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## DEPARTMENT OF ENERGY

### 10 CFR Part 490

RIN 1904-AB69

### Alternative Fuel Transportation Program; Private and Local Government Fleet Determination

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE).

**ACTION:** Final determination.

**SUMMARY:** Pursuant to the Energy Policy Act of 1992 (EPAct 1992), the Department of Energy (DOE) has determined that a regulatory requirement for the owners and operators of certain private and local government fleets to acquire alternative fueled vehicles (AFVs) is not necessary to achieve the recently modified EPAct 1992 Replacement Fuel Goal. DOE therefore has determined that it cannot issue a requirement for certain private and local government fleets to acquire alternative fueled vehicles.

**DATES: Effective Date:** This determination is effective April 1, 2008.

**FOR FURTHER INFORMATION CONTACT:** For information concerning this final determination, contact Mr. Dana V. O'Hara, Office of Energy Efficiency and Renewable Energy (EE-2G), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0121; (202) 586-9171; [regulatory\\_info@afdc.nrel.gov](mailto:regulatory_info@afdc.nrel.gov); or Mr. Chris Calamita, Office of the General Counsel, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0121; (202) 586-9507.

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#### I. Introduction

Under the Energy Policy Act of 1992 (EPAct 1992; Pub. L. 102-486), DOE is required to determine if a requirement for certain private and local government vehicle fleets to acquire alternative fueled vehicles (AFVs) is necessary, as specified in EPAct 1992. (42 U.S.C. 13257(e)) If DOE determines that the Private and Local Government Fleet Requirement is "necessary," then DOE must issue regulations requiring certain fleets to acquire light-duty AFVs annually. (42 U.S.C. 13257(g)) Fleets subject to such a mandate would include all fleets that have at least 50 light duty motor vehicles, and would exclude Federal fleets, State fleets, and fleets covered under the Alternative Fuel Provider mandate. (42 U.S.C. 13257(g)(1)) If DOE determines that the Private and Local Government Fleet Requirement is not necessary then DOE must publish such determination in the **Federal Register** as a final agency action, including an explanation of the findings on which such a determination is made and the basis for the determination. (42 U.S.C. 13257(f))

Relevant to the evaluation of a Private and Local Government Fleet Requirement is the replacement fuel goal established in section 502(b) of EPAct 1992. (42 U.S.C. 13252(b)) Section 502(b)(2) establishes goals of producing sufficient replacement fuels to replace:

- at least ten percent by the year 2000, and
- at least thirty percent by the year 2010

of the projected consumption of motor fuel in the United States for each such year, with at least half of such replacement fuels being domestic fuels. (Replacement Fuel Goal; 42 U.S.C. 13252(b)(2)) Under section 504(b) of EPAct 1992, if DOE determines that the section 502 goals are unachievable, DOE must establish achievable goals. (42 U.S.C. 13254(b))

In determining whether to establish a Private and Local Government Fleet Requirement, DOE is directed to determine if such a requirement is "necessary." (42 U.S.C. 13257(e)(1)) The "necessity" determination is a two part test. First, DOE must determine if the Replacement Fuel Goal established under section 502, or as modified under section 504 of EPAct 1992, is achievable absent a Private and Local Government Fleet Requirement. (42 U.S.C.

13257(e)(1)(A)) Next, the "necessity" determination requires DOE to determine if such a goal is practicable and actually achievable through implementation of a Private and Local Government Fleet Requirement in combination with voluntary means and other relevant programs. (42 U.S.C. 13257(e)(1)(B))

If DOE determines that the Replacement Fuel Goal is not achievable absent the Private and Local Fleet Requirement, and that such goal would be practicable and actually achievable through implementation of such a requirement, DOE must then establish the Private and Local Fleet Requirement under section 507(g). (42 U.S.C. 13257(e)(1)) If either of these findings cannot be made, then DOE is precluded from establishing the Private and Local Fleet Requirement under section 507(g).

Under the Private and Local Government Fleet provisions, if DOE initiates a rulemaking under section 507(g), DOE is again directed to determine whether to modify the Replacement Fuel Goal. (42 U.S.C. 13257(e)(2)) If the Replacement Fuel Goal is not achievable, DOE has to set a Replacement Fuel Goal that is achievable. (42 U.S.C. 13257(e)(2))

In a previous rulemaking, DOE has already determined that the original Replacement Fuel Goal of 30 percent in 2010 is not achievable and a modified Replacement Fuel Goal of 30 percent by 2030 was published March 15, 2007. 72 FR 12042. The purpose of today's document is to determine whether or

not the Private and Local Government Fleet Requirement is necessary to achieve the modified Replacement Fuel Goal.

DOE has determined that it is not “necessary” to promulgate a regulation requiring private and local government fleets to acquire AFVs. DOE has determined that establishment of a Private and Local Government Fleet Requirement is not required for achievement of the Replacement Fuel Goal of 30 percent of U.S. motor fuels by 2030, as modified by DOE in March 2007. 72 FR 12041. As discussed below, this determination is based on DOE’s analysis in revising the Replacement Fuel Goal, under which DOE demonstrated a pathway to achieve the modified Replacement Fuel Goal without establishment of a Private and Local Government Fleet Requirement. 72 FR 12041. Additionally, DOE also provides an analysis demonstrating that were a Private and Local Government Fleet Requirement established, the number of fleets potentially covered by such a requirement, the number of AFVs likely to be acquired, and the amount of U.S. motor fuel likely displaced would not make an appreciable contribution towards achieving the modified Replacement Fuel Goal.

Today’s document implements the March 6, 2006, order of the U.S. District Court for Northern District of California to prepare and publish a determination on the Private and Local Government Fleets rule. *See Center for Biological Diversity v. U.S. Department of Energy et al.*, C 05-01526 WHA (N.D. Cal. 2006) (Order Re Timing of Relief).

## II. Background

On January 2, 2002, EarthJustice, on behalf of the Center for Biological Diversity, Bluewater Network, and Sierra Club, filed a lawsuit in the U.S. District Court for the Northern District of California that, in part, sought to compel DOE to “issue a proposed rule and final determination on the necessity of a private and municipal fleet program.” (Plaintiffs Complaint for Injunctive and Declaratory Relief, pg 55, paragraph 171, dated January 2, 2002). On July 26, 2002, the Court granted plaintiffs’ motion for summary judgment on the issue of whether DOE had missed the deadline set forth in EPAct 1992 section 507(e) for completing the rulemaking. *See Center for Biological Diversity v. Abraham, et al.*, (218 F.Supp.2d 1143 (N.D. Cal., 2002)). On September 27, 2002, the District Court ordered DOE to complete its proposed rulemaking by January 27, 2003, and its final rule by November 27, 2003.

*v. Abraham, et al.*, No. C 02-00027 (N.D. Cal., 2002). On January 17, 2003, the Court subsequently granted a 30-day extension (to February 26, 2003) of the deadline for DOE to complete work on the notice of proposed rulemaking. (*Center for Biological Diversity v. Abraham, et al.*, No. C 02-00027 (N.D. Cal., 2002), Order No. 55 (Entered 01/23/2003)).

On March 4, 2003, as required by section 507 of EPAct 1992 and in accordance with the Court order under *Center for Biological Diversity v. Abraham, et al.*, DOE issued a notice of a proposed determination regarding the Private and Local Fleet Requirement, in which DOE tentatively determined that a requirement was not “necessary,” and therefore should not be imposed. 68 FR 10320. DOE finalized the proposed determination that a regulation requiring private and local government fleets to acquire AFVs is not “necessary” and, therefore, cannot be promulgated, which was published January 29, 2004. 69 FR 4219. The necessity determination was based on DOE’s findings that a private and local government fleet vehicle acquisition mandate would not appreciably increase the percentage of alternative fuel or replacement fuel used in motor vehicles in the United States and thus would make no more than a negligible contribution to the achievement of EPAct 1992’s existing 2010 Replacement Fuel Goal of 30 percent, or of a revised Replacement Fuel Goal were one adopted.

