average fuel economy standard” means a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year.

(7) “dedicated automobile” means an automobile that operates only on alternative fuel.

(8) “dual fueled automobile” means an automobile that—

(A) is capable of operating on alternative fuel and on gasoline or diesel fuel;

(B) provides equal or superior energy efficiency, as calculated for the applicable model year during fuel economy testing for the United States Government, when operating on alternative fuel as when operating on gasoline or diesel fuel;

(C) for model years 1993–1995 for an automobile capable of operating on a mixture of an alternative fuel and gasoline or diesel fuel and if the Administrator of the Environmental Protection Agency decides to extend the application of this subclause, for an additional period ending not later than the end of the last model year to which section 32905(b) and (d) of this title applies, provides equal or superior energy efficiency, as calculated for the applicable model year during fuel economy testing for the Government, when operating on a mixture of alternative fuel and gasoline or diesel fuel containing exactly 50 percent gasoline or diesel fuel as when operating on gasoline or diesel fuel; and

(D) for a passenger automobile, meets or exceeds the minimum driving range prescribed under subsection (c) of this section.

(9) “fuel” means—

(A) gasoline;

(B) diesel oil; or

(C) other liquid or gaseous fuel that the Secretary decides by regulation to include in this definition as consistent with the need of the United States to conserve energy.

(10) “fuel economy” means the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used, as determined by the Administrator under section 32904(c) of this title.

(11) “import” means to import into the customs territory of the United States.

(12) “manufacture” (except under section 32902(d) of this title) means to produce or assemble in the customs territory of the United States or to import.

(13) “manufacturer” means—

(A) a person engaged in the business of manufacturing automobiles, including a predecessor or successor of the person to the extent provided under regulations prescribed by the Secretary; and

(B) if more than one person is the manufacturer of an automobile, the person specified under regulations prescribed by the Secretary.

(14) “model” means a class of automobiles as decided by regulation by the Administrator after consulting and coordinating with the Secretary.

(15) “model year”, when referring to a specific calendar year, means—

(A) the annual production period of a manufacturer, as decided by the Administrator, that includes January 1 of that calendar year; or

(B) that calendar year if the manufacturer does not have an annual production period.

(16) “passenger automobile” means an automobile that the Secretary decides by regulation is manufactured primarily for transporting not more than 10 individuals, but does not include an automobile capable of off-highway operation that the Secretary decides by regulation—

(A) has a significant feature (except 4-wheel drive) designed for off-highway operation; and

(B) is a 4-wheel drive automobile or is rated at more than 6,000 pounds gross vehicle weight.

(b) **AUTHORITY TO CHANGE PERCENTAGE.**—The Secretary may prescribe regulations changing the percentage referred to in subsection (a)(1)(D) of this section to not less than 70 percent because of requirements relating to cold start, safety, or vehicle functions.

(c) **MINIMUM DRIVING RANGES FOR DUAL FUELED PASSENGER AUTOMOBILES.**—(1) The Secretary shall prescribe by regulation the minimum driving range that dual fueled automobiles that are passenger automobiles must meet when operating on alternative fuel to be dual fueled automobiles under sections 32905 and 32906 of this title. A determination whether a dual fueled automobile meets the minimum driving range requirement under this paragraph shall be based on the combined Agency city/highway fuel economy as determined for average fuel economy purposes for those automobiles.

(2)(A) The Secretary may prescribe a lower range for a specific model than that prescribed under paragraph (1) of this subsection. A manufacturer may petition for a lower range than that prescribed under paragraph (1) for a specific model.

(B) The minimum driving range prescribed for dual fueled automobiles (except electric automobiles) under subparagraph (A) of this paragraph or paragraph (1) of this subsection must be at least 200 miles.

(C) If the Secretary prescribes a minimum driving range of 200 miles for dual fueled automobiles (except electric automobiles) under paragraph (1) of this subsection, subparagraph (A) of this paragraph does not apply to dual fueled automobiles (except electric automobiles).

(3) In prescribing a minimum driving range under paragraph (1) of this subsection and in taking an action under paragraph (2) of this subsection, the Secretary shall consider the purpose set forth in section 3 of the Alternative Motor Fuels Act of 1988 (Public Law 100-494, 102 Stat. 2442), consumer acceptability, economic practicability, technology, environmental impact, safety, drivability, performance, and other factors the Secretary considers relevant.

### **§ 32902. Average fuel economy standards**

(a) NON-PASSENGER AUTOMOBILES.—At least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles (except passenger automobiles) manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year. The Secretary may prescribe separate standards for different classes of automobiles.

(b) PASSENGER AUTOMOBILES.—Except as provided in this section, the average fuel economy standard for passenger automobiles manufactured by a manufacturer in a model year after model year 1984 shall be 27.5 miles a gallon.

(c) AMENDING PASSENGER AUTOMOBILE STANDARDS.—(1) Subject to paragraph (2) of this subsection, the Secretary of Transportation may prescribe regulations amending the standard under subsection (b) of this section for a model year to a level that the Secretary decides is the maximum feasible average fuel economy level for that model year. Section 553 of title 5 applies to a proceeding to amend the standard. However, any interested person may make an oral presentation and a transcript shall be taken of that presentation.

(2) If an amendment increases the standard above 27.5 miles a gallon or decreases the standard below 26.0 miles a gallon, the Secretary of Transportation shall submit the amendment to Congress. The procedures of section 551 of the Energy Policy and Conservation Act (42 U.S.C. 6421) apply to an amendment, except that the 15 calendar days referred to in section 551(c) and (d) of the Act (42 U.S.C. 6421(c), (d)) are deemed to be 60 calendar days, and the 5 calendar days referred to in section 551(f)(4)(A) of the Act (42 U.S.C. 6421(f)(4)(A)) are deemed to be 20 calendar days. If either House of Congress disapproves the amendment under those procedures, the amendment does not take effect.

