

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 85, and 86

[AMS-FRL-]

RIN 2060-AF75

**Control of Air Pollution from New Motor Vehicles and New Motor
Vehicle Engines: State Commitments to National Low Emission
Vehicle Program**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY:

Today EPA is finalizing the necessary federal regulations for a voluntary clean car program called the National Low Emission Vehicle ("National LEV") program, which is designed to reduce smog and other pollution from new motor vehicles across the country. The program will come into effect only if the northeastern states (members of the Ozone Transport Commission or "OTC") and the auto manufacturers sign up for it. The National LEV regulations allow manufacturers to commit to meet tailpipe standards for cars and light light-duty trucks that are more stringent than EPA can mandate. Manufacturers have said they would be willing to commit to the program if the OTC States also make binding commitments to the program. Once the program comes

into effect, it would be enforceable in the same manner as any other federal new motor vehicle program.

After spending years helping to develop the program, the OTC States and the auto manufacturers must now decide whether to commit to it and allow the country to benefit from significant reductions in pollution. National LEV would also achieve the same (or better) emission reductions in the Ozone Transport Region (OTR) as would OTC State adopted new motor vehicle programs. Under National LEV there would be substantial harmonization of federal and California new motor vehicle standards and test procedures, which would enable manufacturers to design and test vehicles to one set of standards nationwide. The program would demonstrate how cooperative, partnership efforts can produce a smarter, cheaper program that reduces regulatory burden while increasing protection of the environment and public health.

DATES: This regulation is effective [insert date of publication]. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of [insert date 60 days from date of publication]. The information collection requirements

contained in this rule has been approved by the Office of Management and Budget (OMB) and has an assigned OMB control number of 2060-0345.

ADDRESSES: Materials relevant to this final rule have been placed in Public Docket No. A-95-26. The docket is located at the Air Docket Section, U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460 (Telephone 202-260-7548; Fax 202-260-4400) in Room M-1500, Waterside Mall, and may be inspected weekdays between 8:00 a.m. and 5:30 p.m. A reasonable fee may be charged by EPA for copying docket materials. For further information on electronic availability of this final rule, see the SUPPLEMENTARY INFORMATION section below.

FOR FURTHER INFORMATION CONTACT: Karl Simon, Office of Mobile Sources, U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460. Telephone (202) 260-3623; Fax (202) 260-6011; e-mail simon.karl@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

Regulated entities

Entities potentially regulated by this action are those that manufacture and sell motor vehicles in the United States.

Regulated categories and entities include:

<u>Category</u>	<u>Examples of regulated entities</u>
Industry	New motor vehicle manufacturers

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your activities are regulated by this action, you should carefully examine the applicability criteria in § 86.1701-99. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding "FOR FURTHER INFORMATION CONTACT" section.

Obtaining Electronic Copies of the Regulatory Documents

The preamble, regulatory language, response to comments document, and other related documents are also available electronically from the EPA Internet Web site. This service is free of charge, except for any cost you already incur for internet connectivity. The electronic Federal Register version is made available on the day of publication on the primary Web site listed below. The EPA Office of Mobile Sources also publishes Federal Register notices and related documents on the secondary Web site listed below.

1. <http://www.epa.gov/docs/fedrgstr/EPA-AIR/>
(either select desired date or use Search feature)
2. <http://www.epa.gov/OMSWWW/lev-nlev.htm>

Please note that due to differences between the software used to develop the document and the software into which the document may be downloaded, changes in format, page length, etc. may occur.

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II. Background¹

Today's Final Rule (FRM) is another step towards a voluntary clean car program ("National LEV") that can help control emissions nationwide as well as in the northeastern states. As discussed in previous Federal Register notices,² there have been a number of regulatory and other steps in the development of this program. Today's notice concludes the federal regulatory steps necessary to set up the voluntary clean car program, which will then come into effect if the auto manufacturers and the OTC States commit to it. In June of this year, EPA published a final rule setting forth the framework for the program, including the specific standards that would apply to new motor vehicles if manufacturers opted in. See 62 FR 31192 (June 6, 1997) ("Final Framework Rule"). Today's rule finalizes the regulations for the National LEV program. It is now up to the OTC States and the

¹ Although this section contains a brief summary of the National LEV program and the process that led up to it, this notice assumes that the reader has an in-depth understanding of the National LEV program and is familiar with the previous National LEV rulemaking notices (i.e., the August, 1997, Supplemental Notice of Proposed Rulemaking (SNPRM); the October, 1995, Notice of Proposed Rulemaking (NPRM); and the June, 1997, Final Framework Rule cited in n.2). Readers should review those documents for in-depth discussion of the program, the process and other background information.

² See 60 FR 4712 (Jan. 24, 1995), 60 FR 52734 (Oct. 10, 1995); 62 FR 31192 (June 6, 1997); 62 FR 44754 (Aug. 22, 1997).

auto manufacturers to determine whether the program will come into effect.

Under the National LEV program, auto manufacturers will have the option of agreeing to comply with tailpipe standards that are more stringent than EPA can mandate prior to model year (MY) 2004. Once manufacturers commit to the program, the standards will be enforceable in the same manner that other federal motor vehicle emissions control requirements are enforceable. See the Final Framework Rule at 62 FR 31201-31223 for a detailed discussion of the program structure, tailpipe and related standards, and legal authority for and enforceability of National LEV. Manufacturers have indicated their willingness to volunteer to meet these tighter emissions standards if EPA and the northeastern states (i.e., those in the Ozone Transport Commission (OTC) or the "OTC States") agree to certain conditions, including providing manufacturers with regulatory stability and reducing regulatory burdens by harmonizing federal and California motor vehicle emissions standards.

The National LEV program has been developed through an unprecedented, cooperative effort by the OTC States, auto manufacturers, environmentalists, fuel providers, EPA and other

interested parties. The OTC States and environmentalists provided the opportunity for this cooperative effort by pushing for adoption of the California Low Emission Vehicle (CAL LEV) program throughout the northeast Ozone Transport Region (OTR). Under EPA's leadership, the states, auto manufacturers, environmentalists, and other interested parties then embarked on a process to develop a voluntary National LEV program, a process marked by extensive public participation and a focus on joint problem solving. See the Final Framework Rule at 62 FR 31199 and the NPRM at 60 FR 52739-52740 for further discussion of public participation in the National LEV decision making process.

National LEV will provide public health and environmental benefits by reducing air pollution nationwide. Both inside and outside the OTR, National LEV will reduce ground level ozone, the principle harmful component in smog, as well as emissions of other pollutants, including particulate matter (PM), benzene, and formaldehyde. The Final Framework Rule contains a substantive discussion on the health and environmental benefits of the National LEV program. See 62 FR 31195. EPA has determined that the National LEV program will result in emissions reductions in the OTR that are equivalent to or greater than the emissions reductions that would be achieved through adoption of the CAL LEV

program in the OTR. National LEV will also provide manufacturers regulatory stability and reduce regulatory burden by harmonizing federal and California motor vehicle standards. This will reduce testing and design costs for motor vehicles, as well as allow more efficient distribution and marketing of vehicles nationwide. See the Final Framework Rule at 60 FR 31195-31197 and 31224 for further discussion of the benefits of the National LEV program.

In addition to the national public health benefits that would result from National LEV, the program has been motivated largely by the OTC's efforts to reduce motor vehicle emissions either by adoption of the CAL LEV program throughout the OTR or by adoption of the National LEV program. One of the OTC States' efforts was a petition the OTC filed with EPA. On December 19, 1994, EPA approved this petition, which requested that EPA require all OTC States to adopt the CAL LEV program (called the Ozone Transport Commission Low Emission Vehicle (OTC LEV) program). See 60 FR 4712 (January 24, 1995) ("OTC LEV Decision"). See the Final Framework Rule at 60 FR 31195 for a summary of EPA's decision. In March, 1997, the U.S. Court of Appeals for the District of Columbia affirmed states' rights to adopt the CAL LEV program, but reversed EPA's decision requiring the OTC States to do so. Virginia v. EPA, 108 F.3d 1397 (D.C.

Cir. 1997). Some, but not all, OTC States have adopted CAL LEV programs to date.

Given statutory constraints on EPA, National LEV will be implemented only if it is agreed to by the OTC States and the auto manufacturers. EPA does not have authority to force either the OTC States or the manufacturers to sign up to the program. EPA cannot require the auto manufacturers to meet the National LEV standards, absent the manufacturers' consent, because section 202(b)(1)(C) of the Clean Air Act (CAA, or "the Act") prevents EPA itself from mandating new exhaust standards applicable before model year 2004. The auto manufacturers have indicated that they would be willing to opt into National LEV only if the OTC States make certain commitments, including committing to allow the manufacturers to comply with National LEV in lieu of certain CAL LEV programs adopted under section 177 of the CAA (Section 177 Programs). EPA cannot require the OTC States to make such commitments (although EPA can issue regulations to help make the commitments enforceable). Thus, National LEV cannot come into effect absent the agreement of the auto manufacturers and the OTC States.

Over the past several years, the OTC States and the auto manufacturers have conducted negotiations to develop an agreement on National LEV to be contained in a Memorandum of Understanding (MOU). The parties have reached agreement on most provisions of the National LEV program. Each side has sent EPA an MOU that it has initialed, indicating its agreement with the National LEV program as contained in that Memorandum of Understanding.³ Although there are differences in the two Memoranda, they show that agreement has been reached between the OTC States and the auto manufacturers on most of the provisions of the National LEV program. Based on the MOUs provided to the Agency, EPA issued the Final Framework Rule on June 6, 1997, setting the framework for and describing most of the elements of the National LEV program.

Although the parties had hoped to jointly sign a comprehensive MOU affirming their mutual agreement on the National LEV program, the parties now agree that further discussions are unlikely to result in resolution of the last outstanding issues. Nonetheless, EPA and the parties believe that National LEV would provide substantial public health and environmental benefits. Failure to come to agreement on a

³ See Docket No. A-95-26, IV-G-31 and IV-G-34.

National LEV program would be a significant lost opportunity to improve the nation's air quality.

EPA believes there is sufficient common ground between the parties to provide a basis for a National LEV program to which all parties could agree to opt into. EPA believes that finalizing a program for the OTC States and manufacturers to evaluate as a whole presents the greatest likelihood that the country will achieve the benefits of National LEV, on which many stakeholders worked hard over the years. EPA encourages the auto manufacturers and OTC States to opt in so the country does not lose the significant benefits of National LEV.

Today's final rule (FRM) finalizes regulations on issues relating to how the OTC States will voluntarily opt in to the National LEV program and commit to allow motor vehicle manufacturers to comply with the National LEV program in lieu of state Section 177 Programs. These issues include the duration of the OTC State commitments, the instruments and process through which the OTC States will commit to the program, and the substantive details of their commitments.

Today's FRM also addresses several other outstanding structural details of the National LEV program. These provisions include the timing of OTC State and auto manufacturer opt-ins to the National LEV program, incentives for the parties to keep their commitments to the National LEV program and conditions under which OTC States and manufacturers could exit the program ("offramps"), and the start date of the National LEV program.

In addition, today's FRM includes several modifications and clarifications of several issues addressed to some extent in the Final Framework Rule. These include provisions relating to how the off-cycle supplemental federal test procedure would apply to National LEV vehicles and provisions relating to banking and trading of emissions credits. For additional explanation of the rationale for today's rule and responses to comments, see the Summary and Analysis of Comments for the Final Rule.

III. National LEV Start Date

In the SNPRM, EPA proposed to have the National LEV program start in MY1999, which reflected a change from the original

proposed start date of MY1997.⁵ See 62 FR 44756-57. EPA explained that this change in the start date was necessary because requiring a start date of MY1997 or MY1998 was unrealistic given the delays associated with finalizing the program and the inability of manufacturers to produce and certify National LEV vehicles before MY1999. Additionally, EPA noted that there was no longer a legal requirement for National LEV to produce emissions reductions at least equivalent to those that would be produced by OTC LEV due to the court case overturning EPA's decision granting the OTC's petition. (See Virginia v. EPA, supra.) EPA received no negative comments regarding this proposed change in program start date. EPA is today finalizing its proposal to have the National LEV program start in MY1999 in the OTR.

The change in program start date reflects in part EPA's belief that, given the voluntary nature of the National LEV program, it would be unreasonable to retain the MY1997 start date and have the program begin with some manufacturers having debits from not meeting the fleet average NMOG standards for MY1997 and MY1998. Such debits would be difficult to erase given the

⁵ The National LEV program will start in MY2001 nationwide. The nationwide start date was not at issue in the SNPRM.

increasing stringency of the fleet average NMOG standards and the limited ability of manufacturers to modify their production plans quickly, once the program is in effect, to manufacture a number of National LEV vehicles sufficient to demonstrate compliance with the applicable fleet average NMOG standards.

The MY1999 start date for the National LEV program does not mean that the program is being delayed two years, but merely that the National LEV requirements for MY1997 and MY1998 are being dropped from the regulations. Therefore, the fleet average NMOG standards for MY1999 are 0.148 g/mi for light-duty vehicles and light-duty trucks (0-3750 pounds LVW) and 0.190 g/mi for light-duty trucks between 3750-5750 pounds LVW. As stated above, the MY2001 nationwide fleet average NMOG standards remain unchanged.

EPA also took comment on allowing manufacturers to sell California-certified vehicles⁶ instead of National LEV vehicles throughout the Northeast Trading Region (NTR) for MY1999 and MY2000 as a means to help manufacturers meet their fleet average NMOG standards for these two model years. Manufacturers

⁶ "California-certified vehicles", as the term is used in this rule, are those vehicles which have received an Executive Order from California and a federal certificate of conformity which allows the sale of such vehicles only in the state of California and other states that have adopted the California motor vehicle emission standards under Section 177 of the Clean Air Act.

expressed concern that they might have difficulty producing and certifying National LEV vehicles for MY1999 given that certification of MY1999 vehicles will likely start before EPA is able to find that National LEV is in effect. EPA believes it is appropriate to provide some limited flexibility to manufacturers in a way that does not undercut the environmental benefits of the fleet average NMOG standards in the first year of the program. Thus, for MY1999 only, EPA will issue federal National LEV certificates that will allow manufacturers to sell California-certified TLEV, LEV, ULEV, and ZEV vehicles throughout the NTR and will count those vehicles to determine compliance with National LEV requirements. For MY2000, EPA will also issue certificates that will allow manufacturers to sell California-certified TLEVs throughout the NTR and to count those vehicles to determine compliance with National LEV requirements.

The harmonization of the federal and California motor vehicle emission requirements have left few differences between National LEV and California-certified TLEV and cleaner vehicles. EPA believes that production and certification of vehicles meeting both federal and California requirements, done currently by some manufacturers, should be much more attractive when the National LEV program is in effect. However, program differences

do exist and federal requirements such as the Certification Short Test (CST) and high-altitude requirements remain part of the federal program.⁷ Using Federal certificates to allow manufacturers to certify and sell MY1999 California-certified TLEVs, LEVs, ULEVs, and ZEVs throughout the NTR will give them an additional mechanism to comply with the fleet average NMOG standards by increasing the production and sale of their California-certified vehicles. Manufacturers may still certify and sell National LEV vehicles for MY1999 using the National LEV program requirements, and such vehicles could be sold nationwide. EPA is not allowing sale of California Tier 1 vehicles throughout the NTR because EPA does not believe that certification of vehicles to California Tier 1 standards proves that such vehicles meet the Federal Tier 1 tailpipe emission standards and EPA cannot justify replacing Federal Tier 1 vehicles with California Tier 1 vehicles in the federal motor vehicle emissions program. EPA has consistently taken this position on California Tier 1 vehicles throughout the development of the National LEV program.

⁷ There are different federal and California test procedures for evaporative emissions. Manufacturers generally use the option in California's regulations which allows testing using the federal requirements. EPA expects manufacturers will continue using this option when certifying vehicles for sale in California. The National LEV program requires emission testing using the federal requirements.

California-certified TLEVs, LEVs, ULEVs and ZEVs can be sold in the NTR in MY1999 if they receive a federal National LEV certificate. This certificate will state that, for MY1999, a California-certified vehicle sold in the NTR only will be considered a National LEV vehicle and meet all National LEV requirements. EPA believes that the compliance testing done to obtain a California certificate of conformity for these vehicle categories is sufficient to meet the certification requirements for the National LEV program in MY1999. Allowing California certification to substitute for National LEV certification for vehicles sold in the NTR does not mean that EPA is waiving compliance with the Certification Short Test (CST) and high-altitude requirements. However, EPA believes that a vehicle complying with the MY1999 California TLEV, LEV, ULEV, or ZEV emission standards will also most likely meet the Federal Tier 1 CST and high-altitude requirements. Currently, Federal Tier 1 vehicles are being certified as meeting the CST and high-altitude requirements and EPA, in its certification review and testing, has not identified any problems manufacturers have had in complying with these two requirements. EPA expects that California-certified TLEVs, LEVs, ULEVs, and ZEVs would also meet the Federal Tier 1 CST and high-altitude certification requirements and is thus willing to allow a degree of uncertainty

regarding actual demonstration of compliance with these requirements in MY1999 in order to facilitate the start of the National LEV program for those manufacturers which may find it difficult to certify and sell National LEV vehicles in the NTR. EPA does not believe it is appropriate to waive demonstration with these requirements beyond MY1999 because manufacturers will have had sufficient time to incorporate compliance with the CST and high-altitude requirements into their MY2000 National LEV vehicles. EPA believes there should be minimal adverse environmental impact from substituting California-certified TLEVs, LEVs, ULEVs and ZEVs for National LEV vehicles in MY1999.

Today's Final Rule addresses the issue of National LEV vehicle sales in MY1999 by issuing a Federal National LEV certificate to those vehicles sold in the NTR instead of expanding current policies and allowing the sale of California-certified vehicles throughout the NTR. By granting a Federal certificate to these vehicles, EPA retains its authority to enforce the provisions of the National LEV program. Compliance with many of these provisions, such as compliance with the fleet average NMOG requirements and credit trading, is dependent on meeting conditions associated with the National LEV certificate. EPA is not waiving compliance with the National LEV requirements

in the NTR in MY1999. By requiring a federal National LEV certificate for MY1999 California-certified vehicles sold in the NTR, this provision ensures that EPA may enforce all of the National LEV regulations applicable to MY1999 vehicles.⁸

California-certified vehicles receiving a Federal National LEV certificate allowing sale in the NTR may not be sold outside the NTR.

EPA believes it is also appropriate to issue Federal certificates that will allow manufacturers to sell California-certified TLEVs throughout the NTR in MY2000. As discussed below in sections VIII.E and IX, EPA does not expect manufacturers to produce and sell many TLEVs after MY2000 because other provisions in the National LEV and California LEV programs will provide incentives and requirements which will minimize TLEV production. EPA believes it would be more environmentally beneficial and cost-effective to have manufacturers use their resources to certify and produce cleaner LEVs and ULEVs rather than TLEVs,

⁸ The manufacturers have suggested that EPA address the issue of MY1999 and MY2000 vehicles through expansion of the cross border sales policy, which currently allows sales of vehicles certified to California's emissions standards and other requirements in states contiguous to, or within 50 miles of, California and states that have a program adopted under section 177 in place. See note 49 for further discussion of the cross border sales policy. The approach that EPA is adopting in today's rule is separate from and will have no effect on the cross border sales policy.

which will shortly be phased out of production.⁹ Issuing Federal certificates to allow manufacturers to sell California-certified TLEVs in the NTR in MY2000 does not mean that more TLEVs will be sold in this region because manufacturers will still need to demonstrate compliance with the fleet average NMOG standard in the NTR in MY2000, and all TLEVs sold in the NTR are to be included in the compliance calculations. Instead, EPA is making the determination that the environmental benefits of issuing Federal certificates allowing the sale of California-certified TLEVs in the NTR in MY2000 outweighs the cost and any environmental detriment associated with manufacturers not completing all of the testing generally required to meet the certification requirements necessary to produce and sell a National LEV TLEV in the NTR in MY2000. EPA is not waiving compliance with any National LEV standards, but is accepting California certification as sufficient to demonstrate compliance with TLEV standards for the purpose of certification.

This special provision regarding the sale of California-certified TLEVs is applicable only in the NTR and only in MY2000.

⁹ Manufacturers can continue to produce and sell TLEV vehicles after MY2000 under the National LEV and California LEV programs as long as they obtain a National LEV certificate for the TLEVs and meet the applicable fleet average NMOG standards. EPA is not requiring manufacturers to discontinue TLEV production, which remains a manufacturer decision.

This provision is intended to provide manufacturers with flexibility in meeting the fleet average NMOG standards in the NTR. When the National LEV requirements are effective nationally in MY2001, however, manufacturers' full production efforts will be focused on meeting California and National LEV requirements. If a manufacturer plans to continue producing TLEVs after MY2000, then such vehicles must meet all of the National LEV requirements, including the CST and high-altitude requirements. In meeting the certification requirements for a MY2001 National LEV TLEV, manufacturers may carry over any appropriate data from their MY2000.

EPA is not issuing Federal certificates allowing California-certified vehicles to be sold under National LEV outside the NTR in MY1999. There is no justification for allowing such sales and, unlike in the NTR, there is no requirement that manufacturers produce anything but Federal Tier 1 vehicles. If manufacturers wish to generate early reduction credits in the All State Trading Region in MY1999 and MY2000, they must do so using National LEV vehicle sales in that region.

IV. National LEV Will Produce Larger VOC and NOx Emission

Reductions in the OTR Compared to OTC State Adopted Section

177 Programs

Modeling done in support of the Final Framework Rule showed that the National LEV program would provide greater emission reductions than those from OTC LEV (which is equivalent to state-by-state adoption of the CAL LEV program throughout the OTR). See 62 FR 44757. The SNPRM proposed several changes to modeling assumptions. As proposed, and in light of public comments, EPA has modified some of the assumptions in the modeling, particularly regarding when various programs would start. This modeling supports EPA's conclusion in today's rule that, given current assumptions and best information about future vehicle performance¹⁰ and the migration of people and vehicles, the NOx and VOC emission reductions from National LEV are equivalent to or greater than those from state-by-state adoption of Section 177 Programs throughout the OTR.

¹⁰ EPA's National LEV modeling does not incorporate any factors relating to the effect of fuel sulfur levels on the emissions performance of National LEV vehicles, outside of any factors already included in the MOBILE 5a model. Studies being conducted by the auto and oil industries analyzing the impact of sulfur on the emissions performance of LEV vehicles are ongoing. EPA has not attempted to quantify a sulfur impact on National LEV vehicle emissions as part of the equivalency modeling because the studies and associated analyses have not yet been completed. Additionally, any quantifiable impact would apply to both the National LEV and OTC State Section 177 Programs and would not alter any equivalency determination.

The first set of changes to the modeling relates to the start dates of National LEV and Section 177 Programs. As proposed in the SNPRM, the updated modeling includes a start date of MY1999 (rather than MY1997) for the National LEV program. The updated modeling analysis for the OTC State Section 177 Programs (in the absence of National LEV) also more accurately reflects expected reductions from OTC State Section 177 Programs than did the analysis described in the Final Framework Rule. The modeling for that rule assumed that all of the OTC States had Section 177 Programs in effect for MY1999 and later. In reality, only six of the OTC States have adopted programs that could be effective in MY1999 and there is no longer a specific legal requirement for the other states to adopt a Section 177 Program. Thus, EPA's analysis assumes Section 177 Programs will exist only in those OTC States that have adopted a Section 177 Program.¹¹ EPA believes that this realistic assumption is the proper comparison to National LEV since legally, individual state adoption is the

¹¹ Start date assumptions for EPA's modeling are MY1999 for the National LEV program in the OTR, MY2001 for the National LEV program nationwide, MY1996 for Section 177 Programs in New York and Massachusetts, MY1998 for a Section 177 Program in Connecticut, and MY1999 for Section 177 Programs in Rhode Island, New Jersey, and Vermont. The dates for state Section 177 Programs reflect the effective dates for current state Section 177 Programs. Maine has taken steps to adopt a Section 177 Program. EPA has included Maine with the other six OTC States that have adopted a Section 177 Program, and has given Maine's program a start date of MY2001, recognizing that even though Maine has not yet completed all the steps to make its program go into effect, it has finished most of the actions and is expected to complete its adoption actions in the near future.

only manner in which California vehicles can be required in the Northeast.

EPA believes its current modeling makes the appropriate assumptions and correctly estimates a realistic level of OTC State Section 177 Programs. However, to test its assumptions, EPA also ran as a third case a sensitivity analysis assuming that all of the OTC States adopted Section 177 Programs. For the six OTC States without a Section 177 Program in place as of July 1, 1997, EPA assumed that the programs became effective in MY2001, the earliest time a state that had not yet adopted a Section 177 Program could legally enforce such a program, given the two year lead time requirement in section 177 of the Act. This analysis showed that, even with all 13 OTC States having a Section 177 Program in place at the earliest possible times, National LEV still provided greater emission reductions in the Northeast.

EPA has also changed some of its modeling assumptions regarding the status of federal and state motor vehicle programs in MY2005 and later, in part as a result of changes EPA made regarding the duration of National LEV. To the extent possible, EPA has attempted to make these new assumptions, which affect all three cases analyzed by EPA, consistent from one case to the

next. Although EPA has made assumptions regarding future regulatory actions, these assumptions in no way limit EPA's options in future regulatory actions, nor do they indicate that EPA has prejudged those future actions.

In the National LEV case, EPA assumes National LEV will be in place in all OTC States through MY2005, which is the latest model year the program would be considered a compliance alternative in those OTC States which have adopted a Section 177 Program if EPA issues Tier 2 standards at least as stringent as National LEV standards by December 15, 2000. In MY2006, the seven OTC States with Section 177 Programs already adopted are assumed, for modeling purposes, to have those programs go into effect.¹² The model assumes the rest of the country will have a Tier 2 program which, for modeling purposes, is considered to be equivalent to the National LEV program.

The two modeling cases which analyze emission reductions without the National LEV program assume, for modeling purposes, that a Tier 2 program equivalent to National LEV would go into effect in MY2005. One case assumes Tier 1 standards in effect

¹² Under the National LEV program duration requirements (see section V.A) the OTC States are only committed to have the National LEV program as a compliance alternative to a Section 177 Program until MY2006.

until then in those states that have not adopted a Section 177 Program. The other case assumes Tier 1 standards in effect until then in all states outside the OTR (except California). The MY2005 start date for Tier 2 was chosen as a reasonable estimation for modeling purposes, given the National LEV program deadline of December 15, 2000 date for EPA action on the Tier 2 program (which has been incorporated into the modeling assumption for the National LEV case) in conjunction with lead time for manufacturers to prepare to comply with Tier 2 standards. The MY2005 start date for Tier 2 also represents a reasonable midpoint, for modeling purposes, between the MY2004 and MY2006 deadlines included in the MOUs. EPA is not precluded by the National LEV program from implementing a Tier 2 program in MY2004 if it determines Tier 2 standards should apply in that model year.

