

DEPARTMENT OF TRANSPORTATION
National Highway Traffic Safety Administration

49 CFR Part 538

Docket No.: NHTSA-2001-10774; Notice 3

RIN 2127-AI41

Automotive Fuel Economy Manufacturing Incentives
for Alternative Fueled Vehicles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT)

ACTION: Final Rule

SUMMARY: Consistent with the Alternative Motor Fuels Act of 1988, this Final Rule extends the incentive created by that Act to encourage the continued production of motor vehicles capable of operating on alternative fuels. The incentive, originally enacted to begin the process of moving the nation toward the use of alternative fuels and away from petroleum dependence, has resulted in the creation of a fleet of vehicles able to operate on alternative fuel. To continue the process of moving the nation toward energy independence and to remain dedicated to the policies underlying the enactment of the Act, this Final Rule extends the alternative fuel CAFE incentive as contemplated in the NPRM for four additional model years.

DATES: *EFFECTIVE DATE:* The amendments made in this Final Rule are effective October 1, 2004. ***PETITION DATE:*** Any petitions for reconsideration must be received by NHTSA no later than [insert date 45 days following publication in the Federal Register].

ADDRESS: Any petitions for reconsideration should refer to the docket and notice number of this notice and be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: The following persons at the National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590: For non-legal issues: Mr. Kenneth Katz, Fuel Economy Division, Office of Planning and Consumer Standards, NVS-132, Room 5320, telephone (202) 366-0846, facsimile (202) 493-2290. For legal issues: Otto Matheke, Office of the Chief Counsel, NCC-20, Room 5219, telephone (202) 366-5263, facsimile (202) 366-3820.

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I. Summary of Final Rule

This Final Rule completes the agency's implementation of a statutory requirement to consider the continuation of credits accorded to dual fueled automobiles pursuant to the Alternative Motor Fuels Act of 1988 (AMFA; Pub. L. 100-494). As part of that Act, Congress provided that motor vehicles subject to corporate average fuel economy (CAFE) standards are accorded special consideration if they are capable of running either flexibly (dual fueled) or exclusively (dedicated) on fuel other than petroleum.¹ AMFA encourages the production of these vehicles by providing a specified credit toward the calculation of a manufacturer's CAFE performance. Congress provided this incentive to enhance the nation's energy independence. Congress ensured that the incentive is not negated through the setting of more stringent CAFE standards by prohibiting the agency from considering the AMFA CAFE incentive when determining maximum feasible CAFE standards.

AMFA sets certain parameters for the amount and duration of the incentive program. For model years 1993 through 2004, the maximum allowable credit toward a manufacturer's average fuel economy is 1.2 miles per gallon (mpg). The statute then provides that the Department of Transportation (through NHTSA) must either extend the incentive program for dual fueled vehicles beyond the 2004 model year or issue a *Federal Register* notice justifying termination of the program. The statute limits any extension to no more than four model years and the amount of credit during any such extension to 0.9 mpg per manufacturer. Congress also required that

¹ There are two classes of alternative fuel motor vehicles. Dedicated alternative fuel motor vehicles are motor vehicles designed to run only on alternative fuel. Vehicles that are capable of operating on a conventional fuel (either gasoline or diesel) as well as on an alternative fuel are considered to be "dual fuel" or "flexible fuel" motor vehicles.

NHTSA provide it with a report discussing the progress of the program, apparently to help Congress determine whether any further legislative initiatives would be necessary.

This Final Rule completes the agency's implementation of the statutory mandate by extending the program as authorized by the statute. The agency's decision comes after a considered review of the public comments solicited in anticipation of preparing the Report to Congress, the public comments filed in response to the agency's March 2002 Notice of Proposed Rulemaking, and the legislative history surrounding the enactment of AMFA.

The agency's Report to Congress found that the results of the AMFA incentive program to date have been mixed in that the program led to the development and production of vehicles capable of operating on alternative fuels but has not yet generated an infrastructure to support fully the use of alternative fuels in such vehicles. The Report did not recommend abandoning the AMFA incentive program. On the contrary, the Report concluded that continuation of the program should include additional measures to ensure its success, and in particular measures aimed at encouraging the increased use of alternative fuels and the expansion of an alternative fuel infrastructure.

The agency finds that continuation of the AMFA incentive program, consistent with existing statutory limits, best serves the Congressional intent underlying AMFA and best serves the nation's continuing public policy interest in encouraging energy security. In enacting AMFA, Congress sought to solve the so-called "chicken and the egg" problem inherent in the development of an alternative fuel infrastructure. Vehicle manufacturers could not justify producing vehicles capable of operating on alternative fuels if people would not buy them or be

able to use them, and energy companies could not justify investing in developing fueling infrastructure for fuels of unknown consumer acceptance and utility.

As Congress intended, the CAFE credits accorded through AMFA have induced the creation of a fleet of approximately 3.4 million dual-fueled vehicles through the 2003 model year which, in turn, has begun to spur investment in alternative fuel stations and other infrastructure development. Congress specifically did not choose any particular alternative fuel when enacting AMFA. Instead, Congress provided a sufficient amount of time for experimenting with different fuels, for creating a fleet of vehicles capable of using one or more of those fuels and for beginning the development of an infrastructure to support that fleet. Recognizing that more time may be needed to accomplish the end result, Congress mandated that the agency extend the CAFE incentive through rulemaking (with specified limitations) or publish a *Federal Register* notice explaining why it chose not to do so.

In providing for special CAFE incentives to help create that fleet, Congress recognized in 1988 that its action was just a beginning toward energy security. The legislative history does not suggest that Congress believed the CAFE incentive provided to these vehicles would, in and of itself, lead to infrastructure supporting alternative fuel use and energy independence. Rather, the legislative history is replete with references to the initiation of a process to “begin” such development. If NHTSA were to terminate the incentive program now, the gains that have been made would be lost and there would be no possibility of obtaining the benefits yet to be gained through the continued development of a light vehicle transportation system capable of operating on domestically produced alternative transportation fuels.

II. Statutory Background

Recognizing the substantial energy use by the transportation sector, the need to conserve the Nation's energy resources, and the need to reduce the Nation's dependence upon foreign energy sources, Congress passed the Energy Policy and Conservation Act of 1975 (Pub. L. 94-163). That Act amended the Motor Vehicle Information and Cost Savings Act (Pub. L. 92-513) by adding provisions for improving the fuel efficiency of light-duty motor vehicles. Standards based on Corporate Average Fuel Economy ("CAFE"), the production weighted average of a manufacturer's fleet of new passenger cars and light duty trucks, were mandated for newly manufactured passenger cars produced after 1977 and light trucks after 1978. Congress authorized the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) to promulgate these CAFE standards.

Along with the improvements in light transportation fleet fuel efficiency, Congress undertook a strategy to encourage, and ultimately implement, the use of alternative fuels to reduce the nation's dependence on petroleum. Congress chose not to mandate any particular energy source, but rather to create market incentives to break the "chicken and the egg" problem plaguing any movement away from the developed petroleum infrastructure. AMFA was enacted to initiate a process to encourage the production of a fleet of vehicles that would in turn give rise to consumer acceptance and ultimately lead to the development of infrastructure to distribute and make alternative fuel available.

Section 6 of AMFA provided new incentives for the manufacture of "dual fueled" vehicles that can operate on either an alternative fuel or a petroleum-based fuel such as gasoline or diesel. Under the special procedures for calculating the fuel economy of those vehicles

contained in that section, dual fueled vehicles are assigned a higher fuel economy value for CAFE purposes in recognition of the fact that they can displace gasoline or diesel fuel use, and therefore reduce dependence on foreign oil. This special CAFE calculation procedure encourages the production of dual fueled vehicles by helping manufacturers who build them to meet CAFE standards.

Congress considered the incentive to manufacture dual fueled vehicles so important that it took steps to ensure its continued effectiveness by providing that the agency could not consider the availability of the AMFA credits when determining the maximum feasible fuel economy level for any particular fleet in any particular model year. As Congressman Dingell pointed out during the House debate on the AMFA Conference Report (H. REP. No. 100-929), adjusting CAFE levels to account for the AMFA incentive would negate the incentive:

A provision is included in the legislation to ensure that the incentives provided by this bill are not erased by the Secretary's setting the CAFE standard for cars or trucks at a level that assumes a certain penetration of alternative fueled vehicles. The conferees are aware that the statute requires CAFE standards to be set at the "maximum feasible" level, and that DOT traditionally has determined that level in connection with examining the individual fuel economy capabilities of the larger manufacturers. It is intended that this examination will be conducted without regard to the penetration of alternative fuel vehicles in any manufacturer's fleet, in order to ensure that manufacturers taking advantage of the incentives offered by this bill do not find DOT including those incentive increases in the manufacturer's "maximum fuel economy capability." This, of course, would wipe out the benefits associated with the increases if it resulted in commensurate increases in the CAFE standard. 134 CONG. REC. 8091 (1988).

AMFA established the eligibility criteria and procedures for calculation of the incentive benefits, and further provided that in establishing maximum feasible fuel economy levels, the Secretary "may not consider the fuel economy of dedicated automobiles and shall not consider dual fueled automobiles to be operated only on gasoline or diesel fuel." 49 U.S.C. § 32902(h).

AMFA then provided for a special calculation for determining actual CAFE performance that provides special consideration for the fact that the vehicles can, and may, operate on alternative fuel sources.