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

in the model year. The Secretary may exempt a manufacturer only if the Secretary—

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

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

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

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

(A) imports; or

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

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

(e) EMERGENCY VEHICLES.—(1) In this subsection, “emergency vehicle” means an automobile manufactured primarily for use—

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

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

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

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

(f) CONSIDERATIONS ON DECISIONS ON MAXIMUM FEASIBLE AVERAGE FUEL ECONOMY.—When deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.

(g) REQUIREMENTS FOR OTHER AMENDMENTS.—(1) The Secretary of Transportation may prescribe regulations amending an average fuel economy standard prescribed under subsection (a) or (d) of this section if the amended standard meets the requirements of subsection (a) or (d), as appropriate.

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

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

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

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

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

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

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

### **§ 32903. Credits for exceeding average fuel economy standards**

(a) EARNING AND PERIOD FOR APPLYING CREDITS.—When the average fuel economy of passenger automobiles manufactured by a manufacturer in a particular model year exceeds an applicable average fuel economy standard under section 32902(b)–(d) of this title (determined by the Secretary of Transportation without regard to credits under this section), the manufacturer earns credits. The credits may be applied to—

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

(2) to the extent not used under clause (1) of this subsection, any of the 3 consecutive model years immediately after the model year for which the credits are earned.

(b) PERIOD OF AVAILABILITY AND PLAN FOR FUTURE CREDITS.—

(1) Except as provided in paragraph (2) of this subsection, credits under this section are available to a manufacturer at the end of the model year in which earned.

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

- (i) the Secretary approves the plan; and
- (ii) the manufacturer earns those credits as provided by the plan.

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

(c) DETERMINING NUMBER OF CREDITS.—The number of credits a manufacturer earns under this section equals the product of—

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

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

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

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

(f) REFUND OF COLLECTED PENALTY.—When a civil penalty has been collected under this chapter from a manufacturer that has earned credits under this section, the Secretary of the Treasury shall refund to the manufacturer the amount of the penalty to the extent the penalty is attributable to credits available under this section.

#### **§ 32904. Calculation of average fuel economy**

(a) METHOD OF CALCULATION.—(1) The Administrator of the Environmental Protection Agency shall calculate the average fuel economy of a manufacturer subject to—

- (A) section 32902(a) of this title in a way prescribed by the Administrator; and

(B) section 32902(b)–(d) of this title by dividing—

- (i) the number of passenger automobiles manufactured by the manufacturer in a model year; by

- (ii) the sum of the fractions obtained by dividing the number of passenger automobiles of each model manufactured by the manufacturer in that model year by the fuel economy measured for that model.

(2)(A) In this paragraph, “electric vehicle” means a vehicle powered primarily by an electric motor drawing electrical current from a portable source.

(B) If a manufacturer manufactures an electric vehicle, the Administrator shall include in the calculation of average fuel economy under paragraph (1) of this subsection equivalent petroleum based fuel economy values determined by the Secretary of Energy for various classes of electric vehicles. The Secretary shall review those values each year and determine and propose necessary revisions based on the following factors:

(i) the approximate electrical energy efficiency of the vehicle, considering the kind of vehicle and the mission and weight of the vehicle.

(ii) the national average electrical generation and transmission efficiencies.

(iii) the need of the United States to conserve all forms of energy and the relative scarcity and value to the United States of all fuel used to generate electricity.

(iv) the specific patterns of use of electric vehicles compared to petroleum-fueled vehicles.

(b) SEPARATE CALCULATIONS FOR PASSENGER AUTOMOBILES MANUFACTURED DOMESTICALLY AND NOT DOMESTICALLY.—(1) In this subsection—

(A) a passenger automobile is deemed to be manufactured domestically in a model year if at least 75 percent of the cost to the manufacturer is attributable to value added in the United States or Canada, unless the assembly of the automobile is completed in Canada and the automobile is imported into the United States more than 30 days after the end of the model year; and

(B) the fuel economy of a passenger automobile that is not manufactured domestically is deemed to be equal to the average fuel economy of all passenger automobiles manufactured by the same manufacturer that are not manufactured domestically.

(2)(A) Except as provided in paragraphs (4) and (5) of this subsection, the Administrator shall make separate calculations under subsection (a)(1)(B) of this section for—

(i) passenger automobiles manufactured domestically by a manufacturer (or included in this category under paragraph (3) of this subsection); and

(ii) passenger automobiles not manufactured domestically by that manufacturer (or excluded from this category under paragraph (3) of this subsection).

(B) Passenger automobiles described in subparagraph (A)(i) and (ii) of this paragraph are deemed to be manufactured by separate manufacturers under this chapter.

(3)(A) A manufacturer may submit to the Secretary of Transportation for approval a plan, including supporting material, stating the actions and the deadlines for taking the actions, that will ensure that the model or models referred to in subparagraph (B) of this paragraph will be manufactured domestically before the end of the 4th model year covered by the plan. The Secretary promptly shall consider and act on the plan. The Secretary shall approve the plan unless—

(i) the Secretary finds that the plan is inadequate to meet the requirements of this paragraph; or

(ii) the manufacturer previously has submitted a plan approved by the Secretary under this paragraph.

(B) If the plan is approved, the Administrator shall include under paragraph (2)(A)(i) and exclude under paragraph (2)(A)(ii) of this subsection, for each of the 4 model years covered by the plan, not more than 150,000 passenger automobiles manufactured by that manufacturer but not qualifying as domestically manufactured if—

(i) the model or models involved previously have not been manufactured domestically;

(ii) at least 50 percent of the cost to the manufacturer of each of the automobiles is attributable to value added in the United States or Canada;

(iii) the automobiles, if their assembly was completed in Canada, are imported into the United States not later than 30 days after the end of the model year; and

(iv) the model or models are manufactured domestically before the end of the 4th model year covered by the plan.

