

Summary and Analysis of Comments

National Low Emission Vehicle Program

Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines: State
Commitments to National Low Emission Vehicle Program
(62 FR 44754; August 22, 1997)

December 12, 1997

U.S. Environmental Protection Agency
Office of Air and Radiation
Office of Mobile Sources

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LIST OF COMMENTERS

The commenters listed below submitted written comments to the Agency following publication of the Supplemental Notice of Proposed Rulemaking (SNPRM) on August 22, 1997 (62 FR 44754). The comment number indicates the number of the comment document in the VII-D category of the National LEV public docket. These numbers are used throughout the text to refer to specific commenters.

No.	Commenter
1	Kenneth Churchill, Vice President, Public Affairs, United Parcel Service
2	American Automotive Leasing Association
3	Dennis T. Johnston, Certification Manager, North American Engineering Group, Land Rover
4	William F. O'Keefe, Executive Vice President, American Petroleum Institute
5	Gary G. Allen, Chair, Metropolitan Washington Air Quality Committee
6	Anonymous
7	Richard L. Klimisch, Vice President, Engineering Affairs Division, American Automobile Manufacturers Association, and Gregory J. Dana, Vice President and Technical Director, Association of International Automobile Manufacturers
8	Michael P. Kenny, Executive Officer, California Air Resources Board
9	Douglas I. Greenhaus, Director, Environment, Health and Safety, National Automobile Dealers Association
10	Bruce Carhart, Executive Director, Ozone Transport Commission
11	Commonwealth of Pennsylvania, Department of Environmental Protection, Bureau of Air Quality
12	Thomas L. Hopkins, Executive Director, Virginia Department of Environmental Quality
13	Langdon Marsh, Director, Oregon Department of Environmental Quality
14	Peter M. Iwanowicz, Environmental Advocates; Pete Didisheim, Natural Resources Council of Maine; Joseph Mendelson, III, International Center for Technology Assessment; Michelle Robinson, Union of Concerned Scientists
15	Richard A. Valentinetti, Director, Air Pollution Control Division, Department of Environmental Conservation, Agency of Natural Resources, State of Vermont

16	Scott Harshbarger, Attorney General of Massachusetts
17	Carl Johnson, Deputy Commissioner, New York State Department of Environmental Conservation
18	Merrylin Zaw-Mon, Director, Air and Radiation Management Administration, Maryland Department of the Environment
19	Christopher A. G. Tulou, Secretary, Department of Natural Resources and Environmental Control, State of Delaware
20	Department of Environmental Protection, Commonwealth of Massachusetts
21	Bobby Roades
22	John Ralph

I. Introduction

In June of this year, the Environmental Protection Agency (EPA) published a final rule setting forth the framework for the National Low Emission Vehicle (National LEV) Program, including the specific standards that would apply to new motor vehicles if the program comes into effect. See 62 FR 31192 (June 6, 1997) ("Final Framework Rule"). On August 22, 1997, EPA published a Supplemental Notice of Proposed Rulemaking (SNPRM) that solicited comments on specific program issues that EPA must resolve to finalize the regulations for the National LEV program. See 62 FR 44754. These issues included some that were raised in an October 10, 1995 Notice of Proposed Rulemaking (NPRM) (60 FR 52734) but not resolved in the Final Framework Rule. More than twenty organizations and individuals submitted written comment following publication of the Agency's SNPRM. Commenters represented a wide spectrum of stakeholder interests, including local and state governments, auto manufacturers, oil and gas producers and marketers, environmental organizations, and others, and commenters presented a wide range of opinions. The sections that follow summarize and address the comments that the Agency received regarding this rulemaking. When EPA took comment on the NPRM, the Agency received some comments on some of the issues addressed in the Final Rule signed in December of 1997. These comments were all summarized in the May 1, 1997 Summary and Analysis of Comments on the October 10, 1995 NPRM,¹ but some of the comments were not responded to in that document because the Agency had not yet made a final decision on certain issues. The Agency has not repeated those comment summaries here, but the responses to those comments are contained in this document and the preamble to the December, 1997, Final Rule. For the reader's convenience the discussion of each issue is accompanied by a summary of EPA's proposal. However, these are summaries only, and are not intended to be fully descriptive. Complete descriptions of the proposal are found in the SNPRM. This Response to Comments document should be regarded as a companion to the May 1, 1997, Summary and Analysis of Comments and to all of the proposed rules and final rules noted above and as published in the Federal Register, and in particular should be read in conjunction with the Final Rule signed in December of 1997.

¹Summary and Analysis of Comments, National Low Emission Vehicle Program, Control of Air Pollution from New Motor Vehicle Engines: Voluntary Standards for Light-Duty Vehicles and Light-Duty Trucks (60 FR 53734; October 10, 1995), May 1, 1997.

II. National LEV Start Date

Proposal

Although EPA used model year (MY) 1997 as a placeholder for the start date of National LEV in the Final Framework Rule, EPA noted in that rule that MY1997 was no longer a reasonable or feasible start date, and that a reasonable start date would be proposed for comment in the SNPRM. The SNPRM proposed that the National LEV program start in MY1999, and that requirements in the Final Framework Rule applicable to MY1997 and MY1998 would be dropped. EPA also requested comment on allowing manufacturers to sell California-certified vehicles instead of National LEV vehicles throughout the Northeast Trading Region (NTR) for MY1999 and MY2000.

Comments

In the context of EPA's October, 1995, NPRM, several commenters suggested at that time that it was already too late to start the National LEV program in MY1997 due to manufacturers' need for lead time. In comments on the 1997 SNPRM, AAMA/AIAM (7) supported starting the program with MY1999, but suggested that delayed completion of the final rulemaking could put that start date at risk. They also suggested that some "early introduction" vehicles may not be able to meet this timing, depending upon the ultimate date of the in-effect determination. In order to address such situations, they suggested that manufacturers could be allowed the option of excluding vehicles in a model or engine family that starts production prior to or within 90 days of EPA's in-effect finding from the NMOG average for MY1999. Finally, they conclude that their support for these positions is based on signature of the supplemental final rule no later than very early in the 1998 calendar year.

AAMA/AIAM also suggest that EPA must revise the National LEV program to permit California certified vehicles to be sold in the OTR and counted towards the National LEV fleet average NMOG standards for the 1999 and 2000 model years.

Response

EPA agrees that a start date of MY1997 for the National LEV program is not feasible given the current timing associated with implementation of the National LEV program. EPA has thus changed the start date from MY1997 to MY1999. The preamble to the Final Rule discusses the change in start date. To help alleviate problems manufacturers might have in meeting National LEV fleet average NMOG standards in the beginning of the program, EPA has also included an option under which the manufacturers could obtain a federal certificate that would allow them to sell MY1999 California-certified vehicles in the NTR. "California-certified vehicles" are those vehicles that have received an Executive Order from California and a Federal certificate of conformity that 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. The preamble to the Final Rule more fully discusses EPA's rationale for changing the National LEV program start date and including an

option for manufacturers to obtain a federal National LEV certificate allowing them to sell MY1999 California-certified vehicles in the NTR.

EPA is also providing manufacturers the option to obtain a federal National LEV certificate allowing the sale of California-certified MY2000 TLEVs in the NTR. EPA does not believe it is appropriate to allow the sale of California-certified LEVs and ULEVs in the NTR in MY2000 because manufacturers should have sufficient time to certify and produce LEVs and ULEVs meeting the National LEV requirements for MY2000, especially given the relatively few testing differences between a California and Federal LEV vehicle that will remain after the two emission controls programs have been harmonized under the National LEV program. As discussed in the preamble to the Final Rule, EPA is allowing the sale of California-certified TLEVs in the NTR in MY2000 because it does not expect many TLEV engine families to be produced after MY2000 and would rather see manufacturers devote their resources towards the production of LEVs and ULEVs than to TLEV engine families that will be phased out in one or two years.

The option to obtain a federal National LEV certificate to sell California-certified TLEVs, LEVs, and ULEVs in the NTR in MY1999 and TLEVs in MY2000 does not allow manufacturers to sell such vehicles outside the NTR. Therefore, if a manufacturer wants to obtain early reduction credits outside the NTR in MY1999 or MY2000, it must produce vehicles which comply with National LEV and not California requirements. This option would also not apply to vehicles that would meet the Clean Fuel Fleet requirements in MY1999 or MY2000 since many of the areas covered by the fleet program are outside the NTR and clean fuel fleet vehicles will generally have to be certified on federal fuels unless a fleet purchasing vehicles certified for sale in California decides to use fuels meeting the California specifications.

EPA expects that manufacturers will support these provisions given that the signature of the Final Rule has occurred in late 1997 and not early 1998, which they stated as the cutoff date for support of the provisions discussed in this section.

III. National LEV Will Produce Larger VOC and NO_x Emission Reductions in the OTR Compared to OTC State Adopted Section 177 Programs

Proposal

In the Final Framework Rule, EPA found 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 31224. EPA noted at that time that it would update the modeling of benefits in the OTR to reflect realistic start date assumptions. Using revised start dates, EPA's modeling shows that National LEV would produce larger VOC and NO_x emission reductions in the OTR than would Section 177 Programs in the OTR. This modeling is based on National LEV starting in MY1999, which EPA proposed in the SNPRM, and on state Section 177 Programs going into effect as provided in the current state regulations. 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.

Comments

Several commenters (14, 17) were not convinced that National LEV would provide greater emission reductions than state-by-state adoption of the CAL LEV program in the OTR, or would ensure attainment with the ozone NAAQS standard. Criticism focused on assumptions in the model regarding several factors, including the existence of Tier 1 standards after MY2003 and whether federal Tier 2 standards are in place, potential increases in stringency of the California LEV program, and the impact of the new NAAQS on state adoption of the CAL LEV program. One commenter (17) stated that the new NAAQS may result in additional states outside the OTR adopting Section 177 Programs and may produce a need for states to adopt medium-duty vehicle controls. Some commenters (16, 17) suggested that the analysis does not consider state-by-state emission reduction needs, and that it is possible that states that have already adopted the CAL LEV program will receive less of a benefit under National LEV than from continuing with their CAL LEV program. A commenter (20) looked specifically at Massachusetts in this regard, and found that the Massachusetts LEV program would provide greater emission reductions in Massachusetts than National LEV would, and that improvements to the Massachusetts LEV program would further widen the gap. Another commenter (11) found that the National LEV program is better for air quality in Pennsylvania, due in part to migration benefits and the fact that Pennsylvania could not implement their own LEV program earlier than MY2001. One commenter(14) opined that the auto industry has already committed to producing a national low emission vehicle in their 1995 agreement with California relating to the repeal of the ZEV sales requirements for 1998 and 2001.

Response

As discussed in the preamble to the Final Rule, EPA has updated its equivalency

modeling to address the comments received and better reflect the relative benefits of National LEV and OTC State Section 177 Programs. EPA's modeling still shows that National LEV provides greater emission reductions in the OTR than does OTC State adoption of Section 177 Programs, even if EPA assumes that all of the OTC States have adopted a Section 177 Program effective by MY2001.

In a change from the proposal, all three cases included in the modeling include assumptions for EPA implementation of a Tier 2 program equivalent to the National LEV program. The National LEV scenario assumes the seven OTC States that currently have adopted a Section 177 Program implement their programs in MY2006, which under the National LEV regulations is the first model year in which OTC States would have the option of implementing their own Section 177 Programs. Under the National LEV scenario, for MY2006 and later, all states without Section 177 Programs are assumed to have vehicles meeting Tier 2 standards equivalent to National LEV. The two scenarios analyzing the emission reductions of OTC States' Section 177 Programs in the absence of a National LEV program assume that a Tier 2 program equivalent to National LEV starts in MY2005, which represents a reasonable midpoint, for modeling purposes only, of the period (MY2004 through MY2006) included in the MOUs initiated by the OTC and the manufacturers' associations for implementation of a Tier 2 program and the associated commitments that would be made to National LEV by the OTC States and auto manufacturers. The assumptions regarding the Tier 2 standards are for modeling purposes only -- EPA has not prejudged the need for, or the feasibility, stringency, or timing of Tier 2 standards. Those issues would be addressed by EPA in a separate rulemaking. These scenarios are discussed in greater detail in the Regulatory Impact Analysis and the preamble for the Final Rule.

EPA has tried to keep the other assumptions used in its modeling consistent throughout the National LEV rulemaking process, including modeling done in support of the OTC LEV program. This allows the parties to easily make comparisons regarding the emissions benefits from the variations of the National LEV and Section 177 Programs which have been analyzed throughout the National LEV rulemaking process. Additionally, this modeling is not intended to show the actual level of emission reductions in each OTC state from either the National LEV program or OTC State Section 177 Programs. These values should be generated by individual states as part of their review of the program or SIP revision process. Instead, EPA's modeling only needs to demonstrate that the National LEV program provides emission reductions at least equivalent to those from the OTC State Section 177 Programs. The assumptions contained in the equivalency modeling completed for the Final Rule are the assumptions that will continue to be used if EPA reevaluates the equivalency determination upon request of an OTC State.

EPA did not make any assumptions about changes to the California LEV standards and how such changes would affect emissions inventories in states that have adopted a Section 177 Program. While California has stated its intent to modify its program to include more stringent standards effective in MY2004 at the earliest, it has not completed this process and it would be speculative at best to include any additional

standards in the equivalency modeling done at this time. Both the OTC States and the auto manufacturers will be making opt-in decisions well before California has acted on revisions to its LEV program. The modeling also does not attempt to incorporate any assumptions regarding OTC State adoption of California's medium-duty vehicle LEV standards. The MOUs included a provision that OTC States that opt into the National LEV program would not adopt any LEV standards applicable to medium-duty trucks weighing between 6000 and 14000 pounds if designed to operate on gasoline while National LEV was a compliance alternative in such states. Additionally, to date, none of the OTC States have adopted California's medium-duty emissions standards, so it would be unrealistic to make assumptions about which states would adopt such standards. The modeling also does not make any assumptions about additional states outside the OTR adopting Section 177 Programs or the effect of the new NAAQS on the likelihood that such states will adopt Section 177 Programs. Again, the timing and scope of any such adoptions are simply too speculative to include in the modeling. EPA's modeling is not intended to capture every possible scenario which might occur in the OTC States, outside the OTC States, or with the National LEV program. Rather, the modeling shows that, given a constant set of assumptions based on currently available information, the National LEV program provides emission reductions at least equivalent to those from OTC State Section 177 Programs.

