## ENVIRONMENTAL PROTECTION AGENCY

**40 CFR Parts 85 and 86**

**[OAR–2003–09; FRL–7656–9]**

**RIN 2060–AJ62**

# Motor Vehicle and Engine Compliance Program Fees for: Light-Duty Vehicles; Light-Duty Trucks; Heavy-Duty Vehicles and Engines; Nonroad Engines; and Motorcycles

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This final rule updates the Motor Vehicle and Engine Compliance Program fees regulation promulgated in 1992 under which the Agency collects fees for certain Clean Air Act compliance programs administered by EPA including those for light-duty vehicles and trucks, heavy-duty highway vehicles and engines, and highway motorcycles. Today's action updates existing fees to reflect the increased costs of administering these compliance programs since the initial 1992 rulemaking. EPA is also adding a fee program for similar compliance programs for certain nonroad engines and vehicles for which emission standards have been finalized.

**DATES:** This final rule takes effect on July 12, 2004.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number OAR–2002–0023. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Althought listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically on EDOCKET or in hard copy at: Docket, (EPA/DC), EPA West, Room B102, 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 holidays. The telephone number for the Public Reading Room is (202) 566–1744. The telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Lynn Sohacki, Certification and Compliance Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 2000 Traverwood, Ann Arbor, Michigan 48105; telephone number: 734–214–4851, fax number: 734–214–4869; e-mail address: *sohacki.lynn@epa.gov* or Trina D. Vallion, Certification and Compliance Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 2000 Traverwood, Ann Arbor, Michigan 48105, telephone number: 734–214–4449; fax number: 734–214–4869; e-mail address: *vallion.trina@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

*Regulated Entities*

Entities regulated by this rule are those which manufacture or seek certification (''manufacturer'' or ''manufacturers'') of new motor vehicles and engines (including both highway and nonroad). The table below shows the category, North American Industry Classification System (NAICS) Codes, Standard Industrial Classification (SIC) Codes and examples of the regulated entities:

| Category | NAICS codes (1) | SIC codes (2) | Examples of potentially regulated entities |
|---|---|---|---|
| Industry | 333111 | 3523 | Farm Machinery and Equipment Manufacturing. |
| Industry | 333112 | 3524 | Lawn and Garden Tractor and Home Lawn and Garden Equipment Manufacturing. |
| Industry | 333120 | 3531 | Construction Machinery Manufacturing. |
| Industry | 333131 | 3532 | Mining Machinery and Equipment Manufacturing. |
| Industry | 333132 | 3533 | Oil & Gas Field Machinery. |
| Industry | 333210 | 3553 | Sawmill & Woodworking Machinery. |
| Industry | 333924 | 3537 | Industrial Truck, Tractor, Trailer, and Stacker Machinery Manufacturing. |
| Industry | 333991 | 3546 | Power Driven Handtool Manufacturing. |
| Industry | 336111 | 3711 | Automotive and Light-Duty Motor Vehicle Manufacturing. |
| Industry | 336120 | 3711 | Heavy-duty Truck Manufacturing. |
| Industry | 336213 | 3716 | Motor Home Manufacturing. |
| Industry | 336311 | 3592 | Motor Vehicle Gasoline Engine and Engine Parts Manufacturing. |
| Industry | 336312 | 3714 | Gasoline Engine & Engine Parts Manufacturing. |
| Industry | 336991 | 3751 | Motorcycle, Bicycle, and Parts Manufacturing. |
| Industry | 336211 | 3711 | Motor Vehicle Body Manufacturing. |
| Industry | 333618 | 3519 | Gasoline, Diesel & dual-fuel engine Manufacturing. |
| Industry | 811310 | 7699 | Commercial & Industrial Engine Repair and Maintenance. |
| Industry | 336999 | 3799 | Other Transportation Equipment Manufacturing. |
| Industry | 421110 | ..... | Independent Commercial Importers of Vehicles and Parts. |
| Industry | 333612 | 3566 | Speed Changer, Industrial High-speed Drive and Gear Manufacturing. |
| Industry | 333613 | 3568 | Mechanical Power Transmission Equipment Manufacturing. |
| Industry | 333618 | 3519 | Other Engine Equipment Manufacturing. |

(1) North American Industry Classification System (NAICS)

(2) Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your product would be regulated by this action, you should carefully examine the applicability criteria in title 40 of the Code of Federal Regulations, Parts 86, 89, 90, 91, 92 and 94; also Parts 1048 and 1051 when those Parts are finalized. If you have questions regarding the applicability of this action to a particular product, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

## II. Obtaining Rulemaking Documents Through the Internet

*Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket identification number: OAR–2002–0023.

The preamble, regulatory language and regulatory support documents are also available electronically from the EPA Internet Web site. This service is free of charge. The official EPA version is made available on the day of publication on the primary Web site listed below. The EPA Office of Transportation and Air Quality also publishes these notices on the secondary Web site listed below.

(1) *http://www.epa.gov/docs/fedrgstr/EPA–AIR/* (either select desired date or use Search feature)

(2) *http://www.epa.gov/OTAQ/* (look in ''What's New'' or under the specific rulemaking topic)

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

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## I. Introduction

Since 1992, EPA has assessed fees for the motor vehicle emissions compliance program (MVECP). Since the initial MVECP fees regulation, EPA has incurred additional costs and will continue to incur costs in administering the light-duty and heavy-duty compliance programs for motor vehicles and engines, and new compliance programs for nonroad vehicles and engines. Today's final rule updates the MVECP fee provisions to reflect these changes.

Today's final rule establishes fees under the authority of section 217 of the Clean Air Act (CAA) and the Independent Offices Appropriation Act (IOAA) (31 U.S.C. 9701) to ensure that the MVECP is self-sustaining to the extent possible. The services provided by EPA are described in the section II.B. of the Notice of Proposed Rulemaking (NRPM) (67 FR 51402). Because of comments received, EPA has adjusted the fees collected per certificate for some industry categories. EPA has created several new worksheets and a further explanation of the changes in the worksheets. This updated cost analysis is available in Docket OAR–2002–0023.

On September 19, 2002, EPA held a public hearing concerning the proposed regulations. Comments from that hearing and written comments are included in the public docket. Today's final rule addresses comments received both before and after the close of the public comment period. A discussion of certain comments received is contained in section V below. You may also want to review the Response to Comments document in the Docket OAR–2002–0023 which contains a detailed discussion of many topics raised in this preamble and other comments received and EPA's responses.

## II. What Are the Requirements of This Final Rule?

EPA is adopting as final its proposed rule with a few changes. The most significant changes are pointed out in sections II.A through II.G below. Additional changes are listed in section III. A more detailed discussion of the comments received is in the Response to Comments Document in the docket for this rule.

### *A. What Is the Finalized Fee Schedule?*

The following table indicates fees for light-duty vehicles (LD), medium-duty passenger vehicles (MDPV), complete spark-ignition [1] heavy-duty vehicles (SI HDV), motorcycles (MC), heavy-duty engines (HDE), nonroad compression-ignition [2] (NR CI) engines, nonroad spark-ignition (NR SI) engines, marine engines (excluding inboard and sterndrive engines), nonroad recreational vehicles and engines, and locomotives. The table distinguishes fees for vehicles and engines that are imported by independent commercial importers (ICIs) and also distinguishes vehicles and engines certified for highway (HW) and nonroad (NR) use.

The following is the final fee schedule for each certification request:

[1] A spark-ignition engine is an engine that uses a spark source, such as a spark plug, to initiate combustion in the combustion chamber. Examples of fuels used in spark-ignition engines are: gasoline, compressed natural gas, liquid petroleum gas and alcohol-based fuels.

[2] A compression-ignition engine is an engine that uses compression to initiate combustion in the combustion chamber. Diesel fuel is an example of a fuel used in compression-ignition engines.

TABLE II.A–1

[Fee Schedule]

| Category | Certificate type [a] | Fee |
|---|---|---|
| LD, excluding ICIs | Fed Certificate | $33,883 |
| LD, excluding ICIs | Cal-only Certificate | 16,944 |
| MDPV, excluding ICIs | Fed Certificate | 33,883 |
| MDPV, excluding ICIs | Cal-only Certificate | 16,944 |
| Complete SI HDVs, excluding ICIs | Fed Certificate | 33,883 |
| Complete SI HDVs, excluding ICIs | Cal-only Certificate | 16,944 |
| ICIs for the following industries: LD, MDPV, or Complete SI HDVs | All Types | 8,387 |
| MC (HW), including ICIs | All Types | 2,414 |
| HDE (HW), including ICIs | Fed Certificate | 21,578 |
| HDE (HW), including ICIs | Cal-only Certificate | 826 |
| HDV (evap), including ICIs | Evap Certificate | 826 |
| NR CI engines, including ICIs, but excluding Locomotives, Marine and Recreational engines. | All Types | 1,822 |
| NR SI engines, including ICIs | All Types | 826 |
| Marine engines, excluding inboard & sterndrive engines, including ICIs | All Types and Annex VI | 826 |
| All NR Recreational,[b] including ICIs, but excluding marine engines | All Types | 826 |
| Locomotives, including ICIs | All Types | 826 |

[a] Fed and Cal-only Certificate and Annex VI are defined in 40 CFR 85.2403.

[b] Recreational means the engines subject to 40 CFR 1051 which includes off road motorcycles, all-terrain vehicles and snowmobiles.

This fee schedule will change in calendar year 2006 when the fees will be adjusted for inflation and to reflect changes in the number of certificates issued as explained in sections II.B and C.

*B. Will the Fees Automatically Adjust To Reflect Future Inflation?*

By function of today's rule fees will be automatically adjusted on a calendar year basis to reflect inflation. A formula created by today's rule will determine the fees each year by applying any change in the consumer price index (CPI) to EPA's labor costs. The formula that will be used by EPA to determine the total cost for each fee category and subcategory [3] is:

$$\text{Category Fee}_{cy} = [F + (L * (CPI_{CY-2}/CPI_{2002}))] * 1.169$$

Category $\text{Fee}_{cy}$ = Fee per category for the calendar year of the fees to be collected.

F = Fixed costs within a category or subcategory.

L = Labor costs within a category or subcategory.

$CPI_{CY-2}$ = the consumer price index for all United States (U.S.) cities using the ''U.S. city average'' area , ''all items'' and ''not seasonally adjusted'' numbers calculated by the Department of Labor listed for the month of November of the year two years before the calendar year (CY). (*e.g.*, for the 2006 CY use the CPI based on the date of November, 2004).

$CPI_{2002}$ = the consumer price index for all U.S. cities using the ''U.S. city average'' area, ''all items'' and ''not seasonally adjusted'' numbers calculated by the Department of Labor for December, 2002. The actual value for $CPI_{2002}$ is 180.9.

1.169 = Adds overall EPA overhead which is applied to all costs

The LD category has been split into Cert/FE and In-use subcategories because not all LD certificates require direct EPA In-use services. The costs were totaled from the labor and fixed costs of worksheets #3 and #4 of the Cost Analysis. The values of EPA's labor and fixed costs for the ICI, motorcycle, heavy-duty highway engines, nonroad CI engines and Other categories were taken from worksheet #1 of the Cost Analysis and are shown in the table below:

TABLE II.B–1

[Fixed and Labor Costs by Fee Category]

| | F | L |
|---|---|---|
| LD Cert/FE | $3,322,039 | $2,548,110 |
| LD In-use | 2,858,223 | 2,184,331 |
| LD ICI | 344,824 | 264,980 |
| MC HW | 225,726 | 172,829 |
| HD HW | 1,106,224 | 1,625,680 |
| NR CI | 486,401 | 545,160 |
| Other [4] | 177,425 | 548,081 |

Light-duty manufacturers certifying vehicles for sale only in California will determine the category fee by using the fixed and labor values only for the LD Cert/FE subcategory.

Light-duty manufacturers certifying vehicles that will not be sold only in California (federal vehicles) will determine a category fee that incorporates the costs for both Cert/FE and In-use subcategories. These manufacturers will determine the Cert/FE portion of the fees using the above formula and LD Cert/FE F and L values and then calculate the in-use portion of

[3] The light-duty category is divided into subcategories, Cert/FE and In-use.

[4] The Other category includes: HD HW evap, including ICI; Marine (excluding inboard & sterndrive ) including ICI & Annex VI; NR SI, including ICI; NR Recreational (non-marine), including ICI; Locomotives, including ICI.

the fees by using the LD In-use F and L values. The light-duty federal category fee will be the total of the Cert/FE and In-use fees.

The fee amount per certificate will be determined by dividing the total cost for each certificate category by a rolling average of the number of certificates as discussed below in section II.C. The limitation of the applicability of the CPI to labor costs is a change from the proposal. The removal of the non-labor costs from the portion of EPA's costs to which the CPI will apply is a response to comments received and is discussed in more detail in section 4 of the Response to Comments document.

EPA will calculate new fees based on this established formula for each certificate category in Table II.A–1 and publish the fees in a ''Dear Manufacturer'' letter or by similar means. The ''Dear Manufacturer'' letters are also located on EPA's Web site: *http://www.epa.gov/otaq/cert/dearmfr/dearmfr.htm*. The new fees will also be located on EPA's Fees Web site: *http://www.epa.gov/otaq/fees.htm.* The fees will be applicable by calendar year rather than model year. The first year that the fees will be adjusted for inflation is calendar year 2006.

*C. Will Fees Change To Reflect Changes in the Number of Certificates?*

EPA will adjust fees based on the total number of certificates [5] issued to reflect the change in the cost of services provided by EPA per certificate. As discussed in section II.B above, EPA will annually adjust the amount of the labor costs in each fee category by the CPI approximately 11 months before the new fees will apply. At the time that the adjustment based on CPI is made, EPA will also adjust fees based on the average of the total number of certificates issued in the two completed model years previous to the adjustment. The full formula that will be applied to adjust the fee amount for each category is:

Certificate $Fee_{cy}$ = [F + L* ($CPI_{CY-2}$/$CPI_{2002}$)] *1.169 / [($cert\#_{MY-2}$ + $cert\#_{MY-3}$) * .5]

Certificate $Fee_{cy}$ = Fee per certificate for the calendar year of the fees to be collected

F = the fixed costs, not to be adjusted by the CPI

L = the labor costs, to be adjusted by the CPI

$CPI_{CY-2}$ = the consumer price index for all U.S. cities using the ''U.S. city average'' area, ''all items'' and ''not seasonally adjusted'' numbers calculated by the Department of Labor listed for the month of November of the year two years before the calendar year. (*e.g.,* for the 2006 CY use the CPI based on the date of November, 2004).

$CPI_{2002}$ = the consumer price index for all U.S. cities using the ''U.S. city average'' area, ''all items'' and ''not seasonally adjusted'' numbers calculated by the Department of Labor for December, 2002. The actual value for $CPI_{2002}$ is 180.9.

1.169 = Adds overall EPA overhead which is applied to all costs

$cert\#_{MY-2}$ = the total number of certificates issued for a fee category or subcategory model year two years prior to the calendar year for applicable fees ($Fee_{cy}$)

$cert\#_{MY-3}$ = the total number of certificates issued for a fee category or subcategory model year three years prior to the calendar year for the applicable fees ($Fee_{cy}$)

Light-duty manufacturers certifying vehicles for sale only in California will pay a fee determined by calculating the fees for the LD Cert/FE subcategory and dividing by the average of the total number (California and federal) of light-duty vehicle certificates issued in the applicable model years.

Light-duty manufacturers certifying federal vehicles will pay fees that incorporate the costs for both Cert/FE and In-use subcategories. These manufacturers will determine the Cert/FE portion of the fees as described above and divide by the total number (California and federal) of light-duty certificates issued in the applicable model years. Manufacturers will then calculate the in-use portion of the fees by dividing the LD In-use by the average number of federal certificates issued in the applicable model years. Manufacturers will determine the total fee for light-duty federal certificates by adding the Cert/FE fees and the In-use fees.

As an example, the first year for which the fees will be adjusted is calendar year 2006. In January, 2005, EPA will adjust the total for each fee category for the 2006 model year (MY) based on the CPI published in November, 2004, and will divide the total fee amounts for each category by the average of certificates issued for model years 2003 and 2004.

$Fee_{2006}$ = [F + L* ($CPI_{2004}$/$CPI_{2002}$)] *1.169 / [($cert\#_{MY\ 2004}$ + $cert\#_{MY\ 2003}$) * .5]

If an event such as a rulemaking occurs that causes a significant change in the number of certificate applications received, the Agency will reexamine the formula to determine whether adjusting the fees based upon the number of certificate applications is still applicable.

EPA will notify manufacturers within 11 months of the calendar year in which fees are adjusted by this section, with the new fees for each category, the number of certificates for the appropriate model years and the applicable CPI values after the November CPI values for each year are made available by the U.S. Department of Labor. This information will be available on EPA's Fees Web site: http://www.epa.gov/otaq/fees.htm as well as EPA's ''Dear Manufacturer'' letter Web site: *http://www.epa.gov/otaq/cert/dearmfr/dearmfr.htm.*

This formula will result in an annual adjustment of fees to reflect the change in the number of certificates issued by the EPA. This change from the proposal to adjust fees as a result in a change in the number of certificates is discussed more fully in the response to comments document.

*D. What Is the Procedure for Paying Fees?*

As with the current regulations, fees must be paid in advance of receiving a certificate. For each certification request manufacturers and ICIs will submit a MVECP Fee Filing Form (filing form) and the appropriate fee in the form of a corporate check, money order, bank draft, certified check, or electronic funds transfer [wire or Automated Clearing House (ACH)], payable in U.S. dollars, to the order of the U.S. Environmental Protection Agency. A single fee will be paid when a manufacturer or ICI submits an application for a single engine family or test group that includes multiple evaporative families. It should be noted that separate fees must be paid for each heavy-duty evaporative family certificate application. The filing form and accompanying fee will be sent to the address designated on the filing form. EPA will not be responsible for fees sent to any location other than the designated location. Applicants will continue to submit the application for certification to the National Vehicle and Fuel Emission Laboratory (NVFEL) in Ann Arbor, Michigan or to the Engine Programs Group in Washington, DC.

To ensure proper identification and handling, the check or electronic funds transfer and the accompanying filing form will indicate the manufacturer's corporate name and the EPA

[5] For purposes of this preamble, the regulations and the cost analysis, the term ''total number of certificates'' is used to represent the number of certificate applications for which fees are paid. This term is not intended to represent multiple certificates which are issued within a single engine family or test group.

standardized test group or engine family name. The full fee is to accompany the filing form. Partial payments or installment payments will not be permitted. A banking institution may add an extra charge for processing a wire or an ACH. The manufacturer is responsible for any extra fees a banking institution may charge to perform these services.

*E. What Is the Implementation Schedule for the New Fees?*

The implementation date of the new fees is July 12, 2004. The final fee schedule adopted in this final rule applies to 2004 and later model year vehicles and engines where the certification application is received on or after July 12, 2004. The new fees will not apply to 2004 and later model year certification applications received by EPA prior to the effective date of the regulations, provided that the applications are complete and include all required data. A description of the items needed to constitute a complete application, for the purposes of this fees rule, is included in section 5 of the Response to Comments Document.

*F. What Are the Reduced Fees Provisions?*

EPA believes that an appropriate fee reduction policy can be consistent with the premise underlying section 217 of the CAA: to reimburse the government for the specific regulatory services provided to an applicant. EPA recognizes that there may be instances, in the case of small engine families, where the full fee may represent an unreasonable economic burden. Therefore, EPA will allow manufacturers to pay a fee based on 1.0 percent of the aggregate retail sales price (or value) of the vehicles covered by a certificate. EPA believes this best represents the proper balance between recovering the MVECP costs without imposing an unreasonable economic burden. The reduced fees provisions will continue to use the current two part test which, if met, would qualify an applicant for a reduction of a portion of the certification fee. The reduced fee is available in cases where:

(1) The certificate is to be used for the sale of vehicles or engines within the U.S.; and

(2) The full fee for the certification request exceeds 1.0 percent of the projected aggregate retail price of all vehicles or engines covered by that certificate.