(4)(A) A manufacturer may file with the Secretary of Transportation a petition for an exemption from the requirement of separate calculations under paragraph (2)(A) of this subsection if the manufacturer began automobile production or assembly in the United States—

(i) after December 22, 1975, and before May 1, 1980; or

(ii) after April 30, 1980, if the manufacturer has engaged in the production or assembly in the United States for at least one model year ending before January 1, 1986.

(B) The Secretary of Transportation shall grant the exemption unless the Secretary finds that the exemption would result in reduced employment in the United States related to motor vehicle manufacturing during the period of the exemption. An exemption under this paragraph is effective for 5 model years or, if requested by the manufacturer, a longer period provided by the Secretary in the order granting the exemption. The exemption applies to passenger automobiles manufactured by that manufacturer during the period of the exemption.

(C) Before granting an exemption, the Secretary of Transportation shall provide notice of, and reasonable opportunity for, written or oral comment about the petition. The period for comment shall end not later than 60 days after the petition is filed, except that the Secretary may extend the period for not more than another 30 days. The Secretary shall decide whether to grant or deny the exemption, and publish notice of the decision in the Federal Register, not later than 90 days after the petition is filed, except that the Secretary may extend the time for decision to a later date (not later than 150 days after the petition is filed) if the Secretary publishes notice of, and reasons for, the extension in the Federal Register. If the Secretary does not make a decision within the time provided in this subparagraph, the petition is deemed to have been granted. Not later than 30 days after the end of the decision period, the Secretary shall submit a written statement of the reasons for not making a decision to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives.

(5)(A) A person adversely affected by a decision of the Secretary of Transportation granting or denying an exemption may file, not

later than 30 days after publication of the notice of the decision, a petition for review in the United States Court of Appeals for the District of Columbia Circuit. That court has exclusive jurisdiction to review the decision and to affirm, remand, or set aside the decision under section 706(2)(A)–(D) of title 5.

(B) A judgment of the court under this subparagraph may be reviewed by the Supreme Court under section 1254 of title 28. Application for review by the Supreme Court must be made not later than 30 days after entry of the court's judgment.

(C) A decision of the Secretary of Transportation on a petition for an exemption under this paragraph may be reviewed administratively or judicially only as provided in this paragraph.

(6) Notwithstanding section 32903 of this title, during a model year when an exemption under this paragraph is effective for a manufacturer—

(A) credit may not be earned under section 32903(a) of this title by the manufacturer; and

(B) credit may not be made available under section 32903(b)(2) of this title for the manufacturer.

(c) TESTING AND CALCULATION PROCEDURES.—The Administrator shall measure fuel economy for each model and calculate average fuel economy for a manufacturer under testing and calculation procedures prescribed by the Administrator. However, except under section 32908 of this title, the Administrator shall use the same procedures for passenger automobiles the Administrator used for model year 1975 (weighted 55 percent urban cycle and 45 percent highway cycle), or procedures that give comparable results. A measurement of fuel economy or a calculation of average fuel economy (except under section 32908) shall be rounded off to the nearest .1 of a mile a gallon. The Administrator shall decide on the quantity of other fuel that is equivalent to one gallon of gasoline. To the extent practicable, fuel economy tests shall be carried out with emissions tests under section 206 of the Clean Air Act (42 U.S.C. 7525).

(d) EFFECTIVE DATE OF PROCEDURE OR AMENDMENT.—The Administrator shall prescribe a procedure under this section, or an amendment (except a technical or clerical amendment) in a procedure, at least 12 months before the beginning of the model year to which the procedure or amendment applies.

(e) REPORTS AND CONSULTATION.—The Administrator shall report measurements and calculations under this section to the Secretary of Transportation and shall consult and coordinate with the Secretary in carrying out this section.

### **§ 32905. Manufacturing incentives for alternative fuel automobiles**

(a) DEDICATED AUTOMOBILES.—Except as provided in subsection (c) of this section or section 32904(a)(2) of this title, for any model of dedicated automobile manufactured by a manufacturer after model year 1992, the fuel economy measured for that model shall be based on the fuel content of the alternative fuel used to operate the automobile. A gallon of a liquid alternative fuel used to operate a dedicated automobile is deemed to contain .15 gallon of fuel.

(b) DUAL FUELED AUTOMOBILES.—Except as provided in subsection (d) of this section or section 32904(a)(2) of this title, for any model of dual fueled automobile manufactured by a manufacturer in model years 1993–2004, the Administrator of the Environ-

mental Protection Agency shall measure the fuel economy for that model by dividing 1.0 by the sum of—

(1) .5 divided by the fuel economy measured under section 32904(c) of this title when operating the model on gasoline or diesel fuel; and

(2) .5 divided by the fuel economy measured under subsection (a) of this section when operating the model on alternative fuel.

(c) GASEOUS FUEL DEDICATED AUTOMOBILES.—For any model of gaseous fuel dedicated automobile manufactured by a manufacturer after model year 1992, the Administrator shall measure the fuel economy for that model based on the fuel content of the gaseous fuel used to operate the automobile. One hundred cubic feet of natural gas is deemed to contain .823 gallon equivalent of natural gas. The Secretary of Transportation shall determine the appropriate gallon equivalent of other gaseous fuels. A gallon equivalent of gaseous fuel is deemed to have a fuel content of .15 gallon of fuel.

(d) GASEOUS FUEL DUAL FUELED AUTOMOBILES.—For any model of gaseous fuel dual fueled automobile manufactured by a manufacturer in model years 1993–2004, the Administrator shall measure the fuel economy for that model by dividing 1.0 by the sum of—

(1) .5 divided by the fuel economy measured under section 32904(c) of this title when operating the model on gasoline or diesel fuel; and

(2) .5 divided by the fuel economy measured under subsection (c) of this section when operating the model on gaseous fuel.

