

DEPARTMENT OF ENERGY**10 CFR Part 490**

[Docket No. EE-RM-FCVT-03-001]

RIN 1904-AA98

Office of Energy Efficiency and Renewable Energy; Alternative Fuel Transportation Program; Private and Local Government Fleet Determination

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

ACTION: Notice of proposed rulemaking (NOPR) and public hearing.

SUMMARY: Pursuant to the Energy Policy Act of 1992 (EPAct), the Department of Energy proposes to determine that a regulatory requirement for the owners and operators of certain private and local government fleets to acquire alternative fueled vehicles is not "necessary," and thus cannot and should not be promulgated, because such a program would result in no appreciable increase in the percentage of alternative fuel and replacement fuel used by motor vehicles in the United States and thus would not appreciably contribute to the achievement of the replacement fuel goal set forth in section 502(b)(2) of EPAct.

DATES: Written comments (eight copies and, if possible, an e-mail copy) on the proposed determination must be received by DOE on or before June 2, 2003; electronic copies of comments may be sent to the e-mail address listed below.

Oral views, data, and arguments may be presented at the public hearing, which will be held on May 7, 2003. The length of each oral presentation is limited to 10 minutes. The public hearing will be held at the U.S. Department of Energy Main Auditorium, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Requests to speak at the hearing must be submitted to DOE no later than 4 p.m. on April 22, 2003.

ADDRESSES: Written comments (eight copies) and requests to speak at the public hearing should be addressed to: U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, EE-2G, Docket Number EE-RM-FCVT-03-001, 1000 Independence Avenue, SW., Washington, DC 20585-0121. E-mails may be sent to: regulatory_info@afdc.nrel.gov.

Copies of this notice, the transcript from the hearing, and written comments will be placed at the following website address: http://www.ott.doe.gov/epact/private_fleets.shtml. You may also

access these documents using a computer in DOE's Freedom of Information (FOI) Reading Room, U.S. Department of Energy, Forrestal Building, Room 1E-190, 1000 Independence Avenue, SW., Washington, DC 20585-0121, (202) 586-3142, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. To request a copy of this notice or arrange on-site access to paper copies of other information in the docket, contact Mr. Dana V. O'Hara at the phone number or e-mail address below.

For more information concerning public participation in this rulemaking see the "Opportunity for Public Comment" section found in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: For information concerning this notice: 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.

SUPPLEMENTARY INFORMATION:

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I. Introduction

Section 507(e) of EPAct states that "the Secretary shall . . . determine whether a fleet requirement program is necessary under this section" with respect to certain private and local government vehicle fleets (42 U.S.C. 13257(e)). The Department of Energy (DOE) proposes to determine that it is not "necessary" to promulgate a regulation requiring these fleets to acquire alternative fueled vehicles

(AFVs). DOE proposes this determination because implementation of a private and local government fleet rule program would not appreciably contribute to the achievement of EPAct's existing 2010 replacement fuel goal of 30 percent, or of a revised replacement fuel goal were one to be adopted. DOE's review of EPAct, existing fleet programs, and the status of markets for alternative fuels and AFVs leads it to conclude that adopting a private and local government fleet rule would result in no appreciable increase in the percentage of alternative fuel and replacement fuel used by motor vehicles in the United States.

This conclusion and DOE's proposed determination are based on two interrelated findings and reasons. First, DOE has concluded that the number of fleets that would be covered by a private and local government fleet mandate and the number of AFV acquisitions that would occur are too small to cause an appreciable increase in the percentage of replacement fuel that is used as motor fuel. This is because of the limitations placed by EPAct itself on DOE's authority to promulgate a private and local government fleet acquisition mandate. For example, and as will be explained below, a private and local government fleet program could only apply to light duty vehicles (*i.e.*, less than 8,500 lbs. gross vehicle weight rating (GVWR)), to fleets that are located in certain metropolitan areas, and could not apply to a number of excluded vehicle classes and types (*e.g.*, rental vehicles, emergency vehicles, and vehicles garaged at residences overnight). Furthermore, EPAct requires that even fleets potentially covered by a fleet mandate may avoid some or all of its acquisition requirements if they fall within one of the numerous exemptions set forth in the statute.

Second, even if a private and local government fleet acquisition mandate were adopted and substantial numbers of AFVs were acquired as a result, there is no assurance that the AFVs acquired by covered fleets would actually use replacement fuel. EPAct gives DOE no authority to require that vehicles acquired by private and local government fleets use any particular fuel. Moreover, DOE's experience with implementation of the Federal fleet, State fleet, and alternative fuel provider fleet programs required by EPAct leads DOE to conclude that as a result of the lack of alternative fuel infrastructure, lack of suitable AFV models, lack of reasonable vehicle prices, and high alternative fuel costs relative to conventional motor fuels, market forces would prevent appreciable increases in

replacement fuel use in covered fleets, even if DOE were to impose a private and local government fleet vehicle acquisition requirement pursuant to EPAct sections 507(e) and (g).

DOE's proposed determination that a private and local government fleet regulatory program is not "necessary" under the standards set forth in EPAct section 507(e) and therefore cannot and should not be promulgated is also consistent with the view expressed in many of the comments DOE received during earlier stages of work that preceded issuance of this notice of proposed rulemaking. In these earlier stages, commenters (especially potentially covered fleets) expressed concerns regarding the lack of available fueling infrastructure and suitable AFV models. In addition, a number of alternative fuel proponents stated that the best means of increasing the introduction of AFVs and the use of alternative fuels would be to provide incentives for their use rather than adopting new mandates. These proponents urged DOE to support legislative initiatives that would provide incentives for the use of AFVs and alternative fuels. This Administration is in fact supporting the adoption of incentives for high-efficiency, advanced technology vehicles, which include AFVs. In addition, the President and DOE have proposed the FreedomCAR and Hydrogen Fuel Initiative, which is a major new initiative focused on significantly increasing the availability and use of non-petroleum motor fuels.

In evaluating whether to propose adoption of a private and local government fleet rule under EPAct sections 507(e) and (g), DOE reviewed the status of progress toward achieving the current replacement fuel goal. Based on this review, DOE believes that extraordinary measures would be required to achieve the current goal of 30 percent petroleum replacement by 2010.

At the same time, DOE takes note of the fact that Congress is widely expected to take up comprehensive legislation that may significantly affect our nation's energy future and may bear importantly not only on the achievability of the current goals but also on what any potential revised goals might be. In addition, the FreedomCAR and Hydrogen Fuel Initiative is focused on dramatically increasing the availability and use of replacement fuels and reducing reliance on petroleum as a motor fuel. In light of the momentum that this effort is engendering; in light of what DOE understands to be the principal purpose of EPAct's

replacement fuel goals¹—to keep the pressure on policymakers, industry and the public to engage in aggressive action to expand the use of alternative and replacement fuels; and in light of the likelihood of consideration and enactment of new legislation this Congress that would have a significant bearing on these issues, DOE has concluded that it should not make a determination under EPAct concerning the achievability of the 2010 goals at this time. Therefore DOE also is not proposing at this time to use its EPAct authority to seek to modify these goals. DOE will continue to evaluate this issue.

A. Authority

The issue DOE addresses in this notice of proposed rulemaking is whether a private and local government fleet requirement program is "necessary" under EPAct section 507(e). That section states that a private and local government fleet program shall be promulgated if DOE determines such a program is "necessary," and that such a program "shall be considered necessary" only if DOE finds that "the goal of replacement fuel use * * * is not expected to be actually achieved * * * without such a fleet requirement program" and "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."

The statutory definitions of vehicles and fuels in EPAct are key to DOE's determination discussed in this notice. An "alternative fuel vehicle" is a "dedicated vehicle or a dual fuel vehicle." (EPAct section 301(3)). A "dual fuel" vehicle is one "capable of operating on alternative fuel and on gasoline or diesel fuel." (EPAct section 301(8)(A)). The purchase of an AFV does not assure that "alternative" or "replacement" fuel will be used to operate the AFV. As discussed below, fleets are not required to use alternative or replacement fuel in their AFVs (except for alternative fuel providers, which are required to use alternative

fuel in their AFVs by section 501(a)(4) of EPAct).

"Replacement fuel" is defined by EPAct to mean "*the portion of any motor fuel* that is methanol, ethanol, or other alcohols, natural gas, liquefied petroleum gas, hydrogen, coal derived liquified 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 (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)²) Thus, a certain mixture might constitute an "alternative fuel," but only the portion of the fuel that fell 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, gasohol (a fuel blend typically consisting of approximately 10 percent ethanol and 90 percent gasoline), considered as a total fuel blend, would not qualify as an "alternative fuel," but the 10 percent that is ethanol would qualify as "replacement fuel."

The rulemaking process for determining whether to promulgate a private and local government fleet rule is very different from the previous DOE rulemaking concerning State government and alternative fuel provider fleets. With that rule, DOE was not required to make any findings in order to promulgate a fleet rule; EPAct itself imposed the fleet program. The determination of whether to adopt AFV acquisition mandates for private and local government fleets, however, is conditional and depends on several critical findings by DOE. Regulations covering private and local government fleets, if adopted, in other respects would likely be similar to those already in place for State government and alternative fuel provider fleets. These regulations essentially require that a percentage of a covered fleet's annual acquisitions of light-duty vehicles must be AFVs. See *Alternative Fuel Transportation Program*, 10 CFR Part

¹ The replacement fuel goals call for a certain percentage of motor fuel demand to be supplied by "replacement fuels." Because petroleum (*i.e.*, gasoline and diesel) is the dominant fuel used for motor vehicles, the replacement fuel goals are sometimes referred to in this document as petroleum replacement goals. DOE notes that because the EPAct goals reference "replacement fuel," they cannot be met by simply using less petroleum (such as through efficiency measures), but rather must be met by increasing the overall percentage of non-petroleum or replacement fuels that is used.

² 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 (2002).

490 (2002). Section 507(g) sets forth a tentative schedule for implementing a program for covered fleets that would be enforced if DOE were to promulgate a private and local government AFV acquisition mandate.

In order to determine whether a fleet requirement program for private and local government fleets is “necessary” pursuant to section 507(e), DOE considered the number of fleets that likely would be covered by such a rule and the likely increase in the amount of replacement fuel that would be used by covered fleets as a result of the acquisition mandate. EPAct severely limits the universe of fleets that could be covered by a private and local government fleet rule. These limitations are described in the definitions, exceptions, and exemptions contained in the relevant sections of EPAct, as discussed below.

A “fleet” is defined in section 301(9) of EPAct 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, 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.

The key limitations in this definition include: (1) Only light duty vehicles (*i.e.*, vehicles less than 8,500 GVWR) are covered, and all medium-duty and heavy duty vehicles are excluded; (2) the vehicles must be part of a fleet of 20 vehicles used primarily in a large metropolitan area; (3) the vehicles must be centrally fueled or capable of being centrally fueled; (4) they must be owned or controlled by a local government or an entity that owns at least 50 such

vehicles; (5) fleets of rental vehicles are excluded; (6) law enforcement and emergency vehicles are excluded; and (7) vehicles garaged at personal residences are excluded.

Moreover, even if it is determined that a particular private or local government fleet constitutes a “fleet” under EPAct, the statute provides several exemptions. Section 507(i) allows a fleet to obtain an exemption from DOE for all or part of its fleet, from an otherwise applicable fleet mandate, 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, for a financial hardship.

EPAct furthermore contains a petition provision in section 507(n). That section provides that “[a]s 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.” As a result, even to the extent a fleet constitutes a “fleet” under the narrow EPAct 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.

Finally, AFV purchase requirements that DOE could impose under section 507(g) could only apply to the purchase of “light duty motor vehicles.” A light duty motor vehicle is defined as “a light duty truck or light duty vehicle * * * having a gross vehicle weight rating of 8,500 pounds or less, before any after-market conversion to alternative fuel operation.” See 10 CFR 490.2 (2002). Therefore, medium- and heavy-duty vehicles would not be covered by any mandatory section 507 private and local government fleet program.

DOE originally estimated that about 2 million private and local government fleet vehicles would be covered under a fleet program, were one to be adopted, with AFV acquisitions eventually rising to about 320,000 annually. As discussed below in Section III, however, DOE’s original estimate of the number of fleet vehicles that would be covered under a private and local government fleet rule, and thus the number of annual AFV acquisitions resulting from such a rule, probably was far too high.

The limitations on the potential contribution of a private and local government fleet program to the replacement fuel goal are discussed in Section III. 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 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*]. Similarly, a subsequent DOE report stated that, even if an AFV acquisition mandate for private and local government fleets was imposed, fleets covered by EPAct mandates would provide no more than about 1.5 percent replacement fuel use. These reports were issued before DOE had much experience with implementation and operation of EPAct Fleet programs. A more recent analysis (September 17, 2000), discussed in Section III of this notice of proposed rulemaking, indicated that replacement fuel use would increase only .25 percent if a private and local government rule was promulgated.

Section 504(c) of EPAct limits DOE’s authority to promote the use of replacement fuel. Specifically, DOE is precluded from promulgating rules that would mandate any of the following: “production of alternative fueled vehicles or to specify, as applicable, the models, lines, or types of, or marketing or pricing practices, policies, or strategies for, vehicles subject to this Act.” Section 504(c) also precludes rules that would “mandate marketing or pricing practices, policies, or strategies for alternative fuels or to mandate the production or delivery of such fuels.” Thus, DOE’s authority under EPAct to promote the use of replacement fuels is primarily limited to the following: implementation of the limited fleet programs found in sections 303, 501 and 507; research and development (R&D) activities with industry under Title XX, subtitle B; and voluntary promotional efforts, such as those fostered by the Clean Cities Program under sections 405, 409, and 505.

EPAct section 507 directs DOE to determine whether private and local government fleets should be required to acquire AFVs as they replace their existing stock of light-duty vehicles. Requirements for private and local government fleets, if adopted, would

likely be similar to those mandated by EPAct (42 U.S.C. 13251, 13257(o)) and already in place for State government and alternative fuel provider fleets. *See Alternative Transportation Fuel Program*, 10 CFR part 490 (2002).

EPAct authorizes DOE to conduct two separate rulemakings in order to determine whether to promulgate a private and local government fleet rule. First, section 507(b) allows for an early rulemaking, to be completed by December 15, 1996. As part of that rulemaking, section 507(a)(3) of EPAct required DOE to publish an Advance Notice of Proposed Rulemaking (ANOPR). If no final rule was promulgated by December 15, 1996, then sections 507(b)(3)(c), and (e) require a later rulemaking to determine whether vehicle acquisition requirements are "necessary" under the standards set forth in section 507(e) and should be imposed on private and local government fleets.

The relevant guidance for determining whether a private and local government fleet rule should be implemented is set forth in EPAct section 507(e). This section states that DOE shall promulgate a private and local government fleet requirement program only if it determines that such a program is "necessary." Section 507(e) further states that such a program is "necessary" if "the Secretary finds that" the replacement fuel goal, or a revised replacement fuel goal, "is not expected to be actually achieved by 2010 * * * without such a fleet requirement program" and the goal is practicable and 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."