The reduced fee program for this rule provides two separate pathways by which a manufacturer can request and pay a reduced fee amount. The fee will be 1.0 percent of the aggregate retail price of the vehicles and engines covered by the certificate with a refundable minimum initial payment of $750. Each pathway specifies when manufacturers are required to determine the price of the vehicles or engines actually sold under a certificate and when to either pay additional fees or seek a refund. Under both pathways the manufacturer:

(1) Pays a fully refundable initial payment of $750 or 1.0 percent of the aggregate retail price of the vehicles or engines, whichever is greater, with the request for a reduced fee.

(2) Receives a certificate for an estimated number of vehicles or engines in the engine family to be covered by the certificate.

(3) Requests a revised certificate if the number of vehicles or engines in the engine family exceeds that on the certificate.

(4) Is in violation of the Clean Air Act if the number of vehicles or engines made or imported is greater than the number indicated on the certificate.

The first pathway will be available for engine families having less than 6 vehicles, none of which have a retail price of more than $75,000 each. Manufacturers seeking a reduced fee shall include in their certification application a statement that the reduced fee is appropriate under the criteria. If 1.0 percent of the aggregate retail price of the vehicles or engines is greater than $750, the manufacturer must submit a calculation of the reduced fee and the actual fee. If 1.0 percent aggregate retail price of the vehicles or engines is less than $750 the manufacturer will submit a calculation of the reduced fee and an initial payment of $750. In the event that the manufacturer does not know the value of all of the vehicles to be imported under the certificate, it may use the values of the vehicles or engines that are available to determine the initial payment.

The manufacturer's evaluation and submission of a fee amount under this reduced fee provision is subject to EPA review or audit. If the manufacturer's statement of eligibility is accepted, the manufacturer will receive a certificate for 5 vehicles or engines.

If the manufacturer's statement of eligibility or request of a reduced fee is rejected by EPA then EPA may require the manufacturer to pay the full fee normally applicable to it or EPA may adjust the amount of the reduced fee that is due.

A manufacturer's statement that it is eligible for a reduced fee can be rejected by EPA before or after a certificate is issued if the Agency finds that manufacturer's evaluation does not meet the eligibility requirements for a reduced fee, the manufacturer failed to meet the requirements to calculate a final reduced fee using actual sales data, or the manufacturer failed to pay the net balance due between the initial and final reduced fee calculation (*see* below for discussion of the final fee calculation, reporting and payment).

Within 30 days of the end of the model year, the applicant for a reduced fee will provide EPA with a report called a ''report card'' to aid our review of the applicant's statement of applicability. This report shall include the total number of vehicles ultimately covered by the certificate. The report card shall include information on all certificates held by the manufacturer that were issued with a reduced fee under the first pathway. For each certificate the report will include a calculation of the actual final reduced fee due for each certificate which is derived by adding up the total number of vehicles and their sales prices and calculating 1.0 percent of the total, a statement of the initial fees paid and the difference between the initial payment and the total final fee for the manufacturer. Manufacturers will be required to submit the report card within 30 days of the end of the model year,[6] EPA believes this is reasonable as manufacturers should have final figures for each certificate by this time.

A manufacturer may request a refund if the final fee is less than the initial payment. If the final fee is greater than the initial payment, manufacturers will be required to ''true-up'' or submit the final reduced fee due as calculated in the report card within 45 days of the end of the model year. This is a change from the NPRM in which EPA proposed that manufacturers would only have to pay the final reduced fee if the difference between the final fee and the initial payment was greater than $500. The decision to eliminate a minimum final reduced fee was made as a result of comments regarding EPA's proposed refund policy. This is discussed more fully in the ''What is the Finalized Policy for Refunds and Final Fee Payments?'' section below and in section 8 of the Response to Comments Document.

In addition, EPA may require that manufacturers submit a report card, with the same or similar information as noted above, for previous model years. The purpose of such report card would be to give EPA assurance that the

[6] Typically, this will be the first February 15 after a certificate expires. Certificates generally expire on December 31 of the model year.

manufacturer has demonstrated a continuous capability of submitting the necessary year-to-year report cards and that appropriate fees have been paid. This will assist EPA in its determination as to whether a manufacturer is capable of adequately projecting its annual sales for reduced fee purposes and whether the manufacturer shall remain eligible for the reduced fee provisions.

Under this pathway, if a manufacturer fails to report within 30 days or pay the balance due by 45 days of the end of the model year, then EPA may refuse to approve future reduced fee requests from that manufacturer. In addition, if a manufacturer fails to report within 30 days and pay the balance due by 45 days of the end of the model year as noted above then the Agency may deem the applicable certificate *void ab initio.*

The second pathway is available for engine families that contain more than 5 vehicles or engines and/or have at least one vehicle or engine with a retail price of more than $75,000. Manufacturers seeking a reduced fee under this pathway include in their applications a statement that the reduced fee is appropriate under the criteria and a calculation of the amount of the reduced fee (1.0 percent of the aggregate retail price of vehicles or engines) or an initial payment of $750, whichever is greater. As in the first pathway, the manufacturer's evaluation and submission of a fee amount under this reduced fee provision is subject to EPA review or audit. If the manufacturer's statement of eligibility is accepted, the manufacturer will receive a certificate for the number of vehicles or engines to be covered by the certificate.

If the manufacturer's statement of eligibility or request of a reduced fee is rejected by EPA then EPA may require the manufacturer to pay the full fee normally applicable to it or EPA may adjust the amount of the reduced fee that is due.

A manufacturer's statement that it is eligible for a reduced fee can be rejected by EPA before or after a certificate is issued if the Agency finds that the manufacturer's evaluation does not meet the eligibility requirements for a reduced fee.

At the end of the model year, the manufacturer may request a refund if the final fee is less than the initial payment. Manufacturers with certificates issued with reduced fees under this pathway will not be required to submit the report card and true-up described above under the first pathway.

Under either pathway, if the manufacturer realizes that it will make or import more vehicles or engines than the number specified on the certificate, the manufacturer must revise the application for certification to reflect the new number of vehicles or engines to be covered and request a revised certificate with an increased number of vehicles or engines indicated. At the time of revision, the manufacturer must pay 1.0 percent of the aggregate retail price of the number of vehicles or engines that are being added to the certificate. The additional fee must be received by the Agency and the certificate must be revised and issued before the additional vehicles or engines may be sold or imported in the United States. If a manufacturer imports or sells more vehicles or engines than that indicated on the certificate, the manufacturer will be in violation of the CAA for selling or importing uncertified vehicles (those over and above the number indicated on the original certificate.)

In the case of vehicles or engines which have originally been certified by an original equipment manufacturer (OEM) but are being modified to operate on an alternative fuel, the cost basis for the reduced fee amount is the value-added by the conversion, not the full cost of the vehicle or engine.

On the other hand, ICI vehicle or engine certificates cover vehicles or engines which are imported into the U.S. and that were not originally certified by an OEM. As such, EPA costs associated with providing various MVECP services for these vehicles has not yet been recovered. Since the Agency has not received a fee payment for the ''base vehicle'' or the vehicle imported before its conversion to meet U.S. emissions requirements, the cost basis for calculating a reduced fee for an ICI certification shall be based upon the full cost of the vehicle or engine rather than the cost or value of the conversion.

For ICI requests, EPA will continue the current requirement to calculate the full cost of a vehicle based on a vehicle's average retail price listed in the National Automobile Dealer's Association (NADA) price guide. By using the NADA price guide to establish a vehicle's retail sales price (or value), EPA ensures uniformity and fairness in charging fees. Further, it avoids certain problems such as falsification of entry documents, in particular, sales receipts. Where the NADA price guide does not provide the retail price of a vehicle, and in the case of engines, the applicant for a reduced fee must demonstrate to the satisfaction of the Administrator the actual market value of the vehicle or engine in the United States at the time of final importation. When calculating the aggregate retail sales price of vehicles or engines under the reduced fee provisions such calculation must not only include vehicles and engines actually sold but also those modified under the modification and test options in 40 CFR 85.1509 and 40 CFR 89.609 and those imported on behalf of a private or another owner. Furthermore, EPA is clarifying its policy such that importation of modification and test vehicles and engines will only be allowed under certificates that cover that type of vehicle or engine. For example, light-duty modification and test vehicles must be imported only under light-duty certificates, motorcycle modification and test vehicles must be imported only under motorcycle certificates.

EPA expected the new fees rule to apply during the 2003 model year and thus we did not anticipate any time gap between the existing fee provisions for alternative fuel conversion vehicles—which ran through the 2003 model year—and the implementation of the new reduced fees provisions for such vehicles. Therefore, by today's rule EPA is amending section 86.908–93(a)(1)(iii) in order for those 2004 model year vehicles that are converted to dual or flexible-fuel to still be eligible, under the existing fees rule, to the reduced fees provisions. Therefore, alternative fuel vehicle converters that received certificates of conformity for 2004 model year vehicles may, after July 12, 2004, request a refund for the difference between the fee that they paid and 1% of the value added by the vehicle conversion.

Previously EPA had an exemption of fees for small volume certification requests for vehicles using alternative fuels through the 2003 model year. EPA believes that this program has completed its purpose of providing a short-term relief for alternative fuel conversion manufacturers. Therefore, starting with the 2004 model year, EPA is no longer including this exemption for alternative fuel convertors, and such convertors shall be subject to the same fee provisions as other manufacturers. This includes the reduced fee provisions.

We believe that this fee reduction program will provide adequate relief for small entities that would otherwise encounter some economic hardship by a standardized fee. It is important to note that this fee reduction does not raise the fees for other manufacturers; EPA will simply collect less funds.

The change in the reduced fee provisions results from comments received regarding EPA's proposed reduced fee program as is discussed

more fully in section 6 of the Response to Comments Document.

*G. What Is the Finalized Policy for Refunds and Final Fee Payments?*

There are instances when an applicant submits a filing form with the appropriate fee, has an application undergo a portion of the certification process, but fails to receive a signed certificate. Under the current rule, the Agency offers the manufacturer a partial refund and retains a portion of the fee to pay for the work which has already been done. This policy has been difficult to administer and requires substantial Agency oversight. Consequently, we have finalized a simplified refund policy in today's rule. When a certificate has not been issued, for any reason, the applicant will be eligible to receive, upon request, a full refund of the fee paid. Optionally, in lieu of a refund, the manufacturer may apply the fee to another certification request.

EPA proposed that manufacturers would not have to pay a final fee if the difference between the final fee and the initial payment was less than $500. Conversely, EPA proposed that it would not issue refunds for amounts less than $500. EPA estimated that the reduction in fees received from the final fee payments of under $500 would be balanced by the refunds of less than $500 that would not be distributed. However, the decision to eliminate a minimum final reduced fee of $500 was made as a result of comments regarding EPA's proposed policy of only issuing refunds greater than $500. Therefore, since EPA will be paying full refunds, EPA is setting forth in today's rule that full payment must be submitted at true-up to avoid an overall deficit in its recovery of MVECP costs and to continue to abide by the intent of the IOAA and CAA. The new refund policy will not reduce the money collected by the Agency because the fee schedule is based, in part, on the number of certificates actually issued rather than the number of certification requests.

EPA is continuing its retroactive refund policy wherein a manufacturer that paid the full fee for a certificate but would have qualified for a reduced fee, may request a refund for the difference between the fee paid and the amount of the calculated reduced fee. The Agency will also fully refund any fees if the manufacturer overpaid based on their own projections. This change in and clarification of the refund policy is the result of comments received and are discussed more fully in section 6 of the Response to Comments Document.

## III. What Are the Changes Made to the Proposed Cost Analysis?

EPA published in the Notice of Proposed Rule Making (NPRM) fees that reflected our then projected test plans and associated costs for the regulated industries. In the time between the NPRM and the FRM, EPA has gathered additional information about the programs and tests that it plans to conduct and is in a better position to determine the actual costs of its compliance programs for 2004 and beyond than it was at the time of that the NPRM was written. As a result of an internal reassessment of testing capabilities and requisite levels of appropriate compliance oversight, along with comments received, EPA made several adjustments which have resulted in a change in costs of certificates for several industry categories. EPA has used the information on resources and lab capabilities to make the changes and, therefore, the current rulemaking more accurately represents the test program that EPA will put into place. EPA also notes that conducting a compliance program requires some flexibility to ensure that vehicles and engines are in fact meeting applicable standards throughout their useful lives. This flexibility requires that potentially more testing be conducted when problem areas arise, or perhaps a shift in the types of testing that EPA conducts. The program being finalized today provides a foundation for an adequate compliance program; however, EPA plans to continue assessing the requisite levels of testing to determine an appropriate compliance program. As EPA's programs mature and testing capabilities increase then the compliance testing program will likely adjust. Any further changes in costs based on such adjustments, beyond those made today, will be made through a future rulemaking. The changes are generally described below. The issues are discussed more fully in the Response to Comments document. The changes are also reflected in several new worksheets based on ''Appendix C'' which was attached to the ''Motor Vehicle and Engine Compliance Program Cost Analysis'' document. Thus several new worksheets have been generated from those originally found in Appendix C and EPA also provides an additional description of the changes to these worksheets. The new worksheets and description are available in the docket for this rule and are called ''Updated Cost Analysis.''

*A. Will There Be Fees for Yet-To-Be Regulated Industries?*

The NPRM for this rule proposed establishing the level of fees for classes of nonroad engines and equipment where emissions regulations were under consideration by EPA but were not proposed at the time of the Fees NPRM. The final fees rule does not establish fees for classes of nonroad engines and equipment where EPA had not proposed emissions standards for these classes before the Fees NPRM was published on August 7, 2002. Although the fees proposal included fees for marine SI inboard /sterndrive engines, the final rule does not set fees for these engines. The final fees regulation does include fees for all other nonroad categories that were proposed. This change is a result of comments received. A more detailed discussion may be found in section 1 of the Response to Comments Document.

*B. Is There a Change in Costs for Heavy-Duty Highway and Nonroad CI Engines From the Proposal?*

In the NPRM, EPA projected an appropriate yet ambitious test program for heavy-duty highway and nonroad CI engines that included in-use and confirmatory certification testing for heavy-duty highway engines that would be conducted in newly equipped HD test cells at its Ann Arbor laboratory, in-use on-vehicle testing for HD HW and NR CI engines, as well as testing that would take place at a contractor's facility that would include confirmatory certification testing, selective enforcement audits, and in-use dyno testing. In its reassessment of the testing capabilities EPA adjusted its testing projections to a level that is more representative of the current amount of testing that may be accomplished with the new testing facility in Ann Arbor and the new enhanced engine compliance program testing that will be conducted at a contractor's facility. The programs set forth in this rulemaking more realistically represent the level of testing that EPA will accomplish as it acknowledges that the in-use dyno testing at Ann Arbor and the enhanced engine compliance programs are new programs and will not reach the proposed level of testing for some time.

As part of the reassessment, EPA also reexamined the recoverable costs for the test equipment for HDE tests cells #1 and #2. As discussed below, the cost of the test equipment for these cells has been prorated to reflect the amount of time that the cells would be used for compliance testing. EPA believes that this is a more appropriate cost to be included in the cost study as it

acknowledges that the cells are not used for compliance testing 100 percent of the time.

The reassessment resulted in changes in several elements of the cost study, specifically, a decrease in the number of FTE that would be conducting the testing, a decrease in the percentage of test cell time in the Ann Arbor laboratory, a reduction of the number of in-use engines that would be procured for testing and, finally, a decrease in the tests to be conducted at a contracted facility. These reductions are discussed more fully below. The revised testing programs for heavy-duty highway and nonroad CI are as follows:

TABLE III.B–1; NUMBER OF TESTS FOR HD HW AND NR CI

| | Confirmatory cert at AA | In-use at AA | Confirmatory cert at contractors | SEA | In-use at contractors |
|---|---|---|---|---|---|
| HD HW | 7 | 3 | 0 | 5 | 5 |
| NR CI | 0 | 0 | 6 | 10 | 5 |

The reduced number of tests requires fewer FTE to oversee the testing. Therefore, the number of direct FTE and indirect FTE listed under the heavy-duty highway column has been decreased to 1.25 and .25 FTE, respectively, from 2.25 and .5 FTE. This is a net reduction of 1.25 FTE. The change is included on revised worksheet # 7.

EPA proposed that fees recover all costs identified as compliance costs. Worksheet #10 of the Cost Analysis Document detailed the items identified in the laboratory modification budget request including the costs for various pieces of equipment within the heavy duty test engine sites. One hundred percent of the equipment identified for two heavy-duty engine test cells, HDE #1 and HDE #2, related to compliance-oriented activities was listed as recoverable and, therefore, was included in the fees for the heavy-duty category. These cells, however, will not be used 100 percent of the time for compliance work as anticipated, rather, one cell will be used for one quarter of a year for compliance testing. Therefore, it is appropriate that the amount of the recoverable costs should reflect the actual amount of time that the cells are used for compliance work. The recoverable amount of the two cells listed on worksheet #10 has been decreased to include only one-quarter of the cost for the equipment identified solely for use in HDE cell #2. In addition, some of the compliance oriented equipment will be used for both HDE cell #2 and HDE cell #1. Of this equipment EPA is only recovering one-eighth of the cost based on evenly splitting the cost of such equipment between the two test cells and then recovering one-quarter of the cost associated with HDE cell #2. At this time EPA anticipates using HDE cell #2 approximately one-quarter of the year for compliance oriented activity. EPA plans to conduct three HD in-use tests and seven certification confirmatory tests during that time. Accordingly, the recoverable total for worksheet #10 has been reduced resulting in a decrease in the fees for heavy-duty highway (HDE HW) engine families. This decrease is reflected for this industry in the fees table, Table II.B–1 above.

Although EPA is estimating that the amount of test cell time that will be dedicated to compliance testing is one-quarter of the time of HDE #2, this does not limit the testing that EPA may conduct. In the future, EPA may choose to conduct additional HDE compliance testing, however, fees will not increase to reflect this change until a new fees rulemaking is promulgated. This change responds to a comment received and is discussed in more detail in section V.C. below and section 2 of the Response to Comments Document. Additional changes in the cost for this industry are explained further below and include a change in the estimated number of certificates and the amount of compliance testing that EPA anticipates will be conducted.

Proposed engine procurement costs for heavy-duty engines were shown in worksheet #12. EPA had proposed to test 10 in-use engines, two engine families of five engines per family. The cost to procure the engines is $25,240 for the first engine of the family and $21,860 for subsequent engines as explained in general terms in the Cost Analysis, page 52. The revised test plan consists of testing of three engines in one engine family. The new cost for procuring these engines, at the same cost per engine as proposed, is $68,960. The revised costs are shown on new worksheet #12.

The costs for the proposed Enhanced Engine Compliance Program were shown on worksheet #16. The number of tests were revised as follows: the number of confirmatory tests for certification at a contracted facility were decreased for NR CI and HD HW to 6 families and 0 families, respectively. EPA decided that it will conduct certification confirmatory tests at its Ann Arbor facility in test cell #2 when in-use tests are not being conducted. Five HD HW confirmatory certification tests are being planned per year in Ann Arbor. Furthermore, the number of selective enforcement audits of HD HW engines has been revised from 10 to 5 audits. The revised costs for the enhanced engine compliance program for NR CI and HD HW industries are $300,000 and $165,000, respectively. The revised costs are shown in new worksheet #16.