(e) FUEL ECONOMY CALCULATIONS.—The Administrator shall calculate the manufacturer's average fuel economy under section 32904(a)(1) of this title for each model described under subsections (a)–(d) of this section by using as the denominator the fuel economy measured for each model under subsections (a)–(d).

(f) EXTENDING APPLICATION OF SUBSECTIONS (b) AND (d).—Not later than December 31, 2001, the Secretary of Transportation shall—

(1) extend by regulation the application of subsections (b) and (d) of this section for not more than 4 consecutive model years immediately after model year 2004 and explain the basis on which the extension is granted; or

(2) publish a notice explaining the reasons for not extending the application of subsections (b) and (d) of this section.

(g) STUDY AND REPORT.—Not later than September 30, 2000, the Secretary of Transportation, in consultation with the Secretary of Energy and the Administrator, shall complete a study of the success of the policy of subsections (b) and (d) of this title, and submit to the Committees on Commerce, Science, and Transportation and Governmental Affairs of the Senate and the Committee on Energy and Commerce of the House of Representatives a report on the results of the study, including preliminary conclusions on whether the application of subsections (b) and (d) should be extended for up to 4 more model years. The study and conclusions shall consider—

(1) the availability to the public of alternative fueled automobiles and alternative fuel;

(2) energy conservation and security;

(3) environmental considerations; and

(4) other relevant factors.

**§ 32906. Maximum fuel economy increase for alternative fuel automobiles**

(a) MAXIMUM INCREASES.—(1)(A) For each of the model years 1993–2004 for each category of automobile (except an electric automobile), the maximum increase in average fuel economy for a manufacturer attributable to dual fueled automobiles is 1.2 miles a gallon.

(B) If the application of section 32905(b) and (d) of this title is extended under section 32905(f) of this title, for each category of automobile (except an electric automobile) the maximum increase in average fuel economy for a manufacturer for each of the model years 2005–2008 attributable to dual fueled automobiles is .9 mile a gallon.

(2) In applying paragraph (1) of this subsection, the Administrator of the Environmental Protection Agency shall determine the increase in a manufacturer's average fuel economy attributable to dual fueled automobiles by subtracting from the manufacturer's average fuel economy calculated under section 32905(e) of this title the number equal to what the manufacturer's average fuel economy would be if it were calculated by the formula in section 32904(a)(1) of this title by including as the denominator for each model of dual fueled automobile the fuel economy when the automobiles are operated on gasoline or diesel fuel. If the increase attributable to dual fueled automobiles for any model year described—

(A) in paragraph (1)(A) of this subsection is more than 1.2 miles a gallon, the limitation in paragraph (1)(A) applies; and

(B) in paragraph (1)(B) of this subsection is more than .9 mile a gallon, the limitation in paragraph (1)(B) applies.

(b) OFFSETS.—Notwithstanding this section and sections 32901(c) and 32905 of this title, if the Secretary of Transportation reduces the average fuel economy standard for passenger automobiles for any model year below 27.5 miles a gallon, an increase in average fuel economy for passenger automobiles of more than .7 mile a gallon to which a manufacturer of dual fueled automobiles would otherwise be entitled is reduced by an amount equal to the amount of the reduction in the standard. However, the increase may not be reduced to less than .7 mile a gallon.

**§ 32907. Reports and tests of manufacturers**

(a) MANUFACTURER REPORTS.—(1) A manufacturer shall report to the Secretary of Transportation on—

(A) whether the manufacturer will comply with an applicable average fuel economy standard under section 32902 of this title for the model year for which the report is made;

(B) the actions the manufacturer has taken or intends to take to comply with the standard; and

(C) other information the Secretary requires by regulation.

(2) A manufacturer shall submit a report under paragraph (1) of this subsection during the 30 days—

(A) before the beginning of each model year; and

(B) beginning on the 180th day of the model year.

(3) When a manufacturer decides that actions reported under paragraph (1)(B) of this subsection are not sufficient to ensure

compliance with that standard, the manufacturer shall report to the Secretary additional actions the manufacturer intends to take to comply with the standard and include a statement about whether those actions are sufficient to ensure compliance.

(4) This subsection does not apply to a manufacturer for a model year for which the manufacturer is subject to an alternative average fuel economy standard under section 32902(d) of this title.

(b) RECORDS, REPORTS, TESTS, INFORMATION, AND INSPECTION.—(1) Under regulations prescribed by the Secretary or the Administrator of the Environmental Protection Agency to carry out this chapter, a manufacturer shall keep records, make reports, conduct tests, and provide items and information. On request and display of proper credentials, an officer or employee designated by the Secretary or Administrator may inspect automobiles and records of the manufacturer. An inspection shall be made at a reasonable time and in a reasonable way.

(2) The district courts of the United States may—

(A) issue an order enforcing a requirement or request under paragraph (1) of this subsection; and

(B) punish a failure to obey the order as a contempt of court.

### § 32908. Fuel economy information

(a) DEFINITIONS.—In this section—

(1) “automobile” includes an automobile rated at not more than 8,500 pounds gross vehicle weight regardless of whether the Secretary of Transportation has applied this chapter to the automobile under section 32901(a)(3)(B) of this title.

(2) “dealer” means a person residing or located in a State, the District of Columbia, or a territory or possession of the United States, and engaged in the sale or distribution of new automobiles to the first person (except a dealer buying as a dealer) that buys the automobile in good faith other than for resale.

(b) LABELING REQUIREMENTS AND CONTENTS.—(1) Under regulations of the Administrator of the Environmental Protection Agency, a manufacturer of automobiles shall attach a label to a prominent place on each automobile manufactured in a model year. The dealer shall maintain the label. The label shall contain the following information:

(A) the fuel economy of the automobile.