Section 507(l) requires: "In carrying out this section, the Secretary shall take into consideration energy security, costs, safety, lead time requirements, vehicle miles traveled annually, effect on greenhouse gases, technological feasibility, energy requirements, economic impacts, including impacts on workers and the impact on consumers (including users of the alternative fuel for purposes such as for residences, agriculture, process use and non-fuel purposes) and fleets, the availability of alternative fuels and alternative fueled vehicles, and other relevant factors." Section 507(e) is equally categorical in requiring DOE to promulgate a private and local fleet requirement program only upon a determination that such a program is "necessary" to achieve the replacement fuel goal, and section 507(e) sets forth the criteria DOE is to

apply in determining whether such a program is "necessary."

It is not clear that section 507(l) should be interpreted to apply to a rulemaking proceeding under section 507(e). Section 507(l) includes factors such as greenhouse gas and economic effects that have no bearing on a determination of "necessity" under section 507(e). Moreover, the section 507(l) factors seem geared to helping decide the proper contours of a fleet acquisition mandate once DOE has decided to promulgate such a program, rather than to the threshold determination of whether a program should be promulgated in the first place.

Regardless, it is not necessary in this proceeding to determine whether section 507(l) is properly interpreted as applying to a section 507(e) rulemaking proceeding. Even assuming that it does apply, consideration of the section 507(l) factors would not alter DOE's proposed determination that a private and local government fleet program is not "necessary" under section 507(e).

As explained below, DOE proposes to determine that because implementation of a private and local government fleet AFV acquisition mandate would result in no appreciable increase in the use of replacement fuel, such a program is not "necessary" under the standard set forth in section 507(e). None of the section 507(l) factors could change the outcome of the analysis because they would not change the conclusion that there would be no appreciable increase in the use of replacement fuels. Therefore, even if all of the section 507(l) factors pointed uniformly and strongly in favor of the implementation of a private and local government fleet mandate, and they do not, consideration of those factors could not and would not alter DOE's proposed determination that a fleet program is not "necessary" because such a mandate still would not appreciably increase the use of replacement fuel.

Section 507(m) of EPAct requires DOE to consult with the Secretary of Transportation (DOT) and 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 today's notice of proposed rulemaking to DOT, EPA, and the Office of Management and Budget for their review.

B. Regulatory Time Line

On August 7, 1996, and as required by EPAct sections 507(a) and (b), DOE published in the **Federal Register** an ANOPR to evaluate progress toward achievement of the replacement fuel

goals in EPAct, identifying problems with achieving those goals, assess the adequacy and practicability of the goals, and consider actions needed to achieve the goals. *See* 61 FR 41031. DOE intended this notice to stimulate comments to assist DOE in making decisions concerning future rulemaking actions and non-regulatory initiatives to promote alternative fuels and AFVs. Three hearings were held to receive oral comments on the ANOPR. They were held on September 17, 1996, in Dallas, Texas; on September 25, 1996, in Sacramento, California; and on October 9, 1996, in Washington, DC. A total of 70 persons spoke at the three hearings, and 105 written comments were received by November 5, 1996.

On April 23, 1997, DOE published in the **Federal Register** a Notice of Termination stating that DOE would not promulgate regulations to implement AFV requirements for private and local government fleets pursuant to the early rulemaking schedule of EPAct section 507(a)(1). *See* 62 FR 19701.

On April 17, 1998, and for the purposes of EPAct sections 507(e), (g), and (k), DOE published in the **Federal Register** an ANOPR that asked for comments to assist DOE in making decisions concerning future rulemaking actions and non-regulatory initiatives to promote alternative fuels and alternative fueled vehicles. *See* 63 FR 19372. DOE held three hearings to receive oral comments on the ANOPR. They were held on May 20, 1998, in Los Angeles, California; on May 28, 1998, in Minneapolis, Minnesota; and on June 4, 1998, in Washington, DC. A total of 110 persons spoke at the three hearings, and/or submitted written comments.

On January 12, 2000, consistent with section 507(h) of EPAct (42 U.S.C. 13257(h)), DOE published in the **Federal Register** a notice, stating that it was extending by 90 days the January 1, 2000, deadline contained in section 507(e) in order to provide additional time for consultations with State and local officials, as required by Executive Order 13132. *See* 65 FR 1831. On July 20, 2000, DOE published in the **Federal Register** a notice stating that DOE was further delaying the section 507 rulemaking proceedings concerning private and local government fleets until after it had completed consultations with State and local government officials. *See* 65 FR 44987. DOE said that it was preserving the option of promulgating, at a later time, requirements for private and local government vehicle fleets. In the notice, DOE announced that it would hold three public workshops in order to discuss regulatory options and other

issues related to potential alternative fuel transportation requirements for private and local government fleets. In furtherance of its objective of consulting with affected State and local government officials, the first two workshops were open only to State and local officials. DOE held workshops on August 1, 2000 in Chicago, Illinois; on August 22, 2000 in Denver, Colorado; and on September 26, 2000 in Washington, DC.

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 which, in addition to seeking redress of other grievances, sought to compel DOE to "issue a proposed rule and final determination on the necessity of a private and municipal fleet program." 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 section 507(e) for completing the rulemaking; as a result, the Court ordered a September 26, 2002, hearing to determine a timetable for completing the rulemaking. *See Center for Biological Diversity v. Abraham, et al.*, No. C 02-00027 (N.D. Calif., July 26, 2002) (order on motions for summary judgment). 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. *See Center for Biological Diversity v. Abraham, et al.*, No. C 02-00027 (N.D. Calif., Sept. 27, 2002). The Court subsequently granted a 30-day extension (to February 26, 2003) of the deadline for DOE to complete work on this notice of proposed rulemaking.

As required by section 507 of EPAct and the order of the U.S. District Court for the Northern District of California, DOE has issued today's notice of proposed rulemaking which proposes to determine that DOE should not promulgate regulatory requirements for private and local government fleets.

C. Program Background

Titles III, IV, and V of EPAct are focused on promoting the use of non-petroleum motor fuels, including replacement fuels and alternative fuels, in the transportation sector. EPAct focused on the transportation sector because of its almost complete reliance on petroleum as a fuel source and its significant contribution to petroleum demand. The transportation sector is nearly 97 percent dependent on oil as a fuel and is a major reason the U.S. is so dependent on imported oil. *See Center*

for Transportation Analysis, Oak Ridge National Laboratory, *Transportation Energy Data Book Edition 22*, p. 2-4 (Table 2.2) (ORNL 6967) (Sept. 2002) (www.ornl.gov) [hereinafter *Energy Data Book*]. The transportation sector's demand for oil has continued to grow while other sectors have become less reliant on oil. In 1973, the U.S. transportation sector accounted for 52 percent of total U.S. petroleum use (9.05 of 17.31 million barrels per day (mmbd)). *Id.* at p. 1-18 (Table 1.13). In 2001, transportation sector demand for petroleum accounted for roughly 67 percent of total U.S. petroleum demand and exceeded domestic production by 5.2 mmbd equivalent of oil. *Id.* at pp. 1-16 (Table 1.12), 1-18 (Table 1.13).

The U.S. Energy Information Administration (EIA) has projected that transportation sector consumption of petroleum will rise to 19.22 mmbd by 2020. *See EIA, Annual Energy Outlook 2002*, p. 141 (Table A11) (DOE/EIA-0383(2002)) (December 2001) [hereinafter *AEO 2002*]. In 2020, passenger cars and light-duty trucks, which are the primary focus of Titles III-V of EPAct, are expected to account for 59 percent of the total energy used by the transportation sector. *Id.* at p. 136 (Table A7). In 2020, it is projected that U.S. oil production will provide only about half the total energy needed to fuel light-duty vehicles. *Id.* at pp. 141 (Table A11), 136 (Table A7).

As demand for transportation petroleum has grown, so too have U.S. petroleum imports. Dependence on imported petroleum was 41 percent when EPAct was enacted (6.96 mmbd), reached nearly 56 percent in 2001 (10.9 mmbd), and is expected to reach 63 percent by 2020 (16.6 mmbd). *See Energy Data Book* at p. 1-16 (Table 1.12), and *AEO 2002* at p. 141 (Table A11). Of net U.S. imports, members of the Organization of Petroleum Exporting Countries (OPEC) currently supply almost 50 percent, with Persian Gulf states supplying almost half of this amount. *See EIA, Monthly Energy Review*, Table 1.8 (November 2002) (<http://www.eia.doe.gov/emeu/mer/txt/mer1-8>). OPEC members now account for approximately 40 percent of world oil production, and 52 percent of the petroleum export market. *See EIA, International Energy Outlook 2002* Tables D4, 11; <http://www.eia.doe.gov/oiaf/ieo/> [hereinafter *IEO 2002*]. According to the *IEO 2002* (Table 11), OPEC's share of worldwide crude oil exports is projected to increase to 64 percent by 2020. Much of the oil controlled by OPEC is concentrated in the Middle East, which contains nearly

two-thirds of the world's proven reserves. *See IEO 2002* Table 8.

Reducing total petroleum use and reducing petroleum imports decrease our economy's vulnerability to oil price shocks. Reducing dependence on oil imports from unstable regions enhances our energy security and can reduce payments to nations that may be hostile to U.S. interests. In 2000, the annual U.S. trade deficit in oil reached \$106 billion. *See AEO 2002* at p. 141 (Table A-11). Reducing the growth rate of oil use through conservation and use of non-petroleum motor fuels also relieves pressure on an already strained domestic refinery capacity, decreasing the likelihood of price volatility. Finally, conserving energy and using non-petroleum fuels, many of which are low in carbon intensity, help achieve the goal of decreasing greenhouse gas emissions.

Reductions in the U.S. demand for petroleum can significantly affect worldwide oil demand because the U.S. accounts for one-fourth of total world oil consumption. *See Energy Data Book* at 1-5 (Table 1.4). The consumption of motor fuels by U.S. light-duty vehicles in 2000 accounted for almost 10 percent of total world demand. As demand declines, prices for oil also are generally expected to decline. DOE has previously stated that a "reasonable rule of thumb is that a 1 percent decrease in U.S. petroleum demand will reduce world oil price by 0.5 percent, in the long-run." Short-term impacts are expected to be even greater. *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://www.cities.doe.gov/pdfs/section506.pdf> [hereinafter *Section 506 Report*] (issued pursuant to EPAct section 506).

DOE manages a number of different programs that are aimed at reducing reliance on petroleum motor fuels. Part of this effort includes continued implementation of the programs contemplated under EPAct, including the fleet AFV acquisition programs for Federal, State government and fuel provider fleets (see below for discussion of EPAct Programs). These programs are primarily focused on the development and use of AFVs. DOE will continue efforts through its Clean Cities Program to encourage fleets to expand their use of alternative fuels and AFVs. These efforts involve primarily focusing on niche market fleets, but also include continued support for regulated fleets. DOE also plans to continue research programs involving replacement fuels, including biofuels, such as ethanol and

Status of Alternative Fuel and Alternative Fueled Vehicle Markets

According to the EIA, the number of AFVs on the road has more than doubled since EPAct's passage in 1992. See *Energy Data Book* at 9-3 (Table 9.1), and EIA, *Alternatives to Traditional Transportation Fuels 2000* Table 1 (Sept. 2002) [hereinafter *Transportation Fuels 2000*] (www.eia.doe.gov/fuelalternate.html). As of 2002, EIA estimates that AFVs number slightly more than a half million vehicles, comprising a small fraction of the total U.S. vehicle stock. *Id.* Of the forecasted 2002 total, approximately 281,000 will be fueled by liquefied petroleum gas (propane); 126,000 will be fueled by compressed natural gas; 5,900 will be fueled by M85 (a blend of 85 percent methanol and 15 percent gasoline); 82,500 will be fueled by E85 (a blend of 85 percent ethanol and 15 percent gasoline); and almost 20,000 will be fueled by electricity. The remaining quantity of AFVs consists of a very small number of vehicles fueled by liquefied natural gas, M100 (100 percent methanol), and E100 (100 percent ethanol). *Id.* DOE estimates that approximately 20,000-25,000 new AFVs are acquired annually as a result of the Federal fleet requirements under section 303 of EPAct and the State and Alternative Fuel Provider Fleet Programs found in sections 501 and 507(o).

In addition to the vehicles described above, EIA estimates that by 2000 there were approximately 2.6 million flexible fueled vehicles (FFVs) on U.S. roads capable of operating on ethanol blends of E85. *Transportation Fuels 2000* at Table 1. An FFV is "any motor vehicle engineered and designed to be operated on any mixture of two or more different fuels." 10 CFR 490.2. The number of FFVs is expected to grow significantly in future years as automakers continue to sell hundreds of thousands of these vehicles each year. EIA does not count most of these vehicles in its AFV figures above since these vehicles include cars and light trucks owned by non-fleet owners, who for the most part are not expected at this time to use ethanol in their vehicles. These vehicles, however, could use ethanol if the infrastructure becomes more widely available and fuel supplies are offered at a competitive price.

When EPAct was enacted in 1992, EIA estimated that total alternative fuel and replacement fuel use accounted for approximately 1.6 percent of total motor fuel consumption. This figure rose quickly to 2.2 percent in 1993 largely as a result of requirements under the Clean

Air Act Amendments of 1990, which required the use of oxygenated and reformulated fuels. EIA has projected that, for 2002, the annual consumption of alternative fuels in alternative fuel vehicles will reach the equivalent of approximately 294 million gasoline gallons. Factored together with the use of replacement fuels such as ethanol and MTBE, the total amount of replacement fuel and alternative fuel consumption will displace the equivalent of approximately 4 billion gallons of gasoline. While encouraging, this figure represents only a small part (2.8 percent) of total 2002 on-road motor vehicle fuel consumption. Thus, despite the efforts of the past decade and significant improvements in the state of alternative fuel technology, alternative and replacement fuel use has grown relatively little.

II. Previous Opportunities for Public Comment

Pursuant to the rulemaking process set out in sections 507(c)-(g) of EPAct, DOE issued an advanced notice of proposed rulemaking (ANOPR) and held a series of stakeholder workshops to discuss various options open to it for implementing a private and local government fleet program and in general how to encourage increased use of replacement fuel. Commenters also were asked to provide input on the replacement fuel goals contained in EPAct. The comments and public statements DOE received have informed the determination proposed today. The sections below describe the process used to solicit information, the different proposals made, and the input received. DOE notes that neither EarthJustice nor the other entities it represented in the lawsuit in *Center for Biological Diversity v. Abraham* filed written comments or provided testimony in response to the opportunities for public comment described below.

A. 1998 Advanced Notice of Proposed Rulemaking

On April 17, 1998, DOE published in the **Federal Register** an ANOPR stating that DOE was beginning its process for determining whether to promulgate a rule imposing possible AFV acquisition requirements on private and local government fleets. See 63 FR 19372. Accordingly, DOE requested comments on a number of issues potentially relating to such a rule, arising from section 507(g) of EPAct, as well as relating to possible alternative fuel requirements for urban transit buses under section 507(k). In May and June of 1998, DOE held three public hearings in Minneapolis, MN; Los Angeles, CA;

and Washington, DC. More than 110 interested parties responded by providing written and verbal comments.

