ORAL ARGUMENT SCHEDULED FOR MAY 14, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1077 and consolidated cases

MACK TRUCKS, INC. and VOLVO GROUP NORTH AMERICA, LLC

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITIONS FOR REVIEW OF A FINAL RULE PROMULGATED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF FOR RESPONDENT

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DATED: April 10, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MACK TRUCKS, INC. and VOLVO GROUP NORTH AMERICA, LLC Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Respondent.	)	No. 12-1077 (consolidated with No. 12-1078, 12-1099)

RESPONDENT'S CERTIFICATE OF COUNSEL

Pursuant to Circuit Rule 28(a)(1), counsel for Respondent United States Environmental Protection Agency ("EPA") submits this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

i. Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

ii. Parties to These Cases

All parties, intervenors, and amici appearing in this Court are listed in the Opening Brief for Petitioners.

(B) Rulings Under Review

The EPA action under review is "Nonconformance Penalties for On-Highway Heavy Heavy-Duty Diesel Engines," 77 Fed. Reg. 4678 (Jan. 31, 2012).

(C) Related Cases

The case on review has not been previously before this Court or any other Court. Undersigned counsel is not aware of any other related cases in this court or in any other court involving substantially the same parties or similar issues.

Respectfully submitted,

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GLOSSARY

APA:	Administrative Procedure Act
CAA:	Clean Air Act
CBI:	Confidential business information
COC:	Costs of compliance
EGR:	Exhaust gas recirculation
EPA:	Environmental Protection Agency
g/hp-hr:	Grams per brake horsepower-hour
NCP:	Non-conformance penalty
NO_x:	Nitrogen oxides
OMB:	Office of Management and Budget
SCR:	Selective catalytic reduction

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JURISDICTION

The consolidated petitions for review of the Clean Air Act regulations at issue were timely filed pursuant to 42 U.S.C. §7607(b). Petitioners appear to have alleged sufficient competitor standing.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are set forth in the addendum.

STATEMENT OF ISSUES

Under Clean Air Act ("CAA" or "Act") Section 202(a)(3), 42 U.S.C. § 7521(a)(3), the United States Environmental Protection Agency ("EPA" or "Agency") has established technology-forcing emission standards for certain pollutants from new heavy-duty motor vehicles and engines. Before any manufacturer can introduce such a vehicle or engine into commerce, it must obtain a certificate of conformity from EPA demonstrating that the vehicle or engine complies with the applicable emission standard(s).[1] 42 U.S.C. §§ 7522(a)(1), 7525. Recognizing that some manufacturers of heavy-duty engines may be forced out of the marketplace if they are unable to meet these standards, Congress required EPA to grant such manufacturers a certificate of conformity if they pay a

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[1] References in this brief to "vehicles" include "engines" and vice versa. Also, relevant statutory and regulatory provisions are included in the attached Addendum.

"nonconformance penalty" ("NCP" or "penalty") for their non-compliant engines under Section 206(g). *Id.* § 7525(g).

Navistar, Inc. – a manufacturer of "heavy heavy-duty engines" (used in vehicles over 33,000 pounds) – has not developed technology allowing its engines to meet the current emission standard for nitrogen oxides ("NO_x) and therefore was certifying those engines using banked emission credits.[2] In October 2011, Navistar informed EPA that it would run out of credits in 2012 and would be unable to introduce any heavy heavy-duty engines into commerce beyond that time. EPA therefore established penalty rates for heavy heavy-duty engines that do not comply with the current NO_x standard. *Nonconformance Penalties for On-Highway Heavy Heavy-Duty Diesel Engines*, 77 Fed. Reg. 4678 (Jan. 31, 2012) ("Interim Rule").

Given Navistar's imminent credit shortage, EPA estimated that it might have as little as three to four months to establish penalties before Navistar ran out of

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[2] EPA has established an "averaging, banking, and trading" program that "provide[s] another way besides payment of NCPs for engines to meet emission standards." *Nat'l Petrochem. & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1148 (D.C. Cir. 2002) (citation and internal quotation marks omitted). Averaging "allows some engine families to emit at levels above that of the standard," as long as the manufacturer's other engine families can offset those emissions by emitting at lower levels. 54 Fed. Reg. 22,652 (May 25, 1989). If an engine family emits below the emission standard, the manufacturer can generate "credits" that can be traded with other manufacturers or banked and used in the future. *Id.* at 22,652-53. The NO_x credit program is found at 40 C.F.R. § 86.007-15.

credits and would be forced to stop introducing its engines into commerce. EPA therefore invoked an exception under the Administrative Procedure Act ("APA") that allows agencies to dispense with otherwise applicable notice and comment procedures if there is "good cause" for doing so.

Against that background, this case raises the following issues:

1. Did EPA permissibly invoke the APA's "good cause" exception for the Interim Rule because notice and hearing are not required before EPA establishes NCPs?

2. Did EPA reasonably determine, based on the totality of the circumstances, that "good cause" existed because notice and comment procedures would have been "impracticable, unnecessary, or contrary to public interest" given Navistar's looming inability to introduce its engines into commerce, the limited duration of the Interim Rule, and the potential harm to Navistar, its employees, contractors, and suppliers?

3. Did EPA reasonably determine, based on substantial evidence in the record, that the three regulatory criteria necessary for establishing NCPs were met?

4. Did EPA, based on substantial evidence in the record, reasonably calculate the penalty rates in the Interim Rule and explain the rationale for those rates?

5. If there are procedural or substantive errors in the Interim Rule, are they harmless given that EPA will soon finish its review of final NCPs and Petitioners will suffer no harm in the interim?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case challenges EPA's Interim Rule under CAA Section 206(g), 42 U.S.C. § 7525(g), establishing penalties that manufacturers of heavy heavy-duty diesel engines must pay to sell engines that do not comply with the current NO_x emission standard. EPA established these non-conformance penalties ("NCPs") only after determining that the appropriate regulatory criteria were met. Faced with a short window before one manufacturer would be unable to introduce its non-compliant engines into commerce, however, EPA invoked the APA's "good cause" exception to issue the Interim Rule without notice and comment. EPA simultaneously issued a Notice of Proposed Rulemaking to establish final penalties to replace the Interim Rule. 77 Fed. Reg. 4736 (Jan. 31, 2012). Petitioners challenge EPA's invocation of the "good cause" exception, as well as technical determinations EPA made in establishing the penalties.

II. STATUTORY AND REGULATORY BACKGROUND

A. Regulation Of Heavy-Duty Vehicles And Engines

The 1977 CAA amendments required EPA to reduce emissions from heavy-duty vehicles, which are trucks, buses, or other vehicles with a gross vehicle weight over 6,000 pounds "manufactured primarily for use on the public streets, roads, and highways." 42 U.S.C. § 7521(b)(3)(C). EPA categorizes heavy-duty engines into three classes according to the gross vehicle weight of the vehicles in which they are used: light, medium, and heavy heavy-duty engines. At issue here are heavy heavy-duty ("Class 8") engines, which have a gross vehicle weight over 33,000 pounds and are used in buses and line-haul tractors. [JA36]. Section 202(a)(3) requires EPA to establish emission standards NO_x (and other pollutants) from classes or categories of heavy-duty engines manufactured after model year 1983 that "reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply . . . ." 42 U.S.C. § 7521(a)(3)(A)(i).

Under Sections 202(a)(1) and 206, before a new engine can be sold or otherwise introduced into commerce, each manufacturer must submit engine test results to EPA to determine if that engine complies with the applicable emission standards. *Id.* §§ 7521(a)(1), 7525(a)-(b). If it does, EPA must issue a "certificate

of conformity" to the manufacturer upon terms and for a time period (no longer than one year) that EPA prescribes. *Id.* §§ 7522(a)(1), 7525(a)-(b).

Congress realized the dilemma that technology-forcing standards were likely to cause for "some manufacturers (technological laggards) [who] might be unable to comply initially and would be forced out of the marketplace." 50 Fed. Reg. 35,374 (Aug. 30, 1985). It remedied this problem through the availability of NCPs, which give technological laggards "a temporary alternative to permit them to sell their engines or vehicles through payment of a penalty." 50 Fed. Reg. at 35,374; 42 U.S.C. § 7525(g). Section 206(g) *requires* EPA to issue a certificate of conformity, despite a manufacturer's non-compliant engines, if a manufacturer pays a nonconformance penalty. 42 U.S.C. § 7525(g)(1). This allows the non-compliant manufacturer to stay in business while it develops compliant technology, but ensures that the manufacturer will not have a competitive advantage over compliant manufacturers.

B. EPA's Prior NCP Regulations

Congress established a specific procedure in Section 206(g) for EPA's development of NCPs. The statute first requires that, "notice and opportunity for public hearing[,]" EPA promulgate regulations establishing a formula for determining specific penalties. *See* 42 U.S.C. § 7525(g)(3) ("regulations promulgated under paragraph (1) shall, no later than one year after August 7, 1977,

provide for nonconformance penalties in amounts determined under a formula established by the Administrator"); *id.* § 7525(g)(1) (formula-setting regulations are to be promulgated after "notice and opportunity for public hearing"). Congress required that the penalty formula: (a) take into account the extent to which a manufacturer's emissions exceed the applicable standard; (b) establish how the penalties can be increased periodically to create an incentive for a manufacturer to comply with the standard; and (c) remove any competitive disadvantage to compliant manufacturers. *Id.* § 7525(g)(3)(C)-(E).

After conducting notice and comment, EPA published its formula-setting regulation on August 30, 1985.[3] Among other things, this "Phase I Rule" established the formula that EPA has since used to set NCPs and established how EPA would determine an upper emission limit (the limit that a manufacturer must not exceed when using it obtains a certificate of conformity using NCPs). *See* 50 Fed. Reg. at 35,374.

The Phase I Rule also established three criteria that EPA must determine are met before the Agency can establish NCPs. *See* 40 C.F.R. § 86.1103-87. First, there must be a new or revised emission standard that "is more stringent than the

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[3] Unable to meet the August 7, 1978, deadline, EPA was sued in federal district court and ordered to promulgate regulations by August 31, 1985. *See NRDC v. Ruckelshaus*, No. 84-758, 1984 WL 6092 (D.D.C. Sept. 14, 1984).

previous standard for the pollutant, or [the] existing standard for that pollutant [must have] become[] more difficult to achieve because of a new or revised standard. . . ." *Id.* § 86.1103-87(a). Second, EPA must find that "substantial work will be required to meet the standard for which the NCP is offered. . . ." *Id.* § 86.1103-87(a)(1). "Substantial work" is

> the application of a technology not previously used in an engine or vehicle class or subclass, or the significant modification of existing technology or design parameters, needed to bring the vehicle or engine into compliance with either the more stringent new or revised standard or an existing standard which becomes more difficult to achieve because of a new or revised standard.

Id. § 86.1103-87(b). Finally, it must be "likely" that there is a "technological laggard" – that is, "a manufacturer who cannot meet a particular emission standard due to technological (not economic) difficulties and who, in the absence of NCPs, might be forced from the marketplace." *Id.* § 86.1103-87(a)(2); 77 Fed. Reg. at 4679.

Between the Phase I Rule and the Interim Rule, EPA established five NCPs for particular pollutants from certain classes or categories of heavy-duty engines or vehicles.[4] In each of these instances, as well as in the Interim Rule, EPA used the

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[4] *See* 50 Fed. Reg. 53,454 (Dec. 31, 1985) ("Phase II Rule") (model years 1987 and 1988 for particulate, hydrocarbon, carbon monoxide, and NO_x emissions); 55 Fed. Reg. 46,622 (Nov. 5, 1990) ("Phase III Rule") (model years 1991 and later for NO_x and particulate emissions); 58 Fed. Reg. 68,532 (Dec. 28, 1993) ("Phase IV Rule")

[Footnote continued on next page]

formula, regulatory criteria, and other factors established in the Phase I Rule, and applied them to the specific circumstances presented by the new or revised emission standard for which NCPs were being established.

C. The Current NO_x Standard

In 2001, EPA issued regulations under CAA Section 202(a)(3) requiring heavy-duty engines for model years 2007 and later to reduce NO_x emissions to 0.20 grams per brake horsepower-hour ("g/hp-hr") by 2010.[5] *Control of Air Pollutants from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Sulfur Control Requirements*, 66 Fed. Reg. 5002 (Jan. 18, 2001). Because of phase-in provisions adopted in that rule and the use of banked emissions credits, manufacturers could continue producing engines with NO_x emissions over that limit until model year 2010. The NO_x standard therefore is referred to as the "2010 standard." Manufacturers that retained emission credits to average emissions from engine families could continue to use those credits to

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[Footnote continued from previous page]
(model years 1994 and later for particulate emissions); 61 Fed. Reg. 6,949 (Feb. 23, 1996) ("Phase V Rule") (various model years starting in 1996 for NO_x and particulate emissions); and 67 Fed. Reg. 51,464 (Aug. 8, 2002) ("Phase VI Rule") (model year 2004 and later for non-methane hydrocarbons and NO_x emissions).

[5] "A grams per brake horsepower-hour standard measures the pollution output of an engine in terms of the amount of work the engine is doing." *NRDC v. Thomas*, 805 F.2d 410, 417 n.8 (D.C. Cir. 1986).

produce engines that exceeded the NO_x standard (up to a cap of 0.50 g/hp-hr) even beyond model year 2010.

III. THE INTERIM RULE

In response to the 2010 standard, the vast majority of heavy-duty engine manufacturers (including Petitioners) developed a technology called selective catalytic reduction ("SCR") to achieve the 0.20 g/hp-hr standard. [JA49]. SCR is an exhaust aftertreatment technology that uses a catalytic converter and an aqueous urea solution referred to as Diesel Exhaust Fluid ("DEF") to convert NO_x into nitrogen and water. [JA42-43].

Navistar, however, opted to use a different technology that relies almost entirely on cooled exhaust gas recirculation ("EGR") without any catalytic NO_x aftertreatment. [JA49]. Cooled EGR reduces NO_x emissions by recirculating cooled engine exhaust into the engine's intake air. [JA41]. This lowers the peak combustion temperatures, which reduces the formation of NO_x. *Id.* EGR technology has been used on heavy-duty engines since 2004 and also is used by Petitioners to enhance their SCR systems, although Navistar is employing this technology to a much greater degree. [JA41]. Although manufacturers such as Petitioners have used SCR to certify engines to meet the 2010 standard, Navistar has been unable to demonstrate that its EGR technology can meet that standard.

Thus, Navistar used emission credits to certify its Class 8 engines while it continued to develop its EGR technology.

In October 2011, Navistar orally informed EPA that it was likely to consume its current supply of NO_x emission credits for its Class 8 diesel engines sometime during the first quarter in 2012. Based on Navistar's confidential business information ("CBI"), EPA considered Navistar's credit balance and projected Class 8 engine sales and concluded that Navistar indeed was likely to deplete its credits early in 2012. 77 Fed. Reg. at 4680. Navistar also had not submitted any applications for certification that showed technology compliant with the 2010 standard.

Without certifications, Navistar would have to cease nearly all manufacture and sale of its Class 8 engines (with the potential exception of production of engines for export). [JA76]. Based on Navistar's confidential business information and 2010 Annual Report,[6] EPA estimated that Navistar's inability to certify any Class 8 engines early in model year 2012 would cause layoffs of thousands of Navistar employees, the loss of billions of dollars in revenue to Navistar, and negative impacts on customers and suppliers. [JA76].

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[6] This Report and one other document inadvertently were omitted from EPA's certified index. EPA file an Unopposed Motion to File Supplement to Certified Index to Administrative Record, Document # 1368059, and is submitting a Supplemental Joint Appendix on April 10, 2012.

In light of all these facts, EPA considered whether the three regulatory criteria for establishing NCPs were satisfied. *See* 40 C.F.R. § 86.1103-87. First, the 2010 standard of 0.20 g/hp-hr was more difficult to meet than the previous standard, which was equivalent to a 2.3 g/hp-hr NO_x standard.[7] Second, all manufacturers who currently meet the 2010 standard without using credits are doing so with an SCR aftertreatment system that required significant improvements over technology used to meet the prior standard, thereby requiring substantial work. Finally, because Navistar had not demonstrated that it had a NO_x-compliant technology, Navistar was likely to be a technological laggard.

Although EPA concluded that an NCP was appropriate, Navistar's imminent credit shortage left EPA with a very short amount of time before Navistar ran out of credits, 77 Fed. Reg. at 4680, which was insufficient time to conduct what was likely to be a six to nine month NCP process with notice and comment. EPA therefore looked to the APA's "good cause" exception, which provides, in part, that:

> [e]xcept when notice or hearing is required by statute, [the notice and comment provisions of] this subsection do[] not apply . . . when the agency for good cause finds (and incorporates the finding and a brief

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[7] The previous standard actually was 2.5 g/hp-hr of NO_x plus non-methane hydrocarbons, which EPA acknowledged in the Regulatory Impact Analysis for the 2010 standard was equivalent to a 2.3 g/hp-hr NO_x standard. Addendum ("ADD") at 46.

> statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(B).[8] 77 Fed. Reg at 4680.

Along with the Interim Rule, EPA published a Notice of Proposed Rulemaking proposing final NCPs for heavy-duty engines for model year 2012 and later that, when final, will supersede the Interim Rule. The comment period closed on April 4, 2012, and EPA currently anticipates completing its review of the final rule by the end of May or beginning of June 2012.

STANDARD OF REVIEW

Under APA Section 706, the Court may not set aside EPA's Interim Rule unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). This deferential standard presumes the validity of agency action, and a reviewing court is to uphold an agency action if it satisfies minimum standards of rationality. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983). Where EPA has considered the relevant factors and articulated a rational connection between the

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[8] EPA also relied on an exception under APA Section 553(d) to make the Interim Rule effective immediately upon publication (rather than 30 days from the date of publication) because the Rule effectively granted an exemption from the 2010 NO_x standard or relieved a restriction that would otherwise prevent a manufacturer from certifying its engines. *See* 5 U.S.C. § 553(d)(1). Petitioners do not challenge EPA's use of this exemption.

facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court is not "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Judicial deference also extends to an agency's interpretation of a statute it administers. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). Under *Chevron*, if Congress has "directly spoken to the precise question at issue," that intent must be given effect. 467 U.S. at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. To uphold EPA's interpretation, "[the Court] need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of [the] very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985) (citation omitted). An agency is further entitled to deference in interpreting its own regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted) (agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation'").

Finally, APA Section 706 provides that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. "[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Shinseki v. Sandosi*, 556 U.S. 396, 409 (2009). "If the agency's mistake did not affect the outcome, if it did not prejudice petitioner, it would be senseless to vacate and remand for reconsideration." *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

Congress has mandated that EPA allow technologically disadvantaged manufacturers to certify noncompliant engines if they pay a penalty to make up for the level of noncompliance. Here, EPA was faced with unique circumstances where one such manufacturer was dangerously close to being unable to certify and sell its engines without the use of NCPs. The fact that EPA only became aware belatedly that the manufacturer's emission credits were nearly exhausted does not change EPA's responsibility to carry out Congress' intent.

Under these circumstances, EPA properly invoked the "good cause" exception. Although that exception does not apply when the organic statute requires notice and hearing, CAA Section 206(g) does not require EPA to conduct notice and hearing before EPA establishes specific NCPs. When read as a whole,

Section 206(g) shows that Congress unambiguously required notice and an opportunity for hearing *only* for the initial regulations establishing the formula that would be used to provide for subsequent NCPs.

For the "good cause" exception to apply, EPA needed to find one of three things: that notice and comment were impracticable, unnecessary, *or* contrary to the public interest. In this case, EPA found that *all three* circumstances existed. First, based on Navistar's confidential business information EPA reasonably determined that notice and comment were impracticable because Navistar likely would run out of credits before EPA could issue a final NCP. Without credits or NCPs, Navistar, its employees, customers, and suppliers faced significant harm, including potential shut-down of its Class 8 engine production, layoffs of thousands of employees, and devastating financial losses. Second, EPA found that such notice and comment were unnecessary because of the limited nature and duration of the NCP. This Interim Rule merely applies the pre-existing penalty formula to the specific facts of this case, and will remain in effect only until EPA promulgates final NCPs. Finally, EPA found that notice and comment would have been contrary to the public interest in light of the significant harm to Navistar, its employees, customers, and suppliers. EPA thus reasonably determined that the "good cause" exception applied here.

Petitioners also challenge EPA's determination that the three regulatory criteria for establishing NCPs had been met. Specifically, Petitioners claim that EPA erred in finding that substantial work was required to meet the revised, more stringent NO_x standard, and in finding that Navistar is a technological laggard. Both arguments fail.

As to the first issue, EPA, under its regulations, considers the technology that exists at the time a revised standard is established to determine whether substantial work will be required to reduce emissions from the previous standard to the revised standard. This approach creates a level playing field because all manufacturers will have met the previous standard and, thus, will be starting from the same point to try to meet the revised standard. Petitioners, however, would create an uneven playing field by looking at the differing technology that exists at the time the NCP is established, after manufacturers have built upon their prior technology to try to meet the revised standard. That approach is untenable particularly where, as here, the revised standard had a long phase-in period that allowed manufacturers to progress along different technological tracks. The only approach that puts all manufacturers at the same starting line is one that measures substantial work from the point at which the revised standard is established.

As to whether Navistar is likely to be a technological laggard, EPA permissibly relied on Navistar's confidential business information to make that

determination. Also, Petitioners do not dispute that at the time EPA issued the Interim Rule, Navistar had neither produced nor requested certification for any engines that could meet the 2010 NO_x standard.

Finally, Petitioners challenge EPA's expertise in determining the actual penalty rates. A critical element of the penalty rate calculation is the "upper limit" – the emission level that a manufacturer cannot exceed to certify its engines using NCPs. Congress required EPA to set this limit at a level that the Agency determines to be "practicable" for each NCP, but did not specify how EPA was to determine what is "practicable." 42 U.S.C. § 7525(g)(2). In the past, EPA has set the upper limit at the same level as the prior emission standard. For the Interim Rule, however, EPA determined that an upper limit set at the prior NO_x standard was not appropriate because all manufacturers currently are certifying their engines at a much *lower* NO_x emissions level. EPA reasonably determined that the upper limit in the Interim Rule should be set at the emission level that all manufacturers are currently capable of meeting, not at a higher level that would encourage backsliding by manufacturers.

The upper limit is a critical aspect of NCPs because it determines what costs must be used to develop the penalty rates, which must be set at a level that avoids "competitive disadvantage" to manufacturers who are complying with the applicable emission standard. *See* 42 U.S.C. § 7525(g)(3). EPA's regulations

require penalty rates to be calculated using "costs of compliance," which are estimated by considering the difference between the costs of complying with the upper limit and the costs of complying with the current standard. To determine those costs of compliance, EPA has to determine what engine technologies would emit at the upper limit (the baseline engine) and at the current standard (the compliant engine). EPA selects these engines and then compares the cost difference between the two.

Petitioners do not appear to challenge EPA's selection of the upper limit for the Interim Rule; instead, they primarily attack EPA's selection of the baseline technology that reflects that upper limit. Regardless of whether Petitioners challenge the upper limit or the baseline technology, however, EPA thoroughly explained its rationale. Further, Petitioners' criticisms of the administrative record supporting EPA's penalty calculations ignore that EPA properly relied on confidential business information – from both Petitioners and Navistar – in making those calculations.

In short, Petitioners have failed to identify any defect in EPA's Interim Rule. The Court therefore should uphold that Rule in all respects. Even if, however, Petitioners had shown some procedural or substantive flaw in the Interim Rule, it amounts to only harmless error because there is no harm to Petitioners. Moreover,

EPA currently anticipates completing its review of the final NCPs within the next two month. Thus, vacating and remanding the Interim Rule would be meaningless.

ARGUMENT

I. EPA REASONABLY INVOKED THE APA's "GOOD CAUSE" EXCEPTION.

Chevron governs the Court's review of Petitioners' claim that EPA could not rely on the APA's "good cause" exception because CAA Section 206(g) allegedly requires notice and opportunity for hearing before EPA can establish NCPs. Opening Brief for Petitioners at 21-26, filed March 12, 2012 ("Pet'rs' Br."). *Chevron*'s first step answers the question because Congress' intent is clear: Section 206(g) requires that EPA provide notice and hearing before adopting regulations establishing the NCP formula, but does not require notice and opportunity for a hearing each time EPA thereafter applies the formula to specific facts and circumstances. *See Chevron*, 467 U.S. at 842-43. Even if Congress' intent were unclear, however, EPA's construction of Section 206(g) would be reasonable and should be upheld. *Id.* at 843. EPA's interpretation does not have to be the only permissible one – it only need be sufficiently rational to preclude the Court from substituting its judgment for that of EPA. *Chem. Mfrs. Ass'n*, 470 U.S. at 125.

An agency can invoke the APA's "good cause" exception only if notice and hearing are not required by statute. 5 U.S.C. § 553(b)(B). Petitioners rely

exclusively on CAA Section 206(g)(1) to argue that notice and hearing are required before EPA can establish NCPs. Pet'rs' Br. at 22-23. The problem with Petitioners' argument is that it reads paragraph (1) in isolation, violating the Supreme Court's maxim that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

When properly read as a whole, Section 206(g) requires EPA to provide notice and hearing *only* for the regulations that EPA was required to promulgate to establish a formula for determining subsequent penalties:

> (1) In the case of any class or category of heavy-duty vehicles or engines to which a standard promulgated under section 7521(a) of this title applies . . . a certificate of conformity shall be issued . . . if such manufacturer pays a nonconformance penalty as *provided under* regulations promulgated by the Administrator after notice and opportunity for public hearing. . .
>
> * * *
>
> (3) The *regulations promulgated under paragraph (1) shall, not later than one year after August 7, 1977, provide for nonconformance penalties in amounts determined under a formula established by the Administrator.*

42 U.S.C. § 7525(g)(1), (3) (emphasis added).

This language unambiguously shows Congress' intent that EPA would promulgate regulations by August 7, 1978 – after notice and opportunity for

hearing – and that those regulations would establish a formula for determining subsequent penalties.[9] Contrary to Petitioners' argument, nothing in Section 206 requires EPA to provide notice and hearing every time it applies that formula to establish a specific penalty connected to a particular standard. Rather, the only regulations for which Congress specifically required notice and hearing were those that EPA was directed to promulgate by August 7, 1978, to establish the formula that would *provide* for the penalties. For Petitioners' contrary argument to work, Section 206(g) would need to have been written differently.

First, the phrases "as provided under" in paragraph (1) and "provide for" in paragraph (3) would have to be changed. If Congress had intended paragraph (1) to refer to the specific actions that set each penalty, it would have used words like "specified under" or "established by." Thus, for Petitioners' argument to prevail, paragraph (1) would need to say that a "manufacturer pays a nonconformance penalty *specified under* [or *established by*] regulations promulgated by [EPA] after notice and opportunity for hearing[,]" and paragraph (3) would need to say "the regulations promulgated under paragraph (1) shall, not later than one year after August 7, 1977, *specify* [*or establish*] nonconformance penalties." Congress,

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[9] As discussed above, EPA established those regulations in 1985. *See infra* n.3.

however, chose broader terms, which in this context can mean penalties "provided under," *i.e.*, afforded under, the formula in the Phase I Rule.

Second, under Petitioners' construction, the Court would need to completely disregard paragraph (3)'s reference to the August 7, 1978 deadline. To be read as Petitioners suggest, paragraph (3) would need to say: "[t]he regulations under paragraph (1) shall *specify* amounts determined under a formula established by the Administrator," with no deadline. Petitioners' reading does not give effect to each provision in Section 206(g) and improperly renders the date in paragraph (3) superfluous. *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1108 (D.C. Cir. 1979) ("It is axiomatic that a statute must be construed to avoid that result so that no provision will be inoperative or superfluous.") (citation omitted).

To give effect to Congress' clear intent, Section 206(g) must be read to require EPA to promulgate, after notice and opportunity for hearing, an initial regulation providing the formula to determine subsequent NCPs, which do not themselves require notice and comment. The reference to the formula promulgated in the initial regulations and the references to penalties being "provided for" under regulations that establish that formula are compatible with a regulatory structure under which NCPs for future emission standards are calculated through a ministerial or adjudicative action that merely inputs new facts into the pre-existing

formula. This common-sense reading allows EPA to account for differing factors presented each time EPA establishes new or revised emission standards.