The Senate version of the bill, and ultimately AMFA itself, balanced the need to encourage the development of a fleet of alternative fueled vehicles against concerns that the fuel economy program would be unduly hindered by placing limits on the amount of the CAFE credit available to any manufacturer and by including partial and ultimate sunset provisions. The program was to be in effect through the 2004 model year, and could be continued on more limited terms by the Secretary for up to an additional four years. These limits were specifically aimed at addressing the possibility that dual fueled vehicles might be run entirely on gasoline. (House Debate on Conference Report, Section 6, Vol. 134, Congressional Record, Sept. 23, 1988); (Senate Debate on Conference Report, Section 6, Vol. 134 Congressional Record (Sept. 20, 1988)). Indeed, the Senate Committee Report on S. 1518, the Senate version of AMFA (S. REP. No. 100-271) explained that: “Recognizing that the dual fuel vehicle is a transitional vehicle that might often operate on gasoline, the Committee established reasonable caps in the increase in CAFE so that the broader purposes of CAFE would remain intact.”

In enacting AMFA, Congress undertook to encourage the development of a fleet of vehicles capable of running on alternative fuels in order to create the incentive for the development of an infrastructure to support it. Congress recognized that motor vehicle makers were “reluctant to produce automobiles unless there is a demand for them, consumers will not purchase cars for which there is an inadequate fuel supply, and an adequate fuel supply is unlikely to be developed until there are a significant number of alternative fuel vehicles.”

Congress recognized that the special CAFE incentive contained in AMFA would be a facilitating factor in the development of a transportation system incorporating alternative fuels. The legislative history makes clear that Congress did not expect these CAFE credits solely to drive the development of such a transportation system. Indeed, the legislative history is replete with comments expressing Congress' belief that AMFA, and its CAFE credit, would "begin" a process and that it may well be necessary to continue that process beyond its initial statutory timeframe. For example:

- The incentives provided under this bill are modest yet sufficient to begin this important program. The bill is important, however, both as a step toward increasing our energy options and as a reflection of a new recognition of a need for action on the economic front. 134 CONG. REC. 4101 (statement of Sen. Rockefeller).
- In my judgment, we need to begin an effort to convert a portion of our automotive fleet to methanol and other alternative fuels. *Id.* at 4102 (statement by Senator Danforth).
- This bill begins to solve the [chicken and the egg] dilemma . . . in ways that should help to instill consumer confidence, gain valuable experience, encourage the development, production and sale of vehicles capable of operating on both conventional fuels (gasoline and diesel) and alternative fuels (alcohols and natural gas), and encourage the development of alternative fuel retail pumps for consumer use. H.R. REP. No. 100-476 at 9 (1987).
- We also do not believe that this bill and the opportunities offered by it, including the CAFE incentive, will be a panacea. We have a healthy skepticism about when and how these vehicles will be developed. We are not optimistic that foreign and domestic automakers will transform many lines of passenger cars in the early 1990s to alternative fueled vehicles. *Id.* at 12.
- The importance of this bill is to provide a beginning and to emphasize the importance of developing now an alternative fuels transportation network for the benefit of present and future generations. *Id.*
- Alternative fuels will not be universally or even widely available, however, when the new vehicles are first available. Except for fleets with a central fueling

location many of the early alternative fuel vehicles will need to be capable of running on both the alternative fuel and gasoline. 134 CONG. REC. 8090 (1988) (statement of Rep. Sharp).

- So this really is a very important step forward. It is a very powerful incentive for the automakers to produce automobiles that can consume alternative fuels. *Id.* at 12,916 (statement of Sen. Danforth).

Congress provided that the Secretary of Transportation could extend the CAFE credit program for not more than four consecutive model years and explain the basis on which the extension would be granted (49 U.S.C. 32905(f)). Should the Secretary choose not to extend the program, the statute requires the publication of a *Federal Register* notice explaining the reasons for that decision. The statute imposes no particular criteria to be applied in making that determination, but rather leaves the decision to the discretion of the Secretary.

III. Regulatory Background

A. Fuel Economy Standards

Congress enacted the Energy Policy and Conservation Act (EPCA) in December 1975 to help address the nation's dependence on foreign oil. EPCA provided for the issuance of CAFE standards for passenger automobiles and for automobiles that are not passenger automobiles (light trucks). The CAFE standards set minimum performance requirements in terms of an average number of miles a vehicle travels per gallon of gasoline or diesel fuel. By statute, Congress set passenger car standards for model years 1978 (18 mpg), 1979 (19 mpg), 1980 (20 mpg) and 1985 and thereafter (27.5 mpg). Those standards remained effective by statute unless the Secretary of Transportation changed them through rulemaking. In contrast to passenger cars, Congress did not specify CAFE standards for light trucks. Instead, it provided authority to the

Secretary to establish those standards administratively. The Secretary delegated the authority to promulgate CAFE standards to NHTSA.

Market conditions in the mid and late 1980s led the agency to reconsider established CAFE fuel economy standards to account for consumer preferences that had rendered the standards economically impracticable, despite manufacturers' good faith efforts to comply. Accordingly, passenger car CAFE standards were reduced to 26.0 mpg for the 1986 through 1988 model years and to 26.5 mpg for 1989. Light truck CAFE standards set at 20.5 mpg for the 1987 through 1989 model years were reduced to 20.0 mpg for the 1990 model year. Meanwhile, Congress enacted AMFA in 1988 in an attempt to further reduce the Nation's dependence on foreign oil by encouraging the development of a fleet of vehicles capable of running on alternative fuel.

The passenger car CAFE standard returned to the statutory level of 27.5 mpg between model years 1990 and 1996, while light truck CAFE standards rose slightly through those years from 20.0 mpg to 20.7 mpg. In April 1994, NHTSA issued an Advanced Notice of Proposed Rulemaking stating its intent to increase the light truck CAFE standards for some or all of model years 1998 to 2006. Congress acted to restrain the agency from acting further on this intention.

In enacting the Department of Transportation and Related Agencies Appropriations Act for FY 1996 (Pub. L. 104-50) in November 1995, Congress included a provision prohibiting the agency from using any funds to prescribe corporate average fuel economy standards for automobiles "in any model year that differs from standards promulgated for such automobiles prior to enactment of this section." This same prohibition was included in the appropriations acts for each of the 1997 through 2001 fiscal years, effectively foreclosing NHTSA from acting to

change the passenger car and light truck CAFE standards applicable to the 1999-2003 model years. During those years, Congress kept the CAFE incentive for dual fuel vehicles intact, making no effort during those years to restrict the incentives despite having mandated stability in CAFE standards.

While the Department of Transportation and Related Agencies Appropriations Act for FY 2001 (Pub. L. 106-346) was similar to the prior appropriations acts in that it contained a identical restriction on CAFE rulemaking, the conference committee report for that Act directed that NHTSA fund a study by NAS to evaluate the effectiveness and impacts of CAFE standards (H.R. Conf. Rep. No. 106-940, at 117-118). The NAS submitted its report to the Department of Transportation on July 30, 2001.

One of the recommendations in the NAS report was that “CAFE credits for dual-fuel vehicles should be eliminated, with a long enough lead time to limit adverse financial impacts on the automotive industry.” (at 114) The NAS report stated that, “the provision creating extra credits for multifuel vehicles has had, if any, a negative effect on fuel economy, petroleum consumption, greenhouse gas emissions, and cost.” (at 111) The report also indicated that the production of these dual-fuel vehicles enables “automakers to increase the production of less fuel efficient vehicles.” (at 111)

In a letter dated July 10, 2001, Secretary of Transportation Mineta asked the House and Senate Appropriations Committees to lift the restriction on the agency's ability to spend funds for the purpose of setting and modifying CAFE standards. In response, Congress enacted the Department of Transportation and Related Agencies Appropriations Act for FY 2002 (Pub. L.

107-87 (December 18, 2001) without any provision restricting the Secretary's authority to prescribe fuel economy standards.

On March 31, 2003, NHTSA established new fuel economy standards for light trucks applicable to model years 2005-2007. These new standards represent the largest increase in light truck fuel economy standards in 20 years and will result in substantial savings in petroleum consumption over the lifetime of the vehicles manufactured in those model years. In issuing these standards, the agency discussed the Nation's continuing need to conserve energy and noted the various public and private efforts underway to develop advanced technology vehicles.

B. Other Initiatives to Promote Energy Independence

The CAFE incentive program contained in AMFA is part of the Administration's comprehensive approach to energy security. While the incentive program encourages the mass production of dual-fuel vehicles and the use of alternative fuel, other programs exist to address longer-term technologies and the introduction of fuel-efficient vehicle technologies. Last year, President Bush announced a Hydrogen Fuel Initiative to support for active research and development of commercially viable hydrogen-powered fuel cells for transportation and stationary power applications, and the infrastructure to support them. As the President indicated in his 2003 State of the Union address, successful execution of this Hydrogen Fuel Initiative would mean that the first car driven by a child born today could be powered by fuel cells, and pollution-free. The President's Hydrogen Fuel Initiative complements the Department of Energy's FreedomCAR initiative, a partnership with the U.S. auto industry aimed at developing technologies needed for mass production of safe and affordable hydrogen fuel cell vehicles. Together, these initiatives will enable automobile manufacturers to decide to offer affordable and

technologically viable hydrogen fuel cell vehicles in the mass consumer market by 2015 and the ability to produce and deliver such vehicles to the market by 2020.