Subsequent to the publication of the January 29, 2004, final rule, DOE was sued in Federal court by the Center for Biological Diversity and Friends of the Earth for failing to impose a private and local government fleet acquisition mandate and for not revising the replacement fuel production goal for 2010 as part of its determination. On March 6, 2006, the U.S. District Court for the Northern District of California vacated DOE’s final determination regarding the Private and Local Government Fleet Mandate. *See Center for Biological Diversity v. U.S. Department of Energy et al.*, 419 F.Supp.2d 1166 (N.D. Cal 2006). The Court directed DOE to prepare notices of proposed rulemaking and final rules on both the Replacement Fuel Goal for 2010 and the private and local government fleet determination. *See Center for Biological Diversity v. U.S. Department of Energy et al.*, C 05-01526 WHA (N.D. Cal. 2006) (Order Re Timing of Relief).

On September 19, 2006, DOE published a notice announcing its proposed determination that the EPAct

1992 Replacement Fuel Goal of 30 percent by 2010 was not achievable and announced its proposal to extend the time for achieving the 30 percent replacement fuel production capacity goal to 2030. 71 FR 54771. In that notice, DOE evaluated four scenarios that identified projected replacement fuel capacities of 8.65 percent, 17.84 percent, 35.25 percent, and 47.06 percent, by 2030. (Updated analyses conducted for the final rule resulted in the first and third of these becoming 7.38 percent and 33.13 percent, respectively.) These projections reflected considerations of numerous variables including oil prices, technological breakthroughs, and market acceptance. The modified goal proposed by DOE fell in the mid-range among these scenarios.

On January 23, 2007, the President, in his State of the Union Address, proposed replacing 20 percent of the projected gasoline usage in 10 years (“Twenty in Ten” initiative). The first element was to increase the use of alternative fuels to 35 billion gallons in 2017, reducing projected gasoline consumption by 15 percent, through advancements in many fields including cellulosic ethanol, butanol, and biodiesel. In the second element of “Twenty in Ten,” the President asked Congress to give the Administration authority to reform the fuel efficiency standards for passenger cars, which could save another 5 percent of U.S. projected gasoline usage in 2017.

On March 15, 2007, DOE published a final rule for the Replacement Fuel Goal. 72 FR 12041. In the final rule, DOE determined that the EPAct 1992 goal of establishing sufficient replacement fuel production capacity to replace 30 percent on an energy equivalent basis of all U.S. motor fuel by 2010 was not achievable. This determination was based on a similar evaluation of the projected U.S. production capacity of replacement fuels as was presented in the notice of proposed rulemaking. The Replacement Fuel Goal final rule extended the 30 percent Replacement Fuel Goal out to 2030 based on an analysis similar to that presented in the notice of proposed rulemaking. The Replacement Fuel Goal final rule complied with DOE’s obligation under section 504(b) of EPAct 1992 to “establish goals that are achievable, for the purposes of this title.” (42 U.S.C. 13254(b))

On September 14, 2007, DOE published a proposed determination in which DOE preliminarily determined that a Private and Local Government Fleet Rule was not necessary to meet the revised Replacement Fuel Goal. 72 FR

52496. DOE requested comment on the proposed determination and held a public meeting. The comments received are discussed below.

Following publication of the proposed notice of a determination, and partially in response to the President's Twenty in Ten initiative, Congress passed and on December 19, 2007, President Bush signed into law the Energy Independence and Security Act of 2007 (Pub. L. 110-140; EISA 2007). The most significant elements of EISA 2007 in the context of the EPAct 1992 fleet programs follow the framework of Twenty in Ten, by calling for greater use of non-petroleum fuels and increases in light-duty vehicle fuel economy. Specifically, EISA 2007 calls for:

- An increase in the Renewable Fuel Standard required under Clean Air Act to 36 billion gallons per year by 2022 (42 U.S.C. 7545(o)(2));
- An increase in Corporate Average Fuel Economy (CAFE) to 35 miles per gallon by 2020 (42 U.S.C. 32902(b));
- Extending CAFE credits for flexible fuel vehicle manufacturing through 2019 (fully through 2014, and ramping down in amount of credit through 2019);
- Federal fleets to reduce petroleum consumption, increase alternative fuel use, and install renewable fuel infrastructure; and
- The inclusion of certain vehicle types and activities (e.g., hybrids, neighborhood electric vehicles, alternative fuel refueling infrastructure, and investments in technology development) to the list of vehicles and activities that can qualify for acquisition credit for certain EPAct fleets.

Each of these elements, but in particular the significant expansion of the Renewable Fuel Standard and the revised CAFE requirements, will greatly increase the achievability of the revised Replacement Fuel Goal, thus strengthening DOE's preliminary determination that a Private and Local Government Fleet Rule would not be necessary to meet the revised Replacement Fuel Goal. For this reason, DOE concluded that the provisions of EISA 2007 did not materially affect the analysis or conclusions described in the September 2007 NOPR or in this final determination.

### III. Discussion of Public Comments

In response to DOE's September 2007 NOPR, four statements were provided at the public hearing, and twelve written comments were submitted. The following organizations provided statements at the hearing: American Automotive Leasing Association (AALA), Donlen Corporation, the

National Association of Fleet Administrators (NAFA), and PHH/Arval. AALA; Associated Builders and Contractors, Inc.; the Automotive Fleet and Leasing Association (AFLA); Automotive Resources International (ARI); General Electric; LeasePlan USA; Mohawk Industries, Inc.; Natural Gas Vehicle America (NGVAmerica); PHH Arval; ServiceMaster; Small Business and Entrepreneurship Council; and Wheels, Inc. submitted written statements. It should be noted that the Mohawk Industries, Inc. comments were submitted three days after the deadline. While DOE chose to review Mohawk's comments, they were in line with virtually all the other comments submitted, and therefore did not materially impact DOE's decision in this final determination.

All statements and comments submitted agreed with the Department's preliminary determination that a Private and Local Government Fleet Requirement is not "necessary" and that a fleet rule is not to be promulgated. It should be noted, however, that six of the written submissions appeared to largely be form letters with slight variations, based upon the rationale provided by AALA. These included: AFLA; LeasePlan USA; Mohawk Industries, Inc; PHH/Arval; ServiceMaster; and Wheels, Inc.

### A. Comments on Proposed Determination

In general, all of the comments received, both through the public meeting and the comment period, supported DOE's proposed determination not to promulgate a Private and Local Government Fleet Rule. All but one commenter agreed that a Private and Local Government Fleet Rule was not necessary to meet the Replacement Fuel Goal (as modified to 30 percent by 2030, 72 FR 12041), and that this goal was achievable. One commenter, NGVAmerica, did not comment directly on whether such a rule would be necessary, and instead focused solely on the potential impact of a Private and Local Government Fleet Rule. NGVAmerica agreed with DOE's initial conclusion that such a rule would result in a small amount of additional replacement or alternative fuel use. NGVAmerica stated that "such a rule, by itself, would not appreciably increase levels of alternative fuel use." [See NGVAmerica comments, page 3.] NGVAmerica went on to discuss the many limitations on the overall scope of and DOE's authority under the Private and Local Government Fleet Rule (only light-duty vehicles are covered, take-

home vehicles are excluded, alternative fuel use cannot be required, etc.).

Of the other commenters that addressed the potential impact of the rule in replacement and alternative fuel use, all of these commenters also agreed with DOE's initial conclusion. No commenters expressed support for promulgating a fleet rule.

### B. Comments on Analysis for the Potential Impact of the Rule

In preparing the NOPR, DOE updated the analysis of the potential impact of a Private and Local Government Fleet Rule originally presented as part of a previous determination in 2003, discussed later in this document. The result of this analysis compared closely with previously conducted analyses, indicating an expected replacement fuel contribution of 0.1–0.7 percent. 72 FR 52503.

Three of the four statements provided at the public meeting and eight of the twelve written comments submitted specifically referred to this analysis. All but one stated that the analysis is reasonable without detailed comment. AALA, in more detailed written comments, conducted a more thorough review of the analysis. While AALA expressed its general agreement with the approach taken in the analysis, AALA stated that it believes that the lowest (10 percent) alternative fuel use rate in the analysis was the most likely scenario given the lack of DOE's ability to mandate alternative fuel use instead of the modest 25 percent. It then cited a General Accountability Office (GAO) report (*U.S. Postal Service: Vulnerability to Fluctuating Fuel Prices Requires Improved Tracking and Monitoring of Consumption Information*, GAO-07-244, February 16, 2007) on alternative fuel use by the United States Postal Service (USPS), pointing out that given USPS' alternative fuel usage rate of 1.5%, even the 10% utilization rate in the NOPR might be optimistic. [See AALA written comments, pages 3–10.]