Although delayed in its efforts to promulgate the initial formula-setting regulations, EPA did so in the Phase I Rule on August 30, 1985, after notice and opportunity for comment, as required by Section 206(g)(3). *See* 50 Fed. Reg. at 33,375 (citing notice of proposed rulemaking, 50 Fed. Reg. 9204 (Mar. 6, 1985)). The formula in that Phase I Rule provided a framework for considering specific factors required under Section 206(g)(3)(A)-(E): the degree to which the manufacturer's actual emissions exceed the standard; a periodic increase to create incentives for compliance; and the removal of any competitive disadvantage to compliant manufacturers. 42 U.S.C. § 7525(g)(3)(A)-(E). The Phase I Rule also specified three criteria for making NCPs available and otherwise set the stage for all subsequent penalty determinations. Since then, each subsequent NCP rulemaking has used the Phase I formula establish penalties appropriate for a specific emission standard.

EPA has discretion to use notice and comment to establish NCPs, has generally done so in the past, and is in the process of doing so here. EPA, however, is not *required* to do so by Section 206(g). Nor has EPA stated that it interprets Section 206(g) as requiring notice and comment for any NCP action, or (contrary to Petitioners' suggestion) established notice and comment as a practice

for NCP actions. Even if EPA's discretionary decision to provide notice and comment could be construed as agency "practice," EPA thoroughly explained why it had good cause for departing from that practice here. *See infra* at 26-39; *see Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 526 (citation omitted) (EPA supplied a "'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored'").

Petitioners erroneously claim that EPA tried to "find shelter" in Section 307(d)'s rulemaking requirements. Pet'rs' Br. at 23. In fact, EPA specifically disavowed the application of the usual Section 307(d) requirements to this rulemaking because EPA was relying on the APA's "good cause" exception. 77 Fed. Reg. at 4680 ("However, section 307(d) does not apply to any rule referred to in subparagraphs (A) or (B) of section 553(b) of the APA"). Thus, Petitioners' arguments regarding Section 307(d) are irrelevant.

Congress' clear mandate in Section 206(g) is that EPA was required to conduct notice and hearing before promulgating the formula-setting regulations that EPA was directed to establish by August 7, 1978; but, no such mandate exists for subsequent actions applying that formula to determine specific NCPs. Even if Congress' intent were unclear, EPA's interpretation rationally takes account of the entire structure of Section 206(g) and gives effect to the process that Congress

intended for NCP regulations. EPA thus permissibly invoked the APA's "good cause" exception.

II. THE ADMINISTRATIVE RECORD SUPPORTS EPA'S DETERMINATION THAT "GOOD CAUSE" EXISTED.

The APA's "good cause" exception requires that EPA provide a "brief statement" concerning why "notice and public procedure . . . are impracticable, unnecessary, *or* contrary to the public interest." 5 U.S.C. § 553(b)(B) (emphasis added). Although EPA need only supply sufficient explanation for *one* of those justifications, EPA has shown that *all three* circumstances existed in this case.

Petitioners are correct that the "good cause" exception "'is to be narrowly construed and only reluctantly countenanced.'" Pet'rs' Br. at 26 (quoting *Util. Solid Waste Activities Corp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (internal quotation marks and citation omitted)). The inquiry into whether "good cause" exists, however, "is inevitably fact- or context-dependent." *Mid-Tex Electric Cooperative, Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987). The Court therefore should review the "totality of the circumstances" in determining whether the agency justifiably invoked the "good cause" exception. *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984); *see Council of the Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 582 (D.C. Cir. 1981) (looking to the "totality of the special circumstances" to find good cause).

A. Notice and Comment Were Impracticable.

Congress was concerned about forcing technological laggards out of the marketplace by giving them no option but to immediately comply with new or revised emission standards. To address that concern, Congress *required* EPA to issue certificates of conformity to noncompliant manufacturers if they paid an NCP. Once EPA determined that the three regulatory criteria for issuing an NCP were met in this case (*see infra* at 39-44), EPA had no choice but to comply with that Congressional mandate and issue an NCP. The only question was whether allowing additional time for notice and comment would interfere with EPA's duty to carry out that mandate. As EPA reasonably determined, it would have done so.

1. EPA did not have sufficient time to provide notice and comment.

This Court has recognized, as a *general guideline*, that "the shortest period in which parties can meaningfully review a proposed rule and file informed responses is thirty days." *Petry*, 737 F.2d at 1201 (citation omitted). For reviewing more technically or scientifically complex proposals or data, a sixty-day period may be more reasonable, depending on the circumstances. *Id.* In addition, the agency must have time to consider comments after they are received and, if necessary, redraft the rule, which must then undergo interagency review. *Id.* at 1202.

Here, EPA likely would have given at least sixty days for public comment under even an expedited schedule so that interested parties could provide information on various technologies and compliance costs. EPA then reasonably would have needed at least forty-five to sixty days to review and respond to the comments and make any consequent revisions to the rule. The opportunity for interagency (specifically the Office of Management and Budget ("OMB")) review under Executive Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), also would have been required, which may have taken as long as ninety days. Thus, even under an optimistic and expedited schedule, providing a full rulemaking process would have taken approximately six and a half months. That does not even account for the time that EPA needed on the front end to actually draft the rule, which took at least three months for the Interim Rule. EPA therefore was looking at an overall rulemaking process – from drafting to completion of interagency review – of possibly nine months for the Interim Rule. As discussed below, that would have been too late for Navistar.

2. Navistar, its employees, customers, and suppliers would have experienced significant harm if an NCP had been delayed.

Petitioners insist that "truly catastrophic" harm, Pet'rs' Br. at 28, is required to justify EPA's conclusion that public rulemaking procedures are impractical. That is not the standard – it is "serious harm." *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). The serious harm to Navistar and its employees, and the ripple

effect on its customers and suppliers, was more than sufficient to determine that notice and comment were impracticable.[10]

To estimate the potential harm, EPA looked to information about Navistar's heavy heavy-duty diesel operations and sales from Navistar's 2010 Annual Report ("Report"). *See* [JA76], [JA914]. According to that Report, Navistar's global operations employed roughly 15,800 workers, with net revenues over $12 billion. [JA940, 955], [JA76]. Navistar's Class 8 trucks and engines represent roughly 24% of the retail delivery market share. [JA976]. Extrapolating from that data, EPA estimated that Navistar's Class 8 truck and engine sales represented one-quarter of its total revenue, *i.e.*, $3 billion, and involved approximately one-quarter of its employees, *i.e.*, nearly 4,000. [JA76].

In October 2011, Navistar orally informed EPA of its imminent emissions credit shortage. At that time, Navistar had "not provided EPA with any 2012 model year applications for certification for which EPA could certify Navistar-produced heavy heavy-duty diesel engines as meeting the 0.20 g/hp-hr standard without credits." [JA76]. The exact date that those credits would be gone

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[10] Petitioners take issue with the fact that the words "emergency" or "harm" do not appear in EPA's Interim Rule. Pet'rs' Br. at 29. This is inconsequential – EPA clearly explained that one of the reasons for dispensing with notice and comment was the potential harm to Navistar, its employees, customers, and suppliers. 77 Fed. Reg. at 4,680. EPA's Analysis of the Potential Economic Impacts of Delaying NCPs also discusses the potential harm to Navistar. [JA76-77].

depended on Navistar's rate of sales – a figure that could not be precisely determined at that time. Given this uncertainty, and based on Navistar's prior sales, EPA reasonably estimated that Navistar's credits likely would be exhausted sometime in February 2012 – well before EPA would have been able to promulgate a rule after notice and comment (which, as detailed above, would have taken approximately nine months). 77 Fed. Reg. at 4680; [JA76].

If Navistar exhausted its credits before an NCP was in place, the ramifications would have been extreme. At a minimum, Navistar would have needed to stop nearly all assembly of its Class 8 engines and trucks, and may or may not have been able to continue production of those engines for export. [JA76]. Because Navistar uses only its own Class 8 EGR-equipped engines in its Class 8 trucks, Navistar would have needed to either redesign its Class 8 trucks to accept SCR engines from other manufacturers (which would take many months, if not years) or stop production of those trucks completely. In either case, no Navistar Class 8 trucks could be manufactured during the approximately nine months prior to completion of the rule. This would have meant significant loss of Navistar's estimated $3 billion in revenue from those trucks and engines, and layoffs of nearly 4,000 employees who make those trucks and engines.

In addition to the direct impacts to Navistar, there also would be ripple effects on Navistar's customers and suppliers. Trucking companies contract with

Navistar to buy Class 8 trucks and Navistar would not have been able to honor those contracts if it could not produce Class 8 engines or trucks. [JA77]. Navistar's suppliers also would have been significantly impacted by their lost sales to Navistar for materials associated with the Class 8 engines and trucks. [JA77].

The likelihood of Navistar's significant revenue and customer loss, the potential layoff of thousands of employees, the redesign of Navistar's trucks, and the impact to Navistar's customers and suppliers indeed is "serious harm." *Jifry*, 370 F.3d at 1179. Petitioners' attempts to downplay this harm are unavailing.

First, Petitioners argue that damage to a corporation's economic interests does not constitute serious harm, and claim that this Court has never before relied on such a justification in upholding an agency's decision to invoke the "good cause" exception. Pet'rs' Br. at 30. To our knowledge, however, this Court has never had occasion to consider the "good cause" exception in context with a statutory provision like Section 206(g) that specifically prioritizes the concern that a company may be forced out of the marketplace for failing to comply with technology-forcing standards.

Moreover, in *American Fed'n of Gov't t Employees AFL-CIO v. Block*, 655 F.2d 1153 (D.C. Cir. 1981) ("*AFGE*") (on which Petitioners rely), this Court recognized that economic harm to an industry and its customers could justify an agency's emergency, interim regulations. *Id.* at 1157. There, the agency issued

interim regulations concerning inspection rates in poultry processing plants. Without those regulations, there would have been confusion about how to enforce inspection rates, which would have caused "economic harm and disruption" to the poultry processors, as well as downstream harm to consumers through shortages or increased prices. *Id.* The Court therefore found that "the issuance of emergency regulations to ameliorate this expected harm and, at the same time, to comply with [a] court order did not violate section 553 of the [APA]." *Id.* Here, as in *AFGE*, the harm to Navistar and the attendant harm to its customers was so potentially disruptive that an interim rule issued without notice and comment to ameliorate that harm does not violate the APA.

Second, Petitioners claim that Navistar's harm was not "nearly as dire as the Agency suggests." Pet'rs' Br. at 31. Although EPA's analysis of Navistar's potential harm "entail[ed] a degree of speculation by the agency[,]" this Court has been "hesitant to discount such forecasts, as they 'necessarily involve deductions based on expert knowledge of the Agency.'" *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992) (citation omitted). In such situations, the Court requires the agency to "indicate the basis for its prediction so that the reviewing court may be in a position to determine whether it acted reasonably." *Id.* EPA did so here. EPA has explained "the facts and policy concerns it relie[d] on" and,

given those facts, "a reasonable person could have made the judgment the agency did." *Id.* (citation omitted).

Further, Petitioners have no right – nor does EPA – to dictate to Navistar how the company should conduct its business. Whether Navistar should have or could have "slow[ed] down production" to delay the exhaustion of its emissions credits is irrelevant. Pet'rs' Br. at 31. EPA balanced the value of conducting a public process before issuing the Interim Rule against the Congressional mandate in Section 206(g) to protect technological laggards, and reasonably decided that the harm to Navistar, its employees, customers, and suppliers far outweighed any possible harm from lack of comment on an *interim* NCP.

3. EPA faced emergency circumstances beyond its control.

Contrary to Petitioners' claim, the circumstances that prompted EPA to forego notice and comment – for this temporary period – were beyond the Agency's control. Two years ago, EPA asked manufacturers, including Petitioners and Navistar, to tell the Agency whether there was likely to be a technological laggard. [JA912]. EPA explained that "[w]hile we do not currently plan to establish NCPs, we are open to reevaluating this decision. . . . However, we do not expect to reevaluate this decision unless a manufacturer comes forward and claims that it needs non-compliance penalties under EPA regulations." *Id.* At that time, "no manufacturer ha[d] indicated that it will not be able to meet" the 2010 NO_x

standard and, thus, "NCPs for these standards [did] not appear necessary." *Id.* Navistar waited for nearly a year and a half before notifying EPA that NCPs would be necessary.

This case is distinguishable from cases in which agencies were faced with impending statutory deadlines for which the agencies had advance notice. *See* Pet'rs' Br. at 35-36. Here, EPA was unaware – through no fault of its own – of how quickly Navistar's credits were likely to expire. EPA's prior statement that "Navistar will only be certified as meeting the 2010 NO_x requirements by using banked credits" says nothing about when those credits would be exhausted and falls well short of showing that EPA knew or should have known that this would occur as early as 2012. Pet'rs' Br. at 34 (quoting Respondent's Final Opposition Brief, at 29-30, *Navistar, Inc. v. EPA*, No. 09-1113, Doc. No. 1239213 (D.C. Cir. Apr. 9, 2010)). It is not EPA's responsibility to police a company's credits or to monitor a company's technological progress to predict when NCPs may be necessary. Instead, those responsibilities fall to the company – Navistar.

Petitioners' suggestion that EPA should have preemptively issued NCPs as early as 2009 is inconsistent with statutory requirements. Pet'rs' Br. at 34. EPA cannot issue an NCP until it determines that all three regulatory criteria have been met. One of those criteria is the determination that there is likely to be a technological laggard, which requires that there be "a manufacturer who cannot

meet a particular emission standard due to technological (not economic) difficulties and who, *in the absence of NCPs*, might be forced from the marketplace." 77 Fed. Reg. at 4679 (emphasis added). As long as a manufacturer is using credits, there is no chance that it would be forced out of the marketplace in the absence of NCPs due to its technological deficiencies.

EPA could not have issued an NCP until it verified that all three regulatory criteria for issuing NCPs were met. By the time EPA could do so, it simply was impossible to take action with full public participation before Navistar ran out of credits. EPA therefore reasonably determined that notice and comment were impracticable.

B. Notice and Comment Were Unnecessary.

In determining whether notice and comment are unnecessary, "[t]he interim status of the challenged rule is a significant factor." *Mid-Tex Elec.*, 822 F.2d at 1132; *Tenn. Gas*, 969 F.2d at 1144. Here, the Interim Rule's "temporally limited scope" should be "among the key considerations in evaluating [EPA's] 'good cause' claim." *Mid-Tex Elec.*, 822 F.2d at 1132 (citation omitted).

EPA's Interim Rule will last only until EPA issues the final NCP rule. Since publishing the Notice of Proposed Rulemaking on January 31, 2012, EPA has been taking comments from various parties (including Petitioners) on several issues, including the penalty amounts, parameters for calculating the penalty, and

whether an NCP should be issued at all. *See generally* 77 Fed. Reg. 4736 (Jan. 31, 2012). EPA also held a hearing on March 5, 2012. *Id.* at 4736. The comment period closed on April 4, 2012, *id.*, just over two months after the proposal was published, which is consistent with the timeframe that this court has recognized is reasonable for technical rulemakings. *See supra* at 29. EPA currently anticipates completing its internal review by the end of May or beginning of June, 2012, at which time the rule *may* need to go through further interagency review.

EPA clearly "is not engaging in dilatory tactics during the . . . period" that the Interim Rule is in effect and, thus, the fact that EPA will complete its review of the final rule in approximately two months is a critical factor. *Mid-Tex Elec.*, 822 F.2d at 1132. EPA's assurances that the final NCPs will be sent to OMB for review in the near future should demonstrate to the Court that EPA is acting in good faith to finalize the rulemaking during this interim period. *See Council of the S. Mountains*, 653 F.2d at 582 (impending final rule "contribute[d] substantially to [the court's] impression" that agency was not delaying). Based on the limited duration of the Interim Rule, notice and comment were unnecessary.

Such public procedures also were unnecessary because EPA merely took the formula from the Phase I Rule, which underwent notice and comment, and plugged in fact-specific parameters to reflect the cost of compliance specific to the 2010 NO_x standard. 77 Fed. Reg. at 4680. EPA's Interim Rule did not revisit "how to

calculate penalties from the penalty parameters, how to determine a compliance level, or how to report to EPA" *id.*, all of which were previously established through notice and comment. Although the administrative record for EPA's Phase I Rule cannot substitute for a new round of comments and record for the Interim Rule, EPA's "interim procedures are adequate, as a temporary measure, to afford some protection against those [concerns] and [the interim procedures] strike a reasonable balance, fairly accommodating the interests of all affected parties, while [EPA] considers a permanent solution" to the penalties for the NO_x standard. *Mid-Tex Elec.*, 822 F.2d at 1133.

An agency's use of an interim rule as a temporary measure to balance competing interests until a permanent solution can be found was addressed by this court in *Mid-Tex Electric*. In that case, following vacatur and remand of certain aspects of a prior rule, the agency invoked the APA's "good cause" exception to issue an interim rule (without notice and comment) that "in large measure repromulgat[ed]" the prior rule "and [did] not change the substance of the general provisions" of the prior rule. 822 F.2d at 1128. The prior rule had been adopted "after a lengthy period of public comment." *Id.* at 1133. Although the prior administrative record would not substitute for a new round of public comments for the interim rule, the Court found that the temporary interim procedures were a way

to strike a reasonable balance while the agency considered a more permanent solution. *Id.*

EPA's Interim Rule similarly does not change EPA's formula-setting regulations, which were adopted after public comment – instead, the NCPs in the Interim Rule merely apply that formula. Although the public process for the Phase I Rule does not substitute for public process for the Interim Rule, EPA struck a reasonable balance of competing interests while it considers a permanent solution in the final NCPs. Notice and coment therefore were unnecessary.

C. Notice and Comment Were Contrary To The Public Interest.

As discussed *supra* at 30, the harm from Navistar's potential shutdown would have affected not only Navistar, but thousands of its employees, customers, and suppliers. Similar industry-wide ripple effects were recognized by the Court in *AFGE*, 655 F.2d at 1157, as harm to the public interest justifying use of the "good cause" exception.

EPA need only show that notice and comment were impracticable, unnecessary, *or* contrary to the public interest. In this case, any one of these justifications – let alone all of them, viewed in their entirety – would be "sufficiently weighty to support" EPA's decision to dispense with notice and comment for this Interim Rule under the "good cause" exception. *Mid-Tex Elec.*, 822 F.2d at 1132.

III. EPA REASONABLY DETERMINED THAT THE REGULATORY CRITERIA FOR ESTABLISHING NCPs WERE MET.

EPA's interpretation of its NCP regulations, including the Phase I Rule, is "controlling" unless it is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Here, EPA determined that its regulatory criteria for establishing NCPs were met: the current NO_x standard is more stringent than the previous standard (which is undisputed); substantial work was required to meet the current NO_x standard; and Navistar was a technological laggard. 40 C.F.R. § 86.1103-87. Petitioners have not shown that EPA's actions were "plainly erroneous or inconsistent" with its regulations.

A. Substantial Work Was Required To Meet the 2010 NO_x Standard.

"Substantial work" "means the application of technology not previously used in an engine or vehicle class or subclass, or the significant modification of existing technology or design parameters, needed to bring the vehicle or engine into compliance with . . . the more stringent new or revised standard . . . ." 40 C.F.R. § 86.1103-87(b). EPA reasonably determined that reducing NO_x emissions from 2.3 g/hp-hr (the previous standard) to 0.20 g/hp-hr (the new, more stringent standard) would require "substantial work." Petitioners' arguments to the contrary are misplaced. Under Petitioners' constrained interpretation of EPA's regulations, Pet'rs' Br. at 42, EPA can only look at the technology that exists at the time the NCP is established and never at the technology that was in existence at the time the

revised standard was issued to determine whether substantial work was required to come into compliance with the revised standard. That is not a reasonable interpretation of EPA's regulations.

Under EPA's interpretation of its regulations, EPA looks at whether "substantial work" was required at the time the revised standard was issued, *i.e.*, at the time when manufacturers were using technology that met the previous standard and would need to build upon that technology to meet the revised standard. That interpretation is the only one that accounts for a situation where, as here, an NCP is established at some point long after the revised standard is issued and manufacturers have been proceeding to develop compliant technology – a situation EPA envisioned when it first promulgated the three NCP criteria. EPA previously explained that "[i]f NCPs are appropriate, they will generally be made available concurrent with a promulgation or revision of emission standards." 50 Fed. Reg. at 35,376. EPA anticipated, however, that concurrent NCPs may not always happen: "when this is not feasible or appropriate, the NCPs will be published subsequent to the promulgation of the new standards." *Id.* (citation and internal quotation marks omitted). Thus, EPA envisioned that NCPs could come at some point after a revised standard – possibly even long after manufacturers had already ventured far down the path of developing technology to meet the new or revised standard.

If NCPs are established long after the revised standard is issued, manufacturers no longer will be on the same footing because some will have progressed further in developing their technology than others. To consider, as Petitioners insist, only the technology that exists when the NCP is established, fails to account for the manufacturers who have made less progress. Under Petitioners' view, substantial work would not be required for a manufacturer who lags behind as long as *other* manufacturers have made significant progress toward technology that complies with the revised standard.

The only way to level the playing field is to look, as EPA does, at whether substantial work was required at the time the revised standard was issued. Under EPA's interpretation, regardless of whether EPA establishes the NCP when an emission standard is revised, or at some time later, the point of reference for determining whether substantial work will be required therefore will always be the same: the point in time when the revised emission standard was promulgated. In other words, EPA looks at the state of technology at that time to determine if, from that point, substantial work will be required to achieve compliance with the revised standard. The relevant point of comparison is whether substantial work is required to go from an old standard to a new standard, and for that purpose it is irrelevant whether manufacturers have made significant progress in their technologies *after* the revised standard is issued.

Petitioners also rely on a statement in an EPA preamble to a prior Rule to argue that substantial work cannot exist for one manufacturer where all other manufacturers already have performed that work. Pet'rs' Br. at 40 (quoting 50 Fed. Reg. at 35,403). EPA's quoted statement does not mean what Petitioners claim. As EPA has stated elsewhere, "[w]hen manufacturers must perform substantial work, it is possible that at least one will be unsuccessful and will become a laggard." 50 Fed. Reg. at 9206. To account for that situation, EPA reasonably interprets its regulations to look at substantial work from the same starting point for all manufacturers – the point when the revised standard was issued.

Finally, Petitioners cite an isolated statement by a Navistar Senior Vice President to argue that Navistar only has to perform minor calibration changes or modifications rather than "substantial work." Pet'rs' Br. at 41-42. This statement should be disregarded because it was made *after* EPA issued the Interim Rule, was not before the Agency during the rulemaking, and does not reflect the state of affairs during the rulemaking.

EPA is entitled to deference in interpreting its own regulations to determine that point in time from which "substantial work" must be measured. Here, EPA reasonably determined that at the time the current NO_x standard was issued, substantial work was required to bring then-existing technology into compliance.

B. Navistar Is a Technological Laggard.

Through the penalty scheme in Section 206(g), Congress intended to "protect laggards, and thereby solve the . . . problem of how to avoid forcing a manufacturer off the market." *Natural Res. Def. Council v. Thomas*, 805 F.2d 410, 424 (D.C. Cir. 1986). EPA's regulations therefore require a finding "[t]hat there is *likely* to be a technological laggard." 40 C.F.R. § 86.1103-87(a)(2) (emphasis added). EPA has interpreted a technological laggard "as a manufacturer who cannot meet a particular emission standard due to technological (not economic) difficulties and who in the absence of NCPs, might be forced from the marketplace." [JA32]. Petitioners claim that nothing in EPA's administrative record demonstrates that Navistar was a technological laggard.

In this case, the data and information on which EPA based its determination is confidential business information. [JA76]. Moreover, EPA has explained that it "will make the determination that a technological laggard is likely to develop based in large part" on whether the new or revised standard is more stringent than the previous standard and whether substantial work is required. [JA32]. Given that substantial work was required for Navistar to go from the prior NO_x standard to the 2010 standard using its EGR technology, that Navistar had not yet submitted an application for a certificate of conformity for model year 2012 without the use of emissions credits, and that (based on confidential business information) Navistar

would be forced out of the Class 8 engine marketplace without NCPs, EPA reasonably determined that Navistar was likely to be a technological laggard. [JA76].

Petitioners' reliance on an application that Navistar submitted *after* the Interim Rule was issued should be disregarded because that application was not before the Agency at the time of the rulemaking. *See* Pet'rs' Br. at 45, n.12. Thus, it was not, as Petitioners claim, a "critical fact" relevant to EPA's determination that Navistar is a technological laggard. *Id.* Even if that fact was relevant, EPA has stated publicly that it sees "several significant problems with Navistar's application . . . [and] EPA has substantial concerns regarding the ability of Navistar to certify its engine at a 0.20g/bhp-hr level." [ADD52].

IV. THE ADMINISTRATIVE RECORD SUPPORTS EPA'S PENALTY CALCULATION.

Section 206(g) provides fact-specific parameters for which NCPs must account:

- An upper limit: EPA must establish an upper limit that the Agency deems practicable, which reflects a percentage above the existing standard that the manufacturer cannot exceed, 42 U.S.C. § 7525(g)(2);
- Manufacturers' actual emissions exceedance: EPA must take into account the extent to which the manufacturer's actual emissions exceed allowable emissions, *id.*, § 7525(g)(3)(C);
- Periodic penalty increase: EPA must determine a periodic increase in the penalties, *id.* § 7525(g)(3)(D); and

- Removal of competitive disadvantage: EPA must "remove any competitive disadvantage" to the compliant manufacturer(s), *id.* § 7525(g)(3)(E).

The NCP formula that EPA established in the Phase I Rule specifies how to calculate penalties based on these fact-specific parameters. "The basic form of the NCP formula will be the same for each [engine or vehicle] subclass and each pollutant, although the values of parameters in the formula may vary by engine and vehicle subclass and pollutant." 50 Fed. Reg. at 35,381.

Where EPA "deal[s] with a statutory scheme as unwieldy and science-driven as the Clean Air Act." *Husqvarna AB v. EPA*, 254 F.2d 195, 199 (D.C. Cir. 2001) (citation and internal quotation marks omitted); *see Bluewater Network v. EPA*, 372 F.3d 404, 410 (D.C. Cir. 2004). That proposition holds true here, where such scientific and technical matters as how to apply its own regulations to specific facts to account for the Section 206(g) penalty factors should be left to EPA's discretion. EPA articulated a rational explanation for how it accounted for the relevant parameters in the Interim Rule and those determinations must be upheld. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

A. EPA Reasonably Determined The Upper Limit And Associated Baseline Engine To Use In Calculating The Costs Of Compliance.

1. EPA's methodology for calculating NCPs.

The first step in calculating an NCP is to determine the "upper limit" parameter, which EPA defines as "the emission level for a specific pollutant above

which a certificate of conformity may not be issued or may be suspended or revoked." 40 C.F.R. 86.1102-87(b).[11] The upper limit is required by CAA Section 206(g)(2) – EPA cannot issue a certificate of conformity for any emission that "exceeds [the standard by more than] the percentage determined under regulations . . . to be practicable." 42 U.S.C § 7525(g)(2). The upper limit "[i]n effect . . . limits the magnitude of the overall effect on air quality [that] might result from use of NCPs and, in all cases, prevents the introduction into commerce of grossly polluting engines or vehicles." 50 Fed. Reg. at 35,376.

Congress did not give EPA any guidance on how to determine the upper limit or what is "practicable." EPA therefore previously established a regulation under which the upper limit generally "shall be the previous pollutant emission standard . . . . " 40 C.F.R. § 86.1104-91(a)(1), because that typically will be the standard that manufacturers are achieving. Nothing, however, precludes EPA from refining or clarifying its approach to determining the upper limit, especially where the circumstances dictate that having an upper limit at the previous standard would encourage backsliding.

In the Interim Rule, EPA clarified its interpretation of its regulations to give the Agency the discretion to set the upper limit at a level below the prior emission

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[11] EPA established the definition of "upper limit" and other applicable definitions in the Phase I Rule.

standard. EPA decided this clarification was necessary to account for the rare situation in which the NCP is established at some point after a new or revised emission standard is issued and manufacturers already are achieving a level of emissions better (or lower) than the previous standard. Here, given the long phase-in period of the 2010 standard, every manufacturer currently is certifying its engines at or below 0.50 g/hp-hr, which is far below the previous NO_x emission standard of 2.3 g/hp-hr. If EPA had set the upper limit at the previous standard, it would have encouraged backsliding from the 0.50 g/hp-hr level that manufacturers are achieving. By setting the upper limit at the level manufacturers, including Navistar, are achieving, EPA prevented manufacturers from using NCPs to increase their emissions beyond those levels. This conforms to the purpose of NCPs, "which is to allow manufacturers to continue selling engines they are producing, but not to allow backsliding." 77 Fed. Reg. at 4682.