The ANOPR requested comments on 23 questions within three broad areas: replacement fuel goals, fleet requirements, and urban transit buses. Many of the comments expressed during the public workshops included common themes and overlap among these three areas. Information related to the ANOPR and this rulemaking, in general, is located on the World Wide Web at http://www.ott.doe.gov/epact/private_fleets.shtml.

Discussion of Replacement Fuel Goals and Fleet Requirements

More than 40 commenters addressed the question whether the goal of replacing 30 percent of the Nation's motor fuel by 2010 is achievable. Commenters also identified likely problems in achieving this goal. Less than half of the commenters who explicitly addressed this question regarded the goal as unachievable. Many of the commenters considered the goal unachievable under the then-present economic conditions, and many offered suggestions as to what changes would be required to make the goal feasible. Commenters were in general agreement that the lack of alternative fuel infrastructure, low petroleum fuel prices, and various limitations on AFV availability were key barriers to achievement of EPAct's 30 percent petroleum replacement goal and implementation of any new fleet rules. Many commenters cited the lack of an alternative fuel infrastructure as a significant barrier. One commenter said public access to most existing natural gas refueling sites in his area is either restricted or prohibited. Another commenter said supplies of alternative fuels themselves were inadequate at present.

Two commenters pointed to the low prices of petroleum-derived fuels as an impediment to alternative fuel implementation. One commenter said that low petroleum prices implied that AFV fleet operators might never see a return on their investment. A related comment, noted that installation of an alternative fuel infrastructure could be a financial burden for small and independent fuel retailers and could be unfair to them.

The cost of AFVs and the lack of selection among AFVs were mentioned by a number of commenters. Several commenters also mentioned that it was difficult to lease AFVs or acquire certified conversions. Two commenters said incremental costs of AFVs could

inhibit widespread acceptance of the vehicles and technology.

Five comments identified the resale or residual value of AFVs as a barrier to fleets' acceptance of AFVs. Two of these comments urged government action to address this problem. One commenter stated that government purchase of AFVs at the end of their lease life or a resale price guarantee by the government was needed. The other said that government should establish a resale market (or surrogate), or create a residual value insurance pool for alternative fueled vehicles, analogous to resale value insurance that can be obtained for fleet vehicles.

Commenters who opposed adoption of a private and local government fleet mandate questioned the benefits of or the justification for such a mandate, and suggested it would foster non-compliance and limit participation in voluntary programs. Several commenters questioned DOE's authority to promulgate a private and local government fleet rule. These comments argued that DOE had not yet demonstrated that a private and local government fleet rule was "necessary" or that meeting the EPAct fuel replacement goal through a fleet rule was economically achievable. One commenter said that DOE had not yet performed the cost/benefit analysis called for in section 507(l) of EPAct. Commenters also cited the draft *Section 506 Report* (section III below) which indicated that a private and local government fleet mandate would result in only 1.5 percent fuel displacement.

Several commenters also asserted that much of the additional alternative fuel used under a fleet program would actually be imported, and hence promoting the use of such fuel would do little to meet the section 502(b)(2) provision that at least half of the replacement fuel used to meet EPAct's replacement fuel goals must consist of "domestic fuels." They also believed that there was not currently a match between the AFVs available and vehicles which could meet the normal business requirements of the fleets that would be subject to the acquisition mandate. These commenters, and a few others stated the 30 percent replacement fuel goal set forth in EPAct was arbitrary, and that any modified goal would be equally arbitrary. These commenters stated that DOE should concentrate on accelerating public information programs and increasing participation in voluntary programs, like Clean Cities and Clean Airports. In contrast, two commenters argued in favor of mandates, with one saying failure to impose them would indicate

a lack of confidence in the alternative fuels industry.

DOE's second question solicited input on what level of replacement fuel use is actually achievable, if the goal originally specified in EPAct is not feasible or achievable. Eight commenters responded to this question; only one provided an alternative numerical goal.

DOE's third question asked for information on the practicality of EPAct's replacement fuel goals and whether they should be modified. In response, one commenter criticized the fundamental assumption that replacement fuel goals are needed. Several commenters said that some AFVs are not necessarily cleaner than gasoline-fueled vehicles and that current AFV models are more expensive to operate than their conventional fueled counterparts. Commenters urged DOE to consider the effects of current AFV programs on fleet economics, on progress toward reaching EPAct's replacement fuel goals, and to consider alternatives to mandates. Another commenter questioned the reasonableness of DOE's projections of the number of AFVs that would be necessary in the future to achieve the replacement fuel goals.

DOE's fourth question asked commenters to describe the general outline, structure and implementation of a possible program that focused on fuel use instead of simply on vehicle acquisitions. Many commenters urged the adoption of an incentives-based program instead of new mandates. Other commenters, however, supported a new mandate. Nearly all commenters, including those opposed to mandates, thought that focusing on fuel use rather than vehicle acquisitions was a good idea. A number of commenters recommended replacement fuel programs that were based on or emphasized specific alternative fuels, even though DOE historically and uniformly has been of the view that it should remain fuel neutral in implementing EPAct's regulatory programs.

Some commenters said that DOE should focus its efforts on programs already in place, especially the Clean Cities and Clean Airports Programs. One commenter thought that these programs, combined with the mandatory fleet programs already in place, constituted a sufficient replacement fuel program.

DOE's next two questions concerned what other measures could be taken, in addition to or instead of an acquisition mandate, to further the achievement of the replacement fuel goals, and what types of incentives should be offered, what form should they take, and whom

should they benefit. These questions drew the largest response from commenters. The overwhelming majority of commenters recommended the adoption of financial and non-financial incentives. There was an almost equal split between commenters that advocated measures other than mandates, and commenters that advocated measures in addition to mandates. One commenter, who advocated incentives in addition to mandates, said the adoption of incentives should precede mandates. Another commenter, who called for incentives instead of mandates, said that mandates should be imposed only if the adoption of incentives fails to elicit adoption of alternative fuels. Two commenters opposed incentives; one said they were inappropriate for uneconomic fuels and the other predicted they would not further significant petroleum replacement.

A common theme among comments by State and local government representatives was that incentives also should be available to them. In addition, one commenter suggested linking incentives to actual alternative fuel use. Numerous commenters discussed how incentives could be funded. Commenters suggested a 1-cent-per-gallon tax on gasoline, as well as a tax, or import tariff, on foreign petroleum. One commenter called for additional taxes to be placed on all fuels produced from imported petroleum. Another commenter suggested that incentives be funded through the Transportation Trust Fund.

Many commenters called for tax incentives, including credits for the acquisition of vehicles, fueling infrastructure investments, and alternative fuel use. One commenter noted that if tax incentives are adopted, they should be available for a sufficient period, with a specified phase-out date to facilitate business planning. In addition to tax credits, two commenters advocated direct grants for entities that could not take advantage of tax credits.

Several commenters recommended of non-financial incentives, including granting AFVs access to high-occupancy vehicle (HOV) lanes or their own dedicated travel lanes, parking and toll preferences, relaxed vehicle inspection standards, lower vehicle registration fees, and lower sales taxes. DOE notes that while some such incentives already exist, additional incentives, including new tax credits, would either require new legislation from Congress or legislation or regulatory actions at the State and local government levels.

Several comments suggested regulatory intervention in the vehicle

and fuel markets. One called for a requirement that conventional motor fuel station operators install alternative fuel storage and dispensing systems and sell alternative fuel(s) as a minimum of 10 percent of their annual sales by 2000, and a minimum of 30 percent by 2010. All of these suggestions call for actions that are outside of DOE's authority or are expressly prohibited by EPAct.

Most commenters wanted fleets and other AFV owners and operators to be the primary targets of incentives. One commenter said that incentives should be targeted to small businesses and users, and not to large Original Equipment Manufacturers (OEMs). A few commenters thought that fuel providers should qualify for financial incentives as a way to encourage infrastructure development.

Commenters favoring a program to encourage fuel use offered suggestions on how such a program could work. The general aim of these suggestions was to allow covered and potentially covered fleet operators greater flexibility in meeting requirements. Suggestions for such a program included providing acquisition credits for medium- and heavy-duty vehicles, extra credits for electric and dedicated alternative fueled vehicles, providing credits to non-covered fleets, and providing credits for alternative fuel use.

Commenters voiced considerable support for tying credits (and other incentives) to the amount of alternative fuel(s) actually consumed by the vehicles. Several commenters suggested that emissions trading credits be granted to AFV operators who exceeded alternative fuel use requirements.

DOE asked for guidance on how to factor in changes in oil price and availability into the decision-making process. Relatively few commenters addressed this question. Two pointed to a General Accounting Office study that estimated the benefits to the U.S. of using low-cost imported petroleum to be in the hundreds of billions of dollars, and to outweigh the benefits of alternative fuels. One commenter said that alternative fuel mandates, while they might reduce petroleum imports, could increase imports of other fuels. Two commenters suggested DOE consider the national defense and security costs of the country's current petroleum imports, one of them calling for excise taxes on petroleum that reflect its "costs to society."

There were 15 responses to DOE's question about measures to encourage use of alternative fuels, rather than conventional fuels, in bi-fuel and FFVs. Three commenters recommended DOE simply require alternative fuel use in

FFVs. One commenter argued that alternative fuel use in bi-fuel vehicles and FFVs at least 50 percent of the time should be sufficient to qualify these vehicles for EPAct compliance, while another recommended DOE establish a guideline that an AFV must operate at least 75 percent of the time on alternative fuel if the vehicle is to count toward an operator's compliance with EPAct.

One commenter suggested that DOE add biodiesel and reformulated gasoline (RFG) to the list of alternative fuels specified in the EPAct. In the Final Rule for the Alternative Fuel Transportation Program promulgated on March 14, 1996, DOE added neat (or 100 percent) biodiesel to the definition of "alternative fuel." Additionally, after enactment of section 7 of the Energy Conservation Reauthorization Act of 1998 (ECRA) (Pub. L. 105-388) which allowed covered fleets to earn acquisition credits by using biodiesel blends in medium- and heavy-duty vehicles, DOE issued regulations allowing credit in these circumstances as well. *See* 64 FR 27169 (May 19, 1999). However, DOE has consistently stated that it cannot add RFG to the definition of "alternative fuel" because RFG is more than 80 percent petroleum, and therefore is not "substantially not petroleum" as required by EPAct section 301(2). *See* 61 FR 10622, 10630 (March 14, 1996) (notice of final rulemaking establishing 10 CFR Part 490).

The final replacement fuel question on which DOE sought comments was how to estimate the impacts of replacement fuel. One commenter predicted that achievement of the 30 percent replacement fuel goal would create supply and price problems for current propane users in the agricultural, residential, and industrial sectors. This commenter predicted price increases of several hundred percent, and cited a DOE report that projected vehicle fuel demand for propane could go from 35,000 barrels per day (bbl/day) to 1.7 million bbl/day, and imports could increase from 200,000 bbl/day to 1.7 million bbl/day. General Accounting Office report GAO/RCED-98-260, entitled *Energy Policy Act: Including Propane as an Alternative Motor Fuel Will Have Little Impact on Propane Market*, addressed this concern. The report asserted that EPAct's effects on the supply and price of propane would be minimal and the increase in overall price of propane, attributable to EPAct, would be negligible. It also stated that EPAct would have little effect on existing consumers of propane because the price increases will be so small.

In the area of fleet requirements, DOE asked whether the AFV acquisition schedule in section 507(g) of EPAct should be adhered to, and if not, what alternative schedule should be used. Section 507(g) requires that if DOE promulgates an AFV acquisition mandate for private and local government fleets, annually escalating percentages of the light duty vehicles acquired by the covered fleets must be AFVs, beginning with 20 percent in model year 2002 and rising to 70 percent in model year 2005 and thereafter, although this section also gives DOE authority to change these years and percentages. Eight commenters spoke in favor of retaining the section 507(g) schedule, although one advised making the schedule applicable only to local government fleets and adopting incentives for these fleets. Several commenters supported adoption of a new mandate for local government fleets, including transit agencies, but not for private fleets. Six commenters opposed the schedule in section 507(g). Some commenters opposed any mandate, while others recommended a longer phase-in schedule.

DOE received numerous comments in response to its question regarding what programs other than the fleet requirement program would maximize market penetration of alternative fuels and AFVs, and what market penetration these programs would induce. Many of these comments simply reiterated the call for incentives of various types. A number of commenters, however, said that a concerted effort to expand existing infrastructure would enable fleets to expand their use of AFVs. Though not responsive to the question, a number of commenters suggested expanding the existing fleet programs to cover medium- and heavy-duty vehicles. A few commenters also thought that the statutory geographical limitations on fleet programs should be removed.

A number of commenters cited the Clean Cities Program as an effective means of expanding AFV use. Some called for the program to be expanded, in terms of the number of its participants, the areas it covers, and in funding. Commenters also recommended that Clean Cities coordinators receive training in how to seek Department of Transportation Congestion Mitigation and Air Quality (CMAQ) Improvement Program funds.

A number of commenters urged continued Federal leadership in establishing the use of alternative fuels and alternative fueled vehicles. These commenters indicated that the Federal

Government must do a better job of meeting its own AFV acquisition requirements and using alternative fuels in its vehicles. DOE has worked closely with all the Federal agencies to maximize acquisitions of alternative fueled vehicles and increase the use of alternative fuels. DOE participated actively in the development of Executive Order 13149, which strengthens the Federal Government's commitment to using AFVs and gives DOE a greater role in assisting Federal agencies compliance with EPAct's AFV acquisition requirements and report on their acquisitions.

DOE's final question about fleet requirements asked how DOE should weigh the factors in section 507(l) of EPAct when deciding whether to promulgate a private and local government fleet program. Nine responses explicitly addressed this question. There was no clear consensus that DOE should accord the greatest weight to any particular factor. Four commenters mentioned economic factors: the impacts on fleets, workers, consumers (particularly non-transportation propane consumers); cost burdens the rule would impose on local governments; and fuel market impacts. One commenter said Congress did not intend that a fleet mandate be imposed if it would harm the economic well-being of businesses, workers, or consumers. This commenter also stated that the evidence suggests the costs of such a mandate would greatly exceed its benefits. Three commenters mentioned AFV availability as a concern that should be considered before DOE proposes any fleet AFV acquisition program. Another commenter said the unavailability of suitable vehicles had been regarded by Congress as sufficient reason to defer imposition of fleet mandates.

A commenter raised the issue of environmental benefits of AFVs, saying Congress had not intended for acquisition mandates to be imposed on fleets if AFVs did not confer environmental benefits. The same commenter noted earlier that AFVs at one time had been automatically assumed to have lower environmental impacts than petroleum-fueled vehicles, but that the evidence had since showed this assumption to be false. This commenter also urged DOE to weigh vehicle safety and greenhouse gases in its consideration of a possible private and local government fleet program.