All statements and comments indicated that there was a probable additional impact from a potential rule, which was not explicitly taken into account in the analysis provided in the NOPR. This was the potential of fleets disbanding and changing over to employee reimbursement programs in the event of a fleet rule. NGVAmerica also pointed out that it might be expected that some fleets would simply acquire larger vehicles (above the 8,500 pound Gross Vehicle Weight Rating cut-off) to avoid acquisition requirements. AALA indicated that decisions whether to continue fleet operations are highly cost-sensitive, and thus any change to

the economics (such as from a rule) could drive fleets to employee reimbursement. In general, the vast majority of the comments and statements (including all of those from fleets or fleet management/leasing organizations) more or less agreed with the rationale provided for not imposing a rule, AALA contended that fleets would continue to be able to make the decisions concerning operating fleets and incorporating AFVs that make sense based upon their particular circumstances.

AALA also stated that energy and environmental impacts are typically much less under a managed fleet than under employee reimbursement programs, because under reimbursement there is no control over vehicle types utilized or frequency of maintenance. Because managed fleets have a specific interest in keeping costs down, they are more likely to acquire the most cost-effective vehicle necessary to complete a job, and maintain it in a responsible manner. AALA contended that better maintained vehicles are generally more efficient and have lower tailpipe emissions.

#### *C. Comments on What Fleets and Other Organizations are Doing To Reduce Petroleum Use*

While all of the fleet organizations who commented on the NOPR agreed with the proposed determination to not promulgate a rule, they expressed support for efforts to reduce petroleum use or minimize environmental impacts emissions from fleet operations. Many indicated in their comments that they have initiated voluntary efforts within their organizations to accomplish these objectives.

For example, PHH noted that it is voluntarily implementing a Greenfleet program (that it established with Environmental Defense). As described by PHH, it works with fleets to identify ways to reduce emissions without increasing costs (which actually often results in lower costs), and focuses on overall outcomes rather than specific technologies. The key component of the program is the creation of a greenhouse gas baseline, along with recommendations for reducing or offsetting emissions through vehicle choice or operation. PHH further stated that it makes information on the most fuel efficient or cleanest vehicles easily available to fleets, to help decision-making.

Similarly, Donlen noted that it has already implemented a fuel management program for customers that monitors fuel economy and can reduce consumption by up to 15 percent per

year. Donlen stated that it maintains a call center to ensure that vehicles are maintained properly to reduce consumption, and is collaborating with the Sierra Club on voluntary measuring and reducing CO<sub>2</sub>.

GE indicated in its comments that it has developed programs to help customers reduce energy consumption. ARI indicated that some of its clients are already reducing carbon emissions, both voluntarily and to meet government-set goals. LeasePlan has launched GreenPlan, in partnership with American Forests, which is focused on “carbon neutralizing” its corporate fleet and planting trees in Atlanta and Chicago. ServiceMaster noted that it is already testing and evaluating electric lawn care equipment, mild hybrids, and idle reduction technologies; has already started introducing smaller vehicles; and will continue to evaluate alternative fuel and advanced technologies. Mohawk Industries, Inc. noted that it has established programs to reduce energy and water consumption, and is promoting recycling.

#### *D. Comments Providing Suggestions for DOE, Other Agencies, or Congress*

In addition to discussing existing voluntary efforts to reduce petroleum use or environmental impacts, several organizations provided suggestions to DOE, other agencies, or Congress to encourage the use of alternative fuels and to reduce petroleum consumption.

AALA ended its written comments with several recommendations and statements of principles. First, it indicated that government policies concerning fleets need to be consistent, which AALA believes they have not been. AALA indicated that more intergovernmental coordination is required. Second, AALA stated that future programs should build upon successful efforts, like EPA’s SmartWay program. AALA stated that it simply does not believe that mandates have been successful. Third, AALA stated that lack of access to alternative fuel is the current “choke point”, and efforts are underway to improve this. Fourth, AALA expressed a preference for broad-based solutions that include the general public, not a focus on a narrow band of the market that fleets represent. Fifth, AALA stated that transitional approaches must be selected to lessen disruptions. It indicated that a desired path would be if cost-effective after-market devices were available to allow retrofitting existing vehicles.

ARI suggested that to encourage petroleum reduction in fleets, the Federal Government should focus on

incentives for deployment of new vehicle technologies and fuels.

The most extensive list of recommendations was provided by NGVAmerica, which indicated that such recommendations should be reported to Congress. In general, NGVAmerica recommended the development of further support for natural gas as an alternative fuel. NGVAmerica also recommended that DOE carefully review the recent California Energy Commission (CEC) report list of policy measures and regulatory actions. [See State Alternative Fuels Plan—FINAL Committee Report, publication number CEC-600-2007-011-CTF, October 2007, available at <http://www.energy.ca.gov/2007publications/CEC-600-2007-011/CEC-600-2007-011-CTF.PDF>. In particular, NGVAmerica expressed its support for CEC’s assessment concerning continued needs for incentives, the benefits of focusing on medium- and heavy-duty vehicles, the need for R&D, the need for incentives for utilities to increase involvement, and the need for dedicated funding for infrastructure. All of NGVAmerica’s recommendations are provided in its comment, which can be viewed at [http://www1.eere.energy.gov/vehiclesandfuels/epact/private/plg-ab69\\_docket.html](http://www1.eere.energy.gov/vehiclesandfuels/epact/private/plg-ab69_docket.html).

The suggestions provided by commenters on possible efforts to reduce petroleum consumption and increase alternative fuel use are outside the scope of this determination. However, DOE will consider all of the recommendations under the alternative fuel programs, as appropriate. DOE will take notice of this information, and review it and include it as relevant when preparing the report to Congress under section 509 of EPAct 1992 (42 U.S.C. 13259).

### **IV. Definitions and Statutory Requirements**

#### *A. Definitions*

Under EPAct 1992, an “alternative fuel vehicle” is a “dedicated vehicle or a dual fueled vehicle.” (42 U.S.C. 13211(3))

A “dedicated vehicle” means “a dedicated automobile, such as the term is defined in section 513(h)(1)(D) of the Motor Vehicle Information and Cost Savings Act or a motor vehicle other than an automobile, that operates solely on alternative fuels.” (42 U.S.C. 13211(6))

A “dual fuel vehicle” is one “capable of operating on alternative fuel and on gasoline or diesel fuel.” (42 U.S.C. 13211(8)(A)) DOE notes that because a dual fueled vehicle can be operated on

gasoline or diesel, the purchase of a dual fueled vehicle does not assure that “alternative” or “replacement” fuel will be used to operate the vehicle.

“Replacement fuel” is defined by EPAct 1992 under section 301(14) to mean “*the portion of any motor fuel that is methanol, ethanol, or other alcohols, natural gas, liquefied petroleum gas, hydrogen, coal derived liquefied fuels, fuels (other than alcohol) derived from biological materials, electricity (including electricity from solar energy), ethers, or any other fuel that the Secretary determines meets certain statutory requirements.*” (42 U.S.C. 13211(14); emphasis added)

“Alternative fuel” is defined to include many of the same types of fuels as “replacement fuel” (such as methanol, natural gas, hydrogen and electricity), but also includes certain “mixtures” of petroleum-based fuel and other fuels. (10 CFR 490.2 (2002)<sup>1</sup>) Thus, a certain mixture might constitute an “alternative fuel,” but only the portion of the fuel that is within the definition of “replacement fuel” would actually constitute “replacement fuel.” For example, a mixture of 85 percent methanol and 15 percent gasoline would, in its entirety, constitute “alternative fuel,” but only the 85 percent that was methanol would constitute “replacement fuel.” Also by way of example, B20 (a fuel blend typically consisting of approximately 20 percent biodiesel and 80 percent diesel), considered as a total fuel blend, would not qualify as an “alternative fuel,” but the 20 percent that is biodiesel would qualify as “replacement fuel.”

For the purpose of considering a Private and Local Government Fleet Requirement, the term “covered fleet” is a “fleet, other than Federal fleet, State fleet, or fleet owned, operated, leased, or otherwise controlled by a covered person under section 501 [of EPAct 1992].” (42 U.S.C. 13257(g)) This is interpreted to mean all private and local government fleets not already covered under the existing fleet requirements program.