The National LEV program has always been analyzed as a regional program encompassing the entire OTR. The modeling done throughout the process has consistently focused on region-wide emission reductions. As the comments suggested, the actual level of emission reductions from either program depends on the specific conditions in a state, such as the start date of the Section 177 Program. Different states will benefit from National LEV in different ways, and the exact level of benefit will need to be determined by each state in its SIP process.

One commenter submitted comments which it claimed show that Massachusetts will get "significantly larger emissions reductions" under its own program than under National LEV. The information submitted by the commenter does not persuade EPA that Massachusetts (or any other state) would get "significantly larger emissions reductions" under state Section 177 Programs than under National LEV. For a large number of issues, it is not clear what assumptions the state made in its modeling. Some of the assumptions that are clear are inaccurate and undercut the validity of the conclusion and prevent EPA from agreeing with the commenter. For example, the state's modeling assumes that once a state commits to National LEV, it must stay with the National LEV program forever. This is not the case. Committing to the National LEV program does not affect a state's ability to adopt and enforce a Section 177 Program effective in MY2006 or later. The state's focus on 2020 is inappropriate given that MY2005 vehicles would be the latest vehicles affected by a commitment to National LEV, and the fleet in 2020 would contain few MY2005 or earlier vehicles. Additionally, the state comments that the "benefit [of the state LEV program as compared to National LEV] is attributable primarily to the introduction [of] Zero Emission Vehicles." This implies that the modeling makes different assumptions regarding ZEVs for the National LEV and state

LEV programs, which might not be appropriate given that a ZEV mandate in this state would be unaffected by committing to National LEV. Additionally, the modeling assumes future benefits from a state “LEV II” program. Barring a change in the Clean Air Act, the state cannot adopt its own motor vehicle program, but rather can only use the federal program or adopt the California program. It is impossible to tell from the comments how the state “LEV II” program compares to the standards California is considering. Furthermore, even if the state committed to National LEV, it would be able to enforce a California “LEV II” program starting in MY2006.

The manufacturers’ 1995 agreements with California related to the repeal of ZEV mandates require the manufacturers to participate in a national low emission vehicle program or, if such a program is not implemented, to achieve through other means emissions reduction benefits equivalent to those that California would have received from such a program. Thus, the agreements with California do not require manufacturers to meet the National LEV emissions standards. National LEV is one way, but not the only way, for the manufacturers to satisfy their obligations under the California agreements.

IV. OTC State Commitments

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

Proposal

EPA proposed that the OTC States would commit to the National LEV program until MY2006. This means that the OTC States would commit to accept manufacturers' compliance with National LEV (or equally or more stringent 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 opt into the program would be bound to comply with National LEV until the first model year that manufacturers are subject to a mandatory federal tailpipe emissions program at least as stringent as the National LEV program. 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 lasts at least until MY2004 and could last longer.

Comments

Several commenters (10, 11, 18, 19) reminded EPA that the duration of state commitments and of the National LEV program were key elements agreed to in the development of the MOU language. These commenters objected to the proposed language on duration of state commitments, which they believe is contrary to the consensus of the auto manufacturers and the OTC States. One (19) expressed concerns that the approach proposed by EPA would result in an EPA finding that Tier 2 emission standards are unnecessary "in light of the existence of the NLEV program." If EPA retains the MY2006 commitment for states, the commenter suggests that it be made conditional on the possible adoption of "a different Tier 2 vehicle" in model years 2004-2006; otherwise, state commitments should end in MY2004. The opinion of several commenters is that EPA should use the duration of program language agreed upon by the OTC States and the auto industry.

One commenter (11) explained that providing that the state commitments extend until MY2006 is inappropriate in the absence of the MOU approach to duration of state commitments. The commenter stated that the OTC States only agreed to use of MY2006 contingent on EPA adopting Tier 2 standards prior to Jan. 1, 2001, with stringency at least equivalent to National LEV and effective in MY2004, 2005, or 2006. If EPA continues to use language as proposed without provisions linking to Tier II promulgation, the commenter suggested that the state commitments should end with the start of the 2004 model year.

A commenter (17) believes that the National LEV program effectively delays implementation of the Tier 2 program past statutorily mandated deadlines by establishing states' and auto manufacturers' commitments to the program past the Tier 2 deadline in the Clean Air Act. This commenter believes that EPA's study of potential Tier 2

standards will show that additional reductions from motor vehicles are needed, but that the delay of Tier 2 standards due to National LEV shows that EPA is unlikely and possibly unwilling to promulgate Tier 2 standards by the mandated date.

Some commenters (1, 2) believe that the duration of the National LEV program should be extended to the maximum extent possible, consistent with EPA's authority to issue Tier 2 standards under the Clean Air Act. Another commenter (16) suggested that EPA's "emphasis on locking in the NLEV program until at least MY2006 appears misguided and illegal," given the likely necessity of further reductions in mobile source emissions.

One commenter (18) found that the regulations proposed at 86.1705-99(e)(3)(v) were inconsistent with the rest of the proposal in that they read "through model year 2006" and should read "until model year 2006."

Response

In the Final Rule, EPA takes a different approach to the duration of the state commitments than that proposed, and instead is adopting the approach agreed upon in the MOUs initialed by the OTC and the manufacturer's associations. See the preamble at section V.A for further discussion. Also see the preamble at section V.C.4 for discussion of why EPA believes that state commitments to the National LEV program until MY2006 (or MY2004) are legal and enforceable regardless of any need for future emissions reductions.

EPA agrees that the regulations proposed at 86.1705-99(e)(3)(v) contained an error, which EPA has corrected consistent with the approach to duration provided in the Final Rule.

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

Proposal

EPA proposed the following timing for the OTC States and manufacturers to opt into National LEV, and for EPA to find the program in effect. Seventy-five days from signature of the final supplemental rule, EPA would be required to determine whether the National LEV program was in effect. This finding would be based on the OTC States' initial opt-in packages from their Governors and state environmental commissioners or secretaries that were submitted no later than 45 days from the date of signature of the final supplemental rule, and on the manufacturers' opt-ins submitted no later than 60 days from signature of the final supplemental rule. While any party that missed its deadline for opt-in would not be barred from submitting a late opt-in, EPA would only be required to consider timely opt-ins in determining whether National LEV is in effect. EPA proposed that, after the initial opt-ins and an EPA finding that the program is in effect, the OTC States would generally have one year from the date of the in-effect finding to submit 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. However, due to unique circumstances in a few states, EPA proposed that Delaware, New Hampshire, Virginia, and the District of Columbia would have eighteen months from the date of the in-effect finding to submit a SIP revision.

Comments

One commenter (7) commented that the proposed regulations should be revised so that manufacturers must not be obligated to make an opt-in decision (i.e., their 15 day period does not begin) until all states have signed on, in order to preserve the sequence of opt-ins in the event that EPA extends the states' decision period.

Another commenter (14) commented that the 45 day period for OTC State opt-ins is not in keeping with the spirit of public participation embodied in the Clean Air Act, that it is insufficient time to have a state undergo a rulemaking process to repeal Section 177 programs if such a program is in place, and that any subsequent state rulemaking will have as a foregone conclusion that National LEV will be the enforced motor vehicle program in that state. This commenter suggests that states should have one year following signature of the SNPRM to decide whether or not to opt into the program.

One commenter (5) suggested that the proposal to give deadlines of one year for Maryland and eighteen months for Virginia and the District of Columbia may lead to difficulties in carrying out planning requirements for the Washington, D.C. metropolitan region. This commenter suggests revising the deadlines so that SIP revisions for the portion of Maryland that is part of the Washington, DC, nonattainment area become due in eighteen months rather than twelve months. Another commenter (11) notes the aggressive nature of the timetable, but comments that their state has every intention of meeting the proposed deadlines.

Response

As discussed in the preamble in section V.B, EPA is adopting the proposed timing for opt-ins unchanged. EPA does not agree that it would be appropriate to delay the beginning of the manufacturers' opt-in period until all OTC States have opted in. EPA does not anticipate taking any action to change either the timing or sequence of opt-ins.

EPA disagrees that states should have a year to decide whether to opt into National LEV. Given manufacturers' production schedules, for National LEV to start in MY1999, EPA must find the program in effect early in 1998. EPA does not believe that either the OTC States or the manufacturers are interested in delaying the benefits of the National LEV program for another model year while the states decide whether to opt in. The OTC States have spent years negotiating, and the OTC has already initialed on their behalf, a draft MOU that would provide a similar level of commitment, and the states have long contemplated signing such an MOU before going through their state rulemaking processes. Moreover, while the initial OTC State opt-ins will be politically binding and failure to follow them with a SIP commitment would allow the manufacturers to opt out of the National LEV program, the language of the state commitments explicitly recognizes that states must go through a rulemaking process to adopt the state commitments as state regulations, including changing any existing

regulations that do not allow manufacturers to comply with National LEV in lieu of a state Section 177 Program. Such a rulemaking would be through a notice-and-comment process and allow for full public participation. Finally, several of the OTC States that currently have state Section 177 Programs already have regulations that accept National LEV as a compliance alternative.

EPA believes that it is important to finalize the proposed timing of the state SIP submissions committing to National LEV, absent some indication from the OTC States that they no longer believe the proposed timing to be feasible. EPA is establishing the shortest feasible time frame for submission of the SIP revisions because the SIP commitments are a critical element of the states' commitments to National LEV and hence early submission of the SIP commitments is important to maximize program stability. The State of Maryland has given EPA no indication that it has concerns about the one year period for the submission of its SIP revision. The Agency does not believe that there will be difficulties in regional planning due to different deadlines for SIP submissions from different states. (For example, neither Washington, DC, nor Virginia indicated that it would be impossible for their jurisdictions to meet a one year deadline. Rather, they expressed their concern that due to a longer regulation development process, they could not be assured that they would meet such a deadline, and they requested that they have eighteen month deadlines to assure that any delays would not jeopardize the stability of the National LEV program. Thus, those jurisdictions may well be able to submit their SIP revisions on a schedule very close to Maryland's schedule.) EPA believes it would be more disruptive and inefficient to have two deadlines for one state.

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

This section describes and responds to comments received on EPA's proposed 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 would commit to the program, the elements of their commitments, the permissible conditions on OTC State and manufacturer opt-ins, and the criteria that EPA would use to find the program in effect.

1. Initial Opt-In by OTC States

Proposal

EPA proposed that the OTC States would commit to National LEV in two steps, the first of which would be an opt-in package from each state's Governor and environmental commissioner, indicating the state's intent to opt into National LEV. This step would occur within 45 days of signature of the final rule. The second step would be a SIP revision incorporating the state's commitment to National LEV in state regulations, which EPA would approve into the federally enforceable SIP.

EPA proposed specific elements, including specific language addressing each

element, that would be required to be included in the opt-in package. EPA also requested comment on whether it is necessary for EPA to specify language for the OTC States' opt-ins or whether it would be sufficient for the National LEV regulations to identify the elements that must be in the OTC States' opt-in documents without specifying exact language. EPA proposed that 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. EPA also proposed that, 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). However, EPA requested comment on whether 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).

EPA also requested comment on whether those OTC States that have not adopted a Section 177 Program at the time of signature of the supplemental final rule should include in the commissioner's letter a statement that the state intends to or will forbear from adopting a Section 177 Program effective before MY2006. EPA proposed in the alternative that OTC States without existing ZEV mandate provisions would either have to include a statement in the commissioner's letter indicating that the state intends to forbear from adopting a ZEV mandate effective before MY2006 or would have to include a statement that the state will forbear from adopting such a provision.

In addition, EPA proposed that if all of the conditions provided in the final rule for EPA to find the program in effect have been met, 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.

a. Specific Opt-in Language

Comments

One commenter (7) believes that the state's commitment, and therefore the governor's commitment, should be legally binding and enforceable. It notes that the auto manufacturer opt-in requirements include a statement that they agree to be "legally bound" to the program, and the commenter believes that OTC States should make an equally binding commitment. Without an enforceable and binding state commitment, the commenter believes that the program is not stable and that manufacturers would be signing up to an undefined program. The commenter references EPA's Notice of Proposed Rulemaking on Transitional and General Opt-Out Procedures for Phase II Reformulated Gasoline Requirements (62 FR 15077, March 28, 1997) as an example of governors' ability to make binding commitments.

This commenter also supports consistent language for all states in the governor's letter or Executive Order. It further states that EPA should make it clear that the governor's letter and the environmental commissioner's letter should be an expression of

support for all of the elements of National LEV, and that the commitment must provide adequate disincentives for states to break commitments prior to submitting SIP revisions. The commenter expresses some concern with the proposed statement in the commissioner's letter beginning "[h]owever, the promises of this letter will not have the force of law..." and they recommend deletion of the phrase. In addition, they believe that the commissioner's letter should have language that commits the state to forbear from adopting a Section 177 Program.

A commenter (9) suggested that it is important that state opt-ins involve standardized language. Another (5) believes that states should have some flexibility to develop their own language, but the commenter also expressed an understanding that EPA may need to have specific conforming language, and therefore the commenter does not insist on flexibility. One state (12) commented that it would legally be able to use the language specified for the letter from the Governor, the letter from the Secretary, and the subsequent state regulations and SIP revision, although it suggested a possibility that minor word changes could result from the state rulemaking process. It also noted that it does not intend to adopt a Section 177 Program, and any such small language changes will not diminish this position.

Another state (19) commented that commitments made by the Governor and Secretary/Commissioner cannot use the proposed language since neither official can speak unilaterally for the state, they can only speak for themselves. The commenter offered the following alternative language to be used in the commitment letters where the state is required to speak: "I, in my capacity as governor/secretary, do not intend to adopt..." It noted that the power of state law would become certain when the SIP is revised.

Another state (18) comments that its state law lists specific uses for Executive Orders, none of which are appropriate for an opt-in to National LEV, so it intends to use the option of a letter from the Governor instead.

One state (11) stated that it is developing regulations that will cover the requirements in EPA's SNPRM, but that while such regulations have been approved for proposal by the state Environmental Quality Board, they are not likely to be published by the time the opt-in submittal is due to EPA. Thus, the state plans to submit a copy of the proposed rulemaking prior to publication. The commenter further noted that its proposed rule does not include all of the exact language in EPA's SNPRM, but that it intends to modify the regulations to make them consistent with the final rule language as long as such modifications do not increase the rule's scope. In addition, it suggested that section 86.1705-99(e)(3)(iii)(C), which requires states to specify that manufacturers are committing to National LEV with the expectation that OTC States will allow National LEV as a compliance alternative through MY2006, should be modified because this state could not make such a statement within the proposed 45 day period because of the expectation that certain OTC States will not opt into the program. Finally, it suggested a modification to 40 CFR 86.1705-99(e)(3)(iii)(C) to address its comment that the provisions of a letter will never have the force of law, noting that its proposed rule will not have force and effect of law until published as a final rulemaking.