*C. Is There a Change in the Number of Certificates?*

In order to determine the cost for each certificate EPA determine the total compliance costs associated with each industry and then divided that cost by its best estimate of the number of certificates that would be issued to that industry within a given model year. EPA received comment about the number of certificates for light duty vehicles, heavy-duty highway engines and NR CI engines. EPA reexamined the number of certificates issued over the last three complete model years and used an average of the past two years of certification information to determine a divisor for the three industries noted above. The divisor for the light-duty vehicles and trucks cert/fuel economy portion of the light-duty fee will remain 405 and the divisor for the in-use portion of the light-duty fee will remain 348, as listed in the cost analysis. The divisor for the HDE HW category will be 148 (the number used in the cost analysis was 130) and the divisor for the NR CI category is 662 as compared to 603 used in the cost analysis. As a result of this recalculation of the number of certificates only, the fee for heavy-duty compression and spark-ignition engines went from $30,437 to $25,819 and the fee for nonroad compression-ignition engines went from $2,156 to $1,964. This change is a result of comments received and is discussed further in

section 2 of the Response to Comments Document. The number of certificates will be adjusted and fees changed accordingly beginning in the 2006 calendar year as discussed above in section II.C.

*D. Indirect Changes*

Program changes to one category may indirectly affect the fees in another category. Specifically, the decrease in the number of FTEs in worksheet #7 to the heavy-duty highway engine category resulted in slight changes to the rest of the categories. The change is a result of the use of the FTE method of allocating costs [7] to the different categories. This change in FTE changed not only the allocation of indirect costs to the heavy-duty industry but also changed the proportion of recoverable to nonrecoverable indirect costs. For this reason the costs for the light-duty and highway motorcycles, and Other categories changed even though there were no changes made to the compliance programs for these industries. This change resulted in a slight decrease in fees for the light-duty, motorcycle, ICI and Other industries.

## IV. What Were the Opportunities for Public Participation?

On September 19, 2002, a public hearing was held. The public comment period was open until October 19, 2002. EPA received comments before and after the close of the comment period. All comments were fully addressed to the extent possible. Commenters included manufacturers, manufacturer trade associations and representatives, and an environmental consulting firm. For a list of commenters, see Response to Comments document contained in EPA Air Docket No. OAR–2002–0023.

## V. What Were the Major Comments Received on the Proposed Rule?

Comments on a wide range of issues concerning the proposed Fees rulemaking were received. Summarized here are the comments concerning the major or significant issues and the rationale behind EPA's final decisions. These issues are considered in more detail in the Response to Comments document prepared for this final rule and included in the docket noted earlier.

*A. Legal Authority*

1. Authority To Assess Nonroad Fees

*What We Proposed:*

We proposed an update to our existing Motor Vehicle and Engine Compliance Program (MVECP) fees regulations under which we assess fees for highway vehicle and engines certification and compliance activities. We also proposed the collection of fees for nonroad engines certification and compliance activities which we have regulated since our initial fees rulemaking. The ''nonroad engine category'' includes: nonroad compression engines, marine spark-ignition outboard/personal-water-craft, locomotive, small spark-ignition, recreational vehicles (including, but not limited to, snowmobiles, off-road motorcycles and all terrain vehicles), recreational marine and compression-ignition engines, large spark-ignition engines (over 19 kilowatts (kW)) and marine spark-ignition/inboard-sterndrive engines.

Our proposal examined: the Independent Offices Appropriation Act (IOAA), several provisions of the Clean Air Act (CAA or Act), the Office of Management and Budget's (OMB's) Circular No. A–25, and various court decisions including *Engine Manufacturers Association* v. *EPA*, 20 F.3d 1177 (D.C. Cir. 1994) which considered the Environmental Protection Agency's (EPA's or Agency's) initial fees rulemaking.

We explained that section 217 of the CAA authorizes the collection of fees for our new nonroad vehicle and engine certification and compliance activities. Section 217 allows the Agency to ''recover reasonable costs'' associated with: new vehicle or engine certification activities conducted under section 206(a) of the CAA, new vehicle or engine compliance monitoring and testing under section 206(b) of the CAA (including such activities as selective enforcement audits (SEA) and production line testing (PLT)), and in-use vehicle or engine compliance monitoring and testing under section 207(c) of the CAA. We also explained that section 213 creates a statutory enforcement program which generally mirrors that which Congress created for the regulation of new highway vehicles and engines. We noted that EPA's nonroad standards created under section 213 are subject to the same requirements (*e.g.*, sections 206, 207, 208, and 209) and implemented in the same manner (including certification, SEA, and in-use testing) and under the same sections (as those referenced in section 217) as regulations for new highway vehicles and engines under section 202 (with modifications to the implementing nonroad regulations as the Administrator deems appropriate). We then concluded that because the text of section 217 does not specify either highway or nonroad engines and vehicles, and because the certification and compliance activities related to both are pursuant to sections 206 and 207, we believed collecting fees for new nonroad vehicles and engines' certification and compliance activities under section 217 was appropriate as an additional compliance requirement.

We also stated that the IOAA creates additional and independent authority for EPA to collect fees due to the same special and unique benefits that manufacturers of both new highway and nonroad vehicle and engine manufacturers receive from EPA under the certification and compliance program.

*What Commenters Said:*

We received several comments that questioned our authority to assess and collect fees for our nonroad certification and compliance program activities. EMA argued that the IOAA neither overrides nor provides the EPA with expanded fee assessment authority since section 217 specifically sets out the Agency's authority to assess fees and also incorporates the IOAA by reference. EMA also argued that Congress would not have enacted the specific provisions of section 217 if the IOAA was still intended to apply to EPA's mobile source certification and compliance activities.

In addition, EMA argued that since section 217 is entitled: ''Motor Vehicle Compliance Program Fees,'' Congress could not have intended that this section would authorize fees assessment for nonroad compliance activities. The commenter further noted the distinction drawn between motor vehicle and nonroad vehicle in sections 216(2) and (11) and the omission of nonroad vehicle and engine in section 217 even though both sections 213 and 217 were promulgated as part of the 1990 Amendments. EMA also pointed out that section 213(d) specifically subjects the nonroad standards to sections 206, 207, 208 and 209 but fails to incorporate or even mention section 217.

The Motorcycle Industry Council questioned the applicability of section 217 to off-road motorcycles and all-terrain vehicles (ATVs) and further urged the Agency not to assess fees until clarification of the Agency's authority and issuance of applicable emission standards for these categories.

Another commenter argued that EPA does not have the authority under section 213 to assess fees for nonroad engines and therefore, lacked authority to assess fees for lawn and garden engines. This commenter also considered our discussion of our

[7] For more information on the FTE allocation method see the Cost Analysis, page 10.

authority to assess fees for non-road engines and vehicles as ''tortured.''

*Our Response:*

EPA disagrees with these comments. EPA confirms its view that section 217 authorizes the Agency to recover all reasonable costs associated with certification and compliance activities for nonroad vehicles and engines, including nonroad equipment. EPA also believes that action taken under section 217 is to be consistent with the IOAA. We also believe that even if section 217 does not extend to nonroad vehicles and engines, then the IOAA separately provides the Agency with authority to assess and recover fees for nonroad and engine certification and compliance, and section 217 does not limit or override the IOAA.

A plain reading of section 217 indicates that EPA may recover the costs associated with all of its vehicle and engine certification and compliance programs conducted under sections 206 and 207 of the Act. Under section 217, the Agency may recover the reasonable costs associated with ''new vehicle or engine certification'' under section 206(a), ''new vehicle or engine compliance monitoring and testing'' under section 206(b), and ''in-use vehicle or engine compliance monitoring and testing'' under section 207(c). 42 U.S.C. 7522(a). Under section 213(d), the standards for new nonroad vehicles and engines are subject to all the applicable requirements of sections 206 through 209. The provisions of sections 206(a), 206(b) and 207(c) are therefore applicable to emissions standards for nonroad engines. Here, the nonroad certification and compliance activities for which EPA is adopting fees are actions taken pursuant to these specific provisions. These nonroad costs are clearly costs for ''new vehicle or engine certification'' under section 206(a), ''new vehicle or engine compliance monitoring and testing'' under section 206(b), and ''in-use vehicle or engine compliance monitoring and testing'' under section 207(c).

Section 217 expressly allows for recovery of costs associated with ''vehicle or engine'' certification and compliance, and nonroad vehicles and engines are clearly ''vehicles'' and ''engines.'' CAA section 216(10), (11). The text of section 217 does not limit its scope to ''motor vehicle or engine'' certification and compliance programs. Congress was clearly aware that the terms motor vehicle or engine are different from the terms nonroad vehicle or engine, and in section 217 chose to use the more general terms ''vehicle'' and ''engine'' to identify the scope of authority under section 217. Congress defined motor vehicles and engines distinct from nonroad vehicles and engines, but subjected them both to sections 206(a), 206(b) and 207(c), as well as other provisions in Title II. Congress authorized the same fundamental certification and compliance framework for both nonroad and motor vehicle programs, and used language in section 217 that would then allow EPA to collect fees for its certification and compliance costs for both motor vehicles and engines and nonroad vehicles and engines. Congress likely would have expressly employed the term ''motor vehicle or engine,'' [8] instead of ''vehicle'' or ''engine,'' had it intended to limit the reach of section 217 to motor vehicle or engine certification and compliance activity. There also is no specific provision in section 217 that can be read as precluding EPA from assessing fees for nonroad engines and vehicles. Collecting fees to recover the certification and compliance costs associated with nonroad engines and vehicles therefore is within the plain meaning of the language Congress used in section 217.

Moreover, there is nothing in the legislative history for section 217 to support the commenters' narrow reading. Rather, legislative history only evinces an intent for the Agency to ''recover the costs associated with operating'' compliance and certification programs. [H.R. 101–490, May 1990, 1990 U.S.C.C.A.N. 3355]. The terms used here are general in nature and reasonably indicate an intention to recover such certification and compliance costs. There is no indication in this text that Congress intended to recover only some of these costs, those associated with motor vehicles and engines. Congress likely would have at least identified or mentioned the limitation of section 217 to motor vehicles and engines and the inapplicability to nonroad vehicles and engines in this legislative history.

If, as the commenter suggests, EPA were to subject all nonroad engines and vehicles to the same applicable requirements as on-highway vehicles and engines except for fees assessment, this narrow reading of section 217 would not comport with the stated congressional intent that we ''recover the costs associated with operating'' our certification and compliance programs. [H.R. 101–490, May 1990, 1990 U.S.C.C.A.N 3355]. EPA's interpretation avoids this result and, consistent with the intent of section 217 and the IOAA, provides a reasonable mechanism to equitably collect fees for specific private benefits provided by the agency.

Commenters argue that Congress adopted both sections 213 and 217 in the 1990 amendments, but failed to specifically identify nonroad certification and compliance costs in section 217, and failed to reference section 217 in section 213(d), both indicating that Congress did not intend to include nonroad engines and vehicles in section 217's authority to collect fees. As noted above, this fails to account for the plain meaning of the language employed in section 217 and 213(d). In section 213(d), Congress specifically stated that nonroad engines and vehicles would be subject to the certification and compliance requirements of section 206 and 207, along with other provisions unrelated to fees. Congress also stated in section 217 that EPA could collect fees for costs related to engine and vehicles subject to these specific certification and compliance provisions in sections 206 and 207. Congress did not need to specifically mention nonroad engines and vehicles in section 217, and did not need to specifically mention section 217 in section 213(d) to authorize the collection of nonroad related fees, as the language it did use leads directly to that result. Similarly, Congress did not need to specifically mention motor vehicles or engines in the text of section 217 to authorize collection of fees for motor vehicle and engine certification and compliance costs under sections 206 and 207. The reference to section 206(a), 206(b) and 207(c) brings in both motor vehicle and nonroad related costs.

Clearly Congress could have made such specific references, but it instead used broader language in section 217 and a specific tie into actions under sections 206 and 207, where the plain meaning then covers both nonroad and motor vehicles and engines. It did not need to specifically refer to nonroad engines and vehicles to include them in section 217. The lack of specific references cited by commenters does not detract from the plain meaning of these provisions, and does not lead to the implication drawn by commenters. The plain text of section 217, read in combination with section 213(d), indicates that Congress intended to authorize collection of fees for both nonroad and motor vehicles and engines. There is no indication in the text of either section 217 or section 213(d) that Congress intended to limit section 217 to motor vehicles. This is

[8] *See*, for example, section 218: ''[t]he Administrator shall promulgate regulations applicable to *motor vehicle engines and nonroad engines* . . .'' 42 U.S.C. 7553 (emphasis added).

not a tortured interpretation, but a reasonable reading of the language used by Congress.

The Agency also disagrees with the contention that the title of section 217—''Motor Vehicle Compliance Program Fees''—indicates that Congress did not intend to authorize assessment of fees for nonroad vehicles and engines. ''Headings and titles are not meant to take the place of the detailed provisions of the statutory text; nor are they necessarily designed to be a reference guide or a synopsis.'' *Thistlethwaite* v. *Dowty Woodville Polymer, Ltd.*, 110 F.3d 861, 866 (2d Cir. 1997) (Internal quotation marks and alterations omitted), rather, ''[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'' *Consumer Product Safety Commission 447 U.S. 108, 100 S. Ct. 2055* (1980). Here, both the plain language of section 217 and it's legislative history indicate an intention to authorize collection of fees for all of the new vehicle and engine certification and compliance actions undertaken by EPA under section 206(a), (c) and 207(c). They provide no indication of an intention to limit such authority to motor vehicles and engines. In these circumstances, the use of the term ''motor vehicle'' in the heading of section 217 does not support rejecting a conclusion based on the language actually used by Congress.

Regardless of whether section 217 authorizes the collection of fees for costs related to nonroad engines and vehicles, the IOAA does authorize EPA to assess and recover fees associated with implementing the nonroad engines and vehicles certification and compliance programs. The plain language of the IOAA allows Agencies to charge and recoup reasonable costs for services that confer specific benefits upon identifiable beneficiaries[9]. It authorizes federal agencies to ''impose a fee only for a service that confers a specific benefit upon an identifiable beneficiary.'' *Engine Manufacturers Association (EMA)* v. *EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994). That case indicates that the certification and compliance actions for which EPA is collecting fees do in fact confer a specific private benefit. ''In a regulated industry a certificate of approval [such as a certificate of conformity] is deemed a benefit specific to the recipient.'' *Id.*

There is nothing in the text of the IOAA that indicates the IOAA does not apply to collection of nonroad related costs, assuming section 217 does not authorize such fees. The question then is whether section 217 itself limits the scope of the IOAA with respect to nonroad certification and compliance costs that are otherwise outside the scope of section 217.

Nothing in the text of section 217 indicates that it limits the IOAA in areas not covered by section 217. The introductory text of section 217 refers to the IOAA, stating that EPA's action under section 217 is to be ''consistent with'' the IOAA. The clear meaning of that phrase is that EPA is to apply the criteria of the IOAA in promulgating fees under section 217. It indicates an intention that action taken under section 217 is to be consistent with the IOAA. It does not indicate that Congress intended to deviate from, limit, or override the IOAA in areas outside the scope of section 217.

It seems quite unlikely that Congress would limit the reach of the IOAA in such an oblique fashion in section 217. If Congress intended to amend or overrule the IOAA through section 217, Congress likely would have used language indicating that intent. Instead Congress just generally provided that section 217 is to be read ''consistent'' with the IOAA. *See*, *Chisom* v. *Roemer*, 501 U.S. 380, 111 S.Ct. 2354 (1991). Such an important limitation likely would be clearly discernable from the Act and the legislative history of section 217, and it is not.

The enactment of section 217 even though the IOAA was already in existence does not indicate otherwise. Section 217 serves several valid functions, none of which is related to or indicate an intention to limit or overrule the IOAA for areas not covered by section 217. For example, section 217 creates the fees fund and specifies that fees collected are to be deposited in a special account at the United States Treasury. It also resolves any doubt that a certification and compliance program can be basis for fees. The reference to the IOAA in section 217 is best read in this context. Moreover, reading section 217 as overriding the provisions of the IOAA would amount to a repeal by implication which is generally disfavored.

Commenter's argument would mean that EPA is precluded from recovering the costs associated with the nonroad vehicle or engine certification and compliance program under either the IOAA or section 217. This narrow reading of section 217, as overriding the IOAA, would result in our conferring the specific benefits of our certification and compliance program on non-road engine manufacturers without the authority to recover associated costs for providing this service. Such an interpretation would be inconsistent with the overall purpose of the IOAA—that agencies be ''self-sustaining'' by charging fees to recover costs associated with rendering services to identifiable beneficiaries. Commenter's interpretation also does not have any clearly limited boundaries. The interpretation begs the question of the extent to which section 217 limits the IOAA for areas outside the scope of the IOAA. Is it limited to nonroad certification and compliance activities? Is it limited to other activities under Title II of the Act? Does it extend to all other EPA actions under the Act? The lack of a clear boundary to the limits of IOAA authority under commenter's interpretation indicates it is neither a likely nor reasonable interpretation of Congressional intent underlying section 217.

EPA believes the best interpretation of section 217 and the IOAA is to read them as acting in harmony and in conjunction with each other. For areas covered by section 217, EPA's actions under that section are to be consistent with the IOAA. For areas not covered by section 217, the IOAA continues to be in effect as before section 217 was adopted. This will appropriately ensure that fees' assessment for all of the Agencies programs will be adequately addressed.

Since a nonroad engine manufacturer, similar to the on-highway engine manufacturer, ''obtains a benefit from the entire [EPA] compliance program,'' we believe we may recover the reasonable costs of compliance testing, by a fee that does not exceed the value of the benefit derived by the manufacturer, under the IOAA. *See*, EMA, 20 F.3d at 1181 (D.C. Cir. 1994). Thus, we believe that if section 217 is inapplicable, and we do not believe so, the IOAA would provide authority to assess fees for nonroad engines and vehicles.

In light of the foregoing, we disagree with the commenters' narrow interpretation of section 217. Accordingly, we believe that it is reasonable to read section 217 as providing the requisite authority to collect fees associated with nonroad certification and compliance activities. EPA also believes it is reasonable to read the IOAA as providing independent authority for assessment of fees for nonroad engine compliance and certification activities, if section 217 does not authorize such assessment.

[9] ''It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.'' 31 U.S.C. 9701(a).

EPA believes today's action is appropriate under either section 217 or the IOAA.

Similarly, with regard to comments asserting our lack of fees' assessment authority for other nonroad engines such as off-road motorcycles, ATVs and lawn and garden engines, we believe as discussed above that both section 217 and the IOAA provide us with the requisite authority to ''recover the reasonable costs'' associated with the certification and compliance programs for these nonroad engines.

We also do not believe it is necessary to further ''clarify'' our authority to collect nonroad fees. We set forth the basis for our authority within the NPRM and today's action confirms that authority. We separately address the suggestion to defer fees' collection until issuance of the off-road motorcycles and ATVs emission standards in the Authority to Recover Anticipated Costs for Proposed Programs section below.

2. Authority To Recover Anticipated Costs for Proposed Programs

*What We Proposed:*

EPA published new fees for all industries in the fees rule NPRM, Table III.D–1, 67 FR 51410. EPA updated fees for light-duty vehicles, motorcycles and heavy-duty highway engines and vehicles that were covered by EPA's original fees rulemaking. The new fees for these industries are determined considering inflationary costs, additional costs associated with programmatic decisions, and some future costs known at the time of the proposal that were also known to be necessary to maintain an effective MVECP.

We also proposed fees for certain certification request types in the nonroad industry based on the fact that EPA has had emission regulations in place, prior to the fees proposal, covering such nonroad industries and thus an on-going compliance program exists for these industries. These industries include nonroad (NR) compression-ignition (CI), marine spark-ignition (SI) outboard/personal water craft, small nonroad SI, and locomotives. Some of these industries have had emissions programs in place since the 1996 model year.