The private sector is also responding to the Nation's need to improve energy security through efficient transportation options. On January 6, 2003, General Motors announced that it would offer an optional hybrid (gasoline/electric) powertrain on several of its most popular models, including light trucks. While pointing out that its plans involve "relatively low volumes," General Motors also stated that its initiative would make it "well positioned to meet market demand as it develops." Similarly, Ford Motor Company will introduce an optional hybrid electric powertrain in its Escape Sport Utility Vehicle (SUV), beginning in model year 2005. As Ford explained:

While a few automakers have introduced small, low-volume hybrid-electric cars, Ford is introducing its first HEV on a family-sized sport utility to increase mass customer appeal. The hybrid-electric powertrain also has been developed with additional applications and vehicles in mind to expand the potential impact of the environmentally responsible technology.

DaimlerChrysler will introduce an optional diesel engine in the Jeep Liberty SUV, also beginning with the 2004 model year. The company claimed in December 2002 that American consumers could save about 800 million gallons of oil annually if they chose to purchase clean diesel engines at the same rate as purchased by European consumers. According to DaimlerChrysler: "Today's modern diesel vehicles should be part of the solution to improving fuel efficiency and reducing carbon dioxide emissions. Diesels lead to up to 30 percent improvement in fuel economy, while reducing carbon dioxide emissions an average of 20 percent."

IV. March 2002 Report to Congress

AMFA required the Secretary of Transportation, in consultation with the Secretary of Energy and the Administrator of the EPA, to complete a study “of the success of the policy” of the CAFE incentive for dual fuel vehicles and to report on the results of the study, including preliminary conclusions on whether the CAFE incentive should be extended for up to four more model years. The study and conclusions were to consider the availability to the public of alternative fueled automobiles and alternative fuel, energy conservation and security, environmental considerations and other relevant factors.

NHTSA published a Request for Comments on May 9, 2000 (65 FR 26805)(Docket No. NHTSA-2000-7087), seeking public input on the success of the program. The agency received a number of comments on the published notice: from automotive manufacturers (General Motors Corporation, DaimlerChrysler Corporation and Ford Motor Company), an automotive association (Alliance of Automobile Manufacturers), alternate fuels coalitions (National Ethanol Vehicle Coalition, Clean Fuels Development Coalition and Members of the Renewable Fuels Association), and state governments.² All of these commenters expressed support for extending the CAFE incentive program.

Subsequent to the closing of the comment period, additional letters in support of extending the CAFE incentive program were received from several Members of Congress. Also, subsequent to the closing of the comment period, a joint letter expressing opposition to the extension was received from the Sierra Club, the American Council for an Energy-Efficient Economy, the Center for Auto Safety and the U.S. Public Interest Research Group.

² On March 23, 2001, the Governors’ Ethanol Coalition sent a letter to Secretary Norman Mineta strongly urging DOT to extend the CAFE credit incentive.

All of these submissions are docketed in the DOT Docket Management System, Docket No. 7087. They may be found by conducting a search under that number at <http://dms.dot.gov/>.

The agency gathered information from other sources as well. These included the DOE Alternative Fuels Data Center (AFDC) and publications from the Energy Information Administration (DOE/EIA), the Center for Transportation Research at Argonne National Laboratory, and the Oak Ridge National Laboratory (ORNL). The AFDC was created to facilitate implementation of the directives of AMFA, to gather and analyze information on the fuel consumption, emissions, operation, and durability of alternative fuel vehicles, and to provide information on alternative fuel vehicles to government agencies, private industry, research institutions and other related organizations. The agency also used data from EPA's National Vehicle and Fuel Emissions Laboratory, the California Energy Commission, the General Accounting Office, the American Petroleum Institute and the American Methanol Institute.

Based on consideration of the comments, other information and the factors specified in AMFA, the agency submitted a report in March 2002 Report that concluded that the CAFE incentive program had succeeded in incentivizing the development of a fleet of vehicles capable of operating on alternative fuels, but had not yet succeeded in creating the necessary infrastructure to support the actual use of alternative fuels. The Report also found that the success of the program could be further enhanced through the identification of additional policies and programs to encourage more use of alternative fuels in the vehicle fleet that has been built to accommodate them. The Report did not recommend any suspension or termination of the CAFE incentive program.

V. Notice of Proposed Rulemaking

On March 11, 2002, the agency published a Notice of Proposed Rulemaking (NPRM) in the Federal Register (67 FR 10873) (Docket No. NHTSA–2001–10774; Notice 2) proposing to extend the dual fuel incentive program through the end of the 2008 model year. As we explained in the NPRM, this proposal was based on our tentative conclusion that granting the extension would preserve the opportunities for promoting energy security and decreasing reliance on foreign petroleum by encouraging continued production of dual fuel vehicles while other efforts to increase the growth of a dual fuel infrastructure could be undertaken. We also noted our concern that any extension of less than four years would be insufficient given the relatively recent influx of large numbers of dual fuel vehicles in the marketplace.³

The NPRM reflected our initial conclusion that the benefits of extending the incentive provisions are justified by its potential benefits:

The agency’s tentative decision to extend the incentive program for four years is based on its assessment that the energy and other costs of the incentive program are justified by the potential benefits. We are unable to predict with certainty how much alternative fuel use, which is a critical element to the realization of benefits, will increase. Adoption of the proposed four-year extension entails a risk that manufacturers might be producing dual-fuel vehicles that operate only on petroleum fuel. On the other hand, if the agency were to allow the program to terminate, there would be an equal risk that late-blooming alternative fuel technology and production would be wasted and the opportunities for eventual reductions in petroleum use would be lost. A four-year extension is, in NHTSA’s view, a reasonable reconciling of those risks. Such an extension will provide opportunities for further development of measures to encourage alternative fuel use and, if those policies are successful, result in the development of a domestic fuel supply and infrastructure with either little or no increase in petroleum use.” (at 10881)

³ We said that, in light of this recent influx, “(i)t is, therefore, not yet clear whether the continuing presence of these vehicles, their ability to use alternative fuels, programs intended to increase the use and production of alternative fuels and other conditions will stimulate the expansion of the alternative fuel infrastructure as envisioned by Congress in creating the dual fuel incentive program.” (at 10874) (Emphasis added.)

As the NPRM pointed out, benefits arising from the CAFE incentive program include the development of a fleet of vehicles that can use alternative fuels, reduce dependence on foreign oil and help lessen demand for conventional fuels, thereby helping to keep fuel prices lower than they otherwise would be in the absence of the incentive program. We also observed that if sufficient numbers of dual fuel vehicles exist and spur development of an alternative fuel infrastructure, the nation would (to a degree) be further insulated from the impacts of “oil shocks” resulting from sudden disruptions to the petroleum supply, as the Nation’s transportation system would be less dependent on oil supply, and therefore, less vulnerable to such disruptions.

VI. Summary of Comments

We received numerous comments, responding both to our solicitation of views before preparing the March 2002 Report to Congress and our proposal to extend the AMFA dual fuel incentive. Comments were received from environmental and safety advocacy organizations such as the Alliance to Save Energy (ASE), Environmental Defense (ED), Renewable Fuels Association (RFA), American Council for an Energy Efficient Economy (ACEEE), Natural Resources Defense Council (NRDC), Union of Concerned Scientists (UCS), Sierra Club, Public Citizen, and Center for Auto Safety (CAS).

We also received comments from automobile manufacturers and trade associations -- including Ford Motor Company (Ford), General Motors Corporation (GM), DaimlerChrysler Corporation (DC), and the Alliance of Automobile Manufacturers (the Alliance) -- and alternative fuel groups and grain producers -- including the National Ethanol Vehicle Coalition (NEVC), National Corn Growers Association (NCGA), Colorado Corn Administrative Committee (CCAC), Maryland Grain Producers Association (MGPA) and Minnesota Corn

Growers Association (MCGA). Comments were also received from two individuals -- Edward Parker and Joseph Darling.

In general, commenters expressed either complete support or complete opposition to the proposed four-year extension. None of the commenters indicated that they believed changing the duration of the proposed extension was appropriate. Automobile manufacturers, automotive trade groups, grain producers, and alternative fuel groups favored the extension. Environmental and automobile safety advocacy groups did not support the agency's proposal. The two private citizens did not support the extension.

Those supporting the extension argued that the CAFE incentive program was successful in achieving the goal of increasing the number of dual fuel vehicles. They indicated that the infrastructure supporting the use of alternative fuel in these vehicles is also continuing to grow. Noting that public awareness of the existence of alternative fuel vehicles and the fuels they use continues to increase, they pointed out that the infrastructure to support alternative fuels (in particular E85, a blend of 85% ethanol and 15% gasoline) has grown in recent years and continues to expand. They argued that Congress would not have intended the substantial investment in alternative fuel vehicles and the burgeoning infrastructure to be terminated just as the incentive is starting to show benefits.

The automobile manufacturers listed the vehicles they have built capable of running on ethanol and the various efforts they have made, and continue to make, to build awareness and support for alternative fuel use. Since the late 1990s, they have produced approximately 3.4

million dual fuel vehicles capable of running on alternative fuel.⁴ They further pointed out that having this fleet of dual fuel vehicles improves the Nation's energy security by creating the potential for using non-petroleum fuels if a crisis in petroleum supply develops and encourages continued research into the development of cheaper and cleaner alternative fuels and the infrastructure to support their use.

The ethanol community and its supporters argued that the investment in alternative fuel vehicles has begun to spur the anticipated investment in an infrastructure to support actual fuel use. Both investments would be lost were the agency not to continue implementing the public policy encouraging alternative fuels and their use. The ethanol community and numerous government representatives outlined the strides currently being made to enhance the availability of E85 and to educate consumers on its potential. They urged the agency not to abandon the program during this investment stage by eliminating the incentive provided to automakers to produce and sell vehicles capable of operating on alternative fuel.