Response

EPA believes that the structure of the state commitments incorporated in the SNPRM and Final Rule is as binding as is legally possible prior to completion of the state rulemaking process and EPA approval of the state regulations committing to National LEV as a revision to the SIP. EPA is not aware of any way to provide in the National LEV regulations for more binding state commitments. The reference to the notice of proposed rulemaking for phase II reformulated gasoline (RFG) requirements does not provide any useful guidance here. Section 211(k)(6) of the CAA allows states to opt in to the federal RFG program. It provides that EPA shall apply the federal RFG requirements to nonattainment areas in a state upon the application of the governor. Such federal requirements will continue to apply directly to the fuel providers in that area until EPA removes the requirement. The notice referenced by the commenters proposes the timing for EPA to remove the federal requirement upon the application by the state's governor to opt out of the RFG program. However, neither the CAA RFG opt in provision nor the proposed opt out regulations constrain the state from adopting more stringent fuel requirements for the area. (Under certain circumstances, section 211(c)(4) of the CAA bars states from adopting fuel requirements more stringent than applicable federal fuel requirements, but this bar to state action was established by Congress in the CAA, not by EPA through regulations.) EPA's authority to establish the timing under which it will remove the federal RFG requirement upon a state application does not directly apply to barring states from adopting new motor vehicle requirements pursuant to section 177, nor does it imply any such authority by analogy. See the preamble sections V.C, VI.A, and VII.A for discussion of why the OTC States will keep their commitments to National LEV and the program will be stable.

See the preamble section V.C.1 for EPA's response to the manufacturers' comments regarding the proposed statement in the commissioner's letter beginning "[h]owever, the promises of this letter will not have the force of law..." and the suggestion that states should commit to forbear from adopting a Section 177 Program.

See the preamble section V.C.1 for EPA's response to the comments regarding the requirement for specified language for the state opt-ins and the need for some flexibility in that language.

With regard to comments and alternative language suggested by commenter (19), EPA will work with the state to develop language that would be adequate for the state's letters from the governor and commissioner to commit the state to National LEV. EPA believes that the provision allowing for opt-in language that is substantively identical to the suggested language should provide the state sufficient flexibility to address its concerns.

EPA interprets the 40 CFR 86.1705-99(e)(4) provision accepting submission of proposed regulations in lieu of certain statements in the commissioner's letter to include submission of regulations that have been finalized for proposal but have not yet been published as proposed regulations. To the extent that provisions in a state's proposed regulations are not consistent with the language required for state opt-ins in the final National LEV rule, the commissioner's letter would need to include language addressing

any differences and making the commitment substantively identical to what is required in the regulations. With regard to commenter (11)'s specific comments on proposed 40 CFR 86.1705-99(e)(3)(iii)(C), EPA has modified the language to reference the OTC States that opt into National LEV. Also, EPA accepts the suggested alternative language stating that the proposed rulemaking will not have the force of law until it is a final rule for any state that is submitting proposed regulations in lieu of portions of the secretary's letter, and EPA has modified the final regulations accordingly.

b. ATV Agreements

Comments

Several commenters (4, 5, 7, 9) stated that EPA should not allow state opt-ins to be conditioned on an ATV agreement, and that introduction of ATVs should be market-driven and not mandated by government. Another commenter (15) strongly supported the right of OTC States to condition their commitments on a "meaningful ATV agreement that fosters ZEV technology prior to opting into NLEV," and that the MOU signed by the OTC required an ATV agreement as a component of a National LEV program. Similar sentiments are echoed by the OTC comments (10), which state that an ATV process is an important part of some states' commitment to the National LEV program. Another commenter (14) is "mystified" why the ATV component is not a part of the National LEV program, given EPA's mission to protect public health and the environment, and states that manufacturers are currently rushing to produce high-tech, clean vehicles for the California and Northeast markets.

Response

See the preamble to the Final Rule at section V.C.1 and the preamble to the SNPRM at 44760 for a response to these comments.

c. Backstop Section 177 Programs

Comments

The issue of "backstop" Section 177 Programs prompted comment from a number of sources, some in favor of limiting the ability of states to adopt such programs, others against. The OTC (10) expressed support for the rights of states to initiate backstop Section 177 Programs, commenting that states should not be required to include language in the SIP such as "intends to forbear" or "will forbear" from adopting such programs. Another commenter (14) strongly objected to any condition that restricts a state's ability to adopt either a Section 177 Program and/or a ZEV mandate program. A commenter (9) believes that regulatory language designed to restrict states from adopting Section 177 Programs helps to ensure a uniform National LEV program. Others (10, 11, 18) believe that states should have the opportunity to adopt backstop programs before MY2006, as long as such programs satisfy the identity requirements of section 177 of the CAA. One commenter (11) states that as long as a backstop Section 177 Program allows

National LEV as a compliance alternative, the adoption of such a program should not preclude a state from participating in National LEV or trigger an off-ramp.

Response

See the preamble to the Final Rule section V.C.1 for responses to these comments.

d. ZEV Mandates

Comments

Several commenters (1, 2, 7) assert that state commitments related to ZEV mandates under National LEV should be firm and reflected in the regulations. Commenter (7) states that the National LEV regulations should specify that the state's commitment regarding adoption of ZEV mandates must use only the language "will forbear." Another commenter (17) believes that allowing states to implement ZEV programs is important for emission reductions and technology. This commenter states that although the rule claims to be ZEV neutral, opting into the program seems to preclude states from adopting ZEV programs. Commenter (14) strongly objects to a provision requiring states without a ZEV mandate to forego promulgation of such program until 2006. This commenter states that this would require a state to give up rights granted by Congress and would restrict the state's ability to protect the health of its citizens. Another commenter (10) commented that, for those states willing to make a statement in their SIP regarding their adoption and implementation of a ZEV mandate, the wording should be "intends to" forbear, enabling state legislatures to enact such a provision if they so choose. One OTC State (12) indicated a greater degree of comfort with the "intends to forbear" language regarding Section 177 Programs, but stated that their state would not refuse to commit to National LEV if EPA finalizes the alternative "will forbear" language. Commenter (11) suggests that the regulations should explicitly provide that proposed state regulations that explicitly exclude a ZEV mandate are acceptable to fulfill the requirement for the commitment regarding ZEV programs. This commenter also believes that a state that has proposed a rule that specifically excludes adoption of a ZEV mandate should be allowed to omit the language proposed by EPA in Sec. 86.1705-99(g)(1)(I) that reads "including any mandates for sales of ZEVs." Similarly, the commenter suggests that 40 CFR 86.1705-99(e)(3)(iii)(D) should be modified to allow a state to omit the reference to ZEVs if the state is demonstrating its intentions regarding ZEV mandates elsewhere in its submission to EPA (such as in a regulation proposed by the state, as mentioned above).

Response

See the preamble to the Final Rule section V.C.1 and VI.A.4, the SNPRM at 62 FR 44760, and the NPRM at 60 FR 52740, for responses to some of these comments. The SNPRM did not propose and the Final Rule does not provide that states without existing ZEV mandates must forego promulgation of such a mandate until 2006. Rather,

OTC States without existing ZEV mandates would state their intent not to adopt a ZEV mandate or backstop ZEV mandate effective before model year 2006 (or MY2004 in the event that EPA did not promulgate Tier 2 regulations by the deadline provided). Opting into National LEV would have no effect on ZEV mandates in states with existing ZEV mandates (those adopted before the signature date of this Final Rule). It is inaccurate to say that those OTC States without existing ZEV mandates that opt into National LEV would be restricting their ability to protect the health of their citizens, rather they would be choosing to protect their citizens' health through National LEV rather than through ZEV mandates and Section 177 Programs. The Final Rule respects the OTC States' choices.

With regard to commenter 11's comments on the specific language of the state opt-in regarding ZEV mandates, the commenter's suggested approach does not appear to be consistent with the language of the Final Rule. EPA also is not modifying the Final Rule language in the manner suggested. The alternative approach does not appear to state an intention not to take certain actions at a future time during the period of the state's commitment to the National LEV program. Also, EPA is not aware that the alternative approach has previously been discussed by the OTC States and the manufacturers, and there is no indication that the alternative approach would be acceptable to all parties.

e. Equivalent Emissions Reductions

Comments

A number of commenters objected to EPA's proposal that the letter from the state environmental commissioner would include a statement that National LEV would achieve reductions of VOC and NO_x emissions equivalent to or greater than the reductions that would be achieved through state adopted Section 177 Programs in the OTR. One commenter (19) notes that states are not in a position to have made this determination individually. Another commenter (10) suggests that while some individual states have not made the determination that state LEV programs and National LEV are equivalent, these states could acknowledge that EPA has determined the equivalency of state LEV programs with the National LEV program. Another commenter (17) states that the commitment provisions would require each state to agree that adoption of National LEV will provide greater reductions than adoption of a Section 177 Program, but that EPA has failed to demonstrate that this is correct. Another commenter (11) stated that it is clear that National LEV emission reductions in that state will be equivalent to or greater than those achieved through OTC State adoptions of the California LEV program in the OTR. The commenter recommends that EPA change the proposed language to emphasize states' support of EPA's determination and the adequacy of the emission reductions, rather than faith by states that EPA's determination is true.

A commenter (18) notes that the proposed statement for the commissioner's letter is based on EPA's determination as contained in the final rule, which is not published yet. This commenter also states that the basis for EPA's equivalency determination is likely to be the consultant's (Pechan) study used throughout the rulemaking, which the commenter

believes includes a number of gross assumptions. The commenter asserts that it is unreasonable and unnecessary for EPA to essentially ask states to acknowledge the validity of the consultant's study as a condition of the state's commitment to National LEV. This commenter also notes that equivalency is no longer a legal concern, and therefore this provision should either be eliminated, or at most, states should only have to acknowledge the fact that EPA made this finding.

Response

See the preamble to the Final Rule section IV for discussion of EPA's determination that National LEV would provide greater VOC and NO_x emissions reductions in the OTR than would state-by-state adoption of the CAL LEV program. The Final Rule provides that the state opt-ins would include a statement that, based on EPA's determination in the Final Rule, the state believes that National LEV will achieve reductions of VOC and NO_x emissions that are equivalent to or greater than the reductions that would be achieved through OTC State adoption of California LEV programs in the OTR. Thus, states would not imply that they had made this determination individually, nor would they make a statement regarding the relative emissions benefits of the two programs in that state alone. EPA's determination is based on an updated version of the earlier modeling. It also includes a sensitivity analysis which assumes that all OTC States adopt and implement state Section 177 Programs as soon as possible, which still shows that National LEV would produce greater emissions reductions in the OTR. EPA believes that it is appropriate for states opting into National LEV to acknowledge the relative emissions benefits that the program will provide. Throughout the process of developing the National LEV program, the OTC States have insisted that emissions equivalency is a key criterion for National LEV to be an acceptable alternative to state Section 177 Programs in the OTR, whether or not it is a legal criterion. If EPA finds that National LEV is no longer equivalent, the states have insisted that covered states should be able to opt out of the program, as the Final Rule provides. Given the states' emphasis on emissions equivalency, acknowledgment that this criterion is satisfied is an important aspect of the states' expression of support for and commitment to the National LEV program.

2. Manufacturer Opt-Ins

Proposal

EPA proposed that motor vehicle manufacturers' opt-ins to National LEV would be due within 60 days from signature of the final rule. The mechanism for opting in was specified in the Final Framework Rule (see 40 CFR 86.1705(c)(2)). EPA proposed that the only permissible conditions in a manufacturer's opt-in notification would be that specified OTC States opt into National LEV pursuant to the National LEV regulations and that EPA find the program to be in effect. These conditions parallel the proposed permissible conditions for the OTC States' opt-ins.

Comments

One commenter (7) commented that "EPA's language for manufacturer opt-in appears to be unduly restrictive and unnecessary." In particular, the commenter highlighted regulatory language in 40 CFR 86.1705-99(c)(1) that it believes appears to practically prohibit certification of a California vehicle, a vehicle produced for sale outside the United States, or of heavy light-duty trucks. This language reads "XX Company ... commits not to seek to certify any vehicle except in compliance with the regulations in subpart R." A manufacturer of large sport-utility vehicles (3) also commented that the regulations seem to preclude certification of heavy light-duty vehicles once National LEV is in effect, because subpart R deals only with light-duty vehicles and light light-duty trucks.

One of these commenters (7) also comments that EPA should allow manufacturers to place the following conditions on their opt-ins: certain OTC States opting in; certain OTC states opting in within 45 days of signature of the final rule; certain manufacturers opting in; EPA finding the program in effect; and EPA finding the program in effect within 45 days of signature of the final rule. It notes that the OTC State opt-in conditions should be revised to be consistent with these conditions.

Response

Because subpart R does not apply to California vehicles, vehicles produced for sale outside the United States, or heavy light-duty trucks, this statement in a manufacturer's opt-in would have no effect on a manufacturer's ability to certify such vehicles. See also the preamble to the Final Rule section V.C.2.

The Final Rule provides that manufacturers can condition their opt-ins on certain OTC States and manufacturers opting in and on EPA finding the program in effect, but does not allow the additional timing-based conditions that the manufacturers suggest. EPA has attempted to structure the deadlines for parties to submit opt-ins and for EPA to make a finding that National LEV has come into effect so as to facilitate the process for the parties to reach a final agreement to commit to the National LEV program. EPA is concerned that adding deadlines in the opt-ins would unduly complicate the opt-in process, and the commenter does not identify any advantages of the suggested change. If, after a party opts in conditionally but before all conditions on its opt-in are satisfied the party decided that it no longer wanted to opt into National LEV, it could withdraw its opt-in.

3. EPA Finding that National LEV is in Effect

Proposal

The OTC States' and the auto manufacturers' opt-ins would become effective upon EPA's receipt of the opt-in notification or, if the opt-in were conditioned, upon the satisfaction of that condition. Under the proposal, EPA would find National LEV in effect if each OTC State and each listed manufacturer were to submit an opt-in notification that complied with the requirements for opt-ins, and all conditions on any of those opt-ins had

been satisfied (or would be satisfied upon EPA finding National LEV in effect). EPA also requested comment on whether the Agency should be able to find National LEV in effect if each of the listed manufacturers were to submit an opt-in notification that complied with the requirements for opt-ins, each of the opt-in notifications submitted by an OTC State complied with the requirements for opt-ins, and any conditions placed upon any of the opt-ins were satisfied, even if fewer than all OTC States opted into National LEV.