(B) the estimated annual fuel cost of operating the automobile.

(C) the range of fuel economy of comparable automobiles of all manufacturers.

(D) a statement that a booklet is available from the dealer to assist in making a comparison of fuel economy of other automobiles manufactured by all manufacturers in that model year.

(E) the amount of the automobile fuel efficiency tax imposed on the sale of the automobile under section 4064 of the Internal Revenue Code of 1986 (26 U.S.C. 4064).

(F) other information required or authorized by the Administrator that is related to the information required by clauses (A)–(D) of this paragraph.

(2) The Administrator may allow a manufacturer to comply with this subsection by—

(A) disclosing the information on the label required under section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232); and

(B) including the statement required by paragraph (1)(E) of this subsection at a time and in a way that takes into account special circumstances or characteristics.

(3) For dedicated automobiles manufactured after model year 1992, the fuel economy of those automobiles under paragraph (1)(A) of this subsection is the fuel economy for those automobiles when operated on alternative fuel, measured under section 32905(a) or (c) of this title, multiplied by .15. Each label required under paragraph (1) of this subsection for dual fueled automobiles shall—

(A) indicate the fuel economy of the automobile when operated on gasoline or diesel fuel;

(B) clearly identify the automobile as a dual fueled automobile;

(C) clearly identify the fuels on which the automobile may be operated; and

(D) contain a statement informing the consumer that the additional information required by subsection (c)(2) of this section is published and distributed by the Secretary of Energy.

(c) FUEL ECONOMY INFORMATION BOOKLET.—(1) The Administrator shall prepare the booklet referred to in subsection (b)(1)(D) of this section. The booklet—

(A) shall be simple and readily understandable;

(B) shall contain information on fuel economy and estimated annual fuel costs of operating automobiles manufactured in each model year; and

(C) may contain information on geographical or other differences in estimated annual fuel costs.

(2)(A) For dual fueled automobiles manufactured after model year 1992, the booklet published under paragraph (1) shall contain additional information on—

(i) the energy efficiency and cost of operation of those automobiles when operated on gasoline or diesel fuel as compared to those automobiles when operated on alternative fuel; and

(ii) the driving range of those automobiles when operated on gasoline or diesel fuel as compared to those automobiles when operated on alternative fuel.

(B) For dual fueled automobiles, the booklet published under paragraph (1) also shall contain—

(i) information on the miles a gallon achieved by the automobiles when operated on alternative fuel; and

(ii) a statement explaining how the information made available under this paragraph can be expected to change when the automobile is operated on mixtures of alternative fuel and gasoline or diesel fuel.

(3) The Secretary of Energy shall publish and distribute the booklet. The Administrator shall prescribe regulations requiring dealers to make the booklet available to prospective buyers.

(d) DISCLOSURE.—A disclosure about fuel economy or estimated annual fuel costs under this section does not establish a warranty under a law of the United States or a State.

(e) VIOLATIONS.—A violation of subsection (b) of this section is—

(1) a violation of section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232); and

(2) an unfair or deceptive act or practice in or affecting commerce under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), except sections 5(m) and 18 (15 U.S.C. 45(m), 57a).

(f) CONSULTATION.—The Administrator shall consult with the Federal Trade Commission and the Secretaries of Transportation and Energy in carrying out this section.

### **§ 32909. Judicial review of regulations**

(a) FILING AND VENUE.—(1) A person that may be adversely affected by a regulation prescribed in carrying out section 32901–32904 or 32908 of this title may apply for review of the regulation by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

(2) A person adversely affected by a regulation prescribed under section 32912(c)(1) of this title may apply for review of the regulation by filing a petition for review in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

(b) TIME FOR FILING AND JUDICIAL PROCEDURES.—The petition must be filed not later than 59 days after the regulation is prescribed, except that a petition for review of a regulation prescribing an amendment of a standard submitted to Congress under section 32902(c)(2) of this title must be filed not later than 59 days after the end of the 60-day period referred to in section 32902(c)(2). The clerk of the court shall send immediately a copy of the petition to the Secretary of Transportation or the Administrator of the Environmental Protection Agency, whoever prescribed the regulation. The Secretary or the Administrator shall file with the court a record of the proceeding in which the regulation was prescribed.

(c) ADDITIONAL PROCEEDINGS.—(1) When reviewing a regulation under subsection (a)(1) of this section, the court, on request of the petitioner, may order the Secretary or the Administrator to receive additional submissions if the court is satisfied the additional submissions are material and there were reasonable grounds for not presenting the submissions in the proceeding before the Secretary or Administrator.

(2) The Secretary or the Administrator may amend or set aside the regulation, or prescribe a new regulation because of the additional submissions presented. The Secretary or Administrator shall file an amended or new regulation and the additional submissions with the court. The court shall review a changed or new regulation.

(d) SUPREME COURT REVIEW AND ADDITIONAL REMEDIES.—A judgment of a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28. A remedy under subsections (a)(1) and (c) of this section is in addition to any other remedies provided by law.

### **§ 32910. Administrative**

(a) GENERAL POWERS.—(1) In carrying out this chapter, the Secretary of Transportation or the Administrator of the Environmental Protection Agency may—

(A) inspect and copy records of any person at reasonable times;

(B) order a person to file written reports or answers to specific questions, including reports or answers under oath; and

(C) conduct hearings, administer oaths, take testimony, and subpoena witnesses and records the Secretary or Administrator considers advisable.

(2) A witness summoned under paragraph (1)(C) of this subsection is entitled to the same fee and mileage the witness would have been paid in a court of the United States.