Many of those who commented on the NPRM had also provided submissions in response to the Request for Comments. Others expressed their views on the merits only at that time. For example, we heard from numerous Members of Congress: Senators Grassley, Bond, Bayh, Allard, Hagel, Ashcroft and Levin all expressed unconditional support for extending the incentive. Similarly, the members of the Congressional Auto Caucus (Congressmen Upton, Oxley, Bonilla, Kildee, Dingell, Frost, Ewing, Camp, Buyer, Hoekstra, Manzullo, LaTourette,

⁴ Automakers have also been working toward the widespread application of advanced technologies, such as hybrid electric and modern diesel engines, that may substantially enhance the nation's energy security and overall fuel economy. The Administration and private industry are also supporting the development of fuel cell technology, which over the long run, presents even more potential for substantial fuel economy savings. All of these efforts, including AMFA, are part of a broad array of efforts to encourage development of technologies and infrastructure that collectively and individually will help to reduce the nation's dependence on foreign oil as a primary energy source.

Knollenberg, Stupak, Barcia, Kilpatrick, Kaptur and Stabenow) made clear their position that more alternative fuel vehicles would be built only if the incentive were continued. Senator Daschle urged the agency to extend the incentive, noting, however, that “in the end, the success of the program should be measured not only by the number of flexible fuel vehicles produced, but by the actual use of alternative fuels by those vehicles.” Senator Daschle suggested looking “for ways to encourage the establishment of additional alternative fuel refueling stations around the country.”

State governments also supported extending the incentive. The Governors of Kansas, Wisconsin, New Mexico, and Missouri each urged the agency to extend the incentive. The Governor of Wisconsin pointed out:

The flex-fuel vehicle credit program for auto manufacturers is essential for maintaining support for a cleaner environment through the use of alternative fuels. Until a substantial network for infrastructure is developed, the flex-fuel vehicle credit will assist advancing improvements in infrastructure and enhance the status of alternative fuels. Nationally, the U.S. will gain energy independence from foreign oil and individually gain a cleaner fuel.

Wisconsin is currently assisting in an effort to expand the availability of alternative fuel infrastructure. Until that infrastructure matures, the use of bi-fuel and flex-fuel vehicles will be necessary as a bridge fuel to meet the requirements of the Energy Policy Act and create a demand side draw for the necessary infrastructure to support an all dedicated fuel fleet.

Those opposing the extension of the incentive program voiced common themes in their arguments. They argued principally that the program should not be deemed a success because it has not yet resulted in the widespread use of alternative fuels. Instead, they stated out that, by allowing extra credit toward CAFE requirements, the program so far has allowed the production of more vehicles that are less fuel-efficient than would have been produced had manufacturers

met their CAFE obligations without the incentives. Thus, they contended, the result of the incentive is greater fuel consumption and exhaust emissions without substantial offsetting benefit.

Because the incentive provides additional CAFE credit to vehicles capable of running on alternative fuel, but which in fact have largely been using gasoline, those opposed to the incentive argue that its extension will actually increase dependence on foreign oil.⁵ Accordingly, these commenters also believe that continuation of the incentive will have adverse environmental consequences and argued that the adverse effects of higher gasoline use overwhelm the benefits of the smaller amount of alternative fuel used to date.

Some commenters also consider it unlikely that a fleet of dual fuel vehicles might be useful in the event of sudden disruption in oil supply. ACEEE and NRDC stated that such a crisis is likely to arise so quickly that sufficient time would not be available for existing ethanol production capability to meet demand or for new ethanol production capacity to be built. NRDC argued that ethanol could be added to conventional gasoline to make gasohol blends burned by conventional vehicles, rendering a fleet of dual fuel vehicles unnecessary.

The Sierra Club and UCS raised concerns that if ethanol were used as a MTBE substitute, there might not be sufficient ethanol for use as an alternative fuel. Both organizations noted that the phasing out of MTBE in California and the Northeast could require the use of all of the current projected expansion in ethanol production to meet the refining industry's need for an MTBE substitute.

⁵ The ACEEE also questioned whether some dual fuel vehicles in fact qualified for the incentive taken by the manufacturers. According to ACEEE, the energy efficiency for some vehicles qualifying for the dual fuel credit program is less when operating on alternative fuel than on conventional fuel, even when the varying heating values for each fuel are considered.

CAS argued that a difference in tax treatment makes 10 percent ethanol (referred to as gasohol or E10) more preferred by the ethanol industry than E85 blends. According to CAS, E10 blends qualify for a 5.3¢ per gallon exemption from the motor fuel excise tax, which is the equivalent value of 53¢ per gallon⁶. CAS questioned whether the ethanol industry would support the continued expansion of E85 because the ethanol used in E85 blends qualifies for a 53¢ per gallon tax credit, which is less attractive than the up-front tax exemption provided for E10.

Commenters disagreed on whether continuation of the incentive is likely to spur the development of an infrastructure that has not yet reached critical mass. Many argued that consumer demand remains focused on gasoline and that unless a demand develops for alternative fuels, fuel suppliers will have no incentive to increase the supply or expand the number of alternative fuel outlets currently in existence. Some argued that given the cost to consumers of extending this program, energy conservation efforts would be better directed toward improving fuel economy or installing ethanol stations to fuel the E85 dual-fuel vehicles already produced.

On the other hand, the automobile industry and the ethanol community pointed to their efforts to begin the development of an infrastructure to support ethanol use in the ethanol-capable dual fuel vehicles built since the late 1990s. They cited evidence of continued growth of alternative fuel infrastructure. For example, Minnesota had recently experienced a 70% increase in the number of E85 fueling stations. The Minnesota Corn Growers Association, Colorado Corn Administrative Committee and Maryland Grain Producers Association, Inc. indicated that the number of E85 stations in their states had recently increased. The Alliance cited a number of

⁶ Since January 1, 2003, these incentives have been 5.2 cents and 52 cents respectively. They are scheduled to drop to 5.1 cents and 51 cents on January 1, 2005

initiatives being pursued by automobile manufacturers to promote the expanded use of E85 fuel and increase the number of E85 outlets.

Contending that the present alternative fuel fleet is reaching “critical mass,” the supporters of the CAFE incentive program argued that discontinuing the incentive now would waste the substantial investment already made in a dual fuel vehicle fleet and result in the abandonment of the burgeoning infrastructure of E85 fueling stations. The National Ethanol Vehicle Coalition specifically credited the dual fuel incentive program for the existence of a growing fleet of dual fuel vehicles. Although development of the fueling infrastructure has not progressed as rapidly as the growth of this fleet, the existence and size of the dual-fuel vehicle fleet is clearly linked to the incentive program. Discontinuing the CAFE incentive program now, thereby foreclosing the continued growth of the dual fuel fleet and potential demand for and use of alternative fuels, would also foreclose the potential for alternative fuels to contribute significantly to the nation’s energy security.

On June 18, 2003, the Energy Future Coalition⁷ issued a comprehensive set of energy policy recommendations in a report entitled “Challenge And Opportunity: Charting A New Energy Future” (http://www.energyfuturecoalition.com/full_report/index.shtml)⁸. Officials from

⁷ On its website (<http://www.energyfuturecoalition.com/about.shtml>), the Coalition describes itself as follows:

The Energy Future Coalition is a broad-based, nonpartisan alliance that seeks to bridge the differences among business, labor, and environmental groups and identify energy policy options with broad political support. The coalition aims to bring about changes in U.S. energy policy to address the economic, security and environmental challenges related to the production and use of fossil fuels with a compelling new vision of the economic opportunities that will be created by the transition to a new energy economy.

⁸ A lengthy article on the report appears under the title of “The Future of Energy Policy” in the July-August issue of Foreign Affairs. The authors are three members of the Coalition’s Steering Committee: John Podesta, former chief of staff to former President Clinton, C. Boyden Gray, former counsel to former President G. H.W. Bush, and Timothy Wirth, former U.S. Senator.

a number of environmental organizations that commented on this rulemaking serve on the Coalition's Steering Committee or Advisory Council. Among the recommendations contained in the Coalition's report was the one concerning the future of the CAFE incentives for dual fueled vehicles:

Several million cars and trucks already in the U.S. fleet are fuel-flexible – capable of using gasoline or ethanol interchangeably. Automakers should continue to receive incentives under federal fuel economy standards for the production and sale of these vehicles, and the program should be modified to ensure greater use of alternative fuels, such as high-ethanol blends. (at 22)

VII. Resolution of the “Chicken and Egg” Problem

As noted above, Congress created the CAFE incentive in order to solve what it considered to be a “chicken and egg” problem with the development of a light vehicle transportation system capable of operating on domestically produced alternative fuels. As noted in AMFA's legislative history, Congress sought to address this “problem” by encouraging the development of an infrastructure to support alternative transportation fuels by first promoting the creation of a fleet of vehicles capable of operating on such fuels, then enhancing public awareness and acceptance of such fuels, which in turn would encourage the construction of alternative fuel stations and other infrastructure to support wider use of such fuels.

Congress chose neither to specify a preferred alternative fuel choice nor to impose an absolute timetable for the program to achieve full success. As noted above, the legislative history makes clear that Congress intended to begin the process towards the development of a domestically self-sufficient energy environment through the incentive program. It did not necessarily expect the program to achieve all of its ultimate goals during the first ten years. Indeed, Congress expressly mandated that the Secretary consider extending the program – albeit

on more restricted specified terms – at the end of the first ten model years and further provided a mechanism for the agency to provide information to Congress from which it could determine whether further legislative action is needed.