In addition, we proposed fees for certain nonroad industries (marine CI > 37kW) where EPA had finalized the applicable emission regulations for that industry prior to the fees proposal but the compliance programs had not yet been implemented. Such industries would only pay a fee for certification at the time of their initial applications for certification.

Similarly, EPA also proposed fees for certain nonroad industries (large nonroad SI > 19kW, recreational marine > 37kW, and recreational vehicles (off-road motorcycles (MC), ATVs, snowmobiles, etc)) for which emission regulations had been proposed at the time of the fees proposal (August 7, 2002) but for which no emission regulations had yet been finalized.

Lastly, for a certain nonroad industry (marine SI inboard/sterndrive) we proposed fees although the emission regulation and proposal was just under development at the time of the fees proposal.

*What Commenters Said:*

EMA maintains that it is improper for EPA to quantify fees for anticipated nonroad certification and compliance programs that have not been implemented and in some cases not even proposed. EMA asserts that section 217 only authorizes the Agency to ''recover'' the actual costs that it incurs for administering established certification and compliance programs—''[T]he Administrator may * * * recover * * *'' EMA provides what it feels to be the plain meaning of ''recover'' which is ''to get back.'' EMA contends that for the industry categories noted above, there are no such actual costs for the Agency to tally and then seek to recover or get back. There is no proper basis for the Agency to merely anticipate expenses that will be incurred in the future. EMA maintains that EPA should not impose fees for nonroad categories that were not finalized before the NPRM, nor should EPA include fees associated with nonroad rulemakings that have not yet been finalized and published.

Additionally, EMA believes it is unlawful and improper to establish fees for programs that have not even been proposed as it presupposes the outcome of such rulemakings and so undermines and trivializes the administrative rulemaking process. Without knowledge of the final outcome of the predicate rulemaking the public cannot participate meaningfully in the rulemaking. EMA urges EPA to wait for the underlying regulatory measures to be finalized and implemented before charging manufacturers for anticipated costs.

The Alliance and the Association of International Automobile Manufacturers (AIAM) state that EPA incorrectly bases its costs on ''budget requests'' and ''plans'' rather than actual ''expenditures.'' It is inappropriate to base costs on projections. EPA should account for ''actual expenditures'' or where costs have occurred. In addition, EPA must account for each employee who works on MVECP activities and subtract out time not spent on such activities.

The Motorcycle Industry Council asserts that the compliance fees should not include anticipated or projected costs, future plans and services. The commenter further states that only when actual costs are determined should a fair fee be established and the costs recovered. The Council further requested that the Agency defer finalizing fees for off-road motorcycles and ATVs until the Agency finalizes the applicable emissions requirements and at that time, issue the applicable fees or a ''separate but concurrent fee rule.''

The Outdoor Power Equipment Institute (OPEI) supports EMA's comment stating that EPA lacks the statutory authority to recover anticipated costs for proposed programs prior to their adoption as final regulations.

*Our Response:*

As stated above, we believe section 217 authorizes the Agency to recover reasonable costs associated with vehicle and engine certification and compliance activities. We also believe that the IOAA authorizes the Agency to recover fees. We believe it is appropriate to recover all costs which EPA will incur to provide the necessary MVECP services to a manufacturer during the course of certification and in-use compliance activities. For several reasons EPA also believes it is appropriate to collect such fees prior to issuing certificates. EPA disagrees with EMA's suggestion that the language in section 217 authorizing EPA to establish fees ''to recover'' all reasonable costs means that EPA should ''tally'' its costs and then ''get back'' such costs. EMA does not suggest that EPA change its current regulatory practice of collecting fees in advance of granting a certificate. As such, EMA tacitly recognizes that EPA is indeed projecting the actual future costs associated with certification and in-use activities at the time it is adopting the fees rule and when it collects the fee with the application for a certificate. EPA believes it may project actual costs as long as the fee payers are on adequate notice through rulemaking of what those projected costs are and that EPA has a reasonable basis for deciding that such projections will be accurate. EPA's fees rule is designed to recover or get back its expected actual costs.

We believe this practice is consistent with the guidance provided by OMB Circular No. A–25, which states under its ''General Policy'' section 6(a)(2)(c) that when determining the amount of user charges to assess that ''User charges will be collected in advance of, or

simultaneously with, the rendering of services unless appropriations and authority are provided in advance to allow reimbursable services.'' In this instance, EPA does not believe that section 217 of the CAA limits EPA's authority such that EPA could only seek reimbursement of past expenses. In addition, EPA's continued practice of collecting fees in advance is the most appropriate method and provides applicants with the best information regarding the fees that are owed at time of certification.

The Agency has finalized rules for certain nonroad categories that were proposed but not finalized at the time this fees rule was proposed. With the one exception noted below, we also no longer are ''projecting'' what our compliance activities will be for many of the nonroad industries included in the ''Other'' category as the rules regulating emissions for those industries have been finalized and our expected compliance activities will be implemented.

We agree with commenters that we should not finalize fees at this time for nonroad categories that were not proposed at the time that the fees rule NPRM was published. Although EPA also proposed fees for the marine SI inboard/sterndrive industry, based on what we anticipated to be a modest compliance program, we agree with EMA that it is premature to require fees at this time. EPA believes that the cost study and analysis are proper for this industry but we choose to wait until the actual emission regulation for this industry is proposed, to provide ample opportunity for comment on potential fees. We anticipate finalizing fees for that industry in the final emission regulation. Therefore, in EPA's revised worksheet #2, in the ''Other'' column, we have reduced the total cost of compliance activities by $20,645 to reflect that the marine SI category will not be covered by this regulation. The fees associated with the remaining regulated industries in the ''Other'' column remain the same—$826 per certificate. This change is reflected in section 85.2405 of the regulations, item 14 of the fees table, which indicates the fees for marine engines, excluding inboard and sterndrive engines.

As EPA has maintained throughout this rulemaking, we believe it is appropriate to recover all costs which EPA will incur to provide the necessary MVECP services to a manufacturer for certification and in-use. For several reasons EPA also believes it is appropriate to collect such fees prior to issuing certificates. We also believe that when any significant budget changes occur that affect allocations of resources dedicated to any MVECP activity, or regulatory changes that affect MVECP activities, or EPA evaluations of the compliance rates and associated environmental impacts change, then it is likely appropriate for EPA to reexamine its updated MVECP activities and determine whether any changes in costs have occurred.

We believe it is appropriate within this rule to require fees for those industries that are in fact required to meet EPA's emission standards in order to receive certificates of conformity. EPA proposed fees for certain nonroad industries where the compliance date of the emission standards had not yet occurred (meaning no applications for certification had been submitted), and we believe that such manufacturers had adequate notice of the regulatory emission requirements they would be required to meet in the future and how EPA intended to impose a fee related to EPA's services. Based on the regulatory structure of the emissions program for these industries, EPA also had a reasonable basis for deciding that the projected costs are accurate. As noted in the proposal, EPA intends to only conduct a modest MVECP program for these industries.

In addition, we also believe it is appropriate to require fees for those industries that are newly regulated since EPA issued the fees proposal. At the time of the fees proposal such industries (large nonroad SI > 19kW, recreational marine > 37kW, and recreational vehicles) were on notice of the emission requirements they would likely face (including the requirement of certification) due to existence of NPRMs for such industries prior to the fees proposal. Based on the regulatory structure of the emissions program for these industries, EPA also had a reasonable basis for deciding that the projected costs are accurate. The final emission regulations have since become effective for these industries and EPA anticipates no changes in its modest projections of the compliance activities and costs associated with these newly regulated industries.

*B. Assessment of Costs*

1. Costs Apportioned to Industries

*What We Proposed:*

Our proposed fees were based on past and projected actual costs of providing certification and compliance services to the various mobile source manufacturers and industries. We grouped these various manufacturers and industries into fee categories and we explained that separation of industries into groups with other similar industries was in order to ensure that each category pays fees only for the services that it receives.[10] We also explained that EPA conducted a cost analysis to determine the various compliance activities associated with each fee category and associated annual costs for each certification request type. We set forth our analyses in the Motor Vehicle and Engine Compliance Program Costs Analysis (Cost Analysis Document). We further explained that where the level and type of EPA activity and costs were similar for each industry then those industries were grouped together, the total number of certificates were added together, and equal fees were allocated to each anticipated certificate. (See Cost Analysis Document at p. 21.) In this way, EPA determined the portion of the MVECP costs dedicated to each certification request type.

We proposed three ''fee categories'': 1. Light-Duty, which includes light-duty vehicles and trucks, motorcycles, and because of similar compliance programs medium-duty passenger vehicles and certain heavy-duty vehicles were included, with subcategories created where it was determined that a different level of services and costs were expected to be expended; 2. Engines, which includes heavy-duty highway (HDE HW) and nonroad compression-ignition (NR CI) engines (excluding marine and locomotive), with subcategories created where it was determined that a different level of services and costs were expected to be expended; and 3. Other Engines and Vehicles, where currently EPA only plans to do certification review and includes marine CI and SI engines, nonroad SI engines, locomotive engines, large spark-ignition engines, recreational marine engines, recreational vehicles, heavy-duty engine evaporative systems and heavy-duty engines certified for California only.

*What Commenters Said:*

EMA maintains that the language of section 217(a) of the CAA relevant to heavy-duty engine and vehicle manufacturers, which states in part, that EPA's fees for such manufacturers ''shall not exceed a reasonable amount to recover an appropriate portion of [the] reasonable costs [of the MVECP]'' requires EPA to only recover a portion and not all of the certification and compliance program costs. EMA believes such portion should be from the costs just associated with the heavy-duty engine and vehicle manufacturers.

[10] See original Cost Analysis Document starting at page 16 (step 5 of ''general steps'').

Although EMA initially stated that they did not have a definitive percentage or portion that EPA should assess, EMA in a subsequent comment stated that the appropriate ''portion'' of EPA's certification and compliance costs for heavy-duty engine and vehicle manufacturers to bear is 50 percent.

EMA states that the plain language of section 217(a) requires that only a ''portion'' of the costs associated with the heavy-duty engine (HDE) compliance program can be recoverable and thus 100 percent of such costs is not a portion. EMA suggests that EPA's interpretation (that heavy-duty manufacturers pay 100 percent of the costs allocated to that industry) would provide no purpose or effect to the last sentence in 217(a). Since the basic premise of fee collection is to impose fees for specific benefits conferred upon an identifiable beneficiary,[11] EMA suggests that it is self-evident that EPA would only collect such appropriate fee even without the language in the last sentence. Further, EMA points to the EMA decision and claims it does not validate EPA's interpretation of 217(a). EMA suggests that the dicta from that decision only states that ''Congress intended that the EPA charge manufacturers of heavy-duty engines and vehicles something less than it charges other manufacturer'' and the EPA must ''do something that moves non-trivially in the direction that Congress intended'' and thus does not hold that EPA may assess HDE manufacturers 100 percent of all costs and yet still comply with the requirement in 217(a) which requires that only a portion of such reasonable costs be assessed.

*Our Response:*

EPA agrees with EMA's suggestion that the general principle of section 217 and of the IOAA is to generally recover all costs that are specifically tied to a specific benefit for an identifiable party. The introductory sentence on 217(a) suggests that ''all reasonable costs'' might appropriately be calculated for all the MVECP services as noted in 217(a)(1–3) for all industries and then EPA is subsequently directed to charge the heavy-duty engine and vehicle manufacturers its appropriate ''portion'' of the otherwise aggregated costs.

We disagree with EMA's interpretation of the EMA decision. The court discusses EMA's claim that heavy-duty manufacturers should pay less than the ''fair share'' of costs occurs in section III C of the decision. The court noted that ''According to EMA, the Congress intended that heavy-duty manufacturers be charged a fee that recovers less than their fair share of the total cost of the Compliance Program because they face smaller sales volumes and more onerous compliance testing than do manufacturers of light-duty vehicles and engines.'' The cost methodology EPA used in the fees rule that the court reviewed, and used for the current rule, was to segregate the costs for each certificate type (including HDE HW CI and SI) and divide such total costs by the number of certificates expected to be issued within that certificate type. As noted on worksheet #2 of the original Cost Analysis, the total costs for HDE HW CI and SI is $3,956,759 and cost per certificate is $30,437. Worksheet #2 of the revised Cost Analysis shows that this amount is now $3,193,596. The amount per certificate is $21,578, a reduction of $8,859 per certificate in the final rule (this reduction is a result in a recalculation in the number of certificates expected to be issued, a reduction in the costs associated with the upgrades to the test cells in Ann Arbor, and other adjustments) whereas the fee per light-duty vehicle certificate is $33,883.

The court in EMA (page 1183) acknowledged EPA's methodology of and intent to give effect to section 217(a) by segregating the costs of heavy-duty, light-duty, and motorcycle certificates and by waiving the fee to the extent that it exceeds one percent of the projected sales revenue for any manufacturer. The court suggests that it is reasonably clear that Congress intended that the EPA charge manufacturers of heavy-duty engines and vehicles ''something less than it charges other manufacturers'' although ''the statute is silent as to both the means by which and the degree to which the agency is to do so.'' The court continued and found that what EPA had done, in segregating costs as noted above, was an appropriate way to implement section 217(a) for heavy-duty manufacturers.

We also note that the discussion that EMA cites from EMA regarding the fact that the IOAA already provides the necessary authority and requirement that fees for service only be collected when a specific benefit falls upon an identifiable industry includes additional discussion of what is an ''identifiable beneficiary'' versus the general public. The court states that ''[a] general benefit conferred upon an *industry*, such as the public confidence that may attend the mere facts of its regulation, is insufficient to justify a fee.'' (italics added). The court continues and states that ''[i]n a *regulated industry*, a certificate of approval is deemed a benefit specific to the recipient.'' (italics added).[12] The court clearly differentiates between the regulated industry versus the general public.

All such manufacturers receive the specific benefit of a certificate from EPA and are otherwise regulated. However, we believe the language of section 217 authorizes us to use a methodology that identifies the costs directly associated or portioned by EPA that relate to the heavy-duty engine and vehicle industry. We have in fact identified such costs for this industry and apply no other costs to the fees collected from it. EPA believes this is an appropriate way to implement section 217(a).

*What Commenters Said:*

EMA then points to section 217's use of the term ''reasonable'' and legislative history on this section which is to the effect that ''[t]he authority granted to the Administrator under this section [217] must be carefully exercised so as to avoid proceeding with 'gold plated' compliance programs since the costs will not fall on the government.'' (*See* H.R. 101–490, May 17, 1990). EMA suggests that a 50 percent allocation would also give recognition to the tremendous outlays of capital and man-hours that HDE manufacturers already spend to conduct extensive certification and compliance testing and given the new costs to comply with the 2007 model year requirements and its own in-use not-to-exceed (NTE)[13] compliance testing.

EMA believes that 50 percent is the appropriate portion of the costs that should be collected in order to protect against ''gold-plated'' programs and by ensuring that EPA maintains a meaningful role in funding such programs. It would also recognize the capital and man-hours that heavy-duty manufacturers spend to stay up with EPA requirements, including costs for additional data and new test cells in order to meet the 2007 standards. In addition, EMA again claims that the manufacturers face extensive in-use NTE compliance testing in the future and thus in many ways are already paying more than their fair share of compliance cost burden.

*Our Response:*

EPA believes the best interpretation of section 217 is that the costs associated with heavy-duty manufacturers be

[11] EMA cites *EMA* v. *EPA,* 20 F.3d 1177, 1180 (D.C. Cir. 1994) for this proposition. The court held in this instance that ''Under the IOAA an agency may impose a fee only for a service that confer a specific private benefit upon an identifiable beneficiary.''

[12] EMA at 1180.

[13] Not-to-exceed requirements specify that engine emissions must not exceed a specified value for any of the regulated pollutants.

segregated from other types of manufacturers. In reaching this conclusion EPA is guided by the sentence in section 217 that EMA relies upon ''In the case of heavy-duty engine and vehicle manufacturers, such fees shall not exceed a reasonable amount to recover an appropriate portion of such reasonable costs'' and the preceding sentence which states ''The Administrator may establish for *all* foreign and domestic manufacturers a fee schedule based on such factors as the Administrator finds appropriate and equitable and nondiscriminatory, including the number of vehicles or engines produced under a certificate of conformity'' (italics added).

We believe it is appropriate to segregate the MVECP costs associated with each industry and then to divide the number of certificates within each respective industry by its segregated costs. In order to be nondiscriminatory we also believe that all industry groups (or ''fee categories'') must reimburse the government for all the costs for their respective industry group. The costs that each industry group must incur to comply with EPA's emission requirements such as manufacturers' own NTE testing, test cell development, etc., is properly considered by EPA when it adopts such requirements, *e.g.*, when it adopts emission standards. The cost to industry is taken into account in that rulemaking. This rule, however, focuses on EPA's actions and associated costs. We believe that is consistent with the directive in the IOAA that special benefit programs be self-sustaining to the extent possible and the first sentence of section 217(a) authorizing EPA to ''* * * establish fees to recover all reasonable costs.''

Thus, we believe that the directive to recover ''reasonable,'' ''appropriate,'' and ''equitable and nondiscriminatory'' costs or fees means that EPA must use clear and explained accounting measures, make reasonable estimates of costs, and properly distribute its costs to specific programs where specific benefits are bestowed to a specific industry group.

Therefore, EPA believes the purposes of section 217 and IOAA are also best served by collecting all costs incurred by the Agency but only collecting the fair share of costs of HDE compliance that is associated with such activity and therefore EPA makes no adjustment of its fees based on commenters' suggestions.

EPA believes that the certification and compliance program designed for the heavy-duty industry is appropriate and reasonably correlates with the contribution of emissions from this sector to the overall inventory of emissions from mobile sources and also is very reasonable when compared to the level of activity and costs associated with other industry categories, including the light-duty industry. EPA believes its certification and compliance program is reasonable, if not modest, for the heavy-duty industry and in no respect can it be considered a ''gold-plated'' program. From EPA's original proposed cost of $30,347 for each heavy-duty certificate we have now reduced the cost in the final rule to $21,578.

2. Costs Unrelated to the MVECP

*What We Proposed:*

We proposed recovery of those costs incurred by the Agency in conducting new vehicle and engine certification, new vehicle and engine compliance monitoring and testing and in-use vehicle or engine compliance monitoring. The proposed fees are based on what EPA believes to be all recoverable direct and indirect costs associated with administering these activities. Recoverable costs include all labor, direct and indirect program operating costs associated with the activities listed above, and EPA's general overhead costs. Operating costs include such things as the purchase of equipment or property as that specified on worksheet #10, which is the itemization of laboratory modernization budget request.

The Cost Analysis contains worksheets which further explain the associated costs. Several worksheets within the Cost Analysis set forth the costs that are applicable to the heavy-duty highway certification type.

*What Commenters Said:*

In its initial comments, EMA expressed the concern that EPA was seeking to assess and recover fees for EPA's developmental test lab facilities and personnel in Ann Arbor. EMA stated that since these facilities were not utilized in connection with the MVECP for manufacturers' heavy-duty on-highway or nonroad engines compliance or certification activities but instead are used for general regulatory efforts and technological feasibility demonstrations, such efforts and demonstrations do not confer specific benefits on any identifiable beneficiary or manufacturer.

OPEI supported EMA's comment and contended that EPA cannot impose certification fees on small spark-ignition (SSI) engine manufacturers for costs that are not directly related to processing SSI engine certification. Both commenters considered costs associated with EPA's developmental test lab facilities and personnel associated with such facilities in Ann Arbor, Michigan as ''unrelated costs.''