EPA's modeling shows that National LEV would achieve greater emission reductions in the OTR than individual OTC State Section 177 Programs. EPA's conclusion would not change even if all OTC States were to adopt Section 177 Programs. The emission levels are listed in the Table 1 below. The modeling is based on National LEV starting in MY1999 in the OTR and MY2001 in the rest of the country, with Federal Tier 1 vehicles making up the

federal non-NLEV fleet. EPA did not include existing OTC State zero emission vehicle (ZEV) sales mandates in either of its modeling runs since these mandates are not affected by the National LEV rule. ZEV sales mandates would thus have similar effects on emission levels in both modeling cases and would not affect the relative emissions benefits of National LEV compared to those of OTC State Section 177 Programs.

All other assumptions used in the modeling included in the Final Framework Rule, the SNPRM, and today's rule remain consistent with those used throughout the National LEV process. EPA believes it is important to keep consistent assumptions to provide a comparison between benefits from the National LEV program and state Section 177 Programs in the OTR.

Table 1.-- Ozone Season Weekday Emissions for Highway Vehicles in the OTR (tons/day).

Year	Pollutant	OTC State CAL LEV	National LEV
2005	NMOG	1,573	1,499
	NOx	2,526	2,403
2007	NMOG	1,480	1,366
	NOx	2,427	2,226
2015	NMOG	1,386	1,148
	NOx	2,367	1,899

V. OTC State Commitments

This section describes the substance of the OTC States' commitments to National LEV. It also addresses the process (including timing) by which OTC States and auto manufacturers would commit to National LEV and by which EPA would find the program in effect.

A. Duration of OTC State Commitments and of the National LEV Program

Today's Final Rule takes a different approach to the duration of the OTC State commitments than was proposed in the SNPRM. As discussed in the SNPRM, the MOUs initialed by the OTC States and the auto manufacturers both had the duration of the National LEV program (and hence the duration of both the OTC States' and the auto manufacturers' commitments) depend on whether, by January 1, 2001, EPA issued mandatory new motor vehicle standards ("Tier 2 standards") that were at least as stringent as National LEV and that would go into effect no later than MY2006. If EPA issued the specified standards by that time, the auto manufacturers would stay in National LEV until the Tier 2 standards became effective, and the OTC States would not enforce their own state Section 177 Programs until MY2006. If

EPA did not issue the specified regulations by that time, then National LEV would end with MY2003 and, starting in MY2004, in any state where California or OTC LEV standards were not in place, the applicable standards for manufacturers would revert back to the federal Tier 1 standards. Although EPA rejected the MOU approach in the Final Framework Rule, EPA has reconsidered the issue based on the comments submitted by the OTC States and the auto manufacturers, and has decided to adopt the approach agreed upon by the OTC States and the auto manufacturers. Thus, under 40 CFR 1701(c) and 1705(e) and (g) of today's rule, the commitments of the OTC States and the auto manufacturers to National LEV last until MY2006, unless EPA fails to promulgate Tier 2 standards at least as stringent as National LEV on or before December 15, 2000, in which case the commitments last until MY2004.¹³

EPA had proposed in the SNPRM that the OTC States would commit to the National LEV program until MY2006. This meant that the OTC States would have committed to accept manufacturers' compliance with National LEV (or equally or more stringent

¹³ If EPA promulgates Tier 2 standards at least as stringent as National LEV on or before December 15, 2000, and those standards are in effect in MY2004 or MY2005, the manufacturers will become subject to those standards upon their effective date, but the OTC States' commitments to National LEV will not end until MY2006.

mandatory federal standards) as an alternative to compliance with a state Section 177 Program through MY2005. The length of the auto manufacturers' commitment was set in the Final Framework Rule. Under that rule, manufacturers that opted into the program would be bound to comply with National LEV until the first model year for which manufacturers would be subject to a mandatory federal tailpipe emissions program at least as stringent as the National LEV program with respect to NMOG, NOx and carbon monoxide (CO) exhaust emissions ("Tier 2 standards"). Under section 202(b)(1)(C) of the Clean Air Act, EPA could not mandate such standards prior to MY2004. Thus, the manufacturers' commitment to National LEV was to last at least until MY2004 and could last longer.

In the Final Framework Rule, EPA did not accept the MOU provisions for setting the duration of the National LEV program. EPA rejected the MOU provisions because it was concerned about setting up a program that would have the country take a step backward environmentally if the Agency failed to act by a specified deadline. EPA has reconsidered its views.

The main reason for changing the program duration is the comments received from the OTC States and the auto industry. The

auto industry made it clear that stability until MY2006 is very important, and the OTC States were clear that they were uncomfortable with committing to allow National LEV as a compliance alternative until MY2006 if EPA were not to issue Tier 2 standards by January 1, 2001. The OTC States' primary reason for wanting to tie the duration of the program to promulgation of Tier 2 standards is that they need to know sooner rather than later how the Tier 2 standards and the California LEV program compare so that they can determine whether they will need to have an enforceable California LEV program to meet their air quality goals. EPA believes that an orderly air quality planning process is important and believes that the OTC States are in the best position to know what would be most useful to them in that process. EPA has decided to defer to the OTC States' judgment on this matter.

Having decided that the length of the OTC States' commitment should depend on whether EPA issues Tier 2 standards, EPA believes it would be unfair not to have the manufacturers' commitment also depend on whether EPA issues Tier 2 standards. First, that is the agreement that was reached by the OTC States and the manufacturers. It would be unfair to hold the manufacturers in for longer than they had agreed to in the MOU

while giving the OTC States the benefit of the agreement.

Second, an unintended consequence of EPA's decision not to tie the end of National LEV to EPA's issuance of the Tier 2 regulations is that several groups interpreted that as a signal that EPA was not intending to perform its statutory duty under CAA section 202(i)(3) to evaluate the need for, technological feasibility of, and cost effectiveness of new standards, and to issue new standards if warranted. EPA has every intention of meeting its statutory obligations under the CAA and does not want to send a contrary message. Third, EPA now believes that if National LEV comes into effect and manufacturers change all their manufacturing facilities over to build LEV technology, it is highly unlikely that they would actually change the technology back to Tier 1. A combination of the cost of changing back to old technology and adverse publicity from selling "dirty" cars probably should be sufficient incentive to keep manufacturers using LEV technology. One manufacturer's decision, announced this summer, to sell LEV technology (albeit certified at Tier 1 levels) nationally and various marketing campaigns touting clean cars are evidence that "clean" cars can be used as a selling point. Thus, today's Final Rule modifies the duration of the manufacturers' commitment to National LEV.

*B. Timing of OTC State Commitments, Manufacturer Opt-Ins,
and EPA Finding that National LEV is in Effect*

EPA is establishing a process and deadlines for the OTC States and the manufacturers to opt into the National LEV program and for EPA to find the program in effect. The process and timing are unchanged from EPA's proposal in the SNPRM. Because National LEV needs to be in place as soon as possible to ensure that it is available for MY1999, 40 CFR 86.1706 sets the following deadlines based on the date of signature of this Final Rule.¹⁴ Seventy-five days from signature of this FRM, EPA must determine whether the National LEV program is in effect (see section V.C.3 below for the criteria for finding National LEV in effect). This finding will be based on the OTC States' initial opt-in packages from their Governors and state environmental commissioners or secretaries (discussed below in section V.C) that were submitted no later than 45 days from the date of signature of this rule and on the manufacturers' opt-ins

¹⁴ EPA will provide directly affected parties actual notice and make copies of the FRM available within a week of signature. Upon request, copies of the FRM will also be made available to other parties in the same timeframe.

submitted no later than 60 days from signature of this rule.¹⁵ If EPA finds National LEV in effect, all parties are bound by their commitments to the program. While any party that misses its deadline for opt-in is not barred from submitting a late opt-in, EPA is only required to consider timely opt-ins in determining whether National LEV is in effect. Moreover, given the very short timeframe for the opt-in process and the fact that some parties may be reluctant to opt in before they know whether others will do so, a late opt-in is likely to jeopardize the start-up of the program.

As proposed, after the initial opt-ins and an EPA finding that the program is in effect, the OTC States will generally have one year from the date of the in-effect finding to submit the final portion of their opt-ins, which is a SIP revision committing the state to the National LEV program and allowing manufacturers to comply with National LEV as an alternative to a state Section 177 Program, as described in more detail in section V.C.4 below. For a few states, specifically Delaware, New Hampshire, Virginia and the District of Columbia, the deadline is eighteen months, rather than one year, from the date of the in-

¹⁵ If one of these deadlines would otherwise fall on a weekend or federal holiday, the FRM sets the deadline as the next business day.

effect finding. These states have particular circumstances related to their state rulemaking processes that make a one-year deadline unrealistic. If a state were to miss its deadline for submission of its SIP revision committing to National LEV, the manufacturers would have the opportunity to opt out of the program, as discussed further in section VI.

C. OTC State Commitments, Manufacturer Opt-Ins, and EPA Finding that National LEV Is In Effect

This section describes the process for the OTC States and the manufacturers to commit to the National LEV program and for EPA to find the program in effect. This includes how the OTC States will commit to the program, the elements of their commitments, the permissible conditions on OTC State and manufacturer opt-ins, and the criteria that EPA will use to find the program in effect.

1. Initial Opt-In by OTC States

As proposed, the OTC States will commit to National LEV in two steps, the first of which is an opt-in package from each state's Governor and environmental commissioner, indicating the

OTC State's intent to opt into National LEV. The second step is a SIP revision incorporating the OTC States' commitment to National LEV in state regulations, which EPA will approve into the federally-enforceable SIP.

To opt into National LEV, within 45 days of signature of this rule, the Governor (or Mayor, in the District of Columbia) will submit to EPA an executive order or a letter committing the OTC State to the National LEV program. As specified in 40 CFR 86.1705(e), the executive order or letter will contain three main elements. First, it will state that its purpose is to opt the state into National LEV. Second, it will state that the Governor is forwarding a letter signed by the head of the state environmental agency (or other appropriate agency or department), which specifies the details of the state's commitment to the National LEV program. Third, it will state that the Governor has directed the head of the state environmental agency to take the necessary steps to adopt regulations and submit a SIP revision committing the state to National LEV in accordance with the requirements of the National LEV regulations. In addition, OTC States with existing ZEV

mandates¹⁶ may add language confirming that the opt-in will not affect the state's requirements pertaining to ZEVs.

The Governor's executive order or letter will enclose a letter signed by the state environmental commissioner or secretary of the appropriate state department ("commissioner's letter"), which specifies the details of the state's commitment to National LEV. Alternatively, if an OTC State has proposed regulations meeting the requirements for a SIP revision specified below, the state may substitute the proposed regulations for the portions of the commissioner's letter for which they are duplicative. In that case, the Governor will send to EPA the Governor's executive order or letter, the proposed regulations, and a letter from the commissioner, which will contain the elements specified below that were not included in the proposed regulations.

As proposed, the commissioner's letter will include the following elements. First, it will indicate that National LEV would achieve reductions of VOC and NOx emissions equivalent to

¹⁶ ZEV mandates are those state regulations or other laws that impose (or purport to impose) obligations on auto manufacturers to produce or sell a certain number or percentage of ZEVs. Any OTC State with a ZEV mandate that was adopted prior to the signature date of this rule is considered a state with an existing ZEV mandate.

or greater than the reductions that would be achieved through state adopted Section 177 Programs in the OTR. Second, it will indicate that the state intends National LEV to be the state's new motor vehicle emissions control program. Third, it will state that for the duration of the state's participation in National LEV, the state will accept National LEV or mandatory federal standards of at least equivalent stringency as a compliance alternative to any state Section 177 Program. As EPA is defining it here, a state Section 177 Program is any regulation or other law, except a ZEV mandate, adopted by an OTC State in accordance with section 177 and which is applicable to passenger cars, light-duty trucks up through 6,000 pounds GVWR, and/or medium-duty vehicles from 6,001 to 14,000 pounds GVWR if designed to operate on gasoline, as these vehicle categories are defined under the California regulations. (This commitment would not restrict states from adopting and implementing requirements under section 177 for heavy-duty trucks and engines and diesel-powered vehicles between 6,001 and 14,000 pounds GVWR.) The letter will further state that the state's participation in National LEV extends until MY2006, except as provided in the National LEV regulations' provisions addressing the duration of the OTC State commitments and state offramps. However, in a change from the proposal (discussed in section V.A above), the

letter will add that if no later than December 15, 2000, EPA does not issue mandatory new motor vehicle standards ("Tier 2 standards") at least as stringent as National LEV and that would go into effect no later than MY2006, then the state's participation in National LEV extends only until MY2004, except as provided in the National LEV provisions for state offramps. The offramps allow the OTC States to exit National LEV if an auto manufacturer were to decide to exit the program. OTC States without existing ZEV mandates would add a statement that the state accepts National LEV as a compliance alternative to any ZEV mandates. OTC States with existing ZEV mandates would add a statement that their acceptance of National LEV as a compliance alternative for state Section 177 Programs does not include or have any effect on the OTC State's ZEV mandates.

Fourth, the commissioner's letter will include both an explicit recognition that the manufacturers are opting into National LEV in reliance on the OTC States' opt-ins, and a recognition that the commitments in the initial OTC State opt-in package have not yet gone through the state rulemaking process to be incorporated into state regulations, so they do not yet have the force of law; in addition, the letter will recognize that the state's executive branch must comply with any laws passed by the

state legislature that might affect the state's commitment. The manufacturers' comments opposed inclusion of the proposed language stating that the provisions of the state's letter would not have the force of law until adopted as state regulations and that the state must comply with any state legislation that might affect the commitment. The manufacturers expressed concern that these provisions undermine the states' commitments. However, a number of states have indicated to EPA that they could not make a commitment of this nature before completing the states' rulemaking processes, unless they included language to clarify the legal nature of the initial state commitment. In light of the fact that the states will not have sufficient time to complete a rulemaking before opting into National LEV, EPA believes it is appropriate for the opt-in provisions to allow the states to include the language that EPA proposed. EPA does not believe this language will in any way affect the degree to which the states are legally or politically bound by their initial opt-ins.

Fifth, the commissioner's letter will include an acknowledgment that, if a manufacturer were to opt out of National LEV pursuant to the opt-out provisions in the National LEV regulations, the transition from the National LEV

requirements to any state Section 177 Program or ZEV mandate would be governed by the National LEV regulations. Sixth, similar to the manufacturers' opt-in letters, the commissioner's letter will state that the state supports the legitimacy of the National LEV program and EPA's authority to promulgate the National LEV regulations.

The OTC States have indicated that they support certain commitments regarding ZEV mandates by including those provisions in the MOU voted on by the OTC and initialed by the OTC pursuant to the vote. Consistent with the provisions in the MOU initialled by the OTC, for states without existing ZEV mandates, the commissioner's letter will state that the state intends to forbear from adopting a ZEV mandate effective during the period of the state's participation in National LEV. In this rule, EPA is defining an existing ZEV mandate as a ZEV mandate adopted by an OTC State prior to the signature date of this rule. The manufacturers commented that the states should commit that they will forbear from adopting ZEV mandates, rather than only stating their intent to forbear from such action. However, the OTC States have expressed their concern about attempting to bind future legislatures in this way and have consistently indicated that such language would not be acceptable to them. As it stated

in the NPRM (60 FR 52740) and SNPRM (62 FR 44760) for National LEV, EPA believes that the decision regarding adoption of ZEV mandates by OTC States must be left up to each individual OTC State, to the extent permitted under section 177. Thus, EPA believes it is appropriate to include the language supported by the OTC States here. If any OTC State would prefer to commit that it will forbear from adopting a ZEV mandate, it may make that commitment in its opt-in.

The commissioner's letter from OTC States that have not adopted a Section 177 Program at the time of signature of this rule need not include a commitment or statement of intent to forbear from adopting a Section 177 Program effective during the period of the state's commitment to National LEV, as long as the state commits to accept National LEV as a compliance alternative to any such program. EPA took comment on such a provision in the SNPRM (60 FR 44760) because the draft MOU initialed by the manufacturers included a statement that certain OTC States would forbear from adopting such "backstop" Section 177 Programs,¹⁷ while the draft MOU initialed by the OTC States did not include any statement regarding adoption of such backstop programs. The

¹⁷ "Backstop" Section 177 Programs are programs that allow National LEV as a compliance alternative to the Section 177 Program requirements.

comments on the SNPRM from the manufacturers and the OTC States reiterate these positions. In particular, the manufacturers stated that allowing all OTC States to adopt backstop Section 177 Programs would destabilize the National LEV program. The manufacturers are concerned that the prospect of a return to Tier 1 vehicles in at least some OTC States if a state violates its commitment to National LEV is a powerful incentive for states to abide by their commitments that would be lost with widespread backstops. EPA agrees that the absence of backstops in some OTC States would contribute to program stability in the manner that the manufacturers suggest. However, EPA does not believe it is necessary to bar states from adopting backstops to provide this source of stability, as it is highly unlikely that all or nearly all OTC States will adopt backstop Section 177 Programs effective during the relevant time period and it is unlikely that more than a few (if any) states outside the OTR would adopt backstop programs. In addition, the OTC States said that they are unwilling to commit not to adopt backstop programs. Thus, EPA does not believe it is appropriate to include a provision committing not to adopt a backstop Section 177 Program as an element of the OTC States' commitments to National LEV.

Finally, the commissioner's letter may include a statement that the state's opt-in to National LEV is conditioned on all of the motor vehicle manufacturers listed in the National LEV regulations opting into National LEV pursuant to the National LEV regulations and on EPA finding National LEV to be in effect. However, as with the manufacturers' opt-ins, no conditions other than those specified in the regulations may be placed on any of the state opt-in instruments (the Governor's executive order or letter, the commissioner's letter, or the SIP revision).

The OTC States commented that the regulations should allow an OTC State to condition its opt-in on signature of an acceptable independent agreement with the manufacturers to promote advanced technology vehicles (ATVs). An agreement on ATVs has not been contemplated to be part of the National LEV regulations, but has been discussed as a separate agreement between the OTC States and the auto manufacturers. At one point, the OTC States and manufacturers reached consensus on the substance and language of an ATV agreement, which was to establish mechanisms for sharing information not only about advanced technology vehicles and alternative fuels, but also about the incentives and infrastructure development necessary to make new technology feasible. This agreement was attached to the

MOUs initialed by the manufacturers' organizations and the OTC. EPA supports this agreement, but does not believe that opt-ins to National LEV need be conditioned on final signature of the agreement. If the OTC States and manufacturers want to finalize the agreement (contingent on National LEV coming into effect), they can and should do so before the due date for the OTC State opt-ins. There is no reason to delay finalizing the ATV agreement until after the OTC States have opted in. Thus, although OTC States can refuse to opt in if there is no ATV agreement, they cannot send in an opt-in which is conditioned on an ATV agreement being signed.

In the regulations at 40 CFR 86.1705(e) and (g), EPA is providing specific language for each element of the OTC States' opt-ins to be included in the Governor's executive order or letter, the commissioner's letter, and the SIP revision. Although it is somewhat unusual for EPA to identify specific language for state submissions, EPA believes that this is an appropriate situation to do so. Because the OTC States and manufacturers are signing up for a voluntary program and are unlikely to sign an MOU, using specified language will ensure that they sign up to the same program. Otherwise, the opt-ins might not represent agreement on the terms and conditions of the

voluntary National LEV program. However, in a slight modification to the proposed approach, the final regulations provide that for the Governors' and commissioners' letters, a state may opt into National LEV using the specified language or "substantively identical language." Because the first step of the OTC States' commitments to National LEV will occur before the states can complete their rulemaking processes, EPA recognizes that some slight wording variations may be necessary for individual states. For the subsequent SIP revisions, however, states will have the opportunity to go through notice-and-comment rulemaking on the specified language. Moreover, because the deadline for manufacturers to opt into National LEV is after the deadline for the OTC States, the manufacturers will have the opportunity to assess the adequacy of any state opt-ins that vary from the specified language. If the variation is sufficient to undercut the assurance that the state will carry out its commitment to National LEV, the manufacturers may decide not to opt into National LEV. However, the manufacturers would not have an opportunity to assess beforehand any variations in the SIP revision language submitted by the states. Prior to opt-in, the manufacturers can evaluate the SIP revision language specified in the regulations to determine whether they view the language as an adequate expression of the states' commitments to National LEV,

but they would not have the opportunity to evaluate any variations on that specified language. The importance of ensuring that all parties know what they are signing up to at the time of opt-in further supports the requirement for states to use exact language for the SIP revisions.

Despite the possibility that states may opt into National LEV even with slight non-substantive variations in the language of the Governor's letter or commissioner's letter, EPA emphasizes that any differences must be minor and non-substantive. Because the Governor's letter and commissioner's letter are political as well as legal documents, even language without direct legal effect is important to bind the state politically to carry out its commitment. Hence, EPA and/or the manufacturers are likely to view variations in such language as substantive changes to the state's commitment. To avoid invalid opt-ins, EPA expects most, if not all, OTC States to use the specified language unmodified. Only a few OTC States commented that they might need to make unspecified changes in the language. In addition, as discussed further below, EPA will find National LEV in effect without providing for additional notice-and-comment on whether the conditions are met for finding National LEV in effect. EPA may proceed without additional rulemaking or other process if the

Agency's in-effect finding is essentially a nondiscretionary action based on clear factual determinations. If EPA must use its discretion to determine whether a state has adequately committed to National LEV, that might require further rulemaking and substantially delay implementation of the program. However, if the OTC States use the language specified in the regulations, which EPA has determined to be adequate through a notice-and-comment rulemaking, EPA will be able to find National LEV in effect on that basis.

EPA also recognizes that a state may wish to include background information, especially in the Governor's executive order or letter. This is permissible under today's regulations, providing that the additional information does not add conditions to the state's opt-in.

2. Manufacturer Opt-Ins

As proposed, the motor vehicle manufacturers' opt-ins to National LEV are due within 60 days from signature of this Final Rule. As provided in the Final Framework Rule, a manufacturer will opt into National LEV by submitting a written notification signed by the Vice President for Environmental Affairs (or a

company official of at least equivalent authority who is authorized to bind the company to the National LEV program) that unambiguously and unconditionally states that the manufacturer is opting into the program, subject only to conditions expressly contemplated by the regulations. See 40 CFR 86.1705(c)(2). The only permissible conditions on a manufacturer's opt-in notification would be that the OTC States or the auto manufacturers specified by the manufacturer opt into National LEV pursuant to the National LEV regulations and that EPA find the program to be in effect. These conditions parallel the permissible conditions described above for the OTC States' opt-ins.

One commenter voiced a concern that the opt-in language that would commit the manufacturers "not to seek to certify any vehicle except in compliance with the regulations in subpart R" would prevent manufacturers from certifying heavy-duty vehicles. The statement would not have that effect. Heavy-duty vehicles are not covered by the National LEV program, so they would not need to be (and could not be) certified under the National LEV regulations. Similarly, this opt-in language would not preclude manufacturers from seeking to certify a vehicle for sale only in California and states that have the California program in effect.

The opt-in language also would not commit manufacturers to obtain National LEV certificates for vehicles sold outside the United States.

3. EPA Finding that National LEV Is in Effect

The OTC States' and the auto manufacturers' opt-ins will become effective upon EPA's receipt of the opt-in notification or, if the opt-in is conditioned, upon the satisfaction of that condition. As provided in 40 CFR 86.1706, EPA will find National LEV in effect if each of the listed manufacturers submits an opt-in notification that complies with the requirements for opt-ins, each of the opt-in notifications submitted by an OTC State complies with the requirements for opt-ins, and any conditions placed upon any of the opt-ins are satisfied. Thus, if all the parties that opted into National LEV agree to participate in the program, even if fewer than all OTC States opt into National LEV, EPA will find the program in effect. EPA believes that National LEV should be a national program -- effective in all states but California. This would provide the OTR with emissions reductions greater than what could be achieved without National LEV and would simplify distribution and other aspects of the sale of

motor vehicles. Moreover, the manufacturers have stated that they are not willing to opt into National LEV unless each and every OTC State opts into National LEV. However, if the OTC States and auto manufacturers are willing to participate in a National LEV program even if all OTC States do not opt in, EPA will not stand in the way of National LEV going into effect. By allowing each of the parties in National LEV to condition their agreement to opt in on specified other parties opting in, EPA is leaving it up to each of the parties to decide what is an acceptable basis for its own participation. EPA expects that each motor vehicle manufacturer and each OTC State will carefully evaluate the National LEV program as a whole and make the choice as to whether and under what conditions it chooses to participate.

Once all conditions on opt-ins are satisfied, the manufacturers will be subject to the National LEV requirements for new motor vehicles for the duration of the program, and the OTC States that opt in will be committed to participate in the National LEV program for the duration of their commitments, as discussed above in section V.A.

While the OTC States' SIP revisions are a necessary component of their commitments to National LEV, EPA will make the finding as to whether National LEV is in effect and National LEV will begin before the OTC States' SIP revisions are due. Through an executive order or letter, the Governor of each state will have opted into National LEV and started the process for submission of an approvable SIP revision. Also, as discussed further below, an OTC State's failure to submit the SIP revision within the time provided for submission would give manufacturers an opportunity to opt out of the National LEV program. See Sec. VI.A.2; 40 CFR 86.1707(f). Together, this high level directive for action and the consequences of a failure to conclude the action provide substantial assurance that the OTC States will submit their SIP revisions within the specified time.

EPA will publish the finding that National LEV is in effect in the Federal Register, but the Agency will not go through additional rulemaking to make this determination. In the Final Framework Rule, EPA stated that further Agency rulemaking to find National LEV in effect would be unnecessary because EPA would establish the criteria for the finding through notice-and-comment rulemaking, and EPA's finding that the criteria are satisfied would be an easily verified objective determination. See 62 FR

31226 (June 6, 1997). The public has had full opportunity to comment on the adequacy of the elements of the manufacturers' and OTC States' opt-ins. Thus, EPA will find that National LEV is in effect without conducting further rulemaking if the Agency determines that each of the listed manufacturers has submitted an opt-in notification that includes the specified elements in approved language without qualifications, each of the opt-in notifications submitted by an OTC State includes the specified elements in specified or substantively identical language without qualifications, and any conditions placed upon any of the opt-ins have been satisfied.

4. SIP Revisions

Within one year (eighteen months for a few specified states, as discussed above in section V.B) of the date set for EPA's finding that National LEV is in effect, the OTC States will complete the second phase of their commitments to National LEV by submitting SIP revisions to EPA incorporating their commitments ("National LEV SIP revisions"). As proposed and specified in 40 CFR 86.1705(g), the SIP revisions will contain the following elements incorporated in enforceable state regulations.