EPA also proposed to make the finding as to whether National LEV is in effect before the OTC States' SIP revisions are due. Through the 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. EPA also proposed that 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. EPA would publish the finding that National LEV is in effect in the Federal Register, but the Agency would not need to go through additional rulemaking to make this determination.

Comments

Some commenters (7, 9) agree that it makes sense for manufacturers to sign up to the program after the states have, but state that EPA should indicate that the program does not take effect until after all states and manufacturers have opted in. Many other commenters (10, 12, 11, 15, 17, 18) suggest that EPA should allow the program to come into existence if fewer than all OTC states opt in, as long as auto manufacturers have opted in knowing which states are included and which are not. One commenter (10) notes that throughout discussions on the National LEV program, the OTC States have strongly supported an individual state's right to implement motor vehicle control programs of its own choosing, and that the National LEV program can still be effective without all of the states opting into it. Another commenter (12) states that it is regrettable that some states may not opt into the program, but that this should not deprive the remaining states of the opportunity to have a National LEV program. Some commenters (17, 20) noted that it is likely that not all the OTC States will opt in, and the Massachusetts Department of Environmental Protection (20) comments that Massachusetts has elected to not participate. A state (15) comments that it reserves its right to maintain a Section 177 Program whether or not National LEV goes into effect, and it notes that small market states which often acquire new cars for sale from dealers beyond their borders have a strong incentive to maintain the same emission control requirements as their larger neighboring states.

One commenter (5) stated that states should be able to take emission reduction credits within their attainment SIPs or transportation conformity determinations once EPA finds National LEV is in effect.

Response

See the preamble to the Final Rule section V.C.3 for responses to comments regarding the criteria for finding National LEV in effect. See the preamble to the Final

Rule section VII for responses to comments regarding EPA's finding that National LEV is enforceable and hence the reductions from the program are creditable for SIP purposes.

Consistent with the requirements under Title I of the CAA and implementing regulations, once National LEV is in effect, emissions reductions from National LEV vehicles will be creditable towards relevant State Implementation Plan requirements under Title I, including attainment demonstrations and transportation conformity determinations.

4. SIP Revisions

Proposal

EPA proposed that within one year of the date of EPA's finding that National LEV is in effect, the OTC States would complete the second phase of their commitments to National LEV by submitting SIP revisions to EPA. The SIP submission to EPA would include state regulations containing the bulk of the proposed state commitments, which largely mirrored the provisions of the state commitments included in the initial state opt-ins, and a transmittal letter or similar document from the state commissioner forwarding those regulations. EPA proposed that three additional elements of the SIP commitment may be included either in the transmittal letter or the state regulations. First, the state would commit to support National LEV as an acceptable alternative to state Section 177 Programs. Second, the state would recognize that its commitment to National LEV is necessary to ensure that National LEV remain in effect. Third, the state would state that it is submitting the SIP revision to EPA in accordance with the National LEV regulations. EPA also explained the manner in which the SIP commitments will be enforceable over the duration of National LEV.

Comments

The OTC (10) commented that, for those states willing to make a statement in their SIP regarding their adoption and implementation of a ZEV mandate, the wording should be "intend to" forbear, enabling state legislatures to enact such a provision if they so choose. The manufacturers (7) express the opposite view that states should use the words "will forbear" to commit not to adopt ZEV mandates.

Several commenters (5, 18) questioned why a state without a Section 177 Program would be required to adopt regulations stating that National LEV is a compliance alternative to a Section 177 Program that the state may adopt later, although one of these (18) notes that it could agree to this if EPA clarifies that a backstop Section 177 Program could be adopted prior to MY2006. The other commenter stated that it is unclear what enforcement authority a state would have under National LEV.

One commenter (20) believes that the proposal as written would preclude states from adopting a Section 177 Program even if a state determined that such a program was in its best interest (i.e., a state believes that a Section 177 Program could better address a problem with attainment and maintenance of the air quality standards, or could function as a cost-effective regional transport control strategy). This commenter stated that EPA's

proposed opt-in regulations would in effect deny states access to a Section 177 Program and undermine efforts to protect public health using means that have been demonstrated to be cost-effective. A commenter (14) stated that the proposed opt-in conditions are troubling and "virtually eliminate a state's ability to opt out of the program once EPA deems NLEV in effect." The commenter further asserted that a state could be subject to federal enforcement action by opting out of National LEV. The commenter also suggests that the terms and conditions placed on each OTC State Governor may violate state constitutional provisions since a sitting Governor cannot bind future legislatures or future Governors to National LEV.

Another commenter (17) disagreed with EPA's legal analysis regarding the preemptive effect of a federally-approved National LEV SIP revision. The commenter opined that this is unconstitutional because only the federal courts (not Congress) have the power to declare state legislation invalid and because this would be a violation of the Tenth Amendment. Another commenter (16) opined that the state's commitment to National LEV would be unenforceable under certain circumstances where that state or downwind states need additional emissions reductions to comply with section 110 of the CAA. The commenter cites to case law standing for the proposition that a promise is unenforceable if the interest in its enforcement is outweighed by a public policy harmed by its enforcement. This commenter further disagreed with EPA's discussion of the effect of CAA section 110(l) on EPA's ability to approve a second SIP submission contrary to an approved SIP revision committing to National LEV.

One commenter (18) identified additional concerns with 40 CFR 86.1705-99(g) of the proposed regulations. First, this commenter notes that acceptance of the proposed language regarding the transition to an existing Section 177 Program in the event of a manufacturer opt-out may depend on EPA's changes to the proposed opt-out portions of the National LEV program. Second, it suggests that the language "...for the duration of the STATE commitment to National LEV" should be added to the end of paragraph 86.1705-99(g)(4). Lastly, this commenter asserts that the proposed language "STATE recognizes its commitment to National LEV is necessary to ensure that National LEV remains in effect" may not be an accurate statement since EPA's proposed regulations provide that one state opting out of the program does not necessarily mean the dissolution of National LEV. It suggests that a statement to the effect that a state's commitment may be necessary to ensure that National LEV remains in effect would be more representative of the regulations as written.

Another commenter (11) stated that the proposed regulations at 40 CFR 86.1705-99(g)(3) do not automatically incorporate National LEV provisions into state law, nor should they. This commenter believes that states should be allowed to either adopt by reference or adopt explicitly as long as the transition is governed by National LEV regulations. Once effective, the commenter notes, National LEV will be enforced by EPA and states should not be required to adopt and incorporate National LEV provisions by reference.

Response

See the preamble to the Final Rule section V.C.1 and VI.A.4, the SNPRM at 62 FR 44760, and the NPRM at 60 FR 52740, for responses to comments regarding ZEV mandates.

The purpose of requiring states to commit to National LEV through state regulations approved into SIPs is to make the state commitments legally enforceable for the duration of the commitments. While a state could change its own regulations, the commitment would remain enforceable under the approved SIP revision unless and until EPA approved a subsequent SIP revision deleting the commitment to National LEV. In addition, the commitment will be more politically binding if it has been made through a rulemaking process with full opportunity for public participation. The fact that a state had committed to accept compliance with National LEV for a specified duration in regulations would not mean that the state would have any responsibility for enforcing the National LEV program. See the preamble section V.C.4 for further discussion of the purpose and effect of the state commitments through SIP revisions.

See the preamble to the Final Rule section V.C.4 for responses to comments concerning the effect of a state's commitment to accept National LEV as a compliance alternative to any state Section 177 Program for the duration of the state's commitment. EPA agrees that the opt-in provisions limit the states' ability to opt out of National LEV once the program has come into effect. The benefits of National LEV, in terms of emissions reductions, and uniformity and predictability of motor vehicle standards, depend upon the program remaining in effect for a number of years. Consequently, EPA has structured the National LEV provisions to maximize the stability of the program over its intended duration by limiting the opportunities for either states or manufacturers to opt out of National LEV. If states prefer not to be bound to National LEV for the duration of the program, they need not opt in and the program will not come into effect. EPA does not understand the basis for the commenter's assertion that opting into National LEV could violate state constitutional provisions. States must frequently make choices between different emissions control measures, and the choice of one measure often precludes the opportunity to switch to other measures for a significant period of time due to practical or legal limitations such as incompatible technology, contractual arrangements, resource limitations, lead time constraints, etc. The choice of National LEV is no different. As with the choice of any other emissions control measure, the choice of National LEV will have ramifications for the future, and future state legislatures and governors will have to operate within the constraints created by this state action, just as they must with any other previous state action. EPA is not aware of any way in which this could violate state constitutional provisions.

Section V.C.4 of the preamble to the Final Rule sets forth EPA's legal analysis regarding the preemptive effect of an approved SIP revision. Although federal courts are the ultimate judge of whether a state law is preempted by federal law, the courts base their decision on federal statutes and regulatory actions, and it is not unconstitutional for the courts to do so. EPA is not suggesting anything different in this rulemaking. EPA also disagrees with the comment that the Tenth Amendment prohibits either the preemption of a new state law by a National LEV SIP revision or EPA's disapproval of a

new state law under section 110. The Tenth Amendment is violated when states are required to act under certain circumstances. There is nothing about the initial National LEV SIP revision that forces states to take a particular action -- rather they have an option that they may or may not take. Once the National LEV SIP revision is submitted, no further action by states is required, although some state actions may be invalid. The commenter did not point to any cases (and the Agency is aware of none) holding that federal preemption of state action is a violation of the Tenth Amendment. For discussion of the enforceability of a state commitment in an approved SIP revision and EPA's authority to approve a subsequent SIP submission violating that commitment see the preamble to the Final Rule section V.C.4.

See section V of this document below and section VI of the preamble for responses to comments regarding the provisions relating to opt-outs. EPA has modified the regulatory text at the end of paragraph 86.1705-99(g)(4) to add the suggested language "for the duration of STATE's commitment to National LEV." However, EPA declines to make the other modification to that section suggested by the commenter. EPA continues to believe in the accuracy of a state recognition that "its commitment to National LEV is necessary to ensure that National LEV remains in effect." If a state violates National LEV, there is a significant possibility that the manufacturers will opt out and the program will not remain in effect. Because there is no assurance that the program will remain in effect upon a state violation, the states should recognize that upholding their commitments is one necessary (although not sufficient condition) to ensure that National LEV will remain in effect.

EPA agrees that states need not incorporate the National LEV regulations by reference into state law. However, the state commitment regulations must provide that in the event that a manufacturer opted out of National LEV, the transition from National LEV requirements to any state Section 177 Program would proceed in accordance with the National LEV regulations at 40 CFR 86.1707. EPA agrees that the state may accomplish this through incorporation by reference or explicit adoption. EPA also agrees that EPA, not the states, will be responsible for enforcing the National LEV requirements and the states need not reference or adopt the National LEV regulations, except as specifically provided under the provisions for state commitments.

V. Incentives for Parties to Keep Commitments to Program

Proposal

EPA proposed that the program include 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. EPA also proposed that National LEV would include 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’ proposed offramps 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.

Comments

Some commenters (1, 2) expressed general concerns that voluntary programs like the National LEV program should provide as much certainty as possible for stakeholders, and that offramps should not be able to be triggered with relative ease or for non-substantive reasons.

One commenter (7) believes that EPA must allow manufacturers to opt out if states without existing ZEV programs adopt ZEV programs, or if states without existing Section 177 Programs adopt such programs.

EPA received several comments on the NPRM regarding the termination of the National LEV program if a manufacturer were to opt out. Several commenters stated that National LEV should terminate automatically upon any manufacturer's opt-out. One commented that states with backstops cannot wait for EPA to determine through rulemaking that National LEV is no longer in effect, which could result in significant delays in implementation of backstops. Rather, the commenter asserted, states must be able to apply OTC LEV requirements in accordance with the terms of the draft MOU. This commenter added that there is no room for discretion in the determination as to whether the program is in effect and that the states have no ability to continue National LEV for some manufacturers while applying OTC LEV to others. However, another commenter opposed a provision that would allow EPA to find that National LEV was no longer in effect if a small number of manufacturers opted out based on an OTC State's failure to implement a commitment.

One commenter (7), the manufacturers’ associations, raised a number of issues related to the general provisions for manufacturer opt-outs and provisions for manufacturer opt-outs based on an EPA change to a Stable Standard. The commenter stated that EPA should not be the sole determiner of the validity of a manufacturer's opt-out decision. In addition, the commenter raised a number of issues related to provisions in the Final Framework Rule. EPA did not reopen those aspects of the rule for further comment, apart from a few specific issues. Comments on those specific issues are addressed below in section VII.D of this document.

Response

See the preamble to the Final Rule sections VI and VII and section VI of this document for discussion of the limited offramps provided under National LEV, the stability of the program, and the very low probability that any of the offramps will be triggered.

See the preamble to the Final Rule section V.C.1 for discussion of OTC State commitments on backstop Section 177 Programs and ZEV mandates, section VI.A.4 for manufacturer opt-outs based on adoption of a ZEV mandate, and section IV.C.1 of this document for further discussion.

In the SNPRM (62 FR 44763-44764) EPA explained its proposed approach to termination of the National LEV program and received no comments upon that approach, which is finalized in this rulemaking. Rather than having the National LEV program terminate automatically when a manufacturer opts out or having EPA determine whether National LEV is in effect, each of the OTC States and the auto manufacturers will be able to decide whether to continue with the program -- an approach that was not opposed by any commenter on the SNPRM. Under the Final Rule, for OTC States that keep their commitments to National LEV and have a backstop Section 177 Program adopted at least two years before the effective date of a manufacturer's opt-out, there would be no delays in implementation of a Section 177 Program. See the preamble to the Final Rule section VI for more discussion of state and manufacturer opt-outs.

See the Final Framework Rule (62 FR 31205-31206) and the Summary and Analysis of Comments on the Final Framework Rule (pp. 24-25) for discussion of EPA's determination of whether a manufacturer's opt-out based on an EPA change to a Stable Standard is valid. EPA notes that none of the additional offramps for manufacturers finalized in this rule necessitate or provide for an EPA determination as to the validity of the manufacturer's offramp. Thus, the manufacturers' objections are limited to opt-outs based on an EPA change to a Stable Standard. Moreover, the manufacturers' concerns about the possible subjectivity of an EPA determination regarding whether a change has increased the stringency of a requirement would only apply in the event that EPA revises a Non-Core Stable Standard, and would not apply to any change to the Core Stable Standards, which are the requirements that EPA could not impose absent the manufacturers' consent under the National LEV program. Thus, EPA would not make any determination as to the validity of a manufacturer's opt-out for most of the offramps, and is certainly not the "sole determiner" as to whether opt-outs are valid.