*Our Response:*

EPA agrees with commenters that fees should not be assessed for the costs associated with using Ann Arbor's test laboratory facilities and personnel for activities not related to the MVECP such as general regulatory efforts and technological feasibility demonstrations, or for other developmental purposes. As EPA noted in the NPRM, the costs of activities such as regulation development, emission factor testing, air quality assessment, support of state inspection programs and research were not included with the costs study nor are included in the fees proposed. (See 67 FR at 51409). As noted on worksheet #10, of the $14,130,000 associated with the laboratory modification budget, only $8,485,000 was deemed recoverable as laboratory equipment associated with compliance testing activities. Specifically, those costs linked to the ''advance engine test sites'' and the ''climate control test facility,'' which fall under the heading ''Critical Regulatory Developmental Test Capability'' are not labeled as recoverable and thus are not included in the fees proposed. Worksheet #10 also reflects that other costs associated with developmental testing are not labeled as recoverable. As further noted below, EPA has further refined these costs and has eliminated other costs not determined to be MVECP related.

We did not include the costs of developmental lab facilities and personnel in Ann Arbor in our fees calculation. The lab facilities that were included as recoverable in the cost study are for engine testing that EPA plans to begin in the near future. Therefore, the costs are associated with compliance testing and are recoverable by fees.

*What Commenters Said:*

In its initial comments, EMA also contended that EPA does not currently conduct any HDE testing at Ann Arbor and therefore questioned both the need for such testing along with the additional labor costs of conducting such testing along with the other costs of such testing as summarized on worksheet # 3.

*Our Response:*

EPA notes that the need for such testing partially arises from purely the emission contribution from heavy-duty engines which is second only to light-duty on-highway vehicles for mobile sources and represents approximately one-half of the emissions of light-duty vehicles. Furthermore, EPA has experienced a relatively high degree of the use of defeat devices and non-

conformity of heavy-duty vehicles in recent years. The discovery of the level of noncompliance in this industry led to the perception that EPA was not doing an adequate job of overseeing the HDE industry. In 1998 consent decrees were entered into with almost the entire HDE HW industry, to resolve claims of several cases of noncompliance. The Agency is only now beginning on its efforts to test some of these vehicles during in-use operation over their useful lives. EMA's comment suggests that it may be unnecessary to implement a new HDE compliance program (or that it is not necessary until the 2007 requirements commence), or that such a program is untenable in Ann Arbor. EPA believes these comments are misplaced. As noted from revised worksheet #1, EPA's proposed fees program allocated a cost of $3.2 million for the HDE on-highway industry. This amount has been further reduced by today's final rule.

EPA plans at this point to conduct dyno certification testing and in-use testing on 9 families out of 150 families, and approximately 11 additional families using portable test equipment for in-use surveillance testing. Thus, EPA believes that given the past rates of compliance with emissions standards of these industries, along with emissions contributions, demonstrates that creation of a reasonable compliance program for the heavy-duty industry is reasonable.

EPA believes it has developed and is now in the process of implementing a cohesive and comprehensive compliance program, including a significant component in Ann Arbor, for HDE on-highway engines. EMA is correct that a testing program in Ann Arbor did not exist at the time of the fees proposal, however, EPA has extensive experience in testing light-duty vehicles and has identified a similar need for heavy-duty in order to ensure that any emission problems are found in a timely manner. Similarly, EPA has extensive experience with procuring vehicles for testing and estimating costs and we note that commenters did not question the accuracy of such costs. EPA has invested the requisite resources to conduct a testing program in Ann Arbor and plans to use that facility along with testing conducted in the Washington, DC area and at any necessary outside contracted laboratories as explained at 2.2.4.

3. Costs for In-use Programs

*What We Proposed:*

We proposed continuance of the Agency's current compliance methods for light-duty vehicles, motorcycles and heavy-duty highway vehicles and engines which insure the overall compliance of a vehicle or engine with applicable emission standards throughout their useful life. EPA explained that this certification process may include confirmatory testing (testing conducted by EPA in-house to confirm manufacturer test data) and compliance inspections and investigations (such as selective enforcement audits) and in-use testing. (67 FR at 51406–51408). Currently, EPA conducts testing of in-use heavy-duty highway engines and nonroad compression-ignition engines at costs of $297,200 and $72,800, respectively. This testing is screening in nature, and uses portable test equipment on-board the vehicle. This screening is used as an indicator of engines that may be noncompliant. To assist in this testing, EPA is planning to purchase commercial emission detection units that can monitor emissions from heavy-duty engines and nonroad compression-ignition engines during use at costs of $80,000 and $20,000, respectively. These costs are shown on worksheet #13.

We also proposed fees for new compliance testing for in-use heavy-duty engines. Some of the testing will be conducted in the Ann Arbor laboratory at a test site that is being upgraded to conduct compliance-level tests. The proposed [14] costs for the in-use testing conducted at EPA's Ann Arbor facility included the equipment costs listed in revised worksheet #10 ($385,000 per year for heavy-duty), the labor listed in revised worksheet #7 (1.50 FTE), and the cost of procuring in-use heavy-duty engines listed under Engine Procurement—Heavy-Duty, on revised worksheet #12 ($68,960).

In addition to the new testing that will be conducted in Ann Arbor, we are planning an Enhanced Engine Compliance Program. Revised worksheet #16 reflects the costs for this program. This will be conducted at a contracted facility (with the exception of the selective enforcement testing) and includes selective enforcement testing and in-use engine dyno testing for both heavy-duty highway engines and nonroad CI engines and certification confirmatory testing for NR CI engines.

*What Commenters Said:*

EMA opposed fees based on EPA's expectation of conducting an enhanced in-use compliance program when, at the same time, the Agency is in the process of developing and implementing a manufacturer-run in-use testing program.

EMA states that EPA's current in-use testing is just geared toward regulatory development and feasibility testing of its measurement equipment. EMA further contended that the fees are inappropriate because the NTE emissions standards and related testing and requirements do not become effective for HDE HW engines until 2007, much later than when the new fees become effective, and are not yet proposed for NR CI engines.

*Our Response:*

Regulatory development and feasibility testing were not included in the cost study, and were not included in the costs that will be recovered by fees. Furthermore, the cost study only assesses the costs of compliance and confirmatory testing.

EPA acknowledges that one purpose of the current in-use testing has been developing the portable testing devices and related testing procedures, but the primary purpose now and certainly in the future of the enhanced engine compliance program will be compliance testing. This is to implement the prohibition against use of defeat devices and to conduct compliance testing of new emission control components based on both the 2004 HDE HW standards and the 2007 standards. Thus both our screening testing and laboratory testing will commence in 2004 and not await the additional requirements (such as NTE standards) in 2007. Our current on-vehicle testing has several compliance purposes, including: as a general screening tool to see how such vehicles might perform based on federal test procedure (FTP) conditions, as a tool to insure that no heavy-duty engine manufactures are employing defeat devices. As explained below, in addition to continuing surveillance-like testing of small samples of vehicles per engine family, EPA plans to conduct more compliance testing to measure the durability of new emission components and to measure such vehicles or engines in laboratory conditions.

EPA has included the additional HDE HW compliance programs in its cost analysis and is recovering such costs by today's rule because such programs are part of EPA's plan to increase its compliance oversight for this industry.

We also note that the near term compliance testing will not be for ''regulatory development'' purposes but rather to insure the durability on new technologies being applied to heavy-duty on-highway and nonroad engines. These new technologies have not undergone extensive in-use scrutiny and assurances of durability. As a result an

[14] Note that the final costs for the HDE equipment costs is $77,000 per year, not $193,000 as proposed.

in-use compliance program is necessary now to ensure that the applicable new emission standards are being met.

*What Commenters Said:*

EMA states that manufacturers will be conducting a comprehensive in-use not to exceed (NTE)[15] testing program of on-highway HDE during the 2005 and 2006 time period and will subsequently conduct a manufacturer-run in-use program. EMA maintains that as a result, EPA and the California Air Resources Board (CARB) will not engage in routine in-use testing of HDE engine families. Thus, EMA argues that EPA's in-use testing will be minimized, not enhanced, due to the manufacturer-run in-use testing.

*Our Response:*

EPA agrees with EMA's comment that manufacturers will be conducting an in-use NTE pilot testing program during 2005 and 2006 yet we disagree with EMA's characterization of this testing as ''comprehensive.'' In fact during this pilot period it is expected that EPA will be required to conduct its own testing if determination of the scope or causes of potential nonconformance was required and that EPA may be required to generate additional testing data should a remedial action for nonconformance be sought. EPA also expects, and therefore agrees with EMA's comment, that manufacturers will be conducting their own in-use verification testing program in 2007, and thus EPA will not be conducting routine testing that is duplicative of manufacturer testing. Independent from the manufacturers' testing throughout this time period, EPA sees the need to conduct the projected levels of in-use testing to ensure compliance with all emission standards, including NTE standards. EPA believes that an EPA-run in-use presence will continue into the future at the levels projected.

The enhanced in-use program is planned by EPA to address the Agency's compliance testing needs. New technologies, such as catalysts and traps, will soon be added to heavy-duty on-highway (both for the 2004 and 2007 regulatory requirements) and nonroad compression-ignition engines which have not undergone extensive in-use scrutiny and assurances of durability. Thus we believe it is appropriate to establish an in-use compliance presence to ensure that the applicable new emission standards are being met. In terms of equity with other industries and in terms of the need for the compliance programs, we believe that EPA's proposed compliance program and the associated fees are appropriate. In addition, as noted above, EPA's in-use testing will not be duplicative, but as envisioned by EPA's settlement agreement with EMA, EPA's testing will be used for purposes of verifying any manufacturer testing as necessary in order to make final compliance determinations and other separate testing to supplement the testing of engine families not tested by manufacturers.

As evidence of EPA's intent to conduct the current and future HDE HW and NR CI testing programs, EPA has formally requested an additional $8 million in the fiscal year 2004 budget request sent to Congress ''to help ensure compliance with the more stringent and complex Tier II and Diesel regulations for cars, heavy-duty diesel engines, and gasoline and diesel fuels that will take effect in FY 2004.'' Included in the request is the ''development of a credible heavy-duty compliance program'' as Congress has previously questioned EPA's oversight of this industry. We believe it is appropriate to include the new testing program costs associated with heavy-duty compliance in the budget request just as it was appropriate to include the $10 million associated with the recoverable portion of the $14 million spent on the laboratory modernization projections which, at the time, was based on both EPA's design plans and needs and a similar request to Congress for such funding which has since been funded in subsequent appropriations. We also note that much of the testing that will be conducted during the 2005–2006 pilot testing period will be for purposes of refining testing protocols, etc. and that EPA must maintain a reasonable level of compliance testing in order to ensure that emission standards are being met while vehicles are operating during their useful lives. Similar to EPA's in-use verification program conducted by manufacturers in the light-duty industry (the Compliance Assurance Program (CAP 2000)), EPA believes it will continue to test at projected levels beyond 2007 when manufacturers will be expected to be required to conduct their own in-use testing as EPA testing in conjunction with manufacturer testing forms the basis for adequately determining the performance of engines during in-use operation.

*What Commenters Said:*

The Alliance/AIAM maintains that since CAP 2000 transferred the obligation of in-use verification and confirmatory testing to manufacturers, EPA appears to be charging fees for costs that are already borne by manufacturers. They also cite to a statement regarding our authority to require SEA testing in the NPRM and contend that since CAP 2000 also reduced or transferred EPA's workload as it relates to SEA testing, that any costs associated with SEA testing is inappropriate.

*Our Response:*

Although the Alliance/AIAM maintains that CAP 2000 transferred the obligation of in-use verification and confirmatory testing to manufacturers, in fact what CAP 2000 accomplished was the shift in emphasis that had been placed on certification to in-use performance and in-use testing. EPA neither transferred nor intended to transfer EPA's own in-use verification and confirmatory testing to the manufacturers. Rather, after CAP 2000 was implemented, EPA began gradually increasing the amount of in-use testing that it was conducting, initially at the Virginia test laboratory (VTL) in Alexandria, Virginia, then transferred this testing (during the time when testing at VTL was being phased out) to EPA's Ann Arbor laboratory where the in-use testing program continues to operate and increase in scope. The costs of the in-use testing program reflects our implementation of the new Tier 2 emission standards and associated new technology.

We did not propose any fees for SEA testing for the light-duty program, therefore, the Cost Analysis Document does not reflect any light-duty costs for SEA testing. However, this does not preclude EPA from increasing its in-use testing program or conducting SEA testing if it deems it necessary in the future. Any related fee change would be through Notice and Comment rulemaking.

*What Commenters Said:*

EMA indicated that EPA should readdress the assessment of fees for in-use testing once the manufacturer-run program is up and running. EMA also stated that by the time EPA conducts a new rulemaking for HDE fees, the HDE manufacturers will have been making ''double payments.''

*Our Response:*

EPA believes that its initial modest compliance program that has been designed for the HDE industry, and for which costs will be recovered by today's rulemaking, is appropriate and is expected to continue for the foreseeable future. The Agency recognizes the significant role the HDE manufacturers will play in contributing to a comprehensive compliance program by conducting their own in-use testing. As such EPA anticipates that it may re-examine the scope of its own HDE HW

[15] Not-to-exceed requirements specify that engine emissions must not exceed a specified value for any of the regulated pollutants.

in-use compliance program and its effectiveness at a time when its new program is fully developed and can also be examined in the context of a mature manufacturer-run in-use program. This reexamination will focus on whether the manufacturer in-use testing program as finally adopted and implemented indicates that changes are appropriate in the nature or extent of EPA testing. EPA will examine the scope of manufacturer-run testing and determine whether any redundant or unnecessary in-use testing is being done by EPA or whether additional EPA testing is required. EPA believes that this will timely address the concern of ''double payments,'' in order to avoid manufacturers paying for testing that they are conducting and also paying fees for EPA to conduct the same testing.

4. Costs Too High for Industry

*What We Proposed:*

In the Cost Analysis Document we explained that each request for a certificate of conformity within a certification request type is potentially subject to an equal amount of EPA expenditure related to the applicable certification, SEA, and in-use compliance monitoring and audit programs, and where applicable, fuel economy. EPA believes it is fair and equitable to calculate fees in a manner whereby the fee for each certificate within a certification request type is approximately the same.

The Cost Analysis divided the various affected industries into three separate categories, light-duty vehicles, heavy-duty and nonroad compression-ignition engines, and ''Other.'' Each category was further subdivided if the amount of testing or EPA services varied significantly. The ''Other'' category was not subdivided as it included vehicles and engines that would only receive certification review and some minimal testing. The fees were determined by dividing the total costs of services provided by EPA to this category by the projected number of certificate applications that would be received by manufacturers included in the category.

*What Commenters Said:*

Mercury Marine opposed the fee structure for marine engine manufacturers. It asserted that EPA's proposed fee of $827 per certificate would have a 2003 model year impact to Mercury Marine of over $23,000.

Mercury Marine stated that the marine industry agreed to redesign its products to meet EPA regulations in 1994 and 1995. They noted that the cost of this redesign is in excess of 500 million dollars industry wide. Mercury stated that the discussions at that time certainly did not include any additional costs for certification.

Mercury Marine stated that the marine industry is sensitive to changing costs and is unable to deal with the fees that EPA proposed.

*Our Response:*

As mentioned above, both section 217 and the IOAA direct EPA to recover fees associated with the various engine and vehicle certification and compliance programs. Today's rulemaking is in compliance with the strictures of both provisions. Industries that have not had to pay fees until now will be charged fees to cover the services provided by the EPA. EPA understands that the new fees are an expense that many manufacturers have not had to pay and that this expense may be difficult to budget into a manufacturer's expenses. This is why EPA notified manufacturers of the new fees early in the rulemaking process to give manufacturers time to budget for the new fees.

To reduce their fees burden, EPA included liberal waiver provisions for small engine families to assure manufacturers that the cost of fees will never exceed one percent of the projected aggregate retail value of the vehicle or engines being certified. It should be noted that when a fee is reduced the cost of the compliance services are covered by the government and are not distributed among other fee payers.

Although we did not mention certification fees as part of the marine engines rulemaking, we believe that we have given adequate notice of the new fees in order for manufacturers to prepare for the new fees. Furthermore, since 1992 light-duty vehicle and heavy-duty engine manufacturers have been paying fees. Thus, we also believe that the new fees schedule will ensure the equitable treatment of all manufacturers that are certified by EPA.

*What Commenters Said:*

Briggs and Stratton stated that small engine applications are simple and straightforward, they require a minimum amount of review by EPA, there is no OBD II, fleet averaging, etc. Therefore, only a minimum fee should be set for certification, lower than those in the ''Other'' fee category. Because manufacturers of the small engine industry have a larger number of smaller engine families and the engines are of a low cost then this provides an additional justification for lower fees.

Outdoor Power Equipment Institute (OPEI) suggested that lawn and garden engines should be treated differently than the other engines and vehicles in EPA's category for ''other engines.'' OPEI asserted that EPA took the position that it incurs the same expense, whether processing a certificate for a very complex locomotive engine, or an engine used to power a hedge trimmer. Furthermore, OPEI comments that although it is not familiar with the intricacies of locomotive engine design and usage, EPA cannot possibly spend the same amount of time certifying a locomotive engine as a lawn and garden engine.

*Our Response:*

To reflect the services we provide to industries within a category (see worksheet #2 for the categories ''LDV and Highway Motorcycles,'' ''HDE Highway and Nonroad CI,'' and ''Other'') in some instances we further subcategorized the fee categories. In addition to assessing the time that may be spent reviewing certification applications within a category or subcategory, we also assessed whether the applicable industry type would receive a similar level of compliance testing and associated costs. The goal of this is to develop subcategories that are expected to receive similar compliance activity and related costs. EPA's cost analysis for the fees rule divided categories into subcategories whenever there was a substantial difference between the level of services given to a subcategory. For example, EPA conducts pre-certification testing and in-use testing for light-duty vehicle and trucks. Conversely, EPA plans to conduct much less motorcycle testing within that same category. Therefore, the fees for the motorcycles are less than the light-duty vehicle and light-duty truck fees. EPA plans, for the industries in the ''Other'' category, to conduct the same level of effort for certification review and also plans only a minimal amount of testing. Testing is a major cost that separates subcategories and is not a significant cost for this category. Therefore, the industries in the ''Other'' category remained grouped together.

The certification information submitted by the individual industries largely consists of test data, descriptions of engines or vehicles in the engine family, and forms indicating the standards that the vehicles or engines meet. This information does not vary significantly whether the engines are large and complex or small and less complex. Certification review of all industries in the ''Other'' category consists of a review of the information that the manufacturer submits. The review includes determining that the engine or vehicle is being certified in the correct certification category, that the certification tests were conducted on the worst case engine or vehicle, that the forms were filled out correctly, and

that the vehicle or engine meets EPA's emission standards. In this respect, all of the certificate applications submitted by the industries included in the ''Other'' category are the same.

In the course of EPA's review of certification applications, certain items may be reviewed more closely for one application than for another application, items such as defeat devices, auxiliary control devices or new technology. EPA decides whether these items should be reviewed depending upon the history of the industry, the manufacturer and other factors. Although the level of review of these items may change the total time spent on an individual or an industry's applications, the difference is not significant and does not merit a separate subcategory. Furthermore, other factors such as assisting new manufactures and reviewing incomplete applications require more time than the average difference in review time for industries' applications. For these reasons, EPA decided that the applications in the ''Other'' category are provided basically the same review and testing services and, therefore, should be assessed the same fee.

*What Commenters Said:*

OPEI stated that EPA had an overly simplistic arithmetic system of evenly dividing the certification costs between such disparate industries (as locomotive and trimmers) and OPEI finds this inappropriate and inequitable. OPEI asserted that, using the figures generated by EPA, more than half (546) of the 1,027 engine families in the Other Industries category are lawn and garden engines. In addition, OPEI stated that the simple arithmetic used by EPA results in unfairly loading the ''lion's share'' of the certification costs onto a single industry which should only be responsible for its own share of certification costs.

*Our Response:*

EPA divided the costs attributed to the services provided to the ''Other'' category by the number of projected certification applications from the industries included in this category since each application entails approximately the same amount of review or effort by the Agency. Regardless of the disparity of the applications, the amount of time spent on locomotive applications and trimmer applications will be about the same.