The first regulatory provision will commit that, for the duration of the state's commitment to National LEV, the manufacturers may comply with National LEV or mandatory federal standards of at least equivalent stringency as a compliance alternative to any state Section 177 Program (which is any regulation or other law, except a ZEV mandate, adopted by an OTC State in accordance with section 177 and which is applicable to passenger cars, light-duty trucks up through 6,000 pounds GVWR, and medium-duty vehicles from 6,001 to 14,000 pounds GVWR if designed to operate on gasoline, as these vehicle categories are defined under the California regulations).¹⁸ This provision would not restrict states from adopting and implementing requirements under section 177 for heavy-duty trucks and engines and diesel-powered vehicles between 6,001 and 14,000 pounds GVWR. The regulations will also commit the state to participate in National LEV until MY2006, except as provided in the National LEV regulatory provisions for the duration of the OTC State commitments, including provisions for state offramps. However, as discussed in section V.A above, the regulations will also provide that if, no later than December 15, 2000, EPA has not issued mandatory new motor vehicle standards ("Tier 2 standards")

¹⁸ OTC States that had Section 177 Programs at the time of opt-in would need to modify their existing regulations in accordance with this provision.

at least as stringent as National LEV that would go into effect no later than MY2006, then the state is committed to participate in National LEV only until MY2004, except as provided in the National LEV provisions for state offramps. States that do not have an existing ZEV mandate (see n. 16 above) will additionally provide that manufacturers may comply with National LEV as a compliance alternative to any ZEV mandates for the duration of the state's commitment to National LEV.

The second element of the state regulations will explicitly acknowledge that, if a manufacturer were to opt out of National LEV pursuant to the opt-out provisions in the National LEV regulations, the transition from the National LEV requirements to any state Section 177 Program or ZEV mandate (for states without existing ZEV mandates) would be governed by the National LEV regulations, thereby incorporating these National LEV provisions by reference into state law.

The SIP submission to EPA will include state regulations containing the elements discussed above, and a transmittal letter or similar document from the state commissioner forwarding those regulations. As proposed, four additional elements of the SIP commitment must be included either in the transmittal letter or

the state regulations. First, the state will commit to support National LEV as an acceptable alternative to state Section 177 Programs for the duration of the state's commitment to National LEV. Second, the state would recognize that its commitment to National LEV is necessary to ensure that National LEV remain in effect. Third, the state will state that it is submitting the SIP revision to EPA in accordance with the National LEV regulations. Fourth, each OTC State without an existing ZEV mandate (see n. 16 above) will state that, for the duration of the state's commitment to National LEV, the state intends to forbear from adopting a ZEV mandate effective during the period of the state's participation in National LEV. See section V.C.1 above for further discussion of OTC State commitments relating to ZEV mandates. As discussed in section V.C.1 above, OTC States that had not adopted a Section 177 Program at the time of signature of this rule would not need to commit not to adopt backstop Section 177 Programs.

EPA will be able to find that an OTC States' SIP submission meets the National LEV SIP requirements and to approve it into the SIP without further rulemaking as long as the submission both includes the language specified in the regulations without additional conditions and meets the CAA requirements for

approvable SIP submissions. In the SNPRM, EPA provided full opportunity for public comment on the language that the states would use in their SIP revisions. Today's rule finalizes that language with a few modifications arising from the public comments. Thus, in reviewing such a SIP submittal, EPA will only have to determine whether the submittal includes the specified language without additional conditions, and whether it meets the statutory criteria for approvable SIP submissions, as laid out in sections 110(a)(2) and 110(1) of the CAA. Section 110(a)(2), in relevant part, specifies that the state must have provided public notice and a hearing on the SIP provisions and the submission must provide necessary assurances that the state will have adequate personnel, funding and authority under state law to carry out the provisions. Section 110(1) (discussed in more detail below) provides that SIP revisions must not interfere with attainment or any other applicable requirement.

In this case, these requirements for EPA's approval are easily verified objective criteria. They leave EPA little discretion in deciding whether a state submission meets the requirements for a National LEV SIP revision, and consequently remove any benefits to be derived from conducting notice-and-comment rulemaking on each approval. Determining whether the

language of the SIP submittal tracks the language provided in the final regulations and whether the state has substantively qualified or conditioned that language through modifications or additions is a straightforward, essentially ministerial task. This is also true for assessing whether the state has provided notice and a public hearing on the SIP submission. Because National LEV is a federal program, the state needs no personnel or funding to carry it out, so there is nothing related to the requirement for adequate personnel and funding for EPA to evaluate. For a state with existing regulations requiring compliance with a state Section 177 Program, EPA will merely have to determine whether the state has modified its regulations to include the language in the National LEV regulations to accept National LEV as a compliance alternative for the specified duration of the state commitment, as well as the additional provisions specified above. Again, this is a very simple, objective assessment. Finally, EPA has determined that National LEV would provide reductions in the OTR equivalent to or greater than OTC State Section 177 Programs in the OTR (see section IV), so that an OTC State commitment to National LEV would not interfere with attainment or any other Act requirement. See below for further discussion of this point.

Incorporating the OTC States' commitments to National LEV in state regulations approved into the SIPs will substantially enhance the stability of the National LEV program and support giving states credit for SIP purposes for emissions reductions from National LEV. A SIP revision would clearly indicate a state's commitment to National LEV and would reiterate the state executive branch's support for the National LEV program. More importantly, an approved SIP revision is federal law and hence has binding legal effect.

General Motors Corp. v. U.S., 496 U.S. 530, 540 (1990).

In the SNPRM, EPA explained the circumstances under which EPA believes these SIP commitments would have binding effect. Several commenters disagreed with EPA's legal interpretations. Of course, whether a subsequent state law or regulation could be approved into the SIP or whether it would be preempted by the earlier National LEV SIP revision would be a fact-specific determination that could not be made unless and until a state took final action arguably in conflict with its National LEV SIP revision. Although this is an issue that might never arise, EPA believes it is appropriate to lay out the key legal principles that EPA believes would apply in such circumstances so that any OTC State that submits a National LEV SIP revision does so with a

full understanding of how its commitment to National LEV would be enforceable.

A National LEV SIP revision would provide that the state commits to accept National LEV or mandatory federal standards of at least equivalent stringency as a compliance alternative to a state program under section 177 for a specified time period. EPA approves SIP submissions through a federal notice-and-comment rulemaking process under section 110(k) of the Act. Approved SIP submissions are incorporated by reference into the CFR and are enforceable federal law. If a state adopted new state law or regulations that violated this commitment in the SIP (e.g., by requiring compliance only with a state Section 177 Program), this new state law would conflict with the federally-approved National LEV SIP revision and would not be valid prior to EPA approval into the SIP of the new law. Prior to such action, the new state law would be precluded by the federal law with which it conflicted (i.e., the SIP revision EPA had approved). The courts have held that where Congress has the power under the Supremacy Clause of the U.S. Constitution to preempt an area of state law (which it has with respect to air pollution controls), state law is preempted if either Congress evidences an intent to occupy a given field, or to the extent that the state law actually

conflicts with federal law. Hence, the later state regulation that did not allow National LEV as a compliance alternative would be preempted by the federally-approved National LEV SIP provision and would be unenforceable against the manufacturers.

Manufacturers could bring suit against the state to clarify that the new state law was not enforceable until approved by EPA, thereby enforcing the initial SIP commitment in federal court.

To revise the SIP, the state would have to submit the new provisions and EPA would have to approve them into the SIP through notice-and-comment rulemaking. If EPA approved the new provisions, they would take effect. If EPA disapproved the new provisions, then the new state law would continue to conflict with the federally-approved SIP revision (which is federal law) containing the state commitment to National LEV, and manufacturers could seek a judicial determination that the federally-approved National LEV SIP revision commitment preempted the new state law.

Once a state has an approved SIP provision committing to accept National LEV as a compliance alternative for a specified duration, under section 110(1) of the CAA, EPA would be obligated to disapprove a subsequent SIP revision that violated the state's

commitment if EPA were to find that the SIP revision would interfere with other states' ability to attain or maintain the national ambient air quality standards (NAAQS). Specifically, section 110(l) provides that EPA must disapprove a plan revision if it "interfere[s] with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of this Act." By the terms of its rulemaking, National LEV comes into and stays in effect only if all relevant states commit to allow it as a compliance alternative. If National LEV comes into effect, a number of OTC States, as well as states outside the OTR, are likely to rely on National LEV as a means of attaining and maintaining the ozone NAAQS. These states are likely to forego adoption of other control measures because they will count on reductions from National LEV to meet their attainment and maintenance obligations. In this manner, other states will be relying on each of the OTC States keeping its commitment to National LEV. An OTC State breaking its commitment to allow National LEV as a compliance alternative could lead to the dissolution of the National LEV program, which in turn would likely deprive other states of the emission reductions from National LEV, and could thereby interfere with those other states' ability to attain. As discussed above, in the SIP revisions committing to National LEV,

each OTC State would explicitly recognize that the state's commitment to National LEV is necessary to ensure that the program remain in effect.

One commenter opposed EPA's reading of section 110 on several grounds, focusing in particular on the potential effects on states downwind from the violating state. The commenter objects to anything that would discourage a state that committed to National LEV from implementing a Section 177 Program if that state finds in the future that National LEV will not prevent emissions within that state from interfering with attainment in downwind states. The commenter claims that the commitment to National LEV would violate the section 110(a)(2)(D) requirement that emissions in a state cannot interfere with attainment or maintenance in downwind states.

EPA rejects the suggestion that a state's commitment to National LEV has the potential to interfere with that state's ability to comply with section 110(a)(2)(D). Section 110(a)(2)(D) requires SIPs to "contain adequate provisions prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or

interfere with maintenance by, any other state" Thus, section 110(a)(2)(D) holds a state responsible for reducing a given quantity of emissions that contributes significantly to nonattainment in another state. It does not mandate any particular measure for reducing those emissions, and the Circuit Court of Appeals for the District of Columbia, in Virginia v. EPA, 108 F. 3d 1397 (D.C.Cir. 1997), precluded EPA from requiring states to adopt a program under section 177. States commonly make choices between emissions control measures, and the decision to adopt one measure often precludes another, usually due to practical constraints such as incompatible technology, limited resources, lead time requirements, etc. The choice of National LEV is no different. In selecting National LEV as a means of controlling emissions from new motor vehicles, a state will be fully aware that the choice requires giving up the ability to adopt a state Section 177 Program for a given period of time, except under specified circumstances. EPA has determined that National LEV produces equivalent or greater emissions reductions than OTC State-by-State adoption of Section 177 Programs. Thus, the only way in which adoption of OTC State Section 177 programs in lieu of National LEV could help meet OTC States' section 110(a)(2)(D) obligations is if California were to adopt more stringent CAL LEV requirements, all or almost all OTC States also

adopted such standards, and the timing of the adoptions was such that the standards would become effective earlier than the date on which the OTC States' participation in National LEV would have ended had the states opted into National LEV instead. For National LEV to come into effect in MY1999, OTC States must evaluate the alternatives based on the information available at this time and make a choice now as to whether to opt into National LEV. As is often the case, if state regulators wait until they have perfect information about all possible options, one option -- National LEV, which now looks to be the most attractive option -- will no longer be available. Nor is it an option for OTC States to opt into National LEV without making an enforceable commitment for the specified duration. National LEV is a voluntary program for both states and manufacturers, and manufacturers are unwilling to supply National LEV vehicles without assurance that their future compliance obligations will remain stable for the specified duration. Therefore, a commitment by OTC States to accept compliance with National LEV for the specified duration is an integral and critical element of National LEV. Based on the options and information available now to OTC States and only the possibility that California will tighten its standards at some point in the future, an OTC State that made an enforceable commitment to National LEV for the

specified duration could not be said to be interfering with attainment of downwind states, nor could that commitment be held unenforceable in the future. Of course, for most OTC States, National LEV is only one of the actions they will need to take to meet their CAA obligations. States committed to National LEV would remain responsible for compliance with section 110(a)(2)(D) and would be able to use other means to achieve the necessary reductions. Thus, the state commitments to National LEV in no way violate section 110(a)(2)(D), nor are they consequently unenforceable as the commenter suggests.

The commenter further asserts that EPA is attempting to prohibit states from adopting Section 177 Programs and this is illegal and contrary to section 177, which provides states the right to adopt state standards for new motor vehicles that are identical to California standards. EPA agrees that section 177 clearly provides states the right to adopt the California standards. Under National LEV, states make the choice whether to exercise that right and implement the California standards, or to commit to accept manufacturers' compliance with an alternative set of emissions controls on new motor vehicles for a limited period of time. The OTC States and the manufacturers developed the basic framework and requirements for the National LEV program

and the fundamental agreement on which it is based. EPA does not have the authority to require the manufacturers to produce National LEV vehicles without their agreement or to require the OTC States to commit to National LEV. Absent the voluntary actions of the manufacturers and OTC States there will be no National LEV Program. However, if the manufacturers and OTC States choose to commit to National LEV and bring the program into being, it is in no way contrary to section 177 or any other provision of the Clean Air Act for EPA to enforce the agreement in the manner provided in today's rule.

The commenter further contends that EPA's reading of section 110(1) is incorrect for several reasons. As discussed above, under EPA's interpretation, section 110(1) could bar EPA from approving into the SIP a state submission that would revoke an earlier SIP provision committing a state to accept National LEV as a compliance alternative for a specified duration. First, the commenter states that based on the same analysis, EPA could use its authority under section 110(k)(5) to require even unwilling states to revise their SIPs to accept National LEV as a compliance alternative on the theory that failure to do so would frustrate National LEV and thus interfere with attainment in neighboring states. The commenter states that EPA has no such

authority under section 110(k)(5), (under Commonwealth of Virginia v. Environmental Protection Agency, 108 F.3d 1397 (D.C. Cir. 1997)).

EPA rejects the contention that the section 110(k)(5) analysis is comparable to EPA's interpretation of section 110(l). As emphasized above, National LEV is a voluntary program. Enforcing an agreement that states have voluntarily entered into is a fundamentally different action from mandating that states enter into an agreement. More specifically, EPA's interpretation of section 110(l) relies on the effect that a violation of a state commitment is likely to have on other states that have relied upon the National LEV program. A program will not be useful for state air pollution control and planning purposes unless there is some assurance that it will continue over time, and EPA has attempted to structure National LEV so as to provide such an assurance of stability. Given this structure, states will likely reasonably rely on achieving a certain quantity of emissions reductions from National LEV and hence will likely decide not to adopt other pollution control measures. Since most measures take time to adopt and implement, the sudden and unexpected loss of emissions reductions from National LEV would be likely to cause a significant delay in some states' emissions

control efforts. As a consequence, it would affect such states' ability to meet the statutory and regulatory deadlines for attainment as well as the obligation to protect the health and welfare of their citizens. In contrast, if OTC States did not commit to National LEV and the program never came into effect, while the opportunity for emissions reductions from National LEV would be lost, states would never have expected to receive those reductions, would not have foregone opportunities for other types of emissions reductions, and would not be disadvantaged in their ability to pursue other measures. Under those circumstances, EPA would have no basis for finding that failure to include a commitment to National LEV would make a SIP substantially inadequate to attain the NAAQS or otherwise comply with any requirement of the CAA.

The commenter also cites section 110(a)(2)(D) to argue that section 110 holds each state responsible only for emissions within its jurisdiction and requires a state to take action only if those emissions are interfering with attainment in another state. EPA agrees that section 110(a)(2)(D) only applies to emissions activity within the state, but EPA is here relying on section 110(l), not section 110(a)(2)(D). Section 110(l) simply provides that EPA shall not approve a revision if it "would

interfere with any applicable requirement concerning attainment and reasonable further progress ... or any other applicable requirement of [the] Act." (Emphasis added.) Section 110(1) makes no reference to emissions activities within the state, and EPA declines to attempt to read in such a limitation.

The commenter states further that it would not violate section 110 for EPA to approve into a SIP state provisions that replace National LEV with a section 177 program when the section 177 program would result in equivalent or lower emissions within the state. If the manufacturers might choose to opt out of National LEV as a consequence of an EPA approval of such a revision, the revision would jeopardize all of the emissions reductions from the National LEV program and states without backstop programs could experience the significantly higher emissions that would be produced by Tier 1 vehicles. Thus, it is highly unlikely that the proposed SIP revision would not interfere with attainment in at least some states that had relied upon National LEV, even if emissions in the violating state remained stable or decreased and vehicles from the violating state that migrated into other states emitted at the same or lower levels. For these reasons, section 110(1) could require EPA to disapprove the state's proposed revision.

Finally, the commenter states that EPA could not find that a proposed SIP revision breaking the state's commitment to National LEV would interfere with attainment under section 110(1) because manufacturers would be allowed to sell Tier 1 vehicles in the violating state even if they do not opt out of National LEV. In that situation, approval of the section 177 program would reduce emissions in that state in comparison to the Tier 1 requirements that would otherwise apply. EPA disagrees with the commenter's analysis of how this situation would relate to the requirements of section 110(1). Given the likelihood that manufacturers would opt out of National LEV if EPA were to approve the SIP revision, approval of the SIP revision would be likely to result in overall higher emissions from Tier 1 requirements in many states, not just one, and a number of these states are likely to be relying on the reductions from National LEV. Moreover, the violating state has the ability to avoid some or all of the negative emissions effects of its action, either by not taking the action in the first place, or by curing its violation, as discussed above in section VI.A.1.¹⁹ In contrast, other states cannot

¹⁹ If a state violated its commitment, it would have the ability to limit the period of time for which it would receive Tier 1 vehicles to approximately two full model years by curing the violation. Even if EPA were to approve the SIP revision, the state would receive Tier 1 vehicles for two years pursuant to the requirement for lead time under section 177. Thus, an EPA disapproval of a violating state's proposed SIP revision would not necessarily result in higher emissions in the violating state compared to the result if EPA had approved the proposed

prevent a state from violating, but rather must rely on EPA's disapproval to retain the emissions reductions that they are relying on for attainment. Under these circumstances, the fact that the violating state had taken action that caused Tier 1 requirements to apply in that state would not prevent EPA from disapproving that state's SIP revision on the grounds that the revision would interfere with attainment in other states.

VI. Incentives for Parties to Keep Commitments to Program

Once it comes into effect, National LEV is designed to be a stable program that will remain in effect until replaced by mandatory federal tailpipe standards of at least equivalent stringency, provided such standards are necessary and cost-effective. Manufacturers have the option, but not the requirement, to participate in National LEV. Manufacturers have indicated a willingness to opt into the program, but only if the EPA and the OTC States make certain commitments. To give the manufacturers both assurance that the commitments will be kept and recourse if they are not, the program includes a few specified conditions ("offramps") that would allow manufacturers to opt out of National LEV if EPA or the OTC States did not keep their commitments. In addition, the OTC States also need assurance that National LEV will continue to provide the benefits they anticipated when they opted into the program, both in terms of the number of manufacturers covered by the program and the level of emissions reductions that the program was designed to achieve. Thus, National LEV also includes limited offramps for the OTC States to protect against changes in anticipated emission benefits or the number of covered manufacturers. Both the manufacturers' and the OTC States' offramps, set forth in 40 CFR

86.1707, are structured to maximize all parties' incentives to maintain the agreed-upon program provisions and thereby to maximize the stability of National LEV over its intended duration.

In the unlikely event that any of the offramps were triggered and manufacturers or OTC States opted out, today's regulations set forth which requirements would apply, the timing of such requirements, the states in which they would apply, and the manufacturers that would have to comply with them. The main purpose of these provisions is to enhance the stability of the program by minimizing the incentives for EPA or the OTC States to act in a manner that would trigger an offramp. Additionally, EPA has structured the offramp provisions such that no single event automatically would end the National LEV program. EPA will continue to make National LEV available as long as one or more manufacturers and one or more OTC States wish to remain in the program. EPA recognizes, of course, that if a significant number of OTC States or manufacturers were to opt out of National LEV, after a certain point it is unlikely that the remaining parties would choose to continue the program. However, the issue is highly unlikely to arise, and if it did, it is not clear what would be the critical mass of opt-outs sufficient to end the

program. Rather than deciding now how many OTC State and auto manufacturer opt-outs would be significant enough to end National LEV, EPA believes it is both more appropriate and more efficient to leave that decision to the OTC States and manufacturers to decide, in the unlikely event that an offramp is triggered and significant opt-outs occur. EPA has received no comments on the SNPRM opposing this general approach.

In the NPRM, EPA proposed that the manufacturers' right to opt out of the National LEV program would be limited to two conditions. These offramps were: (1) EPA modification of a Stable Standard, except as specifically provided, and (2) an OTC State's failure to meet or keep its commitment regarding adoption or retention of a state motor vehicle program under section 177. The Final Framework Rule addressed the first offramp (recodified in today's rule at 40 CFR 86.1707(d)), which would allow manufacturers to opt out of National LEV if EPA were to modify a Stable Standard except as provided for under the National LEV regulations. The second offramp is addressed in today's Final Rule. EPA also is adding a third type of offramp related to auto manufacturers' concerns regarding the effects of using federal fuel (instead of California fuel) on emissions control systems. This is discussed in section VI.C below. In addition, as

proposed in the SNPRM, today's Final Rule includes a fourth type of offramp that allows manufacturers to opt out based on an OTC State or another manufacturer legitimately opting out of National LEV. Today's rule also finalizes two offramps for OTC States. An OTC State may opt out if a manufacturer opts out or if EPA makes a finding that National LEV will not produce (or is not producing) emissions reductions in the OTR equivalent to state Section 177 Programs in the OTR. Finally, this section discusses EPA's interpretation of Section 177 if an offramp is taken.

A. Offramp for Manufacturers for OTC State Violation of Commitment

As established in today's Final Rule, there are several ways in which an OTC State might break its commitment and thereby allow manufacturers to opt out of National LEV. These are: (1) taking final action in violation of the commitment to continue to allow National LEV as a compliance alternative to a Section 177 Program or to a ZEV mandate (in those OTC States without existing ZEV mandates); (2) failing to submit a National LEV SIP revision within the timeframe set forth in the National LEV regulations; (3) submitting an inadequate National LEV SIP revision; and (4) taking final action (by an OTC State without an existing ZEV

mandate) adopting a ZEV mandate effective during the state's commitment to National LEV.²⁰ The discussion below addresses each of these possible types of OTC State violations individually. EPA does not believe that any of these scenarios are likely to arise under the National LEV program. Nevertheless, spelling out in the regulations the consequences under each of these scenarios will provide the parties certainty regarding the worst-case outcomes, and more importantly, allows EPA to structure the consequences so as to minimize the likelihood that any of these scenarios will occur.

1. OTC State No Longer Accepts National LEV as a Compliance Alternative

The most significant way in which an OTC State could violate its commitment to National LEV would be to attempt to have a Section 177 Program that was in effect during the state's commitment to National LEV²¹ and that did not allow National LEV or mandatory federal standards of at least equivalent stringency

²⁰ In addition, as discussed in the following section, manufacturers may opt out if an OTC State takes a legitimate offramp.

²¹ An OTC State's commitment to National LEV lasts until MY2006, unless EPA fails to issue Tier 2 standards at least as stringent as National LEV on or before December 15, 2000, in which case the commitment lasts until MY2004.

as a compliance alternative.²² (An OTC State would not be in violation of its commitment under National LEV if it had (or adopted) a Section 177 Program that was effective after the end of its commitment to National LEV that did not allow National LEV as a compliance alternative.) This could happen if an OTC State accepted National LEV as a compliance alternative to a state Section 177 Program or a ZEV mandate (in an OTC State without an existing ZEV mandate) and then took final action purportedly removing the alternative compliance provisions from its regulations, leaving only the state Section 177 Program or ZEV mandate requirements in place. It would also happen if an OTC State took final action purportedly adopting a Section 177 Program or a ZEV mandate (in an OTC State without an existing ZEV mandate) without providing for National LEV as a compliance alternative.²³ This violation of the OTC State's commitment to National LEV attempts to impose a compliance burden directly on

²² Throughout this preamble, EPA often uses "National LEV as a compliance alternative" as shorthand for "National LEV or mandatory federal standards of at least equivalent stringency as a compliance alternative."

²³ In addition, an OTC State with a Section 177 Program in its regulations at the time of opt-in that does not already permit manufacturers to comply with National LEV as a compliance alternative might fail to modify those existing regulations within the time-frame provided, which is the same as the deadline for submission of the state's SIP revision. The consequences of this type of violation would differ slightly from the consequences of other types of violations that attempted to have a Section 177 Program without allowing National LEV as a compliance alternative, as noted below in n.24.

the manufacturers and would abandon the most fundamental element of the agreement underlying the voluntary National LEV program.

The consequences of such a violation, as discussed below and set forth in 40 CFR 86.1707(e), take into account the seriousness of the breach of the commitment, even though the violation would not necessarily directly burden the manufacturers. Once a state adequately commits to National LEV through an approved SIP revision, even if the state were to change its regulations to disallow compliance with National LEV, the requirement would not be enforceable until EPA approved a further SIP revision incorporating the change, as discussed above in section V.C.4. Yet, although the violation might not actually impose any burden on the manufacturers because it is not enforceable, manufacturers should not be bound to comply with more stringent National LEV requirements in the violating state and should not be bound to continue in the National LEV program, as even an unenforceable Section 177 Program would create risks and uncertainties for manufacturers. Manufacturers would be at risk of having to defend against a state enforcement action. The question of whether EPA could approve a proposed state SIP revision deleting National LEV as a compliance alternative -- if only by virtue of the lack of precedence for this issue and its dependence on the

specific facts -- would create further uncertainty for manufacturers.

Manufacturers would be able to opt out at any time after an OTC State took final action that would (or attempted to) require manufacturers to comply with a Section 177 Program or a ZEV mandate (in an OTC State without an existing ZEV mandate) prior to the end of the state's commitment to National LEV without allowing them to comply with National LEV or mandatory federal standards of at least equivalent stringency as an alternative, even if the effective date of the state requirement were some time in the future. The final state action would be the action promulgating the state law or regulations at issue, not the act of defending such law or regulations in litigation. Thus, a self-effectuating state law purporting to impose a Section 177 Program without including National LEV as a compliance alternative would be final state action, as would final state regulations purporting to impose such a program. A state law directing the relevant state agency to change its regulations to remove National LEV as a compliance alternative would not be a final state action, but the regulations promulgated in accordance with that directive would be final state action.

The manufacturers commented that the definition of "final state action" should include the date on which a state passes legislation that requires a state environmental agency to eliminate National LEV as a compliance alternative, even if that state legislation is not self-effectuating. EPA is concerned that it may not necessarily be clear in a particular instance how a law directing a state agency to change its regulations relating to National LEV would actually be implemented by the state agency. Depending on the substantive results of the state rulemaking process implementing the directives of the law and the timing of such regulations, the state may or may not actually violate its commitment to the program. Rather than attempting to hypothesize the effect of final state regulations once promulgated, EPA believes it is appropriate to define a final state action as the action that finalizes the state law or regulations that would be directly applicable to the motor vehicle manufacturers upon the effective date of such law or regulations.

Today's rule provides that, if an OTC State were to violate its commitment by purportedly disallowing National LEV as a compliance alternative, there would be both automatic consequences in the violating state and an opportunity for

manufacturers to opt out of National LEV.²⁴ Two significant elements determine the consequences in the violating state. The first element is the manufacturers' National LEV compliance obligations in the violating state. The second element is when the state Section 177 Program or ZEV mandate requirements apply to manufacturers. Outside of the violating state, manufacturers would continue to be subject to the National LEV requirements unless they opted out of the National LEV program.