Establishing the upper limit is critical because it determines the relevant "costs of compliance" ("COC") that EPA will use in its NCP formula. Those costs of compliance measure the difference between costs of an engine with emissions at the upper limit (the "baseline engine") and costs of an engine with emissions at the existing standard (the "compliant engine"). [JA50] Determining the costs of compliance, however, is not as straightforward as simply comparing the baseline engine with the compliant engine, as Petitioners contend. Costs of compliance

vary across the industry from manufacturer to manufacturer. To account for this variation, EPA does two things.

First, EPA considers various cost categories: engine manufacturing costs, vehicle manufacturing costs, and operating costs, each of which consist of variable and fixed costs. [JA51] The cost of compliance for an engine thus could include the cost of manufacturing the engine with new hardware, the cost to the vehicle manufacturer to redesign the vehicle to fit the new hardware, and increased operating costs such as those associated with increased fuel consumption.

Second, EPA accounts for industry variation in those cost categories by looking at the average and highest costs of compliance. [JA55] The average costs of compliance are referred to as "COC_{50}," which "is an estimate of the industry-wide average incremental cost per engine" associated with meeting the standard versus meeting the upper limit. 77 Fed. Reg. at 4682. In other words, COC_{50} represents manufacturers whose compliance costs are higher than 50 percent of other manufacturers. On the higher end of the spectrum, "COC_{90}" "is an estimate of the 90th percentile incremental cost per-engine" associated with meeting the standard versus meeting the upper limit. COC_{90} thus represents manufacturers with compliance costs that are higher than at least 90 percent of other manufacturers. "Conceptually, COC_{50} represents costs for a typical or average manufacturer, while COC_{90} represents costs for the manufacturers with the highest

compliance costs." *Id.* The COC_{50} and COC_{90} costs, as well as other parameters not relevant here, are incorporated into EPA's NCP formula to determine the actual penalty rates.

2. EPA's selection of the upper limit and baseline engine.

As explained above, EPA set the upper limit for the Interim Rule at 0.50 g/hp-hr, which was lower than the previous NO_x standard of 2.3 g/hp-hr. 77 Fed. Reg. at 4682. EPA does not believe that Petitioners' brief can reasonably be construed as challenging this decision; instead, as discussed below, Petitioners appear to challenge the baseline engine technology that EPA presumed would reflect that upper limit. Even if Petitioners are challenging the upper limit, however, EPA clearly articulated the rationale behind its selection of the upper limit here. As explained above, NCPs are not intended to allow manufacturers to increase emissions. Because this NCP was established several years after the current NO_x standard was issued, manufacturers had a significant period of time to incrementally develop technology to meet that standard. Every manufacturer therefore already had improved its emissions well below the prior NO_x standard of 2.3 g/hp-hr and, in fact, was achieving a level of at least 0.50 g/hp-hr or better. Setting the upper limit above that level would have undermined the anti-backsliding intent of NCPs. Accordingly, EPA reasonably determined that this Interim Rule could set the upper limit at a level below the prior emission standard.

Once EPA set the upper limit at 0.50 g/hp-hr, EPA's existing regulations required that the COC_{50} and COC_{90} costs must be estimated "relative to complying with the upper limit." 40 C.F.R. § 86.1113-87(a)(4). As discussed above, that means that EPA had to determine the difference between the costs of a baseline engine with emissions at the upper limit and the costs of a compliant engine with emissions at the standard. Petitioners do not dispute that this is what EPA's regulations require; instead, they dispute EPA's determination of the baseline engine that would have reflected emissions at the upper limit.

Although the current NO_x standard was promulgated in 2001, it did not apply until the 2007 model year. Starting in model year 2007, manufacturers could generate emissions credits and produce engines with NO_x emissions greater than the 0.20 g/hp-hr standard through model year 2009. Thus, they were actually producing Class 8 engines with NO_x emissions near 1.2 g/hp-hr for model years 2007 through 2009.[12] As of model year 2010, the 0.20 g/hp-hr NO_x standard was fully applicable, except that manufacturers who retained emission credits were allowed to certify engine families (*i.e.*, engines grouped together for averaging purposes) emitting as much as 0.50 g/hp-hr for model years 2010 and later. 77

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[12] Although not part of the record for this NCP, Daimler and Cummins acknowledged this fact in their comments on the Notice of Proposed Rulemaking for the final NCPs.

Fed. Reg. at 4680. Thus, as of model year 2010, all manufacturers either were (1) meeting the 0.20 g/hp-hr standard, or (2) were using credits to certify engine families emitting at a higher level up to 0.50 g/hp-hr. Because of this phased-in applicability of the 2010 NO_x standard and the method by which manufacturers incrementally came into compliance with that standard, no manufacturer except Navistar ever actually manufactured Class 8 engines that emitted at the 0.50 g/hp-hr upper limit.[13]

Without an actual manufactured engine to provide the baseline engine technology necessary to achieve the upper limit, EPA reasonably assumed a hypothetical baseline engine. [JA56]; 77 Fed. Reg. at 4682. To determine the costs that would have been associated with reducing NO_x emissions from 0.50 g/hp-hr (the upper limit) to 0.20 g/hp-hr (the 2010 standard), EPA contacted five manufacturers (including Petitioners) and asked them to consider what technology would have been used in a baseline engine with emissions at the upper limit. 77 Fed. Reg. at 4683; [JA56]. Each of these manufacturers identified a different technology that they would have used. [JA56]. Based on information from these manufacturers, EPA used its expertise to assume that the baseline engine used a

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[13] As explained in the record, EPA did not rely on Navistar's 0.50 g/hp-hr engine for purposes of determining the baseline engine because for EPA to develop an accurate estimate of the actual compliance costs for that engine, EPA would have needed to reveal Navistar's confidential business information. [JA57].

technology package that employed EGR controls, was fully optimized, and used SCR with an appropriately sized tank for the diesel exhaust fluid to control tailpipe NO_x emissions. [JA56]; 77 Fed. Reg. at 4683.

3. Petitioners' challenge to EPA's presumption of the baseline engine is without merit.

Petitioners take issue with EPA's selection of the baseline engine. Petitioners are correct that in past rules, EPA based the penalty rates "directly on the average of actual compliance costs for all manufacturers" relative to the previous standard. [JA55]; Pet'rs' Br at 47. This was possible, as EPA explained, "because each of the manufacturers had actually produced engines at the upper limit (which was almost always the previous emission standard)." [JA55]. Thus, manufacturers could provide EPA with data that reflected the various costs for actual engines that emitted at the upper limit because those engines already had been produced to meet the previous standard. *Id.* As already discussed, that was not the case for the Interim Rule.

Petitioners argue that EPA should have considered the costs of achieving the previous standard versus the costs of achieving the current standard and, thus, that EPA's baseline engine should reflect technology necessary to meet the previous standard rather than technology necessary to meet the upper limit. Pet'rs' Br at 48. That argument ignores the explicit regulatory requirement that EPA determine the costs of compliance "relative to *the upper limit*" – which in this case is lower than

the previous standard. Petitioners' suggestion that "[e]very manufacturer, save Navistar, has information that can demonstrate – accurately and unequivocally – the full cost of utilizing SCR to comply with the 0.20 g/bhp-hr NO_x standard," is thus irrelevant. Pet'rs' Br. at 49-50. Once EPA set the upper limit, the *only* costs that were relevant were those associated with transitioning from the upper limit to the 2010 standard. The "full cost[,]" as Petitioner describe, of transitioning from the previous standard to the 2010 standard is not what EPA's regulations require – those regulations require costs to be determined "relative to the upper limit."

Other than demanding that the baseline engine reflect technology with emissions at the prior standard rather than the upper limit, Petitioners do not challenge the actual technological make-up of EPA's presumed baseline engine, *i.e.*, the use of SCR technology that is fully optimized to have NO_x emissions at the upper limit. Even if Petitioners had challenged EPA's presumed make-up of the baseline engine, the Court should be "at its most deferential" when the Agency is "making predictions, within its area of special expertise, at the frontiers of science." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).

Petitioners' remaining arguments regarding the baseline engine are equally flawed. First, EPA's selection of the upper limit and baseline engine did not "sharply depart[] from years of consistent practice in setting NCPs" as Petitioners claim. Pet'rs' Br. at 48. As explained above, in each of the five previous NCP

rulemakings, EPA determined costs of compliance "relative to the upper limit," just as EPA did in the Interim Rule. The only difference is that the upper limit for the prior NCPs generally was the previous emissions standard, whereas for the Interim Rule the upper limit was a level lower than the previous emission standard. Even if that could be considered a departure from previous practice, EPA thoroughly explained the rationale behind that decision.

Second, Petitioners' argument that EPA has treated "like cases differently" is inapposite. Pet'rs' Br. at 50. Each NCP reflects different circumstances and although EPA considers the same key factors and uses the same formula, the inputs and other potential costs considered are unique to each pollutant and standard – which Congress specifically gave EPA the discretion to take into account in Section 206. 42 U.S.C. §§ 7525(g)(3)(A), (B).

EPA reasonably exercised its discretion to prevent backsliding in the Interim Rule by setting the upper limit at a level lower than the previous emission standard, and then selecting a baseline engine technology that reflected that upper limit, as EPA's regulations require. Petitioners' challenges therefore should be rejected.

B. The Record Amply Supports EPA's Penalty Calculations.

As this Court has previously noted, as long as EPA "'acted within its delegated statutory authority, considered all of the relevant factors, and demonstrated a reasonable connection between the facts on the record and its

decision,' we will not interfere with its conclusion." *Appalachian Power Co.*, 135 F.3d at 802 (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995)). Petitioners' sole complaint about EPA's record for the Interim Rule is that the Agency did not "disclose the actual data it examined, nor . . . set forth the empirical bases for its conclusions." Pet'rs' Br. at 51. The Court, however, will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs.*, 463 U.S. at 43. The Court can easily determine from EPA's record here the evidence and factors that supported EPA's penalty calculations.

EPA's methodology and resulting calculations are thoroughly explained in EPA's Interim and Proposed Technical Support Document. [JA26-75]. EPA analyzed various technologies that manufacturers are using to meet the 2010 NO_x standard, including the specifics of EGR, SCR, and other technologies. [JA41-43]. After considering these various technologies, EPA devoted substantial pages to explaining its analysis of compliance costs associated with these technologies. [JA50-63]. EPA's description of how it calculated the compliance costs is discussed *supra* at 48-49, and described in detail in Chapter 3 of the Technical Support Document. *See* [JA50-63].

Dissatisfied, Petitioners would demand that EPA provide the actual cost data that it received from Petitioners and from Navistar; but, Petitioners themselves, as

well as Navistar, identified these data as confidential business information, precluding EPA from disclosing the data in the administrative record. [JA54]. Thus, without disclosing that information, EPA summarized its analysis of that information in the administrative record – an approach that this Court has found permissible. *See NRDC*, 805 F.2d at 418 n.13 (EPA combined confidential data and plotted it on a graph that was part of the administrative record).

Each manufacturer that the Agency contacted provided different information about combinations of technologies that could be used to produce a baseline engine with emissions at the upper limit. [JA54]. After discussing how and why EPA based its presumed baseline engine on these technologies, EPA provided "details on the total compliance costs to reduce" NO_x emissions from the upper limit to the current standard using this presumed baseline engine and the known compliant engines. [JA57]. EPA described its consideration of the various compliance costs used to calculate the estimated COC_{50} and COC_{90} costs for that baseline engine. [JA57-62]. Finally, EPA put these costs into the regulatory NCP formula (along with other parameters) to calculate the applicable penalties. [JA64-66].

Following this thorough analysis, EPA set the maximum penalty (which reflects the COC_{90}) at $1,919, and the average penalty (which reflects the COC_{50}) at $1,561. [JA62]. To determine the specific penalty a non-compliant manufacturer will have to pay, EPA determines how much the manufacturers'

engine emissions exceed the 2010 standard and plots that exceedance on a graph that ranges between the average and the highest costs of compliance. [JA65]. The maximum penalty per engine is based on the highest compliance costs that manufacturers had to pay to reduce emissions from the upper limit to the standard. [JA67]. By basing the maximum penalty on the highest compliance costs, EPA – as required by the statute – removed any competitive disadvantage to compliant manufacturers. *See* 42 U.S.C. § 7525(g)(3)(E). In other words, the maximum penalty that Navistar would have to pay makes up for any costs that Navistar otherwise would have spent and that other manufacturers and truck operators are spending for compliant engines.

Petitioners rely on conclusory declarations to support their claim that EPA's penalty rates do not remove any competitive disadvantage to them as manufacturers who currently are complying with the 0.20 g/hp-hr standard. Pet'rs' Br. at 50. Cummins vaguely claims that it is at a competitive disadvantage because Navistar's sale of engines under the NCP "upsets the marketplace and harms Cummins' competitive opportunities" and that the "correct NCP value should have been more than double the actual value selected," but offers no facts to support these claims. Declaration of Robert A. Jorgensen, ¶ 13. Daimler claims that it would somehow "be able to capture up to $2 billion of the 2012 and 2013 Class 8 12.4 liter-engine trucks sales" if Navistar were unable to use NCPs, but never

explains how this is so. Declaration of David Kayes, ¶ 9. Finally, Mack/Volvo asserts that it would save at least $11,600 per engine if it only had to comply with a 0.50 g/hp-hr standard rather than the 0.20 g/hp-hr standard, which it claims is not "offset" by the maximum NCP amount of $1,919. Declaration of Anthony Greszler, ¶ 7. Mack/Volvo also claims loss of market share based on Navistar's projected sales. *Id.* ¶¶ 8-9. Again, Mack/Volvo offers no support for these claims and its estimates of the costs it would save per engine fail to account for the formula that EPA applies to set the penalty rates.

Petitioners' cursory declarations do not provide a basis for their demand that the Court second-guess EPA's technical determinations. As shown above, EPA examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (citation and internal quotation marks omitted). Neither Petitioners nor the Court should "substitute [their] judgment for EPA's in this highly technical area." *Appalachian Power*, 135 F.3d at 814.

V. ANY ERROR IN THE INTERIM RULE IS, AT MOST, HARMLESS.

For all the reasons discussed above, Petitioners' challenge to the Interim Rule must be rejected. Even if Petitioners could prevail, however, the Court should not vacate and remand the Interim Rule because any procedural or substantive errors are harmless. Most crucially, EPA is conducting a full public

process to re-evaluate the penalties established in the Interim Rule, and will shortly replace that Rule with final NCPs. *Compare Bluewater*, 372 F.3d at 412-13 (where CAA provision did not resolve how EPA should weigh various factors, Court deferred to EPA's interpretation, particularly because the standards were interim in nature and EPA had committed to re-evaluating standards in subsequent rulemaking).

Petitioners fail to show that they could "mount a credible challenge" to the Interim Rule that would have changed the outcome. *Utility Solid Waste*, 236 F.3d at 755.[14] Petitioners rely on their declarations to claim that if EPA had gone through notice and comment they "could have provided EPA with data and analysis showing that the correct NCP should be set multiples higher than $1,919. . . ." Pet'rs' Br. at 52. Petitioners' spattering of factual disputes and mere allegations of a different result, however, do not rise to the level of a credible challenge, particularly where that challenge must be weighed against the extraordinary deference that EPA enjoys in scientific and technical matters such as establishing NCPs.

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[14] Although the "credible challenge" standard from *Utility Solid Waste* applies here, the instant case is distinguishable on its facts. In *Utility Solid Waste*, the Court rejected EPA's use of the APA's "good cause" exception to forego notice and comment on a *final* rule. In this case, EPA did not conduct notice and comment for an *interim* rule that will soon be superseded. *Compare* 236 F.3d at 755.

Nor have Petitioners been prejudiced by the Interim Rule. The heart of Petitioners' objection to the Interim Rule is their alleged competitive disadvantage. Petitioners point to alternative penalties that, they claim, would remove this supposed disadvantage by compensating for their alleged loss of market share. EPA's record, however, belies any notion that Petitioners will suffer a loss of market share under the Interim Rule. Navistar has been certifying (through the use of credits) engines at a 0.50 g/hp-hr level for several years, which is less expensive than using NCPs and would bestow a potential competitive advantage over manufacturing an engine with NO_x emissions at the 0.20 g/hp-hr standard. [JA39]. To determine whether such an advantage would affect market share, EPA analyzed the market share by sales volume of each of the largest Class 8 truck manufacturers in 2008 through October 2011. *Id.* Although the market shares varied from year to year, each manufacturer generally had about a twenty to thirty percent share of the Class 8 market. *Id.* Interestingly, however, Navistar had a small decrease in its market share between 2008 and 2011, despite manufacturing the 0.50 g/hp-hr engine, while other companies were manufacturing engines that met the 0.20 g/hp-hr standard. [JA39-40]. Thus, even if Navistar had some competitive advantage by spending less money to certify its higher-emitting engines, any such advantage has not allowed Navistar to increase its market share. Navistar's continued

certification of such engines under NCPs presumably similarly would not increase Navistar's market share in the future. [JA40].

In short, "it would be senseless to vacate and remand for reconsideration," especially where this Interim Rule will be superseded in a matter of months. *Jicarilla*, 613 F.3d at 1121 (citation and internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court uphold the Interim Rule.

Respectfully submitted,

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DATED: April 10, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 10, 2012, a true and correct copy of the foregoing Brief of Respondent was served electronically through the ECF system on all registered counsel.

/s/ Michele L. Walter
MICHELE L. WALTER

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing Brief of Respondent EPA contains 13,968 words as counted by the Microsoft Office Word 2007 word processing system, and thus complies with the applicable word limitation.

_/s/ Michele L. Walter _____
MICHELE L. WALTER

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➡➡ § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

Current through P.L. 112-90 approved 1-3-12

END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)
§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Current through P.L. 112-90 approved 1-3-12

END OF DOCUMENT

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter II. Emission Standards for Moving Sources
Part A. Motor Vehicle Emission and Fuel Standards (Refs & Annos)

→→ § 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section--

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A) In general

(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

(B) Revised standards for heavy duty trucks

(i) On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and

welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NO_x) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

(C) Lead time and stability

Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

(D) Rebuilding practices

The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

(E) Motorcycles

For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525(f)(1) of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) of this section applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4)(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to con-

form to requirements prescribed under this subchapter without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 7548 of this title.

(5)(A) If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

(B) Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the model year for which it would be feasible to implement such standards, taking into consideration the restraints of an adequate leadtime for design and production.

(C) Nothing in subparagraph (A) shall (i) prevent the Administrator from specifying different nozzle and fill neck sizes for gasoline with additives and gasoline without additives or (ii) permit the Administrator to require a specific location, configuration, modeling, or styling of the motor vehicle body with respect to the fuel tank fill neck or fill nozzle clearance envelope.

(D) For the purpose of this paragraph, the term "fill pipe" shall include the fuel tank fill pipe, fill neck, fill inlet, and closure.

(6) Onboard vapor recovery

Within 1 year after November 15, 1990, the Administrator shall, after consultation with the Secretary of Transportation regarding the safety of vehicle-based ("onboard") systems for the control of vehicle refueling emissions, promulgate standards under this section requiring that new light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards are promulgated and thereafter shall be equipped with such systems. The standards required under this paragraph shall apply to a percentage of each manufacturer's fleet of new light-duty vehicles beginning with the fourth model year after the model year in which the standards are promulgated. The percentage shall be as specified in the following table:

IMPLEMENTATION SCHEDULE FOR ONBOARD VAPOR

Model year commencing after standards promulgated	Percentage*
Fourth	40
Fifth	80
After Fifth	100

*Percentages in the table refer to a percentage of the manufacturer's sales volume.

The standards shall require that such systems provide a minimum evaporative emission capture efficiency of 95 percent. The requirements of section 7511a(b)(3) of this title (relating to stage II gasoline vapor recovery) for areas classified under section 7511 of this title as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 7511a(b)(3) of this title for areas classified under section 7511 of this title as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet.

(b) Emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen; annual report to Congress; waiver of emission standards; research objectives

(1)(A) The regulations under subsection (a) of this section applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide. The regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during the model year 1980 shall contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of hydrocarbons from light-duty vehicles and engines manufactured during or after model year 1980 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970. Unless waived as provided in paragraph (5), regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during or after the model year 1981 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970.

(B) The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model years 1977 through 1980 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 2.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during the model year 1981 and thereafter shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.0 gram per vehicle mile. The Administrator shall prescribe standards in lieu of those required by the preceding sentence, which provide that emissions of oxides of nitrogen may not exceed 2.0 grams per vehicle mile for any light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty motor vehicles worldwide if the Administrator determines that--

(i) the ability of such manufacturer to meet emission standards in the 1975 and subsequent model years was, and is, primarily dependent upon technology developed by other manufacturers and purchased from such manufacturers; and

(ii) such manufacturer lacks the financial resources and technological ability to develop such technology.

(C) The Administrator may promulgate regulations under subsection (a)(1) of this section revising any standard prescribed or previously revised under this subsection, as needed to protect public health or welfare, taking costs, energy,

and safety into account. Any revised standard shall require a reduction of emissions from the standard that was previously applicable. Any such revision under this subchapter may provide for a phase-in of the standard. It is the intent of Congress that the numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h), and (i) of this section shall not be modified by the Administrator after November 15, 1990, for any model year before the model year 2004.

(2) Emission standards under paragraph (1), and measurement techniques on which such standards are based (if not promulgated prior to November 15, 1990), shall be promulgated by regulation within 180 days after November 15, 1990.

(3) For purposes of this part--

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

(ii) For the purpose of assuring that vehicles and engines manufactured before the beginning of a model year were not manufactured for purposes of circumventing the effective date of a standard required to be prescribed by subsection (b) of this section, the Administrator may prescribe regulations defining "model year" otherwise than as provided in clause (i).

(B) Repealed. Pub.L. 101-549, Title II, § 230(1), Nov. 15, 1990, 104 Stat. 2529.

(C) The term "heavy duty vehicle" means a truck, bus, or other vehicle manufactured primarily for use on the public streets, roads, and highways (not including any vehicle operated exclusively on a rail or rails) which has a gross vehicle weight (as determined under regulations promulgated by the Administrator) in excess of six thousand pounds. Such term includes any such vehicle which has special features enabling off-street or off-highway operation and use.

(3) [FN1] Upon the petition of any manufacturer, the Administrator, after notice and opportunity for public hearing, may waive the standard required under subparagraph (B) of paragraph (1) to not exceed 1.5 grams of oxides of nitrogen per vehicle mile for any class or category of light-duty vehicles or engines manufactured by such manufacturer during any period of up to four model years beginning after the model year 1980 if the manufacturer demonstrates that such waiver is necessary to permit the use of an innovative power train technology, or innovative emission control device or system, in such class or category of vehicles or engines and that such technology or system was not utilized by more than 1 percent of the light-duty vehicles sold in the United States in the 1975 model year. Such waiver may be granted only if the Administrator determines--

(A) that such waiver would not endanger public health,

(B) that there is a substantial likelihood that the vehicles or engines will be able to comply with the applicable standard under this section at the expiration of the waiver, and

(C) that the technology or system has a potential for long-term air quality benefit and has the potential to meet or exceed the average fuel economy standard applicable under the Energy Policy and Conservation Act [42 U.S.C.A. § 6201 et seq.] upon the expiration of the waiver.

No waiver under this subparagraph [FN2] granted to any manufacturer shall apply to more than 5 percent of such manu-

facturer's production or more than fifty thousand vehicles or engines, whichever is greater.

(c) Feasibility study and investigation by National Academy of Sciences; reports to Administrator and Congress; availability of information

(1) The Administrator shall undertake to enter into appropriate arrangements with the National Academy of Sciences to conduct a comprehensive study and investigation of the technological feasibility of meeting the emissions standards required to be prescribed by the Administrator by subsection (b) of this section.

(2) Of the funds authorized to be appropriated to the Administrator by this chapter, such amounts as are required shall be available to carry out the study and investigation authorized by paragraph (1) of this subsection.

(3) In entering into any arrangement with the National Academy of Sciences for conducting the study and investigation authorized by paragraph (1) of this subsection, the Administrator shall request the National Academy of Sciences to submit semiannual reports on the progress of its study and investigation to the Administrator and the Congress, beginning not later than July 1, 1971, and continuing until such study and investigation is completed.

(4) The Administrator shall furnish to such Academy at its request any information which the Academy deems necessary for the purpose of conducting the investigation and study authorized by paragraph (1) of this subsection. For the purpose of furnishing such information, the Administrator may use any authority he has under this chapter (A) to obtain information from any person, and (B) to require such person to conduct such tests, keep such records, and make such reports respecting research or other activities conducted by such person as may be reasonably necessary to carry out this subsection.

(d) Useful life of vehicles

The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and section 7541 of this title. Such regulations shall provide that except where a different useful life period is specified in this subchapter useful life shall--

(1) in the case of light duty vehicles and light duty vehicle engines and light-duty trucks up to 3,750 lbs. LVW and up to 6,000 lbs. GVWR, be a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs, except that in the case of any requirement of this section which first becomes applicable after November 15, 1990, where the useful life period is not otherwise specified for such vehicles and engines, the period shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs, with testing for purposes of in-use compliance under section 7541 of this title up to (but not beyond) 7 years or 75,000 miles (or the equivalent), whichever first occurs;

(2) in the case of any other motor vehicle or motor vehicle engine (other than motorcycles or motorcycle engines), be a period of use set forth in paragraph (1) unless the Administrator determines that a period of use of greater duration or mileage is appropriate; and

(3) in the case of any motorcycle or motorcycle engine, be a period of use the Administrator shall determine.

(e) New power sources or propulsion systems

In the event of a new power source or propulsion system for new motor vehicles or new motor vehicle engines is submitted for certification pursuant to section 7525(a) of this title, the Administrator may postpone certification until he has prescribed standards for any air pollutants emitted by such vehicle or engine which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger the public health or welfare but for which standards have not been prescribed under subsection (a) of this section.

(f) [FN3] High altitude regulations

(1) The high altitude regulation in effect with respect to model year 1977 motor vehicles shall not apply to the manufacture, distribution, or sale of 1978 and later model year motor vehicles. Any future regulation affecting the sale or distribution of motor vehicles or engines manufactured before the model year 1984 in high altitude areas of the country shall take effect no earlier than model year 1981.

(2) Any such future regulation applicable to high altitude vehicles or engines shall not require a percentage of reduction in the emissions of such vehicles which is greater than the required percentage of reduction in emissions from motor vehicles as set forth in subsection (b) of this section. This percentage reduction shall be determined by comparing any proposed high altitude emission standards to high altitude emissions from vehicles manufactured during model year 1970. In no event shall regulations applicable to high altitude vehicles manufactured before the model year 1984 establish a numerical standard which is more stringent than that applicable to vehicles certified under non-high altitude conditions.

(3) Section 7607(d) of this title shall apply to any high altitude regulation referred to in paragraph (2) and before promulgating any such regulation, the Administrator shall consider and make a finding with respect to--

(A) the economic impact upon consumers, individual high altitude dealers, and the automobile industry of any such regulation, including the economic impact which was experienced as a result of the regulation imposed during model year 1977 with respect to high altitude certification requirements;

(B) the present and future availability of emission control technology capable of meeting the applicable vehicle and engine emission requirements without reducing model availability; and

(C) the likelihood that the adoption of such a high altitude regulation will result in any significant improvement in air quality in any area to which it shall apply.