The projected number of applications for the lawn and garden industry constitutes more than half of the applications that will be received and processed by the Agency. Over half of resources that EPA spends on the ''Other'' category will be spent on lawn and garden engines. For this reason, we believe it is appropriate, equitable and nondiscriminatory for the lawn and garden industry to pay more than half of the costs for the ''Other'' category.

*C. Cost Study*

1. Number of Engine Families

*What We Proposed:*

EPA grouped industries into three fee categories (industry groups): (1) Light-Duty, consisting of light-duty vehicles and highway motorcycles; (2) Engines, consisting of heavy-duty highway and nonroad compression-ignition engines; and (3) ''Other'', which contains other vehicles and engines. We proposed a fee schedule based upon the recoverable costs for each certificate type under each fee category and the number of known and projected certificates issued annually for that certificate type. We then divided our recoverable costs by the number of certificates expected to be issued to manufacturers within that certification request type. Thus, for example, we determined the recoverable costs for the nonroad CI industry as $1,300,155 and the number of certificates issued as 603 and the resulting fee is $2,156. (Revised worksheet #2 of the revised Cost Analysis shows updated cost for the NR CI industry to be $2,205,895, the updated number of engine families to be 662 resulting in a new fee of $1,822.)

We determined the number of certificates expected to be issued by examining EPA's certification database. For currently active certification programs, we listed the number of certificates based on the latest information at the time of the proposal which was for the 2001 model year (67 FR at 51406). For other newly regulated industries for which certificates have not yet been issued, we projected the number of certificates based on discussions with manufacturers and information presented to EPA during the emission standards rulemakings for such industries. Id.

*What Commenters Said:*

EMA states that EPA significantly understated the number of HDE on-highway and nonroad CI engine certificates that are issued annually which resulted in an overstatement of the fees that should be allocated to each certificate. EMA stated that in 2001, we issued 159 HDE HW and 661 nonroad CI certificates. EMA also asked for an explanation as to why more current years and certification data should not be used since that would be more reflective of the increase in engine families.

The Alliance/AIAM stated that the Agency did not provide an explanation for the estimated number of certification requests used in calculating the fees. The Alliance/AIAM expresses concern that the number of light-duty certificates appears to be based on CAP 2000 assumptions; assumptions that they maintain have not materialized. In addition, they contended that EPA's Tier 2 and heavy-duty regulations, as well as CARB's low emission vehicle (LEV II) regulation, will likely result in creation of more certification requests than projected and lead to collection of more fees by EPA. As a result, EPA may collect more fees than it is entitled to if it receives more certification requests than projected.

The Alliance/AIAM submitted further comment that they expected 35 additional certificates to be issued for light-duty vehicles for model year (MY) 2004 and that the number of certificates would either remain the same or increase as a result of Tier 2. The Alliance/AIAM was hesitant to predict the effect of the CAP 2000 rule on the number of certificate requests.

The Alliance/AIAM suggests that EPA should base its fee calculation on the most current number of issued certificates. Because this number may fluctuate and because it may be difficult to project future certification trends, they suggest that EPA keep track of the trends and assess a fee based on the average taken from several years. Lastly, they suggest that this process be done by rulemaking to prevent EPA collecting more fees than appropriate.

*Our Response:*

EPA's intention throughout this rulemaking process is to determine with a reasonable level of certainty the recoverable costs of implementing its MVECP and assessing fees per certificate to cover such costs. Thus, we agree with the comment that we should use the most current and accurate number of issued certificates. However, EPA does not agree with the comments of EMA that the number of certificates used in the cost determination should remain the same regardless of the impact on fees collected. Simply put, EPA believes it should only recover what it anticipates to be its actual costs and should devise a reasonable system in order to charge a fee that most closely matches its final actual costs and final number of certificates to be issued in a given year. As explained below, EPA is including a ''rolling average'' formula to be applied in 2006 and thereafter in order to more accurately reflect the number of certificates issued each year and the corresponding fee that is owed per certificate.

In light of the comments that we received, EPA gathered information

regarding the number of certificates for HDE HW, nonroad CI, and light-duty vehicles and trucks, motorcycles and ICIs from several databases, and reexamined its certification numbers for the last three years, 2000, 2001 and 2002 which comprise EPA's most recent and complete information.

Using an average of the past two years of the most recent complete certification information (2001 and 2002) we determined the average number of certificates for HDE HW, nonroad CI, and light-duty vehicles and trucks certification request types. For the other types EPA saw no need to reexamine its projected number of certificates nor did EPA receive any comment. For the light-duty vehicles and truck category we have chosen to keep the number 405 as used in the proposal. Although the actual average is 382 for the 2001 and 2002 model years, we believe it is likely that there will be at least a modest increase in the number of light-duty vehicle and truck certificates given the complexity of Tier 2 standards. In addition, information submitted by the Alliance/AIAM states that the number of additional certificates for 2004 may be as high as 35. This would bring our projection to 417 for 2004. However, this is a projection and we do not have complete confidence in this number. Therefore, we have decided to retain the proposed 405 certificates in the final rule.

For the HDE HW category we have determined, based on a re-examination of our database and discussions with representatives from EMA, that 148 certificates is a more accurate projection, rather than the 130 in the proposal. This will result in a slight reduction of fees for such certificates. For NR CI we have also revised the number slightly upward to reflect a more accurate projection of 662 rather than the proposed. We have re-calculated the fees amount for each of these categories and this is reflected in the new fees table (a new revised worksheet #2 of the Revised Cost Analysis available in Docket OAR–2002–0023) and at 40 CFR § 85.2405(a).

*D. Automatic Adjustment of Fees*

*What We Proposed:*

We considered the effect of inflation on the MVECP and explained that inflation may have an impact on our recovery of the full costs associated with the program. Thus, we proposed, beginning with the 2005 model year, an annual automatic adjustment of fees based on the annual change in the Consumer Price Index (CPI). We also proposed a formula to enable manufacturers to calculate the increase. We also solicited comments on alternate ways of adjusting fees on account of inflationary factors. (*See* 67 FR at 51410)

We explained that we intended to issue annual letters, again beginning with the 2005 model year, informing manufacturers of the adjusted applicable fees. The proposed formula included an ability to project future fees due to the CPI adjustment based on two model years before the adjusted fee model year. Thus, for model year 2005 EPA proposed a formula whereby the CPI for MY2003 (as determined by July 2003 CPI number) is compared to the CPI from 2002. We also solicited comments regarding notification procedures of the new fee amounts. *Id.*

*What Commenters Said:*

One commenter urged the Agency not to include an annual automatic adjustment and maintained that an ''automatic'' increase in fees based on the CPI for ''all items'' should not be implemented as the actual costs of MVECP will be impacted by many factors more significant than the CPI and such factors are not significantly correlated with the general rate of inflation. This commenter also suggested that the Agency's formula for annual adjustment is improper because many of the underlying costs are actually one-time capital expenditures that will not fluctuate at all in response to any changes in the CPI.

*Our Response:*

In order to comply with both section 217 and the IOAA, and to timely collect fees based on actual costs and to collect fees for such costs at time of certification, EPA believes that it is most practical and appropriate to collect fees based on what it reasonably believes will be its actual costs at the time new certification applications are received. Thus EPA continues to believe it most appropriate to determine its current costs and how such costs may be affected by future events, including events such as inflation or the addition of new compliance programs. Although EPA does recognize that several variables exist which may influence the actual future costs that EPA incurs to provide MVECP services, including changes to its budget (and resulting changes to EPA's expenditures on certain compliance programs such as contract costs for testing and procurement of testing vehicles, etc.), EPA believes that such general historical budget variability (appropriations for most of EPA's costs don't change dramatically from year to year and general contract costs remain relatively unchanged) has not in fact significantly affected EPA's actual costs as compared to increases associated with annual inflation costs. However, by today's rule we are narrowing the budget items that will be affected by the inflation adjustment to further limit those items that may indeed be affected by general budget variability.

We believe it is reasonable to consider the effect of inflation on the costs of conducting our various certification and compliance programs. However, at this time, EPA chooses to only implement a fee schedule that will include some adjustment by calendar year for labor costs as these costs can be reasonably determined as explained below.

We also agree with comments that fees should not be adjusted for one-time capital expenditures or for other fixed costs. Because several components of the MVECP reflect items that have a ''fixed cost'' (for example, the costs associated with the Lab Modernization), EPA has changed the inflation formula to address concerns regarding ''one time costs'' and that such cost not be adjusted by the CPI. At this time, EPA will only adjust labor costs each calendar year because, as explained below, we can reasonably determine the effect of inflation on these costs.

EPA also believes that to some extent it may not be appropriate to automatically adjust fees for the costs of some compliance programs, including current direct program costs (*e.g.* contract costs) despite the general history of such costs increasing by some amount each year. Because EPA is not only continuing to implement its many current compliance activities but is also implementing several new compliance programs that may not have a predictable cost increase each year that tracks the inflation rate, EPA is not adjusting such direct program costs.

EPA believes that the determination of the labor requirements to cover the numerous compliance activities was accurate and that such labor requirements will remain constant or perhaps slightly increase within the next few years. Such labor costs (as expressed in annual salary increases or decreases) for EPA historically track a rate of increase (or decrease) that is at least as high as that of the CPI.[16] Thus, we are finalizing our regulations with a provision for automatic adjustment of

[16] EPA normally uses Federal payroll and non-payroll inflators for budget projections issued by the Office of Management and Budget (OMB) when OMB submits the President's Budget to Congress and the assumptions used for the ''inflators'' are higher than the CPI inflation adjuster that EPA is choosing to use to account for increases in labor costs in today's rulemaking. For example, in the fiscal year 2004 (FY 04) President's Budget to Congress, EPA used a payroll (or labor) inflator of 1.048 and for FY 05 through FY 13 EPA used an inflator of 1.040.

labor costs for each fee category based on the changes in the CPI. The fee formula and the table with labor and fixed cost values are discussed in detail in section II.B. above.

EPA notes that manufacturers may have some concern regarding the proper budgeting for its costs for future certification applications and thus the regulations note that EPA will provide notification to manufacturers at least 11 months in advance of the calendar year in which new fees are due. If an event such as a rulemaking occurs that causes a significant change in the number of certificate applications received, the Agency will reexamine the formula to determine whether adjusting the fees based upon the number of certificate applications is still applicable.

*E. Effective Date and Application of New Fees*

*What We Proposed:*

We proposed the ''effective date'' of our new fee schedule as 60 days from the date of publication of the final rule (67 FR at 51411). We also proposed applying the new fees to 2003 and later model year vehicles and engines. Id. In addition, we proposed excluding ''complete'' certification applications received prior to the effective date of the new fees regulation (including any remaining 2003 certification applications). *Id.*

*What Commenters Said:*

One commenter suggested that the new fee schedule should take effect for certification applications for the model year following the model year in which the final rule is published. In this way the manufacturers will have certainty regarding the appropriate amount of the certification fee to be submitted and thus will not have to guess the date that EPA will deem their certification application complete.

The Alliance/AIAM stated that EPA's proposal to increase fees (for light-duty vehicle manufacturers) for manufacturers that submit 2003 and later model year certification requests received on or after 60 days from publication of the final rule creates uncertainty regarding the appropriate fee to submit with each application. The commenter notes that it cannot project when EPA will issue the rule. This information is needed for it to perform its necessary budgeting to assure that it has necessary funds to cover the increase.

*Our Response:*

EPA understands that it would be helpful to manufacturers to have a date before which they are assured that they will be paying the old fees so that they can budget with certainty up to that date. For this reason EPA is finalizing the implementation date as 60 days from the publication of the final rule. We believe that at least a 60 day lead time between when the rule is published and when applicants will be required to pay new fees is adequate and appropriate. EPA is again guided by the principle that its compliance programs ought to be self-sustaining to the extent possible and that because we are incurring costs at this point in time that new fees should commence. Although we anticipated that the final fees rule would become final in fiscal year 2003 (FY03), and based our projections of costs to be incurred during that time, we believe it even more appropriate that we collect fees in FY04 (during which this rule becomes effective) as our compliance programs based on new requirements such as Tier 2 and the 2004 HDE regulations will be in place and our anticipated budget increases will be in place.

In addition, manufacturers have been informed of the new fees rulemaking and commencement of new fees in FY03 for over 2 years. An advance fees rulemaking briefing was held for regulated industries on August 29, 2001 in Ann Arbor, MI. At that time EPA provided a draft of the fees schedule and cost study. The purpose of the briefing was to give businesses enough time to plan for fees in their 2003 FY budgets. Furthermore, the proposed rule was published in August 2002 giving manufacturers notice of the fees rulemaking and implementation time periods. Therefore, the new fees will be applicable to any new certification applications (for MY 2004, or 2005) submitted and received more than 60 days after publication of this rule in the **Federal Register**. The new fees will not apply to any certification applications received by EPA prior to the effective date of the regulations, providing that they are complete and include all required data.

*F. Reduced Fees*

1. Reduced Fee of One Percent Aggregate Retail Price

*What We Proposed:*

EPA proposed to continue the current two part test which, if met, would qualify an applicant for a reduction of a portion of the certification fee.

A reduced fee is available when:

(1) The certificate is to be used for the sale of vehicles or engines within the U.S.; and

(2) The full fee for the certification request exceeds one percent of the projected aggregate retail price of all vehicles or engines covered by that certificate.

Manufacturers that qualify for a reduced fee pay one percent of the aggregate retail price of the vehicles and engines covered by a certificate. Under the reduced fee provision, we proposed to retain this requirement to ensure proper balance between recovering the MVECP costs and mitigating economic burden. EPA invited comment on the continued use of the one percent multiplier, 67 FR 51412.

The Agency proposed two separate pathways by which a manufacturer may request and pay a reduced fee amount. Under the first pathway, manufacturers seeking a reduced fee would include in their certification application a calculation of the reduced fee and a statement that they meet the reduced fee criteria.

Under the second pathway, manufacturers who, due to the nature of their business, are unable to make accurate estimates of the aggregate projected retail price of all the vehicles or engines to be covered by the requested certificate, would pay one percent of the retail selling price of five vehicles, engines or conversions when applying for a certificate or a minimum fee of $300. *Id.*

*What Commenters Said:*

VSC contended that the proposed minimum ''5-car-up-front deposit'' was unreasonable and that the Agency had failed to provide a rationale for its proposal. VSC also stated that it is just as common, if not more common, for an ICI's certificate to cover a total of one (1) car as opposed to 5. VSC noted that EPA had previously acknowledged that it is difficult for ICIs to work with a system that requires them to predict the number of cars they will import. VSC stated that the same associated problem would arise under the Agency's proposal.

VSC suggested that the one percent low volume fee should allow the ICI to pay one percent of the value of the cars to be covered by the certificate for which the ICI has a contract when making a certification request. VSC further suggested that for additional cars imported under the certificate, ICIs should pay one percent of the value of each car as each car is imported, until payment of the standard $8,394 fee. VSC noted that under a pay-as-you-go system, EPA would receive fees at the time of certification or importation and ICIs would only pay for cars they are actually working on and importing.

*Our Response:*

In response to comments received EPA has modified its reduced fee provisions to respond to many of the issues raised. The revised reduced fees

provisions also include two pathways that are discussed in detail in section II.F. above.

The first pathway will be available for engine families having less than six vehicles, none of which has a retail price of more than $75,000 each. Manufacturers seeking a reduced fee shall include in their certification application a statement that the reduced fee is appropriate under the criteria. If one percent of the aggregate retail price of the vehicles or engines is greater than $750, the manufacturer must submit a calculation of the reduced fee and the fee. If one percent aggregate retail price of the vehicles or engines is less than $750 the manufacturer will submit a calculation of the reduced fee and an initial payment of $750. In the event that the manufacturer does not know the value of all of the vehicles to be imported under the certificate, it may use the values of the vehicles or engines that are available to determine the initial payment.

As suggested by VSC, after the initial payment has been submitted, the above reduced fee provisions will allow manufacturers to pay one percent of the retail price of each vehicle or engine as needed. This pay-as-you-go provision will give ICIs and other manufacturers the advantage of only paying a $750 (equivalent to the average fee for two imported vehicles) or one percent of the value of the vehicles initial payment and then paying for additional vehicles as needed. If the initial payment is greater than the final fee, the manufacturer may request and receive a refund for the difference.

Under the provisions we are finalizing today, the difference between the initial payment and the final reduced fee will not be required until after the end of the year. Furthermore, there is no $300 minimum fee as was proposed. Therefore, EPA believes that the reduced fee provides flexibility and mitigates any unreasonable economic burden that a full fee may present to manufacturers with small engine families.

2. Retroactive Payment Under Reduced Fee Program

*What Commenters Said:*

EMA submitted an additional alternative to the reduced fee pathways. EMA suggested that manufacturers who pay the full fee at the time of certification should also have the ability to seek refunds at the end of the model year if the fee paid exceeds one percent of the retail sales. According to EMA, this would enable EPA to receive the fees up front and avoid any unnecessary delays while not adding too much year end burden for manufacturers already required to produce year-end production volume reports.

*EPA Response:*

Currently, the retroactive reduced fee option is available for those engine families/test groups that meet the one percent reduced fee provision. Our response is just to clarify the process. A manufacturer that pays the standard fee for an engine family or test group and later determines that it meets the criteria for a reduced fee may qualify for a retroactive reduced fee. Under today's provision, the manufacturer may be required to submit a report card and a refund request at the end of the calender year for the amount of the difference between the fee paid and one percent of the aggregate retail sales price of the vehicles or engines covered by the certificate.

*G. ICI Issues*

1. ICIs and SBREFA

*What We Proposed:*

In section VIII.B. of the proposed rule we concluded that our proposed fees will have no significant economic impacts on a substantial number of small entities. In addition, we also stated that our reduced fee provisions would limit the impacts of this rule on small entities. (Section VIII.B., Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.* (67 FR 51414).

*What Commenters Said:*

VSC stated that the Regulatory Flexibility Act, 5 U.S.C. 601–612 was amended by SBREFA, Public Law 104–121, to ensure that concerns regarding small entities are adequately considered during the development of new regulations that affect them. VSC further quoted the SBREFA amendments in which Congress stated that ''uniform Federal regulatory * * * requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting, and consulting costs upon small businesses * * * with limited resources[,]'' and directed agencies to consider the impacts of certain actions on small entities.

VSC suggested that EPA consider two points: (1) ''the significant economic impact the proposed rule has on small entities; and (2) any significant alternatives to the proposed rule which would ensure that the objectives of the proposal were accomplished while minimizing the economic impact of the proposed rule on small entities and providing relief to small certifiers of vehicles.''

*Our Response:*

We are committed to minimizing the burden of the fees regulations on small entities or entities with small engine families to the extent feasible while still meeting the statutory requirements to charge fees. The Agency did consider the economic impacts of this rule on small entities, however, we believe this rule will not have a significant economic impact on a substantial number of small entities. We reviewed the rulemakings that set emission standards for the industries affected by the fees rule, including those manufacturers affected by the recreational vehicle rule. The review showed that approximately 108 small businesses will be paying fees. The Agency examined the cost of the fees and determined that the average cost for manufacturers of all sizes, across industry sectors, is approximately $.41 per vehicle or engine.

Nevertheless, to mitigate possible economic hardship EPA is adopting an alternative to the full certification fee requirement including reduced fee provisions to help small volume entities meet the regulations while ensuring the fees rule objectives can be accomplished. The reduced fee provisions limits the impact of this rule on small entities to one percent of the aggregate retail sales price of the vehicles or engines covered by a certification request. Hence, the fee a manufacturer would pay will not exceed one percent of the aggregate retail sales price of the vehicles or engines covered by a certificate. This one percent amount represents a modest cost of doing business. EPA also believes enough notification of this fees rule was provided to allow manufacturers enough time to plan for fees in their budgets.