Until the violating state's Section 177 Program or ZEV mandate requirements apply, the manufacturers' compliance obligations in that state would be governed by the terms of the National LEV regulations. In a state that had violated its commitment by attempting to have a Section 177 Program or ZEV mandate without allowing National LEV as a compliance alternative, beginning with the next model year,²⁵ the National

²⁴ In an OTC State that had a Section 177 Program in its regulations at the time of opt-in and that had never accepted National LEV as a compliance alternative to the Section 177 Program requirements, the consequences in the violating state discussed in this section would not apply, given EPA's interpretation of section 177. See section VI.E. However, the provisions for a manufacturer's offramp would be the same for a state that failed to modify existing regulations to accept National LEV as a compliance alternative as for any other state action not allowing National LEV as a compliance alternative.

²⁵ The "next model year" would be the model year named for the calendar year following the calendar year in which the OTC State took final state action violating its commitment. For example, if an OTC State violated its commitment by taking final state action in calendar year 1999, the next model year would be MY2000.

LEV regulations would allow manufacturers to sell vehicles complying with Tier 1 tailpipe standards in that state and those vehicles would not be counted in determining whether the NLEV fleet average NMOG standard was met. Because model years generally run somewhat ahead of the calendar years with the same numbers, generally this will result in a near-term or immediate change in the manufacturers' compliance obligations.

EPA had proposed that, until the violating state's Section 177 Program requirements applied (which might not be until MY2006), the manufacturers would only have to meet the federal Tier 1 tailpipe standards for vehicles sold in the violating state, and those vehicles would not be used to calculate the manufacturers' fleet NMOG averages. Several commenters objected to this provision on the basis that the violating state or a downwind state might need emissions reductions from controls on new motor vehicles in the violating state during the timeframe in which National LEV regulations required that federal Tier 1 standards be met in the violating state. In response, EPA is modifying this provision slightly to allow a violating state to "cure" a violation and regain the benefits of National LEV (with respect to manufacturers that had not opted out of National LEV) by reversing the action that caused the violation. EPA believes

it is highly unlikely that a state would violate its commitment in the first place, let alone that it would do so and then reverse its action shortly thereafter. Nevertheless such a scenario can be envisioned, for example, in the situation where a state was counting on an alternative means of obtaining needed emissions reductions and then found that the alternative was for some reason not viable. EPA believes that it is appropriate to structure the National LEV regulations so as to maximize states' incentives to uphold their commitments to National LEV without, under certain circumstances, foreclosing a state from obtaining the benefits of National LEV for the remainder of the National LEV program.

Under today's final rule, rather than allowing manufacturers to sell only Tier 1 vehicles in a violating state for as long as the manufacturers are governed by National LEV in that state, if the violating state reverses its action (by taking final action withdrawing, nullifying or otherwise reversing the final action that violated its commitment), after a transition period, vehicles sold in that state by manufacturers that had not opted out of National LEV would once again be subject to the National LEV fleet average NMOG requirements. Vehicles would be subject to the fleet average NMOG standard as of the model year named for

the second calendar year after the violating state took the final action reversing the action that broke its commitment or as of the model year named for the fourth calendar year following the calendar year in which the violating state took the final action, whichever is later. For example, if the violating action occurred in 1999 and the violating state reversed that action in 2000, vehicles sold in that state would count towards the NLEV NMOG fleet average starting with MY2003 (the model year named for the fourth calendar year following the calendar year in which the violating action occurred). If the violating action occurred in 1999 and was reversed in 2002, vehicles in that state would count towards the NLEV NMOG fleet average starting with MY2004 (the model year named for the second calendar year in which the violating action was reversed). EPA believes that it is important to provide OTC States that commit to National LEV with an incentive to keep their commitments and that this approach provides such an incentive.²⁶

²⁶ The commenters mistakenly assumed that, in the absence of this provision, a state that broke its commitment would immediately get the benefits of a state Section 177 Program. Rather, under section 177, a violating state would only be entitled to Tier 1 vehicles for at least two years after it broke its commitment. Thus, for at least two years, the National LEV provision that manufacturers that stay in the program are obligated to provide only Tier 1 vehicles in the violating state is consistent with what would happen under section 177 if the violating state's action ended the program. (For ease of administration, if a violating state is in and then out and then back in the National LEV program, EPA has extended the period that would otherwise be provided by section 177 to ensure that when a states' vehicles again count towards calculation of the NMOG average, all of a manufacturer's vehicles in the

The earliest date on which the violating state's Section 177 Program or ZEV mandate would apply is governed by the two model-year lead time requirement of section 177, EPA's regulations on model year at 40 CFR part 85 subpart X and the National LEV regulations. This date would apply only for any auto manufacturer that opted out of National LEV as a result of the violating state's action (provided that it is later than the effective date of the opt-out), for any auto manufacturer that decided to comply with the violating state's requirements even though it otherwise chose to stay in National LEV, and for all manufacturers if EPA approved the violating state's program into the SIP.²⁷ (As discussed above, EPA believes the violating state's refusal to allow National LEV as a compliance alternative would not otherwise be effective until MY2006 (or MY2004, if EPA

first covered model year count towards the NMOG average.) Even were lead time not required by section 177, EPA believes it is appropriate to give manufacturers time to comply with new motor vehicle requirements pursuant to a change in a state's requirements.

²⁷ Some commenters have expressed the view that, if an OTC State were to delete National LEV as a compliance alternative, the State's new (or revised) Section 177 Program would not be preempted by the federally approved National LEV SIP revision nor would EPA have the legal authority to disapprove the revised state program if it were submitted to EPA for approval into the SIP. As discussed in this preamble and the Response to Comments for today's rule, EPA disagrees with these commenters. However, if these commenters were correct regarding the legal status of the revised state program disallowing National LEV as a compliance alternative, the earliest date on which the violating state's Section 177 Program or ZEV mandate would apply is governed by the lead time requirements in section 177 and EPA's regulations on model year at 40 CFR Part 85 subpart X and in the National LEV regulations.

failed to issue Tier 2 standards at least as stringent as National LEV on or before December 15, 2000).) Thus, if none of these situations occurred, the only requirements applicable to manufacturers in the violating state would be the National LEV regulations, which would allow manufacturers to sell in the violating state vehicles that meet Tier 1 tailpipe standards and to exclude those vehicles from the fleet average NMOG calculation for the time period discussed above.

After National LEV is in effect, a change to a state regulation that deletes National LEV as a compliance alternative attempts to change the manufacturers' obligations. In that circumstance, as discussed in section VI.E below, EPA interprets section 177 to require two years of lead time from the date that the state takes final action changing its regulations (or other law) deleting National LEV as a compliance alternative, regardless of when the state adopted its previous Section 177 Program. Thus, pursuant to the model year regulations at 40 CFR part 85 subpart X and today's regulations at 40 CFR 86.1707, the earliest the state Section 177 Program or ZEV mandate requirements could apply would be to engine families for which production begins after the date two calendar years from the date of the final state action. For example, if the violating state

promulgated regulations purportedly removing National LEV as a compliance alternative on June 1, 2000, the earliest the state Section 177 Program or ZEV mandate requirements could apply would be to engine families that began production on or after June 1, 2002, which might apply to some, but certainly not all, MY2003 vehicles.

In the SNPRM, EPA raised the issue of whether manufacturers should have at least four, rather than two, years of lead time from the date that the state takes final action changing its regulations to delete National LEV as a compliance alternative. The manufacturers' comments advocated that there should be four years of lead time from the date of the state violation of its commitment, but they did not suggest any way (other than enforcing the commitment in a SIP) to make such a requirement for lead time legally enforceable against a state that was already in violation of its commitment to accept National LEV as a compliance alternative to a state Section 177 Program. Numerous other commenters opposed the idea of providing four years of lead time on the basis that it is contrary to the statutory language governing lead time for state programs adopted under section 177. The MOUs initialled by the OTC and manufacturers' organizations did not allude to a four-year lead time under any circumstances,

indicating that the parties had not raised this in their negotiations, let alone agreed upon it, as an appropriate element of the National LEV program. Finally, the National LEV regulations provide several other significant disincentives to an OTC State breaking its commitment, as discussed in this section, and a four-year lead time would likely add little to these existing disincentives. Thus, EPA does not believe it would be reasonable to try to require a four-year lead time under section 177 for a state violation of its commitment to National LEV.

The combined effect of the National LEV regulations allowing manufacturers to comply with Tier 1 tailpipe standards in the violating state and the requirement for two-years lead time before the state Section 177 Program or ZEV mandate requirements could apply means that, if an OTC State were to violate its commitment by not allowing National LEV as a compliance alternative, manufacturers would be subject to only Tier 1 tailpipe standards (and not the NLEV NMOG average) in that state for at least two years. As a consequence, the violating state could not claim SIP credits for control of emissions from new motor vehicles meeting anything more stringent than Tier 1 tailpipe standards during that period. EPA believes that this would provide a powerful incentive for the OTC States to uphold

their commitments to accept National LEV as a compliance alternative for the specified duration.

EPA recognizes that it may take manufacturers some time to take advantage of the less stringent Tier 1 tailpipe standards, and that, consequently, the hardware of the vehicles supplied to the violating state may not change dramatically in the short-term. However, manufacturers would be able to revise vehicle compliance levels rapidly to provide that, for warranty and recall purposes, the vehicles are only complying with Tier 1 tailpipe standards. This means that, over the life of those vehicles, they would only be required to produce emissions below the 50,000 mile and 100,000 mile Tier 1 standards and enforcement action could not be taken to require those vehicles to meet any more stringent standards.²⁸ As long as manufacturers are not required to sell vehicles meeting standards more stringent than Tier 1 in the violating state, it would not be appropriate for EPA to approve SIP credits for any emissions reductions beyond the levels provided by Tier 1 tailpipe standards. Those vehicles would not be included in calculating the manufacturers' compliance with the National LEV fleet average NMOG standards.

²⁸ See section VIII.C for discussion of how EPA's vehicle certification process would allow a manufacturer to provide vehicles meeting Tier 1 standards in a violating state.

Thus, the state would not receive emission credits beyond Tier 1 levels if the vehicles sold in that state were certified to Tier 1 levels when sold in that state because the SIP would not provide in any way for such vehicles to meet emission standards more stringent than Tier 1 levels.

In addition to the relaxed emissions standards that would apply to vehicles sold in the violating state, the other incentive for OTC States not to violate their commitments is that manufacturers would also be able to opt out of National LEV if an OTC State violated its commitment to the program by not allowing National LEV as a compliance alternative. As proposed, the FRM does not set a time limit for manufacturers to exercise their right to opt out as long as the state is in violation of its commitment. After a manufacturer opted out, there also would be no opportunity for the state to cure the violation by changing the state law or regulations to accept National LEV as a compliance alternative and thereby negate an opt-out that a manufacturer had already submitted, regardless of whether that opt-out had become effective already. However, once a violating state took final action to cure the violation, manufacturers that had not already opted out could not opt out based on the violation that the state had cured.

The Final Framework Rule gives EPA an opportunity to make a finding as to the validity of an opt-out based on a change to a Stable Standard. See 62 FR 31202-07. This both provides a safe harbor for a manufacturer that relies on an EPA determination of validity, and provides for rapid resolution in the United States Court of Appeals for the District of Columbia if the validity is disputed, thereby avoiding protracted litigation in federal district court. In contrast, EPA does not believe such a process is necessary here. The validity of an opt-out based on a state disallowing National LEV as a compliance alternative should be a straight-forward factual determination. Consequently, EPA believes there is very little benefit to be gained by providing for an EPA determination of the validity of such an opt-out, and today's final rule does not provide for such a determination.

As proposed, a manufacturer that opts out of National LEV based on a state violation of its commitment to National LEV must continue to comply with National LEV until the opt-out becomes effective (although Tier 1 tailpipe standards will apply in the violating state, as discussed above). A manufacturer's opt-out notification must specify the effective date of the opt-out, which in no event could be any earlier than the next model year (i.e., the model year named for the calendar year following the

calendar year in which the manufacturer opted out).²⁹ After the effective date of its opt-out, a manufacturer would have to comply with any non-violating state's Section 177 Program (except for ZEV mandates) provided that at least two-years lead time (as provided in section 177) had passed since the adoption of the state's Section 177 Program. Other than those ZEV mandates that would be unaffected by the National LEV program (i.e., existing ZEV mandates), if a manufacturer opts out, it would not be subject to any other ZEV mandates until two years of lead time had passed, which would run from the date the manufacturer opts out of National LEV and be measured according to the section 177 implementing regulations. After the effective date of a manufacturer's opt-out, in a non-violating state without a Section 177 Program, the manufacturer must meet all applicable federal standards that would apply in the absence of National LEV.

The following summarizes the tailpipe standards that would apply if an OTC State violated its commitment by not allowing National LEV as a compliance alternative. For vehicles sold in

²⁹ If, however, an OTC State took a legitimate off-ramp as discussed below, a manufacturer could not use a delayed effective date of opt out to continue to comply with National LEV in a state that had opted out after that state's opt-out became effective. As discussed below in section VI.D, an OTC State legitimately opting out of National LEV is required to provide manufacturers at least two-years lead time.

the violating state, all manufacturers would be allowed to sell vehicles meeting Tier 1 standards and to exclude those vehicles from the NMOG fleet average beginning in the next model year after the date of the state violation for at least the two-year lead time set forth in section 177 and the implementing regulations; then manufacturers would become subject to the state Section 177 Program only if the manufacturer opted out of National LEV and its opt-out had become effective, if the manufacturer decided to comply with the violating state's new Section 177 Program while remaining in National LEV, or if EPA approved the state's requirements into the SIP. If a manufacturer opted out, before the opt-out became effective, the manufacturer would continue to be subject to all National LEV requirements for vehicles sold outside of the violating state. Once a manufacturer's opt-out had become effective, for vehicles sold outside of the violating state, the manufacturer would have to comply with any backstop state Section 177 Programs (except ZEV mandates) that a state had adopted at least two years before the effective date of opt-out and, in other states, would have to comply with all applicable federal standards that would apply in the absence of National LEV. Manufacturers would not have to comply with any ZEV mandates (except those that were unaffected by National LEV) until the model year that would start two years

after the date EPA received the manufacturer's opt out.

Manufacturers that did not opt out would continue to be subject to all National LEV requirements for vehicles sold outside of the violating state and, in the violating state, would be allowed, under the National LEV regulations, to sell vehicles meeting Tier 1 tailpipe standards for two years following the state violation and to exclude those vehicles from the NMOG fleet average.

However, if the violating state reversed the action that broke its commitment, vehicles sold in the violating state would count towards the NLEV NMOG fleet average as of the model year named for the second calendar year after the violating state took the final action reversing the action that broke its commitment or as of the model year named for the fourth calendar year following the calendar year in which the violating state took the final action breaking its commitment, whichever is later.³⁰ To the extent these provisions would give a manufacturer less than the two-years lead time set forth in section 177, the manufacturer would waive that protection by opting into National LEV and then

³⁰ For example, if the violating action occurred in 1999 and the violating state reversed that action in 2000, vehicles sold in that state would count towards the NLEV NMOG fleet average starting with MY2003 (the model year named for the fourth calendar year following the calendar year in which the violating action occurred). If the violating action occurred in 1999 and was reversed in 2002, vehicles in that state would count towards the NLEV NMOG fleet average starting with MY2004 (the model year named for the second calendar year after which the violating action was reversed).

setting an effective date in its opt-out notification that was earlier than the two-years lead time would provide. To the extent these provisions would give a manufacturer more than the two-years lead time set forth in section 177, by opting into National LEV the OTC States agree to provide the additional time.

2. OTC State Fails to Submit SIP Revision Committing to National LEV

The second way in which an OTC State could violate its commitment to National LEV would be to fail to submit a SIP revision to EPA containing the state's regulatory commitment to the program. The consequences of this violation differ slightly from a situation where a state does submit such a SIP revision, receives EPA approval for it, but then violates the commitment by attempting to remove National LEV as a compliance alternative. Failure to submit a SIP revision would not necessarily indicate that the state was attempting to impose a compliance obligation on the manufacturers contrary to the terms of the fundamental agreement underlying the voluntary National LEV program. Consequently, if manufacturers did not choose to opt out of National LEV, they would continue to be subject to all the National LEV requirements for vehicles sold both within and

outside of the violating state, and the National LEV program would continue. However, the portion of the OTC State commitments to be contained in the SIP revisions is critical to the long-term enforceability of the state commitments, so EPA believes it is important to allow the manufacturers to opt out of National LEV if a state fails to submit a SIP revision. This will provide incentive for OTC States to submit their National LEV SIP revisions and provide manufacturers recourse in the event of a state failure to do so. This offramp is addressed in 40 CFR 86.1707(f).

As under the previous scenario, there would be no time limit for manufacturers to exercise their right to opt out of National LEV if an OTC State had missed the deadline for its National LEV SIP revision and had not yet submitted such a SIP revision. Once the state submitted its SIP revision, even if after the deadline, manufacturers would no longer have the opportunity to decide to opt out of National LEV. Unlike the previous scenario, a state that had missed the deadline for its SIP submission would have a limited opportunity to cure the violation. For the first six months from the deadline for the SIP submission, manufacturers would only be able to opt out conditioned on the state not submitting a SIP revision within six months of the initial

deadline. If the state submitted the revision within that six-month grace period, any opt-outs based on that violation would be invalidated and would not come into effect.

The manufacturers commented that the National LEV regulations should not provide a six-month grace period for states to submit their SIP revisions beyond the one-year (or for a few states, eighteen-month) period provided for the SIP submissions because the deadline provides states adequate time to submit their SIP revisions. EPA believes this limited opportunity to cure is appropriate here. While the timeframes provided for the OTC States to submit their SIP revisions are feasible, they are very tight and do not give much leeway for delays that may occur in the state regulatory processes. Moreover, the MOUs initialed by the OTC and the manufacturers' associations provided that OTC States would have two years to submit their SIP revisions committing to National LEV. Even if they needed to take advantage of the grace period, the deadline for most of the OTC States to submit their SIP revisions to EPA would still be sooner than provided under the initialed MOUs and no state would have a deadline any later than the MOUs provided. In light of this, together with the fact that failure to submit this SIP revision would not pose the risk of any immediate change

in the manufacturers' compliance obligations, it is reasonable to provide a limited grace period for OTC States to submit their SIP revisions without jeopardizing the benefits of the National LEV program.

After the six-month grace period, the state's submission of a SIP revision would not negate a manufacturer's opt-out that EPA had already received, even if the manufacturer's opt-out had not yet become effective. However, no manufacturer would be able to opt out after the state submitted the SIP revision, no matter how late the state was. As under the previous scenario, whether or not an OTC State has failed to submit a SIP revision by a given date and thereby provided a basis for an opt-out is a very clear cut issue. Consequently, EPA is not providing for an EPA determination of the validity of an opt-out based on this violation.

If a manufacturer opts out it may set the effective date of its opt-out no earlier than MY2000 (or MY2001 if the violating state is the District of Columbia, New Hampshire, Delaware or Virginia) or the next model year after EPA's receipt of the opt-

out, whichever is later.³¹ If a manufacturer opts out of National LEV, in the violating state, the National LEV regulations would allow the manufacturer to meet Tier 1 tailpipe standards and would not require those vehicles to be included in the fleet average NMOG calculations. These special provisions for vehicles sold in the violating state generally would start with the next model year after EPA receives the manufacturer's opt-out notification (e.g., MY2000 for a manufacturer that opts out in calendar year 1999) and continue until the effective date set in the opt-out notice.³² As under the scenario above, the violating state would not receive SIP credits for emissions reductions from vehicles meeting anything more stringent than the Tier 1 tailpipe standards while those standards apply. Once the manufacturer's opt-out had become effective, the manufacturer would be subject to a Section 177 Program in the violating state if the two-year lead time requirement of section 177 had been met.

³¹ If, however, an OTC State took a legitimate offramp as discussed below, a manufacturer could not use a delayed effective date of opt out to continue to comply with National LEV in a state that had opted out after the state opt-out became effective. As discussed below in section VI.D an OTC State legitimately opting out of National LEV is required to provide manufacturers at least two-years lead time.

³² However, these special provisions would start no earlier than MY2001 if the District of Columbia, New Hampshire, Delaware or Virginia were the violating state and no earlier than MY2000 if another OTC State were the violating state.

If a manufacturer opted out of National LEV, in non-violating states it would continue to meet all National LEV requirements until the effective date of its opt out. For vehicles sold in the nonviolating states, once the opt-out became effective the manufacturer would be subject to any backstop Section 177 Programs for which the two-year lead time requirement of section 177 had been met (running from the date the state adopted the backstop program), or would be subject to Tier 1 requirements in states without such programs. Manufacturers would not have to comply with any ZEV mandates (except those that were unaffected by National LEV) until the model year that would start two years after the date EPA received the manufacturer's opt-out notification. To the extent that these regulations would provide a manufacturer with less than the two-year lead time set forth in section 177, the manufacturer waives that protection by opting into National LEV and then setting an effective date in its opt-out notification. To the extent that these provisions would provide manufacturers more than the two-years lead time set forth in Section 177, by opting into National LEV the OTC States agree to provide the additional time.

3. OTC State Submits Inadequate SIP Revision
Committing to National LEV

A third way in which an OTC State could violate its commitment to National LEV would be to submit a SIP revision that did not meet the requirements for a National LEV SIP revision, and thus did not adequately commit the state to the National LEV program. Today's rule, 40 CFR 86.1707(g), maintains the principle EPA had proposed, specifically that a violation of this commitment would allow manufacturers to opt out. However, today's rule takes a somewhat different approach towards when a manufacturer could opt out based on an inadequate SIP revision.

EPA proposed that manufacturers would be able to opt out if EPA disapproved a National LEV SIP revision, and either the state failed to submit a corrected SIP revision within one year of EPA's disapproval, or the state submitted a modified SIP revision and EPA subsequently disapproved the revision. Under the proposal, the date of the violation that would allow a manufacturer to opt out of National LEV would be either the state's failure to submit a National LEV SIP revision committing to National LEV within one year of EPA's disapproval of its initial SIP revision, or publication of EPA's second disapproval. EPA also considered and took comment on several alternative approaches.

The auto manufacturers' comments supported their right to opt out if an OTC State were to submit an inadequate National LEV SIP submission, but opposed the proposed process and timing for using such an offramp. The manufacturers believe that the proposal did not provide them a real opportunity to opt out in a timely fashion if a SIP submission did not adequately commit an OTC State to National LEV. The manufacturers calculated that EPA's proposal might not allow them to opt out until MY2004 if a state submitted an inadequate SIP. Given the expected duration of National LEV, the autos felt this effectively prevented them from opting out if a state were to fail to submit an adequate SIP revision.

The SIP revisions are a critical component of the OTC States' commitments to National LEV. The auto manufacturers should have a right to opt out of the program if an OTC State that has opted into National LEV does not follow through on its commitment. EPA agrees with the manufacturers that the proposal did not provide them an adequate or realistic opportunity to ensure that OTC States submitted adequate SIP revisions. Thus, the FRM takes a slightly different approach than EPA proposed.

Today's rule allows manufacturers to opt out of National LEV if an OTC State has not submitted an adequate SIP revision and either EPA has taken final action on the state's submission finding that it did not meet the requirements for a National LEV SIP revision or at least 12 months has passed since the state submitted its National LEV SIP submission to EPA and EPA has not approved it as meeting the requirements for a National LEV SIP revision. By prohibiting manufacturers from opting out until after EPA has had one year to take action on a SIP submission, the FRM respects EPA's role in evaluating and approving SIPs, as delegated by Congress under section 110(k) of the Act. By allowing manufacturers to opt out immediately if EPA disapproves a SIP submission or if EPA fails to act within one year of receiving the submission, it gives manufacturers a real opportunity to opt out in a timely fashion if a SIP submission is inadequate. This should provide additional incentive for OTC States to send in submissions that meet the requirements for adequate National LEV SIP revisions and thereby increase the stability of the program.

As with the other types of state violations, there is no deadline for manufacturers to opt out based on this offramp. Also, there would be no opportunity for an OTC State to cure the

violation with respect to a manufacturer that had already opted out, although manufacturers that had not opted out could no longer do so once EPA had taken final action finding the State's submission met all the requirements for a National SIP revision. The action allowing opt out is very clear, and hence the regulations do not provide for an EPA determination of the validity of an opt-out based on this type of violation.

Again consistent with the previous scenarios, if a manufacturer opts out it may set the effective date of its opt-out as early as the next model year or any model year thereafter.³³ Manufacturers' obligations under National LEV and state Section 177 Programs would be identical to those described if a state failed to submit a SIP revision.

4. OTC State Without an Existing ZEV Mandate Adopts a Backstop ZEV Mandate

OTC States without ZEV mandates will also state in their opt-ins that they do not intend to adopt a ZEV mandate that would

³³ If, however, an OTC State took a legitimate offramp as discussed below, a manufacturer could not use a delayed effective date of opt out to continue to comply with National LEV in a state that had opted out after the state opt-out became effective. As discussed below in section VI.D an OTC State legitimately opting out of National LEV is required to provide manufacturers at least two years lead time.

be effective during the state's commitment to National LEV. EPA took comment on whether auto manufacturers should be able to opt out if an OTC State without an existing ZEV mandate acted contrary to its stated intent and adopted a backstop ZEV mandate (i.e., a ZEV mandate that allows National LEV as a compliance alternative) with an effective date during the state's commitment to National LEV.³⁴ Today's final rule, 40 CFR 86.1707(h), provides such an offramp for manufacturers. EPA believes this is appropriate given the differing positions of the manufacturers (who wanted the OTC States to agree that they would not adopt a ZEV mandate) and the OTC States (who were willing to state their current intent not to adopt a ZEV mandate). It is also appropriate given that the OTC States without existing ZEV mandates have little incentive to adopt backstop ZEV mandates since they have agreed that a manufacturer would not have to comply with a backstop ZEV mandate until the later of the end of the OTC State's commitment to National LEV (MY2006 or MY2004, depending upon EPA's issuance of Tier 2 standards) or two years after either the manufacturer or the OTC State opts out of National LEV.

³⁴ If an OTC State without an existing ZEV mandate adopts a ZEV mandate that does not allow National LEV as a compliance alternative, the opt-out provisions discussed in Section VI.A.1 above apply.

Sec. 86.1707(h) allows manufacturers³⁵ to opt out of National LEV if an OTC State without an existing ZEV mandate takes final action adopting a backstop ZEV mandate that would become effective during the state's commitment to National LEV. This offramp does not allow manufacturers to opt out if a state adopts a ZEV mandate that could not come into effect until the end of the state's commitment (i.e., until MY2006 or MY2004, depending on EPA's issuance of Tier 2 standards). Adoption of a backstop ZEV mandate would not impose an immediate compliance obligation on auto manufacturers, so EPA has structured the offramp and its consequences to be similar to those for an OTC State's failure to submit its National LEV SIP revision on time. Consequently, if manufacturers did not choose to opt out of National LEV, they would continue to be subject to all the National LEV requirements for vehicles sold both within and outside of the violating state, and the National LEV program would continue.