(g) Light-duty trucks up to 6,000 lbs. GVWR and light-duty vehicles; standards for model years after 1993

(1) NMHC, CO, and NO_x

Effective with respect to the model year 1994 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), and oxides of nitrogen (NO_x) from light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR) and light-duty vehicles (LDVs) shall contain standards which provide that emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall comply with the levels specified in table G. The percentage shall be as specified in the implementation

schedule below:

TABLE G--EMISSION STANDARDS FOR NMHC, CO, AND NO_x FROM LIGHT-DUTY TRUCKS OF UP TO 6,000 LBS. GVWR AND LIGHT-DUTY VEHICLES

Vehicle type	Column A (5 yrs/50,000 mi)			Column B (10 yrs/100,000 mi)		
	NMHC	CO	NO_x	NMHC	CO	NO_x
LDTs (0-3,750 lbs. LVW) and light-duty vehicles	0.25	3.4	0.4*	0.31	4.2	0.6*
LDTs (3,751-5,750 lbs. LVW)	0.32	4.4	0.7**	0.40	5.5	0.97
Standards are expressed in grams per mile (gpm).						
For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs.						
For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs.						
* In the case of diesel-fueled LDTs (0-3,750 lvw) and light-duty vehicles, before the model year 2004, in lieu of the 0.4 and 0.6 standards for NO_x, the applicable standards for NO_x shall be 1.0 gpm for a useful life of 5 years or 50,000 miles (or the equivalent), whichever first occurs, and 1.25 gpm for a useful life of 10 years or 100,000 miles (or the equivalent), whichever first occurs.						
** This standard does not apply to diesel-fueled LDTs (3,751-5,750 lbs. LVW).						

IMPLEMENTATION SCHEDULE FOR TABLE G STANDARDS

Model year	Percentage *
1994	40
1995	80
after 1995	100

[FN*] Percentages in the table refer to a percentage of each manufacturer's sales volume.

(2) PM Standard

Effective with respect to model year 1994 and thereafter in the case of light-duty vehicles, and effective with respect to the model year 1995 and thereafter in the case of light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR), the regulations under subsection (a) of this section applicable to emissions of particulate matter (PM)

from such vehicles and trucks shall contain standards which provide that such emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall not exceed the levels specified in the table below. The percentage shall be as specified in the Implementation Schedule below.

PM STANDARD FOR LDTS OF UP TO 6,000 LBS. GVWR

Useful life period	Standard
5/50,000	0.80 gpm
10/100,000	0.10 gpm

The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs, in the case of the 5/50,000 standard.

The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs in the case of the 10/100,000 standard.

IMPLEMENTATION SCHEDULE FOR PM STANDARDS

Model year	Light-duty vehicles	LDTs
1994	40%*	.....
1995	80%*	40%*
1996	100%*	80%*
after 1996	100%*	100%*

[FN*] Percentages in the table refer to a percentage of each manufacturer's sales volume.

(h) Light-duty trucks of more than 6,000 lbs. GVWR; standards for model years after 1995

Effective with respect to the model year 1996 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), oxides of nitrogen (NO_x), and particulate matter (PM) from light-duty trucks (LDTs) of more than 6,000 lbs. gross vehicle weight rating (GVWR) shall contain standards which provide that emissions from a specified percentage of each manufacturer's sales volume of such trucks shall comply with the levels specified in table H. The specified percentage shall be 50 percent in model year 1996 and 100 percent thereafter.

TABLE H--EMISSION STANDARDS FOR NMHC AND CO FROM GASOLINE AND DIESEL FUELED LIGHT-DUTY TRUCKS OF MORE THAN 6,000 LBS. GVWR

	Column A	Column B

LDT Test weight	(5 yrs/50,000 mi)			(11 yrs/120,000 mi)			
	NMHC	CO	NO_x	NMHC	CO	NO_x	PM
3,751-5,750 lbs. TW	0.32	4.4	0.7*	0.46	6.4	0.98	0.10
Over 5,750 lbs. TW	0.39	5.0	1.1*	0.56	7.3	1.53	0.12

Standards are expressed in grams per mile (GPM).

For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent) whichever first occurs.

For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 11 years or 120,000 miles (or the equivalent), whichever first occurs.

* Not applicable to diesel-fueled LDTs.

(i) Phase II study for certain light-duty vehicles and light-duty trucks

(1) The Administrator, with the participation of the Office of Technology Assessment, shall study whether or not further reductions in emissions from light-duty vehicles and light-duty trucks should be required pursuant to this subchapter. The study shall consider whether to establish with respect to model years commencing after January 1, 2003, the standards and useful life period for gasoline and diesel-fueled light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less specified in the following table:

TABLE 3--PENDING EMISSION STANDARDS FOR GASOLINE

Pollutant	Emission level [FN*]
NMHC	0.125 GPM
NO_x	0.2 GPM
CO	1.7 GPM

[FN*] Emission levels are expressed in grams per mile (GPM). For vehicles and engines subject to this subsection for purposes of subsection (d) of this section and any reference thereto, the useful life of such vehicles and engines shall be a period of 10 years or 100,000 miles (or the equivalent), whichever first occurs.

Such study shall also consider other standards and useful life periods which are more stringent or less stringent than those set forth in table 3 (but more stringent than those referred to in subsections (g) and (h) of this section).

(2)(A) As part of the study under paragraph (1), the Administrator shall examine the need for further reductions in emissions in order to attain or maintain the national ambient air quality standards, taking into consideration the waiver provisions of section 7543(b) of this title. As part of such study, the Administrator shall also examine--

(i) the availability of technology (including the costs thereof), in the case of light-duty vehicles and light-duty trucks

with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for meeting more stringent emission standards than those provided in subsections (g) and (h) of this section for model years commencing not earlier than after January 1, 2003, and not later than model year 2006, including the lead time and safety and energy impacts of meeting more stringent emission standards; and

(ii) the need for, and cost effectiveness of, obtaining further reductions in emissions from such light-duty vehicles and light-duty trucks, taking into consideration alternative means of attaining or maintaining the national primary ambient air quality standards pursuant to State implementation plans and other requirements of this chapter, including their feasibility and cost effectiveness.

(B) The Administrator shall submit a report to Congress no later than June 1, 1997, containing the results of the study under this subsection, including the results of the examination conducted under subparagraph (A). Before submittal of such report the Administrator shall provide a reasonable opportunity for public comment and shall include a summary of such comments in the report to Congress.

(3)(A) Based on the study under paragraph (1) the Administrator shall determine, by rule, within 3 calendar years after the report is submitted to Congress, but not later than December 31, 1999, whether--

(i) there is a need for further reductions in emissions as provided in paragraph (2)(A);

(ii) the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

(iii) obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii).

The rulemaking under this paragraph shall commence within 3 months after submission of the report to Congress under paragraph (2)(B).

(B) If the Administrator determines under subparagraph (A) that--

(i) there is no need for further reductions in emissions as provided in paragraph (2)(A);

(ii) the technology for meeting more stringent emission standards will not be available as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); or

(iii) obtaining further reductions in emissions from such vehicles will not be needed or cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall not promulgate more stringent standards than those in effect pursuant to subsections (g) and (h) of this section. Nothing in this paragraph shall prohibit the Administrator from exercising the Administrator's authority

under subsection (a) of this section to promulgate more stringent standards for light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less at any other time thereafter in accordance with subsection (a) of this section.

(C) If the Administrator determines under subparagraph (A) that--

(i) there is a need for further reductions in emissions as provided in paragraph (2)(A);

(ii) the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

(iii) obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall either promulgate the standards (and useful life periods) set forth in Table 3 in paragraph (1) or promulgate alternative standards (and useful life periods) which are more stringent than those referred to in subsections (g) and (h) of this section. Any such standards (or useful life periods) promulgated by the Administrator shall take effect with respect to any such vehicles or engines no earlier than the model year 2003 but not later than model year 2006, as determined by the Administrator in the rule.

(D) Nothing in this paragraph shall be construed by the Administrator or by a court as a presumption that any standards (or useful life period) set forth in Table 3 shall be promulgated in the rulemaking required under this paragraph. The action required of the Administrator in accordance with this paragraph shall be treated as a nondiscretionary duty for purposes of section 7604(a)(2) of this title (relating to citizen suits).

(E) Unless the Administrator determines not to promulgate more stringent standards as provided in subparagraph (B) or to postpone the effective date of standards referred to in Table 3 in paragraph (1) or to establish alternative standards as provided in subparagraph (C), effective with respect to model years commencing after January 1, 2003, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), oxides of nitrogen (NO_x), and carbon monoxide (CO) from motor vehicles and motor vehicle engines in the classes specified in Table 3 in paragraph (1) above shall contain standards which provide that emissions may not exceed the pending emission levels specified in Table 3 in paragraph (1).

(j) Cold CO standard

(1) Phase I

Not later than 12 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section applicable to emissions of carbon monoxide from 1994 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees Fahrenheit. The regulations shall contain standards which provide that emissions of carbon monoxide from a manufacturer's vehicles when operated at 20 degrees Fahrenheit may not exceed, in the case of light-duty vehicles, 10.0 grams per mile, and in the case of light-duty trucks, a level comparable in strin-

gency to the standard applicable to light-duty vehicles. The standards shall take effect after model year 1993 according to a phase-in schedule which requires a percentage of each manufacturer's sales volume of light-duty vehicles and light-duty trucks to comply with applicable standards after model year 1993. The percentage shall be as specified in the following table:

PHASE-IN SCHEDULE FOR COLD START STANDARDS

Model Year	Percentage
1994	40
1995	80
1996 and after	100

(2) Phase II

(A) Not later than June 1, 1997, the Administrator shall complete a study assessing the need for further reductions in emissions of carbon monoxide and the maximum reductions in such emissions achievable from model year 2001 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees Fahrenheit.

(B)(i) If as of June 1, 1997, 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from model year 2002 and later model year light-duty vehicles and light-duty trucks shall contain standards which provide that emissions of carbon monoxide from such vehicles and trucks when operated at 20 degrees Fahrenheit may not exceed 3.4 grams per mile (gpm) in the case of light-duty vehicles and 4.4 grams per mile (gpm) in the case of light-duty trucks up to 6,000 GVWR and a level comparable in stringency in the case of light-duty trucks 6,000 GVWR and above.

(ii) In determining for purposes of this subparagraph whether 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the Administrator shall exclude the areas of Steubenville, Ohio, and Oshkosh, Wisconsin.

(3) Useful-life for phase I and phase II standards

In the case of the standards referred to in paragraphs (1) and (2), for purposes of certification under section 7525 of this title and in-use compliance under section 7541 of this title, the applicable useful life period shall be 5 years or 50,000 miles, whichever first occurs, except that the Administrator may extend such useful life period (for purposes of section 7525 of this title, or section 7541 of this title, or both) if he determines that it is feasible for vehicles and engines subject to such standards to meet such standards for a longer useful life. If the Administrator extends such useful life period, the Administrator may make an appropriate adjustment of applicable standards for such extended useful life. No such extended useful life shall extend beyond the useful life period provided in regulations under subsection (d) of this section.

(4) Heavy-duty vehicles and engines

The Administrator may also promulgate regulations under subsection (a)(1) of this section applicable to emissions of

carbon monoxide from heavy-duty vehicles and engines when operated at cold temperatures.

(k) Control of evaporative emissions

The Administrator shall promulgate (and from time to time revise) regulations applicable to evaporative emissions of hydrocarbons from all gasoline-fueled motor vehicles--

(1) during operation; and

(2) over 2 or more days of nonuse;

under ozone-prone summertime conditions (as determined by regulations of the Administrator). The regulations shall take effect as expeditiously as possible and shall require the greatest degree of emission reduction achievable by means reasonably expected to be available for production during any model year to which the regulations apply, giving appropriate consideration to fuel volatility, and to cost, energy, and safety factors associated with the application of the appropriate technology. The Administrator shall commence a rulemaking under this subsection within 12 months after November 15, 1990. If final regulations are not promulgated under this subsection within 18 months after November 15, 1990, the Administrator shall submit a statement to the Congress containing an explanation of the reasons for the delay and a date certain for promulgation of such final regulations in accordance with this chapter. Such date certain shall not be later than 15 months after the expiration of such 18 month deadline.

(l) Mobile source-related air toxics

(1) Study

Not later than 18 months after November 15, 1990, the Administrator shall complete a study of the need for, and feasibility of, controlling emissions of toxic air pollutants which are unregulated under this chapter and associated with motor vehicles and motor vehicle fuels, and the need for, and feasibility of, controlling such emissions and the means and measures for such controls. The study shall focus on those categories of emissions that pose the greatest risk to human health or about which significant uncertainties remain, including emissions of benzene, formaldehyde, and 1, 3 butadiene. The proposed report shall be available for public review and comment and shall include a summary of all comments.

(2) Standards

Within 54 months after November 15, 1990, the Administrator shall, based on the study under paragraph (1), promulgate (and from time to time revise) regulations under subsection (a)(1) of this section or section 7545(c)(1) of this title containing reasonable requirements to control hazardous air pollutants from motor vehicles and motor vehicle fuels. The regulations shall contain standards for such fuels or vehicles, or both, which the Administrator determines reflect the greatest degree of emission reduction achievable through the application of technology which will be available, taking into consideration the standards established under subsection (a) of this section, the availability and costs of the technology, and noise, energy, and safety factors, and lead time. Such regulations shall not be inconsistent with standards under subsection (a) of this section. The regulations shall, at a minimum, apply to emissions of benzene and form-

aldehyde.

(m) Emissions control diagnostics

(1) Regulations

Within 18 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section requiring manufacturers to install on all new light duty vehicles and light duty trucks diagnostics systems capable of--

(A) accurately identifying for the vehicle's useful life as established under this section, emission-related systems deterioration or malfunction, including, at a minimum, the catalytic converter and oxygen sensor, which could cause or result in failure of the vehicles to comply with emission standards established under this section,

(B) alerting the vehicle's owner or operator to the likely need for emission-related components or systems maintenance or repair,

(C) storing and retrieving fault codes specified by the Administrator, and

(D) providing access to stored information in a manner specified by the Administrator.

The Administrator may, in the Administrator's discretion, promulgate regulations requiring manufacturers to install such onboard diagnostic systems on heavy-duty vehicles and engines.

(2) Effective date

The regulations required under paragraph (1) of this subsection shall take effect in model year 1994, except that the Administrator may waive the application of such regulations for model year 1994 or 1995 (or both) with respect to any class or category of motor vehicles if the Administrator determines that it would be infeasible to apply the regulations to that class or category in such model year or years, consistent with corresponding regulations or policies adopted by the California Air Resources Board for such systems.

(3) State inspection

The Administrator shall by regulation require States that have implementation plans containing motor vehicle inspection and maintenance programs to amend their plans within 2 years after promulgation of such regulations to provide for inspection of onboard diagnostics systems (as prescribed by regulations under paragraph (1) of this subsection) and for the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems. Such regulations shall not be inconsistent with the provisions for warranties promulgated under section 7541(a) and (b) of this title.

(4) Specific requirements

In promulgating regulations under this subsection, the Administrator shall require--

(A) that any connectors through which the emission control diagnostics system is accessed for inspection, diagnosis, service, or repair shall be standard and uniform on all motor vehicles and motor vehicle engines;

(B) that access to the emission control diagnostics system through such connectors shall be unrestricted and shall not require any access code or any device which is only available from a vehicle manufacturer; and

(C) that the output of the data from the emission control diagnostics system through such connectors shall be usable without the need for any unique decoding information or device.

(5) Information availability

The Administrator, by regulation, shall require (subject to the provisions of section 7542(c) of this title regarding the protection of methods or processes entitled to protection as trade secrets) manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines, and the Administrator for use by any such persons, with any and all information needed to make use of the emission control diagnostics system prescribed under this subsection and such other information including instructions for making emission related diagnosis and repairs. No such information may be withheld under section 7542(c) of this title if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines. Such information shall also be available to the Administrator, subject to section 7542(c) of this title, in carrying out the Administrator's responsibilities under this section.

(f) [FN4] Model years after 1990

CREDIT(S)

(July 14, 1955, c. 360, Title II, § 202, as added Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(8), 79 Stat. 992; amended Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 499; Dec. 31, 1970, Pub.L. 91-604, § 6(a), 84 Stat. 1690; June 22, 1974, Pub.L. 93-319, § 5, 88 Stat. 258; Aug. 7, 1977, Pub.L. 95-95, Title II, §§ 201, 202(b), 213(b), 214(a), 215 to 217, 224(a), (b), (g), Title IV, § 401(d), 91 Stat. 751 to 753, 758 to 761, 765, 767, 769, 791; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(60) to (65), (b)(5), 91 Stat. 1403, 1405; Nov. 15, 1990, Pub.L. 101-549, Title II, §§ 201 to 207, 227(b), 230(1) to (5), 104 Stat. 2472 to 2481, 2507, 2529.)

[FN1] So in original. Probably should be "(4)".

[FN2] So in original. Probably should be "paragraph".

[FN3] Another subsec. (f) is set out following subsec. (m).

[FN4] So in original. Probably should be (n).

Current through P.L. 112-90 approved 1-3-12

END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter II. Emission Standards for Moving Sources
Part A. Motor Vehicle Emission and Fuel Standards (Refs & Annos)

→→ § 7525. Motor vehicle and motor vehicle engine compliance testing and certification

(a) Testing and issuance of certificate of conformity

(1) The Administrator shall test, or require to be tested in such manner as he deems appropriate, any new motor vehicle or new motor vehicle engine submitted by a manufacturer to determine whether such vehicle or engine conforms with the regulations prescribed under section 7521 of this title. If such vehicle or engine conforms to such regulations, the Administrator shall issue a certificate of conformity upon such terms, and for such period (not in excess of one year), as he may prescribe. In the case of any original equipment manufacturer (as defined by the Administrator in regulations promulgated before November 15, 1990) of vehicles or vehicle engines whose projected sales in the United States for any model year (as determined by the Administrator) will not exceed 300, the Administrator shall not require, for purposes of determining compliance with regulations under section 7521 of this title for the useful life of the vehicle or engine, operation of any vehicle or engine manufactured during such model year for more than 5,000 miles or 160 hours, respectively, unless the Administrator, by regulation, prescribes otherwise. The Administrator shall apply any adjustment factors that the Administrator deems appropriate to assure that each vehicle or engine will comply during its useful life (as determined under section 7521(d) of this title) with the regulations prescribed under section 7521 of this title.

(2) The Administrator shall test any emission control system incorporated in a motor vehicle or motor vehicle engine submitted to him by any person, in order to determine whether such system enables such vehicle or engine to conform to the standards required to be prescribed under section 7521(b) of this title. If the Administrator finds on the basis of such tests that such vehicle or engine conforms to such standards, the Administrator shall issue a verification of compliance with emission standards for such system when incorporated in vehicles of a class of which the tested vehicle is representative. He shall inform manufacturers and the National Academy of Sciences, and make available to the public, the results of such tests. Tests under this paragraph shall be conducted under such terms and conditions (including requirements for preliminary testing by qualified independent laboratories) as the Administrator may prescribe by regulations.

(3)(A) A certificate of conformity may be issued under this section only if the Administrator determines that the manufacturer (or in the case of a vehicle or engine for import, any person) has established to the satisfaction of the Administrator that any emission control device, system, or element of design installed on, or incorporated in, such vehicle or engine conforms to applicable requirements of section 7521(a)(4) of this title.

(B) The Administrator may conduct such tests and may require the manufacturer (or any such person) to conduct such tests and provide such information as is necessary to carry out subparagraph (A) of this paragraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system, device, or element of design if such pollutant was not emitted, or was emitted in significantly lesser amounts, from the vehicle or engine without use of the system, device, or element of design.

(4)(A) Not later than 12 months after November 15, 1990, the Administrator shall revise the regulations promulgated under this subsection to add test procedures capable of determining whether model year 1994 and later model year light-duty vehicles and light-duty trucks, when properly maintained and used, will pass the inspection methods and procedures established under section 7541(b) of this title for that model year, under conditions reasonably likely to be encountered in the conduct of inspection and maintenance programs, but which those programs cannot reasonably influence or control. The conditions shall include fuel characteristics, ambient temperature, and short (30 minutes or less) waiting periods before tests are conducted. The Administrator shall not grant a certificate of conformity under this subsection for any 1994 or later model year vehicle or engine that the Administrator concludes cannot pass the test procedures established under this paragraph.

(B) From time to time, the Administrator may revise the regulations promulgated under subparagraph (A), as the Administrator deems appropriate.

(b) Testing procedures; hearing; judicial review; additional evidence

(1) In order to determine whether new motor vehicles or new motor vehicle engines being manufactured by a manufacturer do in fact conform with the regulations with respect to which the certificate of conformity was issued, the Administrator is authorized to test such vehicles or engines. Such tests may be conducted by the Administrator directly or, in accordance with conditions specified by the Administrator, by the manufacturer.

(2)(A)(i) If, based on tests conducted under paragraph (1) on a sample of new vehicles or engines covered by a certificate of conformity, the Administrator determines that all or part of the vehicles or engines so covered do not conform with the regulations with respect to which the certificate of conformity was issued and with the requirements of section 7521(a)(4) of this title, he may suspend or revoke such certificate in whole or in part, and shall so notify the manufacturer. Such suspension or revocation shall apply in the case of any new motor vehicles or new motor vehicle engines manufactured after the date of such notification (or manufactured before such date if still in the hands of the manufacturer), and shall apply until such time as the Administrator finds that vehicles and engines manufactured by the manufacturer do conform to such regulations and requirements. If, during any period of suspension or revocation, the Administrator finds that a vehicle or engine actually conforms to such regulations and requirements, he shall issue a certificate of conformity applicable to such vehicle or engine.

(ii) If, based on tests conducted under paragraph (1) on any new vehicle or engine, the Administrator determines that such vehicle or engine does not conform with such regulations and requirements, he may suspend or revoke such certificate insofar as it applies to such vehicle or engine until such time as he finds such vehicle or engine actually so conforms with such regulations and requirements, and he shall so notify the manufacturer.

(B)(i) At the request of any manufacturer the Administrator shall grant such manufacturer a hearing as to whether the tests have been properly conducted or any sampling methods have been properly applied, and make a determination on the record with respect to any suspension or revocation under subparagraph (A); but suspension or revocation under subparagraph (A) shall not be stayed by reason of such hearing.

(ii) In any case of actual controversy as to the validity of any determination under clause (i), the manufacturer may at any time prior to the 60th day after such determination is made file a petition with the United States court of appeals for the circuit wherein such manufacturer resides or has his principal place of business for a judicial review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Administrator or other officer designated by him for that purpose. The Administrator thereupon shall file in the court the record of the proceedings on which the Administrator based his determination, as provided in section 2112 of Title 28.

(iii) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(iv) Upon the filing of the petition referred to in clause (ii), the court shall have jurisdiction to review the order in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter.

(c) Inspection

For purposes of enforcement of this section, officers or employees duly designated by the Administrator, upon presenting appropriate credentials to the manufacturer or person in charge, are authorized (1) to enter, at reasonable times, any plant or other establishment of such manufacturer, for the purpose of conducting tests of vehicles or engines in the hands of the manufacturer, or (2) to inspect, at reasonable times, records, files, papers, processes, controls, and facilities used by such manufacturer in conducting tests under regulations of the Administrator. Each such inspection shall be commenced and completed with reasonable promptness.

(d) Rules and regulations

The Administrator shall by regulation establish methods and procedures for making tests under this section.

(e) Publication of test results

The Administrator shall make available to the public the results of his tests of any motor vehicle or motor vehicle engine submitted by a manufacturer under subsection (a) of this section as promptly as possible after December 31, 1970, and at the beginning of each model year which begins thereafter. Such results shall be de-

scribed in such nontechnical manner as will reasonably disclose to prospective ultimate purchasers of new motor vehicles and new motor vehicle engines the comparative performance of the vehicles and engines tested in meeting the standards prescribed under section 7521 of this title.

(f) High altitude regulations

All light duty [FN1] vehicles and engines manufactured during or after model year 1984 and all light-duty trucks manufactured during or after model year 1995 shall comply with the requirements of section 7521 of this title regardless of the altitude at which they are sold.

(g) Nonconformance penalty

(1) In the case of any class or category of heavy-duty vehicles or engines to which a standard promulgated under section 7521(a) of this title applies, except as provided in paragraph (2), a certificate of conformity shall be issued under subsection (a) of this section and shall not be suspended or revoked under subsection (b) of this section for such vehicles or engines manufactured by a manufacturer notwithstanding the failure of such vehicles or engines to meet such standard if such manufacturer pays a nonconformance penalty as provided under regulations promulgated by the Administrator after notice and opportunity for public hearing. In the case of motorcycles to which such a standard applies, such a certificate may be issued notwithstanding such failure if the manufacturer pays such a penalty.

(2) No certificate of conformity may be issued under paragraph (1) with respect to any class or category of vehicle or engine if the degree by which the manufacturer fails to meet any standard promulgated under section 7521(a) of this title with respect to such class or category exceeds the percentage determined under regulations promulgated by the Administrator to be practicable. Such regulations shall require such testing of vehicles or engines being produced as may be necessary to determine the percentage of the classes or categories of vehicles or engines which are not in compliance with the regulations with respect to which a certificate of conformity was issued and shall be promulgated not later than one year after August 7, 1977.

(3) The regulations promulgated under paragraph (1) shall, not later than one year after August 7, 1977, provide for nonconformance penalties in amounts determined under a formula established by the Administrator. Such penalties under such formula--

(A) may vary from pollutant-to-pollutant;

(B) may vary by class or category or vehicle or engine;

(C) shall take into account the extent to which actual emissions of any air pollutant exceed allowable emissions under the standards promulgated under section 7521 of this title;

(D) shall be increased periodically in order to create incentives for the development of production vehicles or

engines which achieve the required degree of emission reduction; and

(E) shall remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction (including any such disadvantage arising from the application of paragraph (4)).

(4) In any case in which a certificate of conformity has been issued under this subsection, any warranty required under section 7541(b)(2) of this title and any action under section 7541(c) of this title shall be required to be effective only for the emission levels which the Administrator determines that such certificate was issued and not for the emission levels required under the applicable standard.

(5) The authorities of section 7542(a) of this title shall apply, subject to the conditions of section 7542(b) of this title, for purposes of this subsection.

(h) Review and revision of regulations

Within 18 months after November 15, 1990, the Administrator shall review and revise as necessary the regulations under subsection [FN2] (a) and (b) of this section regarding the testing of motor vehicles and motor vehicle engines to insure that vehicles are tested under circumstances which reflect the actual current driving conditions under which motor vehicles are used, including conditions relating to fuel, temperature, acceleration, and altitude.

CREDIT(S)

(July 14, 1955, c. 360, Title II, § 206, as added Dec. 31, 1970, Pub.L. 91-604, § 8(a), 84 Stat. 1694; amended Aug. 7, 1977, Pub.L. 95-95, Title II, §§ 213(a), 214(b), (c), 220, 224(e), 91 Stat. 758-760, 762, 768; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(69), 91 Stat. 1403; Nov. 15, 1990, Pub.L. 101-549, Title II, §§ 208, 230(7), (8), 104 Stat. 2483, 2529.)

[FN1] So in original. Probably should be "light-duty".

[FN2] So in original. Probably should be "subsections".

Current through P.L. 112-90 approved 1-3-12

END OF DOCUMENT

Subpart J—Fees for the Motor Vehicle and Engine Compliance Program

§86.901 Assessment of fees.

See 40 CFR part 85, subpart Y, for the applicable fees associated with certifying engines and vehicles under this part.

[71 FR 51487, Aug. 30, 2006]

Subpart K—Selective Enforcement Auditing of New Heavy-Duty Engines

§86.1001 Applicability.

(a) The selective enforcement auditing program described in 40 CFR part 1068, subpart E, applies for all heavy-duty engines as described in this section. In addition, the provisions of 40 CFR 1068.10 and 1068.20 apply for any selective enforcement audits of these engines.

(b) For heavy-duty engines, the prescribed test procedure is the Federal Test Procedure as described in subparts I, N, and P of this part (including provisions of 40 CFR part 1065 as specified in this part), except that they shall not be subject to the test procedures specified in §§86.1360(b)(2) and (f), 86.1370, 86.1372, and 86.1380. The Administrator may, on the basis of a written application by a manufacturer, approve optional test procedures other than those in subparts I, N, and P of this part for any heavy-duty vehicle which is not susceptible to satisfactory testing using the procedures in subparts I, N, and P of this part.

[75 FR 22980, Apr. 30, 2010]

Subpart L—Nonconformance Penalties for Gasoline-Fueled and Diesel Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks

SOURCE: 50 FR 35388, Aug. 30, 1985, unless otherwise noted.

§86.1101-87 Applicability.

(a) The provisions of this subpart are applicable for 1987 and later model year gasoline-fueled and diesel heavy-duty engines and heavy-duty vehicles. These vehicles include light-duty trucks rated in excess of 6,000 pounds gross vehicle weight.