*What Commenters Said:*

VSC suggested that EPA should recognize that ICIs are not OEMs. VSC further stated that SBREFA requires this distinction and also compels EPA to adopt a fee system that carefully considers ICIs and how they differ from OEMs. VSC requested that we consider and include the fact that ICIs are small businesses that, on the average, import fewer than 100 vehicles annually.

*Our Response:*

EPA believes that although ICI manufacturers are often small businesses and in some instances may differ from OEMs, both ICIs and OEMs are certificate holders. As certificate holders, ICIs are required to meet certain certification and compliance requirements. These requirements

include meeting emission standards, and also include undergoing recall, maintenance instruction, warranty, running changes, emissions testing and labeling, and fuel economy testing and labeling which are the same requirements with which light-duty OEMs must comply. EPA incurs costs for conducting these types of services.

Under the ICI category of the cost study, we have calculated fees only for the services applicable to ICIs and thus, ICI certificates cost considerably less than certificates for other vehicle manufacturers. EPA also believes that the reduced fees provision, while enabling the objectives of both section 217 and the IOAA to be met, minimizes the economic impact of this rule on small entities or entities with small engine families.

*H. Other Topics*

1. Fee Payment Timing

*What We Proposed:*

EPA proposed that fees must be paid in advance of receiving a certificate (67 FR 51410). We also emphasized that the Agency would not process applications until the appropriate fees had been fully paid. (67 FR 51411).

*What Commenters Said:*

Three commenters suggested that the Agency should not require fees payment prior to issuing certificates.

*Our Response:*

In most instances, we begin reviewing certification applications and, in some cases, complete our review, prior to receiving fees payment. Thus, we do not necessarily suspend application review because of non payment of fees. However, because we cannot issue a certificate of conformity before receipt of fees, we are maintaining the requirement that fees be paid in advance of submitting an application for certification. We believe this will ensure that we do not delay the issuance of certificates.

2. Refunds Less Than $500 and Final Fee Payments Less Than $500

*What We Proposed:*

For applicants who fail to obtain certificates and who subsequently request refunds, we proposed full fee refunds of amounts exceeding $500. This was a change from the existing requirement that allowed for partial refunds when applicants fail to obtain a signed certificate (see 40 CFR § 86.908–93(b)(1), as amended by § 86.908–01(b)(1)). We also proposed the option of applying the refund to another certification request.

Further, we proposed the continuation of the existing requirement of providing partial refunds resulting from decreases in the aggregate projected retail sales price of vehicles or engines covered by the certification request. (See, 40 CFR 86.908–93(b)(2) and 86.908–01(b)(2)). We also invited comments on whether to limit refund requests to $500. (67 FR 51412).

As discussed in section II.F. above, we proposed a reduced fee provision that includes calculating a final reduced fee within 30 days of the end of the model year and ''true-up'' of any additional fees owed within 45 days of the end of the model year. Under the 1992 fees rule reduced fee applicants pay an additional waiver fee any time the aggregate projected retail sales price of the vehicles or engines to be covered by a certification request changes. Also, there was no minimum amount due before payment was required. (*See,* 40 CFR 86.908–93(a)(5)).

*What Commenters Said:*

EMA supported our proposal to allow manufacturers to request a full refund in cases where a certificate is not issued. EMA suggested that 40 CFR 85.2407(a) should read ''may,'' instead of ''shall.'' EMA suggested that we clarify that manufacturers are entitled to a full refund regardless of the reason for non-issuance of a certificate.

EMA suggested that 40 CFR 85.2407(b) should read ''shall'' instead of ''may.'' EMA also suggested that refunds should be predicated upon a decrease in ''actual'' rather than ''projected'' sales prices.

EMA further objected to proposed 40 CFR 85.2407(b)(3) and (b)(4)(vi) and argued that manufacturers should be entitled to any and all refunds regardless of the amount.

*Our Response:*

EPA agrees with EMA's comment regarding refund language. Regulatory language has been amended to reflect these changes in 40 CFR § 85.2405(a) and (b). Upon request from a manufacturer EPA will refund fees. This includes instances of overpayment, when the manufacturer withdraws an application or when EPA denies a certificate as well as any other circumstances that would lead to a certificate not being issued.

However, we disagree with the comment that refunds should be predicated on the decrease in the aggregate ''actual'' price rather than the aggregate ''projected'' price. This is because not all of the vehicles or engines would have been sold and the actual price may not be available at the time of the refund request. Therefore we have revised the regulatory language to indicate projected or actual price. The manufacturer should use whichever is more accurate.

EPA agrees that it should not limit refunds to $500 minimum. Therefore EPA is not adopting proposed § 85.2407(b)(3) and (b)(4)(vi). However, the rationale behind EPA's proposal that manufacturers should not be required to pay a ''true-up'' payment of less than $500 was balanced out by the proposal that refunds would be limited to amounts of $500 or more. We believed that the amounts not paid in refunds would equal the payments not received for ''true-up.'' Therefore, since EPA will be paying full refunds, EPA is setting forth in today's rule that full payment must be submitted at true-up to avoid an overall deficit in its recovery of MVECP costs and to continue to abide by the intent of the IOAA and CAA.

3. Reduced Costs for California-Only

*What We Proposed:*

EPA proposed a separate California-only fee for only the light-duty and heavy-duty fee categories. No California-only fee was proposed for the motorcycle, ICI, Nonroad CI and Other categories because EPA's responsibilities for vehicles and engines are not decreased even though certification is only requested for the State of California.

*What Commenters Said:*

One commenter argued that our proposed fees for California-only certificates was inappropriate since the Agency did not provide any benefits to manufacturers.

Echo stated that the ''Other'' category should have reduced fees for California-only families because other categories have reduced fees for California-only. Echo stated that the full fees for these families cannot be justified and that EPA should not charge for service not provided. Echo also observed that CARB may decide to add its own fees further raising the cost to manufacturers.

OPEI commented that EPA should not impose certification fees on California-only engine families that are not sold outside of California. OPEI questioned the utility of requiring this dual certification burden. The commenter further argued that the proposed fees should be waived since California-only engine families are sold only in California, and as a result, do not generate national sales revenue. OPEI, further requested that the certification fee be waived with respect to California-only engine families.

*Our Response:*

The Clean Air Act requires that vehicles sold in the United States be covered by a federal certificate of conformity including those sold in

California. The EPA receives applications and certifies all vehicles and engines sold in the U.S. The EPA review and testing required for California-only certification, and therefore the benefits received, are no less than that required for other certificates. Test results generated by EPA from certification tests of these vehicles and engines are shared with the CARB to assist in its certification process. However, the California-only fee is less than the standard fee because EPA does not incur the cost of the in-use program. The CARB conducts an in-use program for these categories, but at this time EPA does not. Thus the fee for California-only certificates for light-duty and heavy-duty vehicles and engines reflects the EPA costs in the certification component of the MVECP.

In the case of engines and vehicles in the ''Other'' category, EPA is assessing the costs of the certification and minimal testing services that it provides. A lower California-only fee is not offered as EPA's work is not decreased by compliance work done by the CARB.

OPEI stated that no national sales revenue is generated to absorb the cost of the fee, however, because EPA reviews the certificate applications and the manufacturer receives benefit from receiving a certificate, EPA should recover the costs of providing this service as directed by the CAA and the IOAA.

## VI. What Is the Economic Impact of This Rule?

This rule will not have a significant impact on the majority of vehicle and engine manufacturers. The cost to industry will be a relatively small value per unit manufactured for most engine-system combinations.

EPA expects to collect about 18 million dollars annually, an increase of 7 million dollars from the 11 million that is currently collected. This averages out to approximately 41 cents per vehicle or engine sold annually. However, for engine families or test groups with low annual sales volume, the cost per unit will be higher. To remove the possibility of serious financial harm to companies producing only low sales volume designs, the regulations adopted today include reduced fee provisions for small volume engine families to reduce the burden of fees. These provisions should alleviate concerns about undue economic hardship to small volume manufacturers. Refer to the Regulatory Flexibility Act section, section VII.B, below, for more discussion on this topic.

## VII. What Are the Administrative Requirements for This Rule?

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735 October 4, 1993), EPA must determine whether this regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of this Executive Order. The Order defines a ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

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

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

Pursuant to the terms of the Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because this rulemaking materially alters user fees. As such, this action was submitted to OMB for review.

### *B. Paperwork Reduction Act*

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0545.

EPA estimates that 1600 certifications will be requested annually of which 180 will qualify for a reduced fee. In addition, approximately 50 fee refunds will be processed each year. The total burden of these projected responses per year is 500 hours; an average of 18 minutes per response. There are no capital, start-up, operation, maintenance or other costs associated with this collection.

The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.3 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

EPA has established a public docket for this ICR under Docket ID No. OAR–2003–0111, which is available for public viewing at the Air and Radiation Docket and Information Center, in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.*

### *C. Regulatory Flexibility Act (RFA)*

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule.

For purposes of assessing the impacts of today's rule on small entities, a small entity is defined as: (1) A small business that meets the definition for business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Table VII.B–1 provides an overview of the primary SBA small business categories potentially affected by this regulation. This list is not intended to be exhaustive, but rather provides a guide regarding entities likely to be regulated by this action.

TABLE VII.B–1.—PRIMARY SBA SMALL BUSINESS CATEGORIES POTENTIALLY AFFECTED BY THIS REGULATION

| Industry | NAICS [a] codes | Defined by SBA as a small business if: [b] |
|---|---|---|
| Farm Machinery and Equipment Manufacturing | 333111 | <500 employees. |
| Lawn and Garden Tractor and Home Lawn and Garden Equipment Manufacturing | 333112 | <500 employees. |
| Construction Machinery Manufacturing | 333120 | <750 employees. |
| Mining Machinery and Equipment Manufacturing | 333131 | <500 employees. |
| Turbine and Turbine Generator Set Unit Manufacturing | 333611 | <1,000 employees. |
| Speed Changer, Industrial High-speed Drive and Gear Manufacturing | 333612 | <500 employees. |
| Mechanical Power Transmission Equipment Manufacturing | 333613 | <500 employees. |
| Other Engine Equipment Manufacturing | 333618 | <1,000 employees. |
| Nonroad SI engines | 333618 | <1,000 employees. |
| Internal Combustion Engines | 333618 | <1,000 employees. |
| Industrial Truck, Tractor, Trailer, and Stacker Machinery Manufacturing | 333924 | <750 employees. |
| Power-Driven Handtool Manufacturing | 333991 | <500 employees. |
| Automobile Manufacturing | 336111 | <1000 employees. |
| Light Truck and Utility Vehicle Manufacturing | 336112 | <1000 employees. |
| Heavy-Duty Truck Manufacturing | 336120 | <1000 employees. |
| Fuel Tank Manufacturers | 336211 | <1000 employees. |
| Gasoline Engine and Engine Parts Manufacturing | 336312 | <750 employees. |
| Aircraft Engine and Engine Parts Manufacturing | 336412 | <1000 employees. |
| Railroad Rolling Stock Manufacturing | 336510 | <1000 employees. |
| Boat Building and Repairing | 336612 | <500 employees. |
| Motorcycles and Motorcycle Parts Manufacturers | 336991 | <500 employees. |
| Snowmobile and ATV manufacturers | 336999 | <500 employees. |
| Independent Commercial Importers of Vehicles and Parts | 421110 | <100 employees. |
| Engine Repair and Maintenance | 811310 | <$5 million annual receipts. |

**Notes:**
[a] North American Industry Classification System.
[b] According to SBA's regulations (13 CFR Part 121), businesses with no more than the listed number of employees or dollars in annual receipts are considered "small entities" for purposes of a regulatory flexibility analysis.

After considering the economic impacts of today's rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. Under the reduced fee provisions described above in section II.F, the fee paid by any manufacturer will not exceed 1.0 percent of the aggregate retail sales price of the vehicles or engines covered by a certificate request. The reduced fee provision limits the impact of this rule on small entities, and other manufacturers, to 1.0 percent of the aggregate retail sales price. Therefore, the rule will not have a significant economic impact on any manufacturers, including small entities. A review of rulemakings that set emissions standards for the industries affected by today's rule, including those manufacturers affected by the recreational vehicle rule, showed that approximately 108 small businesses will be paying fees.

The cost per vehicle or engine will vary because the cost per unit depends upon the cost of the certificate and the number of vehicles or engines that are manufactured and sold under one certificate. The cost per vehicle will be highest if a manufacturer pays a fee for a light-duty vehicle certificate but only makes and sells a single vehicles that, because of the value of the vehicle, does not qualify for a reduced fee. The fee cost per vehicle or engine will be least for a manufacturer that pays an ''Other'' category fee and receives a certificate that will cover thousands of vehicles or engines. In this case the fee cost per vehicle may be a fraction of a penny. Because of the difference between highest and lowest possible cost of fees per vehicle, EPA determined that the average fee cost for manufacturers, which, across industry sectors, is approximately $.41 per vehicle or engine.

The following is an example of a final reduced fee calculation: If a light-duty vehicle manufacturer has an engine family of 2 vehicles that are sold for $35,000 per vehicle, under today's fee schedule the full fee would be $33,883, or $16,944 per engine family ($16,942 or $8,472 per vehicle, respectively), depending upon whether the engine family is certified as a Federal vehicle or California-only engine family. Under the rule, the reduced fee would be 1.0 percent of the aggregate retail sales price of the vehicles ($70,000), or $700 (or $350 per vehicle) as shown below:

2 * $35,000 * 0.01 = $700

In today's rule EPA established an initial fee payment of $750. If, at the end of a model year the final reduced fee is less than the initial fee payment, the manufacturer may request a refund of the difference. EPA has eliminated the minimum refund provision proposed in the NPRM so the manufacturer will be entitled to the entire refund. In the above example the manufacturer would be refunded the sum of $50.

*D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory action on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Before promulgation of an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least

burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before we establish any regulatory requirement that may significantly or uniquely affect small governments, including tribal governments, we must develop, under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of our regulations with significant federal intergovernmental mandates. The plan must also provide for informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates for state, local, or tribal governments. Nor does this rule have Federal mandates that may result in the expenditures of $100 million or more in any year by the private sector as defined by the provisions of Title II of the UMRA as the total cost of the fee program is estimated to be about 20 million dollars. Nothing in the rule would significantly or uniquely affect small governments.

*E. Executive Order 13132: Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This rule will not have federalism implications. It will not have direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule will impose no direct compliance costs on states. Thus, the requirements of section 6 of Executive Order 13132 do not apply to this rule.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. The requirements finalized by this action impact private sector businesses, particularly the vehicle and engine manufacturing industries. Thus, Executive Order 13175 does not apply to this rule.

*G. Executive Order 13045: Children's Health Protection*

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA believes this rule is not subject to the Executive Order because it is not an economically significant regulatory action as defined by Executive Order 12866. In addition, this rule is not subject to the Executive Order because it does not involve decisions based on environmental health or safety risks that may disproportionately affect children. Today's rule seeks to implement a fees program and is expected to have no impact on environmental health or safety risks that would affect the public or disproportionately affect children.

*H. Executive Order 13211: Energy Effects*

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355) (May 22, 2001) because it will not have a significant adverse effect on the supply, distribution, or use of energy. Further, we have determined that this rule is not likely to have any adverse energy effects.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272), directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve any technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to Congress and the comptroller General of the United States.

We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective July 12, 2004.

**List of Subjects**

*40 CFR Part 85*

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

*40 CFR Part 86*

Environmental protection, Administrative practice and procedure, Air Pollution Control, Confidential business information, Diesel, Gasoline, Fees, Imports, Labeling, Motor vehicle pollution, Motor vehicles, Reporting and recordkeeping requirements.

Dated: April 29, 2004.

**Michael O. Leavitt,**

*Administrator.*

■ For the reasons set forth in the preamble, title 40 chapter I of the Code of Federal Regulations is amended as follows:

## PART 85—CONTROL OF AIR POLLUTION FROM MOBILE SOURCES

■ 1. The authority citation for part 85 continues to read as follows:

**Authority:** 42 U.S.C. 7401–7671q.

■ 2. Add a new Subpart Y to Part 85 to read as follows:

### Subpart Y—Fees for the Motor Vehicle and Engine Compliance Program

Sec.



## Subpart Y—Fees for the Motor Vehicle and Engine Compliance Program

### § 85.2401 To whom do these requirements apply?

(a) This subpart prescribes fees manufacturers must pay for the motor vehicle and engine compliance program (MVECP) activities performed by the EPA. The prescribed fees and the provisions of this subpart apply to manufacturers of:

(1) Light-duty vehicles (cars and trucks) (*See* 40 CFR part 86);

(2) Medium Duty Passenger Vehicles (*See* 40 CFR part 86);

(3) Complete gasoline-fueled highway heavy-duty vehicles (*See* 40 CFR part 86);

(4) Heavy-duty highway diesel and gasoline engines (*See* 40 CFR part 86);

(5) On-highway motorcycles (*See* 40 CFR part 86);

(6) Nonroad compression-ignition engines (*See* 40 CFR part 89);

(7) Locomotives (*See* 40 CFR part 92);

(8) Marine engines, excluding inboard & sterndrive engines (*See* 40 CFR parts 91 and 94, and MARPOL Annex VI, as applicable);

(9) Small nonroad spark-ignition engines (engines ≤ 19kW) (*See* 40 CFR part 90);

(10) Recreational vehicles (including, but not limited to, snowmobiles, all-terrain vehicles and off-highway motorcycles) (*See* 40 CFR part 1051);

(11) Heavy-duty highway gasoline vehicles (evaporative emissions certification only) (*See* 40 CFR part 86); and

(12) Large nonroad spark-ignition engines (engines > 19 kW) (*See* 40 CFR part 1048).

(b) This subpart applies to manufacturers that submit certification requests received by the agency on or after July 12, 2004.

(c) Certification requests which are complete, contain all required data, and are received prior to July 12, 2004 are subject to the provisions of 40 CFR part 86, subpart J.

(d) Nothing in this subpart will be construed to limit the Administrator's authority to require manufacturer or confirmatory testing as provided in the Clean Air Act, including authority to require manufacturer in-use testing as provided in section 208 of the Clean Air Act.

### § 85.2402 [Reserved]

### § 85.2403 What definitions apply to this subpart?

(a) The following definitions apply to this subpart:

*Agency or EPA* means the U.S. Environmental Protection Agency.

*Annex IV* is a Statement of Voluntary Compliance or Engine International Air Pollution Prevention Certificate issued by EPA under MARPOL Annex VI.

*Body Builder* means a manufacturer, other than the OEM, who installs certified on-highway HDE engines into equipment such as trucks, busses or other highway vehicles.

*California-only certificate* is a Certificate of Conformity issued by EPA which only signifies compliance with the emission standards established by California.

*Certification request* means a manufacturer's request for certification evidenced by the submission of an application for certification, ESI data sheet, or ICI Carryover data sheet. A single certification request covers one test group, engine family, or engine system combination as applicable. For HDV evaporative certification, the certification request covers one evaporative family.

*Consumer Price Index* means the consumer price index for all U.S. cities using the ''U.S. city average'' area, ''all items'' and ''not seasonally adjusted'' numbers calculated by the Department of Labor.

*Federal certificate* is a Certificate of Conformity issued by EPA which signifies compliance with emission requirements in 40 CFR parts 85, 86, 89, 90, 91, 92, 94, 1048, and/or 1051 as applicable.

*Fuel economy basic engine* means a unique combination of manufacturer, engine displacement, number of cylinders, fuel system, catalyst usage, and other characteristics specified by the Administrator.

*Filing form* means the MVECP Fee Filing Form to be sent with payment of the MVECP fee.