As for other offramps based on OTC State actions, there would be no time limit for manufacturers to exercise their right to opt out of National LEV if an OTC State without an existing

³⁵ Only those manufacturers that are large enough that they would be subject to the ZEV mandate if it comes into effect could opt out based on an OTC State's adoption of a ZEV mandate.

ZEV mandate adopted a backstop ZEV mandate. Final action reversing the violating state's adoption of a backstop ZEV mandate would not negate a manufacturer's opt-out that EPA had already received, even if the manufacturer's opt-out had not yet become effective. However, if the violating state were to take final action reversing itself and deleting the backstop ZEV mandate, no manufacturer would be able to opt out after such final action. "Final action" shall have the same meaning here as discussed above in Section VI.A.1. EPA is not providing for an EPA determination of the validity of an opt-out under this provision because it should be very clear cut whether an OTC State has adopted a backstop ZEV mandate.

If a manufacturer opts out, it may set the effective date of its opt-out as early as the next model year after EPA's receipt of the opt-out notification.³⁶ If a manufacturer opts out of National LEV, in the violating state, the National LEV regulations would allow the manufacturer to meet Tier 1 tailpipe standards and would not require those vehicles to be included in the fleet average NMOG calculations. These special provisions

³⁶ If, however, an OTC State took a legitimate offramp as discussed below, a manufacturer could not use a delayed effective date of opt out to continue to comply with National LEV in a state that had opted out after the state opt-out became effective. As discussed below in section VI.D an OTC State legitimately opting out of National LEV is required to provide manufacturers at least two years of lead time.

for vehicles sold in the violating state would start with the next model year after EPA receives the manufacturer's opt-out (e.g., MY2000 for a manufacturer that opts out in calendar year 1999) and continue until the effective date set in the opt-out notice. As under the scenario above, the violating state would not receive SIP credits for emissions reductions from vehicles meeting anything more stringent than the Tier 1 tailpipe standards while those standards apply. Once the manufacturer's opt-out had become effective, the manufacturer would be subject to a Section 177 Program in the violating state if the two-year lead time requirement of section 177 had been met.

If a manufacturer opted out of National LEV, in non-violating states it would continue to meet all National LEV requirements until the effective date of its opt out. For vehicles sold in the nonviolating states, once the opt-out became effective the manufacturer would be subject to any backstop Section 177 Programs for which the two-year lead time requirement of section 177 had been met (running from the date the state adopted the backstop program), or would be subject to Tier 1 requirements in states without such programs. Manufacturers would not have to comply with any ZEV mandates (except those that were unaffected by National LEV) until the model year that would

start two years after the date EPA received the manufacturer's opt-out notification. To the extent that these regulations would provide a manufacturer with less than the two-year lead time set forth in section 177, the manufacturer waives that protection by opting into National LEV and then setting an effective date in its opt-out notification. To the extent that these provisions would give manufacturers more than the two-years lead time set forth in section 177, by opting into National LEV the OTC States agree to provide the additional time.

B. Offramp for Manufacturers if OTC State or Manufacturer Legitimately Opts Out of National LEV

Following the general principle that parties should be able to exit National LEV if there is a significant change in the assumptions that underlay their decision to opt in initially, 40 CFR 86.1707(j) finalizes EPA's proposal that a manufacturer also could opt out if an OTC State or another manufacturer were to opt out of National LEV legitimately.³⁷ This offramp could be used

³⁷ The validity of any opt-out from National LEV would depend in part on whether the underlying condition allowing opt out has actually occurred. Where the initial OTC State or manufacturer's opt-out was invalid, it would not provide an offramp for another manufacturer to opt out of National LEV. Thus, throughout this notice when EPA refers to an initial opt-out as the condition that allows another opt-out, it refers only to valid initial opt-outs.

within 30 days of EPA's receipt of an OTC State or a manufacturer opt-out. The manufacturer could set an effective date for its opt-out beginning the next model year after the date of the manufacturer's opt-out, or any model year thereafter. EPA would not determine the validity of opt-out under this offramp unless EPA is to determine the validity of the initial opt-out.

Manufacturers' obligations under National LEV and state Section 177 Programs would be identical to those described if a state failed to submit a SIP revision, except that no state would be a violating state. EPA received no comments on this provision.

C. Offramp for Manufacturers for EPA Failure to Consider In-Use Fuel Issues

Believing that the effects of fuel sulfur were not adequately addressed by EPA in the National LEV program, the auto manufacturers recommended in June, 1997, that National LEV should include an offramp for manufacturers related to in-use fuels issues and that they should be allowed to exit the National LEV program if EPA were to act (or fail to act) in a specified manner to resolve specific sulfur-related issues. Such an offramp would alleviate their concern that the sulfur levels of in-use fuels

outside California may affect the on-board diagnostic (OBD) systems and tailpipe emissions of National LEV vehicles. The manufacturers outlined six different conditions related to EPA actions (or lack of action) on these issues that they believe should allow them to opt out of National LEV. In the SNPRM, EPA proposed an additional offramp that took into account three of the six conditions advanced by manufacturers and rejected the remaining three. (A complete discussion of these six conditions and EPA's rationale for selecting only three can be found in the SNPRM, 62 FR at 44768-44771.) The proposed offramp was structured such that manufacturers could opt out of National LEV only if EPA failed to consider certain vehicle modifications, on-board diagnostic control systems, or preconditioning of vehicles when requested to do so by a manufacturer as a result of an alleged effect of fuel with high sulfur levels. Today's final rule incorporates this offramp as it was proposed.

EPA recognizes that this remains an important issue for the manufacturers and other interested parties, and 40 CFR 86.1707(i) sets forth a process to allow potential problems related to potential fuel sulfur effects on emissions performance of National LEV vehicles to be addressed within the context of

National LEV as more information becomes available. These problems will be addressed on a case-by-case basis. EPA will respond to a manufacturer's request, supported by data, for appropriate relief for a specific engine family or families adversely affected by sulfur in a manner covered by one of the conditions incorporated into the National LEV regulations for the fuel sulfur offramp.

EPA also recognizes that the effects of sulfur on emission control systems is an issue that raises concerns beyond the context of the National LEV program and is being addressed in numerous other actions. These include testing being done to support EPA's Tier 2 Study and the Ozone Transport Assessment Group's recommendation to EPA to explore reducing fuel sulfur levels. EPA is working with the various stakeholders in developing and analyzing data to quantify any sulfur effects on current and future technology vehicles. EPA has said that in appropriate instances, EPA will address sulfur effects on specific mobile source programs. In March, 1997, EPA released a paper entitled "OBD & Sulfur White Paper: Sulfur's Effect on the OBD Catalyst Monitor on Low Emission Vehicles." This paper summarized the sulfur concerns and the available data, and

outlined EPA's approach to resolving OBD/sulfur issues on a case-by-case basis.³⁸ The fundamental suggested approach of addressing these issues on a case-by-case basis remains EPA's expected approach. The offramp related to fuel sulfur effects in today's final rule is entirely consistent with the approach outlined in EPA's revised paper.

Today's final rule contains a fuel sulfur offramp identical to that proposed in the SNPRM. This offramp could be triggered under the three following conditions:

(1) If, upon a written request from a manufacturer in relation to the certification of an OBD catalyst monitor system, EPA declines to consider the use of the system because it indicates sulfur-induced passes when exposed to high-sulfur gasoline, even though it functions properly on low-sulfur gasoline.

(2) If, upon a written request from a manufacturer, EPA declines to consider, on a case-by-case basis, the manufacturer's suggested modifications to vehicles that exhibit sulfur-induced

³⁸ OBD and Sulfur White Paper, March 1997 (Docket A-95-26, IV-B-06). This paper has been revised to address comments EPA received on the March, 1997 paper. A copy is included in the docket for this rule (A-95-26, VII-J-02).

malfunction indicator light (MIL) illuminations due to high-sulfur gasoline so as to eliminate the sulfur-induced MIL.

(3) If, upon a written request from a manufacturer, EPA declines to consider, on a case-by-case basis, prior to in-use testing, pre-conditioning procedures designed solely to remove the effects of high sulfur from currently available gasoline.

EPA has defined a process for manufacturers to opt out of National LEV if one of the conditions described above were to occur. A manufacturer must send a request to EPA in writing identifying the particular problem at issue, demonstrating that it is due to in-use fuel sulfur levels, requesting that EPA consider taking a specified action in response, and demonstrating the emissions impact of the requested change. For some changes, engineering judgement may be sufficient to demonstrate the emissions impact. The Agency would have 60 days to respond to the manufacturer's request in writing, stating the Agency's decision and explaining the basis for the decision. If EPA were to fail to respond in this manner in the timeframe allotted, manufacturers would have 180 days after the deadline for the EPA response to decide to opt out of National LEV. Once EPA responds to the manufacturer's request, even if after the 60-day

deadline, a manufacturer that had not yet opted out based on this offramp would no longer be able to do so, although if EPA had already received a manufacturer's opt-out, that opt-out would be unaffected by EPA's subsequent response. Only the manufacturer that sent the initial request to EPA would be able to opt out if EPA failed to respond.

Consistent with opt-outs based on other offramps, a manufacturer that opts out based on this offramp must continue to comply with National LEV until the opt-out becomes effective. The manufacturer may set the effective date of its opt-out as early as the next model year or any model year thereafter.³⁹ After the effective date of its opt-out, the manufacturer would be subject to any backstop Section 177 Programs (except for ZEV mandates) provided that at least two-years lead time (as provided in section 177) had passed since the adoption of the state's Section 177 Program, or would be subject to Tier 1 requirements in states without such backstops. Other than those ZEV mandates that would be unaffected by the National LEV program (i.e., existing ZEV mandates), if a manufacturer opts out, it would not be subject to any other ZEV mandates until two years of lead time

³⁹ The next model year would be the model year named for calendar year after which EPA received the opt-out notification.

has passed, which would run from the date the manufacturer opts out of National LEV and would be measured according to the section 177 implementing regulations.

Several commenters highlighted this offramp as an area of some concern. These comments and EPA's responses are detailed in the Response to Comments document. In general, the auto manufacturers felt that the proposed offramp did not go far enough to protect their interests. They would have preferred that the regulations allow a manufacturer to opt out if EPA did not approve the manufacturer's suggested solution to an alleged problem if the manufacturer felt corrective action was justified. EPA's proposed (and final) regulations instead require EPA to consider allowing corrective action based on a request from a manufacturer accompanied by a persuasive demonstration that a problem does indeed exist. EPA believes that following the manufacturers' approach would destabilize the program by putting EPA in what could be an untenable position of either giving a manufacturer the ability to opt out or allowing the manufacturer to dictate a substantive outcome which EPA did not believe was warranted.

Several state government commenters saw the addition of this offramp as a new issue that had not arisen in prior discussions and that had potentially destabilizing impacts on the National LEV program. The American Petroleum Institute likewise commented that it did not support this offramp. Contrary to some commenters' concerns, this offramp cannot be used by the manufacturers to dictate a particular result, nor does it destabilize the National LEV program. The offramp makes it clear that EPA intends to follow through on its commitment in the OBD & Sulfur Status Report to look at potential fuel sulfur effects on a case-by-case basis. The offramp does not expand whatever right to substantive judicial review a manufacturer would otherwise have of an EPA decision related to potential fuel sulfur effects. Rather, to avoid providing manufacturers an opportunity to opt out of the program, this offramp requires EPA to provide a written response to a manufacturers' request. Some commenters expressed the concern that this offramp would require EPA to act in the absence of necessary information. EPA does not read the provision that way. Rather, if a manufacturer submits insufficient information (perhaps by failing to characterize the potential fuel sulfur effect adequately or to provide adequate information regarding the effects of the requested change), EPA

could deny the request or ask the manufacturer to submit additional information without triggering an offramp, provided that EPA explained its response in writing. EPA does not believe the fuel sulfur offramp destabilizes the National LEV program given that it sets up a process rather than requiring a substantive result and given that EPA does not foresee any problem complying with the process.

D. Offramps for OTC States

In light of the practically and legally binding commitments that the OTC States would make to the National LEV program, this Final Rule also identifies the limited circumstances under which the OTC States would no longer be bound by those commitments. There are two circumstances in which an OTC State could opt out of National LEV: (1) if a manufacturer were to opt out of National LEV; or (2) if, based on a periodic equivalency determination, EPA were to find that certain circumstances had changed that would have changed EPA's initial determination that National LEV would produce emissions reductions equivalent to OTC State Section 177 Programs. The first offramp, found in 40 CFR 86.1707(e) through (j), is being finalized as proposed. The

second offramp, found in 40 CFR 86.1707(k), has been modified somewhat from the proposal, as described below in more detail. If an OTC State were to take an identified legitimate offramp from National LEV, it would no longer be bound by any commitments that it made to the program in its initial opt-in package, other than its commitment to follow the National LEV regulations to transition from National LEV to a state Section 177 Program. An OTC State that was already in violation of its National LEV commitments would not be able legitimately to opt out of National LEV based on a manufacturer's opt-out.

To opt out of National LEV, the state official that signed the commissioner's letter in that state would send EPA an opt-out notification letter. The letter would state that the OTC State was opting out of National LEV and specify the condition allowing the state to opt out. The date of the state opt-out would be the date that EPA received the opt-out letter, but there would be a two-year transition period before the state opt-out would become effective and the state could require compliance with a Section 177 Program or ZEV mandate (in a state without an existing ZEV mandate) without allowing National LEV as a compliance alternative. Whether an opt-out letter alone would itself remove

National LEV as a compliance alternative as of the effective date of the opt-out depends on how the state regulations are written. In opting into National LEV the state could structure its regulations and SIP to provide that National LEV would not be an alternative to the state's Section 177 Program if the state had opted out of National LEV pursuant to the National LEV regulations and the opt-out had become effective.

1. Manufacturer Opt-Out

As proposed, an OTC State would be able to opt out of National LEV without violating its commitment if a manufacturer opted out of National LEV under one of the identified offramps for manufacturers.⁴⁰ All parties would have made the choice to opt into National LEV with an understanding about the manufacturers and states that would be subject to the program. If those fundamental assumptions were to change, the parties to the voluntary program should have the opportunity to reevaluate their commitments and choose to opt out. Some OTC States have indicated, for example, that they believe it would not be feasible in their states to have some manufacturers subject to

⁴⁰ The condition allowing an OTC State to opt out would only arise if the initial manufacturers' opt-out were valid. See n. 37.

National LEV while others that had opted out of National LEV were subject to Section 177 Program requirements.

If a manufacturer opted out, OTC States would have a three-month period to submit an opt-out letter. The start of the three-month period would depend on the reason the manufacturer opted out. If a manufacturer were to opt out because of state action or inaction, or because of EPA's failure to consider a manufacturer's request related to effects of in-use fuels, the three-month period would start on the date EPA received the manufacturer's opt-out notification.⁴¹ For a manufacturer's opt-out based on a change to a Stable Standard, the three-month period would start on the date of EPA's finding that the opt-out was valid or the date of a final judicial ruling that a disputed opt-out was valid. If a state did not opt out within that three-month period, the opportunity to opt out based on that manufacturer action would no longer be available.

⁴¹ However, if a manufacturer were to opt out because a state failed to submit a SIP revision by the applicable deadline and the manufacturer submitted the opt-out notification within six months of the applicable deadline for the SIP revision, the manufacturer's opt-out would not be final until the end of that six-month period. That date (not the date of the manufacturer's opt-out) would start the three-month period for state opt out.

The state opt-out could not become effective until the state had provided manufacturers with the two-year lead time set forth in section 177, with the two-year lead time to start on the date that EPA received that state's opt-out letter. Manufacturers commented that for manufacturers that had not opted out of National LEV, states that have opted out should provide four, rather than two, years of lead time. As discussed above in section VI.A.1, section 177 does not require states to provide manufacturers four years of lead time from the date that manufacturers are notified that the state will no longer accept National LEV as a compliance alternative to a state Section 177 Program. Several commenters opposed providing four years of lead time under any circumstances and agreed that section 177 does not provide such lead time. Moreover, the MOUs initialled by the OTC and the manufacturers' associations provided only two model years of lead time before a state election to no longer be bound by its obligations under the MOU would become effective. Thus, EPA believes it is appropriate to finalize the proposed approach, which provides for two years of lead time before a state opt-out becomes effective.

Until the OTC State's opt-out became effective, manufacturers that had not opted out of National LEV or whose opt-outs had not yet become effective would continue to be subject to all the National LEV requirements for vehicles sold in that state. Manufacturers whose opt-outs had already become effective would not be affected by the state opt-out. Once the state opt-out became effective, all manufacturers would be subject to the state's Section 177 Program, if it had been adopted at least two years previously.⁴² As the existence of a manufacturer opt-out as the basis for the state opt-out is a simple factual determination, the rule does not provide for EPA to evaluate the validity of a state opt-out before it could become effective.

2. Periodic Equivalency Determination

EPA had proposed that an OTC State could opt out of National LEV if EPA were to change a Stable Standard in a way that made National LEV less stringent and, if the change had been known at the start of National LEV, it would have changed EPA's initial

⁴² This is true even for a manufacturer that had opted out and set an effective date for its opt-out that was later than the effective date of the state's opt-out.

determination that National LEV would produce emissions reductions at least equivalent to the adopted OTC State Section 177 Programs. In today's Final Rule, EPA is departing somewhat from the proposal. Today's rule is very similar to the proposal regarding how subsequent equivalency determinations would be made, but takes a different approach regarding when they would be made. Today's rule allows an OTC State to request an equivalency determination at any time during the state's commitment to National LEV, rather than limiting states' ability to request such a determination to those times when EPA changes a Stable Standard. This offramp for OTC States is comparable to the manufacturers' offramp if EPA makes certain types of changes to Stable Standards that make the Standards more stringent.

In section IV above, EPA discussed its determination that National LEV would produce equivalent or greater emissions reductions than the alternative of adopted OTC State Section 177 Programs. In the modeling, EPA assumed that, in the absence of National LEV, Section 177 Programs would be in place in those OTC States that currently have adopted such programs (including backstop programs) and that, in all other states (except California) Tier 1 standards would apply through MY2004 and Tier

2 standards equivalent to National LEV would apply thereafter. Today's rule allows an OTC State that is in the National LEV program to request EPA to reevaluate whether National LEV is still equivalent to the alternative approach of OTC State Section 177 Programs. Within six months of receiving the request, EPA is to conduct such a determination.

As proposed, in reevaluating equivalency, EPA would use the same model and inputs as it used in the initial equivalency determination.⁴³ EPA would modify the modeling only to reflect (1) the effect of changes in EPA regulations governing new motor vehicles and implementation of such regulations (to the extent implementation is reflected in the model), and (2) the effect of having Section 177 Programs (identical in stringency to the Section 177 Programs modeled in the initial equivalency determination) in any additional OTC States that had adopted section 177 backstop programs after the initial equivalency determination. In reevaluating equivalency, EPA believes that the focus of the evaluation should be the ongoing validity of the

⁴³ Modeling assumptions that would remain unchanged from those used in the initial equivalency determination include: assumptions related to vehicle miles traveled, MOBILE5a model inputs, inspection and maintenance programs, reformulated gasoline, and permanent migration effects.

initial decision to opt into National LEV, not whether the parties would make the same decision at the time of the reevaluation based on then-current conditions. This is consistent with the approach that the parties took to the periodic equivalency evaluation in the initialed MOUs. At the time of their opt-ins, the parties should not have anticipated that EPA would change its new motor vehicle regulations in a way that would affect one of the basic assumptions used to calculate the relative benefits of National LEV and the alternative of OTC State Section 177 Programs. Thus, it is appropriate to reevaluate the equivalency of the two approaches given such a change, and provide the OTC States an opportunity to opt out of National LEV if it is no longer equivalent to the alternative.

As proposed, the FRM provides that any equivalency reevaluation will include the effect of Section 177 Programs in any additional OTC States that adopt Section 177 Programs after the initial equivalency determination. This represents a compromise between the OTC States' and manufacturers' positions. In making the initial equivalency determination, EPA is comparing National LEV to the alternative of OTC State Section 177 Programs. See section IV. As discussed above, EPA's

determination assumes that Section 177 Program requirements would apply in those OTC States that currently have the programs (including backstop programs) in their state law or regulations and that mandatory federal standards would apply in the other OTC States. The OTC States requested that EPA take a somewhat different approach to the initial equivalency determination by assuming that Section 177 Programs would also apply in particular OTC States that are currently in the process of developing such regulations. For the initial determination, such a change in the assumption about which OTC States have LEV programs would have no effect on EPA's finding that National LEV would produce emissions reductions at least equivalent to those that would be produced by the alternative. EPA performed a sensitivity analysis for the initial equivalency determination to analyze the effects of the most optimistic assumptions regarding adoption of Section 177 Programs by OTC States, which indicated that even with those assumptions National LEV would still produce emissions reductions equivalent to or greater than that alternative. However, given the OTC States' concern, EPA believes it would be appropriate to modify the inputs to any reevaluation to reflect the then-current reality in terms of which OTC States had actually adopted Section 177 Programs. The modeling would continue to assume that all

states with Section 177 Programs would have the same requirements used in the initial equivalency modeling, as discussed above. Thus, the reevaluation would not reflect any changes in the states' legal authority under the CAA to adopt programs subsequent to their decision to opt into National LEV, but it would take into account subsequent actions taken by the OTC States based on legal authority they had at the time of the decision.

EPA does not believe it would be appropriate to include in the reevaluation of equivalency the effects of other changes in circumstances affecting emissions reductions under National LEV or the alternative, such as changes to California's LEV program. At the time of opt-in, all of the parties will be aware that circumstances might change over the period that National LEV is in effect. For example, California might modify its requirements during that time. In making the decision to opt into National LEV and choose it over the alternative for a given period of time, the parties will have to evaluate the likelihood that any of the relevant circumstances would change sufficiently to reverse their inclination to opt in. Thus, the OTC States will have to consider the likelihood that California would modify its

CAL LEV requirements and the likely effect of such a modification, and decide whether to commit to National LEV in lieu of a state Section 177 Program that could include any subsequent changes to CAL LEV. By opting in, the OTC States will have made the decision that the possibility of those benefits is outweighed by the certainty of the benefits from National LEV (if it goes into effect). The reevaluation of equivalency should not allow parties to reconsider that initial choice with the benefit of hindsight. National LEV will only come into effect if the parties to the program commit to it for a specified duration, and an EPA change to the underlying standards should not become an opportunity to undermine that basic commitment.

Several commenters disagreed with this approach, arguing that any changes California makes to its LEV program should be reflected in any future equivalency determinations, particularly since California is contemplating tightening its LEV program. EPA believes that states should take the possibility of future changes to the California LEV program into account in deciding whether to opt in. As noted above, given the uncertainties regarding changes to California's program and the much greater benefits of National LEV as compared to OTC State Section 177

Programs (based on the current CAL LEV program), EPA believes it is reasonable and prudent for states to commit to keep National LEV as a compliance alternative until MY2006. EPA recognizes that this raises the possibility that OTC States might be foregoing enforcement of a tighter California LEV program for a year or two. However, for practical or legal reasons, states often have to make regulatory choices without complete information and taking one regulatory approach often precludes changing course in midstream even if it turns out that another approach might have been better.

Although today's rule generally adopts the approach to periodic equivalency findings contained in the MOUs initialed by the OTC and the auto manufacturers' trade associations, it does differ in one respect. Whereas the MOUs provided for such findings every three years and upon an OTC State's request, today's rule provides for such findings only upon the request of an OTC State that is participating in National LEV. There might not be a need for an equivalency finding every three years. If there is a need, an OTC State can request one.

If EPA were to find that National LEV was not equivalent to OTC State Section 177 Programs, under today's rule, the OTC States would have three months to opt out, running from the date that EPA found that National LEV would no longer produce emissions reductions equivalent to those that would be produced by OTC State Section 177 Programs. If a state did not opt out within that three month period, the opportunity to opt out based on that finding would no longer be available.

Also consistent with the other state offramp, a state opt-out based on a finding of inequivalency could not become effective for model years (as defined in Subpart X) that commence prior to the date two years after the date that EPA received the state's opt-out letter. If a state took this offramp, the manufacturers' obligations would be determined the same way as described in the preceding section (when an OTC State opts out because a manufacturer opted out).

E. Lead Time Under Section 177

Sec. 86.1707's provisions discussed above incorporate and rely on EPA's interpretation of section 177's requirements

related to state adoption of the CAL LEV program. Section 177 of the Act provides the legal authority for states to adopt "standards relating to the control of emissions from new motor vehicles" and governs the timing of implementation of such requirements. It provides that a state may adopt new motor vehicle standards only if they are identical to California standards for a given model year for which EPA has granted a waiver, and the state must "adopt such standards at least two years before commencement of such model year (as determined by regulation of the Administrator)." EPA has previously adopted regulations interpreting this provision. See 40 CFR 85.2301 et seq. These regulations do not adequately address the issue of when the two-year lead time starts for backstop Section 177 Programs (i.e., a Section 177 Program that allows National LEV as a compliance alternative) after National LEV has come into effect.

Today's final regulations address the issue of when under section 177 and EPA's implementing regulations the two-year lead time period would start if, after National LEV came into effect, a state with a backstop Section 177 Program were to delete National LEV as a compliance alternative (either in violation of

its commitment to National LEV or legitimately by taking an offramp) or if a manufacturer legitimately decided to opt out of National LEV. These regulations and EPA's underlying interpretation of section 177 apply only in the context of the National LEV program, and only in the special circumstances that arise when a state has a backstop Section 177 Program that allows National LEV as a compliance alternative and National LEV has gone into effect.

The intent of the two-year lead time provision in section 177 is obvious in the context of a state deleting National LEV as a compliance alternative in violation of its commitment. If a state has a Section 177 Program (or a ZEV mandate) that allows National LEV as a compliance alternative and National LEV is in effect, and then the state changes those regulations to require compliance with the Section 177 Program or ZEV mandate (and does so in a way that violates its commitment to National LEV), then the two-year lead time required by section 177 would start to run when the revised regulations (or other state laws) were adopted. Although the Section 177 Program (or ZEV mandate) was previously on the books, it would have been a very different program because it allowed National LEV as a compliance alternative. Deleting

National LEV as a compliance alternative once National LEV is in effect is essentially the same as adopting a new Section 177 Program (or ZEV mandate), and section 177 prohibits states from enforcing a new program without providing at least two-years lead time.