A “fleet” is defined in section 301(9) of EPAct 1992 as follows:

[T]he term “fleet” means a group of 20 or more light duty motor vehicles, used primarily in a metropolitan statistical area or consolidated metropolitan statistical area, as established by the Bureau of the Census, with a 1980 population of more than 250,000, that are centrally fueled or capable of being centrally fueled and are owned, operated,

<sup>1</sup> EPAct defines “alternative fuel” (see 42 U.S.C. 13211(2)), but DOE has exercised its authority to modify, by regulation, this definition. Therefore, the currently effective definition of “alternative fuel” is set forth at 10 CFR 490.2 (2006).

leased, or otherwise controlled by a governmental entity or other person who owns, operates, leases, or otherwise controls 50 or more such vehicles, by any person who controls such person, by any person controlled by such person, and by any person under common control with such person, except that such term does not include—

(A) Motor vehicles held for lease or rental to the general public;

(B) Motor vehicles held for sale by motor vehicle dealers, including demonstration motor vehicles;

(C) Motor vehicles used for motor vehicle manufacturer product evaluations or tests;

(D) Law enforcement motor vehicles;

(E) Emergency motor vehicles;

(F) Motor vehicles acquired and used for military purposes that the Secretary of Defense has certified to the Secretary must be exempt for national security reasons;

(G) Nonroad vehicles, including farm and construction motor vehicles; or

(H) Motor vehicles which under normal operations are garaged at personal residences at night.

(42 U.S.C. 13211(9))

EPAct 1992 defines the Replacement Fuel Goal in terms of producing sufficient replacement fuels to replace, on an energy equivalent basis, a specified percentage of the projected consumption of motor fuel in the United States for each such year, with at least one half of such replacement fuels being domestic fuels. (42 U.S.C. 13252(b)(2))

Section 301(12) of EPAct 1992 defines “motor fuel” as “any substance suitable as fuel for a motor vehicle.” (42 U.S.C. 13211(12)) Moreover, the term motor vehicle is defined in section 301(13) of EPAct 1992, through reference to 42 U.S.C. 7550(2), as a self-propelled vehicle that is designed for transporting persons or property on a street or highway. (42 U.S.C. 13261(13)) As DOE is required to evaluate the Replacement Fuel Goals established in section 502(b)(2) in terms of the capacity of producing sufficient replacement fuels to offset a certain percentage of U.S. “motor fuel” consumption, DOE, for the purposes of Title V of EPAct 1992, has interpreted the term motor fuel to include all fuels that are used in motor vehicles. This includes fuels used in light-, medium-, and heavy-duty on-road vehicles. 71 FR 54771 (September 9, 2006)

#### B. Key Statutory Requirements

The issue DOE addresses in this final determination is whether a Private and Local Government Fleet Requirement is “necessary” under section 507(e) of EPAct 1992. (42 U.S.C. 13257(e)(1)) Under section 507(e)(1) a Private and Local Government Fleet shall be promulgated if DOE determines such a program is “necessary.” (42 U.S.C. 13257(e)(1)) A Private and Local

Government Fleet Requirement “shall be considered necessary” only if (1) DOE finds that “the goal of replacement fuel use \* \* \* is not expected to be actually achieved \* \* \* without such a fleet requirement program;” and (2) “such goal is practicable and actually achievable \* \* \* through implementation of such a fleet requirement program in combination with voluntary means and the application of other programs relevant to achieving such goals.” (42 U.S.C. 13257(e)(1)(A) and (B))

EPAct 1992 authorizes DOE to conduct two separate rulemakings to determine whether to promulgate a Private and Local Government Fleet Requirement. First, section 507(b) directs DOE to conduct an early rulemaking, to be completed by December 15, 1996. (42 U.S.C. 13257(b)) The deadline for the “early rulemaking” passed without final action and has no continuing relevance. The second rulemaking provision is under section 507(e), which directs DOE to make a “necessity” determination by January 1, 2000. (42 U.S.C. 13257(e)(1)) It is under section 507(e) that DOE issues today’s final determination.

#### C. Other Relevant Requirements

There are a number of other sections of EPAct 1992 that must be weighed in considering a potential Private and Local Government Fleet Requirement, primarily under the second prong of the “necessity” determination. These considerations include how such a requirement would be limited in application and practice, and other considerations and steps related to the determination process.

Under section 507(i), a promulgated Private and Local Government Fleet Requirement must provide for an exemption of a fleet from the applicable requirements on grounds of: (1) Non-availability of appropriate AFVs and alternative fuels; (2) non-availability of appropriate alternative fuels; and (3) with respect to local government entities, financial hardship. (42 U.S.C. 13257(i))

EPAct 1992 furthermore contains a petition provision in section 507(n). That section provides that:

As part of the rule promulgated \* \* \* pursuant to subsection \* \* \* (g) of this section, the Secretary shall establish procedures for any fleet owner or operator or motor vehicle manufacturer to request that the Secretary modify or suspend a fleet requirement program \* \* \* nationally, by region, or in an applicable fleet area because, as demonstrated by the petitioner, the infrastructure or fuel supply or distribution system for an applicable alternative fuel is inadequate to meet the needs of a fleet.

(42 U.S.C. 13527(n)) As a result, even to the extent a fleet constitutes a “fleet” under the narrow EPAct 1992 definition, and does not otherwise qualify for one of the statutory exemptions, it could petition for relief or suspension of a fleet mandate for any one of several different reasons.

Section 507(m) of EPAct 1992 requires DOE to consult with the Secretary of Transportation (DOT), Administrator of the Environmental Protection Agency (EPA), and other appropriate agencies in carrying out the requirements of section 507. DOE provided a pre-publication draft of the proposed determination to DOT, EPA, and the Office of Management and Budget (OMB) for their review. The analysis presented in today’s final determination is essentially the same as that previously provided to DOT, EPA, and OMB.

#### *D. No Fuel Use Requirement Authority*

It is important to note that the ability of a Private and Local Government Fleet Requirement to affect petroleum consumption also depends, in significant part, on whether DOE can require covered fleets to use alternative or replacement fuels in addition to requiring that they acquire AFVs. The only explicit requirements for fuel use in EPAct 1992 are contained in section 501(a)(4), which applies only to alternative fuel provider fleets, and section 302(a)(2) (amending section 400AA of the Energy Policy and Conservation Act), which applies only to Federal fleets. (42 U.S.C. 13251(a)(4) and 6374(a)) While not modifying the specific alternative fuel use requirement for Federal Fleets under EPAct 1992 Section 302(a)(2) (as modified by EPAct 2005 Section 701), EISA 2007 did include a related provision. Section 141 of EISA 2007 appears to incorporate into legislation the primary elements of Executive Order 13423, which required Federal Fleets to reduce petroleum consumption by 20 percent (2015 vs. 2005), while increasing use of alternative fuels by 10 percent per year. Thus, while not specifically going beyond the existing Federal alternative fuel use requirement from EPAct 1992 and 2005, EISA 2007 did add an additional overall metric for Federal fleets based upon alternative fuel use. Section 507 of EPAct 1992, which concerns private and local government fleets, does not contain any similar provision, nor does it contain a provision either authorizing DOE to mandate fuel use or explicitly prohibiting DOE from mandating fuel use.

DOE believes that because Congress specifically required use of alternative fuel in sections 501(a)(4) and 302(a)(2) of EPAct 1992, but not in section 507, the omission was deliberate. As a result, DOE believes that Congress did not intend for DOE, when acting under section 507, to have authority to promulgate regulations containing a requirement that fleet vehicles use particular types of fuel.

This interpretation is consistent with Congressman Philip Sharp’s remarks when he called up the conference report on EPAct 1992 for U.S. House of Representatives approval. Congressman Sharp was one of the key architects of EPAct 1992, and the floor manager for the bill in the House of Representatives. Congressman Sharp said:

Under section 501, covered persons must actually run their alternative fueled vehicles on alternative fuels when the vehicle is operating in an area where the fuel is available. This requirement was not included in the fleet requirement program under section 507, because the conferees were concerned that the alternative fuel providers might charge unreasonable fuel prices to the fleets that are not alternative fuel providers if such fleets were required to use the alternative fuel.