*MARPOL Annex VI* is an annex to the International Convention on the Prevention of Pollution from Ships, 1973, as modified by the protocol of 1978 relating thereto; the international treaty regulating disposal of wastes generated by normal operation of vessels.

*Other category* includes: HD HW evap, including ICI; Marine (excluding inboard & sterndrive ) including ICI & Annex VI; NR SI, including ICI; NR Recreational (non-marine), including ICI; Locomotives, including ICI.

*Recreational* means the engines subject to 40 CFR part 1051 which includes off road motorcycles, all-terrain vehicles, and snowmobiles.

*Subcategory* refers to the divisions of the light-duty category which is composed of two subcategories, the certification/fuel economy subcategory and the in-use subcategory.

*Total Number of Certificates Issued* means the number of certificates for which fees are paid or waivers are issued. This term is not intended to represent multiple certificates which are issued within a single family or test group.

(b) The definitions contained in the following parts also apply to this subpart. If the term is defined in paragraph (a) of this section then that definition will take precedence.

(1) 40 CFR part 85;
(2) 40 CFR part 86;
(3) 40 CFR part 89;
(4) 40 CFR part 90;
(5) 40 CFR part 91;
(6) 40 CFR part 92;
(7) 40 CFR part 94;
(8) 40 CFR part 1048; and
(9) 40 CFR part 1051.

### § 85.2404 What abbreviations apply to this subpart?

The abbreviations in this section apply to this subpart and have the following meanings:

Annex IV—a Statement of Voluntary Compliance or Engine International Air Pollution Prevention Certificate issued by EPA under MARPOL Annex VI.
Cal—California;
CI-Compression-ignition (Diesel) cycle engine;
CPI—Consumer Price Index;
ESI—Engine System Information;

EPA—U.S. Environmental Protection Agency;
Evap—Evaporative Emissions;
Fed—Federal;
HD—Heavy-duty
HDE—Heavy-duty motor vehicle engine;
HDV—Heavy-duty motor vehicle;
HW-On-Highway versions of a vehicle or engine;
ICI—Independent Commercial Importer;
LD—Light-Duty motor vehicle including both LDT and LDV;
LDT—Light-duty truck;
LDV—Light-duty vehicle;
MARPOL-An International Maritime Organization treaty for the control of marine pollution;
MC—Motorcycle;
MDPV—Medium-Duty Passenger Vehicle;
MVECP—Motor Vehicle and Engine Compliance Program;
MY—Model Year;
NR—Nonroad version of a vehicle or engine;
OEM—Original equipment manufacturer;
SI—Spark-ignition (Otto) cycle engine.

**§ 85.2405 How much are the fees?**

(a) *Fees for the 2004 and 2005 calendar years.* For certification applications received for these calendar years that qualify for today's fees under the provisions of § 85.2401 (b), the fee for each certification request is in the following table:

| Category | Certificate type | Fee |
|---|---|---|
| (1) LD, excluding ICIs | Fed Certificate | $33,883 |
| (2) LD, excluding ICIs | Cal-only Certificate | 16,944 |
| (3) MDPV, excluding ICIs | Fed Certificate | 33,883 |
| (4) MDPV, excluding ICIs | Cal-only Certificate | 16,944 |
| (5) Complete SI HDVs, excluding ICIs | Fed Certificate | 33,883 |
| (6) Complete SI HDVs, excluding ICIs | Cal-only Certificate | 16,944 |
| (7) ICIs for the following industries: LD, MDPV, or Complete SI HDVs | All Types | 8,387 |
| (8) MC (HW), including ICIs | All Types | 2,414 |
| (9) HDE (HW), including ICIs | Fed Certificate | 21,578 |
| (10) HDE (HW), including ICIs | Cal-only Certificate | 826 |
| (11) HDV (evap), including ICIs | Evap | 826 |
| (12) NR CI engines, including ICIs, but excluding Locomotives, Marine and Recreational engines. | All Types | 1,822 |
| (13) NR SI engines, including ICIs | All Types | 826 |
| (14) Marine engines, excluding inboard & sterndrive engines, including ICIs | All Types and Annex VI | 826 |
| (15) All NR Recreational, including ICIs, but excluding marine engines | All Types | 826 |
| (16) Locomotives, including ICIs | All Types | 826 |

(1) A manufacturer that requests a federal certificate for a marine engine family and an Annex VI for the same engine family will be charged the fee indicated in paragraph (a) of this section, Table item 14, for only the federal certificate.

(2) [Reserved]

(b) *Fees for 2006 calendar year and beyond.* (1) This subpart applies to manufacturers that submit certification requests received by the agency on or after January 1 of each calendar year beginning in 2006. The fees due for each certification request will be calculated using an equation which adjusts the fees in paragraph (a) of this section for the change in the consumer price index and the change in the total number of certificates issued for each fee category.

(2) Certification requests which are complete, contain all required data, and are received prior to January 1 of each calendar year are subject to the fees provisions of the year that they are received by the Agency.

(3) Fees for the 2006 and later calendar year certification requests will be calculated using the following equation:

$Certificate\ Fee_{cy} = [F + L^* (CPI_{CY-2}/CPI_{2002})] * 1.169/[(cert\#_{MY-2} + cert\#_{MY-3}) * .5]$

$Certificate\ Fee_{cy}$ = Fee per certificate for the calendar year of the fees to be collected

F = the fixed costs, not to be adjusted by the CPI

L = the labor costs, to be adjusted by the CPI

$CPI_{CY-2}$ = the consumer price index for all U.S. cities using the ''U.S. city average'' area, ''all items'' and ''not seasonally adjusted'' numbers calculated by the Department of Labor listed for the month of November of the year two years before the calendar year. (*e.g.*, for the 2006 CY use the CPI based on the date of November, 2004).

$CPI_{2002}$ = the consumer price index for all U.S. cities using the ''U.S. city average'' area , ''all items'' and ''not seasonally adjusted'' numbers calculated by the Department of Labor for December, 2002. The actual value for $CPI_{2002}$ is 180.9.

1.169 = Adds overall EPA overhead which is applied to all costs

$cert\#_{MY-2}$ = the total number of certificates issued for a fee category or subcategory in the model year two years prior to the calendar year for applicable fees ($Certificate\ Fee_{cy}$)

$cert\#_{MY-3}$ = the total number of certificates issued for a fee category or subcategory in the model year three years prior to the calendar year for the applicable fees ($Certificate\ Fee_{cy}$)

(i) The values for F and L are listed in the following table:

| | F | L |
|---|---|---|
| (1) LD Cert/FE | $3,322,039 | $2,548,110 |
| (2) LD In-use | 2,858,223 | 2,184,331 |
| (3) LD ICI | 344,824 | 264,980 |
| (4) MC HW | 225,726 | 172,829 |
| (5) HD HW | 1,106,224 | 1,625,680 |
| (6) NR CI | 486,401 | 545,160 |
| (7) Other | 177,425 | 548,081 |

(ii) EPA will notify manufacturers within 11 months of the calendar year in which fees are adjusted by this section, with the new fees for each category, the number of certificates for the appropriate model years and the applicable CPI values after the November CPI values for each year are made available by the U.S. Department of Labor.

(1) Certificate fees for light-duty California-only certificates will be determined by applying the LD Cert/FE F and L values to the Certificate Fee equation in paragraph (b)(3) of this section. The certificate numbers in the equation will be the total of the number of California-only and federal light-duty certificates issued during the appropriate model years.

(2) Certificate fees for light-duty federal certificates are determined in a 3 part process:

(i) Apply the LD Cert/FE F and L values to the Certificate Fee equation in paragraph (b)(3) of this section. The

certificate numbers in the equation will be the total of the number of California-only and federal light-duty certificates issued during the appropriate model years. This results in the Cert/FE portion of the LD certificate fee.

(ii) Apply the LD In-use F and L values to the Certificate Fee equation in paragraph (b)(3) of this section. The certificate numbers in the equation will be the number of federal light-duty certificates issued during the appropriate model years. This results in the In-use portion of the LD certificate fee.

(iii) Add the LD Cert/FE portion of the fee and LD In-use portion of the fee together to determine the total LD federal fee per certificate.

(3) Certificate fees for all remaining categories of certificates are determined by applying the F and L values from the appropriate category to the Certificate Fee equation above. The certificate numbers in the equation will be the total number of certificates issued in that category during the appropriate model years.

(c) A single fee will be charged when a manufacturer seeks to certify multiple evaporative families within a single engine family or test group. Manufacturers that seek to certify HDE evaporative families will be charged a fee for each evaporative family.

(d) A body builder, who exceeds the maximum fuel tank size for a HDV that has been certified by an OEM and consequently makes a request for HDV certification, must pay a separate fee for each certification request. The fee will be that listed in paragraphs (a) and (b) of this section, paragraph (c) does not apply.

**§ 85.2406 Can I qualify for reduced fees?**

(a) *Eligibility Requirements.* To be eligible for a reduced fee, the following conditions must be satisfied:

(1) The certificate is to be used for sale of vehicles or engines within the United States; and

(2) The full fee for a certification request for a MY exceeds 1.0% of the aggregate projected retail sales price of all vehicles or engines covered by that certificate.

(b) *Determination of Certificate Type.* (1) If the number of vehicles or engines to be covered by the certificate is less than six and the retail sales price of all of the vehicles or engines is less than $75,000 each, a reduced fee request shall be made for a certificate covering 5 vehicles or engines. The final reduced fee calculation and adjustment provisions of paragraph (e) of this section are applicable to certificates issued under this provision.

(2) If the number of vehicles or engines to be covered by the certificate is greater than five and/or the retail sales price of at least one of the vehicles or engines is greater than $75,000 each, a reduced fee request shall be made for a certificate covering the estimated number of vehicles or engines.

(c) *Initial Reduced Fee Calculation.* (1) If the requirements of paragraph (a) of this section are satisfied, the initial fee payment to be paid by the applicant (the ''initial fee payment'') will be the greater of:

(i) 1.0% of the aggregate projected retail sales price of all the vehicles or engines to be covered by the certification request; or

(ii) A minimum initial fee payment of $750.

(2) For vehicles or engines that are converted to operate on an alternative fuel using as the basis for the conversion a vehicle or engine which is covered by an existing OEM certificate of conformity, the cost basis used in this section must be the aggregate projected retail value-added to the vehicle or engine by the conversion rather than the full cost of the vehicle or engine. To qualify for this provision, the applicable OEM certificate must cover the same sales area and model year as the requested certificate for the converted vehicle or engine.

(3) For ICI certification requests, the cost basis of this section must be the aggregate projected retail cost of the entire vehicle(s) or engine(s), not just the value added by the conversion. If the vehicles/engines covered by an ICI certificate are not being offered for sale, the manufacturer shall use the fair retail market value of the vehicles/engines as the retail sale price required in this section. For an ICI certification request, the retail sales price (or fair retail market value) must be based on the applicable National Automobile Dealer's Association (NADA) appraisal guide and/or other evidence of the actual market value.

(4) The aggregate cost used in this section must be based on the total projected sales of all vehicles and engines under a certificate, including vehicles and engines modified under the modification and test option in 40 CFR 85.1509 and 89.609. The projection of the number of vehicles or engines to be covered by the certificate and their projected retail selling price must be based on the latest information available at the time of the fee payment.

(5) A manufacturer may submit a reduced fee as described in paragraphs (a), (b) and (c)(1) through (c)(4) of this section if it is accompanied by a statement from the manufacturer that the reduced fee is appropriate under this section. The reduced fee shall be deemed approved unless EPA determines that the criteria of this section has not been met. The Agency may make such a determination either before or after EPA issues a certificate of conformity. If the Agency determines that the requirements of this section have not been met, EPA may deny future reduced fee requests and require submission of the full fee payment until such time as the manufacturer demonstrates to the satisfaction of the Administrator that its reduced fee submissions are based on accurate data and that final fee payments are made within 45 days of the end of the model year.

(6) If the reduced fee is denied by the Administrator, the applicant will have 30 days from the date of notification of the denial to submit the appropriate fee to EPA or appeal the denial.

(d) *Revision of the Number of Vehicles or Engines Covered by the Certificate.* (1) If after the original certificate is issued, the number of vehicles or engines to be produced or imported under the certificate exceeds the number indicated on the certificate, the manufacturer or importer shall:

(i) Request that EPA revise the certificate with a number that indicates the new projection of the vehicles or engines to be covered by the certificate. The revised certificate must be requested, revised and issued before the vehicles or engines are sold or imported into the United States.

(ii) Submit payment of 1.0% of the aggregate projected retail sales price of all the vehicles or engines over and above the number of vehicles or engines listed on the original certificate to be covered by the certification request;

(iii) Submit a final reduced fee calculation and adjustment at the end of the model year as set forth in the provisions of paragraph (e) of this section, if the original certificate was issued under the provisions of paragraph (b)(1) of this section.

(2) A manufacturer must receive a revised certificate prior to the sale or importation of any vehicles or engines that are not originally included in the certificate issued under paragraph (b)(1) or (b)(2) of this section, or as indicated in a revised certificate issued under paragraph (d)(1) of this section. In the event that a certificate is not timely revised such additional vehicles or engines are not covered by a certificate of conformity.

(e) *Final Reduced Fee Calculation and Adjustment.* (1) For certificates issued under the provisions of paragraph (b)(1) of this section, within 30 days of the

end of the model year, the manufacturer shall submit a model year reduced fee payment report covering all certificates issued under the provisions of paragraph (b)(1) of this section in the model year for which the manufacturer has paid a reduced fee. This report will include for each certificate issued:

(i) The fees paid prior to the time of issuance of the certificate;

(ii) The total actual number of vehicles covered by the certificate;

(iii) The calculation of the actual final reduced fee due for each certificate; and

(iv) The difference between the total fees paid and the total final fees due from the manufacturer.

(2) The final reduced fee shall be calculated using the procedures of paragraph (c) of this section but using actual production figures rather than projections.

(3) If the initial fee payment does not exceed the final reduced fee, then the manufacturer shall pay the difference between the initial reduced fee and the final reduced fee using the provisions of § 85.2408. This payment shall be paid within 45 days of the end of the model year. The total fees paid for a certificate shall not exceed the applicable full fee of § 85.2405. If a manufacturer fails to make complete payment with 45 days or to submit the report under paragraph (e)(1) of this section then the Agency may void *ab initio* the applicable certificate. EPA may also refuse to grant reduced fee requests submitted under paragraph (c)(5) of this section.

(4) If the initial fee payment exceeds the final reduced fee then the manufacturer may request a refund using the procedures of § 85.2407.

(5) Manufacturers must retain in their records the basis used to calculate the projected sales and fair retail market value and the actual sales and retail price for the vehicles and engines covered by each certificate that is issued under the reduced fee provisions of this section. This information must be retained for a period of at least three years after the issuance of the certificate and must be provided to the Agency within 30 days of request. Manufacturers are also subject to the applicable maintenance of records requirements of Part 86, Subpart A. If a manufacturer fails to maintain the records or provide such records to EPA as required by this paragraph then EPA may void *ab initio* the certificate for which such records shall be kept.

#### § 85.2407 Can I get a refund if I don't get a certificate or overpay?

(a) *Full Refund.* The Administrator shall refund the total fee imposed by § 85.2405 if the applicant fails to obtain a certificate, for any reason, and requests a refund.

(b) *Partial Refund.* The Administrator shall refund a portion of a reduced fee, paid under § 85.2406, due to a decrease in the aggregate projected or actual retail sales price of the vehicles or engines covered by the certificate request. The Administrator shall also refund a portion of the initial payment when the initial payment exceeded the final fee for the vehicles or engines covered by the certificate request.

(1) Partial refunds are only available for certificates which were used for the sale of vehicles or engines within the United States.

(2) Requests for a partial refund may only be made once the model year for the applicable certificate has ended. Requests for a partial refund must be submitted no later than six months after the model year has ended.

(3) Requests for a partial refund must include all the following:

(i) A statement that the applicable certificate was used for the sale of vehicles or engines within the United States.

(ii) A statement of the initial fee amount paid (the reduced fee) under the applicable certificate.

(iii) The actual number of vehicles or engines produced or imported under the certificate (whether or not the vehicles/engines have been actually sold).

(iv) The actual retail selling or asking price for the vehicles or engines produced or imported under the certificate.

(v) The calculation of the reduced fee amount using actual production figures and retail prices.

(vi) The calculated amount of the refund.

(c) *Refunds due to errors in submission.* The Agency will approve requests from manufacturers to correct errors in the amount or application of fees if the manufacturer provides satisfactory evidence that the change is due to an accidental error rather than a change in plans. Requests to correct errors must be made to the Administrator as soon as possible after identifying the error. The Agency will not consider requests to reduce fee amounts due to errors that are reported more than 90 days after the issuance of the applicable certificate of conformity.

(d) In lieu of a refund, the manufacturer may apply the refund amount to the amount due on another certification request.

(e) A request for a full or partial refund of a fee or a report of an error in the fee payment or its application must be submitted in writing to: U.S. Environmental Protection Agency, Vehicle Programs and Compliance Division, Fee Program Specialist, National Vehicle and Fuel Emission Laboratory, 2000 Traverwood, Ann Arbor, MI 48105.

#### § 85.2408 How do I make a fee payment?

(a) All fees required by this subpart shall be paid by money order, bank draft, certified check, corporate check, or electronic funds transfer payable in U.S. dollars to the order of the Environmental Protection Agency.

(b) A completed fee filing form must be sent to the address designated on the form for each fee payment made.

(c) Fees must be paid prior to submission of an application for certification. The Agency will not process applications for which the appropriate fee (or reduced fee amount) has not been fully paid.

(d) If EPA denies a reduced fee, the proper fee must be submitted within 30 days after the notice of denial, unless the decision is appealed. If the appeal is denied, then the proper fee must be submitted within 30 days after the notice of the appeal denial.

#### § 85.2409 Deficiencies.

(a) Any filing pursuant to this subpart that is not accompanied by a completed fee filing form and full payment of the appropriate fee is deemed to be deficient.

(b) A deficient filing will be rejected and the amount paid refunded, unless the full appropriate fee is submitted within a time limit specified by the Administrator.

(c) EPA will not process a request for certification associated with any filing that is deficient under this section.

(d) The date of filing will be deemed the date on which EPA receives the full appropriate fee and the completed fee filing form.

## PART 86—CONTROL OF EMISSIONS FROM NEW AND IN-USE HIGHWAY VEHICLES AND ENGINES

■ 3. The authority citation for Part 86 continues to read as follows:

**Authority:** 42 U.S.C. 7401–7671q.

### Subpart J—[Amended]

■ 4. Section 86.903–93 is revised to read as follows:

#### § 86.903–93 Applicability.

(a) This subpart prescribes fees to be charged for the MVECP for the 1993 through 2004 model year. The fees charged will apply to all manufacturers and ICIs of LDVs, LDTs, HDVs, HDEs, and MCs. Nothing in this subpart shall be construed to limit the

Administrator's authority to require manufacturer or confirmatory testing as provided in the Clean Air Act, including authority to require manufacturer in-use testing as provided in section 208 of the Clean Air Act.

(b) The fee requirements of 40 CFR part 85, subpart Y for 2004 and later certification requests received on or after July 12, 2004 apply instead of the fees prescribed in this subpart.

(c) The fees prescribed in this subpart will only apply to those 2004 model year certification requests which are complete, include all data required by this title, and are received by the Agency prior to July 12, 2004.

■ 5. Section 86.908–93 is amended by revising paragraph (a)(1)(iii) to read as follows:

**§ 86.908–93 Waivers and refunds.**

(a) * * *

(1) * * *

(iii) For converted vehicles that are dual-or flexible-fuel vehicles and can operate on a gaseous fuel, the full fee for a certification request for a MY exceeds 1% of the value added to the vehicle by the conversion, for MY 2000 through July 12, 2004.

* * * * *

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