The meaning of the two-year lead time provision in section 177 is ambiguous in the context of a backstop Section 177 Program (or ZEV mandate) where a state legitimately opts out of National LEV. There are at least three possible ways to approach this provision in this context. One possible approach is that the two-year lead time period starts when the state adopts the backstop Section 177 Program (or ZEV mandate). Under this interpretation, section 177 would require the state to have adopted its backstop Section 177 Program (or ZEV mandate) at least two years before the model year to which it applies. After the two-year lead time had run from the date of adoption, the state could remove National LEV as a compliance alternative and require immediate compliance with the Section 177 Program (or ZEV mandate) at any time. Another possible approach is that, if a manufacturer will need to comply with a state Section 177 Program after National LEV has come into effect, the two-year lead time

runs from the date that the manufacturer knew that it would need to comply with the state Section 177 Program rather than with National LEV. Several of the OTC States' comments strongly supported the first approach, focusing on section 177's use of the word "adopt." In addition, these commenters expressed concern that the second approach, which EPA proposed, could set a precedent for other reinterpretations to "fit unique circumstances." The comments stated that it would be inappropriate to discourage a state from availing itself of a right granted by Congress, and they stated that EPA's proposed interpretation is inconsistent with the CAA and federal district and appellate court decisions.

Nevertheless, EPA does not believe the first approach is a proper application of section 177 in the National LEV context. The two-year lead time requirement is intended to give manufacturers time to make the changes in product planning, production and distribution that are involved in switching from one motor vehicle program to another. It recognizes the practical difficulties in making large production shifts in very short time-frames. Where manufacturers have had the legal authority to comply with National LEV in lieu of the state

program, allowing states to drop National LEV as a compliance alternative with no lead time would prevent manufacturers from receiving the protection that Congress conferred on manufacturers in section 177.⁴⁴ EPA does not believe it is appropriate to interpret the statute in a manner that negates the intended purpose of the provision, and hence does not agree that the alternative interpretation is inconsistent with either the CAA or the court cases to date that have addressed the implementation of section 177. In addition, EPA is explicitly stating that this interpretation is only warranted by and is confined to the unique circumstances presented by backstop programs under National LEV, and thus EPA does not believe this interpretation will set a precedent that could be applied in inappropriate circumstances. Finally, EPA does not agree that this interpretation discourages a state from exercising a right provided by Congress. EPA does

⁴⁴ EPA is rejecting the date of state adoption of regulations as the starting date for determining whether the section 177 lead time requirement has been met only in those situations where a state has adopted a backstop Section 177 Program and National LEV has come into effect. For those states that already have backstop Section 177 Programs, if National LEV does not come into effect, the date of adoption of the state regulations is still the controlling date for determining when the two-year lead time requirement has been met. In those states, the only legal option available to manufacturers has been to comply with the state Section 177 Program. The theoretical possibility that they might not have to comply with the state requirements does not mean that they have not been given the two-year lead time required by section 177. EPA did not receive any comments disagreeing with this application of section 177.

not believe that Congress provided a state the right to accept National LEV as a compliance alternative and then impose a backstop Section 177 Program without providing any time for the manufacturers to meet the new requirements. Thus, EPA is not adopting this approach.

EPA is therefore adopting the second approach to section 177 under these limited circumstances. EPA believes this is the most appropriate way to implement section 177 in this special circumstance, as long as manufacturers are able to waive the two-year lead time requirement. Given that the failure to provide statutory lead time renders noncomplying state programs unenforceable, rather than rendering them void,⁴⁵ there should be little question that manufacturers have the ability to waive the lead time requirement if they choose. The manufacturers' comments did not question their ability to waive lead time under section 177. This approach to section 177 (including both when lead time starts and that manufacturers can waive the lead time) ensures that, in the context of National LEV and state backstop Section 177 Programs, two of Congress' purposes in adopting

⁴⁵ See American Automobile Manufacturers Ass'n v. Greenbaum, No. 93-10799-MA, slip op. at 23, 1993 WL 442946 (D. Mass. Oct. 27, 1993), aff'd., 31 F.3d 18 (1st Cir., 1994).

section 177 are met -- it protects manufacturers from having insufficient time to switch from one motor vehicle program to another, and it allows states to ensure that they can achieve the extra emissions reductions from motor vehicles contemplated by section 177.

However, the OTC States indicated that even if section 177 did not require the amount of lead time incorporated in the National LEV regulations, the OTC States were willing to agree to provide that lead time. Thus, as an alternative legal theory independent of the proper interpretation or application of section 177, by opting into National LEV, the OTC States agree to provide manufacturers with the lead time provided in the National LEV final regulations if a state deletes National LEV as a compliance alternative (including legitimately opting out of National LEV) or a manufacturer legitimately opts out of National LEV.

EPA's interpretation of section 177 is reflected in today's final regulations 40 CFR 86.1707 regarding what requirements would apply in the unlikely event that an OTC State were to break its commitment to National LEV or that a manufacturer or an OTC

State were to opt out of National LEV. For example, if a state with a backstop Section 177 Program were to delete National LEV as a compliance alternative after National LEV had come into effect, the state would have changed the manufacturers' regulatory obligations and the manufacturers would be entitled to two-years lead time running from the date of the state action purporting to change the manufacturers' regulatory obligation. By opting into National LEV, manufacturers would not be agreeing to waive the lead time required under section 177 in a circumstance where a state broke its commitment to National LEV and deleted National LEV as a compliance alternative. Thus the manufacturer would get the full two-years lead time set by section 177.

Another example demonstrates how the waiver provision modifies the two-year lead time. If an offramp were triggered and a manufacturer were to decide to opt out of National LEV and then set an effective date one year from the time of its opt out, under today's regulations, upon the effective date of the opt out, the manufacturer would be required to comply with Section 177 Programs (except for backstop ZEV mandates) in any state that had not broken its commitment to National LEV. To the extent

that this provides the manufacturer with less than two-years lead time, the manufacturer will have waived the lead time provision by opting into National LEV combined with setting the effective date for its opt-out. For backstop ZEV mandates, however, manufacturers would not have to comply with the ZEV mandate until the two-year lead time period had passed (which would start running from the date of the manufacturer's opt-out) because in opting into National LEV manufacturers are not waiving the two-year lead time with respect to ZEV mandates. Additionally, by opting in, the OTC States are agreeing to provide this two-years of lead time regardless of the applicability of section 177.

A third possible approach to section 177's two-year lead time requirement provides an alternative basis for today's rule. Under this approach, the lead time requirement differs depending upon the factual setting. In some instances, measuring lead time from the date of state adoption of a backstop Section 177 Program still provides manufacturers adequate protection and thereby implements both the clear language of the statute and the clear intent of the provision. For example, in opting into National LEV, a manufacturer is choosing to accept a compliance alternative that involves some risk of a rapid change in the

manufacturer's regulatory obligations if the manufacturer opts out. However, as provided here, the program that the manufacturer is opting into provides substantial protection for manufacturers with regard to the applicability of backstop Section 177 Programs upon an opt-out. Because the manufacturer controls the effective date of the opt-out and the manufacturer would not be subject to a backstop Section 177 Program until its opt-out became effective, the manufacturer can ensure that it does not become subject to a Section 177 Program without whatever lead time it views as adequate. In this situation, the statutory intent to ensure that manufacturers have lead time is met by providing that a state can immediately implement a Section 177 Program for any manufacturer whose opt-out from National LEV is effective, if the backstop Section 177 Program was adopted at least two years previously. Thus, for situations where the manufacturer controls the date that it becomes subject to the Section 177 Program, section 177 would start the two- year lead time period from the date of state adoption of the backstop Section 177 Program.

The other type of situation is one where the state takes an action imposing requirements on a manufacturer under section 177

and the manufacturer has no control over the timing of those requirements. For example, a state might remove National LEV as a compliance alternative from its state regulations, leaving only the Section 177 Program requirements in place, which the state had adopted at least two years earlier. In that instance, making the manufacturer immediately subject to the section 177 requirements would be contrary both to the purposes of the section 177 lead time requirement and to the intended operation of National LEV. By opting into National LEV the manufacturer did not accept the possibility that a state might commit to National LEV and then violate that commitment. Nor is there any way for the manufacturer to protect itself against an immediate application of the section 177 requirements by the violating state, except not to opt into National LEV at all. Under the circumstances where the state controls the timing of the applicability of the Section 177 Program, the section 177 lead time provisions would be implemented by requiring two years of lead time from the date that the manufacturer knew it would become subject to the state's Section 177 Program without the option of complying with National LEV as an alternative.

Today's interpretation of section 177 applies only in the unique situation presented by National LEV -- where states and manufacturers are both voluntarily opting into the national program. It does not necessarily provide any guidance for other circumstances.

**VII. National LEV Will Produce Creditable Emissions Reductions
Because It Is Enforceable**

In the Final Framework Rule, EPA noted that National LEV must be an enforceable program to grant states credits for SIP purposes for emission reductions from National LEV vehicles. As discussed in the Final Framework Rule, there are two aspects to ensuring that National LEV is enforceable. See 62 FR 31225 (June 6, 1997). First, the National LEV program emissions standards and requirements must be enforceable against those manufacturers that have opted into the program and are operating under its provisions. In the Final Framework Rule, EPA found that the National LEV program meets this aspect of enforceability. Second, the National LEV program itself must be sufficiently stable to make it likely to achieve the expected emissions reductions. To achieve the expected emissions reductions from National LEV, the offramps must not be triggered and the program must remain in effect for its expected lifetime. EPA also found in the Final Framework Rule that the program elements finalized in that rule would contribute to a stable National LEV program. In today's notice, EPA finds that the complete National LEV program as contained in today's Final Rule and the Final

Framework Rule will be sufficiently stable to make the program enforceable and hence creditable for SIP purposes.

The only circumstances that would allow the National LEV program to terminate prematurely would be an OTC State's failure to meet the commitments it makes regarding adoption of motor vehicle programs under section 177 of the Act, certain EPA changes to Stable Standards, an EPA determination that National LEV would no longer produce emission reductions equivalent to or greater than OTC State Section 177 Programs, or certain EPA actions or inactions related to in-use fuels.⁴⁶ The Final Framework Rule described the basis for EPA's belief that the Agency is unlikely to change any of the Stable Standards in a manner that would give the auto manufacturers the right to opt out of National LEV.⁴⁷ Here EPA finds that National LEV is

⁴⁶ OTC States could also opt out if a manufacturer opted out, and manufacturers could opt out if either another manufacturer or an OTC State opted out. Yet for purposes of evaluating the stability of the National LEV program, EPA need not consider these secondary opt-out opportunities because they would only arise if an OTC State or EPA had already triggered another offramp.

⁴⁷ The list of Non-Core Stable Standards which previously referenced the federal Tier 1 Supplemental Federal Test Procedures (SFTP) requirements has been updated to reflect the SFTP provisions in today's rule. This does not affect EPA's rationale for finding the National LEV program stable, as discussed in the Final Framework Rule.

Due to the change in the duration of the auto's commitment (discussed in section V.A. above), EPA has reworded 40 CFR 86.1705(d)(10). The wording changes do not change the intent of the provision, however, which is to clarify that EPA's promulgation of Tier

stable because EPA believes that an OTC State is unlikely to fail to meet its commitments to National LEV, National LEV is likely to continue to produce equivalent (or better) emission reductions than OTC State Section 177 Programs, and EPA is unlikely to act in a manner that would allow manufacturers to opt out based on the proposed offramps related to in-use fuels.

A. OTC States Will Keep Their Commitments to National LEV

As discussed above, there are four ways in which an OTC State could violate its commitments to National LEV and allow the manufacturers to opt out of the program: (1) attempt to have a state Section 177 Program (including ZEV mandates, except in states with existing ZEV mandates) that was in effect and that did not allow National LEV as a compliance alternative for the duration of the state's commitment to National LEV; (2) in states without existing ZEV mandates, adopt a backstop ZEV mandate that would come into effect before the end of the state's commitment to National LEV, even if the state allows National LEV as a compliance alternative to the ZEV mandate for the duration of the state's commitment to National LEV; (3) fail to submit a National

² standards effective in MY2004 or later does not allow manufacturers to opt out of National LEV.

LEV SIP revision to EPA by the specified date; or (4) fail to submit an adequate National LEV SIP revision. EPA is confident that the OTC States will keep all of their commitments to National LEV for the duration of the program. The OTC States' practical ability to meet their commitments, the fact that the OTC States would have made commitments to the program through both practically binding instruments and legally binding instruments, and the effects of a violation of their commitments, all combine to support a finding that the states are unlikely to trigger an offramp for manufacturers.

First, the OTC States should have no practical difficulty carrying out their commitments. After the OTC States have opted into National LEV and the program has come into effect, the states will need to adopt regulations (or modify existing regulations) to commit to accept National LEV as a compliance alternative for the specified duration and to submit those regulations to EPA as a SIP revision within one year (or for a few states, eighteen months) of the date of EPA's finding that National LEV is in effect. Based on discussions with each of the OTC States on the time needed to complete a rulemaking in that state and the absence of any comments to the contrary, EPA

believes that these are realistic deadlines for state action, which would provide sufficient time for the states to complete their regulatory processes and submit their SIP revisions. (See docket no. A-95-26 for memo on these discussions.) See the SNPRM (60 FR 44754 at 44775) for further discussion of how the timing and political significance of the initial opt-ins enhances the likelihood that the states will submit their SIP revisions in a timely manner.

Once EPA has approved a National LEV SIP revision, the state will be legally bound to uphold its commitment. As discussed above in section V.C.4, an approved SIP provision committing a state to accept National LEV as a compliance alternative to a state Section 177 Program or ZEV mandate would preempt a conflicting state law that required manufacturers to comply with a state Section 177 Program or ZEV mandate without allowing National LEV as a compliance alternative. Until EPA approved a subsequent SIP revision, manufacturers could enforce the initial SIP commitment in federal court. Furthermore, EPA would be obligated to disapprove a subsequent SIP revision that violated a state's commitment to allow National LEV as a compliance alternative for the specified period if it would interfere with

other states' ability to attain the NAAQS. Other states are likely to have reasonably relied upon the emissions reductions from National LEV for attainment and maintenance, and the effect of approving the new SIP revision would very likely be to deprive the states of those reductions.

For states without existing ZEV mandates, the statement of intent not to adopt a backstop ZEV mandate effective during the period of the state's commitment to National LEV need not be incorporated as a legally enforceable element of the state's SIP revision. However, there are still strong practical disincentives for a state to adopt such a provision, as it would allow the manufacturers to opt out of National LEV with all of the negative environmental consequences that doing so would entail, as discussed below. In addition, OTC States would have very little incentive to adopt a backstop ZEV mandate effective during the period of the state's commitment to National LEV because such a backstop would offer a state very little protection against a manufacturer's opt-out from National LEV. A backstop state Section 177 Program, which would require compliance with the fleet average NMOG provisions of the CAL LEV program, would apply to any manufacturer that had opted out of

National LEV immediately upon such a manufacturer's opt-out becoming effective. Thus, adoption of a backstop state Section 177 Program at least two years prior to the effective date of a manufacturer's opt-out would allow the program to apply as soon as the manufacturer was no longer subject to the National LEV requirements, without the state providing an additional two years of lead time. However, in their commitments to National LEV, OTC States would commit to, and section 177 would require, that they provide manufacturers at least two years of lead time from the date of the manufacturer's opt-out prior to any ZEV mandate becoming effective, regardless of the effective date of the manufacturer's opt-out. Thus, the only potential benefit from adoption of a backstop ZEV mandate effective during the period of the state's commitment to National LEV would be to avoid the additional delay in the applicability of the mandate that would be caused by the time required for adoption, but not to avoid the delay caused by providing the required lead time. Given that the state commitments to National LEV extend until MY2006 at the latest, it is highly unlikely that a manufacturer would opt out of National LEV within a timeframe in which such a delay could have any effect. With virtually no benefit to be gained from such an action, combined with the fact that it would allow

manufacturers to opt out of National LEV, EPA believes it is highly unlikely that any state without an existing ZEV mandate would adopt a backstop ZEV mandate effective during the period of the state's commitment to National LEV.

Even if the state were not bound to its commitment legally, the practical effects of not meeting its commitment provide an independent basis for finding that National LEV is stable. The structure of the opt-out provisions establishes substantial disincentives for OTC States to violate their commitments, given the requirements that would apply to vehicles sold in the violating state, the opportunity it would provide for manufacturers to opt out of National LEV, and the consequences of such an opt-out. As discussed in detail above in section VI.A.1, for an OTC State that has violated its commitment by attempting to have a state Section 177 Program that does not allow National LEV as a compliance alternative, the consequences in that violating state would be that under National LEV all manufacturers would be able to comply with Tier 1 tailpipe standards and not count those vehicles in the fleet NMOG average. Thus, as provided in 40 CFR 86.1707(e)(2), the violating state would receive SIP credits based on this reduced compliance

obligation. Similarly, if a state failed to submit its SIP revision committing to National LEV, submitted an inadequate SIP revision, or adopted a backstop ZEV mandate effective during the period of the state's commitment to National LEV, the same reduced tailpipe standard requirements would apply in the violating state for any manufacturer that opted out of National LEV until the manufacturer's opt-out became effective. Thus, the violating state would (or is likely to, depending upon the type of violation) receive higher emitting vehicles and commensurately fewer SIP credits. (See section VI.A above for a discussion of timing of requirements applicable to manufacturers under various options.)

In addition, states will be further discouraged from violating their commitments because a state violation would give manufacturers the opportunity and reason to opt out of National LEV, and manufacturer opt-outs would hurt air quality in all states. If National LEV is in effect, a substantial number of the OTC States and probably all of the 37 States are unlikely to have backstop Section 177 Programs in place. States without backstop Section 177 Programs would not be able to implement a state Section 177 Program for over two years because of the time

needed to adopt a program and the two years of lead time required under section 177. During this period, manufacturers that had opted out of National LEV would have to comply only with federal Tier 1 standards for sales of new motor vehicles in those states without backstop programs. Also, sales of these Tier 1 vehicles would further increase vehicle emissions in both the violating state and states with backstop Section 177 Programs as well, through migration of dirtier Tier 1 vehicles and transport of air pollution from states receiving Tier 1 vehicles.

EPA is confident that the combination of the feasibility of compliance with the OTC State commitments, the practical and legal constraints on a state breaking its commitment, and the environmental and SIP-related consequences of a state breaking its commitment make it highly unlikely that an OTC State that has opted into National LEV will violate any of its commitments to the program.

B. It Is Unlikely That National LEV Would Be Found Not To Produce Emission Reductions Equivalent To OTC State Section 177 Programs

As discussed in section VI.D.2 above, today's Final Rule allows OTC States to request that EPA do a periodic equivalency finding to determine whether modifications to EPA new motor vehicle regulations (or their implementation, to the extent that is reflected in the modeling) will reverse EPA's finding that National LEV is equivalent to (or better than) OTC State Section 177 Programs. EPA believes it is unlikely to change the result of its equivalency determination as a result of the periodic determinations. The primary, and perhaps only, possible circumstance that could cause a change in the equivalency finding would be EPA modifying a new motor vehicle regulation in a way that makes it significantly less stringent.⁴⁸ It is highly unlikely that this would occur. Given the greater emissions reductions that would be produced by National LEV compared to the alternative of OTC State Section 177 Programs (discussed above in section IV), only a significant weakening of an EPA regulation would be likely to change EPA's determination that National LEV would produce emissions reductions at least equivalent to the alternative. Such a weakening of an EPA new motor vehicle regulation would be contrary to EPA's mission of environmental

⁴⁸ The OTC States have suggested that changes in implementation of EPA new motor vehicle regulations might also affect the equivalency determination. EPA is not aware that the model reflects this type of implementation of EPA regulations.

protection and would jeopardize the National LEV program, which the Agency strongly supports. EPA has invested significant resources in facilitating the negotiations between the parties and developing the regulatory framework for the National LEV program, and the Agency would not lightly jeopardize the results of this effort. The discussion in the SNPRM as to why EPA would not make a Stable Standard less stringent in a way that would change the equivalency determination applies to changes to all new motor vehicle standards. See Section VII.B of the SNPRM, 62 FR 44776.

*C. EPA Is Unlikely to Fail to Consider In-Use Fuels Issues
Upon a Manufacturer's Request*

EPA also believes that the Agency is unlikely to act or fail to act in a manner that would allow the manufacturers to opt out of National LEV based on the offramp related to in-use fuels. As discussed above, today's Final Rule provides autos with an offramp if EPA fails to consider certain manufacturer requests regarding the potential effects of fuel sulfur levels on the emission performance of National LEV vehicles.

Given the nature of the offramp, EPA believes it is highly unlikely that it would ever be triggered. This offramp does not guarantee manufacturers any particular substantive outcome to their requests, nor does it provide manufacturers any additional rights (beyond what rights, if any, are provided otherwise under the Clean Air Act and the Administrative Procedure Act) to a particular substantive outcome or to have the substantive outcome reviewed by a court. Rather, this offramp formalizes the process EPA previously committed to follow in addressing potential problems related to the higher sulfur levels in fuel supplied nationally (including in the OTC States) than in California. If ongoing additional investigations indicate problems that need to be addressed, EPA will need to reassess the fuel sulfur issue in both the National LEV context and other EPA motor vehicle emission control programs, as discussed above in section VI.C. Given EPA's recognition of the manufacturers' concerns and the ongoing process for resolving them outside of the National LEV context, EPA believes it is highly unlikely that the Agency would fail to respond to a manufacturer's request to address any problems that are identified or decline to consider any reasonable solutions. In addition, EPA would have all the same incentives here to avoid taking any action that would jeopardize

the benefits from the National LEV program, as discussed above for changes to new motor vehicle requirements that could result in a change to the equivalency finding.

VIII. Additional Provisions

A. *Early Reduction Credits for Northeast Trading Region*

As was proposed, under today's rule manufacturers may generate early reduction credits for sales of vehicles in the Northeast Trading Region (NTR) in MY1997 and MY1998, prior to the start of National LEV in MY1999. 40 CFR 86.1710(c)(8). No commenters opposed early reduction credits. The ability to generate these credits will provide manufacturers added flexibility as well as create an incentive for them to introduce cleaner vehicles into this region before MY1999, thus providing air quality benefits sooner.

Today's rule takes the same approach to these early reduction credits in the NTR as the Final Framework Rule took to the early reduction credits earned in the 37 States before MY2001.40 CFR 86.1710(c)(7). Since the credits cannot be used or traded before MY1999, EPA is proposing to treat any credits earned in the NTR before MY1999 as if earned in MY1999 for annual discounting purposes. This is consistent with EPA's approach to early reduction credits in the 37 States and with California's

approach to allowing early generation of credits. These credits will be subject to the normal discount rate starting with MY1999, meaning they will retain their full value for MY2000 and will be discounted from then on. In addition, consistent with the approach to early reduction credits in the 37 States, early reduction credits in the NTR will be subject to a one-time ten percent discount applied in MY1999, as discussed below.

Manufacturers will be able to generate early reduction credits in the NTR by supplying vehicles with lower emissions than otherwise required during this time period in any OTC State that is in National LEV for MY1999 and later. Specifically, manufacturers would be able to generate credits for sales of TLEVs, LEVs, ULEVs and ZEVs sold in the OTR outside New York and Massachusetts in MY1997, and outside of New York, Massachusetts and Connecticut in MY1998, to the extent that such vehicles can be sold under EPA's cross-border sales policy.⁴⁹ Additionally, manufacturers could generate credits for sales of vehicles

⁴⁹ See docket no. A-95-26, IV-A-03 for EPA's cross border sales policy. The current cross border sales policy allows sales of vehicles certified to California's emission standards in states contiguous to, or within 50 miles of, California and states that have a program adopted under section 177 in place. Thus, in the OTR for MY1997 and MY1998, manufacturers are allowed to sell California vehicles in Maine, New Hampshire, Vermont, Massachusetts, New York, Rhode Island, New Jersey, Pennsylvania, and Connecticut.

achieving a lower fleet average NMOG value than required under the state Section 177 Programs in New York and Massachusetts in MY1997, and in New York, Massachusetts and Connecticut in MY1998, assuming that those states commit to National LEV for MY1999 and later. Manufacturers would not be able to take credit for vehicles sold to meet the applicable NMOG averages in New York, Massachusetts and Connecticut in MY1997 and MY1998, as that would be using vehicles required independent of National LEV to reduce the stringency of the National LEV requirements, and hence would be "double-counting."

EPA believes that there are substantial benefits to early introductions of cleaner vehicles. However, the Final Framework Rule included a discount for early reduction credits in the 37 States in part to address a concern that giving full, undiscounted credits for all early reductions may generate some windfall credits. See 62 FR 31214-31215. "Windfall" credits are credits given for emission reductions the manufacturer would have made even in the absence of an early credit program. The purpose of giving credits for early reductions is to encourage manufacturers to make reductions that they would not have made but for the credit program. Because credits can be used to

offset higher emissions in later years, if manufacturers are given credits for early reductions they would have made even without a credit program, an early credit provision could decrease the environmental benefits of the program.

Although EPA took comment on the potential for windfall credits in the NTR and in the 37 State region and whether ten percent is an appropriate discount factor for each region, EPA decided that circumstances had not changed since the Final Framework Rule in a way that would justify reducing the discount factor below 10%. To the contrary, Honda's introduction nationally of LEV technology vehicles (albeit certified to Tier 1 levels) confirmed that National LEV and the ability to earn early reduction credits are not the only reasons manufacturers would move to cleaner vehicle technology.

B. Calculation of Compliance with Fleet Average NMOG Standards

Today's final rule contains provisions for the calculation of compliance with the National LEV fleet NMOG average in the event that fewer than 49 states are participating in the program.

These provisions are necessary even though EPA continues to believe that National LEV should be a 49-state program and the auto manufacturers have repeatedly stated that all thirteen OTC States must opt in for National LEV to come into effect. If the auto manufacturers and the relevant OTC States are interested in National LEV proceeding even with less than 49 states participating, EPA would want National LEV to proceed. Additionally, after the program is found in effect, it is possible that National LEV would continue even if one or more OTC States opt out at a future time. Therefore, National LEV requirements must provide for the possibility of having less than 49 states in the program, which will necessitate changes in the Final Framework Rule's provisions for determining compliance with the fleet average NMOG standards.

In the SNPRM, EPA proposed to modify the Final Framework Rule so that the fleet average NMOG calculation would not include vehicle sales in any OTC State that legitimately opts out once that opt-out becomes effective.⁵⁰ This would help ensure that states that opt into National LEV will receive the anticipated

⁵⁰ EPA's treatment of vehicle sales in OTC States that break their commitments is addressed in the regulatory provisions and preamble discussion of manufacturer and OTC State offramps. See section VI above and 40 CFR 86.1707.

emissions benefits as long as they and the auto manufacturers participate in National LEV. The opposite approach (i.e., including all vehicle sales in any OTC States that are not participating in National LEV) would concentrate cleaner cars in those OTC States with state Section 177 Programs at the expense (environmentally) of OTC States committed to National LEV. EPA is finalizing the program to have manufacturers not include vehicles sold in a state that opts out of the program in their fleet average NMOG compliance calculations for the Northeast Trading Region (NTR) or All States Trading Region (ASTR). This action provides the maximum emission benefits to the states participating in the National LEV program. Additionally, vehicles sold in an OTC State that was not participating in National LEV will be included in the fleet average NMOG compliance calculations for that state, and it would be inequitable to count those vehicles in compliance calculations for the National LEV program as well.