(b) References in this subpart to engine families and emission control systems shall be deemed to apply to durability groups and test groups as applicable for manufacturers certifying new light-duty trucks and Otto-cycle complete heavy-duty vehicles under the provisions of subpart S of this part.

[65 FR 59957, Oct. 6, 2000]

§86.1102-87 Definitions.

(a) The definitions in this section apply to this subpart.

(b) As used in this subpart, all terms not defined herein have the meaning given them in the Act.

Compliance level means the deteriorated pollutant emissions level at the 60th percentile point for a population of heavy-duty engines or heavy-duty vehicles subject to Production Compliance Audit testing pursuant to the requirements of this subpart. A compliance level for a population can only be determined for a pollutant for which an upper limit has been established in this subpart.

Configuration means a subdivision, if any, of a heavy-duty engine family for which a separate projected sales figure is listed in the manufacturer's Application for Certification and which can be described on the basis of emission control system, governed speed, injector size, engine calibration, or other parameters which may be designated by the Administrator, or a subclassification of light-duty truck engine family emission control system combination on the basis of engine code, inertia weight class, transmission type and gear ratios, rear axle ratio, or other parameters which may be designated by the Administrator.

NCP means a nonconformance penalty as described in section 206(g) of the Clean Air Act and in this subpart.

PCA means Production Compliance Audit as described in §86.1106-87 of this subpart.

Subclass means a classification of heavy-duty engines of heavy-duty vehicles based on such factors as gross vehicle weight rating, fuel usage (gasoline-, diesel-, and methanol-fueled), vehicle usage, engine horsepower or additional criteria that the Administrator shall apply. Subclasses include, but are not limited to:

(i) Light-duty gasoline-fueled Otto cycle trucks (6,001–8,500 lb. GVW)

(ii) Light-duty methanol-fueled Otto cycle trucks (6,001–8,500 lb. GVW)

(iii) Light-duty petroleum-fueled diesel trucks (6,001–8,500 lb. GVW)

(iv) Light-duty methanol-fueled diesel trucks (6,001–8,500 lb. GVW)

(v) Light heavy-duty gasoline-fueled Otto cycle engines (for use in vehicles of 8,501–14,000 lb. GVW)

(vi) Light heavy-duty methanol-fueled Otto cycle engines (for use in vehicles of 8,501–14,000 lb. GVW)

(vii) Heavy heavy-duty gasoline-fueled Otto cycle engines (for use in vehicles of 14,001 lb and above GVW)

(viii) Heavy heavy-duty methanol-fueled Otto cycle engines (for use in vehicles of 14,001 lb. and above GVW)

(ix) Light heavy-duty petroleum-fueled diesel engines (see § 86.085–2(a)(1))

(x) Light heavy-duty methanol-fueled diesel engines (see § 86.085–2(a)(1))

(xi) Medium heavy-duty petroleum-fueled diesel engines (see § 86.085–2(a)(2))

(xii) Medium heavy-duty methanol-fueled diesel engines (see § 86.085–2(a)(2))

(xiii) Heavy heavy-duty petroleum-fueled diesel engines (see § 86.085–2(a)(3))

(xiv) Heavy heavy-duty methanol-fueled diesel engines (see § 86.085–2(a)(3))

(xv) Petroleum-fueled Urban Bus engines (see § 86.091–2)

(xvi) Methanol-fueled Urban Bus engines (see § 86.091–2).

For NCP purposes, all optionally certified engines and/or vehicles (engines certified in accordance with § 86.087–10(a)(3) and vehicles certified in accordance with § 86.085–1(b)) shall be considered part of, and included in the FRAC calculation of, the subclass for which they are optionally certified.

Test Sample means a group of heavy-duty engines or heavy-duty vehicles of the same configuration which have been selected for emission testing.

Upper limit means the emission level for a specific pollutant above which a certificate of conformity may not be issued or may be suspended or revoked.

[50 FR 35388, Aug. 30, 1985, as amended at 55 FR 46628, Nov. 5, 1990]

§ 86.1103–87 Criteria for availability of nonconformance penalties.

(a) EPA shall establish for each subclass of heavy-duty engines and heavy-duty vehicles (other than motorcycles), an NCP for a motor vehicle pollutant, when any new or revised emission standard is more stringent than the previous standard for the pollutant, or when an existing standard for that pollutant becomes more difficult to achieve because of a new or revised standard, provided that EPA finds:

(1) That for such subclass of engines or vehicles, substantial work will be required to meet the standard for which the NCP is offered, and

(2) That there is likely to be a technological laggard.

(b) Substantial work, as used in paragraph (a)(1) of this section, means the application of technology not previously used in an engine or vehicle class or subclass, or the significant modification of existing technology or design parameters, needed to bring the vehicle or engine into compliance with either the more stringent new or revised standard or an existing standard which becomes more difficult to achieve because of a new or revised standard.

§ 86.1104–91 Determination of upper limits.

(a) The upper limit applicable to a pollutant emission standard for a subclass of heavy-duty engines or heavy-duty vehicles for which an NCP is established in accordance with § 86.1103–87, shall be the previous pollutant emission standard for that subclass.

(b) If no previous standard existed for the pollutant under paragraph (a) of this section, the upper limit will be developed by EPA during rulemaking.

(c) If a manufacturer participates in any of the emissions averaging, trading, or banking programs, and carries over certification of an engine family from the prior model year, the upper limit for that engine family shall be the family emission limit of the prior model year, unless the family emission limit is less than the upper limit determined in paragraph (a) of this section.

[55 FR 30629, July 26, 1990]

§ 86.1105–87 Emission standards for which nonconformance penalties are available.

(a)–(b) [Reserved]

(c) Effective in the 1991 model year, NCPs will be available for the following additional emission standards:

(1) [Reserved]

(2) Petroleum-fueled diesel heavy-duty engine oxides of nitrogen standard of 5.0 grams per brake horsepower-hour.

(i) For petroleum-fueled light heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(*1*) COC_{50}: $830.

(*2*) COC_{90}: $946.

(*3*) MC_{50}: $1,167 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(h): 0.12.

(ii) For petroleum-fueled medium heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(*1*) COC_{50}: $905.

(*2*) COC_{90}: $1,453.

(*3*) MC_{50}: $1,417 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(h): 0.11.

(iii) For petroleum-fueled heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(*1*) COC_{50}: $930.

(*2*) COC_{90}: $1,590.

(*3*) MC_{50}: $2,250 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(h): 0.11.

(3) Petroleum-fueled diesel light-duty trucks (between 6,001 and 14,000 lbs GVW) particulate matter emission standard of 0.13 grams per vehicle mile.

(i) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(A) COC_{50}: $711.

(B) COC_{90}: $1,396.

(C) MC_{50}: $2,960 per gram per brake horsepower-hour.

(D) F: 1.2.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(h): 0.01.

(d) Effective in the 1993 model year, NCPs will be available for the following additional emission standard:

(1) Petroleum-fueled diesel bus engine (as defined in § 86.093–2) particulate emission standard of 0.10 grams per brake horsepower-hour.

(i) The following values shall be used to calculate an NCP for the standard set forth in § 86.093–11(a)(1)(iv)(A) in accordance with § 86.1113–87(a):

(A) COC_{50}: $4,020.

(B) COC_{90}: $4,535.

(C) MC_{50}: $22,971 per gram per brake horsepower-hour.

(D) F: 1.2.

(E) UL: 0.25 grams per brake horsepower-hour.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP for the standard set forth in § 86.093–11(a)(1)(iv)(A) in accordance with § 86.1113–87(h): 0.02.

(2) [Reserved]

(e) The values of COC_{50}, COC_{90}, and MC_{50} in paragraphs (a) and (b) of this section are expressed in December 1984 dollars. The values of COC_{50}, COC_{90}, and MC_{50} in paragraphs (c) and (d) of this section are expressed in December 1989 dollars. The values of COC_{50}, COC_{90}, and MC_{50} in paragraph (f) of this section are expressed in December 1991 dollars. The values of COC_{50} COC_{90}, and MC_{50} in paragraphs (g) and (h) of this section

(Authorized Company Representative)

§86.1113–87 Calculation and payment of penalty.

(a) The NCP for each engine or vehicle for which a compliance level has been determined under §86.1112–87 is calculated according to the formula in paragraph (a)(1) or (a)(2) of this section depending on the value of the compliance level. Each formula contains an annual adjustment factor (AAF_i) which is defined in paragraph (a)(3) of this section. Other terms in the formulas are defined in paragraph (a)(4) of this section.

(1) If the compliance level (CL) is greater than the standard and less than or equal to X (e.g., point CL_1 in figure 1), then:

$$NCP_n = (PR_1)(CL - S)\left(\prod_{i=1}^{n} AAF_i\right)$$

where:

$PR_1 = (F)\,(MC_{50})$

(2) If the compliance level is greater than X and less than or equal to the upper limit as determined by §86.1104–87 (e.g., point CL_2 in figure 1), then:

$$NCP_n = (COC_{50} + (PR_2)(CL - X))\left(\prod_{i=1}^{n} AAF_i\right)$$

where:

$$PR_2 = \frac{COC_{90} - COC_{50}}{UL - X}$$

(3) AAF_i has the following values:

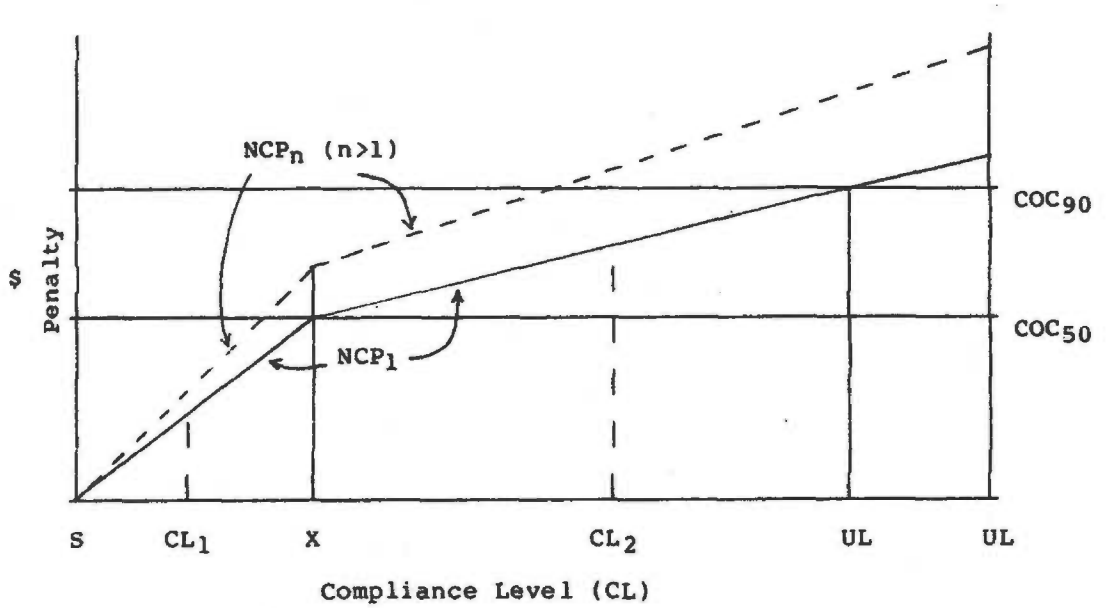
(i) If $frac_{i-1} = 0$, then $AAF_i = 1 + I_{i-1}$

(ii) If $frac_{i-1} > 0$, then:

$$AAF_i = 1 + I_{i-1} + A_i\left[\frac{1}{1 - frac_{i-1}}\right]^i$$

Figure 1

Penalty vs. Compliance Level



If $frac_{i-1}$ >0.50, then $frac_{i-1}$ will be set equal to 0.50.

(iii) AAF_1=1

(iv) In calculating the NCP for year n, the value $frac_{i-1}$ for i=n will include actual NCP usage through March 31 of model year n–1 and EPA's estimate of additional usage for the remainder of model year n-1 using manufacturer input. All manufacturers using NCPs must report by subclass actual NCP and non-NCP production numbers through March 31, an estimate of NCP and non-NCP production for the remainder of the model year, and the previous year's actual NCP and non-NCP production to EPA no later than April 30 of the model year. If EPA is unable to obtain similar information from manufacturers not using NCPs, EPA will use projected sales data from the manufacturers' application for certification in computing the total production of the subclass and the $frac_{i-1}$. The value of $frac_{i-1}$ will be corrected to reflect actual year-end usage of NCPs and a corrected AAF will be used to establish NCPs in future years. The correction of previous year's AAF will not affect the previous year's penalty.

(4) The terms in the above formulas have the following meanings and values, which may be determined separately for each subclass and pollutant for which an NCP is offered. The production of Federal and California designated engines or vehicles shall be combined for the purpose of this section in calculating the NCP for each engine or vehicle.

NCP_n=NCP for year n for each applicable engine or vehicle

CL=Compliance level for year n for applicable engines or vehicles

S=Emission standard

UL=Upper limit as determined by section 86.1104–87, except that, if the upper limit is determined by section 86.1104–87(c), the value of UL in paragraph (a)(2) of this section shall be the prior emission standard for that pollutant.

UL'=Upper limit as determined by section 86.1104–87(c). This value is not used in the above formulas.

X=Compliance level above the standard at which NCP_1 equals COC_{50}

$$X = \frac{COC_{50}}{(F)(MC_{50})} + S$$

PR_1=Penalty rate when $CL \leq X$
PR_2=Penalty rate when $X < CL \leq$ applicable upper limit

$$\prod_{i=1}^{n} AAF_i = \text{Running product, i.e., } (AAF_1)\times(AAF_2)\times\cdots\times(AAF_n)$$

i=An index representing a year. It represents the same year for both Federal and California designated engines or vehicles of the same production model year.

n=Index representing the number of model years for which the NCP has been available for an engine or vehicle subclass (i.e., n=1 for the first year that the NCP is available, and so on until n=n for the nth year that the NCP is available). The factor "n" is based on the model year the NCP is first available, as specified in section 86.1105-87 for the engine or vehicle subclass and pollutant for both Federal and California designated engines and vehicles.

COC_{50}=Estimate of the average total incremental cost to comply with the standard relative to complying with the upper limit.

COC_{90}=Estimate of the 90th percentile total incremental cost to comply with the standard relative to complying with the upper limit.

MC_{50}=Estimate of the average marginal cost of compliance (dollars per emission unit) with the standard.

F=Factor used to estimate the 90th percentile marginal cost based on the average marginal cost (the minimum value of F is 1.1, the maximum value of F is 1.3).

AAF_i=Annual adjustment factor for year i, $frac_{i-1}$=Fraction of engines or vehicles of a subclass using NCPs in previous year (year i-1).

A_i=Usage adjustment factor in year i: A_i=0.10 for i=2; A_i=0.08 for i<2.

I_i=Percentage increase in overall consumer price index in year i.

(5) The values of COC_{50}, COC_{90}, MC_{50} and F will be determined for each applicable subclass by EPA based on the cost data used by EPA in setting the applicable emission standard. However, where the rulemaking to establish a specific NCP occurs after the rulemaking to establish the standard, EPA may augment the data base used to establish the standard by including the best cost and emission performance data available to EPA during the specific NCP rulemaking.

(6) In calculating the NCP, appropriate values of the following predefined terms should be used: CL, S, UL, F, and A_i. For all other terms, unrounded values of at least five figures beyond the decimal point should be used in calculations leading up to the penalty amount. Any NCP calculated under paragraph (a) of this section will be rounded to the nearest dollar in accordance with ASTM E29-67.

(b) The NCP determined in paragraph (a) of this section is assessed against all those engines or vehicles of the nonconforming configuration or engine family produced at all assembly plants and distributed into commerce—

(1) Since the beginning of the model year in the case of a certification failure described by §86.1106-87(a).

(2) Beginning ten days after an SEA failure described by §86.1106-87 (b) or (c).

(3) Following implementation of a production running change described by §86.1106-87(d).

(c) The NCP will continue to be assessed during the model year, until such time, if any, that the configuration or engine family is brought into conformance with applicable emission standards.

(d) A manufacturer may carry over an NCP from a model year to the next model year. There is no limit to the number of years that carryover can continue. The amount of the penalty will increase each year according to paragraph (a) of this section.

(e) The Administrator shall notify the manufacturer in writing of the nonconformance penalty established under paragraph (a) of this section after the completion of the PCA under §86.1112-87.

(f) A manufacturer may request a hearing under §86.1115-87 as to whether

the compliance level (including a compliance level in excess of the upper limit) was determined in accordance with the procedures in § 86.1112–87(a) or whether the nonconformance penalty was calculated in accordance with the procedures in § 86.1113–87(a). If a nonconformance penalty has been established, such hearing must be requested within fifteen (15) days or such other period as may be allowed by the Administrator after the notification of the nonconformance penalty. If a manufacturer wishes to challenge a compliance level in excess of the upper limit, he must request a hearing within fifteen (15) days or such other period as may be allowed by the Administrator after the completion of the Production Compliance Audit.

(g)(1) Except as provided in paragraph (g)(2) of this section, the nonconformance penalty or penalties assessed under this subpart must be paid as follows:

(i) By the quarterly due dates, i.e., within 30 days of the end of each calendar quarter (March 31, June 30, September 30 and December 31), or according to such other payment schedule as the Administrator may approve pursuant to a manufacturer's request, for all nonconforming engines or vehicles produced by a manufacturer in accordance with paragraph (b) of this section and distributed into commerce for that quarter.

(ii) The penalty shall be payable to U.S. Environmental Protection Agency, NCP Fund, P.O. Box 360277M, Pittsburgh, PA 15251.

(2) When a manufacturer has requested a hearing under § 86.1115–87, it must pay the nonconformance penalty, and any interest, within ten days after the Presiding Officer renders his decision, unless the manufacturer first files a notice of intention to appeal to the Administrator pursuant to § 86.1115–87(t)(1), or, if an appeal of the Presiding Officer's decision is taken, within ten days after the Administrator renders his decision, unless the manufacturer first files a petition for judicial review.

(3) A manufacturer making payment under paragraph (g)(1) or (g)(2) of this section shall submit the following information by each quarterly due date to: Director, Manufacturers Operations Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. This information shall be submitted even if a manufacturer has no NCP production in a given quarter.

(i) Corporate identification, identification and quantity of engines or vehicles subject to the NCP, certificate identification (number and date), NCP payment calculations and interest payment calculations, if applicable.

(ii) The following statement and endorsement:

This information is submitted pursuant to section 206 of the Clean Air Act. All information reported herein is, to the best of

_____'s

(Company name)

knowledge, true and accurate. I am aware of the penalties associated with violations of the Clean Air Act and the regulations thereunder.

_____

(Authorized Company Representative)

(4) The Administrator may verify the production figures or other documentation submitted under paragraph (g)(3) of this section.

(5)(i) Interest shall be assessed on any nonconformance penalty for which payment has been withheld under § 86.113–87(g) (1) or (2). Interest shall be calculated from the due date for the first quarterly NCP payment, as determined under § 86.1113–87(g)(1), until either the date on which the Presiding Officer or the Administrator renders the final decision of the Agency under § 86.1115–87 or the date when an alternate payment schedule (approved pursuant to § 86.1113–87(g)(1)) ends.

(ii) The combined principal plus interest on each quarterly NCP payment withheld pursuant to § 86.1113–87(g) (1) or (2) shall be calculated according to the formula:

$$QNCP(1 + R).25n$$

where:

QNCP=the quarterly NCP payment

R=the interest rate applicable to that quarter

n=the number of quarters for which the quarterly NCP payment is outstanding.

(iii) The number of quarters for which payment is outstanding for purposes of this paragraph shall be the number of quarterly NCP payment due

dates, as determined under §86.1113–87(g)(1), which have elapsed throughout the duration of a hearing request, or alternate payment schedule.

(iv) The interest rate applicable to a quarter for purposes of this paragraph shall be the rate published by the Secretary of the Treasury pursuant to the Debt Collection Act of 1982 and effective on the date on which the NCP payment was originally due.

(6) A manufacturer will be refunded an overpayment, or be permitted to offset an overpayment by withholding a future payment, if approved in advance by the Administrator. The government shall pay no interest on overpayments.

(h) A manufacturer that certifies as a replacement for the nonconforming configuration, a configuration that is in conformance with applicable standards, and that performs a production compliance audit (PCA) in accordance with §86.1112–87(a) that results in a compliance level below the applicable standard, will be eligible to receive a refund of a portion of the engineering and development component of the penalty. The engineering and development component will be determined by multiplying the base penalty amount by the engineering and development factor for the appropriate subclass and pollutant in §86.1105–87. The amount refunded will depend on the model year in which the certification and PCA take place. In cases where payment of penalties have been waived by EPA in accordance with paragraph (g)(1)(iii) of this section, EPA will refund a portion of the engineering and development component. The proportionate refund to be paid by EPA will be based on the proportion of vehicles or engines of the nonconforming configuration for which NCPs were paid to EPA. The refund is calculated as follows:

$$R_{tot}=D_n \times F_{E\&D} \times NCP_1 \times Prod_{tot}$$

$$R_{Cal}=(Prod_{Cal}/Prod_{tot}) \times (R_{tot})$$

$$R_{EPA}=R_{tot}-R_{Cal}$$

Where:

n=index representing the number of model years for which the NCP has been available for an engine or vehicle subclass (i.e., n=1 for the first year that NCPs are available, . . . , n=n for the n^{th} year the NCPs are available; same as "n" in paragraph (a)(4)).

D_n=discount factor depending on the number of model years (n) for which NCPs were available at the time of certification and PCA of the replacement configuration, and its value is as follows:

D_1=0.90
D_2=0.79
D_3=0.67
D_4=0.54
D_5=0.39
D_6=0.23
D_7=0.05
D_n=0.00 for n=8 or larger

$F_{E\&D}$=the engineering and development factor specified in section 86.1105–87 for the appropriate subclass and pollutant

NCP_1=the penalty for each engine or vehicle during the first (base) year the NCP is available as calculated in paragraph (a)

$Prod_{tot}$=total number of engines or vehicles produced in the subclass for which NCPs were paid to EPA or to the State of California

$Prod_{Cal}$=number of engines or vehicles in the subclass demonstrated to have been titled, registered or principally used in the State of California and for which NCPs were paid to the State of California under paragraph (g)(1)

R_{tot}=Total refund due to the manufacturer for the engineering and development component of the NCP

R_{Cal}=Refund due to the manufacturer from the State of California for the engineering and development component of the NCP

R_{EPA}=Refund due to the manufacturer from EPA for the engineering and development component of the NCP.

[50 FR 35388, Aug. 30, 1985, as amended at 50 FR 53467, Dec. 31, 1985; 53 FR 19134, May 26, 1988; 55 FR 46629, Nov. 5, 1990; 61 FR 51366, Oct. 2, 1996]

§86.1114–87 Suspension and voiding of certificates of conformity.

(a) The certificate of conformity is suspended with respect to any engine or vehicle failing pursuant to paragraph (f) of §86.1112–87 effective from the time that a fail decision is made for that engine or vehicle.

(b) Once a certificate has been suspended for a failed engine or vehicle as provided for in paragraph (a) of this section, the manufacturer shall take the following actions:

(1) Before the certificate is reinstated for that failed engine or vehicle,

(i) Remedy the nonconformity, and

(ii) Demonstrate that the engine or vehicle conforms to the applicable standards or compliance levels by retesting the engine or vehicle in accordance with these regulations; and

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[FRL-2869-1]

Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Nonconformance Penalties for Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is promulgating the generic aspects of a nonconformance penalty (NCP) rule. The NCP will allow a manufacturer of heavy-duty engines (HDEs) or heavy-duty vehicles (HDVs) whose engines or vehicles fail to conform with certain applicable emission standards, but which do not exceed a designated upper limit, to be issued a certificate of conformity upon payment of a monetary penalty. An "upper limit" is an emission level, established by regulation and appropriate to a specific pollutant, above which an HDE or HDV cannot be certified.

This rule specifies the criteria for the availability of NCPs, the method of establishing upper limits, a testing program called Production Compliance Auditing (PCA), a penalty formula to determine the dollar amount of the NCP and other general aspects of an NCP rule. Specific upper limits and penalty rates to be used in the penalty formula are proposed in a separate rulemaking published elsewhere in this issue.

This rule is the result of an innovative rulemaking process called Regulatory Negotiation, the concept of which is to allow the parties interested in or affected by the outcome of the rule an opportunity to participate in its development through face-to-face negotiations. This rule, which was proposed in 50 FR 9204 (March 6, 1985), is based upon the consensus that was reached during the Regulatory Negotiation process. This is EPA's first completed rulemaking under this new regulatory process.

Regulations affected by this rulemaking are codified in Subparts A, K and L of 40 CFR Part 86.

EFFECTIVE DATE: September 30, 1985.

ADDRESS: Public Docket: Copies of materials relevant to this rulemaking proceeding are contained in Public Docket EN-85-02 at the Central Docket Section of the U.S. Environmental Protection Agency, West Tower Lobby/ Gallery 1, 401 M Street, S.W., Washington, D.C. 20460, and are available for review between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Montgomery or Mr. Claude Magnuson, Manufacturers Operations Division [EN-340F], Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Telephone: (202) 382-2487 or (202) 382-2547.

SUPPLEMENTARY INFORMATION

A. Statutory Authority

Section 206(g) of the Clean Air Act (the Act), 42 U.S.C. 7525(g), requires EPA to issue a certificate of conformity for any class or category of heavy-duty vehicles or engines which exceeds a section 202(a) emissions standard, but does not exceed an upper limit associated with that standard, if the manufacturer pays a nonconformance penalty (NCP) established by rulemaking. In placing section 206(g) in the Clean Air Act amendments of 1977, Congress intended NCPs as a response to perceived problems with technology-forcing heavy-duty emissions standards.[1] Following *International Harvester* v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), Congress realized the dilemma that technology-forcing standards were likely to cause. If strict standards were maintained, then some manufacturers (technological laggards) might be unable to comply initially and would be forced out of the marketplace. NCPs were intended to remedy this potential problem; the laggards would have a temporary alternative to permit them to sell their engines or vehicles through payment of a penalty, yet leaders would not suffer an economic disadvantage compared to nonconforming manufacturers, because the NCP would be based, in part, on the amount of money the laggard and his customer saved from the nonconforming engine or vehicle.

Under section 206(g)(1), NCPs may be offered for heavy-duty vehicles (HDVs) and heavy-duty engines (HDEs), which are engines to be installed in heavy-duty vehicles. HDVs are defined by section 202(b)(3)(C) as vehicles in excess of 6000 pounds gross vehicle weight (GVW). They include the part of the light-duty truck (LDT) class between 6001 and 8500 pounds GVW—the heavy light-duty trucks. The penalty may vary by pollutant and by class or category of vehicle or engine.

Section 206(g)(3) requires NCPs to be designed so as to:

- Increase with the degree of emission nonconformity;
- Increase periodically to provide incentive for nonconforming manufacturers to achieve the emission standards; and
- Remove any competitive disadvantage to conforming manufacturers.

Section 206(g) authorizes EPA to require testing of production vehicles or engines in order to determine the emission level on which the penalty is based. This emission level, the "compliance level," becomes the benchmark for warranty and recall liability; the manufacturer who elects to pay an NCP may be responsible for warranty or recall liability if its vehicle or engine exceeds the compliance level in-use. It would not have in-use warranty or recall liability for emissions levels above the standard but below the compliance level.

However, if the emission level of a vehicle or engine exceeds the upper limit of nonconformity, the vehicle or engine would not qualify for an NCP under section 206(g) and no certificate of conformity could be issued to the manufacturer.

B. Previous EPA Rulemakings Regarding Heavy-Duty Engine and Light-Duty Truck NCPs

NCPs were previously proposed by EPA in two separate rulemakings. An NCP system was first proposed when EPA proposed HC and CO standards for 1983 and later model year HDEs (44 FR 9464, February 13, 1979). A generic NCP formula was proposed, based on the marginal cost of bringing a "typical" HDE into compliance when its emissions are in the allowable range of nonconformity (not in excess of the upper limit). Also proposed was a system of Production Compliance Auditing (PCA) to measure the compliance levels of vehicles and engines which may qualify for NCPs. The notice stated that the proposed hydrocarbon (HC) and carbon monoxide (CO) emission standards for HDEs could probably be achieved by all manufacturers, so that upper limits would be set equal to the proposed standards, and NCPs would not be offered for those standards. A similar NCP/PCA system was outlined when EPA proposed HC and CO standards for 1983 and later model year LDTs (44 FR 40784, July 12, 1979), but again, specific NCPs were not proposed.