Discussion of Urban Transit Buses

In the ANOPR, DOE asked for input on how it should determine if the inclusion of urban transit buses in the

proposed rule would help meet the replacement fuel goals. Virtually all the commenters responding to this question took it as soliciting their opinion on whether an urban transit bus fleet rule should be promulgated. Eighteen commenters urged DOE to promulgate a mandate that urban transit bus operators acquire alternative fuel buses. A number of these comments suggested that this mandate could be adopted independent of a private fleet mandate. There was general agreement among supporters of a transit fleet mandate that transit buses were a good fit for alternative fuels.

Nine commenters, six of them urban transit bus operators, opposed the imposition of an urban transit bus AFV mandate. Two of them described such a mandate as "unfunded." One argued that imposition of such a requirement would be overly ambitious, financially burdensome, and could decrease urban transit bus ridership. Several commenters stated that requiring the acquisition of more expensive alternative fueled buses could lead to reduced ridership if transit agencies had to raise fares to pay for the buses. One commenter said transit riders already help reduce petroleum imports by not driving their own cars, and that DOE should recognize that the petroleum fuel consumed by urban transit buses is going to the "highest use." Two commenters pointed out that an increasingly large percentage of new urban transit bus purchases are alternative fueled, and that alternative fuels have made impressive inroads in the urban transit bus sector. Two other commenters said these gains have been made without mandates, and voluntary adoption of alternative fueled urban transit buses should continue, as local funding and circumstances permit.

DOE asked how it should quantify the impact on public transit properties of requiring them to acquire alternative fueled buses. Thirteen of the 15 respondents to this question spoke directly or indirectly to the issue of economics. All said that it would be a financial burden because of the higher cost of alternative fuel buses, the cost of installing the infrastructure (or the operational costs of off-site refueling), the cost of training maintenance personnel, and the costs (in some cases) of retrofitting large facilities to accommodate AFVs. One also pointed out that increasing (conventional) diesel engine efficiency had permitted a reduction in transit bus fuel consumption over the past 10 years.

DOE asked for comment on whether an urban transit bus fleet mandate, if imposed, should apply to public and private urban transit bus operators, or

only to public operators. By a substantial margin (nine to one), commenters favored applying the requirement equally to public and private operators.

Two commenters commented on ways to address offset the economic penalties of owning and operating alternative fueled urban transit buses. One favored using a life-cycle cost approach, rather than emphasizing the first cost of vehicles and infrastructure. The other noted that CMAQ funds are available from the Department of Transportation and that other Federal funds are available to help finance alternative fueled bus purchases. This commenter urged DOE to work with the Federal Transit Administration (FTA) and the Federal Highway Administration to secure the maximum available funding for urban transit bus projects.

In response to its question concerning what implementation schedule, if any, should be used for transit bus fleets, DOE received three comments advocating use of the schedule that is described in section 507(g) of EPAct, described above. One commenter called for an emphasis on fuel replacement, but offered no specific advice on how this objective should be accomplished. Eight comments suggested other schedules, mostly longer phase-in periods.

DOE's final question about a potential AFV mandate for urban transit buses concerned the types of exemptions and exclusions it should provide transit agencies. Three transit properties called for exemption of all urban transit bus fleets irrespective of size. One commenter said participation of urban transit bus fleets should be based not on acquisition numbers, but on annual fuel use. Three other transit properties said exemptions should be based on the cost-effectiveness and/or the technical applicability of alternative fueled urban transit bus operation for the fleet in question. Another commenter said that fleets with fewer than 100 buses should be exempted if an urban transit bus fleet rule were imposed.

B. Stakeholder Meetings—Fall 1998

In the Fall of 1998, DOE held a series of informal meetings with stakeholder groups to supplement the formal hearings held in conjunction with the ANOPR several months earlier. These meetings were held because DOE was interested in expanding the scope of regulatory options that it was considering and in gauging stakeholder reactions. At these meetings, DOE discussed the issues affecting the development of the NOPR, including DOE's processes, requirements, and

authority. In addition to giving them a forum to respond to the options presented, DOE offered stakeholders an opportunity to identify key barriers to increased use of alternative fuels and to suggest possible solutions. Invitees included fuel providers, fleets (both public and private), regulatory agencies, technology research organizations, vehicle fuel systems providers, consulting firms, vehicle manufacturers, and related associations and coalitions.

In connection with new stakeholder workshops, DOE developed several new potential regulatory options. These alternatives were raised as a way of soliciting comments on whether DOE could encourage or require fuel replacement in addition to or instead of requiring fleets to acquire AFVs. DOE developed these potential options because of its concern that simply adopting the fleet mandate authorized by section 507(e) and (g) would not result in a significant increase in alternative fuel use or petroleum replacement. This focus on fuel use was also a potential way of responding to sentiments expressed in comments DOE received during ANOPR process.

DOE developed these new options, in part, in response to the direction in EPAct section 507(a)(3) and 507(c) for DOE to evaluate "all actions needed to achieve [the replacement fuel] goals." This directive obviously did not limit the scope of DOE's analysis to only regulatory actions and policies that were within DOE's current legal authority to promulgate. As a result, DOE concluded that it should ask for comments on a number of different options without regard to whether those options or the other options commenters might offer were within DOE's statutory authority under EPAct.

DOE's concern about fuel use arose in part from its experience in implementing the mandate for State government fleets under section 507(o). Based on this experience, DOE believed that many State government fleets use alternative fuels a relatively small percentage of the time in their alternative fueled vehicles. With no requirement to use alternative fuels, many State fleets are acquiring FFVs and running them on gasoline. Many fleets prefer these vehicles because they have little or no incremental cost. At the same time, State fleets lack inducements to actually fuel their FFVs with alternative fuel. Reasons for this vary. For example, the existing infrastructure for ethanol is very localized and limited. Many States do not have any locations that provide ethanol. The ethanol industry is focusing its efforts on having ethanol blended into gasoline and RFG,

and for the most part, has not focused on developing a widespread fueling infrastructure for E85. Additionally, ethanol, in general, costs more at the pump than gasoline. *See Alternative Fuel Price Report (www.afdc.doe.gov/documents/pricereport/pricereports.html).*

A few State fleets make substantial use of alternative fuel. These States tend to be those where natural gas and/or propane is abundant, or where the Governor has publicly committed to using alternative fuels, such as California, New York, Texas and West Virginia. These States also tend to acquire dedicated alternative fueled vehicles as a larger portion of their new acquisitions.

Because DOE's experience had shown that fleets will opt to fuel AFVs with gasoline or diesel rather than alternative fuels, DOE sought to identify ways to require or encourage local government and private fleets to use alternative fuel. DOE turned to the public comments it received in response to the ANOPR and on the proposed rule for the State and Alternative Fuel Provider Fleet Program. Commenters suggested a variety of ideas to DOE in these forums, including that DOE should mandate fuel use or provide credits for alternative fuel use. At the same time, a number of commenters stated that DOE does not have the authority to require fuel use. Many of the comments in favor of a fuel use requirement suggested that fleets should receive credits based on the amount of alternative fuel their vehicles used and that medium- and heavy-duty vehicles, because they use more fuel than light-duty vehicles, should receive multiple credits. Some commenters suggested that dedicated vehicles be awarded multiple credits or that dual-fueled vehicles should only receive half a credit.

No efforts were made during the meetings to achieve consensus. Meetings ranged in size from approximately 15 to 40 representatives in attendance, and included a reasonably representative cross-section of stakeholders. DOE identified representatives from stakeholder groups and invited them to attend the stakeholder meetings. In some cases, an individual representing multiple stakeholders was invited (such as from an association), while in other cases, an individual representing a particular interest was invited (such as from a single company or government organization).

The schedule for the meetings was as follows:

October 26, 1998—Private Fleets, Transit Bus Operators, and Medium-/Heavy-Duty Fleets

October 27, 1998—Local and State Government Fleets

October 28, 1998—Electric Utilities and Fleets

October 30, 1998—Liquid Fuel Providers

November 2, 1998—Natural Gas Fuel Providers, Propane Fuel Providers and Fleets

The meetings were held in Washington, DC. In addition, DOE held several informal meetings or discussions with automobile manufacturers outside of the stakeholder meetings, with the same purposes and information as the stakeholder meetings identified above. These consisted of the following:

October 6, 1998—American Honda Motor Company

October 29, 1998—Toyota Motor Corporation

November 9, 1998—Ford Motor Company

November 10, 1998—Chrysler Corporation

November 10, 1998—General Motors Corporation

DOE began each meeting by discussing the replacement fuel goals, the authority to modify these goals, the possible regulatory options for a fleet requirement rule, and the additional statutory authority related to urban transit buses. DOE also presented four regulatory options that were under consideration at the time. These options were:

Option #1—Proposing a rule based solely upon the AFV acquisition requirements identified within section 507(g);

Option #2—Including all elements of Option #1, but adding a requirement that the alternative fueled vehicles must operate on alternative fuels wherever available;

Option #3—Including all elements of Option #1, but adding a provision for the allocation of credits for actual use of replacement fuel; and

Option #4—Proposing a replacement fuel program, focused on reducing fleet petroleum consumption by requiring fleets to reduce their light-duty fleet petroleum consumption through the use of replacement fuel.

Most of the discussions at the stakeholder workshops focused on the specific approaches to developing a fleet rule. Some of the discussions also concerned to the replacement fuel goals.

Many of the comments made during these meetings were similar to those made during the ANOPR process. Private fleets cited barriers to increased alternative fuel use, including the incremental price of many AFVs, the lack of sufficient infrastructure, increased operational costs of AFVs,

and the lack of established resale value for AFVs. Several commenters suggested ways of overcoming these barriers. Private fleets suggested providing incentives not only for the development of alternative fuels infrastructure, but for maintenance and training as well. Private fleets also favored imposing a moratorium on taxes of AFVs and/or alternative fuels.

Private fleets also suggested that DOE investigate the possibility of making certain requirements conditional upon market events. For example, if AFV or alternative fuel prices came down to a certain level or infrastructure developed to a certain point, AFV acquisitions or alternative fuel use could then be required.

Transit bus operators cautioned that their cost-effectiveness is closely tied to Federal Transit Authority funding policies. They also cautioned that anything that increases fares discourages overall ridership. For this reason, among others, transit bus operators opposed any mandates. Some stakeholders expressed support for including the transit bus industry in a private and local government fleet mandate. These stakeholders indicated that current new orders for alternative fuel transit buses are increasing. Some also indicated that transit buses are a very successful market niche for alternative fuels.

Medium- and heavy-duty fleet stakeholders favored establishing non-financial incentives at the local level and providing them to State and local government fleets alike. One suggested providing special curb access (non-ticketing zones) to alternative fuel delivery vehicles. These stakeholders generally believed that medium- and heavy-duty vehicles are a good fit for alternative fuel use, often better than light-duty vehicles. These stakeholders stated, however, that DOE should not require the acquisition of medium- and heavy-duty AFVs, but instead should provide credits for the use of alternative fuels by medium- and heavy-duty vehicles.

Local government attendees identified a number of barriers to alternative fuel use. They said they have trouble justifying incremental purchase and higher operating costs for AFVs, especially for governments with severe fiscal constraints. Conversions were generally viewed as a cost-effective alternative to OEM product offerings. In some cases, a mandate, if too costly, might impede some local government agencies from fully completing their core missions. Several local government representatives also said that the Federal Government must lead first,

before local governments can be expected to follow.

Local governments offered a number of proposals to address barriers. While they saw financial incentives as critical to increasing alternative fuel use, a number of fleet managers also indicated their support for non-financial incentives. These included giving AFVs the right to use HOV lanes with and "green" parking spaces where AFVs would have receive preferential parking locations, possibly at reduced or no cost. Commenters also said that because heavy-duty vehicles use significantly more fuel than light-duty vehicles, their use should be strongly encouraged, and large numbers of credits should be provided for these vehicles (such as based upon a comparison of annual fuel use).

State representatives provided information both in their capacity as government agencies interested in pursuing certain societal goals (such as increased energy security or improved environment) and in their capacity as the owners of fleets operating under the current AFV acquisition requirements. State fleets asserted that there needs to be a more explicit tie between energy and environment among the Federal agencies. For example, States (and others) would like to receive EPAct credit for alternative fuels dispensed from stations they build. They pointed out that States could make use of alternative fuels and AFVs by private entities a condition of receiving State contracts. State fleets already regulated under DOE's existing regulations were interested in finding out if other AFV-related programs (such as those discussed above) could be available to them.

Electric utilities indicated that they would like to receive credits for putting infrastructure in place. They also expressed an interest in receiving credits for R&D commitments. Some of these commenters expressed the belief that many organizations (including the electric utilities) are acquiring vehicles slightly larger than 8500 GVWR limit for light duty vehicles so as to avoid acquisition requirements, and that these practices are causing greater petroleum use by these fleets. Others, however, thought that AFV acquisition requirements should be extended to medium- and heavy-duty vehicles, to provide manufacturers with a greater incentive to make these vehicles available as alternative fueled vehicles. They also said that increased competition in the electric industry is forcing many utilities to re-evaluate their electric vehicle (EV) programs, since they typically have not been cost-

effective. This means that not only fleet purchases, but deployment, demonstration, R&D, infrastructure, and fleet assistance programs are coming under greater scrutiny.

Liquid alternative fuel providers and petroleum providers seemed to support an approach similar to option number 4, the replacement fuel/reduced fuel consumption approach. Overall, the oil industry asserted that there is little value in achieving a replacement fuel goal. These providers stated that there is a disconnect between projected or desired demand and actual demand for alternative fuels, which is seriously hindering development of the infrastructure. Fuel suppliers would also like to see some sort of credit for providing alternative fuel.

The natural gas and propane providers comprised the largest stakeholder group and raised many issues and concerns. These providers said option 4 provided the most flexible method for fleets to comply with a fleet rule, while also avoiding the situation of having dual-fueled vehicles not operating on alternative fuels. At the same time, several organizations said that an AFV acquisition program approach should not be completely abandoned.

Many attendees asserted that including medium- and heavy-duty vehicles within an AFV acquisition program would be advisable, for several reasons. First, they would present significant opportunities for using larger quantities of alternative fuels. Second, this would close off a perceived way around the requirements for fleets (eliminating the chance to avoid requirements through acquisition of vehicles above the 8,500 lbs. GVWR level). In addition, there was significant interest in adding requirements for transit buses, due to the current success in this market as well as their potential for large consumption of alternative fuel.

Most attendees felt that including any contribution from fuel efficiency would "water down" the contribution from alternative fuels, and was not really in keeping with the purpose of the alternative fuels portions of EPAct. At the same time, they felt it was important to keep the rule "wide open" for a variety of vehicle technologies, as well as for generation of credits by fleets that may not be covered.

Several stakeholders voiced strong opinions that no matter which approach is ultimately adopted, enforcement must be made an integral part of the program, and must be seen as a program priority. Otherwise, many fleets were likely to disregard the requirements.