As to the other issues raised by the commenter (7) related to the Stable Standards provisions in the Final Framework Rule, EPA's rationale for those provisions is contained in the preamble to, and Summary and Analyses of Comments for, the Final Framework Rule.

A. Offramp for Manufacturers for OTC State Violation of Commitment

In the SNPRM, EPA proposed 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 time frame set forth in the National LEV regulations; and (3) submitting an inadequate National LEV SIP revision. In addition, EPA requested comment on whether manufacturers should also be able to opt out of National LEV if an OTC State without an existing ZEV mandate adopted a ZEV mandate (even if it accepted National LEV as a compliance alternative for that requirement) and that state had either stated its intent or committed not to adopt such a mandate.

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

Proposal

If an OTC State were to violate its commitment by purportedly disallowing National LEV as a compliance alternative, EPA proposed both automatic consequences in the violating state and an opportunity for manufacturers to opt out of National LEV.

In a state that has 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, EPA proposed that manufacturers would be allowed 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. Additionally, the violating state could not claim SIP credits for control of emissions from vehicles meeting anything more stringent than Tier 1 tailpipe standards until the state Section 177 Program requirements applied (which might not be until MY2006).

EPA also proposed that manufacturers would be able to opt out at any time after an OTC State takes final action that would require manufacturers to comply with a Section 177 Program or a ZEV mandate (in an OTC State without an existing ZEV mandate) prior to MY2006 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 would be some time in the future. EPA proposed that there would be no time limit for manufacturers to exercise their right to opt out as long as the state was in violation of its commitment.

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, EPA proposed to interpret 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 those proposed in the SNPRM, 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. EPA also requested comment on whether there is a way to ensure that manufacturers have at least four, rather than two, years of lead time from the date that the state takes final action changing its regulations deleting National LEV as a compliance alternative, and what the legal basis would be for such an approach.

Comments

A commenter (7) suggests that EPA must provide incentives for states to not adopt backstop Section 177 Programs and/or ZEV programs, recommending that a state must automatically receive four years of Tier 1 SIP credits if it does not allow National LEV as a compliance alternative to a State Section 177 Program, regardless of the type of vehicles delivered to the state. Many other commenters (10, 11, 14, 16, 17) oppose a four year lead time under any circumstances on the basis that it is not authorized by the Clean Air Act. One (14) states that the timing requirements of a state undertaking a section 177 rulemaking process that could take 18 months could effectively mean a five to six year lag during which states could not enforce a program more stringent than Tier 1.

Regardless of whether there are two or four years of lead time, commenter (7) recommends determining lead time on a model year basis, and not basing it on the start of production date for separate engine families as appeared to be done in the SNPRM. As an example, they suggest that a two year lead time in the context of National LEV should be defined as "the first model year that starts after the date that is two calendar years" from the event triggering the lead time.

This same commenter states that OTC States are allowed to cure a trigger for a manufacturer opt-out based on a state no longer accepting National LEV as a compliance alternative, and recommends that states should not be able to reverse a manufacturer's opt-out that EPA has already received.

One commenter (18) notes that providing that vehicles sold in a violating state need only meet Tier 1 standards results in an emissions penalty for "innocent" downwind states. This commenter suggests that the punishment for an offending state should be fashioned so as to not result in adverse environmental consequences, such as only allowing Tier 1 SIP credits for the offending state even though National LEV vehicles would continue to be sold in that state. Another commenter (16) noted that if a state attempts to break its commitment to National LEV, auto manufacturers would be permitted to sell Tier 1 vehicles in the violating state beginning in the next model year, whether or not the state actually succeeded in ending its participation in National LEV. The commenter observed that a state that chooses to opt out of National LEV in MY1999 by revoking acceptance of National LEV as a compliance alternative might be unable to enforce its own LEV program until MY2006 if EPA refused to approve the SIP revision.

A commenter (20) indicated that Massachusetts state regulations require the adoption of the California motor vehicle emission control program unless the federal program is found to provide greater emission reductions. The commenter notes that even if National LEV provided greater benefits now, any changes in the California program that increase stringency would require Massachusetts to immediately opt out in order for the state to take advantage of a more stringent California program, thus triggering the

punitive measures of the National LEV program.

A number of commenters expressed disagreement with EPA's proposed interpretation of the lead time requirements of section 177 of the Clean Air Act. This specific issue is addressed in section V.E of this document.

Response

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. This issue is discussed in additional detail in the preamble to the Final Rule section VI.A.1.

With regard to the comments on how lead time relates to model years, EPA has previously promulgated regulations defining model year in 40 CFR part 85 subpart X and continues to believe that applying these existing regulations is appropriate here. However, EPA also notes that in most of the situations related to opt-outs that could potentially arise under National LEV the manufacturers would have the ability to avoid any problems arising from split model years (where different requirements would apply to different engine families in the same model year) by setting their opt-out effective dates accordingly.

EPA's intent in the proposal was that if a violating state cured its violation it would prevent any additional manufacturers from opting out based on the state's action, but would not reverse a manufacturer's opt-out that EPA had already received. This approach appears to be consistent with the approach recommended by the commenter. In the Final Rule, EPA has revised the proposed regulations to clarify this provision.

In response to the issue of a violating state or a downwind state potentially needing emissions reductions from controls on motor vehicles in the violating state, EPA is modifying the regulations 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 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. 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. These provisions are discussed in additional detail in the preamble to the Final Rule section VI.A.1. Additional comments related to the provision that vehicles sold in a violating state need only meet Tier 1 standards and the effects on downwind states are summarized and addressed in the preamble to the Final Rule section V.C.4.

EPA recognizes that some OTC States may need to modify their existing state laws and/or regulations to commit to National LEV through the SIP revision or to ensure that they can continue to comply with their commitments to National LEV over the

duration of those commitments. EPA assumes that states will take this into account in choosing to opt into National LEV and that states that make the decision to opt into National LEV will take whatever actions are necessary to uphold their commitments.

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

Proposal

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. As under the previous scenario, EPA proposed that 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, EPA proposed that 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. After the six-month grace period, the state's submission of a SIP revision would not negate an opt-out that a manufacturer had already submitted to EPA, 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. EPA proposed not to provide for an EPA determination of the validity of an opt-out based on this violation.

Again consistent with the previous scenario, EPA proposed that, if a manufacturer opts out it may set the effective date of its opt-out as early as the next model year after the date of the opt-out or any model year thereafter. 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 NMOG fleet average calculations. These special provisions for vehicles sold in the violating state would start with the next model year after the manufacturer opts 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. EPA requested comment on whether, regardless of the effective date of an opt-out, National LEV regulations should allow manufacturers to sell vehicles that meet Tier 1 tailpipe standards for four years in the violating state.

Comments

A commenter (7) believes that there should not be a 180 day grace period beyond the deadline for the state SIP submission, and that the deadline itself should provide the states adequate time to submit their SIPs. They believe that states must be given adequate incentive to submit their SIP revisions on time, and that use of the grace period carries minimal penalty for the violating state, and no penalty if no manufacturers opt out. They also note that the National LEV program must provide disincentives for those states that do not meet their National LEV commitments regarding timely and adequate SIP submission.

Response

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. See the preamble to the Final Rule section VI.A.2 for discussion of why EPA believes that a limited six month grace period for state SIP submissions is appropriate.

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

Proposal

Under the provisions proposed in the SNPRM, 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 adequately commit the state to the National LEV program. 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 this scenario, 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 requested comment on the following alternative approaches for when a manufacturer could opt out based on an inadequate National LEV SIP revision. One alternative would be to allow manufacturers to opt out immediately upon EPA's initial disapproval of a state's National LEV SIP revision. Another would be to allow manufacturers to opt out if a state's National LEV SIP revision was inadequate and EPA failed to approve it within nine months (or one year) of the deadline for state submission of the SIP revision, whether that failure was through disapproval or inaction. Still another alternative would be to allow opt out upon a determination by the manufacturer that the SIP revision is inadequate, even if EPA has not yet acted on it.

As with the other types of state violations, EPA proposed no deadline for manufacturers to opt out based on this offramp. Also, there would be no opportunity for

the state to cure the violation after a manufacturer had opted out, although manufacturers that had not opted out could no longer do so once the state had cured a violation and EPA had approved the SIP revision committing the state to National LEV. EPA did not propose to provide for an EPA determination of the validity of an opt-out based on this type of violation.

Again consistent with the previous scenarios, EPA proposed that 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. EPA proposed that 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.

Comments

One commenter (7) outlines a timetable based on the proposed approach, which they believe eliminates auto manufacturers' access to opt-outs when a state breaks its commitment to submit an adequate SIP. Under this timetable, the state SIP submission and EPA approval cycle could result in the inability of manufacturers to opt out until MY2004, based on an in-effect determination in January, 1998. They suggest that EPA should approve or disapprove the National LEV portion of a state's SIP submission within 90 days of submission, and that manufacturers must be allowed to opt out immediately upon EPA disapproving a state's SIP submission. Additionally, they note that EPA needs to establish mechanisms to accelerate the SIP submittal/approval process and to determine its enforceability, which would ensure that a state receives its authorized SIP credits in an efficient manner.

Another commenter (18) states that a manufacturer should only be allowed to opt out if EPA disapproved a SIP revision and the state failed to submit a corrected SIP within one year that is approved by EPA. The commenter noted that there are many reasons why a SIP revision could be found defective, including technical reasons that would not affect a manufacturer's obligations, and states should be allowed to make corrections before an offramp is triggered.

Response

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, and the Final Rule takes a slightly different approach, which is discussed in the preamble to the Final Rule section VI.A.3. The Final Rule allows manufacturers to opt out of National LEV if an OTC State has not submitted an adequate SIP revision and either EPA has disapproved the state's submission or at least 12 months has passed since the state submitted its National LEV SIP revision to EPA and EPA has not approved it as an adequate National LEV SIP revision. Under this approach, manufacturers would be able to opt out upon an EPA disapproval of a state's SIP submission without providing the state an opportunity to resubmit. EPA expects that states will work with the Agency during the process of developing the SIP revisions and hence would be able to correct any technical problems before EPA would have to act to disapprove the SIP submissions. See

the preamble to the Final Rule section V.C.4 for discussion of EPA's ability to accelerate the process of acting on National LEV SIP revisions by approving certain submissions without going through additional notice-and-comment rulemaking.

B. OTC State or Manufacturer Legitimately Opt Out of National LEV

Proposal

EPA proposed that a manufacturer could opt out if an OTC State or another manufacturer were to opt out of National LEV legitimately. (Where the initial state or manufacturer's opt-out was invalid, it would not provide an offramp for another manufacturer to opt-out of National LEV.) This proposed offramp could be used 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. EPA proposed that 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.

Comments

EPA received no comments regarding this aspect of the proposal.

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

Proposal

EPA proposed an additional offramp for manufacturers related to the potential effects of fuel sulfur levels on emissions performance of National LEV vehicles. EPA proposed that manufacturers could opt out of National LEV 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 high-sulfur fuel levels.

Believing that the effects of fuel sulfur were not adequately addressed by EPA in the National LEV program, the auto manufacturers proposed 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. 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 44768-44771.) The proposed fuel sulfur offramp would be triggered

under three conditions:

(1) If EPA, upon a written request from a manufacturer in relation to the certification of an OBD catalyst monitor system, 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, based on 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 MIL illuminations due to high-sulfur gasoline so as to eliminate the sulfur-induced MIL.

(3) If 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 also proposed a process for manufacturers to opt out of National LEV if one of the conditions described above occurred. 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, and requesting that EPA consider taking a specified action in response. 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 failed 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 responded 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 a manufacturer had already submitted an 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, EPA proposed that a manufacturer that opts out based on this offramp must continue to comply with National LEV until the opt-out becomes effective.

Comments

Several commenters highlighted this offramp as an area of some concern. The auto manufacturers (7) felt that the proposed language did not go far enough to protect their interests. They would prefer EPA to use language that would allow them to implement a solution to an alleged problem if they felt corrective action was justified, whereas EPA's proposed regulations 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. In addition, they state that EPA should add a provision that allows auto manufacturers to opt out if EPA fails to adjust I/M standards upwards to account for the impact of sulfur or other fuel quality problems. Finally, they suggest that if EPA fails to implement corrective action within 60 days, the manufacturer opt-out condition must not be reversed if EPA subsequently implements the corrective action.

Several state government commenters (10, 11 17, 18, 19) view the addition of this offramp as a new issue that had not arisen in prior discussions and that has potentially

destabilizing impacts on the National LEV program, particularly if it does not provide for any input from states in evaluating remedies that could have a substantial impact on anticipated emission reductions. Some of these (10, 19) note that a fuel sulfur problem with LEV vehicles is not a problem unique to the National LEV program, and that Section 177 programs are equally affected and no offramp is provided in the context of those programs. One (19) suggests that EPA use the language in the OTC State and auto industry MOUs to address any sulfur impacts. Another state (13) believes that corrective actions such as additional preconditioning or modifications to the OBD system will "purge and mask the real world adverse effects of high sulfur gasoline on emission control performance." Although EPA stated in the SNPRM that there is insufficient data to characterize the sulfur effects on National LEV vehicles, the commenter notes that other national groups have concluded that the data is compelling enough to recommend that EPA adopt a national gasoline sulfur control program. With several sulfur-related test programs underway at the time of the SNPRM, the commenter suggests that EPA view the results of these programs before solidifying the National LEV program. This commenter finally suggests that the sulfur offramp "concessions" appear to result in National LEV vehicles that will not provide the emission reductions purported by EPA in actual use, and as a result the National LEV program becomes less attractive to non-OTC states. The consensus of state government commenters, summarized in the OTC comments (10), is that EPA should delete the proposed offramps and return to the language incorporated in the MOUs if EPA believes that these fuel issues must be addressed in the regulations.