*138 Cong. Rec. H11399 at H11400 (October 5, 1992).*

#### **V. Analysis for Private and Local Fleets Rule Determination**

As stated above, DOE must issue a Private and Local Government Fleet Requirement if DOE determines that such a requirement is “necessary.” (42 U.S.C. 13257(e)(1)) For the purpose of this determination, a Private and Local Government Fleet Requirement is necessary if:

i. The Replacement Fuel Goal under section 502(b)(2)(B), or as modified under section 504, is not actually expected to be achieved by 2010, or the date established under section 504, without such a fleet requirement; and

ii. Such a goal is practicable and actually achievable within the appropriate period, through implementation of such a fleet requirement in combination with voluntary means and the application of other programs relevant to achieving such goals.

(42 U.S.C. 13257(e)(1)(A) and (B))

#### *A. Achievability of the Replacement Fuel Goal*

As stated above, DOE recently determined that the Replacement Fuel Goal of 30 percent by 2010 established under section 502(b)(2)(B) is not achievable. 72 FR 12041. Pursuant to its statutory authority to do so, DOE established a modified goal by extending the goal date to 2030, i.e., establishing a Replacement Fuel Goal of

30 percent by 2030. 72 FR 12041. In establishing the modified Replacement Fuel Goal, DOE determined that such a goal is achievable.

In evaluating and modifying the goal, DOE was directed to balance considerations to establish goals that are “achievable.” (42 U.S.C. 13254(b)) The Replacement Fuel Goal must promote replacement fuels to the “maximum extent possible” while remaining technologically and economically feasible. (42 U.S.C. 13254(a) and (b)(2)) DOE determined that the modified goal meets these requirements, for several reasons. First, DOE based its analysis on the best information available, from published and peer-reviewed sources. In particular, much of DOE’s analysis was based on the Energy Information Administration’s (EIA) Annual Energy Outlook (AEO) 2005 through 2007. Second, DOE’s analysis generally was based on the current budget and policy framework, under which many technologies show reasonable potential for success and market penetration. Thus, the analysis assumed virtually no major new policies or funding initiatives beyond those already in place. Third and last, the modified goal balances the minimum and maximum projected replacement fuel production capacities from several reasonable scenarios. A complete discussion of the analysis relied on in the final rule for the modified Replacement Fuel Goal and the supporting documents can be reviewed at [http://www1.eere.energy.gov/vehiclesandfuels/epact/private/plg\\_docket.html](http://www1.eere.energy.gov/vehiclesandfuels/epact/private/plg_docket.html).

In evaluating a modification to the Replacement Fuel Goal, DOE analyzed four scenarios to generate a range of potential replacement fuel production capacities. In none of these scenarios did DOE include potential increases in alternative fuel production as a result of a Private and Local Government Fleet Requirement. As such, DOE determined that the modified Replacement Fuel Goal of 30 percent by 2030 is expected to be achieved without establishing a Private and Local Government Fleet Requirement.

Given the determination in the modified Replacement Fuel Goal final rule that the modified goal is expected to be achieved by 2030 without a Private and Local Government Fleet Requirement, DOE has determined that the first prong of the “necessity” determination has not been met.

With the enactment of EISA 2007, the Renewable Fuel Standard has been significantly expanded to 36B gallons by 2022. In addition, consumption of petroleum fuels will decrease through the increased CAFE requirements as a

result of the Act. Thus, the probability of achieving the revised Replacement Fuel Goal has been greatly increased, further negating the need for a Private and Local Government Fleet Rule to meet the Goal.

*B. Potential Contribution of a Private and Local Government Fleet Requirement to the Production Capacity of Alternative Fuel*

The second prong of the “necessity” determination requires DOE to determine whether the Replacement Fuel Goal is actually achievable were a Private and Local Fleet Requirement established. (42 U.S.C. 13257(e)(1)(B)) As stated above, DOE has determined that the modified Replacement Fuel Goal is achievable. Although DOE has determined that the Private and Local Government Fleet Requirement is not necessary to achieve the modified Replacement Fuel Goal, DOE also performed an initial analysis to estimate the contribution that such a requirement would make to the Replacement Fuel Goal, if such a requirement were established. This analysis was revised with the latest information available for the Final determination.

In the mid-1990s, DOE initially estimated that between 1.7 and 7.3 million AFVs would be acquired over 19 years if a possible Private and Local Government Fleet Requirement was implemented. The purchases of AFVs under such a fleet program level out at approximately 400,000 to 500,000 AFVs annually starting in 2010. As discussed below, however, more detailed analyses showed DOE's initial estimates were probably too high.

Several follow-up analyses were conducted by DOE from 1996 to 2000 to attempt to determine not just how many AFVs would be required to be acquired, but more importantly, what the potential contribution of a Private and Local Government Fleet Requirement would be to replacing U.S. motor fuel. The limitations on the potential contribution of a private and local government fleet program to the Replacement Fuel Goal are discussed in section II above. In brief, however, one DOE report issued in 1996 estimated that total fuel use from all fleets, including private and local government fleets, potentially covered by EPAct 1992 fleet programs to be approximately 1.2 percent of U.S. gasoline use. See *Assessment of Costs and Benefits of Flexible and Alternative Fuel Use in the U.S. Transportation Sector, Technical Report Fourteen: Market Potential and Impacts of Alternative Fuel Use in Light-Duty Vehicles: A 2000/2010 Analysis*

(DOE/PO-0042) (January 1996) [hereinafter *Technical Report 14*].

DOE's *Section 506 Report*<sup>2</sup> was only slightly more optimistic, indicating that “[a]lternative fuel use by EPAct [1992] covered fleets, even with the contingent mandates for private and local government fleets, is unlikely to provide more than about 1.5 percent replacement fuel use[.]” *Section 506 Report* at p. 35. In either case, subtracting the portion of replacement fuel use represented by the existing (Federal, State, and alternative fuel provider) fleet programs would leave the potential private and local government fleet program contribution closer to a maximum of 1 percent.

However, both these earlier reports included calculations based only upon the percentage of light-duty gasoline fuel use. For purposes of the goal contained in section 502 of EPAct 1992, DOE has repeatedly asserted that fuel replacement should be considered in the context of all on-highway motor fuel use, including heavy-duty vehicle fuel use, because the goal is to be considered in the context of the “projected consumption of motor fuel in the United States.” (42 U.S.C. 13252(b)(2)) Therefore, the figures provided in these earlier reports, when adjusted to reflect the impact on all on-highway motor fuel use, show that a Private and Local Government Fleet Rule—even with a fuel use requirement, which as noted above, DOE does not have the authority to impose—would provide at most on the order of 0.7–0.8 percent motor fuel replacement, assuming virtually complete use of alternative fuel in the AFVs required.

Both the analyses in *Technical Report 14* and the *Section 506 Report* were conducted before DOE had much experience with implementation and operation of the EPAct 1992 fleet programs. DOE's experience with those programs now has shown that the number of fleets originally envisioned to be covered was far larger than the number of fleets covered in actual practice, and that these fleets could not, in the absence of a specific mandate, be assumed to use alternative fuel in their AFVs 100 percent of the time. Thus, DOE believes that the figures in these reports probably overstated the potential impact of a Private and Local Government Fleet Rule. This view was supported by analyses contained in a later DOE-supported report, *The*

<sup>2</sup> See Energy Efficiency and Renewable Energy, DOE, Replacement Fuel and Alternative Fuel Vehicle—Technical and Policy Analysis p. viii-ix (Dec. 1999—Amendments Sept. 2000); [http://www1.eere.energy.gov/vehiclesandfuels/epact/pdfs/plf\\_docket/section506.pdf](http://www1.eere.energy.gov/vehiclesandfuels/epact/pdfs/plf_docket/section506.pdf).

*Alternative Fuel Transition: Results from the TAFV Model of Alternative Fuel Use in Light-Duty Vehicles 1996–2000*<sup>3</sup> (*TAFV Model Report*), which incorporated more realistic assumptions regarding these fleet programs. The *TAFV Model Report* stated that,

In particular, over all of the price scenarios, we find that the [private and local government fleet] rule increases the alternative fuel penetration in 2010 from 0.12% (without the private and local government rule) to, at most, 0.37% [with a private and local government rule] of total fuel sales.

*TAFV Model Report* at p. 28. Thus, the analysis in the *TAFV Model Report* placed contributions from the Private and Local Government Fleet Rule at 0.25 percent. As with *Technical Report 14* and the *Section 506 Report*, these percentages were calculated based on the total fuel sales of the fuel used by light-duty vehicles only. Thus, the projected contribution from a potential rule dropped to below 0.2 percent when evaluated as part of all on-highway motor fuel use and can be reconciled somewhat with those found by the earlier reports. As indicated in section II above, DOE does not have authority to mandate that AFVs acquired actually operate on alternative fuels. Experience with the existing State Fleet Program, where fleets are similarly not required to use alternative fuel, has shown that alternative fuel use rates are typically in the ten to twenty-five percent range. Thus, when adjusting the levels found in *Technical Report 14* and the *Section 506 Report* by such utilization levels, the overall projected impacts likely end up in about the 0.2 percent range.