In comments submitted in June 2000, as well those submitted in response to the NPRM, the automobile manufacturers outlined the technical difficulties they initially faced in producing a large volume of alternative fuel vehicles in the early to mid-1990s. Manufacturers' initial efforts focused both on methanol and ethanol fueled vehicles capable of using fuels that containing as much as 95 percent alternative fuel. These vehicles were initially provided for fleet applications.

All three major U.S. manufacturers have been producing dual fuel vehicles since 1992, with Ford and General Motors producing those vehicles as early as 1987 and 1988, respectively:

- Starting with the 1987 model year and continuing to the 1989 model year, Ford produced approximately 200 methanol dual fuel Crown Victoria models. These vehicles were used in various public fleet demonstration programs.
- In model year 1991, Ford introduced its methanol dual fuel Taurus, which was produced until model year 1998, the last model year in which Ford produced methanol flexible fuel vehicles (FFVs).
- In model year 1994, Ford added the ethanol dual fuel Taurus, which it continues to produce today. From model year 1999 to model year 2002, Ford produced ethanol dual fueled versions of the Ranger and the Mazda B3000 pickup. In addition, Ford produced an ethanol dual fuel version of its popular Explorer SUV in the 2001 and 2002 model years.
- GM produced test fleets of methanol dual fuel 1988 Corsicas and methanol dual fuel 1991 Luminas. GM redesigned the Lumina for the 1994 model year and did not offer a methanol dual fuel version in 1994 and 1995.

- After the conclusion of its methanol dual fuel test fleet program, GM embarked on a test fleet program for ethanol flexible fuel vehicles, starting with the production of 50 ethanol dual fuel Luminas in model year 1992. These were followed by a production run of 320 ethanol dual fuel Luminas in the 1993 model year.
- Due to technical problems with these vehicles, GM did not produce another ethanol dual fuel vehicle until model year 2000, when the company produced approximately 100,000 ethanol dual fuel S-10s and Sonomas. A similar quantity of these vehicles was produced in model year 2001. Starting with the 2002 model year, GM has been producing full-size pickups and SUVs with 5.3 L V8 ethanol dual fuel engines.
- Chrysler produced 2,500 methanol dual fuel Plymouth Acclains and Dodge Spirits in the 1992 model year, which were sold to fleets and the public. Chrysler continued offering methanol Acclains/Spirits until model year 1994, when the company started producing its large passenger cars as methanol dual fuel vehicles.
- Since model year 1999, DaimlerChrysler has mass-produced ethanol dual fuel minivans by equipping these minivans with engines capable of operating on E85.

These early fleet introductions led to the identification of several technological problems with the operation of dual fueled vehicles when using alternative fuels. These included the corrosive nature of the fuels, their effect on engine cylinders, and the need for alcohol compatible materials for fuel lines, hoses, gaskets, valves, fuel pumps, fuel injectors and fuel tanks. Ultimately, these problems were overcome by substituting parts that were more compatible with alcohol-based alternative fuels. With the resolution of these problems, and the movement toward ethanol as the primary source of alternative fuel, the growth of a fleet capable of operating on alternative fuel and the development of an infrastructure to support it began in earnest.

Two main issues eventually led to the discontinuation of methanol flexible fueled vehicle production: (1) methanol's being more corrosive than ethanol; and (2) the shift in focus by the methanol industry away from providing methanol for M85 to providing methanol for MTBE. Because methanol is more corrosive than ethanol, engineers were faced with challenges more difficult with methanol than those faced with ethanol. The challenges created by ethanol were overcome by 1997, which resulted in a mass influx of E85 vehicles into the market, which continues to this day. These technical solutions enabled E85 vehicles to be mass-produced and reduced their incremental price to such a level that these vehicles are now sold at no additional cost to the consumer. Additionally, methanol producers rapidly altered their focus from developing an M85 infrastructure to providing methanol and MTBE to the refining industry.

Automobile manufacturers have joined with state and local governments and other ethanol supporters to help develop public awareness about E85 and to encourage its use in dual fuel vehicles capable of operating on E85. Other corporations, such as the United Parcel Service, have also embraced alternative fuel vehicles (Fortune Magazine, "Corporate Responsibility: Tree Huggers, Soy Lovers, and Profits," June 23, 2003, noting that the UPS fleet includes 1,800 alternative-fuel vehicles and that Federal Express announced plans to convert all its trucks to hybrid electric-diesel engines).

GM has been involved with a variety of efforts focused on promoting the use of E85 in flexible fuel vehicles, including supporting university research and sponsoring programs such as the Ethanol Challenge, an engineering competition focused on E85 vehicles. GM's efforts in the infrastructure area include joint sponsorship with BP Amoco to develop E85 fueling stations and encouraging, through letters and GM's internal website, its employees to refuel their FFVs with

E85. GM also provides a list of E85 refueling locations on its GM alternative fuel vehicle website, www.gmaltfuel.com.

In February 2003, GM announced a new, multi-million dollar campaign to promote the use of corn-based E85 as an alternative to gasoline. As announced, this campaign will be a 2-year partnership with the non-profit National Ethanol Vehicle Coalition (NEVC) and will be focused on increasing ethanol use in flexible fuel vehicles. The ethanol promotion effort will begin in six key states: Missouri, Wisconsin, Colorado, Minnesota, Michigan and Illinois.⁹ Methods will include making information available at dealerships and through direct mail, advertising and on-line activities.

Since the early 1990's, Ford has been a contributor to the effort to develop the E85 infrastructure and increase public awareness of the benefits of E85 use. Ford has recently completed an effort to expand the number of E85 stations in the Chicago area, and has initiated the installation of E85 stations in Denver and Milwaukee, which should be completed this summer. Ford also was able to install an E85 station in the Detroit area to service both public and company owned vehicles.

As part of the Minnesota E85 Team, Ford has assisted with the establishment of 30 additional E85 stations in the Minneapolis/St. Paul area. As a result, there are now 62 E85 refueling outlets in Minnesota, which has enabled the use of E85 in the Minneapolis/St. Paul area to grow by 70 percent in recent years. Ford also was an advertising sponsor for the Minnesota Timberwolves NBA team, with an E85 and clean air theme, which included a Taurus FFV as a

⁹ Representatives of many of these states (as well as others) expressed their support in the rulemaking record for extending the CAFE incentive to help in their efforts to ensure the continuation of a fleet capable of using E85 and to encourage the use of E85 to service that fleet.

prize. In recognition of these achievements, the Environmental Protection Agency awarded Ford, as a participant in the Minnesota E85 Team, with its 2002 “Clean Air Excellence Award.”

Ford has also been involved in promoting public awareness of E85 and flexible fuel vehicles. In its comments, Ford noted it plans to hand out approximately 50,000 ethanol/FFV brochures at events, include FFV’s in its full-line product brochure (approximately 70,000 were distributed last year), and to mail approximately 55,000 CD’s containing ethanol and FFV information to interested customers. Ford also committed to continuing the dissemination of information about ethanol and FFV’s on its website, and promote ethanol and FFV’s in their regional merchandising kits and product presentations.

DaimlerChrysler also has been involved in activities to promote the use of E85 in flexible fuel vehicles. DaimlerChrysler distributes the “AFV Quarterly” every three months to 35,000 customers, dealers, corporate executives and alternative fuel vehicle industry personnel. This publication contains articles related to alternative fuels, the company’s AFVs and promotes the purchase of AFVs including E85 vehicles. Since 1992, DaimlerChrysler has placed ads in a variety of magazines and publications promoting its AFVs and E85 vehicles.

As set forth in its comments, DaimlerChrysler supports and participates in the DOE Clean Cities program, including membership in many Clean Cities coalitions, and participation in many events, meetings and conferences. DaimlerChrysler also actively sponsors and participates in a multitude of conferences and events designed to promote the use of AFVs, and alternative fuel, including E85.

In addition to corporate activities, the ethanol community and state and local governments are actively encouraging the use of E85 in the alternative fuel fleet. In June 2003,

representatives from industry, government and public interest groups announced the launch of a nationwide public education, information and outreach campaign to advance the production and use of renewable ethanol. The program, entitled "Ethanol Across America," is designed to generate awareness and build support for ethanol.

U.S. Senators Conrad Burns (R-Mont.) and Ben Nelson (D-Neb.) will serve as co-chairmen of the new effort, which is directed by the Clean Fuels Foundation, a 501 (c) (3) non-profit organization and supported by the U.S. Department of Energy. Ethanol Across America will use a wide range of methods to educate the public, including educational publications, conferences and workshops, consumer brochures (e.g., The Ethanol Fact Book and Flexible Fuel Vehicle Fact Book) and an already-released curriculum guide for a high school course on ethanol. Ethanol Across America also will serve as an information clearinghouse by creating a national services directory database and a national speakers bureau. In addition, the campaign will include a unique nationwide radio component on approximately 400 stations called the 'Ethanol Minute' during which spokespersons from all walks of life, including elected officials, celebrities, energy and environmental experts, will discuss various aspects of ethanol.

Although not yet completed, a light vehicle transportation system capable of incorporating E85 is developing and investment in that system is growing. The March 2002 Report to Congress recommended building on the foundation that has been laid to date by the incentive program. It did not recommend that the incentive be terminated or that the program be halted. To the contrary, it recommended that further efforts be made to enhance the actual use of E85 and to encourage the already occurring investment in order to achieve the ultimate success of more widespread use of alternative fuels.