In addition to general concerns about these offramps, one commenter (17) had some specific concerns. First, the commenter stated that the proposed regulations did not define what it means to "consider" or "fail to consider" requests submitted to EPA by the manufacturers. Second, they comment that there is no indication of a manufacturer's remedy for what it believes is an improper conclusion by EPA in considering its request. Third, the commenter suggests that the proposal provides no information on how EPA will evaluate a manufacturer's request, such as an analysis of the impact of suggested modifications on anticipated reductions or a re-evaluation of equivalency based on the proposed modifications. This commenter concludes that creation of a separate mechanism to address the effects of fuel sulfur on emission control systems is inappropriate given EPA's commitment to conduct a multi-party process to resolve in-use fuel sulfur issues, and that EPA should take action to reduce the fuel sulfur content.

A representative of the petroleum refining industry (4) likewise did not support this offramp in comments submitted to EPA. This commenter suggested that EPA should commit to respond expeditiously to manufacturers, but that EPA should have more than 60 days to respond to an alleged problem to allow the pursuit of additional information that may not be readily available. The commenter also suggests that input on possible problems and recommended actions should be solicited via a notice and comment rulemaking process.

Another commenter (9) expressed concerns about sulfur, suggesting that EPA should provide for expeditious implementation of corrective actions if higher sulfur fuels

are found to negatively impact OBD systems or I/M programs, and that a failure to account for these contingencies "risks undermining the public and repair industry's confidence in National LEV vehicles."

Response

As EPA has repeatedly stated, it is committed to using a multi-party process to resolve issues related to the effects of non-California gasoline on emissions control systems if testing shows a significant effect. 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 continues to work with the various stakeholders in developing and analyzing all available data to quantify any sulfur effects on current and future technology vehicles, including vehicles such as those that will be produced under the National LEV program. 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 if certain specific issues arise for particular engine families.² The offramp related to fuel sulfur effects in this Final Rule is entirely consistent with the approach outlined in EPA's revised paper.

The 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 is building into National LEV a process to allow certain potential problems related to potential fuel sulfur effects on emissions performance of National LEV vehicles to be addressed on a case-by-case basis within the context of National LEV as more information becomes available. 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. The intent of establishing a case-by-case process to evaluate and resolve potential problems is to respond to the concerns of commenters that higher sulfur fuels may negatively impact OBD systems, which would risk undermining the public and the repair industry's confidence in National LEV vehicles -- outcomes that EPA clearly has strong incentives to avoid.

As noted above, the manufacturers outlined six different conditions related to EPA actions (or lack of action) that they believe should allow them to opt out of National LEV, three of which EPA rejected in the SNPRM. One of those rejected was the provision that would allow auto manufacturers to opt out if EPA failed to adjust I/M

² 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).

standards to account for the impact of sulfur or other fuel quality problems. EPA's rationale for rejecting this provision was fully explained in the SNPRM (62 FR 44768-44771), and the commenters offered no additional information supporting such a provision. Therefore, EPA has finalized the three conditions that were proposed in the SNPRM.

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.

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 how to address potential fuel sulfur effects in the course of vehicle certification or in-use testing. Rather, to avoid providing manufacturers an opportunity to opt out of the program, this offramp only requires EPA to provide a written response to a manufacturers' request.

EPA does not believe that this offramp would require EPA to act in the absence of necessary information. 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. Because of this, and because these offramps have nothing to do with whether or not National LEV vehicles provide the emission reductions purported by EPA, EPA disagrees with the commenter's suggestion that these offramps reduce the attractiveness of National LEV program to non-OTC states.

EPA believes that the regulations adequately define what is meant to "consider" or "fail to consider" requests received by EPA from the auto manufacturers, as is further discussed in section VI.C of the preamble to the Final Rule. In addition, EPA does not believe it is necessary, or even desirable, to specify how a manufacturer's request will be evaluated. This depends on information that EPA does not have at this time, such as the nature of the request, the information and data submitted by a manufacturer, and the specific issue being addressed by the request.

The comments suggesting that EPA reduce the sulfur content in fuel raise issues beyond the scope of the National LEV program. Any change to in-use fuel requirements in the future would require a full notice-and-comment rulemaking process.

D. Offramp for OTC States

Proposal

EPA proposed 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 EPA were to change a Stable Standard in a way that would make it less stringent and as a consequence, it would have changed EPA's initial determination that National LEV would produce emissions reductions equivalent to OTC State Section 177 Programs. EPA proposed that 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, EPA proposed that 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 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 EPA proposed that 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 without allowing National LEV as a compliance alternative. EPA requested comment on whether the National LEV regulations should require a four-year transition period instead.

Comments

One commenter (18) objects to the requirement that a state that opts out must provide manufacturers two years of lead time starting from the date EPA receives the state's opt-out notice. This commenter believes that as long as two years had passed since the date the backstop program was adopted, that is all the lead time required by section 177 and it is unreasonable to require more. The commenter points out that the manufacturer that opts out is on notice of the existence of the backstop and could exercise some control over its own opt-out in order to provide it sufficient time to change its production.

Response

See the preamble to the Final Rule section VI.D and VI.E for discussion of EPA's rationale for the two-year transition period.

1. Manufacturer Opt-Out

Proposal

EPA proposed that 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. If a manufacturer opted out, EPA proposed that 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. 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.

EPA proposed that 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. Until the 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.

Comments

Auto manufacturers (7) commented that, for manufacturers that had not opted out of National LEV, states that have opted out based on a manufacturer's opt-out should provide four, rather than two, years of lead time. Other commenters opposed providing four years of lead time under any circumstances. These comments are more fully summarized above in section V.A.1 of this document.

Response

EPA does not believe that section 177 requires states to provide manufacturers with 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. Thus, EPA believes it is appropriate to finalize the proposed approach. This issue is discussed in the preamble to the Final Rule section VI.A.1.

2. Periodic Equivalency Determination

Proposal

The second condition that EPA proposed would allow an OTC State to opt out of National LEV would be an EPA change to a Stable Standard that made National LEV less stringent and, if the change had been known at the start of National LEV, would have changed EPA's initial determination that National LEV would produce emissions reductions at least equivalent to the adopted OTC State Section 177 Programs. EPA proposed that, if EPA were to change any of the Stable Standards in a way that made the requirements less stringent, an OTC State could request EPA to reevaluate whether

National LEV is still equivalent to the alternative approach of OTC State Section 177 Programs. EPA proposed regulations providing that within six months of receiving the request EPA would conduct such an evaluation or would determine that the revision to the standard or requirement would not make it less stringent.

In reevaluating equivalency, EPA proposed to use the same model and inputs as it used in the initial equivalency determination. EPA would modify the modeling only to reflect the effect of the modified Stable Standard and 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 since the initial equivalency determination.

If EPA found that a change to a Stable Standard would have changed the equivalency determination, EPA proposed that 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.

Also consistent with the other state offramp, EPA proposed that a state opt-out based on a change to a Stable Standard could not become effective until it 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 the state's opt-out letter. The manufacturers' obligations if a state took this offramp would be determined the same way as when an OTC State opts out because a manufacturer opted out.

Comments

A commenter (7) commented that the equivalency reevaluation must not include Section 177 Programs adopted subsequent to the initial determination, because the purpose of the reevaluation is to evaluate the change in the National LEV Stable Standard, not any changes in state section 177 requirements. They also suggest that EPA clarify in its regulations that the section 177 standards used are those that were in place at the time of the initial determination, and are not updated due to any standard changes made by California or section 177 States. Another commenter (12) accepts EPA's equivalency determination and believes that a reevaluation should only be necessary when a core or non-core stable standard is changed.

Another commenter (16) recommends that EPA's equivalency determination should modify all inputs and assumptions to be in accord as closely as possible with real world conditions. This commenter asserts that an offramp that allows states to opt out of the program if the equivalency determination finds National LEV no longer provides equivalent or greater reductions when compared to Section 177 Programs within the OTR is too narrow. The commenter points out that EPA has not provided an offramp for the OTC States if EPA is proven wrong in the assumptions underlying its equivalency determination, if California strengthens its emission standards, or if it otherwise becomes clear that adoption of Section 177 Programs within the OTR is necessary to attain the NAAQS or to prevent interference with attainment in a downwind state. The commenter asserts that states should be free to opt out of National LEV whenever the model shows

that National LEV is not producing equivalent or greater reductions when compared to the current California LEV program if it were to be in effect in the OTR.

Some commenters (10, 19) recommend that EPA should make an equivalency determination no less than every three years or pursuant to an OTC request, as outlined in the MOU language.

Several commenters raised issues with the equivalency determination in comments on the NPRM. Some stated that equivalence between the OTC LEV and the National LEV programs must be guaranteed, with some requesting that EPA reassess the equivalency determination on a regular basis (e.g., annually, every three years) or upon request. One commenter added that if the National LEV program has a shortfall of emissions reductions when compared to OTC LEV, states should no longer be bound by the commitments that they have made. Another asserted that National LEV should include a monitoring program to verify that the modeled results of National LEV are being achieved and should assign responsibility for any failure to meet attainment milestones.

Response

The Final Rule departs somewhat from the proposal regarding when periodic equivalency assessments would be made, allowing 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.

The Final Rule provides that 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. As discussed in the preamble to the Final Rule section VI.D.2, EPA believes it is 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, but would not 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.

The Final Rule provides for EPA to make an equivalency determination only upon the request of an OTC State that is participating in National LEV, not every three years as well as upon a request. If there have been no changes to inputs that could affect the modeling results, there would be no need to rerun the model with the same inputs every three years. If there is a need for an equivalency determination, an OTC State can request one. EPA is to conduct such a determination within six months of receiving the request.

E. Lead time Under Section 177

Proposal

It is not clear under section 177 or EPA's current implementing regulations when 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. Therefore, as part of the National LEV regulations, EPA proposed regulations to determine the date on which the two-year lead time period starts in the special circumstances that arise only when a state has a backstop Section 177 Program that allows National LEV as a compliance alternative and National LEV has gone into effect.

EPA proposed 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.

Comments

A number of commenters expressed disagreement with EPA's proposed interpretation of the lead time requirements of section 177 of the Clean Air Act. Several commenters (10, 11, 15, 17) disagree with EPA's interpretation of the lead time requirements of section 177 for transitions following an opt-out and at the end of the National LEV program and assert that EPA's interpretation is inconsistent with the Clean Air Act. The commenters believe that EPA cannot interpret section 177 of the Clean Air Act to require an additional two years of lead time for states that opt out of the program and already have a Section 177 Program in place. One (15) believes that EPA's interpretation of section 177 is one of many aspects of the National LEV program that are intended to create consequences that will discourage an OTC State from implementing a Section 177 Program, despite the fact that Congress gave states the right to adopt such programs in the Clean Air Act. They argue that it is inappropriate for EPA to act in a manner that arguably violates a state right and expressly discourages a state from using a right granted to it by Congress. Another (17) argues that EPA is incorrectly interpreting section 177 lead time requirements to mean two years following notification of EPA of certain events, rather than two years from adoption of a California program. They note that there is no specific requirement in section 177 that a state notify EPA, at any time, of its adoption of such a program. This commenter believes that EPA's interpretation of the lead time requirements of section 177 is "contravening the express language of the Clean Air Act" and setting a precedent for reinterpretation to "fit unique circumstances." Another commenter (10) likewise disagrees with EPA's interpretation. Instead, this commenter suggests that a state that violates its commitment, but has a backstop program adopted more than two model years before the violation, would have waived its right to immediately implement its own Section 177 Program. The commenter states that this interpretation does not change the plain reading of section 177, nor does it penalize a non-violating state by giving up its right to have a lead time of no longer than two years. Further, the commenter believes that Congress expressed no intent to lengthen the two-

year lead time, and that National LEV does not necessitate such a reinterpretation.

EPA also received comments on the NPRM regarding how the section 177 lead time requirement might apply in the context of National LEV. Some commenters stated that if National LEV were breached, auto manufacturers must waive the two year lead-time requirement in order to avoid a break in delivery of cleaner cars, while others objected to the lack of a mechanism to ensure that manufacturers comply with state regulations upon opt-out. Another commenter anticipates that the motor vehicle manufacturers would attempt to argue that the CAA two-year lead time requirement would apply even for those states with backstops.

Response

See the preamble to the Final Rule section VI.E for discussion of EPA's interpretation of the section 177 lead time requirements in the context of the National LEV program. EPA received no comments from the motor vehicle manufacturers opposing EPA's proposed interpretation of section 177 or the regulations implementing that interpretation, which provide that in a nonviolating state, a backstop program adopted at least two years previously will apply to any manufacturer that has opted out when the opt-out becomes effective.

VI. National LEV Will Produce Creditable Emissions Reductions

A. OTC States Will Keep Their Commitments to National LEV

Proposal

EPA proposed three 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 prior to MY2006 did not allow National LEV as a compliance alternative; (2) failure to submit a National LEV SIP revision to EPA by the specified date; or (3) failure to submit an adequate National LEV SIP revision. In the proposal, EPA stated that it 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 environmental and SIP-related consequences of a violation of their commitments, all combine to support a finding that it is highly unlikely that an OTC State that has opted into National LEV will violate any of its commitments to the program and thereby trigger an off-ramp for manufacturers.

Comments

One commenter (2) stated that the parties' commitments to National LEV must be certain enough to ensure the program's success. Another (9) commented that, if the program is to become a reality, the states and the autos must make clearly identifiable and binding commitments.

Response

See the preamble to the Final Rule sections VII.A and V.C, and the Final Framework Rule at 62 FR 31223 for discussion of the binding nature of parties' commitments to National LEV and the consequent stability of the National LEV program.

B. EPA is Unlikely to Change a Stable Standard to Allow OTC States to Opt Out of National LEV

Proposal

In the Final Framework Rule, EPA explained why 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. In the SNPRM, EPA explained why the Agency is unlikely to change any of the Stable Standards in a manner that would allow the OTC States to opt out of National LEV. In the SNPRM, EPA proposed that an OTC State would be able to opt out of National LEV if EPA changed a Stable Standard in a way that made it less stringent and as a consequence would have changed EPA's initial determination that National LEV would produce emissions reductions equivalent to the

OTC State Section 177 Programs that would be in place in the absence of National LEV. Given the greater emissions reductions that would be produced by National LEV compared to the alternative of OTC State Section 177 Programs, only a significant weakening of a Stable Standard would be likely to have changed EPA's determination that National LEV would produce emissions reductions at least equivalent to the alternative. Such a weakening of a Stable Standard would be contrary to EPA's mission of environmental protection and would jeopardize the National LEV program, which the Agency strongly supports and in which EPA has invested significant resources.

Comments

There were no comments on this aspect of the proposal.