[1] The existence of NCPs, however, will not change the criteria under which the standards have been and will be set under section 202.

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In adopting the final HC and CO standards for both HDEs and LDTs, EPA stated that NCPs would be offered as part of a separate rulemaking to provide for isolated instances where compliance was not achieved. However, in April, 1981, the Administration announced a number of regulatory relief initiatives aimed at reducing the impact of government regulations on the automotive industry. One element of this program included the proposed revision of HC and CO emission standards so that catalysts would not be required for heavy-duty gasoline engines. Thus, NCPs were not offered for the final standards, as revised in 1983 (48 FR 1413, 1424, January 12, 1983), since the Agency believed manufacturers could generally comply with the revised standards. However, recognizing that NCPs may be necessary for some future emissions standards, such as the oxides of nitrogen (NO_x) and particulate standards recently promulgated for 1988 and later model years (50 FR 10606, March 15, 1985), or for previously promulgated standards if future standards for other pollutants makes compliance with existing standards more difficult, EPA published the Notice of Proposed Rulemaking (NPRM) for this rule earlier this year (50 FR 9204, March 6, 1985).

C. Generic Rule

This rule is the culmination of the generic phase (Phase I) of the current NCP rulemaking. During this generic phase, EPA is promulgating regulations concerning when NCPs will be made available for emissions standards, how upper limits will be chosen, the general formula for calculating the penalties, and procedures for testing the degree of emissions nonconformity. This final rule adopts, in most respects, the proposed generic rule. In Phase II, EPA will apply the Phase I concepts to determine particular emissions standards for which NCPs will be available, specific upper limits, and numerical values for the variables in the penalty formula for particular subclasses of engines. Subsequent phases will repeat this process as necessary for other future standards.

Under the schedule set by a federal district court order in *Natural Resources Defense Council* v. *Ruckelshaus*, No. 84–758 (D.D.C. Sept. 14, 1984), EPA will publish this generic final rule and the Phase II NPRM by August 31, 1985, and the Phase II final rule by December 31, 1985.

D. Public Participation

This rule is a result of an innovative rulemaking process called regulatory negotiation, which allows the parties interested in or affected by the outcome of the proposed rule an opportunity to participate in the rule's development through face-to-face negotiations. This rule is based largely upon the consensus that was reached during the regulatory negotiation process prior to the proposal. This is EPA's first completed rulemaking under this new regulatory process.

Participants in the negotiations included heavy-duty vehicle and engine manufacturers, representatives of state air pollution control programs, an environmental organization, industry trade associations and EPA.

During the time that was available for public comment on the NPRM, a total of thirteen organizations presented written and/or oral comments. Seven were heavy-duty vehicle or engine manufacturers, three were industry trade associations, two were state air pollution control programs and one was an environmental organization.

Several of the participants in the negotiations commented that EPA should use the regulatory negotiation process for the Phase II NCP rulemaking. Due to the court-ordered deadline of August 31, 1985 for publication of the Phase II proposal, however, there is insufficient time to use the regulatory negotiation process.

E. Discussion of Final Rule and Comments

This final rule adopts most of the proposed provisions for the reasons stated in the NPRM. EPA will not discuss in this notice all of the provisions of the rule. Instead, EPA will discuss only the most significant provisions, or those that have been significantly revised or that were criticized in comments.

1. Availability Criteria

This generic rule imposes three conditions, as proposed, that must be met before NCPs will be made available: an emission standard must become more dificult to meet, either because the standard itself has become more stringent or because compliance with it has been made more difficult because of another standard which has become more stringent; EPA must find that substantial work is necessary to meet the standard; and EPA must determine that there is likely to be a technological laggard.

The possibility of a technological laggard is a key concept in the NCP availability scheme. Congress intended that EPA limit the availability of NCPs to situations where there are likely to be technological laggards. One purpose of section 206(g) was to avoid, at least temporarily, the problem of technological laggards being driven out of the market because of their inability to meet technology-forcing emissions standards. Thus, the existence of NCPs presupposes the existence of a potential laggard. If laggards are not anticipated, then an upper limit may be set equal to the standard and NCPs need not be offered.

The Engine Manufacturers Association (EMA) and Onan Corporation commented that EPA should accept a manufacturer's claim that it cannot comply as *prima facie* evidence that there is likely to be a technological laggard. Of course, when considering whether to make an NCP available, EPA intends to seek comments on the likelihood that there will be a laggard and will accord respect to a manufacturer's claim. However, as the Agency made clear during the negotiations, EPA does not have the burden of disproving the manufacturer's claim. The regulatory negotiation consensus document stated that an NCP will be made available only when "*EPA finds* . . . that there is likely to be a technological laggard" (emphasis added). Because the manufacturer has superior access to data for developmental emissions control technology, the Agency believes that it must be the manufacturer's responsibility to support any claim that there will be a technological laggard and not EPA's responsibility to disprove the manufacturer's claim. Accordingly, EPA chooses to adopt the provision as proposed, and reject the comments.

In the proposal, EPA requested comments on whether it could offer NCPs for evaporative emission standards for heavy-duty vehicles in excess of 8,500 pounds GVWR, without departing from the consensus agreement. All commenters stated that the EPA proposal was correct in making NCPs potentially available for these heavy-duty vehicles. Accordingly, this rule confirms that NCPs may be made available in the future for evaporative emissons from such vehicles.

Another issue raised in the NPRM was whether vehicles or engines which qualify as HDVs on the basis of vehicle frontal area greater than 45 square feet could qualify for NCPs, even though they are under 6,000 pounds GVWR. Onan Corporation stated that vehicles with greater than 45 square feet frontal area or engines to be installed in such vehicles should qualify for NCPs so that nonconforming engines could be installed in a greater range of vehicle chassis. However, EPA agrees with the

comment of the Manufacturers of Emission Controls Association (MECA), which stated that sections 202(b)(3)(C) and 206(g) of the Act require that a vehicle/engine combination must exceed 6,000 pounds GVWR to be considered heavy-duty and, thus, eligible for an NCP. Thus, NCPs will not be available for vehicles which exceed 45 square feet frontal area, but not 6,000 pounds GVWR.

Once EPA makes NCPs for a given pollutant available for any subclass or other group, they may be used by any manufacturer for its vehicles or engines in that category, with the exception of nonconforming vehicles or engines imported under 40 CFR Part 85, Subpart P. When a manufacturer decides to pay an NCP, no judgments will be made about whether the manufacturer is motivated by economic rather than technological reasons. The penalty formula, as discussed below, has been designed to remove the economic advantage for nonconformance and, by doing so, obviates the need for making difficult determinations of subjective intent.

If NCPs are appropriate, they will generally be made available concurrent with a promulgation or revision of emission standards. But as EPA stated in the NPRM, "when this is not feasible or appropriate, the NCPs will be published subsequent to the promulgation of the new standards." 50 FR 9204, 9206 (March 6, 1985).

Concerning availability of NCPs as a remedy for in-use nonconformities, EMA and General Motors Corporation (GM) protested the Agency's statement in the proposal that "NCPs are not available to a manufacturer in lieu of recalling engines or vehicles due to in-use nonconformities." Both argued that this issue is specific, not generic, and thus should be addressed in Phase II of the NCP rulemaking. Furthermore, they claimed that this statement in the Phase I NPRM was offered without adequate explanation. However, EPA repeatedly emphasized during the regulatory negotiation process that Congress clearly intended NCPs solely as a remedy for problems with obtaining or retaining certificates of conformity. In describing NCPs, section 206(g)(1) states that "a certificate of conformity . . . shall not be suspended or revoked" if a manufacturer pays NCPs on the nonconforming vehicles or engines. Similarly, the legislative history of section 206(g) only discusses NCPs as a means of avoiding denial, suspension, or revocation of a certificate of conformity. *See* H.R. Rep. No. 95–294 95th Cong., 1st Sess. 275–76 (1977); Conference Report, H.R. Rep. No. 95–564 95th Cong., 1st Sess. 163 (1977). A certificate of conformity only permits a manufacturer to put a vehicle or engine into the stream of commerce. See section 203(a)(1). Since an in-use problem would normally not affect the certificate of conformity, NCPs were not intended to be available to remedy in-use problems. Accordingly, EPA concludes that there is no authority under section 206(g) to offer NCPs for in-use vehicles and that this is clearly a generic issue appropriate for resolution in Phase I. For similar reasons, EPA will not permit NCPs for vehicles or engines produced prior to an SEA failure (*see infra*).

2. Upper Limits

An upper limit is an emission level, established by regulation and appropriate to a specific HDE or HDV pollutant, above which NCPs are not available and an HDE or HDV configuration cannot be certified or introduced into commerce. In effect, this limits the magnitude of the overall effect on air quality this might result from use of NCPs and, in all cases, prevents the introduction into commerce of grossly polluting engines or vehicles. Section 206(g)(2) of the Clean Air Act refers to the upper limit as a percentage above the emission standard, set by regulation, that corresponds to an emission level EPA determines to be "practicable."

EPA intends to set each upper limit at an emission level that should be achievable by all manufacturers, including technological laggards. EPA proposed that when an emission standard is changed and becomes more stringent than the prior emission standard, the upper limit for the new emission standard be the prior emission standard, when one existed. EPA requested comments on whether this should always be the case. The NPRM also proposed that in cases where there is no prior standard, the upper limit would be set by EPA through the rulemaking process.

Mack Trucks supported the concept that the prior emission standard, where there is one, should always be the upper limit. MECA commented that it is opposed to setting the upper limit above the old standard simply to facilitate the emissions averaging program.

Several manufacturers, however, commented that the upper limit for an emission standard should be the prior emission standard, except that it should not be more stringent than the corresponding upper limit (i.e., the family emission limit), if there is one, for emissions averaging purposes (e.g., for particulate emissions, 50 FR 10607). GM commented that it would be too confusing for a manufacturer to be potentially subject to different upper limits for the same pollutant in the NCP program and the emission averaging program.

The California Air Resources Board (CARB) commented that the upper limit for an unchanged emission standard that becomes more difficult to meet due to a change in another standard should not be the prior emission standard. CARB suggested that the upper limit in this situation should be determined by EPA based on the degree by which the unchanged emission standard has become more stringent.

EPA has considered all comments received on this issue and has decided that the upper limit for standards tightened either by regulation or by operation of another standard will be the prior emission standard, when one existed. When an emission standard is promulgated for a pollutant that had no prior emission standard, the upper limit will be determined by EPA through rulemaking. In the limited circumstances where a manufacturer participates in the emissions averaging program and carries over certification of an engine family from the prior model year, the upper limit for that engine family will be the family emission limit of the prior model year, provided that the family emission limit was above the prior emission standard.

EPA reached these decisions because it believes that if NCPs are available, a manufacturer should not be forced to immediately remove an HDE or HDV from the market when an emission standard becomes more stringent. Therefore, the upper limit for a standard should be set at a level that is reasonably achievable by all manufacturers with vehicles in the relevant class. For standards tightened by regulation, the prior emission standard or family emission limit, when it exists, represents such a level, since manufacturers certified their vehicles to that standard or limit in the past. For standards tightened by operation of another standard, the previous standard will not necessarily represent such a level, as manufacturers did not in the past have to meet the prior standard *and* the standard whose operation has tightened the current standard. However, EPA believes that in practice the prior standard should be achieveable in almost all cases and thus adopts the consensus approach to setting the upper limit for standards tightened by operation of another standard. As for identifying an upper limit more stringent than the prior standard, as suggested by CARB, EPA

ii. Estimated total emissions of the engines or vehicles assuming that all met the standards.

iii. Estimated total emissions of the engines or vehicles assuming the old standard had been met.

iv. Total funds collected from NCPs.

EPA may separate the above information by state.

h. Other Implementation Aspects

Several provisions contained in the Subpart L regulations are being promulgated, as proposed, to make the NCP regulations consistent with the SEA regulations (Subparts G and K) for production line testing. These provisions are essentially identical and include:

Testing by the Administrator (§ 86.1107–87)
Maintenance of records (§ 86.1108–87)
Entry and access (§ 86.1109–87)
Sample selection (§ 86.1110–87)
Test procedures for PCA testing (§ 86.1111–87)

In reference to the "Maintenance of records" section, GM commented that a manufacturer should not be required to record the names of all personnel involved in the conduct of the PCA. EPA agrees that such detail is unnecessary and has modified this requirement in the final rule to require only that the names of supervisory personnel be recorded.

In addition, EPA is promulgating, as proposed, minor technical amendments to Subpart A (§ 86.085–22(e) and § 86.087–30(e)) to reference the Subpart L regulations. EPA is also promulgating, as proposed, minor technical amendments to Subpart K to allow SEAs to be conducted for engines or vehicles that have SEA liability with respect to a compliance level, as opposed to an emission standard, determined pursuant to Subpart L.

4. Other Public Comment

EPA received comments from Mack Trucks, MECA and NRDC on the relationship between the NCP program and the emissions averaging program. Mack Trucks and NRDC commented that both NCPs and emissions averaging should not be used by a manufacturer for the same engines or vehicles. MECA commented that if a manufacturer uses NCPs, it should be prohibited from using emissions averaging. While EPA views the relationship of these two programs as a generic issue, it is outside the scope of the present rulemaking action. EPA plans to examine this issue and address it in a subsequent rulemaking.

F. NCP Penalty Formula

As discussed above, the Clean Air Act sets three requirements for determining the amount of NCPs. First, the NCP is to remove any competitive disadvantage to manufacturers whose engines or vehicles conform to the relevant standard. Second, the penalty must take into account the extent to which actual emissions exceed a standard. Third, the NCP must be increased periodically to create incentives for conformance with the standards.

When EPA determines that NCPs will be available for a standard and specifies the HDE or HDV categories for which the NCP will be provided, a formula will be used to calculate the NCP for nonconforming engines or vehicles. These categories may comprise HDE or HDV subclasses, groups of subclasses, or subdivisions of subclasses. The basic form of the NCP formula will be the same for each HDE or HDV subclass and each pollutant, although the values of parameters in the formula may vary by engine and vehicle subclass and pollutant. There were very few comments on the proposed formula and this final rule adopts the proposal with no significant changes.

As proposed, the NCP formula will incorporate the following elements: (1) the compliance level determined in PCA testing, (2) penalty rates, expressed in dollars per unit of emissions, and (3) annual adjustment factors. Basing the penalty on the compliance level will insure that the NCP takes into account the extent to which actual emissions exceed the applicable standard. The penalty rate, because it is based on projected compliance costs, will remove the competitive advantage of not conforming by eliminating the cost savings associated with nonconformance. Annual adjustment factors will be used to increase the NCP from year to year to provide additional incentives for conformance and keep the penalty in current year dollars.

When a manufacturer elects to pay an NCP, the first step in determining the amount of the NCP will be to calculate the "initial penalty." The initial penalty is the penalty amount that would be paid if the nonconformity occurred in the first year that the penalty was available for a particular standard. To arrive at the penalty for the current year, the initial penalty is multiplied by the annual adjustment factors for each year since the first year the penalty was available. When payment of an NCP is elected in the first year in which the NCP is available, no annual adjustment factor is used in calculating the penalty amount for that year.

1. Penalty Rates

EPA will use a combination of a "marginal cost" approach and an "average cost" approach to set the penalty rates. Under a marginal cost approach, the penalty rate for each engine and vehicle category and pollutant combination would be the slope of the steepest segment of an estimated emission control cost curve for the category. The cost curve would depict the relationship between emission control cost and emission levels ranging from the upper limit down to the new standard for each pollutant. Its slope, the marginal cost, would be expressed in terms of cost per unit of emission reduction. If the marginal cost increased continuously as the emission level fell (as might be assumed in a simplified analysis), the steepest slope (greatest marginal cost) would be the slope of the curve at the new standard. However, since the relationship between emission control costs and emission rates (i.e., the marginal cost) may be discontinuous and "lumpy," the greatest marginal cost may instead occur elsewhere. For example, it may be associated with the addition of a significant emission control hardware item such as a catalyst or particulate trap.

Under an average cost approach, the penalty rate for each engine and vehicle category and pollutant combination would be based on an estimate for the category of the expected total incremental compliance cost per engine or vehicle for reducing emission levels from the upper limit to the new standard. The estimate used would be near the upper end of the range of the estimates of the cost of compliance among manufacturers. That total cost of compliance would then be divided by the emission reduction required to meet the new standard, resulting in a penalty rate equal to the average cost per unit of emissions reduction.

The initial penalty can be represented graphically by two linear segments as shown by the dashed lines in Figure 1. This form was chosen in order to satisfy two criteria simultaneously: (1) that the penalty rate near the new standard be steep enough to discourage voluntary noncompliance by manufacturers who are technologically able to conform, and (2) that the initial penalty faced by a technological laggard whose compliance level is significantly above the standard would not be substantially higher than the estimated total incremental cost of compliance with the new standard. Thus, for compliance levels that exceed but remain near the new emission standard, the penalty is based on an estimate of the 90th percentile marginal cost of compliance within the HDE or HDV category. EPA will first estimate the averge marginal cost of compliance

submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on January 4, 2012, for publication.

List of Subjects in 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Veterans cemeteries.

Dated: January 26, 2012.

Robert C. McFetridge,

Director of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 38 is amended as follows:

PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

■ 1. The authority citation for part 38 is revised to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 2306, 2402, 2403, 2404, 2408, 2411, 7105.

■ 2. Amend § 38.620 to add paragraph (i) to read as follows:

§ 38.620 Persons eligible for burial.

* * * * *

(i)(1) Any biological or legally adoptive parent who dies on or after October 13, 2010, and whose deceased child:

(i) Is a veteran who dies on or after October 7, 2001, and

(A) Except as provided in paragraph (i)(2) of this section, dies as the direct result of hostile action with the enemy, while in combat, while in transit to or from a combat mission if the cause of death is directly related to hostile action, or while hospitalized or undergoing treatment at the expense of the United States for injury incurred during combat; or

(B) Is killed mistakenly or accidentally by friendly fire that was directed at a hostile force or what was thought to be a hostile force; or

(C) Died from a training-related injury while performing authorized training activities in preparation for a combat mission;

(ii) Is interred in a national cemetery; and

(iii) Has no spouse or child who is buried, or surviving spouse or child who, upon death, may be eligible for burial, in a national cemetery under paragraph (e) of this section.

(2) A parent is not eligible for burial if the veteran dies due to the elements, a self-inflicted wound, combat fatigue, or a friendly force while the veteran was in an absent-without-leave, deserter, or dropped-from-rolls status or was voluntarily absent from a place of duty.

(3)(i) A parent may be buried only within the veteran child's gravesite.

(ii) No more than two parents are eligible for burial per deceased veteran child.

(4) Parent burial eligibility is subject to a determination by the Secretary that there is available space within the veteran's gravesite.

[FR Doc. 2012–2043 Filed 1–30–12; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[AMS–FRL–9623–8]

Nonconformance Penalties for On-Highway Heavy Heavy-Duty Diesel Engines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: EPA is taking final action to make nonconformance penalties (NCPs) available to manufacturers of heavy heavy-duty diesel engines in model years 2012 and 2013 for emissions of oxides of nitrogen (NO_X). In general, the availability of NCPs allows a manufacturer of heavy-duty engines (HDEs) whose engines fail to conform to specified applicable emission standards, but do not exceed a designated upper limit, to be issued a certificate of conformity upon payment of a monetary penalty to the United States Government. The upper limit associated with these NCPs is 0.50 grams of NO_X per horsepower-hour.

DATES: This rule is effective January 31, 2012. We will accept comments on this interim final rule until April 4, 2012.

ADDRESSES: Submit your comments, to Docket EPA–HQ–OAR–2011–1000, by one of the following methods: *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

Email: a-and-r-docket@epa.gov.

Fax: EPA: (202) 566–9744.

Mail: EPA: Air Docket, Environmental Protection Agency, EPA Docket Center, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

Hand Delivery: EPA: EPA Docket Center, (Air Docket), U.S. Environmental Protection Agency, EPA West Building, 1301 Constitution Ave. NW., Room: 3334, Mail Code: 2822T, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2011–1000. See the **SUPPLEMENTARY INFORMATION** section on "Public Participation" for additional instructions on submitting written comments.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy in the docket. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the following locations:

EPA: EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Chuck Moulis, U.S. EPA, National Vehicle and Fuel Emissions Laboratory, 2000 Traverwood, Ann Arbor, MI 48105; Telephone (734) 214–4826; Email *moulis.charles@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regulated Entities

This action affects you if you produce or import new heavy heavy-duty diesel engines which are intended for use in highway vehicles such as trucks and buses or heavy-duty highway vehicles. The table below gives some examples of entities that may be affected by these regulations. But because these are only examples, you should carefully examine the regulations in 40 CFR part 86. If you have questions, call the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

Category	NAICS[a] Codes	Examples of potentially regulated entities
Industry	336112 336120	Engine and truck manufacturers.

[a] North American Industry Classification System (NAICS).

Table of Contents

I. Statutory Authority and Regulatory Background

A. Statutory Authority

Section 206(g) of the Clean Air Act (the Act), 42 U.S.C. 7525(g), allows EPA to promulgate regulations permitting manufacturers of heavy-duty engines (HDEs) or heavy-duty vehicles (HDVs) to receive a certificate of conformity for HDEs or HDVs that exceed a federal emissions standard, but do not exceed an upper limit associated with that standard, if the manufacturer pays a nonconformance penalty (NCP) established by rulemaking. Congress adopted section 206(g) in the Clean Air Act Amendments of 1977 as a response to a concern with requiring technology-forcing emissions standards for heavy-duty engines. The concern was if strict technology-forcing standards were promulgated, then some manufacturers might be unable to comply initially and would be forced out of the marketplace. NCPs were intended to remedy this concern. The nonconforming manufacturers would have a temporary alternative that would permit them to sell their engines or vehicles by payment of a penalty. At the same time, conforming manufacturers would not suffer a competitive disadvantage compared to nonconforming manufacturers, because the NCPs would be based, in part, on money saved by the nonconforming manufacturer.

Under section 206(g)(1), NCPs may be offered for HDVs or HDEs. The penalty may vary by pollutant and by class or category of vehicle or engine. Section 206(g)(3) requires that NCPs:

- Account for the degree of emission nonconformity;
- Increase periodically to provide incentive for nonconforming manufacturers to achieve the emission standards; and
- Remove the competitive disadvantage to conforming manufacturers.

Section 206(g) authorizes EPA to require testing of production vehicles or engines in order to determine the emission level upon which the penalty is based. If the emission level of a vehicle or engine exceeds an upper limit of nonconformity established by EPA through regulation, the vehicle or engine would not qualify for an NCP under section 206(g) and no certificate of conformity could be issued to the manufacturer. If the emission level is below the upper limit but above the standard, that emission level becomes the "compliance level," which is also the benchmark for warranty and recall liability. The manufacturer who elects to pay the NCP is liable for vehicles or engines that exceed the compliance level in use. The manufacturer does not have in-use warranty or recall liability for emissions levels above the standard but below the compliance level.

B. Background Regarding Nonconformance Penalty Rules

Since the promulgation of the first NCP rule in 1985, subsequent NCP rules generally have been described as continuing "phases" of the initial NCP rule. The first NCP rule (Phase I), sometimes referred to as the "generic" NCP rule, established three basic criteria for determining the eligibility of emission standards for nonconformance penalties in any given model year (50 FR 35374, August 30, 1985). As described in section IV.A.(1) of this Interim Final Rule, we have determined that these criteria have been met for one manufacturer. (For regulatory language, see 40 CFR 86.1103–87.) The first criterion is that the emission standard in question must become more difficult to meet. This can occur in two ways, either by the emission standard itself becoming more stringent, or due to its interaction with another emission standard that has become more stringent. Second, substantial work must be required in order to meet the emission standard. EPA considers "substantial work" to mean the application of technology not previously used in that vehicle or engine class/subclass, or a significant modification of existing technology, in order to bring that vehicle/engine into compliance. EPA does not consider minor modifications or calibration changes to be classified as substantial work. Third, EPA must find that a manufacturer is likely to be noncomplying for technological reasons (referred to in earlier rules as a "technological laggard"). Prior NCP rules have considered such a technological laggard to be a manufacturer who cannot meet a particular emission standard due to technological (not economic) difficulties and who, in the absence of NCPs, might be forced from the marketplace. As described in section IV.A.(1) of this Interim Final Rule, we have determined that this criterion has been met for one manufacturer. This manufacturer notified us late in 2011 that it would not have enough emission credits for its model year 2012 heavy heavy-duty engines.

The criteria and methodologies established in the 1985 NCP rule have since been used to determine eligibility and to establish NCPs for a number of heavy-duty emission standards. Phases II, III, IV, V, and VI published in the period from 1985 to 2002, established NCPs that, in combination, cover the full range of heavy-duty—from heavy light-duty trucks (6,000–8,500 pounds gross vehicle weight) to the largest diesel truck and urban bus engines. NCPs have been established for hydrocarbons (HC), carbon monoxide (CO), nitrogen oxides (NO_X), and particulate matter (PM). The most recent NCP rule (67 FR 51464, August 8, 2002) established NCPs for the 2004 and later model year NO_X standard for heavy-duty diesel engines (HDDEs). The NCP rulemaking phases are summarized in greater detail in the Interim and Proposed Technical Support Document for this rulemaking.

C. 2007 and 2010 NO_X Standards

The 0.20 g/hp-hr NO_X standard that applies for current and future heavy-duty engines was adopted January 18, 2001 (66 FR 5001), and first applied in the 2007 model year. However, because of phase-in provisions adopted in that

rule and use of emission credits generated by manufacturers for early compliance, manufacturers have been able to continue to produce engines with NO_X emissions greater than 0.20 g/hp-hr. The phase-in provisions ended after model year 2009 so that the 0.20 g/hp-hr NO_X standard was fully phased-in for model year 2010. Equally important, the cap applicable to Family Emission Limits (FELs)[1] for credit using engine families was lowered to 0.50 g/hp-hr beginning in model year 2010. Because of these changes that occurred in model year 2010, the 0.20 g/hp-hr NO_X emission standard is often referred to as the 2010 NO_X emission standard, even though it applied to engines as early as model year 2007.

While some manufacturers retain NO_X emission credits that currently allow them to produce engines with NO_X emissions as high as 0.50 g/hp-hr, we expect that one of these manufacturers could exhaust its supply of heavy heavy-duty engine NO_X credits as early as this year.

II. Justification for This Interim Final Rule

EPA is taking this action as an interim final rule without prior proposal and public comment because EPA finds for good cause under section 553(b)(B) of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* that notice-and-comment are impracticable, unnecessary or contrary to the public interest in this instance. Section 307(d) of the CAA states that in the case of any rule to which section 307(d) applies, notice of proposed rulemaking must be published in the **Federal Register** (CAA § 307(d)(3)). The promulgation or revision of regulations under section 206 of the CAA is generally subject to section 307(d). However, section 307(d) does not apply to any rule referred to in subparagraphs (A) or (B) of section 553(b) of the APA.

In reaching this determination, EPA considered several factors: (1) Taking interim final action avoids the possibility of an engine manufacturer from being unable to certify a complete product line of engines for model year 2012 and/or 2013; (2) the Agency is only amending limited provisions in existing NCP regulations in 40 CFR part 86; (3) the rule's duration is limited (see, *e.g., Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506 (D.C. Cir. 1983)); and (4) there is no risk to the public interest in allowing manufacturers to certify using NCPs before the point at which EPA could make them available through a full notice-and-comment rulemaking.

EPA is promulgating NCPs for heavy heavy-duty diesel engines in this Interim Final Rule because we have concluded that there is a significant likelihood that they will be needed during the 2012 model year. One manufacturer is currently using NO_X credits to certify all of its heavy heavy-duty diesel engines at nearly 0.50 g/hp-hr. Based on its current credit balance and projected sales for this service class, we do not expect this manufacturer to have sufficient credits to cover its entire model year 2012 production. Since we have not certified any of this manufacturer's model year 2012 heavy heavy-duty diesel engines without the need for emission credits, we believe it is possible that it may need NCPs during this model year. We have concluded that the very earliest we could make NCPs available through a full notice-and-comment rulemaking, would be late in model year 2012, which would likely be after the manufacturer's credit supply has been depleted. Thus, making NCPs available through this Interim Final Rule is the only way to ensure that the manufacturer's depletion of its NO_X credits will not force it to cease production of heavy heavy-duty engines this year.