VIII. Extending the CAFE Incentive

The agency has decided to continue the CAFE incentive program consistent with AMFA and our proposal in the NPRM. Our review of the legislative history has led us to conclude that, when AMFA was enacted in 1988, Congress intended the incentive to be extended if the policy underlying it had begun to work, but the purposes had not yet been fully achieved. That is the situation in which we find the nation as we consider whether to extend the dual fuel vehicle incentive. As AMFA sought, the incentive has led to a growing fleet of dual fuel vehicles, currently more than 3 million strong, capable of using alternative fuels. But, since the development of that fleet occurred only in the late 1990s and early 2000s, an infrastructure for alternative fuel (and particularly for ethanol) has only begun to develop.

Congress gave the agency the authority to extend the CAFE incentive in order to allow the continued development of a dual fuel fleet, an alternative fuel infrastructure, and, ultimately, the implementation of alternative fuels into daily use. Congress itself considered the implications of extending the credits on the overall CAFE program, and created the balance it deemed appropriate by limiting the application of the incentive and the terms on which it could be extended.

We do not believe Congress expected the agency to continue the incentive only if the vehicle fleet it created had led to substantial alternative fuel use. If that were the case, the incentive would serve no ongoing purpose, having already achieved its objective, and there would have been no reason for Congress to have placed statutory limits on the time and scope of the extension. Nor do we believe Congress expected the agency to continue the incentive if the automakers had not developed vehicles capable of running on alternative fuels or if no

infrastructure seemed likely to develop. Indeed, the legislative history is clear that Congress believed that it was beginning a process toward the use of domestically produced fuel, with the full knowledge that the limited time table set forth in AMFA may not be sufficient to spur the investment into alternative fuels it sought to achieve.

While the infrastructure to support E85 is in its infancy, the availability of approximately 3.4 million vehicles to use that fuel has, as set forth in the comments in this record, provided the necessary encouragement to begin investment in E85 refueling stations. As an example, as of January 19, 2004, there are 182 E85 refueling stations in the country. This includes 56 more stations than existed in March of 2002 when the Report to Congress was completed. Private industry is working with public entities (and, in particular, with state governments) to educate the public about the utility of domestically produced alternative fuels and to encourage consumers to use it. Many commenters argued that were we to discontinue the incentive now, and thereby remove the government's policy support for these efforts, the efforts they are making would likely cease and the gains they have made, and will make, would likely be lost.-

The NRDC argued that the agency cannot continue the CAFE incentive without first considering: (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. These are the matters that Congress mandated be considered by the agency when preparing the Report to Congress required by 49 U.S.C. § 32905(g).

The NRDC argued that the program has failed in these regards, asserting that dual fuel vehicles do not use alternative fuels, that an extension of the incentive would harm energy conservation and that an extension would have negative environmental effects. The NRDC

believes the program should be terminated because, in its view, the primary result of the program to date has been to allow automobile manufacturers the opportunity to enhance their CAFE numbers without yet a corresponding actual reduction in petroleum use. And, to be sure, NHTSA's Report to Congress in March 2002 described the possibility that the AMFA program had, as of that time, resulted in a slight increase in petroleum use (1%) and greenhouse gas emissions (well less than 1%).

However, we note that it is not clear from the statute whether Congress intended the agency to base its administrative decision on the matters required to be considered in the Report to Congress. Had Congress intended that to be the case, it could easily have included those considerations in the statutory provision governing the extension (49 U.S.C. § 32905(f)), rather than just the Report to Congress (49 U.S.C. § 32905(g)). Nor did Congress specify whether the nation's continuing need to conserve energy and to reduce dependence on foreign oil should militate for or against an extension when, as now, the incentive program established by AMFA has begun to work but not yet achieved its ultimate objective.

As described above, we believe that the most consistent application of Congressional intent is to extend the CAFE incentive contained in AMFA based on data indicating that the program envisioned by Congress has begun but not yet been fully achieved. We believe Congress would not have expected the program to be extended if no fleet of alternative fuel vehicles had arisen or if infrastructure development had yet to begin, nor if the program had been so successful that the acceptance and use of an alternative fuel was self-supporting and needed no further assistance.

Since Congress did not include these criteria in the statutory provision governing the extension, nor provided any guidance on how to apply them, we do not believe that Congress intended there to be any legal requirement for the agency make specific findings with regard to those criteria when considering whether to extend the dual fuel incentive. We believe it more likely that Congress sought information in the Report to Congress from which it could determine whether further legislative action was necessary or desirable. The criteria are accordingly set forth in the statutory section governing the Report to Congress and appropriately provide no guidance as to how or whether to apply the criteria when making preliminary conclusions about whether the incentive should be extended.¹⁰

While we do not believe there to be any legal requirement that we make findings relating to those criteria before deciding whether to continue the incentive as provided in 49 U.S.C. 32905(f), we do believe those criteria to be relevant to our consideration of an extension. In contrast to the analysis suggested by NRDC and other advocacy groups, we believe that these criteria support further extension of the CAFE incentive for dual fuel vehicles.

First, on March 31, 2003, the agency issued corporate average fuel economy levels for light trucks for model years 2005-2007 (68 FR 16868; April 7, 2003). The agency's analysis concluded that the Nation's continuing need to conserve energy and to enhance energy security justified increased fuel economy levels representing the maximum technologically feasible and economically practicable standards. The public policy needs that led Congress to enact AMFA remains vital today – energy security remains a serious public policy concern. As recent Congressional debate on comprehensive energy legislation has made clear, the development of a

¹⁰ Indeed, subsequent to the submittal of the Report to Congress, both Houses of the Congress passed bills last year that would have extended the dual fuel vehicle incentive.

light vehicle transportation system based on a domestically produced transportation fuel remains an important energy policy objective. As Congress recognized might be the case, continuation of the AMFA incentive is essential to continue the development of such a system. Without it, the investment already made may be lost and the continuing investment underway may well cease.

The availability of vehicles capable of operating on alternative fuels, and the growing but as yet not commercially developed system to support such a system, argue for (not against) the continuation of the incentive providing the impetus for the development of the vehicle fleet and the infrastructure to support it. The availability of vehicles that can use alternative fuel, and the beginnings of an infrastructure to support it, trumpet the need to continue the incentive to further the fleet and to further spur the implementation of refilling stations and other necessary infrastructure to further use of non-petroleum fuel.

It is worth noting, however, that the Report to Congress described an analysis performed by the Environmental Protection Agency (EPA) comparing a baseline case in which no incentive program existed with a case where the incentive program was in place, but in which dual fuel vehicles would use an alternative fuel source only one percent of the time. Not surprisingly, this analysis indicated that when dual fuel vehicles are operated on alternative fuel only 1% of the time, petroleum use would increase slightly because the incentive program would discourage, rather than encourage, the production of more fuel-efficient vehicles. In analyzing the results of the analysis, the Report to Congress stated:

The results of the analysis indicate that the incentive has resulted in an increase in alternative fuel use (almost all E85), and some slight increase (about one percent) in petroleum consumption and greenhouse gas emissions for 1996 through 2000. The effects beyond 2000 will depend almost entirely on the amount of E85 fuel used by FFVs. Unless actions are taken to significantly expand the availability

and use of alternative fuels, the CAFE credit incentive program will not result in any reduced petroleum consumption or greenhouse gas emissions in the future. (at xii)

Rather than argue for termination of the CAFE incentive (as suggested by some commenters), EPA's analysis demonstrates that the real benefits of the CAFE incentive have not yet been realized, and further extension of the CAFE incentive is needed to expand the alternative fuel infrastructure and realize substantial gains in replacement fuel use and petroleum displacement. Only by extending the CAFE incentive can we take full advantage of the existing (and future) investment in the Nation's alternative fuel vehicle fleets and infrastructure. As many commenters have made clear, abandoning that investment today would likely result in the contraction of the dual fuel vehicle fleet, reversal of the upward trend in the construction of refueling stations and reduced public education concerning and acceptance of alternative fuels.

In enacting AMFA, Congress determined that a vehicle fleet capable of operating on alternative fuels was the best approach to encouraging investment in domestic energy sources. As evident in the Report to Congress, the incentive program has resulted in the development of a vehicle fleet, but has only begun to spur the investment necessary for that fleet actually to use alternative fuel. The Report to Congress also emphasizes that increasing the use of domestic alternative fuels in lieu of imported petroleum will have beneficial environmental and energy effects. To abandon the program at this juncture would not allow those benefits to be realized. That is why the Report to Congress concludes that further efforts should be made to encourage the use of alternative fuel, but does not offer a preliminary conclusion suggesting that the program be terminated.

Second, the agency does not agree with the comments of several groups that the CAFE incentive program should be abandoned because manufacturers have used it to enhance their CAFE performance. Several of the advocacy groups claim this has resulted in reducing, rather than enhancing, energy security by permitting the development of a less fuel-efficient vehicle fleet than would have been permitted without the incentive. We believe that argument to be contrary to the policies and objectives underlying the legislative program. Congress specifically decided to use a special dual fuel CAFE calculation to promote the production of dedicated and dual fuel vehicles. To ensure that the incentive is not subsumed within higher CAFE standards, Congress expressly prohibits the agency from acknowledging the incentive when determining maximum feasible average fuel economy levels. Moreover, because Congress recognized that the CAFE incentive could potentially lead to lower overall fleet fuel economy, Congress placed express limitations on the scope of the incentive and the term of any necessary extension specifically to strike the appropriate balance between encouraging alternative fuel system development and providing relief from CAFE obligations.