Meetings and discussions with automobile manufacturers focused primarily upon presentation of DOE's authority, possible approaches, and issues. The manufacturers indicated their continuing interest in alternative fueled vehicles and their desire in being informed concerning development of the rule. As a whole, the automakers expressed interest in options that provided the maximum flexibility to the fleets. They also encouraged aggressive enforcement of the existing requirements for Federal, State, and alternative fuel provider fleets. Several automakers reemphasized that their corporate policies do not favor governmental mandates.

C. Public Workshops—August—September 2000

Pursuant to its Notice of Intergovernmental Consultation, DOE conducted three public workshops (Argonne, IL; Golden, CO; and Washington, DC) and solicited written comments from the public concerning the replacement fuel goals and a potential private and local government fleet program. *See* 65 FR 44987 (July 20, 2000). These workshops were held to ensure that the requirements of Executive Order 13132 (*Federalism*) (*See* 64 FR 43255 (August 10, 1999)) and DOE's statement of policy regarding intergovernmental consultation (DOE *Statement of Policy*) (*See* 65 FR 13735 (March 14, 2000)) were met. Under these directives, DOE must consult with State and local governments before issuing any proposed rule which would have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. To ensure that State and local government organizations had ample opportunities to respond, the first two workshops were limited primarily to those types of organizations, with Clean Cities coordinators also permitted. The Washington, DC workshop was open to all groups. A total of over 100 interested persons attended, and 28 sets of written comments were received. Neither EarthJustice nor any of the entities it represents in the lawsuit that resulted in the court order compelling the issuance of this notice filed comments in those proceedings.

Public workshops were held in Chicago, IL (August 1, 2000); Denver, CO (August 22, 2000); and Washington, DC (September 26, 2000). DOE once again took the opportunity to solicit input on a number of different options for implementing a private and local

government fleet rule. Some of these options involved creative alternatives to the section 507(e) mandate that DOE acknowledged might require new legislative authority for their adoption. The options presented at these workshops included:

- Option 1—No Regulatory Requirement for Local Government and Private Fleets is Proposed
- Option 2—The Local Government and Private Fleet AFV Acquisition Program as Provided by Section 507(g) of EPAct
- Option 3—The Fleet Rewards Program
- Option 4—The Replacement Fuel Program
- Option 5—Extension of Flexible Options to Other Fleets
- Option 6—An Alternative Fueled Urban Transit Bus Acquisition Program as Provided by Section 507(k) of EPAct

The discussion that follows provides details concerning each of these options.

Option 1—No Regulatory Requirement for Local Government and Private Fleets Is Proposed

Under this option, DOE indicated that it could decide that no requirement for local private and local government fleets should be promulgated.

Option 2—The Local Government and Private Fleet AFV Acquisition Program as Provided by Section 507(g) of EPAct

Under this option, DOE would require certain private and local government fleets to acquire AFVs as a percentage of their new light-duty vehicle acquisitions starting with Model Year 2002. The program was envisioned to parallel the existing program for State and alternative fuel provider fleets.

DOE acknowledged that there were significant drawbacks to this option, primarily that it did not guarantee alternative fuel use or petroleum replacement. Because of the experiences with the similar programs for State and fuel provider fleets, as well as the Federal fleet, there was concern that this option would result in little actual alternative fuel use. DOE indicated that it had considered the option of promulgating a rule, based upon section 507(g), with a fuel use requirement, but stated at the time that it was doubtful that DOE had authority to require fuel use under section 507(g). For this reason, the options presented did not include a 507(g) rule with a fuel use requirement as had earlier been discussed as a possibility.

Option 3—The Fleet Rewards Program

Under this option, DOE would craft a regulatory program that encouraged fuel use. Although the local government and private fleet market is very large, imposing AFV acquisition requirements

on this market would not necessarily result in the expansion of alternative fuel use, nor the complementary expansion of the alternative fuel infrastructure necessary to permit that expansion. DOE again reiterated its belief that section 507(g) does not require the fleets to use alternative fuel in the AFVs they acquire. DOE indicated that it was considering adoption of a Fleet Rewards Program to fill this gap. Under this option, fleets could meet the requirements of 507(g) directly (through AFV acquisitions), or opt into the Fleet Rewards Program under which they could meet their requirements through a combination of voluntary AFV acquisitions and alternative fuel use.

Under the Fleet Rewards Program, the number of light-duty vehicles acquired by a fleet in a model year would still serve as the basis for determining the potential proposed rule's requirements. As under the prior option, a specific percentage of the light-duty vehicles each covered fleet acquired would have to be AFVs. However, the Fleet Rewards Program would differ by allowing a fleet to take specific actions, called AFV-Equivalency actions, to achieve compliance with its AFV acquisition requirements while also encouraging the use of alternative fuel. Specifically, a fleet would receive AFV-Equivalency Credits for any size and class of AFV it acquired, and for each 500 gasoline gallons equivalent (GGEs) of alternative fuel it consumed. Each AFV acquired by a fleet, regardless of size or class, would earn an AFV-Equivalency Credit. Each discrete use of 500 GGEs of alternative fuel would also earn an AFV-Equivalency Credit. Two AFV-Equivalency credits would be allocated for the acquisition of dedicated AFVs. The operation of an existing dedicated AFV in a fleet would also be eligible for AFV-Equivalency Credit.

Option 4—The Replacement Fuel Program

For Option 4, DOE stated it was considering whether to design a program different from the 507(g) acquisition requirements, that was more tailored to achieving the overall goals of displacing petroleum through use of replacement fuel. Such a program might avoid the shortcomings of EPAct's existing approach toward fleets, which solely focuses on acquiring AFVs, but not on the use of alternative fuel.

The Replacement Fuel Program would require fleets to reduce their light-duty vehicle petroleum usage by increasing the percentage of replacement fuel used by their light-duty vehicles. In order to use a sufficient amount of replacement

fuel, fleets would eventually need to acquire AFVs, even though AFV acquisitions themselves would not be specifically required. DOE proposed a possible compliance schedule that included certain percentages, which represented the portion of a fleet's light-duty fuel use that would have to be replacement fuel. The required replacement fuel portion of a fleet's light-duty vehicle fuel use would eventually rise to 50 percent. Another option that was presented included adopting a schedule that would rise to a maximum of 70 percent, which is the same as the top AFV acquisition percentage requirement set forth in section 507(g).

As with other fleet programs, this option would include a credit program allowing fleets to bank or trade credits. However, since the Replacement Fuel Program would not be restricted to the credit program currently in place for State and alternative fuel provider fleets, the program could be designed to provide fuel providers with replacement fuel credits for installation of refueling stations, which they could then sell to organizations with requirements under the Replacement Fuel Program. Under this approach, there would also be a new opportunity for fuel blends to have a key role, since blends of replacement fuels with conventional fuels would greatly assist fleets in meeting their requirements. This option could include extending credit generation to non-covered fleets or to the general public.

Option 5—Extension of Flexible Options to Other Fleets

Participants in the stakeholder groups discussion repeatedly asked DOE whether any of the optional program concepts (such as the Fleet Rewards Program) could be extended to fleets currently operating under the Alternative Fuel Transportation Program. The two types of fleets currently covered by this program are State government and alternative fuel provider fleets.

Section 507(o) of EPAct required that DOE promulgate a rule requiring State fleets to acquire specified percentages of AFVs. The State program acquisition requirements started in model year 1996 (ultimately modified to 1997) with percentages increasing through model year 2000 (modified to 2001) to a maximum of 75 percent. Because EPAct section 507(o) makes the State fleet AFV acquisition mandate program mandatory, DOE does not believe that it could extend the Fleet Rewards Program concept to State fleets.

Likewise, section 501 of EPAct required DOE to promulgate a rule

covering alternative fuel provider fleets. Again, the language in this section made it clear this was a mandatory program. Section 501 specifies an AFV acquisition program, with requirements starting in model year 1996 (modified to 1997) and increasing to 90 percent or more of new acquisitions in model year 1999 (modified to 2000) and thereafter. Congress also provided one additional requirement on alternative fuel providers which was not imposed on any other fleet type: that their AFVs must operate on alternative fuels wherever the fuels are available. DOE believes it would be inappropriate to allow alternative fuel provider fleets to receive credits for using alternative fuels when they are already required by statute to do so.

The Fleet Rewards Program option would only allow covered fleets to earn credits. The Replacement Fuel Program, on the other hand, would allow non-covered fleets to earn credits to provide additional flexibility, encourage additional persons to use alternative fuels, and possibly increase the overall use of alternative fuels.

Option 6—An Alternative Fueled Urban Transit Bus Acquisition Program as Provided by Section 507(k) of EPAct

This option was previously discussed with stakeholders and in the ANOPR. DOE again solicited comments on whether it should adopt a fleet rule that included urban transit buses, as authorized under section 507(k) of EPAct. DOE offered several different options for how transit operators could comply with a fleet requirement. One possible option would require that a portion of new bus acquisitions be alternative fuel buses, with percentages requirements similar to those contained in section 507(g) or perhaps rising to a maximum of only 50 percent. Another possible option would allow urban transit bus operators the opportunity to "opt into" the Fleet Rewards Program as an optional compliance path. Under this approach, urban transit bus operators might receive credit both for acquisitions of AFVs and for alternative fuel use. As with the light-duty vehicle program, the bus program would include a fair and appropriate AFV-Equivalency Credit program.

DOE also discussed a Replacement Fuel Program for urban transit bus fleets. DOE requested comments on whether urban transit bus operators should have a separate Fleet Rewards or Replacement Fuel Program, or whether it should be a subset of a possible Fleet Rewards or Replacement Fuel Program for private and local government fleets.

Summary of Workshop Proceedings

The first workshop was held on August 1, 2000 in Chicago, Illinois. Representatives from State government, city governments, and Clean Cities coalitions located in Illinois, Wisconsin, and Indiana were the primary attendees.

Representatives at the workshop generally agreed that DOE should take steps to increase use of alternative fuels and reduce dependence on petroleum imports. A number of organizations indicated that additional efforts to promote the use of alternative fuels would likely not occur without government action. A number stated that many of the voluntary programs to promote use of alternative fuels have been developed in anticipation of new mandates. These organizations said that without additional mandates from DOE these efforts would stall.

Representatives generally agreed that whatever mechanism DOE selects needs to be flexible and focus on fuel use. There seemed to be slightly more support for a fleet rewards-type concept, certainly more than for a straight 507(g) AFV acquisition mandate. The Replacement Fuel Program option also generated considerable interest and prompted many questions. Attendees also thought that DOE should gradually phase in any option it might select, whether requirements for private fleets could be promulgated separately from requirements for local government fleets, since the situations of private and local government fleets are very different.

Some attendees at the workshop expressed concern about the level of refueling infrastructure—both its current and future availability, and what it will take to encourage the necessary investments by fuel retailers. Representatives from areas with relatively little refueling infrastructure were concerned about options focused on fuel use. Ethanol was singled out as a concern—there are many FFVs that could operate on it, but very few stations, and fuel cost has been high.

Some commenters indicated that fleets are moving away from central refueling, which may make fuel records difficult to obtain for fuel use-based programs. In addition, even centrally-fueled fleets often do not keep records on a vehicle-by-vehicle basis, and therefore it may be difficult to determine which fuel is used in a light-duty vehicle and which in a medium-or heavy-duty vehicle. Commenters also continued to express concerns about vehicle availability.

A number of local government organizations (especially cities) said

their fleets likely would oppose a mandatory program. Other organizations expressed significant concern that private fleets, and their representatives, would fight any requirements (including through court challenges). Other representatives indicated that DOE should simply "get on with it," whatever DOE should decide to do.

Organizations not supporting mandates stated that they supported incentives instead of mandates. Despite the fact that no large source of funds was expected to be available from DOE, organizations asked for DOE's assistance in applying for funds from other sources (e.g., CMAQ funds). In addition, several organizations indicated that incentives must be large enough to make them worth pursuing because small grants simply are not worth the time and expense required to secure them.

Some attendees expressed interest in extending flexible options to other fleets, although there was concern regarding the administrative burden this would place on DOE and whether DOE would be able to obtain sufficient funding to implement such a program properly. Some attendees also expressed interest in transit buses, especially given their success as a niche market for alternative fuels, but most attendees acknowledged they could not provide detailed input on this issue.

The second workshop was held in Denver, Colorado on August 22, 2000. Representatives from State governments, city governments, and Clean Cities coalitions, plus one municipal utility attended. The largest number of representatives were from Colorado, but representatives from California, Louisiana, Kentucky, Kansas, Oklahoma, Arizona, Washington, Oregon, and Missouri attended as well.

As at the Chicago workshop, the consensus was that DOE should take additional actions to increase demand for alternative fuels and to reduce petroleum imports. Additionally, attendees felt that energy goals (and any requirements that might grow out of them) needed to be closely tied to environmental goals, such as those from the Clean Air Act Amendments (Pub. L. 101-549). Attendees said that incentives were the key to building necessary infrastructure. Conversely, tax credits were viewed as too complex and of no real assistance for government fleets. One Clean Cities coordinator pointed out that a number of fleets joined the coalition because of potential future mandates, and that without additional mandates it was unlikely that fleets would continue to be interested in alternative fuels. Participants echoed the sentiment from the first meeting that

regardless of which requirements are imposed, they should ramp up slowly to allow fleets time to plan their acquisitions or determine how to obtain fuel. Attendees again expressed concerns about the necessary infrastructure—not only the number of refueling sites but also maintenance and training requirements for stations as well as actually being able to reliably find the correct fuel. There was some frustration with the level of investment by fuel providers.

Attendees generally favored the Replacement Fuel Program and the Fleet Rewards Program, the latter receiving the most support. There was general support for extending credits to non-covered fleets. Fleets already covered under the existing State and Alternative Fuel Provider Programs expressed an interest in participating in either the Replacement Fuel Program or the Fleet Rewards Program. A common theme was that fuel use should be encouraged or required. A very small number of attendees opposed any kind of new mandate. Several representatives addressed transit buses, emphasizing local air quality issues and the benefits of using alternative fuels in transit buses. Several attendees felt that there would be more overall support for a new regulatory program if transit buses were included.

There was some general concern with the technical performance of AFVs. Many of these concerns were associated with earlier generation vehicles, including conversions. However, several commenters noted that there also had been problems with vehicles offered by OEMs.

The last workshop was held in Washington, DC on September 26, 2000. Unlike the previous two workshops, attendees included not only representatives from State, city governments, and Clean Cities coalitions, but also from nongovernmental entities including transit operators, alternative fuels associations, vehicle manufacturers, fleet associations, and fuel providers.

A number of attendees made specific points about the replacement fuel goals. Some said the replacement fuel goals covered by sections 502 and 504 of EPAct were important to determining what path to take. Several attendees indicated that more data and analysis were required in order to make decisions. Others said it would be arbitrary for DOE to set a revised goal in the absence of this information. Some attendees identified the need for an overall plan incorporating all regulatory and voluntary programs and others suggested that a coordinated approach

for implementation of programs between State, local, and Federal Government efforts is very important. For example, many participants believed DOE should be working more closely with EPA.