The second reason for invoking the good cause exemption is that EPA is establishing NCPs based on the existing regulatory provisions in 40 CFR part 86, subpart L, and is only adding new penalty parameters to reflect the costs of compliance specific to the 2010 NO_X standard. In this Interim Final Rule, EPA is not revisiting the regulatory provisions that specify how to calculate penalties from the penalty parameters, how to determine a compliance level, or how to report to EPA. Since these provisions have been established through notice-and-comment rulemaking several times before, interested parties have had opportunity to comment on them. Thus, it is unnecessary to provide an additional opportunity to comment prior to issuing this interim final rule.

Third, at most, this interim final rule will address only heavy heavy-duty engines in model years 2012 and 2013, and by its own terms is applicable for less than two calendar years. It is thus limited in duration. EPA is publishing a parallel notice of proposed rulemaking simultaneously with this rule and EPA intends to take appropriate final action on that rule as soon as possible. With due consideration to comments, the interim NCPs being established in this IFR will cease to be applicable once the follow up Final Rule is effective.

Finally, it is important to note that NCPs are set at a level that is intended to ensure that manufacturers only use them when there is no other path to certification. Thus, should EPA be incorrect in its projection that NCPs will be needed during model year 2012, the fact that they will be available on an interim basis will have no practical significance because manufacturers will not use them.

For the reasons explained above, EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B). Nonetheless, EPA is providing until April 4, 2012 for submission of public comments following this action. EPA will consider all written comments submitted in the allotted time period in the context of the accompanying notice of proposed rulemaking.

Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. APA section 553(d) excepts from this provision any action that grants or recognizes an exemption or relieves a restriction. Since today's action can be considered to either effectively grant an exemption from meeting the current applicable NO_X emission standard or relieve a restriction that would otherwise prevent a manufacturer from certifying, EPA is making this action effective immediately upon publication.

III. Notice of Proposed Rulemaking

EPA is also simultaneously publishing a parallel Notice of Proposed Rulemaking (NPRM) addressing NCPs for heavy-duty engines. Among other things, that NPRM seeks comment on NCPs for model year 2012 and later heavy heavy-duty diesel engines, as well as for medium heavy-duty diesel engines. The NCPs in the Final Rule for that NPRM will eventually supersede the NCPs being promulgated in this Interim Final Rule, especially for model year 2013 and later. For example, should the follow-up Final Rule be published by September 14, 2012, it would likely have an effective date of November 13, 2012. Should that Final Rule establish different NCPs for heavy heavy-duty engines, those new NCPs would be available for any engines produced on or after November 13, 2012, instead of the interim NCPs being finalized today.

Note that Docket Number EPA–HQ–OAR–2011–1000 is being used for both the Interim Final Rule and the parallel NPRM.

[1] FELs are emission levels specified by the manufacturer that serve as the applicable emission standard for engines participating in the emission averaging program. The FEL cap is the highest FEL to which a manufacturer may certify an engine using emission credits.

IV. Nonconformance Penalties for 2012 and Later Heavy-Duty Engines and Heavy-Duty Vehicles

A. NCP Eligibility: Emission Standards for Which NCPs Are Being Established in This Interim Final Rule

(1) Heavy Heavy-Duty Diesel NO_X Standard

As discussed in section I.B., EPA must determine that three criteria are met in order to determine that an NCP should be established in any given model year. For the 2010 NO_X standard, we believe these criteria have been met for heavy heavy-duty diesel engines, and it is therefore appropriate to establish NCPs for this standard for the current model year and later.

The first criterion requires that the emission standard in question must become more difficult to meet. This is the case with the 2010 NO_X standard. The previous emission standard for this category is a combined NMHC + NO_X standard of 2.4 g/hp-hr, or optionally a 2.5 g/hp-hr NMHC + NO_X with a limit of 0.5 g/hp-hr NMHC.[2] The 2010 (*i.e.*, current) standards are 0.20 g/hp-hr for NO_X and 0.14 g/hp-hr for NMHC. When promulgated, the Agency concluded that the 0.20 g/hp-hr NO_X standard was a technology forcing standard. Second, all heavy heavy-duty diesel engines currently certified to the 0.20 g/hp-hr standard without using credits are using new aftertreatment systems to meet this standard.[3] It is therefore logical to conclude the standard is more difficult to meet and that substantial work was required to meet the emission standard.

Third, EPA is promulgating NCPs for heavy heavy-duty diesel engines because we have concluded that there is a significant likelihood that they will be needed by an engine manufacturer that has not yet met the requirements for technological reasons. One manufacturer is currently using NO_X credits to certify all of its heavy heavy-duty diesel engines at nearly the FEL cap level of 0.50 g/hp-hr. Based on its current credit balance and projected sales for this service class, we do not expect this manufacturer to have sufficient credits to cover its entire model year 2012 production. This manufacturer intends to use a different technology to meet the NO_X standard but has not yet submitted an application for the 2012 model year with NO_X emissions at or below the 0.20 g/hp-hr standard. Since it has not yet submitted an application for certification for any model year 2012 heavy heavy-duty diesel engines that would not require emission credits, we believe it is a reasonable possibility that this manufacturer may not be able to comply for technological reasons with respect to the 2010 NO_X standards for heavy heavy-duty diesel engines in the 2012 and 2013 model years. This manufacturer notified us late in 2011 that it would not have enough emission credits for its model year 2012 heavy heavy-duty engines.

B. NCP Eligibility: Emission Standards for Which We Are Not Establishing NCPs in This Interim Final Rule

This section identifies the emission standards for which we are not establishing NCPs in this Interim Final Rule. Note that EPA is issuing a parallel Notice of Proposed Rulemaking (NPRM) proposing and/or seeking comment on NCPs for certain other emission standards.

(1) Light and Medium Heavy-Duty Diesel NO_X Standards

EPA believes that the first two NCP criteria have been met for the 2010 NO_X standard for light and medium heavy-duty diesel engines. However, we have not determined that any manufacturer of light or medium heavy-duty diesel engines will be unable to certify to the 2010 NO_X standard for the 2012 and 2013 model years. We believe that any manufacturer unable to achieve 0.20 g/hp-hr will have sufficient NO_X emission credits to continue certifying light heavy-duty and medium heavy-duty engines through the 2013 model year. (See the parallel NPRM.)

(2) Heavy-Duty Gasoline Engine Standards

In a final rule published on January 18, 2001 (66 FR 5001), EPA established more stringent emission standards for all heavy-duty gasoline (or "Otto-cycle") vehicles and engines. These standards took two forms: A chassis-based set of standards for complete vehicles under 14,000 pounds GVWR (the chassis-based program), and an engine-based set of standards for all other Otto-cycle heavy-duty engines (the engine-based program). Each of the two programs has an associated averaging, banking, and trading (ABT) program. The new standards generally took effect starting with the 2008 model year, and all manufacturers are in compliance with them.

(3) Heavy-Duty Diesel Engine NMHC, CO, and PM Standards

EPA adopted new NMHC and PM for model year 2007 and later heavy-duty engines in the same rule that set the 2010 NO_X emission standard (66 FR 5001, January 18, 2001). The CO standard was not changed. We are not considering NCPs for any of these other standards because all manufacturers are already fully compliant with them.

(4) Heavy-Duty CO_2 Standards

In a final rule published on September 15, 2011 (76 FR 57106), EPA established new CO_2 emission standards for all heavy-duty vehicles and engines. We are not considering NCPs for any of these standards at this time because we currently do not have a basis to conclude that a technological laggard is likely to develop.

We are adding a new regulatory provision related to these CO_2 emission standards. The provision prohibits generating CO_2 emission credits from engines paying NCPs for NO_X. Given the general tradeoff between CO_2 and NO_X emissions, we were concerned that a manufacturer capable of meeting the 0.20 g/hp-hr NO_X emission standard could choose to pay an NCP in order to generate CO_2 credits by recalibrating its engines for higher NO_X emissions and lower CO_2. There are two reasons this would be inappropriate. First, emission credits are supposed to provide an incentive for a manufacturer to go beyond what is normally required to meet emission standards. However, allowing manufacturers to generate CO_2 credits while paying NCPs would actually create an incentive for manufacturers to do less than is required to meet the emission standards. Equally important, NCPs have always been intended for manufacturers that cannot meet an emission standard for technological reasons rather than manufacturers choosing not to comply.

V. Penalty Rates

This rulemaking is the most recent in a series of NCP rulemakings. These are referred to as Phases and are referenced below.[4] The discussions of penalty rates

[2] NMHC stands for non-methane hydrocarbons, which is a measure of total hydrocarbons with the methane emissions subtracted out. For typical on-highway diesel fueled heavy-duty engines, methane emissions are on the order of 10 percent of the total hydrocarbon emissions.

[3] For this notice, EPA describes those manufacturers that have achieved the 0.20 g/hp-hr emission standard as "conforming", "compliant" or "complying" manufacturers, and those that have not as the "nonconforming", "noncompliant" or "noncomplying" manufacturers. However, it is important to clarify that manufacturers certifying above the 0.20 g/hp-hr NO_X emission standard using emission credits are in compliance with regulations as long as they have enough emission credits to offset their total NO_X emissions above the standard.

[4] The previous NCP rules include: The Phase VI rulemaking (67 FR 51464, August 8, 2002), Phase IV rulemaking (58 FR 68532, December 28, 1993), Phase III rulemaking (55 FR 46622, November 5, 1990), the Phase II rulemaking (50 FR 53454,

Continued

in those rulemakings are incorporated by reference. This section briefly reviews the penalty rate formula originally promulgated in the Phase I rule (currently found at 40 CFR 86.1113–87) and discusses how EPA arrived at the penalty rates in this Interim Final Rule.

The penalty rates being established in this rule rely on the existing NCP regulatory structure. Thus, the only changes being made to the regulations are updates to the cost parameters to reflect the compliance costs for the 2010 standards, setting of the upper limit, and clarifying in § 86.1104–91 that EPA may set the upper limit at a level below the previous standard if we determine that the lower level is achievable by all engines.

Because these penalties are being adopted in an Interim Final Rule, we are limiting their applicability to model years 2012 and 2013. Prior to model year 2014, we will promulgate a Final Rule addressing NCPs following notice and comment. Note that we may promulgate the Final Rule as soon as later this calendar year, and as applicable, it would supersede the provisions of this Interim Final Rule after it becomes effective.

The NCP rates being adopted in this IFR are specified for model year 2012. As required by the Clean Air Act, the existing regulations include a formula that increases the penalty rates with each new model year. We will apply this annual adjustment formula to the NCPs by setting the 2012 model year as year number one. Traditionally, NCPs are available the first year of the new emission standard and that becomes year one for purposes of the annual escalator. However, EPA believes the 2012 model year is the correct year for the first year of the escalator calculation even though the NO_X emission standard began in 2010.

A. Parameters

As in the previous NCP rules, we are specifying the NCP formula for each standard using the following parameters: COC_{50}, COC_{90}, MC_{50}, F, and UL. The NCP formula is the same as that promulgated in the Phase I rule. As was done in previous NCP rules, costs consider additional manufacturer costs and additional owner costs, but do not consider certification costs because both complying and noncomplying manufacturers must incur certification costs. COC_{50} is an estimate of the industry-wide average incremental cost per engine (references to engines are intended to include vehicles as well) associated with meeting the standard for which an NCP is offered, compared with meeting the upper limit. COC_{90} is an estimate of the 90th percentile incremental cost per-engine associated with meeting the standard for which an NCP is offered, compared with meeting the associated upper limit. Conceptually, COC_{50} represents costs for a typical or average manufacturer, while COC_{90} represents costs for the manufacturers with the highest compliance costs.

MC_{50} is an estimate of the industry-wide average marginal cost of compliance per unit of reduced pollutant associated with the least cost effective emission control technology installed to meet the new standard. MC_{50} is measured in dollars per g/hp-hr for heavy-duty engines. F is a factor used to derive MC_{90}, the 90th percentile marginal cost of compliance with the NCP standard for engines in the NCP category. MC_{90} defines the slope of the penalty rate curve near the standard and is equal to MC_{50} multiplied by F. UL is the upper limit above which no engine may be certified.

The derivation of the cost parameters is described in a support document entitled "Interim and Proposed Technical Support Document: Nonconformance Penalties for 2012 and later Highway Heavy-Duty Diesel Engines," which is available in the public docket for this rulemaking. All costs are presented in 2011 dollars.

(1) Upper Limit

We are revising the regulations in § 86.1104–91 to clarify that EPA may set (during rulemaking) the upper limit at a level below the previous standard if we determine that the lower level is achievable by all engines. As described below, we are also establishing the upper limit for this NCP rule at 0.50 g/hp-hr. These are the only regulatory changes being made with respect to the upper limit.

The upper limit is the emission level established by regulation above which NCPs are not available and a heavy duty engine cannot be certified or introduced into commerce. CAA section 206(g)(2) refers to the upper limit as a percentage above the emission standard, set by regulation, that corresponds to an emission level EPA determines to be "practicable." The upper limit is an important aspect of the NCP regulations not only because it establishes an emission level above which no engine may be certified, but it is also a critical component of the cost analysis used to develop the penalty rates. The regulations specify that the relevant costs for determining the COC_{50} and the COC_{90} factors are the difference between an engine at the upper limit and one that meets the applicable standards (see 40 CFR 86.1113–87).

The regulatory approach adopted under the prior NCP rules sets the default Upper Limit (UL) at the prior emission standard when a prior emission standard exists and is then changed to become more stringent. EPA concluded that the upper limit should be reasonably achievable by all manufacturers with vehicles in the relevant class. It should be within reach of all manufacturers of HDEs or HDVs that are currently allowed so that they can, if they choose, pay NCPs and continue to sell their engines and vehicles while finishing their development of fully complying engines. A manufacturer of a previously certified engine or vehicle should not be forced to immediately remove an HDE or HDV from the market when an emission standard becomes more stringent. The prior emissions standard generally meets these goals because manufactures have already certified their vehicles to that standard.

In the past, EPA has rejected suggestions that the upper limit should be more stringent than the prior emission standard because it would be very difficult to identify a limit that could be met by all manufacturers. For this rule, however, all manufacturers are currently certifying all of their engines at or below the 0.50 g/hp-hr FEL cap. Thus, since NCPs were not intended to allow manufacturers to increase emissions, we are setting the upper limit for this NCP rule at 0.50 g/hp-hr NO_X. This will conform to the purpose of NCPs, which is to allow manufacturers to continue selling engines they are producing, but not to allow backsliding.

(2) Cost Parameter Values

The regulations being adopted specify that the values in Table 1 (in 2011 dollars) be used in the NCP formula for the 2012 and later model year NO_X standard of 0.20 g/hp-hr for diesel heavy heavy-duty engines. The basis is summarized here. The complete derivation of these parameters is described in the Interim Technical Support Document for this rulemaking.

We also considered other methodologies for estimating the incremental compliance costs between the upper limit and the standard. We rejected these alternatives because we are not confident that we could estimate the costs with sufficient accuracy or describe our basis without revealing confidential business information. Moreover, we have no reason to believe

December 31, 1985) as well as the Phase I rulemaking (50 FR 35374, August 30, 1985).

that these alternative methodologies would have been better with respect to the statutory requirement to remove the competitive disadvantage of the complying manufacturers.

(a) General Methodology

Based on our review of the various hypothetical baseline engine designs, we selected a straightforward "baseline engine" technology package with associated costs that were determinable within a reasonably high degree of certainty. This approach best limited the sensitivity of the penalty rate versus small variations in any of the "baseline engine" technology package elements. This cost stability mitigated the hypothetical nature of the "baseline engine" technology package, which, in turn, led to a penalty rate that we believe is reasonable. As is described in the TSD, we believe estimating costs by this approach is the least speculative method to determine compliance costs.

We selected a baseline engine technology package that would employ the same basic emission controls used to meet the 2007 NO_X and PM emission standards (*e.g.* cooled exhaust gas recirculation), optimized turbo-charging, optimized fuel injection, diesel particulate filters), plus liquid urea based Selective Catalytic Reduction (SCR) NO_X emissions control technology with an appropriately sized tank for the diesel exhaust fluid (DEF). Further details are provided in this rule's TSD. While EPA selected the baseline engine (or upper limit engine) to be a fully optimized, SCR-equipped engine that complies with all other emission standards and requirements, the NCPs may be used for engines using other technologies.

This approach differs slightly from that used in previous NCP rules, where EPA based the NCPs directly on an average of actual compliance costs for all manufacturers. This was appropriate in those prior rules because each of the manufacturers had actually produced engines at the upper limit (which was usually the previous emission standard). It was relatively straightforward for them to provide us with a confidential engineering analysis of the costs they actually incurred: The real costs of additional hardware and fluids and the differences in performance characteristics. We have always sought full understanding of the manufacturers' inputs, and for previous NCP rules it was also reasonable for EPA to conclude that the manufacturers' input accurately reflected the manufacturers' actual costs because the costs were derived directly from actual in-production engine information. In the case of this NCP rule, however, compliant manufacturers have not designed and optimized in-production engines for the U.S. market at 0.50 g/hp-hr NO_X (the upper limit). Thus, a compliance cost estimate based directly on actual experience for in-production engines was not available for this NCP rule.

Instead of averaging actual costs (because none were available), the NCP penalty formulas for this rule are based primarily on EPA's estimate of the cost difference between an engine emitting at the upper limit (the "baseline engine") and one emitting at the standard (the "compliant engine"). We requested cost of compliance information from several engine manufacturers and used that information to inform our own analysis of compliance costs, as described in the Interim and Proposed Technical Support Document. The engine manufacturers we contacted approached this cost analysis in the same way we did. That is, the scenarios we and the manufacturers considered were all based upon hypothetical baseline engine designs that were intended to meet the 0.50 g/hp-hr NO_X upper limit.

It is worth noting that each of the five engine manufacturers we contacted considered hypothetical baseline engines with different technology packages. Two complying manufacturers based their compliance costs on a baseline engine equipped with similar (but not identical) hardware as EPA; another on an SCR-equipped engine without exhaust gas recirculation, and a fourth on its estimation of the non-complying engines produced by a competitor. All four manufacturers meeting the 0.20 g/hp-hr NO_X standard compared the costs for their hypothetical baseline engines to the costs for their actual compliant engines. The one non-SCR manufacturer we contacted (that has not yet certified any engines with NO_X emissions at 0.20 g/hp-hr) provided its projections of what it will spend to bring its current 2011 engine into compliance without the use of emission credits.

(b) Calculated Values

The most significant of the NCP parameters is the 90th percentile costs of compliance, COC_{90}, which defines the penalty for engines emitting at the upper limit. The value of COC_{50} only matters when EPA estimates that marginal compliance costs change as the compliance level approaches the standard. In such cases, COC_{50} defines that point on the curve at which the slope changes. We estimated COC_{90} and COC_{50} by assuming the baseline engine would have been an SCR equipped engine with NO_X emissions at 0.50 g/hp-hr and that it looked very similar to an engine with NO_X emissions at 0.20 g/hp-hr. However, the higher NO_X emissions of the baseline engine would allow the use of less expensive hardware and would require less consumption of liquid urea (also known as diesel emission fluid or "DEF").

We estimated the marginal costs of compliance as being equal to the total incremental costs of compliance divided by 0.30 g/hp-hr (the difference between the upper limit and the standard). This assumes that the cost to reduce emissions from 0.30 g/hp-hr to 0.20 g/hp-hr is not significantly different from the cost to reduce emissions from 0.50 g/hp-hr to 0.40 g/hp-hr. This results in a penalty curve that is a straight line, which in turn makes our estimate of the average cost of compliance irrelevant to the calculation of the penalty. In other words, the COC_{50} point lies directly between zero cost at 0.20 g/hp-hr and COC_{90} at the Upper Limit of 0.50 g/hp-hr NO_X. The penalty paid for engines at the upper limit would be equal to EPA's estimate of the highest marginal cost paid by a complying manufacturer for the same emission range.

TABLE 1—INTERIM NCP CALCULATION PARAMETERS

Parameter	Heavy heavy-duty diesel engines
COC_{50}	$1,561.
COC_{90}	$1,919.
MC_{50}	$5,203 per gram per horse-power-hour.
F	1.23.
UL	0.50 g/hp-hr.

(3) Resulting Penalties

The calculation parameters listed in Table 1 are used to calculate the penalty rate. These parameters are used in the penalty rate formulas which are defined in the existing NCP regulations (See 40 CFR 86.1113(a)(1) and (2)). Using the parameters in Table 1, and the equations in the existing NCP regulations, we have plotted penalty rates versus compliance levels in Figure 1 below. This penalty curve is for the first year of use of the NCPs (*i.e.*, the annual adjustment factors specified in the existing NCP regulations have been set equal to one).

OTHER MATERIALS

United States
Environmental Protection
Agency

Air and Radiation

EPA420-R-00-010
July 2000

Regulatory Impact Analysis: Control of Emissions of Air Pollution from Highway Heavy-Duty Engines

EPA420-R-00-010
July 2000

Regulatory Impact Analysis: Control of Emissions of Air Pollution from Highway Heavy-Duty Engines

Assessment and Standards Division
Office of Transportation and Air Quality
U.S. Environmental Protection Agency

CHAPTER 6: ENVIRONMENTAL IMPACT OF HD DIESEL STANDARDS

I. Introduction

This chapter describes the expected environmental impacts of the new heavy-duty diesel engine NMHC plus NOx emissions standards described in the preamble. Specifically, this chapter includes an estimated nationwide NOx, VOC, and PM_{10} inventory for 2000, heavy-duty diesel engine NOx, NMHC, and PM inventory projections for future years (with and without additional control), estimates of the impacts of the standards on typical vehicles over their lifetime, and a discussion of the environmental effects of the emissions reductions.[1]

While the new standards are combined NMHC plus NOx levels, we consider the NMHC and NOx emissions impacts separately. Given the technologies we expect manufacturers to use on heavy-duty diesel engines to comply with the new standards, we model the fleet-average impact of the combined standard as being equivalent to a 2.3 g/bhp-hr NOx standard and a 0.2 g/bhp-hr NMHC standard. We base these emission factors on the judgement that manufacturers will find it easier to design for low NMHC to give them more flexibility for their NOx calibrations. This is consistent with statements made in informal discussions with engine manufacturers.

We emphasize, however, that this is only an analytical approach; we expect that manufacturers will optimize each family uniquely with respect to the combined standards, balancing the sometimes competing effects on NMHC and NOx control technologies. Thus individual engine families may have emission levels different from the fleet-average emissions we use in this analysis. It is also important to note that we are modeling the environmental impacts of the supplemental testing requirements beginning in calendar year 2004, because we believe that manufacturers will design most, if not all, of their engine models to comply with these requirements in model year 2004. This assumption, which is consistent with the assumptions made for the economic analysis in Chapter 4, should not significantly affect the results of the cost-effectiveness analysis in Chapter 8.

The inventory analysis described below builds on the inventory analysis in the Regulatory Impact Analysis associated with the 1997 Final Rulemaking for heavy-duty diesel engines (HDDE).[1] However, we use recent studies to improve our understanding of the emissions impact of mobile sources. We discuss these studies and their effects on the calculated HDDE emissions inventories in this chapter.

(l) Three terms are used in this chapter to describe organic emissions: "total hydrocarbons" (THC or HC), volatile organic compounds"(VOC), and "nonmethane hydrocarbons" (NMHC). THC refers to the organic emissions from an engine as measured by the test procedures of 40 CFR 86. VOC refers to organic emissions excluding compounds that have negligible photochemical reactivity, primarily methane and ethane (see 40 CFR 51.100). NMHC refers to the difference obtained by subtracting methane from total hydrocarbons. Since the ethane content of emissions is very small from diesel engines, organic emissions measured as NMHC are approximately the same as when measured as VOC.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

FEB 28 2012

OFFICE OF
AIR AND RADIATION

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Dear Ms. Domike and Mr. Zacaroli:

On January 27, 2012, you submitted a petition, on behalf of Mack Trucks, Inc., and Volvo Group North America ("Mack") to the Honorable Lisa P. Jackson, Administrator of the Environmental Protection Agency that requested a stay of an Interim Final Rule that was signed on January 20, 2012 and published in the Federal Register on January 31, 2012 (77 Fed. Reg. 4678). The Interim Final Rule (IFR) established interim nonconformance penalties (NCPs) for the NOx emission standard applicable to heavy heavy-duty engines that went into full effect in model year 2010 ("2010 NOx standards").[1] On that same day, EPA also published a Notice of Proposed Rulemaking (NPRM) proposing and seeking comment on final NCPs to replace the interim NCPs. (77 Fed. Reg. 4736).

For the reasons provided in this response, EPA is denying your request for a stay of the IFR. However, EPA plans to continue to communicate with Mack as part of the rulemaking process.

I. Introduction

Clean Air Act (CAA) section 206(g) states that for heavy duty engines subject to CAA emission standards, a certificate of conformity "shall be issued ... for such vehicles or engines manufactured by a manufacturer notwithstanding the failure of such vehicles or engines to meet such standards if such manufacturer pays a nonconformance penalty as provided under regulations" promulgated by EPA. The IFR published on January 31 was promulgated pursuant to this statutory provision.

[1] The 0.20 g/hp-hr NOx standard currently applicable to heavy-duty engines was published January 18, 2001 (66 FR 5001) and first applied in the 2007 model year. However, because of phase-in provisions adopted in that rule and use of emission credits generated by manufacturers for early compliance, manufacturers were able to continue to produce engines with NOx emissions over 0.20 g/hp-hr until (and in some cases after) 2010 model year. The phase-in provisions ended after model year 2009 and a final emission cap was adopted so that the standards were fully phased-in for model year 2010. Because of this, the 0.20 g/hp-hr NOx emission standard is often referred to as the 2010 NOx emission standard, even though it applied to engines as early as model year 2007. For this rulemaking, the fully phased-in NOx requirements are referred to as the 2010 NOx standards.

EPA regulations establish three criteria for issuance of NCPs. 40 C.F.R. § 86.1103-87. The first is that the new or revised standard is more stringent than the previous emission standard for that pollutant. Second, substantial work must be required in order to meet the emission standard. EPA considers "substantial work" to mean the application of technology not previously used in that vehicle or engine class/subclass, or a significant modification of existing technology, in order to bring that vehicle/engine into compliance. Third, there must be a likelihood of a "technological laggard," which is an engine manufacturer that cannot meet the requirements for technological reasons. EPA found that all these criteria were met for the IFR. 77 Fed. Reg. at 4681.

EPA also determined that good cause existed under section 553(b)(B) of the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. to find that notice and comment are impracticable, unnecessary or contrary to the public interest in this instance. *Id.* at 4680. EPA noted several factors considered in reaching this determination:

1. Taking interim final action avoids the possibility of an engine manufacturer being unable to certify a complete product line of engines for model year 2012 and/or 2013.
2. The Agency is only amending limited provisions in existing NCP regulations in 40 CFR part 86.
3. The rule's duration is limited (see, e.g., Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (DC Cir. 1983)).
4. There is no risk to the public interest in allowing manufacturers to certify using NCPs before the point at which EPA could make them available through a full notice-and-comment rulemaking.

EPA also found that since the IFR "can be considered to either effectively grant an exemption from meeting the current applicable NOx emission standard or relieve a restriction that would otherwise prevent a manufacturer from certifying," it could be made effective immediately upon publication in the Federal Register under section 553(d) of the APA. *Id.*

EPA intends to issue a Final NCP Rule later this year that will supersede the Interim Final NCP Rule. For purposes of this response, the period between the effective date of the Interim Final Rule and the effective date of the Final Rule will be referred to as the interim period.

Mack's Petition for Stay (Petition) was filed pursuant to the Federal Rule of Appellate Procedure 18 which requires that a party ordinarily move first before an agency for a stay pending review of a final rule. In determining whether a stay should be granted, the courts (and here the Agency) weigh these four factors.

1. The substantial likelihood that the Petitioner will prevail on the merits of its case.
2. The likelihood that the Petitioner will suffer irreparable harm absent a stay.
3. The likelihood that no adverse party will be substantially harmed by a stay.
4. The public interest.

Davis v. Pension Benefit Guaranty Corporation, 571 F. 3d 1288, 1291 (D.C. Cir. 2009)

> The four factors have typically been evaluated on a "sliding scale." If the petitioner makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor. For example, if the movant makes a

> very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success. Alternatively, if substantial harm to the non-movant is very high and the showing of irreparable harm to the movant very low, the movant must demonstrate a much greater likelihood of success. It is in this sense that all four factors must be balanced against each other. When seeking a preliminary injunction, the movant has the burden to show that all four factors, taken together, weigh in favor of the injunction.