C. EPA is Unlikely to Fail to Consider In-Use Fuels Issues to Allow Manufacturers to Opt Out of National LEV

Proposal

In the SNPRM, EPA also stated its belief 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 an offramp related to in-use fuels. EPA proposed an additional offramp for manufacturers to address their concerns regarding the potential effects of fuel sulfur levels on the emission performance of National LEV vehicles. This offramp could be triggered if manufacturers assert that one of the identified potential problems related to fuel sulfur levels arises and EPA declines to consider allowing manufacturers to take the identified actions in response. In the SNPRM, EPA stated that it recognizes that the potential effects of fuel sulfur levels are of particular concern to manufacturers. 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. Given EPA's recognition of the manufacturers' concerns and the ongoing process for resolving them outside of the National LEV context, EPA stated that it 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 for changes to Stable Standards.

Comments

As noted above in section V.C, several state government commenters (10, 11 17, 18, 19) view the addition of the sulfur offramp as a new issue that has potentially destabilizing impacts on the National LEV program. A commenter (4) believes that the ability of manufacturers to opt out of National LEV if EPA triggers the sulfur offramp calls into question the certainty of SIP credits associated with the National LEV program.

Response

See the preamble to the Final Rule section VII.C for discussion of why EPA is finding that it is highly unlikely that the fuel sulfur offramp would ever be triggered, National LEV is enforceable, and the emissions reductions from National LEV are creditable for SIP purposes. See also Final Framework Rule section V.B on the enforceability of the National LEV program for further discussion of why National LEV is enforceable, and hence the reductions from the program are creditable for SIP purposes. 62 FR 31225-31226.

VII. Additional Provisions

A. Early Reduction Credits for Northeast Trading Region

Proposal

EPA proposed that 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. This would 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. EPA proposed to take 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. Since the credits cannot be used or traded before MY1999, EPA proposed 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. EPA proposed that these credits would be subject to the normal discount rate starting with MY1999, meaning they would retain their full value for MY2000 and would be discounted from then on. In addition, EPA proposed that, consistent with the approach to early reduction credits in the 37 States, early reduction credits in the NTR would be subject to a one-time ten percent discount applied in MY1999, as discussed below.

EPA requested comment on the potential for windfall credits in the NTR and whether ten percent is an appropriate discount factor. In addition, EPA requested comment on whether it should apply a uniform approach to early reduction credits in the 37 States and the NTR, or whether there are reasons to take different approaches in the two regions. EPA also requested comment on whether ten percent (or some lower percent or zero) is the appropriate discount factor for early credits in the 37 states given that National LEV is now proposed to start in MY1999 instead of MY1997.

Comments

Some commenters (1, 2) supported EPA's proposal that manufacturers may generate early reduction credits for sales of vehicles in the NTR in MY1997 and MY1998. Auto manufacturers (7) support early credit generation provisions in the NTR, however, they do not support discounting of early credits generated in the NTR or in the 37 States by any amount.

Response

See the preamble to the Final Rule section VIII.A and the Final Framework Rule at 62 FR 31214-31215 for discussion of early reduction credits.

B. Calculation of Compliance with Fleet Average NMOG Standards

Proposal

Various provisions in the Final Framework Rule assume that National LEV is a 49-state program. However, it is possible that National LEV would continue even if one or more OTC States opt out. Having less than 49 states in the National LEV program would require changes in the Final Framework Rule's provisions for determining compliance with the fleet average NMOG standards.³

EPA proposed to modify the Final Framework Rule so that the NMOG fleet average calculation will not include vehicle sales in any OTC State that legitimately opts out once that opt-out becomes effective. Similarly, if National LEV came into effect without all OTC States opting in, EPA proposed that vehicle sales in those states would not be included in the NMOG average. EPA requested 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. EPA also requested comment on whether it would be appropriate to count some (but not all) types of California-certified vehicles in the National LEV fleet average NMOG calculation.

Comments

AAMA/AIAM (7) recommend that manufacturers be allowed to sell California certified vehicles in the NTR for the 1999 and 2000 model years, and that they must also be allowed to count such vehicles for determining compliance with the NTR NMOG National LEV fleet average standard for those model years. They also recommend that California-certified vehicles produced and delivered for sale outside the NTR in the 1999 and 2000 model years should not be included in the calculation of the NTR NMOG fleet average, but instead should be allowed to be used for early credit generation in the 37-state region. They suggest that California vehicles sold under EPA's CBS policy in the 2001 and later (if a state opts out) model years should not be counted in a manufacturer's NLEV NMOG fleet average calculations. They suggest that no tracking requirements should be initiated that require tracking inconsistent with manufacturers' current systems, and that the EPA Administrator should have the authority to approve acceptable alternatives.

Response

The National LEV program includes an option that allows manufacturers to obtain a federal National LEV certificate allowing the sale of California-certified TLEVs, LEVs, and ULEVs in the NTR in MY1999. Additionally, the National LEV program will allow a manufacturer to obtain a federal certificate to sell California-certified TLEVs in the NTR in MY2000. Under EPA's CBS policy, manufacturers might also sell California-

³ These changes would also be required if not all OTC States opted in. EPA stated that it continues to believe that National LEV should be a 49-state program. EPA also noted that the auto manufacturers have repeatedly stated that all OTC States must opt into National LEV. However, if the auto manufacturers and the relevant OTC States were interested in National LEV proceeding even with less than 49 states participating, EPA stated that it would want National LEV to proceed. The air quality benefits of National LEV are too important not to do so.

certified vehicles in the NTR if at least one of the OTC States does not opt into the National LEV program or otherwise has its own Section 177 Program (even if the vehicles do not have a National LEV certificate). The preamble to the Final Rule discusses these issues further. EPA has decided to require manufacturers to count any California-certified vehicles (including California Tier 1 vehicles) sold in the NTR in MY1999 and MY2000 in their fleet average NMOG calculations. Manufacturers would not include any vehicles sold in an OTC State that had not opted into the National LEV program or otherwise has its own Section 177 Program in order to avoid any problems with double-counting vehicles when determining compliance with the state and National LEV fleet average NMOG standards. EPA believes including all of these types of vehicles in the compliance calculations for the National LEV fleet average NMOG standards best captures the fleet of vehicles sold in the NTR states.

Manufacturers will not include any California-certified vehicles sold in National LEV states for MY2001 and later, including any vehicles sold under EPA's Cross Border Sales policy. There is less of a chance for manufacturers to artificially affect the National LEV fleet of vehicles given the nationwide trading region that goes into effect in MY2001. The treatment of California-certified vehicles in the National LEV fleet average NMOG standard compliance calculations is discussed further in the preamble to the Final Rule.

If manufacturers want to generate early reduction credits in the ASTR, they can do so by selling National LEV vehicles in the ASTR before MY2001. The National LEV certificate EPA will issue for California-certified LEVs and ULEVs in MY1999 and for California-certified TLEVs in MY1999 and MY2000 will not allow manufacturers to sell those vehicles outside the NTR. EPA is not allowing manufacturers to generate early reduction credits in the ASTR through sale of California-certified vehicles because, unlike in the NTR, there is no requirement to meet the fleet average NMOG standards in the ASTR before MY2001. There is thus no reason to count the sales of California-certified vehicles in the ASTR. Manufacturers may always earn early reduction credits by certifying and selling their vehicles to meet both National LEV and California requirements, which should be a feasible alternative given the harmonization between the two programs incorporated into the National LEV program,

EPA believes that the National LEV program does not require manufacturers to develop any new tracking systems that are not already in place. Manufacturers currently track or will soon track vehicles to the point of first sale, such as a dealership or fleet purchaser, for a few of the OTC States in order to demonstrate compliance with those states' fleet average NMOG standards. Additionally, manufacturers keep records of vehicle purchases for other non-emission related purposes such as sending out marketing information or customer surveys to vehicle purchasers. The National LEV program does not require manufacturers to track vehicles to the ultimate purchaser, though a manufacturer that already did so could incorporate such information into its fleet average NMOG standards calculations. This issue is discussed further in the preamble to the Final Framework Rule and the Final Rule.

EPA does not believe that it is appropriate for the Administrator to have

additional authority to approve different vehicle tracking and reporting requirements. The National LEV program is intended to have manufacturers generally use the tracking systems they have in place now and, if necessary, modify the scope of such systems to incorporate the greater number of states included in the National LEV program. The regulatory provisions are broad enough to incorporate different methods manufacturers might use to track vehicle sales. The commenter failed to explain why there would be a need for the Administrator to approve alternative tracking systems in the future.

C. Certification of Tier 1 Vehicles in a Violating State

Proposal

If an OTC State violated its commitment to National LEV, in some instances National LEV would only require manufacturers to supply vehicles meeting Tier 1 emission standards in the violating state. EPA proposed that, as one means of implementing this provision, EPA would 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 only applicable to vehicles sold in a violating OTC State, EPA would give a manufacturer a procedure to respond to a state violation in a timely fashion and produce a real disincentive for an OTC State to violate its commitment.

Comments

Some commenters (10, 17) do not support any approach which would entail adjusting vehicles' emissions upward in the field using running changes. They believe this to be an inappropriate reinterpretation of the running change process and the certification process, and that manufacturers should not be allowed to take "short cuts" that undermine EPA's certification process.

Response

EPA does not believe that allowing running changes to be used in the described manner would undermine the currently established certification process, nor would it allow a vehicle's compliance level to change in the field after the vehicle had been sold. See section VIII.C of the preamble to the Final Rule for an additional discussion.

D. Provisions Relating to Changes to Stable Standards

Proposal

EPA proposed to make a few minor changes to the provisions for opt-outs based on a change to a Stable Standard. EPA proposed to delete the provisions allowing the Agency the ability to cure under specific circumstances, and proposed to set 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. EPA also proposed 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 the same 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). 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 be subject to backstop ZEV mandates once the two-year lead time set forth in section 177 had passed (running from the date of 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 would have waived that protection by opting into National LEV and then setting an effective date in its opt-out notification that provided for less than two-years lead time.

Comments

One commenter (7) stated that there should not be different effective dates for manufacturer opt-outs based on different EPA or OTC State actions and the effective date of an opt-out should always be determined by the manufacturer.

Response

The Final Rule provides that the effective date for a manufacturer opt-out is as determined by the manufacturer, but generally may be no earlier than the next model year. The only exception is for an opt-out based on an EPA change to a Non-Core Stable Standard, which is as determined by the manufacturer, but may be no earlier than the first model year to which the revision applies. See the Final Framework Rule (62 FR 31207) for discussion of EPA's rationale for the earliest effective date for a manufacturer opt-out based on a change to a Non-Core Stable Standard. See also the preamble to the Final Rule sections VI.A.1 and VIII.D for further discussion of the effective dates of manufacturer opt-outs.

E. Nationwide Trading Region

Proposal

The National LEV program, as initially proposed and as set forth in the Final Framework Rule, requires 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). Credits and debits generated under the program are specific to the region of creation. EPA proposed in the SNPRM to establish a nationwide trading region (not

including California), starting in MY2001. For MY1999 and MY2000, manufacturers would have to demonstrate compliance with National LEV standards only in the OTR. For MY2001 and later, when the program is introduced nationwide, EPA proposed that there be one compliance region.

Under the SNPRM proposal, National LEV would continue to include 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 would include all states in National LEV except for California, and apply for 2001 and later model years. Manufacturers would demonstrate compliance with the fleet average NMOG standards in these two regions under the provisions set forth in the Final Framework Rule. EPA proposed to delete the 37 State trading region that was finalized in the Final Framework Rule.

To address the treatment of credits and debits generated before MY2001, EPA proposed that manufacturers could continue to generate early reduction credits in the states outside the NTR before MY2001 to apply to 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, EPA proposed that a manufacturer could not apply early reduction credits generated outside the NTR to offset any debits generated in the NTR before MY2001. EPA requested comment on two possible methods to ensure that any debits in the NTR from MY1999 or MY2000 are made up in the NTR. EPA also requested comment on allowing 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.

Comments

The OTC (10) suggests that two trading regions be retained indefinitely because vehicle tracking requirements would be a useful mechanism for information for the states, EPA, and the auto manufacturers on the implementation of the National LEV program. Another commenter (9) suggests that a 49-state trading region in model years 2001 and later helps to ensure that the National LEV program is national and uniform in nature. The auto manufacturers (7) support a 49 state trading region starting in the 2001 model year, and they also support EPA's proposal to allow production data in lieu of sales data to demonstrate compliance with the fleet average NMOG standards in a nationwide trading region.

Response

EPA believes that a nationwide trading region starting in MY2001 is the best mechanism to reduce administrative burdens on EPA and the manufacturers while not compromising the levels of emission reductions in the NTR expected from the program. The two trading regions are maintained for the first two years of the program, which are the two most likely model years where manufacturers will have a fleet including a

significant portion of Tier 1 vehicles and TLEVs. The OTC States will thus have fleet data showing the number of such vehicles sold in the NTR. However, for MY2001 and later, the usefulness of separate trading regions, and the associated vehicle tracking requirements, becomes greatly diminished due to the fewer number of vehicles not certified to at least LEV standards. A full discussion of the rationale behind the nationwide trading region can be found in the preamble to the Final Rule.

The Final Rule also contains provisions giving manufacturers the option of demonstrating compliance with the fleet average NMOG standards using vehicle production data in lieu of sales data. This concept is used in other EPA mobile source programs and is discussed further in the preamble to the Final Rule section VIII.E.

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

Proposal

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. 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.

Comments

Auto manufacturers (7) support the removal of the five-percent cap provisions, including the provision for opt-out based on exceedance of the five-percent cap. Some commenters (10, 19) believe that the five-percent cap should be maintained as part of the National LEV program because it was agreed to by the states and the auto manufacturers and because EPA has not provided any information or analysis supporting deletion of this provision. One commenter (19) added that elimination of the five-percent cap could make reevaluation of equivalency very difficult due to the loss of tracking information that the five-percent cap provisions would necessitate.

Response

As discussed in the preamble, EPA is deleting the five-percent cap provisions from the National LEV rule because there is no legal need and less practical need for this provision and because any benefits of this provision would be minimal. Support for deletion of the five-percent cap can be found in the preamble to the SNPRM and the Final Rule section VIII.F. Even though this provision was included in the MOUs initialed by the parties, EPA does not believe this provision should be part of the National LEV

program. Actions taken by the manufacturer to demonstrate compliance with the five-percent cap would negate most of the administrative benefits associated with the nationwide trading region.