Certain representatives asserted that environmental drivers for alternative fuels, while still important in the near-term would diminish in the future as petroleum vehicle technologies become cleaner. Attendees said flexibility was key element of all programs. Several attendees stated that they were looking to DOE to display leadership with respect to alternative fuels. Attendees had differing opinions on the subject of efficiency and its role within the goals and under fleet programs. Some felt that programs should address both efficiency and alternative fuels. Others felt that efficiency was not addressed within Title V of EPAct and therefore was outside of DOE's authority. Some attendees asserted that alternative fuel use would displace more petroleum than efficiency measures, at least on a per-vehicle basis.

The Washington, DC attendees also discussed the subject of barriers to greater utilization of alternative fuel and replacement fuel. First, they identified the following overall barriers: Vehicle incremental purchase costs, vehicle reliability and range, fuel costs, public/private education and awareness, and infrastructure. Second, concerning vehicle costs, several participants indicated that it might help if they could use the General Services Administration buying schedule, or if all fleet purchases could be "bundled" to reduce costs through larger acquisitions. Third, attendees wanted DOE to work more closely with OEMs to ensure that AFVs meet covered fleet demand for performance, range, reliability, and design. For example, several fleet managers asserted that OEMs adding tanks in pickup beds to increase range was unacceptable, since it reduces pickup bed utility. R&D was also highlighted as a key need, especially since the OEMs are still spending many times more on R&D to improve petroleum-fueled vehicles than AFVs. Fourth, within infrastructure, attendees identified refueling availability and reliability, the need for trained technicians, maintenance facility costs, and the ability to have vehicles maintained at convenient facilities as key issues. Several fleet managers asserted that their costs would rise if a fleet AFV acquisition mandate were promulgated, not only because of increased costs to meet the vehicle or fuel acquisition requirements, but also for increased costs of maintenance and

to conduct planning and reporting. Fifth, attendees generally agreed on the need for incentives to help offset the costs of moving toward alternative fuels, especially the costs of infrastructure. Some stated that incentives should be adopted instead of mandates, while others said incentives were useful in conjunction with mandates.

The attendees at the Washington, DC workshop also raised issues concerning education and outreach needs. First and foremost they saw, education and outreach programs as key activities, whether or not a fleet rule is proposed. They identified a major need to provide information to fleet operators and decision-makers. Second, they stated that education of personnel is also now more complicated, because of the need to train them on the aspects of complex, computer-controlled vehicles. Third, attendees asserted that most of the public does not understand the true affect of oil use, and how individual actions impact the Nation's energy security. Attendees argued that the general public hears about supply issues, but not about demand. They asserted that large vehicles (like sport utility vehicles and full-size pickup trucks) are often not actually needed by the drivers using them, but that the OEMs are selling these vehicles in large numbers. Attendees argued that until the general public understands the impacts of oil use, support for higher budgets (such as for local governments or incentives) to help AFV programs, and changes to the relative economics of oil and alternative fuels is unlikely.

In contrast to the attendees at the first two workshops described above, attendees at the Washington, DC workshops had widely differing opinions on possible regulations. This wide divergence of opinions was primarily was due to the unrestricted attendance at the Washington workshop.

While a number of attendees supported some form of regulatory action by DOE, several not only had a negative view of mandates, but also asserted that because of the substantial legal issues presented, virtually any mandate by DOE would be met with litigation. Of those who supported regulatory action, most supported a Replacement Fuel Rule, with some stating that the Fleet Rewards Program should be a fall-back position. Most attendees supported a flexible approach that focused on fuel use, and felt that vehicle acquisition programs do not result in alternative fuel use. Several commenters felt that unless DOE moved forward with some regulatory action, it

would be sending a message that replacing petroleum is not important.

Several attendees were interested in whether private fleets could be separated from local government fleets, so that different requirements could be imposed on each. Several State government representatives discussed the relationship between a potential private and local government rule and the existing fleet regulations because they were interested in opting into a Replacement Fuel Rule or Fleet Rewards Program.

Attendees said enforcement of existing and future fleet programs was an issue. For any regulations put in place, commenters asserted that DOE must be committed to enforcing them to ensure that the program goals are being achieved.

Summary of Written Comments

DOE received 28 sets of written comments in response to the notice for intergovernmental consultation, from equipment suppliers, local governments, alternative fuel organizations, Clean Cities coalitions and coordinators, and fleet management and leasing organizations, among others. These comments in many respects echo the remarks made at the three workshops. Some important themes run through these comments, and are summarized below.

While most comments focused almost exclusively on a potential fleet requirement rule, a few key addressed the replacement fuel goals. A representative from a conversion company asserted that reducing the use of petroleum is important, and that incentives are needed for natural gas companies to provide public stations. The representative also stated that grants are needed for stations and equipment, but organizations trying to move things ahead are being penalized by matching requirements. One local government representative submitted a similar statement, arguing that DOE should focus on reducing the financial burden on fleets from AFV acquisition programs, through additional grants for vehicles and refueling infrastructure.

An alternative fuel association representative stated that EPAct's energy security objectives are not being met under current conditions. This representative felt that the present regulatory framework is not effective in displacing petroleum, and that DOE should reform existing fleet programs by adding greater flexibility and multiple options. The representative also believed that DOE must realize EPAct's replacement fuel goals cannot be achieved solely through AFV

acquisitions and alternative fuel use by private and local government fleets. This representative supported adoption of financial and non-financial incentives, including tax incentives and grant programs, especially for infrastructure.

A representative for Clean Cities coalitions stated that its chapters strongly support fuel-neutral incentives. This representative said its chapter were working toward an initial appropriations target of \$25–30 million to support AFV acquisitions, infrastructure construction, and educational programs. This additional funding would be used to increase alternative fuel use.

One Northeastern State asserted that not achieving the replacement fuel goals set forth in EPAct is a function of policy limitations, not potential. The State said fleets are acquiring FFVs and dual-fuel vehicles, and thus gaining the capability of using alternative fuels, but operating them on gasoline. The State felt that DOE should keep the 30 percent by 2010 replacement fuel goal in EPAct.

The U.S. Conference of Mayors, an association representing potentially-covered fleets, stated that it strongly supports policies to promote use of alternative fuels, but does not support mandates. It suggested that DOE work with communities to support the use of alternative fuels. It also suggested that DOE work with EPA to develop a comprehensive policy integrating clean air objectives and EPAct goals. Its members adopted a resolution supporting reducing dependence on imported fossil fuels and increasing fuel diversity, as well as one indicating that widespread use of alternative fuels provides air quality, economic, and national security benefits. It said that Clean Cities has not provided sufficient funding to support widespread promotion and implementation of alternative fuel programs. Further, the resolution indicated that community leaders are committed to actively implementing AFV projects if adequate resources are available, and that the organization supports making alternative fuels a priority for the Nation, but calls upon the Federal government to provide sufficient funds. In addition, the National League of Cities expressed the concern that the proposals presented did not include sufficient information concerning costs to local governments and availability of infrastructure.

An association representing vehicle dealers indicated that a successful local government or private fleet AFV acquisition program needs to try to reduce the cost differentials between

AFVs and powered vehicles for cost-sensitive fleet buyers. This could include tax credits, grant funding, access to Federal acquisition pricing, and an expansion of allowable vehicles to include hybrids. Cost and performance are key considerations for fleets, and alternative fuels must be comparable to, if not better than, conventional fuels. The association said that most available alternative fuels do not meet these criteria. Therefore, it opposed new mandates because there are still too many barriers to increased use of alternative fuels to make an AFV acquisition mandate practicable. The association suggested that DOE could scale back Clean Cities to focus on niche market fleets selected for high likelihood of success and reproducibility. The association said resale value of used AFVs was a big issue to dealers, who are the largest purchasers and resellers of used fleet vehicles. If AFVs are not well-accepted by the market, the impact on dealers could be disastrous, according to the association. It said that DOE should assist in guaranteeing a resale value floor.

A member of an association of State fleet administrators suggested that programs need to provide incentives or accommodation for future technologies and current emerging technologies, especially high fuel economy vehicles. The commenter strongly urged a restructuring of the basic legislation to allow flexibility to recognize technologies that achieve the objectives of EPAct and the Clean Air Act Amendments.

A large city government suggested creation of a voluntary incentive-based program, although it cautioned that DOE needs to determine whether this would meet DOE's objectives under EPAct. It felt that DOE needs to conduct cost and operational impacts analyses and seek long-term Federal funding to offset costs for local governments for operation and maintenance, repair facility retrofits, land acquisition, staffing, etc., and that DOE should also coordinate efforts with EPA. Specifically, it stated that DOE needs to assist local governments concerning technical issues, such as vehicle availability, performance, operational limitations, health and safety requirements, as well as lack of fueling infrastructure.

One fuel producer asserted that if DOE chooses to seek to increase the use of alternative or replacement fuels through funding, it should be done in a fuel-neutral manner, providing equal funds for all alternative/replacement fuel. Under this approach, if a fuel does not require funding for refueling

infrastructure, funds could be used to increase production. A Midwestern State argued that the two most critical aspects of reducing petroleum consumption are having AFVs available that meet consumer needs at prices comparable to conventional vehicles, and having alternative fuels readily available at prices comparable to conventional fuels. The State did not view raising the price of petroleum to high levels as the answer. From a fleet perspective, the State said efforts to provide incentives to manufacturers and fuel providers have not worked well, since the availability of vehicles and fuels is still relatively low and has grown very slowly.

A second alternative fuel provider association voiced its preference for a comprehensive package of incentives that would encourage, not require, private fleets to use AFVs and alternative fuels. It also argued that energy security is an important national priority, and that the U.S. will not be able to protect itself from future oil supply disruptions unless it offsets petroleum demand with alternative fuel use. The association also asserted that more efficient vehicles were no substitute for AFVs in this regard. "Even if more efficient vehicles were available in large numbers, it would take many years for them to replace the existing fleet of vehicles and have an impact on petroleum consumption * * *. Efforts to increase efficiency should be encouraged but should not be used to undermine the basic goal of Titles III-V of EPAct: replacing petroleum motor fuels with the use of alternative fuels."

This trade association also believed that the EPAct goal of 30 percent replacement fuel use by 2010 was a high requirement, but that it is an important goal that should be retained. It commented that the markets covered by EPAct are too small, especially since medium- and heavy-duty vehicles are excluded, and are thus insufficient to create economies of scale that would cause vehicle owners not subject to an acquisition mandate to participate. In addition, it said that the government has been slow to enforce existing programs. It also mentioned FFVs as a problem, since due to the higher price of the fuels, there is no incentive for operators to use anything but gasoline. The association asserted that financial incentives would be key, especially to encourage voluntary alternative fuel use. It suggested that these could include tax incentives, increased funding for infrastructure projects, and a competitive grant program. It also said that market development, including building up international markets,

identification of key market sectors, and coordination of AFV acquisitions among all types of government fleets should be pursued. Air quality and energy security criteria should be applied when providing Federal grants, and States should receive State implementation plan (air quality) credits for AFV programs. In addition, the trade association argued that funding for alternative fuel R&D is also required to improve vehicle efficiency, reduce emissions, reduce the cost and improve the reliability of fueling infrastructure, and demonstrate AFV systems in new applications. It said that education and outreach were required to improve public awareness of alternative fuels and their benefits.

One Western State stated that a number of efforts should be pursued to reduce the barriers to alternative fuel use. For example, it said that the Federal Government should work with local organizations to more fully utilize existing refueling stations. It said that the Federal fleet should not put large numbers of ethanol FFVs into States where there is no ethanol refueling. Along with a county board of commissioners from another Western State and a California coastal city, it also encouraged DOE to improve grant programs, encourage legislation to help fleets for whom tax incentives do not work, encourage development of highly fuel-efficient vehicles, encourage the use of new technologies (e.g., hybrid vehicles), provide recommendations to Congress for encouraging use of AFVs and alternative fuels by the public, change current programs to be fuel-rather than AFV-based, and establish a reward program for organizations that exceed their requirements.

A small Eastern State's agriculture department stated that it has been working with soybean organizations to support use of biodiesel in its State. It believed that the future of U.S. agriculture depends upon increasing the utilization of the Nation's renewable resources and that DOE should consider options that benefit the use of agricultural-based fuels, which can help energy security, the environment, and the agriculture sector.

The fleets that would be potentially covered by new regulations were overwhelmingly opposed to the adoption of mandates. Most fleets expressed their support for alternative fuels but said that they have limited funding to pay for the added costs of many (especially local governments) such requirements. These fleets supported using incentives to encourage increased use of alternative fuels. A number of State representatives

expressed their interest in being included in a Replacement Fuel or Fleet Rewards Program. These fleets generally thought that it would be unfair and impracticable to set up two separate programs, one for covered State fleets, and another new one covering local government fleets.

At least one commenter expressed an interest in drastically reworking the existing EPAct fleet programs in order to provide credits for infrastructure investments. Several commenters favored providing credits for petroleum-fueled hybrid electric vehicles. Most commenters supported a Fleet Rewards or Replacement Fuel Program. Very few commenters were in favor of adopting a fleet program of the type set forth in EPAct section 507(g) (*i.e.*, an AFV acquisition only mandate). In fact, a number of commenters suggested that such a program would not result in significant petroleum replacement.

Several comments addressed enforcement and potential loopholes. One commenter asserted that if DOE is not serious about enforcement it should not adopt new mandates. It also noted that fleets could break up their fleets into smaller units or develop employee vehicle ownership programs as a way of avoiding the mandates. Several comments questioned DOE's authority to promulgate any new regulations. One comment noted that EPAct's deadline for promulgating a private and local government fleet rule had lapsed.

Only one organization addressed the issue of whether DOE had the legal authority to adopt a Fleet Rewards or Replacement Fuel Program. That organization asserted that DOE had authority under section 502 of EPAct to promulgate a Replacement Fuel Program but did not have that authority under section 507(g). The comments appear to assert that DOE has authority independent of section 507(g) to require fuel use regardless of the fleets that are covered.

D. November 2002 Meeting

In November of 2002, representatives of the National Association of Fleet Administrators (NAFA) met with DOE officials to express their views on the private and local government fleet rulemaking. DOE stated at that time that it was working on a draft. NAFA representatives stated that its members are opposed to additional mandates, including requirements to purchase AFVs. With respect to the replacement fuel goal, NAFA expressed concern that DOE would establish a replacement fuel goal that would not accomplish any societal objective or any of the stated objectives of EPAct, but that was

gerrymandered so that it would serve as the basis for DOE to establish an AFV acquisition mandate for private and local government fleets.

III. Private and Local Government Fleet Determination

A. Statutory Requirements

EPAct section 507(e) directs DOE to determine whether private and local government fleets should be required to acquire AFVs. In this respect, the rulemaking process for the private and local government fleet rule is very different from the previous rulemaking on the State government and alternative fuel provider fleet rule. In the case of the State government and alternative fuel provider fleet rule, DOE was not required to make any findings in order to promulgate a fleet rule. The determination of whether to adopt regulations for private and local government fleets, however, is conditional and depends on DOE first making several critical findings. Regulations covering private and local government fleets, if adopted, would in other respects likely be similar to those already in place for State government and alternative fuel provider fleets. As described above, these regulations essentially require that a percentage of a covered fleet's annual acquisitions of light-duty vehicles must be AFVs. *See Alternative Fuel Transportation Program*, 10 CFR Part 490. Section 507(g) sets forth a tentative AFV acquisition schedule for private and local government fleets should DOE establish such a program.