Id. at 1291, 1292. (internal quotes and cites removed)

The Petition states that all four factors support staying the IFR. However, after evaluating Mack's initial filing and its supplemental filing, EPA believes that on balance, Mack has not met its burden to show that a stay should be granted. [2]

II. Substantial Likelihood of Prevailing on the Merits

We disagree that the petitioner is substantially likely to prevail on the merits. The petitioner claims that it is likely to prevail for three reasons. It claims:

1. EPA did not have good cause to bypass notice and comment.
2. EPA has not demonstrated the existence of a true technological laggard.
3. EPA has set the penalty level arbitrarily too low.

A. Good Cause for Interim Final Rule

The petitioner is challenging EPA's finding that there was good cause to issue the IFR without prior notice and comment. EPA recognizes that promulgation of regulations without notice and comment should occur in very limited situations. However, EPA believes that the exigencies of the circumstances in this case justified NCPs to be in effect without notice and comment for an interim period.

The primary reason for EPA invoking the "good cause" exception for the IFR was the serious harm the delay associated with notice and comment procedures would have on one manufacturer, Navistar.[3] As Mack acknowledges, Navistar has not introduced any engines into commerce that meet the 0.20 g/bhp-hr standard. EPA believes that absent NCPs Navistar would soon run out of credits that it has relied upon to manufacture heavy-heavy duty engines. Based on its current credit balance and projected sales for this service class, EPA stated that it expects Navistar to run out of credits early in 2012. *See* Analysis

[2] Volvo's request for an administrative would appear to be pursuant to section 705 of the APA, which authorizes an agency to "postpone the effective date of action taken by it, pending judicial review." In this case, the IFR was made effective upon publication, raising a question of whether EPA could postpone the effective date as the effective date has already passed. However, EPA does not need to reach this issue as the request for a stay is being denied for the reasons discussed herein.

[3] EPA also noted that it established NCPs based on the existing regulatory provisions in 40 CFR part 86, subpart L, and merely added new penalty parameters to reflect the costs of compliance specific to the 2010 NOx standard, without substantially revising the existing regulatory provisions. Since these provisions have been established through notice-and-comment rulemaking several times before, interested parties have had opportunity to comment on them. EPA also noted that the interim NCPs will be of limited duration. EPA noted that by its own terms the interim rule will be applicable for less than two calendar years. EPA also noted that it intends to replace the interim NCPs as soon as possible with due consideration to comments on the co-proposal.

of the Potential Economic Impacts of Delaying NCPs, EPA-HQ-OAR-2011-1000-0009.[4] As discussed below, EPA's current expectation is that Navistar's model year 2012 heavy heavy-duty diesel engines will require emission credits or NCPs for purposes of certification. We believe that the earliest we could make NCPs available through a full notice-and-comment rulemaking would be later in model year 2012, which would likely be well after the manufacturer's credit supply would be depleted absent NCPs. Thus, making NCPs available through the Interim Final Rule is the only way to ensure that the manufacturer's depletion of its NOx credits will not force it to cease production of heavy heavy-duty engines this year.

The consequences of EPA's inability to certify Navistar engines with NCPs could be devastating to Navistar. In an Analysis of Potential Economic Impacts of Delaying NCPs, EPA-HQ-OAR-2011-1000-0009, EPA states that "[a]t a minimum, this would have led to Navistar ceasing nearly all assembly of heavy heavy-duty diesel engines. Navistar may or may not have continued production of heavy heavy-duty engines for export. Since Navistar's current tractor designs would need to be redesigned to accept other manufacturers' SCR-equipped engines, it would likely also have led to Navistar ceasing assembly of heavy heavy-duty vehicles for up to a year." *Id.* at 1. The analysis goes on to state that Navistar's global operations employed more than 15,000 workers in 2010 and estimate that its heavy heavy-duty Class 8 tractor sales represent about one-quarter of its revenue. Regarding the effect of Navistar's inability to certify engines, it states:

> While we do not have details of how many of Navistar's employees are currently involved in the assembly of heavy heavy-duty diesel engines and vehicles, if it is proportional to revenue, then it could be one-quarter of Navistar's employees. Halting nearly all assembly of heavy heavy-duty diesel engines and vehicles would have likely resulted in the layoff of these workers and would also have had a cascading impact on Navistar's suppliers, dealers, and other businesses that support the assembly plants. Thus, this scenario would likely have resulted in the layoff of several thousand workers.

Id.[5]

Petitioner raises several issues regarding EPA's rationale. EPA does not believe these arguments diminish the need for issuance of the IFR without prior notice and comment. Mack claims that EPA's concerns regarding Navistar are speculative. They are not. While Navistar has claimed its end-of-year credit balance for heavy heavy duty engines and its engine sales data to be confidential business information, EPA has access to such information and it clearly indicates that Navistar would run likely out of credits early in 2012 absent NCPs.

Mack argues that EPA should have started its rulemaking sooner, which would have allowed full notice and comment on the rule prior to it becoming final. Mack argues that in 2009, EPA knew that Navistar could not manufacture an engine to meet the 0.20 g/bhp-hr standard. However, given Navistar's ability to use credits and the amount of time available to meet the standard, EPA did not at that time have

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[4] EPA notes that Navistar, like most if not all manufacturers, has labeled this information as confidential business information. EPA would not release this information without first determining the claim to be erroneous.

[5] While the analysis notes that in the long run, customers may be able to sign new contracts with other engine and truck manufacturers, which could stimulate production and possibly jobs at the other companies, "it is likely that it would have taken manufacturers and suppliers at least several months, and perhaps as much as a year, to increase production enough to fully meet the new demand. The new jobs may have lagged even more if manufacturers chose to initially increase overtime hours instead of hiring new workers." *Id.* at 2.

enough information to determine that there was likelihood of a manufacturer who would not meet the requirements for technological reasons. On February 22, 2010, EPA notified engine manufacturers that it appeared "that all heavy-duty diesel engine manufacturers will comply with the model year 2010 emission regulations" and that "no manufacturer has indicated that it will not be able to meet these requirements in the future."[6] EPA also noted that it was open to reevaluating these findings, but did not receive any response from any of the engine manufacturers until Navistar notified EPA in late 2011 that it would soon run out of emission credits.

Moreover, at the time when EPA began working on the noncompliance penalty rule, in the middle part of 2011, EPA did not believe that Navistar would run out of credits prior to the end of 2012. Given Navistar's sales of heavy heavy-duty engines in 2010, and Navistar's end of year credit total for heavy heavy-duty engines in 2010, EPA believed that Navistar would not need NCPs in 2012. However, towards the end of 2011, EPA received information indicating that Navistar's early 2011 engine sales were occurring at a much larger rate than its 2010 engine sales.[7] Upon confirmation by Navistar, EPA determined that Navistar would likely run out of credits in the early part of the 2012, which would not allow for notice and comment rulemaking prior to Navistar's credits being depleted, which would lead to Navistar not being able to sell engines while the notice and comment proceeding continued.

While Mack may say with hindsight that EPA should have known earlier to start its rulemaking process, the fact remains that, by the end of 2011, EPA was faced with the prospect of either having a company not being able to introduce its heavy heavy duty engines, with serious harm to those who work for the company and its affiliates, or promulgating an interim rule without notice and comment that would allow the company to continue operations while the notice and comment process was completed. Faced with this unhappy choice, EPA believes that it was within the bounds of the "good cause" exception in promulgating the IFR.

It is worth noting in addition that with regard to the actual notice Mack had of this rulemaking, it is not appropriate to say that Mack was not aware that EPA intended to promulgate in NCP rule or that it had no ability to comment. EPA did provide actual notice and opportunity for submission of relevant information. Specifically, EPA held three teleconferences with Mack to allow its staff to provide input on the costs of compliance and any competitive disadvantage it may face. While EPA did not set the interim NCP parameters at the costs provided by Mack, they were considered fully. *See generally,* "Interim and Proposed Technical Support Document ("TSD")," EPA-HQ-OAR-2011-1000-0014, Chapter 3.

Mack supplemented its petition for stay on February 2, 2012, bringing to EPA's attention statements by Navistar officials stating that Navistar "is ready with an engine that does meet the 0.2 gram NOx limit"[8] and that Navistar has filed an application for certification of this engine. Further, Mack provides a statement from a Navistar official indicating that Navistar will apply for NCPs not because of technological concerns with its 0.20 g/bhp-hr engines, but because its other engines get better fuel economy.

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[6] "Nonconformance Penalties for Heavy-Duty Diesel Engines in 2010 Model Year", Letter from Karl J. Simon, Director of the Compliance and Innovative Strategies Division, February 22, 2010, CISD-10-03 (HD)

[7] *See* Ward's Economic Group Data indicating Navistar-International Class 8 engine sales more than doubled from 2010 to 2011.

[8] The 0.20 g/bhp-hr standard is often referred to as a 0.2 gram limit.

EPA has indeed received an application for certification from Navistar for a 0.20 g/bhp-hr engine. However, EPA's initial view is that there are several significant problems with Navistar's application. EPA is not prepared to share publicly these problems at this time, because Navistar has claimed much of their information as confidential. While EPA has not taken final action regarding certification, and intends to continue discussions with Navistar, EPA has substantial concerns regarding the ability of Navistar to certify its engine at a 0.20 g/bhp-hr level. In addition, even if Navistar's engine could be certified, Navistar apparently will not be able to introduce the engine into commerce until June15, 2012 at the earliest, based on their request for certification. Therefore, the situation remains that absent NCPs authorized under the IFR, Navistar would have no ability to introduce its engines.

B. Justification for Promulgating NCPs

In 40 CFR 86.1103-87(a)(2), EPA specifies that, before issuing NCPs, it must find "that there is likely to be a technological laggard." While the regulations do not define this term, as the petitioner noted, in the past EPA has interpreted this as meaning a manufacturer who cannot meet the emission standard due to technological difficulties, not merely economic difficulties. 67 Fed. Reg. 51,464, 51,465 (Aug. 8, 2002). It is also important to note that the regulations do not require EPA to be certain that one or more manufacturers will actually be unable to meet the standard for technological reasons. Rather, the regulations specify that it is sufficient for EPA to find a likelihood that this will be the case.

Based on confidential business information available to EPA at the time the Interim Final Rule was signed, EPA determined that there was no viable technological path available to Navistar during the interim period that would allow it to produce engines that fully comply with 0.20 g/hp-hr NOx emission standard, or to use compliant engines made by another engine manufacturer in its vehicles. This determination was based on EPA's analysis of the performance of Navistar's emission controls, which unlike the rest of the industry do not rely on selective catalytic reduction (SCR). The determination was also based on the amount of time it would take redesign its engines and vehicles for an alternate compliance path that would use SCR to reduce NOx emissions. These limitations are technological rather than economic in nature, and no amount of money could be spent by Navistar to bring its engines into compliance during the interim period.

Navistar could have decided two years ago to apply SCR to its engines, as the rest of the industry did. However, it made a decision to attempt to meet the emission standard without SCR. The emission standard adopted by EPA is a performance standard, and does not require that all manufacturers use the same technology to meet the standards. Congress, understanding that manufacturers may not all be in the same place regarding compliance with technology-forcing standards, specifically permitted manufacturers to emit higher levels of pollutants using NCPs. Having made its decision to use a different technology to meet the standards, Navistar has not yet developed and produced engines that have been certified to meet the 0.020 standard. This is similar to the circumstances in 2002 when Caterpillar developed its "ACERT" technology rather than use cooled exhaust gas recirculation (EGR) technology and needed to use NCPs while developing ACERT.[9]

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[9] *See* "Caterpillar Announces Plans to Phase Out Bridge Engines," Transport Topics, Sept. 9, 2003; Final Technical Support Document: Nonconformance Penalties for 2004 Highway Heavy Duty Diesel Engines, EPA420-R-02-021 August 2002, at 11-12 ("Engine manufacturers generally agree with us that cooled EGR is one of the principal technologies capable of achieving the 2004 emission standards. In the past several months, a number of engine manufacturers have announced they are pursuing cooled EGR technology as their principle means of complying with the 2004 standards. In addition, at least one engine manufacturer [identified as Caterpillar] has announced they are pursuing an alternative technology for complying with the 2004 HDDE standards which does not include the use of cooled EGR.")

As indicated above, EPA's initial view is that EPA has substantial concerns regarding the ability of Navistar to certify its engine at a 0.20 g/bhp-hr level based on the information currently available to EPA, as there are several issues concerning the engine's ability to meet the standards and other regulations. Thus, nothing in Navistar's recent actions changes EPA's view that a technological laggard exists.

C. Penalty Level

With respect to the level of the NCPs, we note that the only evidence provided by the petitioner were comparisons to EPA's most recent NCP rulemaking and to the hardware costs associated with SCR. While we acknowledge that the maximum penalties under the interim NCPs will be lower than the maximum penalties under the most recent prior NCPs, we do not believe this to be the relevant analysis. EPA's statutory obligation is to set the NCPs at a level that "shall remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction." The petitioner provided no evidence to support its claim that the interim NCP does not meet this requirement. However, even if comparisons to prior NCPs were relevant, we note that, while the maximum penalties under the interim NCPs will be lower than the maximum penalties under the most recent prior NCPs, they will be higher than other prior NCPs. Moreover, we note that when expressed as dollars per g/hp-hr emission exceedance, the interim NCPs are actually higher than those established in the most recent prior NCP rule, as shown in the following table:

Comparison of Interim 2010 NCPs to Most Recent NCPs for Heavy Heavy-Duty Engines			
Standard	Upper Limit	COC90 (in 2011 Dollars)	Dollars per g/hp-hr
4.0 g/hp-hr 1998 NOx Standard	5.0 g/hp-hr	$3,855	$3,855
2.4 g/hp-hr 2004 NOx+NMHC Standard	6.0 g/hp-hr	$15,508	$4,308
0.20 g/hp-hr 2010 NOx Standard	0.50 g/hp-hr	$1,919	$6,397

The petitioner also claims that the IFR's lack of a formal notice and comment period led to the penalties being promulgated without the opportunity to "demonstrate the flaws" in the EPA's calculations and to "remedy the competitive disadvantage" allegedly created by the NCPs. However, petitioner had a full opportunity to provide its views and information on the proper level for NCPs. Prior to issuing the

Interim Final Rule, EPA held several conference calls with the engine manufacturers, including petitioner, who certified heavy heavy-duty engines at or below the 0.20 g/hp-hr NOx emission standard. For each of these manufacturers, there was an initial call informing it of EPA's intent to adopt NCPs for heavy heavy-duty engines and EPA staff's initial thoughts on the cost analysis. EPA held at least one follow-up call with each of these manufacturers in which the manufacturer provided information about costs of compliance. EPA had similar discussions with Navistar. Mack therefore had substantial opportunity to provide its views regarding the proper level for NCPs and EPA's initial thoughts, including its intentions to estimate compliance costs relative to a baseline engine (with emissions at the upper limit) that includes both SCR and EGR hardware.

The petitioner also claims, without further information, that the penalty is too low because it does not take into account the numerous costs faced by manufacturers in developing and using SCR. As noted, EPA explained to manufacturers that it was estimating compliance costs presuming a baseline engine that met an emission level of 0.50 g/hp-hr, rather than the previous standard of approximately 2.0 g/hp-hr, because all engine manufacturers were meeting the 0.50 g/hp-hr level. Manufacturers, including Navistar, all had expended considerable costs to achieve the 0.50 g/hp-hr level. Under the regulations, the relevant compliance costs are the difference in life-cycle costs between the upper limit engine (here, a 0.50 g/hp-hr engine) and an engine with NOx emissions below the 0.20 g/hp-hr standard. This includes fixed costs such as research and development, hardware and manufacturing costs, and operating costs. This excludes costs associated with reducing emissions from the previous emission standard to 0.50 g/hp-hr.

Moreover, EPA explained that its costs presumed a baseline engine that already contained both SCR and EGR. EPA explained that using this baseline would mean that most of the hardware costs associated with adding SCR to an engine would not be included in the compliance costs. The most significant of the NCP parameters in the regulations is the 90th percentile costs of compliance, COC_{90}, which defines the penalty for engines emitting at the upper limit. This cost should represent what the costs would be for the manufacturer with the highest life-cycle compliance costs of compliance. EPA estimated COC_{90} by assuming the baseline engine would have been an SCR equipped engine with NOx emissions at 0.50 g/hp-hr and that it looked very similar to an engine with NOx emissions at 0.20 g/hp-hr. However, the higher NOx emissions of the baseline engine would allow the use of less expensive hardware and would require less consumption of liquid urea (also known as diesel emission fluid or "DEF").

EPA did consider the other technology paths suggested by manufacturers (which assumed baseline engines with EGR but not SCR, or baseline engines with SCR but not EGR). [10] However, EPA rejected these approaches because of concerns about the inaccuracy of projecting large changes in operating costs. In the TSD, EPA noted that it is possible that over the life of a truck, the increased operating costs could even be greater than the original hardware cost. The complete cost analysis is described in Chapter 3 of the TSD. The cost parameters included engine manufacturing costs, vehicle manufacturing

[10] Each of the five engine manufacturers contacted assumed a different technology package on its baseline engine. Manufacturers that produced engines below 0.20 g/hp-hr based their compliance costs on the following baseline engines: engines equipped with similar (but not identical) SCR and EGR hardware, SCR-equipped engines without EGR, an EGR version of its own engine, or the non-SCR engines produced by a competitor. Some of these manufacturers estimated costs relative to more than one baseline engine, while others provided costs relative to a single baseline engine. Four of the manufacturers compared the costs for their assumed baseline engine to the costs for their actual compliant engines. The one non-SCR manufacturer contacted provided its projections of what it will spend to bring its current 2011 engine below 0.20 g/hp-hr.

costs, and operating costs. Engine manufacturer costs for emissions control include variable costs (for incremental hardware, assembly, and associated markups), fixed costs (for tooling, research and development, etc.), and warranty costs. EPA also evaluated whether vehicle manufacturers are expected to incur some variable hardware costs or some fixed costs. Owner costs can include fuel costs, diesel exhaust fluid costs, maintenance and repair costs, and costs associated with any time that the vehicle is down for repair.

EPA further explained that it intended to use this baseline approach because of concerns about accurately estimating the potentially large difference in fuel consumption rates between SCR-equipped engines at 0.20 g/hp-hr NOx and a non-SCR engine at 0.50 g/hp-hr NOx. Mack's comments therefore ignore the better fuel consumption of SCR equipped engines compared to EGR-equipped engines with comparable NOx emissions. As noted on page 32 of the TSD, EPA estimates that each one-percent reduction in fuel consumption results in a discounted lifetime fuel saving of $986 for the typical operator. However, the engine manufacturers that are using SCR have claimed the SCR engines have significantly better fuel consumption than even their 2009 engines with NOx emissions at nearly 1.2 g/hp-hr. Thus, we believe that there is net savings in operating costs so that the life cycle costs for SCR engines are much lower than the cost of the SCR hardware.

EPA also specifically reviewed competitive issues in its IFR. When EPA considered the available information about market prices and market share, it found them to be supportive of the conclusion that the NCPs are large enough to remove the competitive disadvantage to complying manufacturers. For example, EPA based its maximum penalty on its estimated "worst case" cost that a manufacturer would have to pay to reduce emissions from the base engine to the standard. Moreover, EPA examined the "emissions surcharge" (the increase in price manufacturers charge to recover the cost of reducing emissions) that manufacturers of SCR-equipped engines charged in comparison with that charged by Navistar, and found that while manufacturers of SCR-equipped engines did have a larger emissions surcharge, the difference in surcharges was less than the NCP that EPA promulgated for such engines. See Section 4.2 of the TSD for a more complete discussion. Petition makes no attempt to refute this analysis.

We continue to believe that the penalties were set at the appropriate level for purposes of the IFR, given the information available to us at the time the rule was issued.

III. Harm to petitioner

The petitioner claims, without providing any specific evidence, that it will be harmed by the availability of the interim NCPs, and by their levels. Presently, Navistar is selling these same engines using credits that it has amassed in prior years, as permitted under the regulations. The only change that will come from this rule is that Navistar will have the opportunity to sell the same engines that they are currently selling, except with the requirement to pay the government a penalty for each engine sold. One could assume that Navistar paying an NCP would have one of two results: either Navistar would have lower profit for each engine sold, or it would increase the price of its engines. It is hard to see how the imposition of a penalty on one's competitor would harm petitioner.

We note that Navistar has been selling its engines with a slightly lower emissions surcharge than its competitors SCR engines for two years without any gains in market share relative to its 2008 sales. *See,* TSD, chapter 4.2; Figure 1-4. It has done this while using previously generated emission credits and paying no NCPs. Clearly, even if the penalty is too low, as Mack claims, it will not allow Navistar to gain any market share because any NCP will increase its costs.

By requesting a stay of the Interim Final Rule, the petitioner is asking that no NCPs be made available during the interim period rather than asking for the penalty to be raised. This would likely result in Navistar being unable to manufacture any heavy heavy duty engines in the near future as Navistar depletes its emission credits. While this would certainly have an effect on Navistar, it is less obvious that it will have any effect in the short term, or certainly any significant effect, on Mack. In order to show that the petitioner would lose sales if the Interim Final Rule is not stayed, the petitioner must show not only that Navistar will cease production or lose sales if the rule is stayed, it must also show that it is likely that Navistar's customers would instead buy from Mack and that Mack has the production ability to increase production and sell additional engines and vehicles during the interim period. However, the petitioner has provided no evidence that it could take advantage of Navistar's ceasing production. In evaluating this request, we have no way of knowing whether sales that would have gone to Navistar would in fact have gone to the petitioner, even if it does have the ability to significantly increase production during the interim period. It is possible that Navistar's customers would have chosen to delay purchase or even not purchase new trucks if the Navistar trucks were unavailable, or perhaps the customers would have instead purchased trucks from a different manufacturer. Moreover, even to the extent that the IFR interfered with Mack's ability to increase its sales in the short term, which Mack has not shown, EPA believes that this is best characterized as an impediment to a potential unplanned benefit that Mack could receive by taking advantage of a harm to their competitor, rather than actual harm to Mack.

Regarding the interim NCP level, the petitioner does not provide any evidence that setting the penalty at a different rate would have any impact on them at all. The only way in which it appears the petitioners could be harmed by a low penalty would be if it allowed Navistar to price its engines lower to gain or retain market share. The petitioners appear to be claiming that they will be harmed because Navistar will not be forced to increase its prices enough to cause it to lose market share. However, the petitioners provide no evidence that this will occur.

Moreover, by questioning the likelihood of Navistar running out of credits during the interim period, the petitioner appears to doubt whether staying this Interim Final Rule have any effect on Navistar. If Navistar could continue to sell engines using credits, it would be unlikely to need NCPs at all.

Petitioner also appears to argue that it has suffered irreparable harm because it was not able to comment on the rule prior to it becoming effective. As discussed above, EPA notes that Petitioner did have the opportunity to provide its cost estimates and other information and views to EPA prior to publication of the IFR. However, even if this were not the case, it is hard to see how the temporary inability to comment on this interim rule, in and of itself, can be irreparable harm, particularly where Mack will have the opportunity to provide comment on the notice of proposed rulemaking that EPA published when it published the IFR. Mack has had the opportunity to provide EPA with its views at this time and will also have the opportunity to provide EPA with its views during the notice and comment period. Mack may contend that the consequences of its temporary ability to provide comments is irreparable harm, though, as discussed above, EPA believes such claimed harm to be speculative and minimal.

However, EPA fails to see how Mack's ability to comment prior to EPA's completing the IFR, in and of itself, causes any irreparable harm to petitioner when Mack will have the opportunity to comment during the comment period for the accompanying notice of proposed rulemaking.

IV. Harm to EPA and Navistar

The petitioner claims that neither EPA nor Navistar would be harmed by a stay of the Interim Final Rule. We agree that the Agency would not be harmed by a stay. However, we do not agree that Navistar would not be harmed. We determined that Navistar could have run out emission credits needed for it heavy heavy-duty engines by early 2012 absent NCPs. As discussed above, EPA believes that if the NCP rule were not in effect prior to Navistar's depletion of its credits, Navistar and its affiliated companies would be faced with the possible layoffs of thousands of workers and severe corporate financial disruption. The losses these workers would face would be irreparable, as they would lose any income they would have received during that period, and the prospect of massive layoffs could be devastating to the communities that depend on these jobs.[11]

As discussed above, while it may be true that Navistar could have informed EPA earlier of its potential credit shortfall, this does not make the potential harm any less severe or any less irreparable.

Regarding Navistar's statements on its 0.20 gram engine, as discussed above, EPA's initial view is that EPA has substantial concerns regarding the ability of Navistar to certify its engine at a 0.20 g/bhp-hr level based on the information currently available to EPA, as there are several issues concerning the engine's ability to meet the standards and other regulations. In addition, the engine apparently will not be ready for production until June 15, 2012, even if it were able to be certified. Therefore, in the absence of the IFR, Navistar will still not have any ability to manufacture and introduce heavy heavy duty engines once it runs out of credits.

The Petitioner also seems to argue that Navistar will not avoid harm because the rule will ultimately be vacated. This assumes the court adopts Mack's position on the merits, which, as this response indicates, EPA does not believe is appropriate. In any case, the question at hand in determining the "harm" criterion in a request for stay is the current effect of a stay on the parties. There can be no question that as long as the IFR remains in place, Navistar will be able to certify and manufacture engines based on the NCPs promulgated in the IFR, and that in the absence of the NCP rule Navistar would not be able to do so. Regarding Mack's statement regarding future recall of the engines, the engines manufactured under certificates based on the NCPs will be legal and will not need to be recalled, no matter what happens later regarding the NCP rule. While any future action regarding the rule may lead to further action regarding future certificates and future vehicles manufactured under existing certificates, vehicles validly manufactured under the law pursuant to certificates in effect at the time would not need to be recalled.

Finally, we find it disingenuous for the petitioner to claim that that it will lose sales due to the interim NCPs, but that Navistar will not lose sales without NCPs.

[11] EPA notes that since the initial filing of this request for stay, EPA has certified certain Navistar engine families using NCPs. EPA interprets Volvo's petition as intending that EPA not have ever granted these certifications or to in some manner withdraw them.

V. Public interest

Mack provides no new information or arguments in its discussion of why it believes granting the stay is in the public interest. EPA does not believe granting the stay request would be in the public interest.

EPA believes that three factors must be considered in determining whether a stay of the Interim Final Rule would be in the public interest:

1. The environmental effects of allowing production of engines with emissions above the 0.20 g/hp-hr NOx emission standard.
2. The economic effects of Navistar being forced to cease production of its heavy heavy-duty vehicles.
3. The general public interest in having an opportunity to comment on regulatory action.

We believe that Congress addressed the first factor in specifying that NCPs be made available when needed. In doing so they effectively determined that the public interest in preventing a manufacturer from being forced from the market outweighs any short-term harm to the environment. In part this allows EPA to issue standards for heavy-duty vehicles and engines that are technology forcing in nature, with NCPs acting in part as a safety valve.

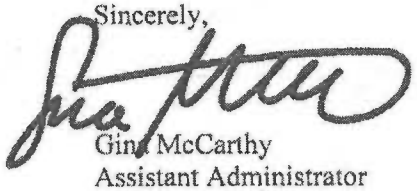
As noted above, EPA has determined that without the interim NCPs, Navistar would be forced to cease production of heavy heavy-duty vehicles during the interim period. Even if one does not believe that Navistar deserves protection from harm that results from its own engineering choices, it does not follow that it would be in the public interest for it to cease production of these vehicles. Forcing Navistar form the market would harm the workers at Navistar and it suppliers. We estimate that this would impact thousands of workers. It would also harm customers who are awaiting delivery of vehicles they have ordered. It would finally hurt the public interest in general due to the loss of economic activity caused by the ceased production.

Finally, while we agree that the public has a general interest in having an opportunity to comment on regulatory action, we do not believe, in this particular situation where Congress has prioritized the interests of companies who lag behind, that it outweighs the public interest in avoiding the consequences discussed above.

VI. Conclusion

For the reasons discussed above, EPA is denying Mack's request for a stay of the Interim NCP rule.

Sincerely,



Gina McCarthy
Assistant Administrator