(b) CIVIL ACTIONS TO ENFORCE.—A civil action to enforce a subpoena or order of the Secretary or Administrator under subsection (a) of this section may be brought in the district court of the United States for the judicial district in which the proceeding by the Secretary or Administrator was conducted. The court may punish a failure to obey an order of the court to comply with the subpoena or order of the Secretary or Administrator as a contempt of court.

(c) DISCLOSURE OF INFORMATION.—The Secretary and the Administrator each shall disclose information obtained under this chapter (except information obtained under section 32904(c) of this title) under section 552 of title 5. However, the Secretary or Administrator may withhold information under section 552(b)(4) of title 5 only if the Secretary or Administrator decides that disclosure of the information would cause significant competitive damage. A matter referred to in section 552(b)(4) and relevant to an administrative or judicial proceeding under this chapter may be disclosed in that proceeding. A measurement or calculation under section 32904(c) of this title shall be disclosed under section 552 of title 5 without regard to section 552(b).

(d) REGULATIONS.—The Administrator may prescribe regulations to carry out duties of the Administrator under this chapter.

### **§ 32911. Compliance**

(a) GENERAL.—A person commits a violation if the person fails to comply with this chapter and regulations and standards prescribed and orders issued under this chapter (except sections 32902, 32903, 32908(b), and 32917(b) and regulations and standards prescribed and orders issued under those sections). The Secretary of Transportation shall conduct a proceeding, with an opportunity for a hearing on the record, to decide whether a person has committed a violation. Any interested person may participate in a proceeding under this subsection.

(b) AUTOMOBILE MANUFACTURERS.—A manufacturer of automobiles commits a violation if the manufacturer fails to comply with an applicable average fuel economy standard under section 32902 of this title. Compliance is determined after considering credits available to the manufacturer under section 32903 of this title. If average fuel economy calculations under section 32904(c) of this title indicate that a manufacturer has violated this subsection, the Secretary shall conduct a proceeding, with an opportunity for a hearing on the record, to decide whether a violation has been committed. The Secretary may not conduct the proceeding if further measurements of fuel economy, further calculations of average fuel economy, or other information indicates a violation has not been committed. The results of the measurements and

calculations and the information shall be published in the Federal Register. Any interested person may participate in a proceeding under this subsection.

**§ 32912. Civil penalties**

(a) GENERAL PENALTY.—A person that violates section 32911(a) of this title is liable to the United States Government for a civil penalty of not more than \$10,000 for each violation. A separate violation occurs for each day the violation continues.

(b) PENALTY FOR MANUFACTURER VIOLATIONS OF FUEL ECONOMY STANDARDS.—Except as provided in subsection (c) of this section, a manufacturer that violates a standard prescribed for a model year under section 32902 of this title is liable to the Government for a civil penalty of \$5 multiplied by each .1 of a mile a gallon by which the applicable average fuel economy standard under that section exceeds the average fuel economy—

(1) calculated under section 32904(a)(1)(A) or (B) of this title for automobiles to which the standard applies manufactured by the manufacturer during the model year;

(2) multiplied by the number of those automobiles; and

(3) reduced by the credits available to the manufacturer under section 32903 of this title for the model year.

(c) HIGHER PENALTY AMOUNTS.—(1)(A) The Secretary of Transportation shall prescribe by regulation a higher amount for each .1 of a mile a gallon to be used in calculating a civil penalty under subsection (b) of this section, if the Secretary decides that the increase in the penalty—

(i) will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed; and

(ii) will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State.

(B) The amount prescribed under subparagraph (A) of this paragraph may not be more than \$10 for each .1 of a mile a gallon.

(C) The Secretary may make a decision under subparagraph (A)(ii) of this paragraph only when the Secretary decides that it is likely that the increase in the penalty will not—

(i) cause a significant increase in unemployment in a State or a region of a State;

(ii) adversely affect competition; or

(iii) cause a significant increase in automobile imports.

(D) A higher amount prescribed under subparagraph (A) of this paragraph is effective for the model year beginning at least 18 months after the regulation stating the higher amount becomes final.

(2) The Secretary shall publish in the Federal Register a proposed regulation under this subsection and a statement of the basis for the regulation and provide each manufacturer of automobiles a copy of the proposed regulation and the statement. The Secretary shall provide a period of at least 45 days for written public comments on the proposed regulation. The Secretary shall submit a copy of the proposed regulation to the Federal Trade Commission and request the Commission to comment on the proposed regulation within that period. After that period, the Secretary shall give interested persons and the Commission an opportunity at a public hearing to present oral information, views, and argu-

ments and to direct questions about disputed issues of material fact to—

- (A) other interested persons making oral presentations;
- (B) employees and contractors of the Government that made written comments or an oral presentation or participated in the development or consideration of the proposed regulation; and
- (C) experts and consultants that provided information to a person that the person includes, or refers to, in an oral presentation.

(3) The Secretary may restrict the questions of an interested person and the Commission when the Secretary decides that the questions are duplicative or not likely to result in a timely and effective resolution of the issues. A transcript shall be kept of a public hearing under this subsection. A copy of the transcript and written comments shall be available to the public at the cost of reproduction.

(4) The Secretary shall publish a regulation prescribed under this subsection in the Federal Register with the decisions required under paragraph (1) of this subsection.

(5) An officer or employee of a department, agency, or instrumentality of the Government violates section 1905 of title 18 by disclosing, except in an in camera proceeding by the Secretary or a court, information—

- (A) provided to the Secretary or the court during consideration or review of a regulation prescribed under this subsection; and
- (B) decided by the Secretary to be confidential under section 11(d) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 796(d)).

(d) WRITTEN NOTICE REQUIREMENT.—The Secretary shall impose a penalty under this section by written notice.