Third, the view that extension of the CAFE incentive should be premised on the existence of a well-developed alternative fuel infrastructure misinterprets the intent of Congress with respect to the “chicken and egg” problem and its actions to provide the agency with the option to extend the CAFE incentive. Were there a well-developed alternative fuel infrastructure and a corresponding substantial use of alternative fuels, there would be no need for an extension of the CAFE incentive. Similarly, had there been no movement toward a fleet capable of

operating on alternative fuels, or no movement toward the growth of infrastructure to that fleet, there would not be any basis for extending the CAFE incentive.

As it is, however, after initially experimenting with methanol and working through technological issues with alternative fuels, in the mid to late 1990s, automobile manufacturers created a fleet of vehicles (as Congress intended) and states and local governments began to encourage investment in infrastructure to support that fleet. As we observed in the NPRM, while no liquid fuel dual-fueled light duty vehicles were produced prior to 1996, approximately 3.4 million dual-fueled light duty vehicles were produced in the 1998 through 2003 model years. Indeed, about one million of these vehicles were produced in the 2003 model year alone. Termination of the incentive now would likely discourage the further growth of the dual fuel vehicle fleet, as well as the further development of the growing infrastructure to support this fleet. This would, in effect, stamp out the gains toward energy security that the CAFE incentive has already produced and will produce in the future. Further, as stated in the Report to Congress, the Nation's long-term energy security must be given considerable weight when balanced against possible short-term petroleum consumption and environmental impacts.

Fourth, commenters who supported the agency's proposal noted that manufacturers would not have developed and produced these dual fuel vehicles in the absence of the incentive. In addition, these commenters indicated the importance of the fact that the dual fuel fleet had only begun to grow in size in recent years, reaching a "critical mass" of vehicles to support investments in alternative fuel infrastructure. In contrast, those commenters opposed to the extension argued that the continued lack of meaningful development of an alternative fuel infrastructure indicated the existence of the dual fuel vehicles themselves has had no impact on

demand for alternative fuels. Instead, these commenters, notably Public Citizen, argued that the presence of the growing dual fuel fleet is meaningless if not accompanied by a corresponding growth in demand for alternative fuel. Without such demand, they contend, an alternative fuel infrastructure will not fully develop.

Congress recognized it was unlikely that an alternative fuel vehicle fleet, consumer demand for such vehicles and infrastructure to support such vehicles all would develop contemporaneously. Congress created the incentive in order to spur the necessary investment to create an alternative fuel vehicle fleet, which would drive consumer demand for alternative fuels and, ultimately, the necessary infrastructure to support such demand. Congress further recognized the likelihood that an extension could be necessary to complete the process it had started. Accordingly, the agency does not agree with those commenters that suggest that the credit should be terminated because consumer demand and infrastructure have not yet developed to an extent that an alternative fuel system is self-sustaining.

Fifth, we believe that the existence of a significant fleet of dual fueled vehicles is meaningful even in the absence of substantial current demand for alternative fuels. Maintaining the CAFE incentive program, and thus continuing to spur the production of dual fuel vehicles, will help attenuate the potential impacts of “oil shocks” caused by rapid changes in the petroleum supply. In the event of an oil shock, dual fuel vehicles could – in those areas where infrastructure is already developed or rapidly expanding – use a domestically produced alternative fuel to reduce the nation’s overall petroleum consumption. We do not agree with those commenters who argued that continuing the incentive is unnecessary because manufacturers could reinstitute production of dual fuel vehicles if the need arose, as the

technology to build vehicles capable of operating on alternative fuels must be incorporated into the design and manufacture of those vehicles, a process which requires several years lead time.

Sixth, a number of commenters suggested that the supply of ethanol might be a limiting factor in expanding E85 use, the largest component of growth in alternative fuel use. Current U.S. ethanol production is approximately 3.6 billion gallons per year. A substantial percentage of this production capacity is used to produce additives for conventional gasoline or to produce gasohol (90 percent gasoline/10 percent ethanol). Ethanol production capacity has essentially doubled in recent years and, based on the comments showing increased investment in both infrastructure and consumer education, appears likely to continue to grow so that there will be more than enough ethanol to meet the demand for additives and provide E85 fuel. The March 2002 Report to Congress estimated that there were 400 million gallons of ethanol available for use in E85 for the year 2000. By 2002, the amount available for E85 use had grown to slightly over 1 billion gallons.

Recent experience with using ethanol as a replacement for methyl tertiary butyl ether (MTBE) indicates that the ethanol industry has the ability to increase production capacity quite rapidly in response to increased demand. The Report to Congress indicated that if ethanol production remained at a constant rate, production in 2010 would be approximately 2.6 billion gallons per year. However, the California Energy Commission now projects that U.S. ethanol production capacity will exceed 5 billion gallons per year by December 2004¹¹. Therefore, the Nation's experience with MTBE's replacement by ethanol has thus far demonstrated that the ethanol industry has the capability to expand production capability rather quickly. The move by

¹¹ Schremp, Gordon. "California's Phaseout of MTBE - Background and Current Status"
http://www.energy.ca.gov/mtbe/documents/2003-03-17_SCHREMP_AT_EPA.PPT

some States to phase-out MTBE has also had other salutary effects in terms of improvements in the production, transportation, distribution and blending of ethanol. Therefore, while this MTBE phase-out has significantly increased demand for ethanol, it has also established that ethanol production can be expanded to meet that increased demand.

The existence of the capability to rapidly expand ethanol production underscores the need to have and maintain an ethanol dual fuel vehicle fleet. The presence of an alternative fuel fleet would, in the event of significant changes in the availability of petroleum fuels, provide a ready market for a domestically produced fuel. While the Alliance and Ford both indicated their support for this contention, ACEEE and the NRDC indicated that sudden changes to the petroleum supply might not allow sufficient time for the development of additional ethanol production to allow dual fuel vehicles to use E85 fuel. Rapid changes to ethanol production capacity – i.e., taking less than six months to a year – are not likely and probably not useful in ameliorating the impact of a sudden oil crisis or “shock.” Similarly, if sufficient ethanol production capacity exists in such a situation, or is rapidly developed thereafter, the ethanol produced could be used in an E10 blend as well as E85. However, if restrictions to the petroleum supply persist over a longer term, the ethanol industry’s recently demonstrated ability to rapidly expand production indicates that more ethanol could become available. The use of E85 fuels in E85 vehicles is likely to occur simply because much less petroleum would be available. In such an instance, the existence of a dual fuel fleet could be an important asset to the Nation’s energy security.

Seventh, we note that the Department of Energy (DOE) has recently published a final rule determining that it is not necessary to require private and local government fleets to

acquire alternative fuel vehicles. (69 FR 4219; January 29, 2004). The statutory authority under which DOE issued its final rule specifies that DOE may adopt such a requirement only if it is able to determine that doing so is “necessary” to meet the statutory goal of replacing 30 percent of motor vehicle petroleum use by 2010.

DOE concluded that a private and local government fleet mandate was not necessary because, under current conditions, the limited number of fleets that would be covered and of alternative fuel vehicles that would be acquired under a mandate, coupled with the statutory constraints on such a mandate, would mean that the mandate would not appreciably increase the use of replacement fuels by motor vehicles. DOE also pointed out that even if the number of fleets and acquired alternative fuel vehicles were larger, there was no assurance that acquired vehicles would actually use alternative fuels.

DOE’s final rule is consistent with our approach in today’s final rule. DOE has merely decided not to impose a mandate on private and local government fleets in the absence of appreciable benefits from such a mandate. Moreover, of course, DOE’s action is under a different statute and subject to different statutory requirements than is our rulemaking today. DOE’s statute expressly conditions a determination of necessity, and thus the adoption of a mandate, upon that Department’s being able to make twin findings: that the 2010 goal of replacement fuel use is not expected to be achieved by voluntary means or pursuant to any law without a mandate, and that that goal is practicable and actually achievable through the adoption of a mandate in combination with voluntary means and any other relevant programs. It would not have been enough for DOE simply to find that a private and local government fleet AFV acquisition mandate would increase the level of alternative or replacement fuel used; rather, in

order for a mandate to be promulgated, DOE would have had to find that the 2010 goal actually is achieved “through implementation of such a fleet requirement program in combination with voluntary means and the application of other programs” (42 U.S.C. 13257(e).) In contrast, our decision to extend the incentive is not conditioned upon making any findings. This affords us greater discretion in determining what decision is appropriate.

Eighth, we note that CAS observed that the respective tax treatments of E10 and E85 militate against producers choosing to make E85 instead of E10, stating that E10 blends qualify for a 5.3¢ per gallon exemption from the motor fuel excise tax, which is the equivalent value of 53¢ per gallon, while the ethanol used in E85 blends qualifies for a 53¢ per gallon tax credit. Gasohol, or E10, benefits from direct reduction of taxation while E85 is subject to the equivalent reduction in taxation through operation of a credit. The two tax treatments are equal in their impact, if not in their operation, and we have no data on which to base a conclusion that the differing approaches to taxing the fuels will affect the production level of either.

Finally, we note that ACEEE indicated that it did not understand how certain dual fuel vehicles, which are required to provide equal or greater energy efficiency when operating on alternative fuel than when using gasoline or diesel fuel, could be classified as such. The agency calculates the relative energy efficiency of a dual fuel vehicle by dividing the vehicle’s combined fuel economy (miles/gallon) when operating on gasoline or diesel fuel by the net heating value of the gasoline or diesel fuel (BTU/gallon). We then divide the vehicle’s combined fuel economy (miles/gallon) when operating on alternative fuel by the net heating value of the alternative fuel (BTU/gallon). This results in two values, expressed in miles/BTU, which provides the energy

efficiency of that vehicle while operating on alternative fuels and the energy efficiency of the vehicle while operating on gasoline or diesel fuel.