It also should be noted that during earlier rulemaking processes, no commenter presented any persuasive analysis or data to counter or dispute the data and conclusions in *Technical Report 14*, the *Section 506 Report*, or the *TAFV Model Report*. Therefore, DOE concluded from these reports that a Private and Local Government Fleet Requirement under authority provided to DOE by EPAct 1992 section 507 would be expected to contribute, at best, an extremely small amount toward achievement of the Replacement Fuel Goal (below 1 percent and likely below 0.2 percent of all on-highway motor fuel use). Even without the additional statutory limitations described above, which EPAct 1992 places on such a Private and Local Government Fleet Requirement, the contribution from such a mandate to the EPAct 1992

<sup>3</sup> ORNL.TM2000/168 (September 17, 2000) [http://pz1.edornl.gov/tav99report31a\\_ornltn.pdf](http://pz1.edornl.gov/tav99report31a_ornltn.pdf).

Replacement Fuel Goal would be very small.

When the prior private and local fleets determination was conducted in 2003 through 2004, the analyses relied upon by DOE were the most recent, relevant analyses that it had. As such, these were all dated 2000 or earlier. With the passage of several more years between that determination and this rulemaking, DOE believed it was important to conduct an updated analysis to determine if circumstances had changed sufficiently to warrant imposition of acquisition requirements upon fleets. The approach taken was to first conduct a somewhat more simplified analysis than the previous ones, and if this analysis indicated significantly different results, than a more detailed and lengthy analysis would be commissioned. (Note that at the end of this section, the discussion of the analysis is included which was updated for today's final action.)

To conduct the current analysis, the Department relied, in large part, upon fleet industry data developed by *Automotive Fleet*, a leading publisher in the field. Each year, *Automotive Fleet* publishes an annual Fact Book, which includes detailed data on a number of fleet subjects. Unfortunately, *Automotive Fleet* does not provide the specific data necessary to support today's draft determination (namely the likely number of AFVs that would need to be acquired by fleets meeting EPAct 1992's coverage criteria). Therefore the Fact Book data was used as a starting point, with other information (such as from the EIA Annual Energy Outlook) and various assumptions used to further refine the data to move closer to the specific types of numbers required for today's action.

For the purpose of today's final determination, two analyses were conducted to determine what portion of U.S. motor fuel use might be replaced with replacement fuels by vehicle acquisitions resulting from a potential fleet rule. The first method compares annual acquisitions under a potential rule to the total annual U.S. acquisitions. The second method of analysis compares vehicles in operation due to a potential rule to all vehicles in operation. Both methods were used as analogs to determine the overall percentage replacement of U.S. motor fuel.

According to the 2005 Fact Book (which reports data for 2004), fleets in

the United States acquired 2,849,837 light-duty vehicles (cars and light trucks), of which 1,944,581 (68.2 percent) were acquired for rental fleets. Because rental vehicles are specifically excluded from coverage under EPAct 1992 section 301(9) (42 U.S.C. 13211(9)), the remaining potentially covered vehicle acquisitions drop to 905,256 vehicles. Note that this does not exclude any leased vehicles, of which the Fact Book indicates there were another 326,832 acquired in 2004. Many of these may ultimately be excluded as perhaps either shorter term leases or vehicles specifically held for lease to others (another excluded class). Because there is no way to determine which portion of these leased vehicles would most likely be excluded, DOE chose to rely on the 905,256 value as the number of vehicles purchased by fleets that would potentially be subject to a Private and Local Government Fleet Requirement.

Next, the current annual acquisitions of vehicles already subject to EPAct 1992 fleet requirements needed to be subtracted. Data was obtained from the Department's EPAct 1992 Web sites, at <http://www1.eere.energy.gov/vehiclesandfuels/epact/>. For Federal Fleets, there were 18,426 covered light-duty vehicles acquired in 2004. For State and Alternative Fuel Provider Fleets, there were 13,374 covered light-duty vehicles acquired. Thus, the remaining number of potentially covered acquisitions drops to 873,456.

In 2004, a total of 16,537,440 light-duty vehicles were acquired throughout the United States. This means that the maximum potential pool of covered light-duty vehicles under a Private and Local Fleet Requirement would represent 5.3 percent of total acquisitions for the year. Because the maximum acquisition requirement percentage under the potential Private and Local Government Fleet Rule is 70 percent (42 U.S.C. 13257(g)), the maximum potential number of AFVs that would need to be acquired on an annual basis would be 611,419. This number represents approximately 3.7 percent of all light-duty vehicles acquired in the United States.

DOE's experience, however, is that the maximum potential number of required acquisitions is quite different from the actual number of required acquisitions. This is because section 301(9) includes several basic

requirements for coverage of a fleet's acquisitions. (42 U.S.C. 13211(9)) The fleet must be owned or controlled by an entity that owns at least 50 light-duty vehicles nationwide, of which 20 must reside in one of the 125 covered Metropolitan Statistical Areas (MSAs, with 1980 population of more than 250,000) and are centrally fueled or capable of being centrally fueled. (42 U.S.C. 13211(9))

In arriving at the 50 and 20 light-duty vehicle minimums, several classes of vehicles are excluded from consideration, including emergency and law enforcement vehicles (42 U.S.C. 13211(9)(D) and (E)), vehicles taken home at night by employees (42 U.S.C. 13211(9)(H)), and non-road vehicles (42 U.S.C. 13211(9)(G)). With these exclusions the number of potentially required AFV acquisitions drops even further. For example, if just the 2004 acquisitions of Ford Crown Victorias and Chevy Impalas are reviewed, the non-rental numbers acquired for commercial and government fleets totals nearly 90,000 vehicles (according to the 2005 Fact Book). These two vehicles are often acquired for use as police vehicles, or else taxicabs (a class of vehicles whose status under the program is undetermined for this analysis and for which many might not ultimately be covered due to fleet size, location, or other reasons).

Based on DOE's experience with the Federal, State, and Alternative Fuel Provider Fleet requirements and the vehicle classes excluded from consideration by EPAct 1992, DOE considered two scenarios for this analysis, one where 50 percent of the maximum potential annual acquisitions are required (305,710 AFVs), and one (considered much more likely) where 25 percent of the maximum potential annual acquisitions are required (152,855 AFVs). These two scenarios thus represent 1.8 and 0.9 percent, respectively, of overall annual light-duty acquisitions.

So the net result of this portion of the analysis is that a fleet rule could result in requirements to acquire between 150,000 and just over 600,000 AFVs each year, representing between approximately 1 to 3.7 percent of total annual light-duty vehicle acquisitions, based on 2004 data. This portion of the annual acquisition analysis is summarized below in Figure 1.

FIGURE 1.—SUMMARY OF ANNUAL ACQUISITION ANALYSIS, FLEET VEHICLES

Total New Cars and Trucks Registered by Fleets in 2004 .....	2,849,837
Total New Cars and Trucks Registered by Rental Fleets in 2004 .....	1,944,581

FIGURE 1.—SUMMARY OF ANNUAL ACQUISITION ANALYSIS, FLEET VEHICLES—Continued

Percentage in Rental Fleets .....	68.2%
Remainder of New Cars and Trucks, not in Rental Fleets 2004 .....	905,256
New Covered LDV acquisitions in 2004, Federal Fleet .....	18,426
New Covered LDV acquisitions in 2004, State and Fuel Provider Fleets .....	13,374
Net New Cars/Truck Registered, not in Fleets Already Covered .....	873,456
Total New LDV Registrations, 2004 .....	16,537,440
Max Potential Portion of 2004 Fleet acquisitions covered out of total registrations .....	5.3%
EPAct 1992 Maximum Acquisition Requirement .....	70%
Max Potential AFV Acquisitions per year, numbers of AFVs required .....	611,419
Max Potential AFV Acquisitions per year, percentage of total acquisitions .....	3.7%
If 50% of maximum potential actually covered, number of AFVs required .....	305,710
If 50% of maximum potential actually covered, percentage of total acquisitions .....	1.8%
If 25% of maximum potential actually covered, number of AFVs required .....	152,855
If 25% of maximum potential actually covered, percentage of total acquisitions .....	0.9%

The analysis above is in the context of light-duty vehicles and would represent between one and 3.7 percent of motor fuel consumption by light-duty vehicles. For the purpose of section 507(e)(1)(B), DOE must evaluate the potential contribution of a Private and Local Government Fleet Requirement to the Replacement Fuel Goal. (42 U.S.C. 13257(e)(1)(B)) The Replacement Fuel Goal is in terms of motor fuel consumption, including consumption from medium- and heavy-duty vehicles. As indicated in the Energy Information Administration's Annual Energy Outlook 2007 (AEO 2007), light-duty vehicles only account for 75.22 percent of on-road motor fuel use in the United States, with the remainder consumed by medium- and heavy-duty classes, neither of which is covered by the Private and Local Government Fleet

Requirement. In terms of total motor fuel consumption, the contribution of the potential AFV acquisitions under a Private and Local Government Fleet Requirement must be adjusted down to 0.7 to 2.8 percent.