EPA also took comment on whether to count in a manufacturer's fleet average NMOG calculation those California-certified vehicles that are sold under EPA's Cross Border Sales (CBS) policy in states that are participating in National LEV. A

National LEV program consisting of less than all of the OTC States would necessitate the continuation of EPA's CBS policy for those manufacturers producing vehicles certified separately to Federal and California standards. This policy allows manufacturers to introduce into commerce California-certified vehicles in states that are contiguous to California or other states that have adopted the Section 177 Program. The policy was designed to alleviate the burden on dealerships located in border regions of states with a Section 177 Program from having to stock, service, and sell two types of vehicles: those meeting the California emission requirements and those meeting the Federal emission requirements. If a state were not participating in National LEV and instead had a Section 177 Program in effect, under the CBS policy manufacturers would be allowed to sell California-certified vehicles in National LEV states bordering the non-participating state. The necessity of continuing the Cross-Border Sales policy raises the issue of how to count such California-certified vehicles sold in those contiguous states in calculating the manufacturer's compliance with its National LEV fleet average NMOG requirement.

EPA has decided to allow manufacturers to include all National LEV vehicles and California-certified vehicles sold in the NTR in MY1999 and MY2000 (including California Tier 1 vehicles) in their fleet average NMOG compliance calculations for the NTR in MY1999 and MY2000 (except for any vehicles sold in an OTC State that has not opted in or that otherwise has its own Section 177 Program). If all these California-certified vehicles were not included in the compliance calculation, a manufacturer could detrimentally affect its compliance with the fleet average NMOG standards in the NTR by selling higher-emitting California-certified vehicles, which would not be included in its NTR compliance calculation nor in any calculation done to show compliance with a state Section 177 Program. These vehicles would decrease the size of the manufacturer's fleet in the NTR and allow the manufacturer to demonstrate compliance with applicable fleet average NMOG standards using a smaller fleet size than was actually sold in the NTR.

EPA has also decided to allow manufacturers to count only vehicles certified to federal standards in the fleet average NMOG calculation for MY2001 and later. No California-certified vehicles sold in National LEV states will count in a

manufacturer's fleet average NMOG compliance calculation after MY2000. Given the nationwide trading region that will go into effect in MY2001, it becomes much more difficult for a manufacturer to artificially decrease the size of its National LEV fleet and thereby artificially inflate its NLEV NMOG fleet average through sales of California-certified vehicles. The much larger number of vehicles included in the ASTR means that any sales of California vehicles in the NTR under the CBS policy will not have a generally noticeable effect on the calculated fleet averages in the ASTR. California-certified vehicles sold in the NTR after MY2000 will also likely be LEVs and ULEVs, as discussed in sections IX and VIII.E, so there is even less likelihood of a detrimental environmental impact from the sale of California-certified vehicles in the NTR. The auto manufacturers' comments supported not including California-certified vehicles in their fleet average NMOG compliance calculations after MY2000.

C. Certification of Tier 1 Vehicles in a Violating State

If an OTC State violates its commitment to National LEV, in some instances manufacturers will have the option of supplying vehicles meeting only the Tier 1 emission standards in the

violating state. To exercise this option, manufacturers could sell different vehicles (i.e., Tier 1 vehicles) to the violating OTC State than they are selling to the other states (i.e., TLEVs, LEVs, ULEVs and ZEVs). Alternatively, manufacturers could sell the same vehicles to all states, but have a label that indicates that vehicles sold in the violating OTC State are only certified to Tier 1 levels. Such vehicles sold in the violating OTC State would have Tier 1 tailpipe standards for their compliance levels (which would govern recall and warranty actions and SIP credits), but would have TLEV, LEV, ULEV or ZEV tailpipe standards for their compliance levels when sold in other states covered by the National LEV program.

It is possible that a manufacturer could begin vehicle certification for a given model year before learning that it is only required to sell Tier 1 vehicles in a given state. In such a situation, EPA will allow a manufacturer to change the compliance levels of its vehicles sold in a violating OTC State through the submission of running changes to EPA. A running change is a mechanism manufacturers use to obtain approval from EPA for modifications or additions to vehicles or engines that have already been certified by EPA but are still in production.

By allowing a manufacturer to change the compliance levels of its vehicles through a running change that applies only to vehicles sold in a violating OTC State, manufacturers will have a procedure to respond in a timely fashion to a state breaking its commitment, which will provide a real disincentive for an OTC State to break its commitment.

Manufacturers currently use running changes in the federal certification process to obtain EPA approval of a change in a specified vehicle configuration or an addition of a vehicle or engine to an approved engine family that is still in production.⁵¹ A manufacturer may notify the Administrator in advance of or concurrent with making the addition or change. The manufacturer must demonstrate to EPA that all vehicles or engines affected by the change will continue to meet the applicable emission standards. This demonstration can be based on an engineering evaluation and testing if the manufacturer determines such testing is necessary. The Administrator may require that additional emission testing be performed if the manufacturer's determination is not supported by the data included in its running change application. EPA may disapprove a running change

⁵¹ See 40 CFR 86.079-32, 86.079-33, and 86.082-34.

request, which could then require manufacturers to remedy vehicles or engines produced under the request.

EPA will exercise its current authority to allow manufacturers to use a running change to modify quickly the compliance level of their National LEV vehicles to Tier 1 tailpipe standards when the National LEV regulations set the only applicable tailpipe standards at Tier 1 levels in a particular state. Such running changes will reflect only the change in emission standards the vehicles are required to meet. After such running change has been made, vehicles sold in a state for which Tier 1 standards are applicable will be treated as Tier 1 vehicles for purposes of federal enforcement requirements and warranty limits and would not count in the manufacturers' NMOG fleet average.

If a manufacturer wished to sell vehicles with Tier 1 compliance levels in a violating OTC State and more stringent compliance levels in other states, it would be required to modify its certification application to reflect the change and install a modified Vehicle Emission Control Information (VECI) label. The label would state that the vehicle complies with TLEV, LEV, ULEV

or ZEV standards (whichever is applicable), but if such vehicle is sold in the specified violating OTC State, such vehicle is certified to Tier 1 tailpipe standards. The modified VECI label will highlight the distinction in vehicle compliance levels to consumers and the general public.⁵² EPA believes that running changes for this particular situation may be allowed by applying good engineering judgment, rather than additional emission testing, since a vehicle certified to National LEV TLEV, LEV, ULEV, or ZEV standards should also meet Federal Tier 1 standards. In the instance where an engineering evaluation is judged to be insufficient to support a change, EPA will require additional data.

Vehicles complying only with Tier 1 tailpipe standards and sold in an OTC State that has violated its National LEV commitment will be treated as Tier 1 vehicles in that state for purposes of demonstrating compliance with federal requirements

⁵² Such a running change would not have a retroactive effect. Any vehicle sold as a TLEV, LEV, ULEV or ZEV (i.e., any vehicle without a label that said Tier 1 was the applicable standard for sales in the relevant state at the time of the sale) would still be subject to warranty and recall for the tailpipe standards applicable to that category. EPA believes it would be unacceptable for a consumer who purchases a LEV that, at the time of sale in that state, is being sold as a vehicle certified to LEV standards for that state to find out later that the vehicle has mysteriously been converted to a Tier 1 vehicle.

and SIP credits. These vehicles will be held only to the Tier 1 tailpipe standards for purposes of recall liability in that state. For example, a National LEV vehicle certified to LEV standards but sold as a Tier 1 vehicle in a violating state would not be subject to recall action in the violating state if the problem causing the recall did not cause the vehicle to exceed the Tier 1 standards.⁵³

D. Provisions Relating to Changes to Stable Standards

The Final Framework Rule provided that, with certain exceptions, manufacturers would be able to opt out of National LEV if EPA changed a motor vehicle requirement that it had

⁵³ EPA is considering making significant changes to its existing federal compliance program, currently targeted to begin with MY2000 (these changes are referred to as CAP 2000, or Compliance Assurance Program 2000). While CAP 2000 is still pre-proposal, EPA has established a docket (A-96-50), which contains information on the concepts currently being considered. Once promulgated, CAP 2000 may have some potential ramifications for quickly changing certification designations for National LEV vehicles sold in an OTC State that had violated its National LEV commitment. In particular, EPA is considering significantly streamlining its current certification program and requiring manufacturers to perform an in-use verification testing program to demonstrate that the streamlined certification procedures are capable of predicting in-use compliance. This program would apply to all federally certified vehicles, including Tier 1 vehicles. Thus, CAP 2000 could also possibly apply to any National LEV vehicles that were only required to comply with Tier 1 tailpipe standards under the proposal outlined above.

designated a "Stable Standard." The Stable Standards are divided into two categories: Core Stable Standards and Non-Core Stable Standards. Core Stable Standards generally are the National LEV standards that EPA could not impose absent the consent of the manufacturers. Non-Core Stable Standards generally are other federal motor vehicle standards that EPA does not anticipate changing for the duration of National LEV. For both Core and Non-Core Stable Standards, EPA can make changes to which manufacturers do not object. For Non-Core Stable Standards, EPA can also make changes that do not increase the stringency of the standard or that harmonize the standard with the comparable California standard. EPA can make other changes to any of the Stable Standards, but such changes would allow the manufacturers to opt out of National LEV. See the Final Framework Rule for more detail on the specific Stable Standards and the offramp for manufacturers associated with changes to the Stable Standards (62 FR 31202-31207).

As proposed in the SNPRM, EPA is making a few minor changes to the provisions for opt-outs based on a change to a Stable Standard. See 40 CFR 86.1707(d). Under the Final Framework Rule, EPA had an opportunity to prevent an opt-out based on a change to

a Stable Standard from coming into effect by withdrawing the change to the Stable Standard before the effective date of the opt-out. To give EPA sufficient time to withdraw the change and prevent the opt-out, under the Final Framework Rule, such an opt-out could not become effective until the model year named for the second calendar year following the calendar year in which the manufacturer opted out.

As proposed in the SNPRM, this Final Rule deletes the provisions that allowed the Agency the ability to prevent an opt-out by withdrawing a change that had allowed manufacturers to opt out. Today's rule also sets the earliest effective date of an opt-out based on a change to a Core Stable Standard to be the same as the earliest effective date of an opt-out based on a violation of an OTC State commitment to National LEV. Thus, an opt-out based on an EPA change to a Core Stable Standard or an OTC State violation of its commitment to National LEV could become effective beginning in the "next model year" after the manufacturer opts out.⁵⁴ See section VI.A above for further

⁵⁴ The "next model year" is the model year named for the calendar year following the calendar year in which EPA received the opt-out notification. For example, if EPA received the opt-out in 2000, the "next model year" would be MY2001.

discussion of the effective date of opt-outs based on an OTC State violation of its commitment to National LEV.

EPA does not believe that this change will adversely affect the stability of the National LEV program. For the reasons discussed in the SNPRM (60 FR 44776), EPA is highly unlikely to make any change to a Stable Standard that may allow the manufacturers to opt out. EPA received no comments opposing this proposed change. See the SNPRM section VIII.D for additional discussion of the reasons why EPA believes this change is appropriate.

In the Final Framework Rule, EPA stated that, if a manufacturer were to take an offramp because EPA changed a Stable Standard, the applicable state or federal standards would apply. At that time, EPA did not discuss in detail the timing for when state or federal standards would apply. As proposed in the SNPRM (60 FR 44779), today's rule provides that, if a manufacturer validly opted out of National LEV based on an EPA change to a Stable Standard, once the manufacturer's opt-out was effective, the manufacturer's obligations would be determined in the same manner as if the manufacturer had opted out because an OTC State

failed to submit its National LEV SIP revision on time (except that no state could be treated as a violating state). As of the effective date of its opt-out, the manufacturer would be subject to any backstop Section 177 Programs for which the two-year lead time requirement of section 177 had been met (running from the date the state adopted the backstop program), and would be subject to Tier 1 requirements in states without such programs. Manufacturers would be subject to backstop ZEV mandates for model years (as defined in Part 85, Subpart X) commencing two years after the date of EPA's receipt of the opt-out notification. To the extent that these regulations would provide a manufacturer with less than the two-year lead time set forth in section 177, the manufacturer waives that protection by opting into National LEV and then setting an effective date in its opt-out notification that provides for less than two-years lead time. To the extent these regulations would provide a manufacturer with more time than required by section 177, by opting into National LEV the OTC States commit to provide the lead time set forth in the National LEV regulations.

E. Nationwide Trading Region

The National LEV program, as set forth in the Final Framework Rule, required manufacturers to determine compliance with the fleet average NMOG standards for the two classes of National LEV vehicles in two separate trading regions: the OTC States and the 37 States making up the rest of the country (except California). In the SNPRM, EPA proposed to remove the requirement for two trading regions for MY2001 and later model years and instead establish a nationwide trading region. EPA cited the elimination of the legal requirement for National LEV to provide equivalent emission reductions to the OTC LEV program and the change in program start dates for both National LEV and OTC State Section 177 Programs as the major reasons for it to reconsider the necessity of separate trading regions. See 62 FR 44779-80. In today's rule in 40 CFR 86.1710, EPA is establishing a nationwide trading region which manufacturers will use to demonstrate compliance with National LEV standards in MY2001 and later.

It is important that the emissions reductions expected from National LEV in the OTR are actually achieved. Various aspects of the program, such as the periodic equivalency determination and the separate trading regions, were designed to ensure the

expected quantity of emission reductions in the OTR. However, EPA believes that a nationwide trading region will not detrimentally affect the environmental benefits of National LEV in the OTR. EPA has received no data showing significantly different vehicle model sales in different regions of the country and has no reason to expect that manufacturers' compliance with a nationwide trading region will lead to greater numbers of higher-emitting vehicles in the OTR.

Even if vehicle model sales levels were significantly different in various regions of the country, a discrepancy between the emissions produced by the fleets sold in the OTR and outside the OTR would only be possible if a manufacturer's fleet was made up of a number of engine families certified to Tier 1, TLEV, and LEV standards. After MY2000, a manufacturer's fleet would have to include Tier 1 vehicles and TLEVs, as well as LEVs and ULEVs, for there to be even a possibility of introducing a greater percentage of dirtier vehicles in the OTR than in the rest of the country. As noted in the SNPRM, EPA does not believe significant numbers of Tier 1 vehicles and TLEVs will be sold in the OTR after MY2000, since other provisions of the National LEV

program will act to reduce the incentive to sell substantial numbers of such vehicles at that time.

Two factors support EPA's belief that the OTC States participating in the National LEV program will receive vehicles with the same level of emissions control under a nationwide trading region as would be expected if the program retained two trading regions. First, beginning in MY2001, National LEV regulations prohibit manufacturers from offering for sale any Tier 1 vehicles and TLEVs in the NTR unless the same engine families are certified and offered for sale in California in the same model year. See 62 FR 31218 (June 6, 1997); 40 CFR 86.1711.⁵⁵ California's more stringent fleet average NMOG standard and SFTP phase-in requirements, as described in section IX, will act to limit the number of Tier 1 and TLEV engine families certified and sold in California, and, therefore, the

⁵⁵ As stated in the SNPRM, manufacturers will not be required always to sell exactly the same engine families in both California and the NTR because in some instances, that would not be possible. In the specific case of Tier 1 engine families, National LEV maintains Federal Tier 1 standards while California has its own Tier 1 standards, so a manufacturer could not sell an identical California Tier 1 vehicle as a Federal Tier 1 vehicle in the NTR under the National LEV program. Therefore, for purposes of this provision, EPA will consider a National LEV Tier 1 or TLEV engine family the same as a California Tier 1 or TLEV engine family if the National LEV engine family has the same technology (hardware and software) as the comparable California engine family. A manufacturer could always certify a Tier 1 or TLEV engine family as a 50-state family and avoid this issue.

number sold in the NTR. Second, even though the National LEV fleet average NMOG standard is not as stringent as California's, the 0.075 g/mi and 0.100 g/mi standards applicable under National LEV for MY2001 and later will make it difficult for manufacturers to include substantial numbers of Tier 1 vehicles and TLEVs in their fleet and still comply with the fleet average NMOG standard. Each Tier 1 vehicle or TLEV sold by a manufacturer would have to be offset by more than one ULEV vehicle in order for that manufacturer to remain in compliance with the applicable fleet average NMOG standards. Therefore, EPA believes there are strong incentives for manufacturers to limit or even eliminate the production and sale of Tier 1 vehicles and TLEVs in the NTR in MY2001 and later, which would result in a nationwide vehicle fleet of essentially LEVs. This result is not dependent on having a separate trading region in the OTR.

A nationwide trading region will also reduce manufacturers' and EPA's administrative burden in demonstrating and assessing compliance with the National LEV fleet average NMOG standards. Compliance under one nationwide trading region rather than two separate regions for MY2001 and later model years will reduce the manufacturers' compliance burden by eliminating the need

specifically to track and report vehicle sales in two separate regions and maintain two separate tallies of credits and debits specific to the two regions. A single trading region will also reduce EPA's administrative burden in determining whether manufacturers are complying with the applicable fleet average NMOG standards. Given a nationwide fleet that is all or almost all LEVs, a separate trading region for the OTR will not have any significant air quality benefit and will add additional unnecessary complexity to the National LEV program. Moreover, even separate trading regions would not have required manufacturers to demonstrate program compliance on an OTC state-by-state basis, but would instead have only required compliance demonstrations based on regionwide sales. Separate trading regions would thus have been of limited value to OTC States wishing to use National LEV program vehicle tracking requirements to check on the different types of vehicles sold within individual states.

Under today's rule, National LEV retains the NTR, which would apply for MY1999-2000 and cover vehicles sold in the OTC States. The second region would be the All States Trading Region (ASTR), which will include all states in National LEV except for

California, and apply for 2001 and later model years.

Manufacturers will demonstrate compliance with the fleet average NMOG standards in these two regions under the provisions set forth in today's rule and the Final Framework Rule. EPA is eliminating the 37 State trading region that was finalized in the Final Framework Rule.

Manufacturers can generate early reduction credits in the states outside the NTR before MY2001 to apply to compliance in the ASTR from MY2001 on. Manufacturers could also use credits generated in the NTR for demonstrating compliance in the ASTR from MY2001 on at the same value as if the manufacturer had used them in the NTR under the Final Framework Rule. However, a manufacturer could not apply early reduction credits generated outside the NTR to offset any debits generated in the NTR before MY2001. Using credits generated outside the NTR to offset debits generated in the NTR during MY1999 and MY2000 would decrease the environmental benefits that should accrue in the NTR.

Shifting from the NTR in MY2000 to the ASTR in MY2001 does raise special transition issues for manufacturers that end MY2000 with debits in the NTR. (If a manufacturer ends MY2000 with

credits in the NTR, these credits would be subject to the usual discounting (rather than to the special provisions for early reduction credits) and then could be applied either in the ASTR or the NTR. Section 86.1710(d)(2) specifically addresses this situation. If a manufacturer ends MY2000 with debits in the NTR, it can make up those debits only with NTR credits. This is necessary to ensure that the NTR gets the intended environmental benefits from starting the program in the NTR two years before it starts in the rest of the country. A manufacturer that ends MY2000 with debits in the NTR must calculate its fleet average NMOG value in the NTR for MY2001. If the manufacturer does not have any credits in the NTR in MY2001 (and it does not obtain NTR credits from another manufacturer), then it will be subject to an enforcement action for the MY2000 debits. If the manufacturer has credits in MY2001 in the NTR, these must be applied to offset its MY2000 NTR debits. If the MY2000 debits exceed the MY2001 credits, then the manufacturer would be subject to an enforcement action for the remaining MY2000 debits. In addition to calculating fleet average NMOG values for the NTR, the manufacturer must also calculate fleet average NMOG values for the ASTR. After calculating the level of debits or credits in

the ASTR, the level must be adjusted by deducting all credits used to offset MY2000 debits in the NTR.

The National LEV program will allow a manufacturer to demonstrate compliance with the fleet average NMOG standards using actual production data in lieu of actual sales data if the manufacturer is demonstrating compliance with the fleet average NMOG standards in the ASTR. A manufacturer will need to petition EPA to allow production volume to be used in lieu of actual sales volume and would have to submit the petition to EPA within 30 days after the end of the model year. EPA will grant such a petition if the manufacturer establishes, to the satisfaction of the Administrator, that production volume is functionally equivalent to sales volume. Manufacturers will still have to keep sales data in the NTR to demonstrate compliance with the ban on the sale of Tier 1 and TLEV engine families in the NTR if such engine families are not certified for sale in California for the same model year, but such data would not be reported to EPA as part of a regular report. EPA has previously allowed manufacturers to use production volume in lieu of sales volume as part of the Tier 1 standards phase-in.

F. Elimination of Five-Percent Cap on Sales of Tier 1 Vehicles and TLEVs in the OTR

EPA's Final Framework Rule codified the OTC States' and manufacturers' recommendation that National LEV include provisions limiting the sale of Tier 1 vehicles and TLEVs in the NTR after MY2000. The first provision is that manufacturers may sell in the NTR Tier 1 vehicles and TLEVs only if the same or similar engine families are certified and offered for sale in California as Tier 1 vehicles and TLEVs. This provision is being retained in the National LEV program. The second provision is a five-percent cap on sales of Tier 1 vehicles and TLEVs in the NTR starting in MY2001, which allows all manufacturers to sell Tier 1 vehicles and TLEVs in the NTR to the extent permitted under the first limitation as long as the overall Tier 1 vehicle and TLEV fleet does not exceed five percent of the National LEV vehicles sold in the NTR. EPA proposed to delete the five-percent cap provision because of the change in the OTC States' legal obligation since this provision was proposed and because of the additional administrative burden it would entail if EPA were to adopt the proposal to have a single trading region starting in MY2001. Furthermore, EPA believes the five-percent cap would not

provide any air quality benefit given the expected fleet make-up after MY2000 and the other limitation on sales of these vehicles in the NTR. See 62 FR 44781 (August 22, 1997).

EPA has decided to delete the five-percent cap provision from the National LEV program. The court reversal of the requirement that all OTC States adopt Section 177 Programs effective in MY1999 means there is no longer a legal requirement that EPA find that National LEV is equivalent to state Section 177 Programs throughout the OTR. Additionally, the expected benefits in the OTR of National LEV as compared to OTC State adopted Section 177 Programs has increased. Therefore, there is no legal need and less practical need for a five-percent cap to control NOx emissions.

EPA also believes the five percent cap is not necessary because it expects manufacturers will not introduce significant numbers of Tier 1 vehicles and TLEVs after MY2000 in the national, let alone the Northeast, market. This means that National LEV will not have a NOx penalty when compared to OTC State adopted Section 177 Programs. A National LEV fleet, made up primarily of LEV vehicles, will have similar effects on NOx

emissions when compared to a CAL LEV fleet consisting primarily of LEV and ULEV vehicles since both types of vehicles have the same NOx emission standards. The provision limiting manufacturers' sale in the NTR of Tier 1 vehicles and TLEVs based on California certification also provides additional assurance. A staff report on SFTP revisions issued by the California Air Resources Board offers further support for EPA's decision to drop the five percent cap requirement. In this report, CARB states that their cost estimates assume that the entire California new motor vehicle fleet will be certified to LEV or more stringent standards by MY 2001, although they note that "in actuality, staff estimates that something less than five percent of new motor vehicles will be certified to the Tier 1 and TLEV emission standards by the 2001 model year" due to the stringency of the fleet average NMOG standard in California.⁵⁶ For all these reasons, EPA believes that any sales of Tier 1 vehicles and TLEVs in the NTR after MY2000 will make up less than five percent of the fleet in any instance, and does not believe having a separate requirement to ensure such sales limits is needed.

⁵⁶ Staff Report: Public Hearing to Consider Adoption of New Certification Tests and Standards to Control Exhaust Emissions from Aggressive Driving and Air-Conditioner Usage for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles under 8501 Pounds Gross Vehicle Weight Rating. State of California, California Environmental Protection Agency, Air Resources Board, July, 1997.

Finally, even if there were some benefit to the NTR from a five-percent cap, EPA believes the benefit would be so minimal that it would not justify the administrative burden given the single trading region that applies after MY2000. Requiring compliance demonstrations with the five-percent cap would negate any administrative savings associated with the All State Trading Region for 2001 and later model years and the provision allowing manufacturers to demonstrate compliance through production data. Moreover, retention of the five-percent cap would not provide any additional assurance that National LEV will continue to provide a quantity of emissions reductions at least equivalent to the quantity that would be provided by OTC State Section 177 Programs as demonstrated through EPA's periodic equivalency determination. The mobile source emissions model used in the original equivalency determination, including fleet make-up in the OTR, will be used as part of the equivalency determination, unless all parties agree to use an updated modeling methodology. Modifications made to the model in the course of a periodic equivalency determination would take into account changes in EPA's rules and regulations and implementation of such rules and regulations, not changes in the emissions inventory assumptions used in the original equivalency determination.

G. Technical Corrections to Final Framework Rule

The Agency is also making several minor technical corrections to the National LEV regulations issued in the Final Framework Rule. A June 24, 1997 letter from the American Automobile Manufacturers Association (AAMA) and Association of International Automobile Manufacturers (AIAM) (available in the public docket for review) suggests a number of technical corrections to the regulations EPA promulgated on June 6, 1997. The corrections detailed by AAMA/AIAM have been reviewed by EPA and incorporated in today's rule to the extent that they are necessary and appropriate. In addition, a number of changes must be made to reflect the start of the program in MY1999, rather than MY1997, which was used as a placeholder in the Final Framework Rule. These revisions are detailed in the Response to Comments document for today's Final Rule.

In the Final Framework Rule, EPA required manufacturers to track vehicles to the "point of first sale" for purposes of determining compliance with fleet average NMOG standards (62 FR 31212, June 6, 1997). EPA defined "point of first sale" as "the

location where the completed LDV or LDT is purchased" and it "may be a retail customer, dealer, or secondary manufacturer." See 40 CFR 86.1702-97(b). EPA recognized that requiring manufacturers to always track vehicle sales to the ultimate purchaser would add an additional burden on manufacturers without having any significant effect on air quality.

Requiring manufacturers to track vehicles to the point of first sale was intended to impose similar requirements on manufacturers as those associated with EPA's Tier 1 standard phase-in compliance requirements found in 40 CFR 86.094-8 and 86.094-9. In the Tier 1 program, manufacturers could demonstrate compliance "based on total actual U.S. sales of light-duty vehicles of the applicable model year by a manufacturer to a dealer, distributor, fleet operator, broker, or any other entity which comprises the point of first sale." See 40 CFR 86.094-8(a)(1)(i)(B)(1)(i). EPA believes the National LEV vehicle sales tracking requirements operate in the same manner as those found in the Tier 1 regulations, but the auto manufacturers have notified EPA of their concern that National LEV imposes different requirements. (Document available in docket A-95-26.)