The relative energy efficiency of that vehicle can be expressed by a ratio of the energy efficiency of the vehicle while operating on alternative fuels to the energy efficiency of the vehicle while operating on gasoline or diesel fuel. If that ratio, called the energy efficiency ratio, is equal to or greater than one, then that dual fuel vehicle provides equal or greater energy efficiency while operating on the alternative fuel than that vehicle operating on gasoline or diesel fuel. Our review indicates that vehicles currently classified as dual fuel vehicles have, when the method described above is used, energy efficiency ratios indicating that they qualify as dual fuel vehicles.

IX. Conclusion

For the reasons set forth above, we have determined that the extension of the AMFA CAFE incentive program for dual fuel vehicles is necessary to carry out the Congressional aim of encouraging development and use of alternative motor fuels. AMFA envisioned the alternative fuel program as a series of steps: the production of a vehicle fleet capable of operating on alternative fuel that, in turn, would increase consumer demand for alternative fuels to use in those vehicles, which would then spur the growth of infrastructure (such as refueling stations) to support such demand. Combined with a public education and awareness campaign to generate acceptance of alternative fuels as a replacement for conventional fuels, this Congressional program can result in significant economic and energy security benefit as alternative fuel becomes increasingly available and its use gains public acceptance and becomes more widespread.

The extension is consistent with the clear Congressional intent to continue the program if, after a fixed period of time, the CAFE incentive had initially generated some success in the creation of a vehicle fleet, but had not yet resulted in enough infrastructure to create a self-sustaining alternative fuel system. In enacting AMFA, Congress decided to permit a slight short-term reduction in fleet fuel economy in order to encourage long-term energy security through the development of an alternative fuel automobile fleet. The agency has found that the incentive has led to the creation of such a vehicle fleet, and more recently has led to expanded investment in infrastructure and public education campaigns to develop the actual use of alternative fuel in that fleet.

We have determined that extension of the CAFE incentive appropriately balances the Nation's need to continue to encourage investment in alternative fuel infrastructure and the risk that the Nation's alternative fuels system may never become self-sustaining. The recent proliferation of E85 refueling stations, the recent Congressional support for ethanol as an alternative fuel, and the recent expansion of public awareness and acceptance campaigns to encourage ethanol use all imply a continuing increase in E85 use and the ultimate success of the program created by Congress in AMFA, at least as far as ethanol-based fuels are concerned. The current status of the program does not support its abandonment by terminating the CAFE incentive that has sparked its development to date.

X. Regulatory Analyses

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is "significant" and

therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Order defines a “significant regulatory action” as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

This final rule is economically significant. While final rule does not require the production of alternative fuel vehicles, it allows manufacturers producing dual-fuel vehicles to produce less efficient conventionally fueled vehicles. The impact of the production of these less efficient vehicles may result in additional annual fuel costs of more than \$100 million.

Accordingly, it was reviewed under Executive Order 12866. The rule is also significant within the meaning of the Department of Transportation’s Regulatory Policies and Procedures.

Because this final rule is economically significant, the agency has prepared a Final Economic Assessment (FEA), as required by E.O. 12866.¹² Among the estimates and conclusions in the FEA are the following:

- The incentive program has stimulated a significant increase in the availability of dual fuel vehicles (about 3.4 million E85 vehicles were sold through MY 2003, mostly light trucks).
- Even under the most pessimistic assumption regarding the use of E85 fuel (1% usage) in dual fuel vehicles, overall increases in gasoline consumption are relatively small - less than one percent.
- The average consumer cost of adding dual fuel capability to a vehicle is \$100 to \$200 (in \$2000).
- The ability of GM, Ford and DaimlerChrysler to rely on the incentive credits during the extension will decrease the extent to which those companies would otherwise need to increase the fuel economy of their conventional vehicles, with a resulting average savings, from the manufacturer's perspective, ranging from \$34 for MY 2005 light trucks to about \$85 for MY 2007 light trucks.

The full FEA is available in the docket and has been placed on the agency's website along with the final rule itself.

B. Regulatory Flexibility Act

¹² As we noted in IX. Conclusion above, we have determined that the extension of the AMFA CAFE incentive program for dual fuel vehicles based on our conclusion that doing so is necessary to carry out the Congressional aim of encouraging development and use of alternative motor fuels. Combined with a public education and awareness campaign to generate acceptance of alternative fuels as a replacement for conventional fuels, this Congressional program can result in significant economic and energy security benefit as alternative fuel becomes increasingly available and its use gains public acceptance and becomes more widespread.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR 121.105(a) define a small business, in part, as a business entity "which operates primarily within the United States." No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this final rule under the Regulatory Flexibility Act. I certify that this final rule does not have a significant economic impact on a substantial number of small entities. The rationale for this certification is that there are not currently any small motor vehicle manufacturers in the United States building vehicles that will be affected by the extension of the dual-fuel incentive credit.

C. National Environmental Policy Act

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has performed an Environmental Assessment and determined that implementation of this final rule will not have a significant impact on the quality of the human environment. Adoption of this final rule could result in increased vehicle

emissions and an increase in greenhouse gases, depending on the amount of alternative fuel consumed by dual-fueled vehicles manufactured in response to the rule. Such increases will stem largely from the production of larger, less fuel-efficient vehicles made possible by the extension. However, under any scenario, the amount of increased emissions represents a de minimis percentage of overall emissions resulting from the consumption of petroleum fuels by highway vehicles.

D. Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation. NHTSA also may not issue a regulation with Federalism implications and that preempts State law unless the agency consults with State and local officials early in the process of developing the proposed regulation.

The agency has analyzed this final rule in accordance with the principles and criteria set forth in Executive Order 13132 and has determined that it will not have sufficient Federalism implications to warrant consultation with State and local officials or the preparation of a Federalism summary impact statement. The extension of the incentive program through the 2008 model year might result in additional conventional fuel costs for state and local governments. At the same time, extension of the incentive program will ensure that dual fuel vehicles, which state and local governments might need to acquire to comply with other government mandates, will be available at lower costs. Any increased costs that will not be offset by the continued availability of lower cost dual fuel vehicles, however, are not direct costs. The agency's final rule will not otherwise have any substantial effects on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local officials.

E. Civil Justice Reform

This final rule will not have any retroactive effect. 49 U.S.C. 30161 sets forth a procedure for judicial review of final rules establishing, amending, or revoking Federal motor vehicle safety standards. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. This final rule will not require any new collections of information as defined by the OMB in 5 CFR Part 1320. Data regarding production of dual-fuel vehicles will be submitted to

the agency under the existing procedures found in 49 CFR Part 537.

G. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272) directs us to use voluntary consensus standards in our regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the Society of Automotive Engineers (SAE). The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

There are no voluntary consensus standards available at this time. However, NHTSA will consider any such standards if they become available.

H. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than \$109 million in any one year (adjusted for inflation with base year of 1995). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires NHTSA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law.

Moreover, section 205 allows NHTSA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted.

This final rule is not a Federal mandate; instead, it provides an incentive for automobile manufacturers. Further, the rule is not estimated to result in expenditures by State, local or tribal governments, or by the private sector, of more than \$109 million annually.

I. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

List of Subjects in 49 CFR Part 538

Energy conservation, Gasoline, Imports, Motor vehicles

In consideration of the foregoing, NHTSA is amending 49 CFR part 538 as follows:

PART 538--MANUFACTURING INCENTIVES FOR ALTERNATIVE FUELED VEHICLES

1. The authority citation for part 538 of Title 49 continues to read as follows:

Authority: 49 U.S.C. 32901, 32905, and 32906; delegation of authority at 49 CFR 1.50.

2. Revise § 538.1 to read as follows:

□ 538.1 Scope.

This part establishes minimum driving range criteria to aid in identifying passenger automobiles that are dual-fueled automobiles. It also establishes gallon equivalent measurements for gaseous fuels other than natural gas. This part also extends the dual-fuel incentive program.

3. Revise §538.2 to read as follows:

¶538.2 Purpose.

The purpose of this part is to specify one of the criteria in 49 U.S.C. chapter 329 "Automobile Fuel Economy" for identifying dual-fueled passenger automobiles that are manufactured in model years 1993 through 2004. The fuel economy of a qualifying vehicle is calculated in a special manner so as to encourage its production as a way of facilitating a manufacturer's compliance with the Corporate Average Fuel Economy Standards set forth in part 531 of this chapter. The purpose is also to establish gallon equivalent measurements for gaseous fuels other than natural gas. This part also specifies the model years after 2004 in which the fuel economy of dual-fueled automobiles may be calculated under the special incentive provisions found in 49 U.S.C. 32905(b) and (d).

4. Add §538.9 to read as follows:

¶ 538.9 Dual Fuel Vehicle Incentive.

The application of 49 U.S.C. 32905(b) and (d) to qualifying dual fuel vehicles is extended to the 2005, 2006, 2007, and 2008 model years.

Issued on:

Jeffrey W. Runge, MD
Administrator

Billing Code 4910-59-P

[Signature page for RIN 2127-AI41]

[Final Rule for Automotive Fuel Economy Manufacturing Incentives for Alternative Fuel Vehicles]