### **§ 32913. Compromising and remitting civil penalties**

(a) GENERAL AUTHORITY AND LIMITATIONS.—The Secretary of Transportation may compromise or remit the amount of a civil penalty imposed under section 32912(a) or (b) of this title. However, the amount of a penalty imposed under section 32912(b) may be compromised or remitted only to the extent—

- (1) necessary to prevent the insolvency or bankruptcy of the manufacturer of automobiles;
- (2) the manufacturer shows that the violation was caused by an act of God, a strike, or a fire; or
- (3) the Federal Trade Commission certifies under subsection (b)(1) of this section that a reduction in the penalty is necessary to prevent a substantial lessening of competition.

(b) PENALTY REDUCTION BY COMMISSION.—(1) A manufacturer liable for a civil penalty under section 32912(b) of this title may apply to the Commission for a certification that the penalty should be reduced to prevent a substantial lessening of competition in the segment of the motor vehicle industry subject to the standard that was violated. The Commission shall make the certification when it finds that reduction is necessary to prevent the lessening. The Commission shall state in the certification the maximum amount by which the penalty may be reduced.

(2) An application under this subsection must be made not later than 30 days after the Secretary decides that the manufacturer

has violated section 32911(b) of this title. To the maximum extent practicable, the Commission shall make a decision on an application by the 90th day after the application is filed. A proceeding under this subsection may not delay the manufacturer's liability for the penalty for more than 90 days after the application is filed.

(3) When a civil penalty is collected in a civil action under this chapter before a decision of the Commission under this subsection is final, the payment shall be paid to the court in which the action was brought. The court shall deposit the payment in the general fund of the Treasury on the 90th day after the decision of the Commission becomes final. When the court is holding payment of a penalty reduced under subsection (a)(3) of this section, the Secretary shall direct the court to remit the appropriate amount of the penalty to the manufacturer.

#### **§ 32914. Collecting civil penalties**

(a) CIVIL ACTIONS.—If a person does not pay a civil penalty after it becomes a final order of the Secretary of Transportation or a judgment of a court of appeals of the United States for a circuit, the Attorney General shall bring a civil action in an appropriate district court of the United States to collect the penalty. The validity and appropriateness of the final order imposing the penalty is not reviewable in the action.

(b) PRIORITY OF CLAIMS.—A claim of a creditor against a bankrupt or insolvent manufacturer of automobiles has priority over a claim of the United States Government against the manufacturer for a civil penalty under section 32912(b) of this title when the creditor's claim is for credit extended before a final judgment (without regard to section 32913(b)(1) and (2) of this title) in an action to collect under subsection (a) of this section.

#### **§ 32915. Appealing civil penalties**

Any interested person may appeal a decision of the Secretary of Transportation to impose a civil penalty under section 32912(a) or (b) of this title, or of the Federal Trade Commission under section 32913(b)(1) of this title, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. A person appealing a decision must file a notice of appeal with the court not later than 30 days after the decision and, at the same time, send a copy of the notice by certified mail to the Secretary or the Commission. The Secretary or the Commission promptly shall file with the court a certified copy of the record of the proceeding in which the decision was made.

#### **§ 32916. Reports to Congress**

(a) ANNUAL REPORT.—Not later than January 15 of each year, the Secretary of Transportation shall submit to each House of Congress, and publish in the Federal Register, a report on the review by the Secretary of average fuel economy standards prescribed under this chapter.

(b) JOINT EXAMINATIONS AFTER GRANTING EXEMPTIONS.—(1) After an exemption has been granted under section 32904(b)(4) of this title, the Secretaries of Transportation and Labor shall conduct annually a joint examination of the extent to which section 32904(b)(4)—

- (A) achieves the purposes of this chapter;
- (B) improves fuel efficiency (thereby facilitating conservation of petroleum and reducing petroleum imports);
- (C) has promoted employment in the United States related to automobile manufacturing;
- (D) has not caused unreasonable harm to the automobile manufacturing sector in the United States; and
- (E) has permitted manufacturers that have assembled passenger automobiles deemed to be manufactured domestically under section 32904(b)(1)(A) of this title thereafter to assemble in the United States passenger automobiles of the same model that have less than 75 percent of their value added in the United States or Canada, together with the reasons.

(2) The Secretary of Transportation shall include the results of the examination under paragraph (1) of this subsection in each report submitted under subsection (a) of this section more than 180 days after an exemption has been granted under section 32904(b)(4) of this title, or submit the results of the examination directly to Congress before the report is submitted when circumstances warrant.

### **§ 32917. Standards for executive agency automobiles**

(a) DEFINITION.—In this section, “executive agency” has the same meaning given that term in section 105 of title 5.

(b) FLEET AVERAGE FUEL ECONOMY.—(1) The President shall prescribe regulations that require passenger automobiles leased for at least 60 consecutive days or bought by executive agencies in a fiscal year to achieve a fleet average fuel economy (determined under paragraph (2) of this subsection) for that year of at least the greater of—

- (A) 18 miles a gallon; or
  - (B) the applicable average fuel economy standard under section 32902(b) or (c) of this title for the model year that includes January 1 of that fiscal year.
- (2) Fleet average fuel economy is—

(A) the total number of passenger automobiles leased for at least 60 consecutive days or bought by executive agencies in a fiscal year (except automobiles designed for combat-related missions, law enforcement work, or emergency rescue work); divided by

(B) the sum of the fractions obtained by dividing the number of automobiles of each model leased or bought by the fuel economy of that model.

### **§ 32918. Preemption**

(a) GENERAL.—When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

(b) REQUIREMENTS MUST BE IDENTICAL.—When a requirement under section 32908 of this title is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement.

(c) STATE AND POLITICAL SUBDIVISION AUTOMOBILES.—A State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use.