To eliminate confusion about the required level of vehicle tracking necessary to demonstrate compliance with National LEV fleet average NMOG standards, today's final rule modifies the definition of "point of first sale" in the National LEV program such that it is equivalent to the "point of first sale" language found in the Tier 1 regulations. EPA did not intend to limit "point of first sale" entities to those specifically listed in the National LEV regulations. EPA also does not intend to limit a manufacturer to tracking vehicles only to the point of first sale if a manufacturer decides further tracking gives it a more accurate account of vehicle sales in the different trading regions or if a manufacturer's current vehicle tracking system is set up to track vehicles beyond the point of first sale. However, as noted in the Final Framework Rule, EPA does not believe this additional level of tracking vehicles is necessary.

H. Clarifications to Final Framework Rule

Based on comments and other letters submitted by the auto manufacturers, EPA believes that some provisions and discussions in the Final Framework Rule and preamble could cause confusion.

Thus, EPA is taking the opportunity here to clarify a few issues addressed in the Final Framework Rule.

1. Operation of National LEV Vehicles on In-Use Fuels

In the Final Framework Rule EPA reiterated a set of three principles originally presented in the October 10, 1995 NPRM. These principles, agreed upon by representatives of the auto industry, some segments of the oil industry, and the OTC States, stated:

- 1) Adoption of the National LEV program does not impose unique gasoline requirements on any state. Gasoline specified for use by any state will have the same effect on the National LEV program as on the OTC LEV program.

- 2) Testing is needed to evaluate the effects of non-California gasoline on emissions control systems.

- 3) If testing results show a significant effect, EPA will conduct a multi-party process to resolve the issue without adversely affecting SIP credits or actual emission reductions

when compared to OTC LEV using fuels available in the OTR or imposing obligations on manufacturers different from the obligations they would have had under OTC LEV.

The Agency continues to hold to these principles, but at the request of some members of the auto industry EPA will clarify some related statements made in the Final Framework Rule. As noted in the Final Framework Rule, EPA anticipates that auto manufacturers will take advantage of the option to certify vehicles under the National LEV program using California Phase II reformulated gasoline (62 FR 31219, June 6, 1997).

Consequently, vehicles will be designed by auto manufacturers to achieve the applicable emission standards using fuel meeting the California specifications. Under the National LEV Program, vehicles in actual use will be using the range of fuels commercially available across the country. In the preamble to the final regulations, EPA stated that "section 86.1705-97(g)(5) [renumbered as 86.1701(d) in today's rule] requires auto manufacturers to design National LEV vehicles to operate on fuels that are otherwise required under applicable federal regulations." In this context, the use of the word "operate" refers to the overall performance of the vehicle, such as

starting, acceleration, etc. It is not intended to convey that a gasoline-powered vehicle using commercially available fuel outside California would necessarily achieve the same emissions performance as it would using the relatively cleaner fuel required in California. Nonetheless, the emission reductions potentially realized by the National LEV program remain significant relative to the alternative of a fleet of Tier 1 vehicles operating on the same commercially-available fuels.⁵⁷ To clarify another provision, 40 CFR 86.1701(d) does not require manufacturers to design methanol, ethanol, electric, compressed natural gas, or propane vehicles to operate on gasoline or any alternative fuel other than the type (methanol, ethanol, electricity, etc.) of fuel for which it was designed.

2. Clarification of Banking and Trading Provisions

In the Final Framework Rule, EPA included a limitation on the nature of the emissions credits recognized under the National LEV program. (See 40 CFR 86.1710(c)(10).) In the preamble, EPA stated that, as with other emission credits or allowances

⁵⁷ The auto and oil industries are currently conducting studies designed to quantify the emissions performance of LEV-type vehicles when operated on gasoline with various levels of sulfur. The data tabulation and associated analyses for these studies are not yet completed.

recognized under the Act, any emissions credits generated under the National LEV program are not the holder's property, but instead are a limited authorization to emit the designated amount of emissions. Consequently, nothing in the National LEV regulations or any other provision of law should be construed to limit EPA's authority to terminate or limit this authorization through a rulemaking. In their comments, manufacturers expressed their concern that this provision might affect the status of the National LEV averaging, banking and trading provisions as a Core Stable Standard, which, if EPA made certain changes to those provisions, would allow the manufacturers to opt out of the National LEV program.

The limitation at issue is a standard provision for EPA emissions trading programs. EPA believes it is important to make it clear that while emissions credits can be generated, banked, bought and sold pursuant to regulatory authorization, they do not constitute property. Rather, they are only a limited authorization to emit a designated amount of emissions. In establishing a credit trading system, EPA is providing an alternative means of compliance with statutory or regulatory limits on emissions. In authorizing the generation and use of

emissions credits, EPA has in no way given up its regulatory authority to limit emissions further by modifying either the underlying regulatory emission limitations or the way they may be achieved through generation or use of emissions credits. As a consequence, if EPA were to modify the provisions relating to emissions credits under National LEV, the Agency would not be subject to challenge on the grounds that its action was a taking of private property protected under the Fifth Amendment to the U.S. Constitution.

However, the limits on the nature of emissions credits included in the Final Framework Rule are not intended to affect the opt-out provisions of the National LEV program. If EPA modified any of the National LEV banking and trading provisions in a manner that triggered an offramp based on a change to a Stable Standard, the manufacturers would be able to opt out of National LEV. In stating the limited nature of emissions credits, EPA only intended to preserve its regulatory authority to make regulatory changes affecting such credits, in the unlikely event that EPA decided such changes were appropriate. Section 86.1710(c)(10) does not nullify either the designation of the banking and trading provisions as a Core Stable Standard or

the manufacturers' ability to opt out if EPA changes them over a manufacturer objection. Nevertheless, to clarify further its intent, EPA is adding the following language to the end of 40 CFR 86.1710(c)(10): "If EPA were to terminate or limit the authorization to emit associated with emissions credits generated under the provisions of this section, this paragraph (c)(10) would have no effect on manufacturers' ability to opt out of the National LEV program pursuant to § 86.1707."

3. Recordkeeping Requirements

Under the final National LEV regulations, EPA may void certificates ab initio only for a manufacturer's failure to retain records or provide such information as specified upon request. EPA will enforce most of the other National LEV requirements through conditioning the certificate and identifying individual noncomplying vehicles in the event of a violation.

EPA has determined that the authority to void certificates ab initio for major record-keeping and reporting violations is an important enforcement mechanism for programs in which compliance must be demonstrated using data held by manufacturers. For many

flexible compliance schemes, such as averaging, banking and trading approaches or phase-ins of requirements, the absence of records and reports on how the regulated entities complied could preclude EPA from enforcing the underlying substantive requirements. For example, EPA could never prove that a particular vehicle violates a fleet average or a phase-in by testing that vehicle; enforcement of a fleet average or a phase-in depends on accurate records for the entire fleet. Thus, in return for giving regulated parties some flexibility in meeting the requirements, EPA must have a mechanism to ensure that the manufacturers keep the records and make the reports necessary to verify compliance.

In their comments, the manufacturers expressed concerns about EPA's authority to void ab initio certificates for recordkeeping or reporting violations. As discussed above, EPA believes that this enforcement mechanism is an important tool to ensure compliance with the provisions of the National LEV program such as averaging, banking, and trading of fleet average NMOG credits and debits. However, EPA does not intend to use this authority for every recordkeeping or reporting violation which might occur under the National LEV regulations. Most violations

will likely be minor, such as submitting late reports or not providing all of the required information, and would be considered violations of section 203(a)(1) of the Act, subjecting the manufacturer to applicable civil penalties. EPA would only void a certificate ab initio for the most egregious record-keeping and reporting violations, where a manufacturer's records or reporting are so substantially incomplete that EPA cannot determine compliance with the fleet average NMOG standard or other substantive requirements. EPA regulations currently provide for voiding certificates ab initio for record-keeping and reporting violations for several motor vehicle requirements with some compliance flexibility. (See e.g., Tier 1 (40 CFR 86.094-23), and evaporative emissions (40 CFR 86.096-23)). Both precedent and practical enforcement concerns support providing this strong penalty as a critical means to ensure the enforceability of underlying substantive requirements.

IX. Supplemental Federal Test Procedure

A. Background

The Federal Test Procedure (FTP) is the vehicle test procedure historically used by EPA and the California Air Resources Board (CARB) to determine the compliance of light-duty vehicles and light-duty trucks with the conventional or "on-cycle" exhaust emission standards. Using the FTP, emissions performance is tested while the vehicle is driven over a "typical" driving schedule (a pattern of acceleration and deceleration over a given period of time), using a dynamometer to simulate the vehicle-to-road interface. Pursuant to the requirements of section 206(h) of the CAA, EPA has promulgated revisions to the Federal Test Procedure to make the test procedure better represent the manner in which vehicles are actually driven (61 FR 54852, October 22, 1996). These revisions added the Supplemental Federal Test Procedure (SFTP) with accompanying emission standards. The SFTP emission standards promulgated by EPA are appropriate for vehicles meeting EPA's Tier 1 emission standards. EPA did not propose LEV-stringency standards as part of its FTP revisions. In addition, the earlier

National LEV final rulemaking (62 FR 31192, June 6, 1997) did not include LEV-stringency standards for the SFTP test procedure.

EPA and CARB coordinated closely their review of the FTP, their research efforts, and the development of their respective off-cycle policies. On April 23, 1997, CARB published a proposal detailing their approach to addressing off-cycle emissions in the State of California.⁵⁸ Following a comment period that remained open through May 6, 1997, CARB released a notice of public hearing accompanied by a staff report regarding its proposed adoption of SFTP test procedures and standards ("Staff Report").⁵⁹ The CARB proposal had four basic elements to it: test procedures, emission standards for LEVs and ULEVs, emission standards for Tier 1 vehicles and TLEVs, and a phase-in schedule. CARB adopted SFTP requirements largely consistent with their

⁵⁸ Draft Regulatory Measure to Control Emissions During Non-Federal Test Procedure Driving Conditions From Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles Under 8,500 Pounds Gross Vehicle Weight Rating, Mail-Out #MSC 97-06, April 23, 1997. Available in the public docket for review, and also at <http://arbis.arb.ca.gov/msprog/macmail/macmail.htm>.

⁵⁹ Notice of Public Hearing to Consider Adoption of New Certification Tests and Standards to Control Emissions from Aggressive Driving and Air-Conditioner Usage for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles Under 8,501 Pounds Gross Vehicle Weight Rating, Mail Out #97-13, May 27, 1997. Available in the public docket for review, and also at <http://arbis.arb.ca.gov/msprog/macmail/macmail.htm#msc9713>.

proposal at a public hearing on July 24, 1997, then subsequently released a Notice of Public Availability of Modified Text for a 15 day comment period on September 5, 1997 ("15-day Notice").⁶⁰

EPA stated in the National LEV Final Framework Rule its intent to harmonize the SFTP requirements of the National LEV program with California, and proposed to do so in the SNPRM once California completed the adoption of such requirements under its LEV program. As CARB has completed the adoption of SFTP requirements into its LEV program, today's rule harmonizes the CARB and National LEV SFTP programs.⁶¹ The following sections address this harmonization, including changes made as a result of CARB's public hearing on July 24, 1997 and as published in their 15-day Notice, as well as those changes resulting from public comments received on EPA's SNPRM. A more detailed discussion of

⁶⁰ Notice of Public Availability of Modified Text: Public Hearing to Consider Adoption of New Certification Tests and Standards to Control Emissions from Aggressive Driving and Air-Conditioner Usage for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles under 8,501 Pounds Gross Vehicle Weight Rating, Mail-Out # MSC 97-17, September 5, 1997. Available in the public docket for review, and also at <http://www.arb.ca.gov/msprog/macmail/macmail.htm>

⁶¹ Based on comments from AAMA/AIAM with which EPA agrees, a practical result of making this change is that the list of Non-Core Stable Standards in 40 CFR 86.1707(d) must be updated to reflect the change in emphasis from the federal SFTP to the California SFTP. Today's regulations thus incorporate the California SFTP as a Non-Core Stable Standard.

the SFTP standards and test procedures can be found in the SNPRM (62 FR 44782, August 22, 1997).

B. Elements of the CARB Proposal and Applicability Under National LEV

1. Test Procedure

CARB adopted high speed, high acceleration, and air conditioner supplemental test procedures that are in all respects identical to the procedures adopted by EPA. In fact, CARB incorporated by reference the federal regulations for SFTP test procedures. Therefore, as proposed in the SNPRM, the SFTP test procedures for all vehicles covered by National LEV are those currently contained in federal regulations (40 CFR Secs. 86.158, 86.159, 86.160, 86.161, 86.162, 86.163, and 86.164).

2. Emission Standards

California adopted two sets of emission standards, one applicable to LEVs, ULEVs, and super ULEVs (SULEVs), and the

other applicable to Tier 1 vehicles and TLEVs. However, the only SULEVs in CARB's regulations are in their Medium-Duty Vehicle category, a class of vehicles not covered by the National LEV Program, and consequently not covered in the following discussion of emission standards or in today's regulations. In addition to the items discussed below, today's final rule makes several changes to be consistent with changes announced at CARB's hearing and published in their 15-day Notice. These include revisions to the language regarding "A/C-on Specific Calibrations" found in the regulations in paragraphs 86.1708(e)(3) and 86.1709(e)(3), and revisions to the "Lean-On-Cruise" Calibration Strategies language found in paragraphs 86.1708(e)(4) and 86.1709(e)(4).

a. LEVs and ULEVs

For each of the affected vehicle weight categories, CARB adopted a set of SFTP certification standards that applies to LEVs and ULEVs (see Table 1). These standards apply only to gasoline, diesel, and fuel-flexible vehicles while operating on gasoline or diesel fuel. These standards apply at 4,000 miles, and in conjunction with the low-mileage standards, CARB provides for no in-use vehicle compliance requirements (recall testing)

for SFTP standards. Today's rule adopts the standards shown in Table 1 as the SFTP standards applicable to LEVs and ULEVs covered under the National LEV Program. These standards apply to the National LEV Program in the same manner as adopted by CARB, in that they apply at 4,000 miles and there will be no in-use enforcement to these SFTP standards for LEVs and ULEVs. For further information and justification for this approach, see the SNPRM (62 FR 44783-44784, August 22, 1997).

A commenter pointed out that the proposed regulations contained incorrect SFTP standards for light-duty trucks from 3751 to 5750 pounds loaded vehicle weight (the preamble to the proposed regulations contained the correct standards). This error has been corrected in today's final rule.

Table 1.--US06 and SC03 4,000 Mile Certification Standards for LEVs and ULEVs

Vehicle Type	Loaded Vehicle Weight (lbs.)	US06 (g/mi)		SC03 (g/mi)	
		NMHC+NOX	CO	NMHC+NOX	CO
LDV	All	0.14	8.0	0.20	2.7
LDT	0-3,750	0.14	8.0	0.20	2.7

	3,751-5,750	0.25	10.5	0.27	3.5
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b. Tier 1 Vehicles and TLEVs

CARB's final SFTP standards for Tier 1 vehicles and TLEVs are identical to those promulgated by EPA for Tier 1 vehicles. As under the federal regulations, these standards apply at 50,000 and 100,000 miles, and vehicles certifying to these standards face an in-use compliance requirement. Additionally, CARB also maintains EPA's higher NMHC+NOx standard for diesel vehicles, as well as EPA's exemption of alternative fuel Tier 1 vehicles and TLEVs from compliance with the SFTP standards. As proposed in the SNPRM, today's final rule adopts CARB's treatment of Tier 1 vehicles and TLEVs.

3. Implementation Schedule

Today's final rule also adopts CARB's four year implementation schedule for SFTP emission standards, which requires compliance of 100 percent of the fleet by MY2004. Beginning with a minimum of 25 percent of the fleet in MY2001, the schedule then requires 50 and 85 percent in MY2002 and

MY2003, respectively. Although Tier 1 vehicles and TLEVs are certified to standards of different stringency than LEVs and ULEVs, CARB allows the number of vehicles from both groups to be combined for the purpose of determining compliance with the phase-in schedule. However, CARB ensures an adequate phase-in of LEVs and ULEVs complying with the SFTP by requiring that the percentage of LEVs and ULEVs meeting the SFTP requirements also meet the required phase-in schedule. This means that meeting the phase-in percentage with the subset of the fleet made up of LEVs and ULEVs will also meet the overall phase-in requirement if a manufacturer has no Tier 1 vehicles or TLEVs. If a manufacturer does have some Tier 1 or TLEV engine families, it would have the choice of certifying some proportion of those vehicles to the SFTP standards or expending some effort phasing in additional LEV or ULEV engine families in order to maintain compliance with the phase-in requirements. Consistent with the SNPRM, today's rule adopts the same SFTP implementation schedule finalized by CARB, including provisions consistent with the methodology noted above.

To provide some additional flexibility, CARB uses a concept of equivalent phase-in schedules, which are allowed in place of the required phase-in schedule. This approach allows

manufacturers to use an alternative phase-in schedule providing that the alternative measures up to the required schedule according to a set methodology. The equivalent phase-in methodology calculates credits by weighting the required phase-in percentages in each model year of the phase-in schedule by the number of model years prior to and including the last model year of the scheduled phase-in, then summing these credits over the phase-in period. These "credits" are calculated for the required phase-in schedule. In the case of the CARB SFTP phase-in, the required "credits" are: $(25\% * 4 \text{ years}) + (50\% * 3 \text{ years}) + (85\% * 2 \text{ years}) + (100\% * 1 \text{ year}) = 520$. Any alternative phase-in that results in an equal or larger cumulative total number of credits by the end of the last model year of the scheduled phase-in is acceptable. This allows manufacturers some additional flexibility while ensuring no loss in overall emissions over the phase-in schedule. Additionally, using this methodology, manufacturers can gain credits towards their phase-in through early introductions of vehicles meeting the applicable requirement even prior to the beginning of the required phase-in (e.g., 10 percent compliance five years before full phase-in gains 50 "points" towards the total required). Regardless of the number of "points" earned by a given alternative schedule, phase-

in of 100% must be achieved in the required final year of the phase-in. CARB made one change to this element of the SFTP in the 15-day Notice, adding language that requires manufacturers who choose to use an alternative phase-in schedule to submit the schedule they intend to use "before or during calendar year 2001 for passenger cars and light-duty trucks and calendar year 2003 for medium-duty vehicles." Today's rule adopts an alternative phase-in schedule methodology consistent with the methodology adopted by CARB, including the changes contained in the 15-day Notice.

As proposed in the SNPRM, this alternative phase-in schedule will be enforced much like the current enforcement provisions regarding non-compliance with a phase-in schedule. Specifically, failure to attain the required credits will be regarded as a failure to satisfy the conditions on which the certificate was issued. Vehicles sold in violation of that condition will not be covered by the certificate and hence will be subject to the currently available penalties. Today's regulations contain appropriate revisions to 40 CFR 86.096-30 to implement this approach.

4. Implementation Compliance

To determine manufacturer compliance with the SFTP phase-in levels under the National LEV program, EPA proposed to give the manufacturers the option of combining their entire fleet of light-duty vehicles and light light-duty trucks such that this combined fleet meets the applicable phase-in requirements. EPA also proposed to have manufacturers demonstrate compliance with the phase-in requirements based on vehicles sold outside California, but requested comment on having compliance determinations based on vehicles sold only in California or in all states.

As noted in the SNPRM, EPA supports allowing manufacturers to combine light-duty vehicles and light-duty trucks into one fleet for the purpose of the SFTP phase-in requirements. This approach is consistent with CARB's implementation of the SFTP phase-in, and is the approach contained in today's final rule. However, EPA noted in the SNPRM some concerns with allowing manufacturers to show compliance with National LEV SFTP requirements based on a manufacturer's California fleet mix as opposed to its National LEV fleet mix. AAMA/AIAM commented that

manufacturers have already planned which products will be meeting the early-term SFTP requirements in California, and that using national sales volumes would cause changes in their phase-in plans without adequate lead time, creating an undue burden. Based on this, as well as on this commenter's definition of harmonization ("identical in every aspect to the California requirements"), AAMA/AIAM expressed support for the option of using California sales volumes to assess compliance with the SFTP phase-in schedule.

EPA has decided to adopt language in today's rule that addresses the concerns heard from the auto companies by basing the SFTP phase-in compliance on vehicle sales in California. EPA understands the implications of requiring a separate phase-in for vehicles outside California, and agrees that the burden of requiring such a phase-in is unnecessary. However, EPA is adding language to the SFTP phase-in under National LEV to assure that SFTP vehicles are not underrepresented in states outside of California. Given that the phase-in will be demonstrated using California sales, unique cases could potentially arise whereby the California version of a vehicle is certified to the SFTP but the version distributed federally is not. Without some

protective language in the regulations, there would be no obligation or requirement for the version marketed in the 49 states outside California to comply with the SFTP, and although the phase-in would be met in California, certainly the potential exists for the rest of the country to fall unacceptably short of the phase-in percentage. To protect against this type of scenario, yet to allow auto manufacturers the flexibility of only having to demonstrate compliance with the phase-in in California, EPA is adding the additional requirement that, for every engine family certified to SFTP standards in California, the "sibling" of that vehicle certified under the National LEV program outside California must also be certified to the SFTP standards. Today's regulations define the relationship between California and federal "sibling" vehicles as vehicles of the same make and model, and with the same number of cylinders, the same cylinder configuration, the same cylinder volume, the same transmission class, and the same axle ratio. However, the ability to use California sales to demonstrate phase-in compliance applies only to those years of the phase-in with a less than 100 percent compliance requirement (MY2001-2003). When California is scheduled to achieve 100 percent compliance with the SFTP in

MY2004, the National LEV fleet must also have attained 100 percent compliance in that model year.

X. Administrative Requirements

A. Administrative Designation

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and 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.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is not a "significant regulatory action" because the regulations in this rule will not have annual impacts on the economy that are likely to exceed \$100 million. This rule, along with the Final Framework Rule, sets forth the National LEV program regulations. The Final Framework Rule was determined to be a significant regulatory action. See 62 FR 31231 and the Regulatory Impact Analysis. EPA has submitted this rule to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record. EPA has updated the Regulatory Impact Analysis (RIA) prepared for the Final Framework Rule. Changes reflect the current program start dates, updated cost information, and other changes to the emissions reduction modeling as discussed in Sec. IV.

B. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this rule. EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities. Only manufacturers of motor vehicles, a group which does not contain a substantial number of small entities, will have to comply with the requirements of this rule.

C. Unfunded Mandates Reform Act

Under sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA), EPA generally must prepare a written statement to accompany any proposed or final rule that includes a federal mandate that may result in expenditures by state, local, or tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year.

EPA has determined that the written statement requirements of sections 202 and 205 of UMRA do not apply to today's rule, and thus do not require EPA to conduct further analyses pursuant to those requirements. National LEV is not a federal mandate because it does not impose any enforceable duties and because it

is a voluntary program. Because National LEV would not impose a federal mandate on any party, section 202 does not apply to this rule. Even if these unfunded mandates provisions did apply to this rule, they are met by the Regulatory Impact Analysis prepared pursuant to Executive Order 12866 and contained in the docket.

Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. EPA has not prepared such a plan because small governments would not be significantly or uniquely impacted by the rule.

D. Congressional Review of Agency Rulemaking

Under section 801(a)(1)(A) of the Administrative Procedure Act (APA) as amended by the Small Business Regulatory Enforcement Reform Act of 1996, EPA has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in

today's Federal Register. Today's rule is not a "major rule" as defined in section 804(2) of the APA, as amended.

E. Reporting and Recordkeeping Requirements

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2060-0345.

The information collection would be conducted to support the averaging, banking and trading provisions included in the National LEV program. These averaging, banking and trading provisions would give automobile manufacturers a measure of flexibility in meeting the fleet average NMOG standards. EPA would use the reported data to calculate credits and debits and otherwise ensure compliance with the applicable production levels. When a manufacturer has opted into the voluntary National LEV program, reporting would be mandatory as per the regulations included in this rulemaking. This rulemaking would not change the requirements regarding confidentiality claims for

submitted information, which are generally set out in 40 CFR part 2.

The information collection burden associated with this rule (testing, record keeping and reporting requirements) is estimated to average 241.3 hours annually for a typical manufacturer. It is expected that approximately 25 manufacturers will provide an annual report to EPA. However, the hours spent annually on information collection activities by a given manufacturer depends upon manufacturer-specific variables, such as the number of engine families, production changes, emissions defects, and so forth.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This estimate also includes the time needed to: review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train

personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15. EPA is amending the table in 40 CFR Part 9 of currently approved ICR numbers issued by OMB for various regulations to list the information requirements contained in this rule.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., S.W., Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., N.W., Washington, D.C.

20503, marked "Attention: Desk Officer for EPA." Include the ICR number in any correspondence.

F. Effective Date

This rule is effective upon the date of publication. This expedited effective date is necessary to provide effective final regulations to guide the process for the OTC States and auto manufacturers to opt into the National LEV program in time for the program to begin in model year 1999. Given their planning and production schedules, manufacturers have informed EPA that the Agency must find National LEV in effect early in the 1998 calendar year, at the latest, to allow them to comply with the National LEV requirements for MY1999 vehicles. This requires that the OTC States and the manufacturers complete the opt-in process as soon as possible. While the timing for opt-ins is based on the signature date of the rule, rather than its effective date, it would not be appropriate for parties to have to make the decision to opt in to the program before this rule becomes effective, and if the effective date of these regulations were delayed until thirty days from publication, depending upon the length of time between signature and publication, it is possible

that the deadline for OTC State opt-ins would occur before the rule became effective. In addition, because National LEV is a voluntary program, this rule, by itself, does not place a burden on any party. Rather, it provides an opportunity for the OTC States and the manufacturers to avail themselves of the benefits of the National LEV program and voluntarily to become subject to its requirements. Finally, in the SNPRM, EPA took comment on the timing for parties to opt into National LEV, and none of the parties potentially affected by the rule objected to this timing.

Given the lack of burden on affected parties and the need to make this rule effective upon publication, the Agency finds good cause for expediting the effective date of the rule. EPA believes that this is consistent with 5 U.S.C. 553(d)(1) and (3).

XI. Judicial Review

Under section 307(b)(1) of the Act, EPA hereby finds that these regulations are of national applicability. Accordingly, judicial review of this action is available only by filing of a petition for review in the United States Court of Appeals for the District of Columbia Circuit within 60 days of publication in the Federal Register. Under section 307(b)(2) of the Act, the requirements which are the subject of today's rule may not be challenged later in judicial proceedings brought by EPA to enforce these requirements. This rulemaking and any petitions for review are subject to the provisions of section 307(d) of the Clean Air Act.

XII. Statutory Authority

The promulgation of these regulations is authorized by sections 177, 202, 203, 204, 205, 206, 207, 208, 209 and 301 of the Clean Air Act as amended by the Clean Air Act Amendments of 1990 (CAAA) (42 U.S.C. 7507, 7521, 7522, 7523, 7524, 7525, 7541, 7542, 7543, and 7601).

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 85

Confidential business information, Imports, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements, Research, Warranties.

40 CFR Part 86

Administrative practice and procedure, Confidential Business Information, Incorporation by reference, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: _____

Carol M. Browner, Administrator