BEFORE THE HONORABLE CAROL BROWNER, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

PETITION FOR RECONSIDERATION OF THE CAP 2000 RULE – 64 FED. REG. 23,906 (May 4, 1999)

Petitioner

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On May 4, 1999, EPA issued new regulations substantially revising the "certification" process for motor vehicles under the Clean Air Act ("CAA" or "Act"). See 64 Fed. Reg. 23,906 (to be codified at 40 C.F.R. Part 86.1801 et seq.). In connection with these new regulations (known as the "CAP 2000 rule"), EPA rejected comments filed by Ethyl Corporation ("Ethyl") and others who objected, among other things, to EPA's failure to adhere to its responsibility under CAA § 206 to establish new certification test procedures "by regulation" after notice and opportunity for public comment in accordance with CAA § 307(d). In the preamble to the final rule, EPA articulated for the first time several interpretations of the Act not previously presented as part of the CAP 2000 proposal and regarding which Ethyl had no opportunity to submit comments for the Agency's consideration. The interpretations at issue are of central relevance to the outcome of the rule because the legality of the CAP 2000 rule ultimately depends upon their validity. Accordingly, Ethyl hereby petitions the Agency to reconsider issuance of the CAP 2000 rule and requests that the Agency convene appropriate administrative proceedings as specified in CAA § 307(d)(7)(B).[1] Notwithstanding EPA's newly articulated interpretation of the Act, Ethyl continues to believe that the CAP 2000 rule is inconsistent with the Act because EPA can only approve use of manufacturer-specific certification test procedures by regulation in accordance with the "rulemaking" requirements set forth in § 307(d).

I. Section 206(d) of the Act Requires EPA to Establish Certification Test Procedures "By Regulation."

In its comments and oral testimony, Ethyl maintained, among other things, that EPA must adopt certification test procedures "by regulation" in accordance with the plain terms of CAA § 206(d) and subject to the "rulemaking" procedures established in § 307(d).[2] The Agency disagreed, arguing in response that the phrase "methods and procedures" as used in § 206(d) is sufficiently uncertain in meaning to encompass the establishment of a case-by-case "adjudicatory type procedure" for the review and approval of manufacturer-specific test procedures without the necessity of incorporating the test procedures formally into the Agency's regulations.[3] As explained by EPA,

> [t]hese terms are broad enough in nature to include a process for future determination of the specific details of a test program, based on submission of a proposed program for EPA review according to pre-set criteria. The term "establish" also appears general enough to include both the establishment of detailed specifics at one time, as well as establishment of a process to set detailed specifics at a

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[1] Ethyl filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit on July 2, 1999. See Ethyl Corp. v. EPA, No. 99-1255 (D.C. Cir. July 2, 1999). That petition remains pending before the court.

[2] Letter to EPA Air Docket A-96-50 from Hunton & Williams dated September 24, 1998, Docket No. IV-D-10 (hereafter "Ethyl Comments") at 4-5.

[3] See 64 Fed. Reg. at 23,912-23,914.

> future point. The text of section 206(d) does not appear to indicate a clear congressional intent to prohibit the adjudicatory approach proposed by EPA, but instead employs terms that are broad and general in nature, allowing a variety of potential ways to establish methods and procedures for testing.[4]

EPA has not considered, however, that the phrase "methods and procedures" in § 206(d) does not stand alone. Section 206(d) provides in its entirety that "[t]he Administrator shall by regulation establish methods and procedures for making tests under this section." (Emphasis added.) Nowhere does EPA account for the phrase "for making tests" as it relates to the "methods and procedures" covered by the provision. The phrase "for making tests" as it appears in § 206(d) is not the same as the phrase "for making or developing tests" as EPA apparently would prefer to read the provision. That Congress did not enact a provision covering "methods and procedures for developing tests" evidences a clear congressional intent that the regulations mandated by § 206(d) set forth the details for "making" certification tests rather than contain procedures for developing tests at some indeterminate date in the future.[5]

Moreover, that Congress did not expressly state in § 206(d) "that EPA may not exercise its authority under section 206(d) by setting up an adjudicatory process in the regulations" is of no consequence.[6] The D.C. Circuit has repeatedly held that it "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power."[7] In short, the Agency should reconsider the CAP 2000 regulations to ensure that they are consistent with the plain terms of § 206(d) of the Act.