Section 507(e) sets forth the requirements for determining whether a private and local government fleet program is "necessary." Section 507(e)(1) states that:

* * * Such a program shall be considered necessary and a rule therefor shall be promulgated if the Secretary [of Energy] finds that—(A) the goal of replacement fuel use described in section 502(b)(2)(B), as modified under section 504, is not expected to be actually achieved by 2010, or such other date as is established under section 504, by voluntary means or pursuant to this title or any other law without such a fleet requirement program, taking into consideration the status of the achievement of the interim goal described in section 502(b)(2)(A), as modified under section 504; and (B) such goal is practicable and actually achievable within periods specified in section 502(b)(2), as modified under section 504, 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))

The question addressed in this portion of this **SUPPLEMENTARY**

INFORMATION is whether a fleet rule is "necessary" under the section 507(e) standard. DOE believes that a determination of whether a fleet rule is "necessary" depends on the following factors: The amount of replacement fuel use that would result if such a program would adopted (*i.e.*, whether it provides more than a very small percentage contribution to overall U.S. use of replacement fuels in motor vehicles); the level of certainty about the contribution such program might make; whether the replacement fuel use resulting from such a fleet rule could be encouraged through other means, including voluntary measures; and whether certain necessary market conditions (*e.g.*, whether alternative fuel and suitable AFVs are sufficiently available) exist to support a new fleet rule.

B. Rationale for the Private and Local Fleet Determination

Statutory Limitations

As described above, while EPAct authorizes DOE to mandate certain vehicle acquisitions, it severely limits the universe of fleets that would be covered by a private and local government fleet mandate, thus limiting the replacement fuel use that would result from such a program. The definition for "fleet" in EPAct section 301(9), (42 U.S.C. 13211(9)), limits coverage to large, centrally-fueled fleets located in major metropolitan areas. Only those fleets that operate or own at least 50 or more light duty vehicles may be considered for coverage. In addition, the definition of fleet specifically excludes from coverage a number of vehicle types and classes (*e.g.*, rental vehicles, emergency vehicles, demonstration vehicles, vehicles garaged at personal residences at night, etc.). Vehicles that tend to use larger amounts of fuel, medium- and heavy-duty vehicles, are also excluded from coverage.

Even for potentially covered fleets, EPAct section 507(i) provides several opportunities for regulatory relief through exemptions for non-availability of appropriate AFVs and alternative fuels. Specifically, any private and local government fleet rule "shall provide for the prompt exemption" by DOE of any fleet that demonstrates AFVs "that meet the normal requirements and practices of the principal business of the fleet owner are not reasonably available for acquisition," alternative fuels "that meet the normal requirement and practice of the principal business of the fleet owner are not available in the area in which the vehicles are to be

operated," or for government fleets, if the requirements of the mandate "would pose an unreasonable financial hardship." Section 507(a)(3) further reinforces these exemptions: "Nothing in [Title V of EPAct] shall be construed as requiring any fleet to acquire alternative fueled vehicles or alternative fuels that do not meet the normal business requirements and practices and needs of the fleet."

Taken together, these statutory exemptions would likely dramatically lower the number of fleets and fleet vehicles subjects to a private and local government AFV acquisition mandate. The provision concerning state and local government might not be implicated by a majority of otherwise covered government fleets, since in times when local government budgets are particularly stretched and many local governments are required to cut services or raise taxes to maintain existing levels of service, there will be greater likelihood that petitions for exemption from hard-pressed local governments would be granted. Even if DOE were disinclined to grant such petitions, the prospects that these petitions must be considered would create a "stop and go" quality about the local government portion of a private and local government fleet requirement program.

The ability of a private and local government fleet rule 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. DOE's experience with fleet programs demonstrates that vehicle acquisition requirements alone result in a relatively small (in the context of overall U.S. fuel consumption) amount of petroleum replacement. However, as will be explained below, DOE believes it does not have the authority, were it to promulgate a private and local government fleet mandate program, to require that the vehicles acquired use any particular fuel, including alternative fuels.

The only explicit requirement for fuel use in EPAct is contained in section 501, which extends only to alternative fuel provider fleets. Section 501(a)(4) states that "vehicles purchased pursuant to this section shall be operated solely on alternative fuels except when operating in an area where the appropriate alternative fuel is unavailable." Section 507, which concerns private and local government fleets, does not contain a similar provision, nor does it contain a provision either authorizing DOE to

mandate fuel use or explicitly prohibiting DOE from mandating fuel use. Therefore, DOE recognizes that it may be argued that section 507's silence leaves the issue of imposing a requirement to use alternative fuel open to DOE rulemaking authority.

However, DOE believes the more appropriate interpretation is that, because Congress specifically required use of alternative fuel in section 501(a)(4), 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.

Although this textual analysis is sufficient to support DOE's determination that it should not impose a fuel use requirement under section 507(e) and (g), it also is worthwhile to revisit Congressman Philip Sharp's remarks when he called up the conference report on EPAct for House approval. Congressman Sharp was one of the key architects of EPAct, and the floor manager for the bill in the U.S. 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. H11400 (October 5, 1992).

Thus, Congressman Sharp's floor statement is fully consistent with DOE's interpretation that it does not have statutory authority to mandate fuel use under a section 507 fleet program, and that in enacting section 507, Congress specifically intended to withhold that authority from the agency.

Finally, DOE is also limited in its authority to affect other market behavior. Section 504(c) precludes DOE from promulgating rules that would:

* * * mandate the production of alternative fueled vehicles or to specify, as applicable, the models, lines, or types of, or marketing or pricing practices, policies, or strategies for, vehicles subject to this Act. Nothing in this Act shall be construed to give the Secretary authority to mandate marketing or pricing practices, policies, or strategies for alternative fuels or to mandate the production or delivery of such fuels.

(42 U.S.C. 13254(c))

These limitations severely restrict DOE's opportunities to affect the use of replacement fuel, or to establish the market conditions necessary to support a private and local government fleet rule.

In addition to all of these provisions, Congress furthermore enacted a petition provision in section 507(n). That section provides:

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. In the event that the Secretary determines that a modification or suspension of the fleet requirements program on a regional basis would detract from the nationwide character of any fleet requirement program established by rule or would sufficiently diminish the economies of scale for the production of alternative fueled vehicles or alternative fuels and thereafter the practicability and effectiveness of such program, the Secretary may only modify or suspend the program nationally. The procedures shall include provisions for notice and public hearings. The Secretary shall deny or grant the petition within 180 days after filing.

(42 U.S.C. 13257(n))

Thus, even if DOE had authority to require alternative fuel use or could adopt an approach that awarded credits (e.g., Fleet Rewards) for fuel use, the "normal requirements and practices" provisions in sections 507(i)(1) and 507(g)(3), described above, and the petition procedure for modification or suspension of a fleet requirement program under section 507(n), would likely result in many fleets potentially covered by the fleet rule in the first instance being able to obtain relief from the rules requirements.

Consequently, it is fair to say that there is an unusually high degree of regulatory uncertainty built into Title V of EPAct, and that Congress has substantially limited the effectiveness of any fleet program that might be promulgated under section 507. The nature of the exemption and petition procedures and the associated regulatory uncertainty would undermine the potential effectiveness of a regulatory mandate to purchase significant numbers of alternative fueled vehicles, and accordingly, support today's proposed finding that a private and local government fleet requirement program would make no appreciable contribution to actual achievement of

any replacement fuel goal and therefore is not "necessary" under the section 507(e) standard.

Analysis of Potential Replacement Fuel Use

The limitations on the potential contributions of a private and local government fleet program identified above are supported by analyses conducted for and by DOE. In both *Technical Report 14* and the *Section 506 Report*, estimates of the potential replacement fuel use from a private and local government fleet program were very similar. *Technical Report 14* estimated total fuel use from all EPAct fleet programs to be approximately 1.2 percent of U.S. gasoline use (p. 63, Table III-21). The *Section 506 Report* was only slightly more optimistic, indicating that "[a]lternative fuel use by EPACT 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 out 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 at closer to 1 percent. It should be noted that both reports chose to include calculations based only upon the percentage of light-duty fuel use, represented as solely gasoline at the time of these reports. Therefore, replacement fuel use from the private and local government fleet program when viewed as a percentage of all on-highway motor fuel use would be on the order of 0.7 to 0.8 percent.

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 fleet programs. This experience has shown that the number of fleets originally envisioned to be covered was far larger than actually occurred.

Estimates prepared by Oak Ridge National Laboratory indicated that approximately 380,000 AFVs would be acquired annually pursuant to the various AFV acquisition mandates in EPAct, if a private and local government fleet program were promulgated and once all EPAct programs reached their maximum mandated percentage requirements. (See *TAFV Model Report*, p. 25, and Technical Documentation of the Transitional Alternative Fuels and Vehicles TAFV Model, Model Version 1.0, ORNL, July 1997, table 10, pp. 32-33 (hereafter, *TAFV Documentation*)).

More specifically, fleets covered by the current Federal Government, State Government, and Alternative Fuel Provider fleet programs were projected to require approximately 60,000 AFVs each year, while private and local government fleets were projected to require approximately 320,000 vehicles each year. Based upon replacement rates of 3 years for private fleet cars, 4.5 years for private fleet light trucks, and 6.75 years for all local government light-duty vehicles, this equates to a total covered fleet vehicle population of approximately 1.87 million light-duty fleet vehicles at the maximum AFV acquisition requirement of 70 percent.

The TAFV model, however, has proven to be incorrect for fleets currently subject to EPAct AFV acquisition requirements. That model estimated that the current EPAct fleet programs would result in approximately 60,000 AFV acquisitions annually, but DOE's experience with those programs shows that the covered fleets are acquiring closer to 20,000 to 25,000 AFVs per year. (See Federal Fleet and State and Fuel Provider programs at <http://www.ott.doe.gov/epact>.) Based on this experience, which DOE believes would likely be replicated with respect to private and local government fleets, the TAFV estimate of AFV acquisitions that would result from a private and local government fleet mandate probably is 2 to 2 1/2 times the actual level of AFV acquisitions that would result. Thus, annual AFV acquisitions resulting from a potential private and local government fleet AFV acquisition mandate probably would be in the neighborhood of 130,000 to 160,000, with total covered light-duty fleet vehicles of approximately 750,000. Similarly, DOE's experience has also been that fleets not required to use alternative fuel often tend to acquire FFVs or bi-fuel vehicles, and operate them on gasoline. There is no reason to believe the results would be any different with private and local government fleets.

A more recent analysis, *The Alternative Fuel Transition: Results from the TAFV Model of Alternative Fuel Use in Light-Duty Vehicles 1996-2000* (ORNL.TM2000/168) (September 17, 2000) [hereinafter *TAFV Model Report*], http://pzl1.ed.ornl.gov/tafv99report31a_ornltm.pdf, appears to incorporate more realistic assumptions regarding these fleet programs. The *TAFV Model Report* states 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, this analysis placed contributions from the private and local government fleet rule at 0.25 percent. Again, as with *Technical Report 14* and the *Section 506 Report*, the percentages were based only upon fuel use by light-duty vehicles. Therefore, the contribution from a potential rule drops below 0.2 percent when compared against all on-highway motor fuel use.

Thus, a potential private and local fleet program under authority provided to DOE by EPAct would be expected to contribute, at best, an extremely small amount toward achievement of replacement fuel goals. Even without the statutory limitations in EPAct described above, such a contribution would still be very small.

Infrastructure and Fuel Availability

During the ANOPR and public workshops, a number of commenters expressed their concern that alternative fuel infrastructure was not adequate to support a private and local government fleet rule. Since that time, it is DOE's view that fuel provider investments in alternative fuel infrastructure have in fact slowed down. In the early 1990's, shortly after EPAct's passage, a significant number of natural gas and electric utilities entered the transportation fuels market, hoping to market alternative fuels to fleets subject to the Clean Air Act and EPAct. The number of alternative fuel stations, natural gas stations in particular, grew from little more than a handful to several thousand. The total number of alternative fuel stations, however, appears to have stalled or slightly declined in the past few years. See Department of Energy, Alternative Fuel Data Center, *Refueling Stations* (http://www.afdc.doe.gov/refuel/state_tot.shtml) (Dec. 2002) [hereinafter *AFDC Refueling Stations*].

Restructuring in the utility industry and the lack of demand for alternative fuels have played a part in the reduced role of utilities in the development of these facilities. Under existing fleet mandates and voluntary programs, electric utilities have expressed their discouragement at the lack of EVs on the road. A private and local government fleet rule probably would not appreciably affect that calculus given the small percentage of vehicles covered fleets would seek to operate on those fuels. Therefore, it is DOE's view that, if it were to adopt an AFV acquisition requirement for private and local government fleets, there is no assurance

or even any demonstrable likelihood that utilities would invest in the infrastructure needed to support these fleets.

The ethanol industry also has made only limited investment in building infrastructure for supplying E-85, the fuel used by ethanol FFVs, of which there are several million in service today. That industry has primarily focused its attention on supplying the gasohol and gasoline oxygenate market. DOE furthermore has concerns that if, in the future, the demand for ethanol blends increases as a result of market forces outside of any DOE mandate, there could be a lack of domestic ethanol to meet the demand for E-85. Today, there are only approximately 150 fueling outlets nationwide that provide E-85. *See AFDC Refueling Stations.*

Major energy suppliers, principally oil companies, have been unwilling to invest in the alternative fuels market (or they have actively opposed it) and instead have primarily focused their attention on ensuring that gasoline and diesel fuels meet current and future environmental regulations. Thus, DOE does not expect that the major oil retailers would install infrastructure necessary to support a private and local government fleet rule given the extremely small amount of replacement fuel use that likely would result from such a mandate; certainly that infrastructure is not in place now. This lack of infrastructure is likely to result in exemption requests and petitions to suspend any fleet requirement program DOE might impose under section 507(e), and DOE's granting of those requests.

Alternative Fueled Vehicle Availability

Automakers have for several years now offered some variety of AFVs, including passenger cars, light-duty pickup trucks and vans. The availability of these vehicles is in stark contrast to when EPAct was passed. In 1992, there were virtually no OEM vehicles available that operated on alternative fuel. Consumers and fleets had to have an existing gasoline vehicle converted by an aftermarket shop if they wanted an AFV. The AFVs that are available today are built by auto manufacturers for two primary purposes: (1) To meet the needs of the fleets currently subject to fleet mandates; and, (2) to provide credits to automakers that can be used to meet the corporate average fuel economy (CAFE) standards. Automobile manufacturers are awarded CAFE credits as an incentive to develop a fleet of AFVs that will in turn lead to the development of infrastructure to support alternative fuel use.