### CHAPTER 331—THEFT PREVENTION

- Sec.
- 33101. Definitions.
  - 33102. Theft prevention standard for high theft lines.
  - 33103. Theft prevention standard for other lines.
  - 33104. Designation of high theft vehicle lines and parts.
  - 33105. Cost limitations.
  - 33106. Exemption for passenger motor vehicles equipped with anti-theft devices.
  - 33107. Voluntary vehicle identification standards.
  - 33108. Monitoring compliance of manufacturers.
  - 33109. National Stolen Passenger Motor Vehicle Information System.
  - 33110. Verifications involving junk and salvage motor vehicles.
  - 33111. Verifications involving motor vehicle major parts.
  - 33112. Insurance reports and information.
  - 33113. Theft reports.
  - 33114. Prohibited acts.
  - 33115. Civil penalties and enforcement.
  - 33116. Confidentiality of information.
  - 33117. Judicial review.
  - 33118. Preemption of State and local law.

#### § 33101. Definitions

In this chapter—

(1) “chop shop” means a building, lot, facility, or other structure or premise at which at least one person engages in receiving, concealing, destroying, disassembling, dismantling, reassembling, or storing a passenger motor vehicle or passenger motor vehicle part that has been unlawfully obtained—

(A) to alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, or remove the identity of the vehicle or part, including the vehicle identification number or a derivative of that number; and

(B) to distribute, sell, or dispose of the vehicle or part in interstate or foreign commerce.

(2) “covered major part” means a major part selected under sections 33102(c)(1) and 33104 of this title for coverage by the vehicle theft prevention standard prescribed under section 33102 or 33103.

(3) “existing line” means a line introduced into commerce before January 1, 1990.

(4) “first purchaser” means the person making the first purchase other than for resale.

(5) “line” means a name that a manufacturer of motor vehicles applies to a group of motor vehicle models of the same make that have the same body or chassis, or otherwise are similar in construction or design.

(6) “major part” means—

- (A) the engine;
- (B) the transmission;
- (C) each door to the passenger compartment;
- (D) the hood;
- (E) the grille;
- (F) each bumper;
- (G) each front fender;
- (H) the deck lid, tailgate, or hatchback;
- (I) each rear quarter panel;

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(c) An order, rule, or regulation in effect under a law replaced by sections 1–4 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(d) An action taken or an offense committed under a law replaced by sections 1–4 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.

(e) An inference of legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of a caption or catch line of the provision.

(f) If a provision enacted by this Act is held invalid, all valid provisions that are severable from the invalid provision remain in effect. If a provision enacted by this Act is held invalid in any of its applications, the provision remains valid for all valid applications that are severable from any of the invalid applications.

REPEALS

SEC. 7. (a) The repeal of a law by this Act may not be construed as a legislative implication that the provision was or was not in effect before its repeal.

(b) The laws specified in the following schedule are repealed, except for rights and duties that matured, penalties that were incurred, and proceedings that were begun before the date of enactment of this Act:

Schedule of Laws Repealed  
Statutes at Large

Date	Chapter or Public Law	Section	Statutes at Large		U.S. Code	
			Volume	Page	Title	Section
1864 July 2	216 .....	15 .....	13	362 .....	45	83
1873 Mar. 3	226 .....	2(words after 2d semicolon).	17	508 .....	.....	.....
1874 June 20	331 .....	.....	18	111 .....	45	83
June 22	414 .....	.....	18	200 .....	45	89
1879 Mar. 3	183 .....	1(4th par. on p. 420) .....	20	420 .....	45	90
1887 Feb. 4	104 .....	25 .....	24	379 .....	49	26
Mar. 3	345 .....	.....	24	488 .....	App. 45	94, 95
1893 Mar. 2	196 .....	.....	27	531 .....	45	1–7
1896 Apr. 1	87 .....	.....	29	85 .....	45	6
1897 Mar. 3	386 .....	(proviso under heading "Transportation and Recruiting, Marine Corps").	29	663 .....	45	91

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Schedule of Laws Repealed—Continued

Statutes at Large

Date	Chapter or Public Law	Section	Statutes at Large		U.S. Code	
			Volume	Page	Title	Section
Oct. 20	92-513 .....	(less 511) .....	86	947 .....	15	1901, 1901(note), 1911-1922, 1941-1949, 1961-1964, 1981, 1981(note), 1982-1991, 2001-2010, 2012, 2021- 2034
Oct. 25	92-548 .....	.....	86	1159 .....	15	1381(note), 1409, 1410
	92-556 .....	.....	86	1170 .....	49	1324(note)
Oct. 27	92-574 .....	7(b) .....	86	1239 .....	App. 49 App.	1431
1973 June 18	93-44 .....	.....	87	88 .....	49 App.	1513, 1701(note), 1711, 1712, 1714, 1716, 1717
Aug. 13	93-87 .....	138, 164, 301 .....	87	270, 281, 295.	49 App.	1602a, 1603, 1603(note), 1607d(note), 1608(note), 1612
Aug. 14	93-90 .....	.....	87	305 .....	45	421(note), 441(note)
	.....	.....	.....	.....	49 App.	1762
Nov. 3	93-146 .....	.....	87	548 .....	45	501(note), 502, 543, 543(note), 545, 546, 548, 561-564, 601, 602, 641
1974 Jan. 2	93-236 .....	303(e)(words "title VII of the Railroad Revitalization and Regulatory Reform Act of 1976 or of"), 711(words " , the National Railroad Passenger Corporation, or the Amtrak Commuter Services Corporation").	.....	.....	45	743, 797j
	93-239 .....	4 .....	87	1048 .....	49 App.	1421
Aug. 5	93-366 .....	.....	88	409 .....	49 App.	1301(note), 1301, 1356, 1357, 1471, 1472, 1473, 1487, 1511, 1514-1516
Aug. 22	93-383 .....	813 .....	88	737 .....	49 App.	1602, 1602a, 1602a(note)
Aug. 30	93-403 .....	.....	88	802 .....	49 App.	1671(note), 1674, 1684