II. EPA Cannot Avoid It's Rulemaking Responsibilities Under § 307(d) by Characterizing the Certification Process as an "Adjudicatory Type Proceeding.

Even if the Agency is deemed to have correctly interpreted § 206(d) (which Ethyl believes it has not), characterizing the process by which the Agency reviews and approves certification test procedures as "adjudicatory" in nature does not relieve the Agency of its independent obligation under § 307(d) to undertake "rulemaking" as a part of the Agency's so-called "adjudicatory" process. As Ethyl indicated in its comments, § 307(d) applies by its plain

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[4] 64 Fed. Reg. at 23,912-23,913.

[5] EPA's separate suggestion that durability test programs may not be subject to § 206(d) is also without merit. See id. at 23,913-23,914. Standards under CAA § 202 apply for the vehicle's "useful life" and durability test programs are the only way to evaluate compliance with standards over the useful life period. See 42 U.S.C. § 7521(a) ("standards shall be applicable for such vehicles and engines for their useful life").

[6] See 64 Fed. Reg. at 23,913.

[7] See Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (citing NRDC v. Reilly, 983 F.2d 259, 266 (D.C. Cir. 1993)); American Petroleum Institute v. EPA, 52 F.3d 1113, 1120 (D.C. Cir. 1995).

terms to the "promulgation or revision of . . . test procedures for new motor vehicles or engines under section 7525 . . . ."[8] Consequently, all of the "rulemaking" requirements set forth in § 307(d) apply to EPA's review of proposed certification test procedures whether or not EPA chooses to characterize the process as "adjudicatory" or "regulatory" in nature.[9] This means that, at a minimum, EPA must:

Open a "rulemaking" docket for the proceeding into which all relevant information must be placed for public review;

2. Provide notice of the proceeding in the Federal Register;

Prepare a statement of basis and purpose that includes the factual data on which the proposal is based; the methodology used in obtaining the data and in analyzing the data, if any; and the major legal interpretations and policy considerations underlying the proposed action;

4. Afford the public the opportunity to submit oral and written comments on the proposal; and

5. Respond to each of the significant comments, criticisms, and new data submitted during the comment period.

Moreover, as specified in § 307(d)(6)(C), EPA's ultimate decision on the proposal "may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of promulgation" of the rule.

Despite the clear language of § 307(d), however, the CAP 2000 regulations make no provision for participation by interested persons in the development of individualized certification test procedures. In the case of durability test procedures, for example, the CAP 2000 regulations specify only that "[t]he manufacturer will propose a durability program" and that "[t]he Administrator will approve the program if he/she determines that it is reasonably expected to meet [the specified] design requirements."[10]

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[8] 42 U.S.C. § 7607(d)(1)(K).

[9] EPA asserts that "an adjudicatory process is a more efficient method of reviewing and approving or rejecting such durability programs, avoiding the time and resources that would be necessary to promulgate by rulemaking each manufacturer-specific durability program." 64 Fed. Reg. at 23,913. The purported "efficiency" of an administrative process different from the one mandated by Congress provides no basis to ignore clear Congressional directives.

[10] 64 Fed. Reg. at 23,946 (to be codified at 40 C.F.R. § 86.1823-01(a)).

In the final rule, EPA responds only to whether "EPA's regulations must themselves contain the specific details of each manufacturer's durability program,"[11] without responding to Ethyl's more fundamental assertion that "[n]othing in the Act authorizes EPA to certify vehicles in reliance upon test procedures . . . otherwise kept secret from the public at large."[12] Although the incorporation of certification test procedures into EPA's regulations would be fully consistent with the plain terms of § 206(d) (and, as noted above, is mandated in Ethyl's view), the "rulemaking" requirements of § 307(d) are not limited solely to the promulgation by EPA of regulations. They can and do apply to EPA's self-styled "adjudicatory type procedure" for development of individualized certification test procedures.[13]

By including the promulgation and revision of certification test procedures within the scope of § 307(d), Congress envisioned substantial public participation in the development of certification test procedures under CAA § 206. The only way the public can be afforded a meaningful opportunity to comment upon the proposed development and use of individualized certification test procedures under § 307(d), however, is if those procedures are fully described in the notice seeking public comment on the test procedures. As one court has noted in an analogous setting, "one cannot ask for comment on a scientific paper without allowing the participants to read the paper . . . To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether."[14]

Thus, the Agency cannot evade its obligation to divulge proposed certification test procedures and related information for review and comment by the public simply by characterizing its decision-making process as "adjudicatory" in nature. Whatever EPA chooses to call the administrative process it uses, interested persons have a right to participate meaningfully in the development of individualized certification test procedures.[15]

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[11] Id. at 23,912.