The expected contribution of AFVs acquired under a Private and Local Government Fleet to alternative fuel consumption must be further adjusted. As explained above, EPAct 1992 does not allow DOE to require alternative fuel use in the required AFVs, the potential consumption values represent the portion of petroleum consumption replaced at an alternative fuel use level of 100 percent. Experience with programs for which fuel use is not required (such as the State Fleet Program) indicates that the assumption of 100 percent alternative fuel use is not

realistic. DOE has seen alternative fuel usage levels as low as 10 percent.

For the purposes of this analysis, DOE looked at cases where alternative fuels were used 50, 25, and 10 percent of the time in the potentially required AFVs. These results yielded percentages of overall motor fuel consumption replaced of 0.1 to 1.4 percent, with the high value represented by the maximum potential case (already identified as overly optimistic) with a 50 percent alternative fuel use level. Thus, the likely range of consumption replaced is better represented by the 25 and 50 percent of maximum potential acquisition cases, which ranged from 0.1 to 0.7 percent.

The summary for this portion of the analysis is shown in Figure 2, where the shaded zone represents the more likely range of results.

FIGURE 2.—SUMMARY OF ANNUAL ACQUISITION ANALYSIS, PORTION OF OVERALL MOTOR FUEL CONSUMPTION

[In Percent]

	Maximum potential acquisitions	50% of maximum potential acquisitions	25% of maximum potential acquisitions
AFVs Required, Percentage of Total LDVs .....	3.7	1.8	0.9
Portion of Total Motor Fuel Use Due to LDVs .....		75.22	
Potential Maximum Consumption Percentage for Required AFVs (100% Alternative Fuel Use) .....	2.8	1.4	0.7
Potential Consumption Percentage for Required AFVs (50% Alternative Fuel Use) .....	1.4	0.7	0.3
Potential Maximum Consumption Percentage for Required AFVs (25% Alternative Fuel Use) .....	0.7	0.3	0.2
Potential Maximum Consumption Percentage for Required AFVs (10% Alternative Fuel Use) .....	0.3	0.1	0.1

It should be noted that this likely range of consumption replacement under the potential rule, 0.1 to 0.7 percent, is very close to that predicted by the TAFV report in 2000 (0.2 to 0.8 percent).

The second analysis, as indicated above, sought to use the portion of the in-use inventory of vehicles on the road in the United States that were represented by the cumulative numbers of AFVs acquired under the potential

rule as a way to determine the portion of overall motor fuel use replaced. This case then assumes that once the program reaches the maximum acquisition requirement (70 percent), and levels off, all relationships between

the consumption of the required AFVs and the overall on-road fleet are relatively unchanged over time. It also explicitly assumes that the AFVs acquired under this potential rule use the same amount of fuel, on average, as all other light-duty vehicles in operation in the United States.

This second analysis, therefore, uses the annual AFV acquisition requirements identified in the first analysis, ranging from just over 150,000 AFVs/year (25 percent of maximum potential acquisitions covered) to just over 610,000 AFVs/year (for maximum potential acquisitions covered). The 2004 Fact Book identifies that the average amount of time a light-duty vehicle stays in a fleet ranges from 31 to 56 months depending on model type, or just a bit less than five years. Therefore, to provide an estimate of the maximum portion of the on-road fleet that could be AFVs due to the potential rule, DOE chose to use a five-year period for AFVs to operate in the covered fleets.

The approach taken was to develop the percentage of the on-road vehicles in

the United States that would be AFVs, once the potential Private and Local Government Fleet Requirements reached maximum, steady-state requirements. (Under section 507(g), the requirements actually include a ramp-up of the AFV acquisition requirements, starting at 20 percent and rising to 70 percent. (42 U.S.C. 13257(g)) This steady-state, maximum case status, therefore, would be determined by looking at the portion of the on-road fleet that would be AFVs based upon five years of acquisitions of the AFVs required under the program. For the maximum potential case, this meant roughly three million AFVs, while for the 50 percent and 25 percent of maximum potential cases this meant 1.5 million and 760,000 AFVs, respectively. Because AEO2007 identified the on-road inventory of light-duty vehicles in the United States in 2004 as just over 215 million vehicles, this means that the AFVs under this program would represent 0.4 to 1.4 percent of all light-duty vehicles on the road in the United States.

But, as indicated in the first (annual acquisition) analysis above, light-duty vehicles only represent approximately 75 percent of U.S. motor fuel use. Therefore, even if everything else is equal concerning consumption patterns, the percentage of all light-duty vehicles that the AFVs under the potential program represent must be adjusted before identifying the likely replacement of petroleum consumption. Thus, if these AFVs are assumed to use alternative fuels one hundred percent of the time, the maximum replacement of petroleum due to these vehicles ranges from 0.3 to 1.1 percent.

There is, however, one final adjustment that needs to be made. Just as in the first analysis, it must be noted that DOE cannot mandate alternative fuel use in these vehicles. To account for less than complete alternative fuel use, DOE further adjusted the analysis, developing estimates for alternative fuel use from ten to fifty percent of the time. Thus, the more likely contribution from the potential fleet rule ranged from 0.03 to 0.3 percent. Figure 3 summarizes these results.

FIGURE 3.—SUMMARY OF CUMULATIVE ANALYSIS

	Maximum potential acquisitions	50% of maximum potential acquisitions	25% of maximum potential acquisitions
AFVs Required Annually .....	611,419	305,710	152,855
AFVs Added to Fleet over Five Years, at Maximum Fleet Requirement (70%) .....	3,057,096	1,528,548	764,274
Total Number of Light-Duty Vehicles in Operation in the United States, 2004 .....			
Maximum Portion of On-Road LDV Fleet that are AFVs in this Program .....	1.4%	0.7%	0.4%
Portion of U.S. Motor Fuel Use from Light-Duty Vehicles .....	75.22%		
Potential Maximum Consumption Percentage for Required AFVs (100% Alternative Fuel Use) .....	1.1%	0.5%	0.3%
Potential Consumption Percentage for Required AFVs (50% Alternative Fuel Use) .....	0.53%	0.27%	0.13%
Potential Maximum Consumption Percentage for Required AFVs (25% Alternative Fuel Use) .....	0.27%	0.13%	0.07%
Potential Maximum Consumption Percentage for Required AFVs (10% Alternative Fuel Use) .....	0.11%	0.05%	0.03%

In preparing today's final action, the Department revisited the analysis conducted for the NOPR. During the interim between the proposed determination and today's action, some additional information was released. To ensure that the analysis is still accurate and correct with the latest data available, DOE updated the analysis. The revised analysis was done with data representing primarily 2006, rather than 2004 in the previous action. The 2006

data showed some changes of relevance to the analysis, such as an increase in the number of light-duty vehicles acquired by fleets during the year from about 2.8 million in 2004 to nearly 3.3 million in 2006, as well as a drop in the overall acquisition of light-duty vehicles by the U.S. market, from approximately 16.5M in 2004 to just under 16.2M in 2006. Thus the maximum potential AFV acquisitions rose from 611,000 and 3.7 percent of total light-duty acquisitions

to approximately 760,000 and 4.7 percent of total light-duty acquisitions. In addition, the portion of overall motor (on highway) fuel use represented by light-duty vehicles rose from 75.22 percent to 78.34 percent.