Contrary to the comment received, the five-percent cap program would not generate any data which would be used as part of an equivalency determination. The modeling inputs used in this determination would not change based on future fleet makeup in the NTR, unless the auto manufacturers and OTC States agree to change the modeling methodology. If such an agreement was made, the OTC States and auto manufacturers could possibly generate the actual number of Tier 1 vehicles and TLEVs sold in the NTR through analysis of vehicle registration data and sales records.

See the preamble to the Final Rule section VIII.F for further discussion on EPA's decision to delete the five-percent cap provisions from the National LEV program.

G. Technical Corrections to Final Framework Rule

Proposal

The Agency proposed to make several minor technical corrections to the National LEV regulations issued in the Final Framework Rule, including changes that must be made to reflect the proposed start of the program in the 1999 model year, rather than the 1997 model year as was used as a placeholder in the June 6 Final Framework Rule. In addition, EPA noted several other errors and omissions that require correction. Errors and omissions identified in the SNPRM included incorrect full useful life in-use formaldehyde (HCHO) standards for some categories of vehicles. Due to the simplistic and non-controversial nature of these changes, EPA did not propose specific regulatory language in the SNPRM, and elected to defer these changes to the 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. See 62 FR 31212. 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." To eliminate confusion about the required level of vehicle tracking necessary to demonstrate compliance with National LEV fleet average NMOG standards, EPA proposed to modify the definition of "point of first sale" in the National LEV program to include the "point of first sale" language found in the Tier 1 regulations.

Comments

Comments from AAMA/AIAM (7) reiterated support for numerous technical corrections to the regulations EPA promulgated on June 6, 1997 detailed in a June 24, 1997 letter from AAMA and AIAM. Some commenters (10, 11, 18) noted that Honda was omitted from the list of manufacturers in 40 CFR 86.1706-99 of the regulations.

Response

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. These

comments identified some errors in the in-use formaldehyde standards applicable to light-duty vehicles and light-duty trucks. The full useful life in-use formaldehyde standard for MY1999-2002 ULEV light-duty vehicles stated in Table R97-6 (62 FR 31248) of the Final Framework Rule should have been 0.008 grams per mile, not 0.011 grams per mile. The intermediate useful life in-use formaldehyde standard for ULEV light-duty trucks 0-3750 pounds loaded vehicle weight was incorrectly stated in the Final Framework Rule as 0.012 grams per mile for MY1999-2000 and 0.008 grams per mile for MY2001-2002. It should have been 0.008 grams per mile for MY1999-2002. Similarly, the intermediate useful life in-use formaldehyde standard for ULEV light-duty trucks 3751-5750 pounds loaded vehicle weight for MY1999-2002 should have been 0.009 grams per mile, not 0.014 grams per mile as stated in the Final Framework Rule. Finally, the full useful life in-use formaldehyde standards for light-duty truck LEVs 3751-5750 pounds loaded vehicle weight for MY1999 should have been 0.023 grams per mile, and for MY1999-2002 ULEVs in the same weight category the standard should be 0.013 grams per mile. The Final Rule makes all of these corrections.

A number of changes to the Final Framework Rule were made to reflect the start of the program in the 1999 model year, rather than the 1997 model year as was used as a placeholder in the June 6 Final Framework Rule. Revisions to accommodate this change include revising the titles to all subpart R sections, revising the titles of all tables in subpart R, and revising the references to these sections and tables. This change also necessitated revisions to 40 CFR 86.097-1(c), 40 CFR 86.101(c), 40 CFR 86.1701(a), and 40 CFR 86.1705(b). The sections dealing with emission standards (40 CFR 86.1708 and 86.1709 for light-duty vehicles and light-duty trucks, respectively) also required some revisions to enable implementation of National LEV starting with the 1999 model year. References to 1997 and 1998 model years were deleted and replaced with the 1999 model year, but in some cases the revisions were more complicated. For example, the statement in paragraph (c)(1)(i) in both of these sections that "In-use compliance with standards beyond the intermediate useful life shall be waived...through the 1998 model year" is no longer applicable to vehicles in the National LEV program. A similar case arises with respect to flexible-fuel and dual-fuel vehicles, which had different in-use NMOG standards for the 1997 and 1998 model years (paragraph (c)(3) in 40 CFR 86.1708 and 86.1709) under the Final Framework Rule. The Final Rule eliminates these no longer applicable requirements by reserving the affected paragraphs or replacing them with language that appropriately reflects the requirements. Additionally, the tables of in-use standards for light-duty vehicles and light light-duty trucks contain standards applicable to model years prior to 1999, as does the table of fleet average NMOG standards for vehicles sold in the NTR. The December Final Rule removes these pre-MY1999 standards from the tables.

The omission of Honda from the list of manufacturers in 40 CFR 86.1706-99 of the regulations was an error that is corrected in the December Final Rule.

VIII. Supplemental Federal Test Procedures

Proposal

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. Pursuant to the requirements of section 206(h) of the CAA, EPA recently 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). The SFTP emission standards promulgated by EPA are appropriate for vehicles meeting the so-called "Tier 1" on-cycle emission standards; EPA did not propose LEV-stringency off-cycle standards as part of its FTP revisions or as part of an earlier National LEV rulemaking.

On April 23, 1997, CARB published a proposal detailing their approach to addressing off-cycle emissions in the State of California.⁴ 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").⁵ The proposal has 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 these requirements at a public hearing on July 24, 1997.

EPA stated in the National LEV Final Framework Rule its intent to harmonize the SFTP requirements of the National LEV program with California once California completes the adoption of such requirements under its LEV program. In the SNPRM, EPA proposed to adopt the CARB SFTP substantially as outlined by CARB in its June 6, 1997 Staff Report and as adopted at their July 24, 1997 public hearing. EPA also proposed to address any additional minor changes that arose in subsequent stages of CARB's regulatory process in the National LEV supplemental final rule.

Comments

The only comments received by EPA regarding the SFTP came from the auto manufacturer trade associations. Stating a general position that the National LEV SFTP requirements must be identical to California's, they highlighted a handful of

⁴ 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>.

⁵ 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>.

recommendations. First, they recommend that EPA change the proposed regulatory language to be consistent with CARB Mail-Out 97-13 and subsequent changes CARB made in Mail-Out 97-17. Second, they noted an error in one of the tables of emission standards for light light-duty trucks. Third, they recommended changing the regulations to incorporate these SFTP requirements in the list of Stable Standards. Fourth, they requested a clarification in the regulations that the SFTP requirements apply for 2001 and later model year vehicles. Fifth, they restate their position that National LEV and CARB SFTP requirements must be harmonized. Sixth, they highlight "lean-on-cruise" language in CARB Mail-Out 97-17 that must be incorporated. Seventh, they note some changes to the A/C simulation correlation requirement in CARB's Mail-Out 97-17 that must be incorporated into National LEV. Eighth, they state that the SFTP phase-ins must be based on California sales.

Response

EPA has modified the proposed regulatory language to be consistent with the most recent revisions that CARB has finalized with respect to their SFTP, including Mail-Out 97-13 and Mail-Out 97-17. These changes include the revisions to the language regarding lean-on-cruise and A/C provisions noted by the commenter. EPA noted the error in the table of light light-duty truck emission standards and has corrected this error in the Final Rule. As noted in the preamble to the Final Rule, EPA has modified the list of Stable Standards to incorporate the appropriate SFTP standards and test procedures. With regard to the commenter's fourth point, EPA feels that a revision is not necessary and that the regulations adequately describe the model years to which the SFTP applies. As is further explained in the preamble to the Final Rule, the phase-in of the SFTP standards will be based on California sales. Specific details of the incorporation of the SFTP provisions into the National LEV program can be found in section IX of the preamble to the Final Rule.

IX. Impact on Clean Fuel Fleet Programs

Proposal

The Agency did not propose any changes to the federal Clean Fuel Fleet Program regulations.

Comments

One commenter (1) expressed support for "voluntary, broad-based programs such as NLEV" because of the potential for more emissions at lower costs than targeted approaches such as the Clean Fuel Fleet program. This commenter encouraged EPA to ensure that the National LEV and Clean Fuel Fleet programs are closely coordinated, particularly to ensure that fleet operators are not left trying to deal with incompatible mobile source programs.

Response

EPA addressed comments related to the impact of the National LEV program on the Clean Fuel Fleet program in the Summary and Analysis of Comments for the Final Framework Rule.

X. Costs and Benefits

Proposal

The costs and benefits associated with the National LEV program are set forth in the Regulatory Impact Analysis.

Comments

A commenter (6) stated that there are no firm estimates of the costs of the program, with incremental per vehicle estimates ranging from \$96 to \$2000. Another (8) stated that National LEV is a cost-effective means to reduce air pollution, noting that since 1990 costs for LEV technology have continued to decrease to levels below the original estimates. Massachusetts (20) stated that the cost to a state of implementing a Section 177 Program can be very low.

A commenter (13) noted that lower emission vehicles will be provided to non-OTC states, but at the expense of higher vehicle costs.

Response

The Regulatory Impact Analysis and the accompanying technical analysis (Pechan Analysis), which is available in the National LEV docket (A-95-26, VIII-B-01), contains a quantitative analysis of the costs and benefits of the National LEV Program.

XI. Federal Compliance Requirements

A. Void Ab Initio

Proposal

In the Final Framework Rule, EPA required that the fleet average NMOG credit program would be implemented and enforced through the certificate of conformity. The certificate for each vehicle would be conditioned on each vehicle meeting the applicable National LEV tailpipe and related emission standards, and on the manufacturer demonstrating compliance with the applicable NMOG fleet average standard. If a manufacturer did not meet the latter condition, the vehicles causing the NMOG fleet average violation would be considered not covered by the certificate applicable to the engine family. EPA could then assess penalties on an individual vehicle basis for sale of vehicles not covered by a certificate. In addition, where a manufacturer failed to retain the required records (which are necessary for EPA to determine whether a manufacturer has complied with the applicable fleet average NMOG standard), EPA may void ab initio the certificates of conformity for the vehicles without records. In the SNPRM, EPA proposed an additional condition on the certificate based on compliance with the alternative SFTP phase-in schedule requirements.

Comments

A commenter (7) noted that they had previously commented on EPA's compliance requirements in the context of the Final Framework Rule. This commenter characterized the Final Framework Rule as allowing EPA to condition or void certificates for a range of compliance requirements. They object to EPA's ability to void certificates retroactively for violation of record-keeping requirements. They recommend that EPA should provide for an appropriate process for assessing civil penalties for non-compliance, but eliminate the concept of voiding certificates.

Response

EPA's rationale and authority for placing certain conditions on the certificates of conformity for National LEV vehicles is detailed in the Summary and Analysis of Comments to the Final Framework Rule, and in the preamble to the December 1997 Final Rule in section VIII.H.3. EPA notes here, however, that the National LEV requirements provide that violation of various National LEV requirements would cause vehicles not to be covered by a certificate of conformity, but, except for egregious record-keeping or reporting violations, do not provide that EPA may void the certificate ab initio.

XII. Certification and In-Use Fuel Provisions

Proposal

EPA did not propose any changes to the certification fuel provisions contained in the Final Framework Rule.

Comments

A commenter (13) suggested that certifying National LEV vehicles with California Phase 2 reformulated gasoline will produce misleading emission control benefits for National LEV since fuel used in the 49 states is dirtier than fuel in California. This commenter recommended that the National LEV program should move ahead only if vehicles are certified on fuel that is more typical of fuel supplied nationally or that will be required to be supplied nationally in the future.

Response

EPA finalized the fuel provisions of the National LEV program in the Final Framework Rule, and comments of this nature were addressed in the context of that rulemaking. See the Summary and Analysis of Comments to the Final Framework Rule.

XIII. General Provisions

A. Harmonization

Proposal

The Final Framework Rule provides that EPA may change any Non-Core Stable Standard to harmonize with the comparable California standard or requirement, even if the revision would increase the stringency of the standard or requirement, without triggering an offramp.

Comments

AAMA/AIAM (7) commented that harmonization with California needs to be defined in the National LEV regulations as "being identical in every aspect to the California requirements."

Response

In the SNPRM, EPA did not propose to make any changes to this provision of the rule and did not request comment on this provision. EPA does not agree that harmonization with California requirements should be defined as being identical in every aspect to such requirements. EPA also does not believe that it would be helpful to attempt to further define harmonize in the abstract, without reference to any actual change to a Non-Core Stable Standard and the corresponding California requirement. EPA believes that the regulations finalized in the Final Framework Rule provide the manufacturers sufficient certainty.

B. Applicability of Federal Regulations

Proposal

In both the Final Framework Rule and the SNPRM, EPA constructed the National LEV regulations such that all requirements of 40 CFR parts 85 and 86 apply to vehicles under the National LEV program, unless specifically superseded by the provisions of National LEV.

Comments

AAMA/AIAM (7) express concern that EPA has appeared to set the federal standards as the default for the National LEV program. They note that the underlying premise of the National LEV program is the adoption of a program consistent with California requirements, and the approach taken by EPA concerns the auto industry due to "hidden requirements" which may apply to National LEV vehicles. They recommend that the regulations be written such that National LEV regulations supersede all other federal requirements except those specifically listed. Specifically, they recommend that only those provisions referenced in subpart R should be applicable, and that referenced provisions should include the Certification Short Test, high altitude requirements, and

PM and THC standards.

Response

Since the publication of the NPRM in October, 1995, EPA has attempted to structure the National LEV regulations by using the new subpart R to identify specific requirements that differ from the "normal" federal requirements and to add to those requirements outside subpart R as necessary. EPA believes that subpart R accomplishes this in the most effective manner. There is no intention on EPA's part to subject manufacturers to "hidden requirements" by using the structure of the National LEV regulations in subpart R. In fact, EPA's implementation of the National LEV program is essentially the same as California's implementation of their California LEV program, in that California incorporates by reference the federal regulations but uses its own regulations to effect changes to the federal requirements. In implementing the National LEV program, EPA has used subpart R to do just that -- the federal regulations apply except as modified by subpart R. In most cases, the language in subpart R that makes modifications to the existing federal program is identical to the language used by the California Air Resources Board.

XIV. Miscellaneous Issues

Comments

A commenter (6) stated that current emission regulations are too complicated. This commenter recommends that EPA abolish California waivers, have uniform national emissions regulations for conventional vehicles, adopt nationally the current California LEV regulations (or a suitable alternative), and enact federal, state, and local programs to promote ULEVs and ZEVs through research and development support, government fleet purchases, tax deductions or credits for purchasers.

Response

EPA does not have statutory authority to do what the commenter suggests.