[12] Ethyl Comments at 5.

[13] Even if § 307(d) did not apply by its plain terms to the promulgation or revision of certification test procedures, the requirements of the Administrative Procedure Act would apply to foreclose the Agency's efforts to exclude the public from participating in the development of certification test procedures. See 42 U.S.C. § 7607(d)(1).

[14] United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977).

[15] Nothing in the Act grants EPA unreviewable authority to issue certificates of conformity. For this reason as well, the Agency must ensure effective public notice and opportunity to comment in its certification regulations. Without notice of the "adjudicatory type" proceedings established in the CAP 2000 rule and an opportunity to participate in the development of the administrative record underlying EPA's certification decisions, including review of proposed test procedures to be employed in the certification process, meaningful judicial review of EPA's certification decisions is simply not possible. See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983) ("[B]y giving affected parties an opportunity to develop evidence in the record to support their objections to the rule, notice enhances the quality of judicial review.").

For this reason, the Agency is misguided when it asserts in the final rule that "Congress did not require that EPA make available the specific details of test procedures employed to generate the emissions data or the durability programs employed in the certification process."[16] To the contrary, the plain terms of the Act mandate public access to the test procedures and related information relied upon by EPA in determining whether to certify a motor vehicle even if EPA chooses to characterize the forum for establishing such procedures as "adjudicatory" in nature. Because the CAP 2000 regulations and the "adjudicatory" process established therein reflect EPA's unfounded determination that "rulemaking for each durability program is not required" under § 307(d),[17] the CAP 2000 regulations should be reconsidered.

III. Maintaining the Secrecy of Certification Test Procedures is Not in the Public Interest.

The Agency has a long history of supporting public participation in the development of environmental regulations and policy, as well as promoting the availability of information on which the Agency's actions depend. This is reflected in a wide range of EPA programs and regulations.[18] Precisely why the Agency would adopt a contrary approach in its certification program remains unclear, particularly since the public interest would benefit from a more "transparent" approach to certification.

First, the suppression of information directly relevant to EPA's certification decisions, such as the test procedures employed in the certification process, is contrary to basic principles of administrative law. As noted above, the release of all relevant certification information is the only way that EPA's certification decisions can be properly evaluated by interested members of the public, and where necessary, by a reviewing court.

Second, the suppression of certification information may be affirmatively harmful to the environment. As reflected in a wide range of recent legal actions directed at automobile

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[16] 64 Fed. Reg. at 23,914.

[17] Id. (emphasis added).

[18] For example, in 40 C.F.R. Part 25, EPA adopted as two of its principal objectives for any regulatory activity under the Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act (1) "to assure that the government does not make any significant decision on any activity covered by this part without consulting interested and affected segments of the public;" and (2) "[t]o use all feasible means to create opportunities for public participation, and to stimulate and support participation." See 40 C.F.R. § 25.3(c)(2) and (c)(7) (emphasis added). Similarly, in another CAA program requiring EPA to proceed "by regulation," the Agency's registration testing regulations adopted pursuant to CAA § 211 require the Agency to provide notice to the public and an opportunity to comment whenever the Agency proposes to mandate "alternative" health tests for certain fuels and fuel additives different from those established in EPA's regulations. See 40 C.F.R. § 79.58(c).

manufacturers (including an action initiated against Toyota Motor Sales U.S.A., Inc. (hereafter "Toyota") on July 12th), the government has alleged that millions of vehicles have been improperly certified under the Act over the past several years.[19] If the certification process allowed for more effective public participation, including broader and more complete dissemination of the information contained in certification applications (such as the test procedures employed in the certification process), the likelihood that the government would be forced to take legal action against the automobile industry "after the fact" for alleged non-compliance with certification requirements would be substantially reduced.