Overall, however, these changes did not impact the analysis results significantly. Under the annual acquisition approach, potential impact from the Rule changed from 0.1 to 0.7 percent in the NOPR analysis to 0.1 to

0.9 percent. Again, this result was not far off from the TAFV result in 2000 of 0.2 to 0.8 percent. Under the cumulative (inventory) analysis approach, the changes were even less. While the NOPR analysis had indicated that a realistic range for the impact was 0.03 to just under 0.3 percent, the updated analysis based upon 2006 data indicated that this range would be 0.03 to just over 0.3 percent. Thus, neither analysis method as revised showed sufficiently significant changes to impact today's determination.

It should be noted, however, that one other relevant change occurred in the interim between the NOPR and today's final determination. When Congress passed EISA 2007, it included in section 133 an expansion of the vehicle types and other actions that qualified for credit as AFVs under EPACT's Title V fleet programs. In doing so, it included such vehicle types or actions as hybrid vehicles, plug-in hybrid electric vehicles, investments in refueling infrastructure, investments in advanced technologies, and other elements. While improving the flexibility for covered fleets, this change could ultimately decrease the estimated contribution from a potential Private and Local Government Fleet Rule even further, by allowing fleets to comply with currently-available hybrid vehicles. These vehicles, while generally representing an increase in efficiency, do not allow for the use of alternative fuels as do AFVs, and thus would not contribute significant use of replacement fuels beyond low-level blends. They also do not help to build demand for alternative fuel refueling infrastructure, which is a key to greater displacement of petroleum. Thus, this change would be expected in many cases to result in replacement of even less petroleum fuel, probably reducing the levels estimated in the analyses even further.

In summary, the updated analysis conducted for today's action does not appear to change significantly from those analyses relied upon for the previous private and local fleet determination. Under either updated analysis approach used now, the potential contribution from a Private and Local Government Fleet rule appears to be far below one percent, probably on the order of 0.2–0.3 percent, similar to the levels identified in the 2003–2004 determination. Therefore no further analyses were deemed necessary by DOE.

## VI. Determination

In establishing a revised Replacement Fuel Goal, DOE demonstrated how the

modified goal could be achieved through a number of replacement fuel technologies, including biofuels, other alternative fuels, and energy efficiency. In demonstrating the achievability of the new goal, DOE did not assume imposition of a Private and Local Government Fleet Requirement. Given that DOE has demonstrated the achievability of the Replacement Fuel Goal absent a Private and Local Government Fleet requirement, DOE has determined that a Private and Local Government Fleet requirement is not necessary under the EPAct Fleet program. Moreover, were DOE to establish such a requirement, its projected impact would likely be on the order of about 0.2 percent of U.S. motor fuel consumption.

Therefore, DOE has determined that the Private and Local Government Fleet Requirement is not "necessary" as specified in section 507(e)(1) of EPAct 1992, and DOE is not proposing to establish a Private and Local Government Fleet Requirement.

## VII. Regulatory Review

### A. Review Under Executive Order 12866

This action has been determined to be a "significant regulatory action" under Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (October 4, 1993). Accordingly, today's action was reviewed under the Executive Order by the Office of Information and Regulatory Affairs (OIRA).

### B. Review Under Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires preparation of a regulatory flexibility analysis for any rule that is likely to have a significant economic impact on a substantial number of small entities. The negative determination under EPAct 1992 section 507(e) will not result in compliance costs on small entities. Therefore, DOE certifies that today's determination will not have a significant economic impact on a substantial number of small entities, and accordingly, no initial regulatory flexibility analysis has been prepared.

### C. Review Under the Paperwork Reduction Act

Because DOE is not promulgating requirements for private and local government fleets, no new recordkeeping requirements, subject to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, would be imposed by today's determination.

### D. Review Under the National Environmental Policy Act of 1969 (NEPA)

DOE has not prepared an environmental impact statement or an environmental assessment for this rulemaking, and has determined that neither is required. This final determination implements the March 6, 2006, Order of the U.S. District Court of California to issue a final determination under section 507(e) of EPAct 1992. *Center for Biological Diversity*, 419 F.Supp. 2d 1166. The Court order held that the Secretary is not "obligated to prepare an impact statement under NEPA in either accepting or rejecting a fleet rule." *Id.* at 1173.

EPAct 1992 requires DOE to issue a Private and Local Government Fleet Requirement if such a requirement is necessary. (42 U.S.C. 13257(e)) Today's final determination establishes that a Private and Local Government Fleet Requirement is not necessary, and therefore DOE is not issuing a requirement. Once the Secretary has made the determination, the Secretary has no discretion whether to issue the requirement. *See Center for Biological Diversity*, 419 F.Supp. 2d 1166, 1173.

### E. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive Agencies to review regulations in light of applicable standards in section 3(a) and 3(b) to

determine whether they are met or it is unreasonable to meet one or more of them. Today's final action does not establish a new regulation.

#### *F. Review Under Executive Order 13132*

Executive Order 13132, *Federalism*, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's determination and has determined that it would not have a substantial direct effect 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.

Because DOE is determining that a private and local government fleet AFV program is not "necessary" under section 507(e) and therefore is not promulgating such a program, no significant impacts upon State and local governments are anticipated. The position of State fleets currently covered under the existing EPAct 1992 fleet program is unchanged by this action.

#### *G. Review of Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, requires each Federal agency to assess the effects of Federal regulatory actions on State, local and tribal governments and the private sector. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officials on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published in the **Federal Register** a statement of policy on its process for intergovernmental consultation under the Act (62 FR 12820). Today's final determination does not contain any Federal mandate, so the requirements of the Unfunded Mandates Reform Act do not apply.

#### *H. Review of Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations

Act, 1999, Public Law 105-277, requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's determination will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### *I. Review of Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's final determination under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

#### *J. Review Under Executive Order 13211*

Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use*, 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for significant regulatory actions under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. A determination that a private and local government fleet AFV acquisition program is not "necessary" under EPAct 1992 section 507(e) does not require private and local government fleets, suppliers of energy, or distributors of energy to do or to refrain from doing anything. Thus, although today's determination is a significant regulatory action, the determination will not have a significant adverse impact on the supply, distribution, or use of energy.

#### *K. Review Under Executive Order 13432*

Executive Order 13432, *Cooperation Among Agencies in Protecting the Environment With Respect to Greenhouse Gas Emissions from Motor Vehicles, Nonroad Vehicles, and Nonroad Engines*, 72 FR 27717 (May 16, 2007) requires DOE to work with DOT and EPA when conducting rulemakings that could be considered to affect emissions. In particular, this Executive Order requires that "the head of an agency undertaking a regulatory action that can reasonably be expected to

directly regulate emissions, or to substantially and predictably affect emissions, of greenhouse gases from motor vehicles, nonroad vehicles, nonroad engines, or the use of motor vehicle fuels, including alternative fuels, shall" conduct the rulemaking jointly with other agencies, to the extent permitted by law; consider, as appropriate, laws, information, and recommendations of the other agencies; exercise the agency's authority effectively; and obtain concurrence or other views by the other agencies throughout the rulemaking process. In meeting this requirement, the Department consulted with both DOT and EPA during development of the proposed determination. The analysis reviewed by the DOT and EPA is essentially the same as that presented in the final determination.

### **VIII. Approval by the Office of the Secretary**

The issuance of the Private and Local Government Fleet Determination has been approved by the Office of the Secretary.

Issued in Washington, DC, on March 6, 2008.

**Alexander A. Karsner**

*Assistant Secretary, Energy Efficiency and Renewable Energy.*

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## **FEDERAL TRADE COMMISSION**

### **16 CFR Part 453**

#### **Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices**

**AGENCY:** Federal Trade Commission.  
**ACTION:** Confirmation of rule.

**SUMMARY:** The Federal Trade Commission (the "Commission" or the "FTC") has completed its regulatory review of the Trade Regulation Rule on Funeral Industry Practices ("the Funeral Rule" or "the Rule"). The Rule sets forth preventive requirements in the form of price and information disclosures to ensure funeral providers avoid engaging in acts or practices the Commission has identified as unfair or deceptive acts or practices. Pursuant to the review, the Commission concludes that the Rule in its current form continues to be valuable to consumers, and the benefits of the Rule outweigh the costs. Because of insufficient support in the record, the Commission declines to propose amendments that some commenters advocated, namely to: expand the scope