Third, maintaining the secrecy of certification test procedures unfairly hampers the petroleum product industry's ability to develop environmentally beneficial fuels, fuel additives, lubricants and other products, or to engage in necessary product stewardship.[20] As Ethyl noted in its comments, existing EPA guidance requires new fuels and fuel additives to be evaluated using certification test procedures.[21] Without access to certification test procedures, there is little or no incentive to innovate due to technical questions that would inevitably arise about use of inappropriate test procedures.[22] Similarly, with respect to the on-going debate about sulfur in gasoline, the oil industry has not had an opportunity to evaluate the extent to which any purported increases in emissions allegedly due to higher gasoline sulfur concentrations are merely an artifact of the test procedures used by the automobile industry to evaluate the durability of the vehicles they produce.[23] Given that automobiles and fuels are now viewed as an

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[19] Attachment 1 is a copy of the government's complaint against Toyota. Copies of similar complaints against other motor vehicle manufacturers are available in the administrative docket for the CAP 2000 rule. See EPA Air Docket A-96-50, No. IV-G-11.

[20] As the Agency is presumably aware, automobile manufacturers have recently made allegations in owner's manuals and elsewhere that the vehicles they manufacture cannot operate adequately using certain products and services offered by competing industrial sectors. Illustrative examples of the allegations made in recent owner's manuals are included in Attachment 2.

[21] Ethyl Comments at 1.

[22] Prior to the CAP 2000 regulations, EPA's regulations included a "standard" certification test procedure that oil industry participants could potentially use to evaluate new and existing fuels and fuel additives, irrespective of any company-specific modifications to the test procedure adopted by individual automobile manufacturers. See 40 C.F.R. § 86.094-26(a)(2) (1998). The CAP 2000 regulations eliminate this "standard" test procedure. See 63 Fed. Reg. 39,654, 39,660 (July 23, 1998) ("Due to Agency concerns about the adequacy of the AMA as a durability mileage accumulation cycle, the Agency is now proposing to eliminate use of [the] AMA for new durability demonstrations starting with the 2001 model year.").

[23] The various test programs underlying EPA's proposal to reduce sulfur in gasoline have employed artificial aging techniques for critical emission control components, such as catalytic converters and oxygen sensors, developed by automobile manufacturers in the certification process. Whether artificially aged components are more sensitive to sulfur than "real world" aged components has not been addressed by EPA in its proposed sulfur regulations. Nor has it

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integrated system, it makes little sense to proceed with the regulation of gasoline sulfur levels without having determined whether and to what extent use of different vehicle test procedures impacts the apparent emission effects of sulfur over a range of sulfur levels. No such analysis is possible without access to the test procedures employed in the certification process.

Finally, the basis on which EPA has previously refused to release manufacturer-specific certification test procedures and related information is the alleged "proprietary" characteristic of the information. The information at issue, however, is not what would traditionally be deemed proprietary in the sense that the information relates centrally to the business of automobile manufacturers. The business of automobile manufacturers is the production of automobiles. To the extent that automobile manufacturers have developed alternative test procedures for the "certification" of the vehicles they manufacture, they have done so in response to government mandates, <u>not because such test procedures are indispensable to the production or marketing of automobiles</u>. Indeed, even if certification test procedures could appropriately be characterized as "trade secrets" (which Ethyl believes they cannot), Congress expressly authorized EPA to release such information "when relevant in any proceeding under this chapter."[24] By ensuring the release of all relevant certification information, EPA will help to ensure that motor vehicles are equipped with only the most effective and durable systems currently available.

IV. Request for Relief

Petitioners respectfully request that the Agency modify the CAP 2000 regulations to ensure that all individualized certification test procedures are developed in accordance with the procedural requirements set forth in CAA § 307(d). Prompt action on this petition is essential to ensure compliance with the Act as EPA begins to implement the CAP 2000 program.[25] Petitioners further request that the Agency provide prompt public notice of each certification application submitted under the CAP 2000 program and will construe a failure to provide such notice as a constructive denial of this petition.

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been addressed by the automobile industry. Notably, the California Air Resources Board ("CARB") recently expressed "concern[] that some aging methods currently being used by manufacturers may not be representative of real world deterioration . . . ." <u>See</u> CARB Mail Out #MSC 99-12 at 4. A copy of the CARB mail out is Attachment 3.

[24] 42 U.S.C. § 7542(c), CAA § 208(c).

[25] Guidance issued by EPA in May 1999 directs that automobile manufacturers "should begin using these new procedures beginning June 1, 1999 for CAP 2000 programs (including early opt-in)." A copy of this guidance is Attachment 4.

Petitioners appreciate the opportunity to submit this petition. If you have any questions about the petition, please contact Kevin L. Fast at (202) 955-1519.

Respectfully submitted:

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