Manufacturers currently offer up to a

million new FFVs each year. Other AFVs are available in significantly lower numbers, generally on the order of 10,000 per year.

DOE is concerned that if it adopts a requirement for private and local government fleets to acquire AFVs, there may not be an adequate supply of suitable AFVs available. The number of AFVs that likely would be acquired under a private and local government fleet mandate are, in DOE's view and based on the comments it has received, insufficient to create the market demand that would cause manufacturers to build sufficient numbers of AFVs, suitable for the covered fleets, at affordable prices. Under the existing State government and alternative fuel provider fleet programs, DOE has been obliged to provide exemptions to a number of fleets that are unable to acquire AFVs that meet their business needs. Unless automakers significantly expand their current offerings of AFVs, DOE likely would be forced to process and approve thousands of exemption requests each year.

Because EPAct expressly prohibits DOE from mandating the production of AFVs or to specify the types of AFVs that are made available, there is little that DOE can do, outside of the voluntary efforts already underway with vehicle manufacturers, to ensure that adequate supplies suitable of AFVs would be available.

Alternative Fuel Costs and Alternative Fuel Use

At the present time, the cost of some alternative fuels (such as biofuels) exceeds the cost of conventional motor fuel, and it is reasonable to assume that, absent changes in technology, in the supply of petroleum, or in policy as established by law, the price differential will continue and will influence fleet owners and operators for the foreseeable future. The likely effect of the price differential is predictable in light of DOE's experience in administering the State government fleet requirement program under section 507(o) of EPAct. Most State government fleets are acquiring significant numbers of FFVs and operating them lawfully using conventional motor fuels. Although this practice in part may be a function of lack of infrastructure, the fuel cost differential of ethanol is probably a significant contributing factor. There is no reason to assume that the result would be any different—and substantial reason to believe that the result would be exactly the same—if DOE were to impose a private and local government fleet requirement program under section 507(e).

Discussion of Previous Proposals

DOE considered but ultimately has decided not to propose a Fleet Rewards or Replacement Fuel Program, or any of the tax credit, tax incentive, or other programs discussed in the earlier stages of this rulemaking proceeding. Many commenters supported these concepts, but few offered any arguments that DOE had authority to implement such programs under section 507(e). On the other hand, a number of comments did question whether DOE had sufficient legal authority to promulgate or implement them. DOE believes it has no legal authority under EPAct to promulgate the tax credit and tax incentive programs that were discussed by DOE and commenters, and believes it is doubtful DOE has authority to promulgate the other types of incentive programs discussed.

One advantage of the Fleet Rewards program was that it did not require fuel use, so it was not an explicit fuel use requirement; it would have allowed fuel use credits to be used instead of requiring vehicle acquisitions. Therefore, the program would not have been an explicit fuel use mandate, which DOE believes it has no authority to promulgate. Even so, DOE still has serious doubt about its authority to adopt such a program under section 507 because EPAct only provides credits for vehicle acquisitions. Specifically, EPAct section 508 sets forth a detailed crediting system, but allows credits to be earned only for AFV acquisitions, not fuel use or some other action. Moreover, even if DOE did have authority to provide credits for fuel use, DOE believes that there would be little incentive for most fleets to choose this option, since they could comply by acquiring FFVs that have little or no incremental cost, and could operate them on gasoline.

In any event, a Fleet Rewards or Replacement Fuel Program would be of little use unless it was accompanied by a mandate for vehicle acquisitions or fuel use; those programs would be alternative methods to comply with the mandates. Because DOE is proposing to determine that a private and local government program is not "necessary" and thus cannot and should not be promulgated, there is no reason or need for DOE to consider or propose adopting a Fleet Rewards or Replacement Fuel Program in this notice. Furthermore, coupling a Fleet Rewards or Replacement Fuel Program with a private and local government fleet AFV acquisition mandate would be extremely unlikely to change significantly the amount of estimated

alternative and replacement fuel use by covered fleets and thus would not alter the analysis described above as to whether a fleet program is "necessary." There is no evidence that the Fleet Rewards or Replacement Fuel Programs would result in enough fuel use to significantly change the economics and practicability of using alternative or replacement fuels, and therefore there is no evidence that such programs would affect covered fleets' willingness or ability to use alternative or replacement fuels to any appreciable degree.

Summary of Determination

For the reasons stated in this part of the **SUPPLEMENTARY INFORMATION**, DOE proposes to determine that a private and local government fleet requirement rule under sections 507(e) and (g) of EPAct is not "necessary," and therefore should not be imposed. Such a mandate would make no appreciable contribution (less than 0.2 to 0.8 percent of on-highway motor fuel use) toward achievement of the 2010 replacement fuel goal in EPAct section 502 or a revised goal, and even this extremely small contribution is highly uncertain. As a result, DOE cannot make either of the two determinations set forth in section 507(e), both of which must be determined in the affirmative before a private and local government fleet requirement program can be determined to be "necessary" and thus implemented. At this time, DOE cannot determine that the 2010 replacement fuel goal in EPAct (or a revised goal) is not expected to be achieved "without such a fleet requirement program," or that the replacement fuel goal can be achieved "through implementation of such a fleet requirement program" in combination with other means.

First, there are the limitations in EPAct itself, which include: (1) Limitations on the coverage of a private and local government fleet requirement program to only certain light-duty vehicle fleets; (2) procedures allowing case-by-case exemptions; and (3) DOE's lack of authority to require alternative or replacement fuel use or to create an effective substitute regulatory program. Second, even if DOE imposed AFV acquisition requirements, market conditions will encourage covered fleets to file petitions seeking modification and/or suspension of the entire fleet requirement program and/or its application to specific fleets and vehicles. Those conditions, which are likely to persist for the foreseeable future, are: (1) Lack of an alternative fuel infrastructure; (2) unavailability of suitable AFVs; and (3) high alternative

fuel costs (for certain fuels) relative to the costs of conventional motor fuels.

On the basis of the foregoing, DOE today proposes to determine that a private and local government fleet requirement program is not "necessary" under the standards set forth in EPAct section 507(e) and therefore cannot and should not be promulgated.

C. Determination for Fleet Requirements Covering Urban Transit Bus Option and Law Enforcement Vehicles

Section 507(k)(1) of EPAct provides in relevant part: "If the Secretary determines, by rule, that the inclusion of fleets of law enforcement motor vehicles in *the fleet requirement program established under subsection (g)* would contribute to achieving the [replacement fuel] goal described in section 502(b)(2)(B) * * * and the Secretary finds that such inclusion would not hinder the use of the motor vehicles for law enforcement purposes, the Secretary may include such fleets in such program * * *." (emphasis added). Section 507(k)(2) contains similar language with regard to new urban buses. 42 U.S.C. 13257(k)(1) and (2).

DOE considered whether to interpret section 507(k) to mean that law enforcement vehicle fleets and urban buses must be considered in making a determination under section 507(e) and (g) as to whether a private and local government fleet acquisition mandate program is "necessary" or, alternatively, whether law enforcement fleets and urban buses should be covered by a fleet acquisition mandate only may follow completion of a rulemaking under section 507(e) and (g) that determines a private and local government fleet acquisition program is "necessary" and that promulgates such a program. In DOE's view, EPAct prohibits DOE from considering law enforcement vehicle fleets when making the "necessary" determination under sections 507(e) and (g) because such fleets are specifically excluded from the statutory definition of the term "fleet" (42 U.S.C. 13211(9)). Similarly, it is DOE's view that EPAct prohibits DOE from considering urban buses when making the "necessary" determination under sections 507(e) and (g) because the statutory definition of the term "fleet" is limited to "light duty vehicles" which are vehicles no more than 8,500 lbs. GVWR, and under the definition of "urban bus" referenced in section 507(k) and contained in 40 CFR 86.093-2, most urban buses would not qualify as light duty vehicles.

Furthermore, sections 507(k)(1) and (2) specifically refer to "the fleet

requirement program established under subsection (g)." In DOE's view, the better interpretation of section 507(g) is that it did not in and of itself "establish" a fleet requirement program. That section merely sets forth a vehicle acquisition schedule that, in order to have any applicability or force at all, must be implemented by DOE with a rule promulgated pursuant to a determination under section 507(e) that a private and local government fleet rule is "necessary." As a result, in order for section 507(k) to come into operation, a private and local government fleet program first must be "established" by DOE pursuant to the authority in sections 507(e) and (g). Although it is perhaps arguable that subsection (k) could be construed to merely refer to subsection (g) without the necessity for DOE to have first acted to establish a private and local fleet program under sections 507(e) and (g), this alternative interpretation is not as reasonable as DOE's interpretation in view of the text of the statutory definition of "fleet" and the use of that term in subsection (g).

Moreover, in DOE's view, this alternative interpretation is undesirable as a matter of policy. First of all, with respect to urban transit buses, during the earlier stages of this rulemaking some commenters argued that an AFV acquisition mandate should not be imposed on urban transit buses because the buses and their riders already were reducing petroleum consumption by the fact the riders were not using their personal cars. These commenters argued that imposing an AFV acquisition mandate could raise the cost of riding an urban transit bus, which could then reduce ridership and actually increase petroleum consumption by causing riders to return to driving their cars. DOE agrees with these concerns.

Second, and with respect to law enforcement vehicles, EPAct already expresses a policy that such vehicles should not be considered "fleets." DOE believes that, as a matter of policy, it should not seek to impose mandates on law enforcement authorities until a mandate first was extended to other local governmental fleets, both because the numbers are insufficient to appreciably change the overall analysis of the necessity or desirability of a private and local government fleet mandate program, and because commenters generally did not support imposing mandates on such fleets. Therefore, on the basis of the foregoing, today's rulemaking notice does not address law enforcement fleets and urban buses under section 507(k).

IV. Whether To Modify Replacement Fuel Goal

DOE has decided not to propose modification of the 2010 replacement fuel goal of 30 percent in this notice of proposed rulemaking. As noted earlier, the process of determining whether to adopt a regulatory requirement for private and local fleets depends on whether such a rule is "necessary" to achieve EPAct's petroleum replacement fuel goals. As part of the process of evaluating whether to propose AFV acquisition mandates for private and local government fleets pursuant to EPAct section 507, DOE reviewed the replacement fuel goals in EPAct section 502 and considered whether to revise them, but decided for several reasons that it would not propose any such modifications.

First of all, EPAct does not require DOE to revise the petroleum replacement fuel goal in order for DOE to determine whether a private and local government fleet rule is "necessary." Although section 507(e)(2) permits DOE to modify the replacement fuel goal in the context of making a private and local government fleet determination, the statute does not require the goals to be modified.

Second, DOE believes it would not promote the right incentives or actions to propose modifications to the 2010 replacement fuel goal at this time. Congress in 1992 created by statute (in EPAct section 502(b)(2)) an initial national goal of using replacement fuels for at least 10 percent of motor fuel used in the United States in 2000, and a long-term goal of at least 30 percent in 2010, on a petroleum fuel energy equivalent basis. EPAct's legislative history does not explain why Congress chose these particular goals and dates, nor does it provide any analysis supporting them. However, and in light of the overall purposes of EPAct, DOE believes that Congress set these particular goals to establish aggressive aspirational petroleum reduction targets for the Federal government and the public. Congress apparently intended to encourage action that would aggressively advance the availability and use of replacement fuels. DOE believes that the goals as set in EPAct were intended to encourage actions that would lead to significant increases in replacement fuel use.

Since EPAct's enactment in late 1992, the Federal government has implemented a number of regulatory and voluntary programs in an effort to increase the use and availability of replacement fuels. These programs are discussed in more detail in the

Introduction section of this

SUPPLEMENTARY INFORMATION. While these programs have had a favorable impact on the environment and on the use of alternative fuels and replacement fuels, these programs have not had the desired effect of greatly increasing the availability or use of alternative and replacement fuels, or of causing the use of replacement fuels to become a viable alternative, on a large-scale basis, to the use of petroleum-based fuels in vehicles. The result is that although the use of replacement and alternative fuels has increased since 1992, the overall use of these fuels relative to total petroleum consumption remains relatively small. In 1992, replacement fuels accounted for slightly less than 2 percent of total motor fuel consumption; by 2001, replacement fuels accounted for less than 3 percent. *See Transportation Fuels 2000* at Table 10. Thus, to date, very little progress has been made toward achieving the aggressive goals established by EPAct and little progress will be made in the future without major new initiatives.

At the same time, DOE takes note of the fact that Congress is widely expected to take up comprehensive legislation that may significantly affect our nation's energy future and may bear importantly not only on the achievability of the current goals but also on what any potential revised goals might be. Moreover, the President and DOE have proposed bold initiatives to dramatically increase the availability, use and commercial viability of replacement fuels in the transportation sector. DOE's primary efforts are focused on the long-term goal of developing the technology and infrastructure to allow hydrogen to become a key motor vehicle fuel. These efforts, if fully supported with necessary enabling legislation and funding as DOE has proposed, offer the potential to achieve the long term goal of replacing petroleum as the primary transportation fuel.

In light of the momentum that these various efforts are engendering; in light of what DOE understands to be the principal purpose of EPAct's replacement goals in section 502(b)(2)—to encourage policymakers, industry and the public to engage in aggressive action to expand the use of alternative and replacement fuels; and in light of the likelihood of consideration and enactment of new legislation by this Congress that would have significant bearing on these issues, DOE has concluded that it should not make a determination under EPAct concerning the achievability of the 2010 goals at this time. Therefore DOE is not at this

time proposing to change the 2010 replacement fuel goal set forth in EPAct section 502(b)(2). DOE will continue to evaluate this issue and may in the future, if it considers appropriate, review and modify the 2010 replacement fuel goal pursuant to its authority in EPAct Title V.

V. Opportunity for Public Comment

A. Participation in Rulemaking

Interested persons are invited to participate in this proceeding by submitting written data, views, or comments with respect to the subject set forth in this notice and the proposals made by DOE. DOE encourages the maximum level of public participation possible in this proceeding. Individual consumers, representatives of consumer groups, manufacturers, associations, coalitions, States or other government entities, and others are urged to submit written comments on the proposal. DOE also encourages interested persons to participate in the public hearing announced at the beginning of this notice. Whenever applicable, full supporting rationale, data and detailed analyses should also be submitted.

B. Written Comment Procedures

Written comments (eight copies) should be identified on the outside of the envelope, and on the comments themselves, with the designation: "Alternative Fuel Transportation Program: Private and Local Government Fleet Determination, NOPR, Docket Number EE-RM-FCVT-03-001" and must be received by the date specified at the beginning of this notice. In the event any person wishing to submit written comments and cannot provide eight copies, alternative arrangements can be made in advance by calling Mr. Dana O'Hara at (202) 586-9171. Additionally, DOE would appreciate an electronic copy of the comments to the extent possible. Electronic copies should be e-mailed to regulatory_info@afdc.nrel.gov. DOE is currently using Corel WordPerfect or Microsoft Word.

All comments received on or before the date specified at the beginning of this notice of proposed rulemaking and other relevant information will be considered by DOE before final action is taken on the proposal. All comments submitted will be made available in the electronic docket set up for this rulemaking. This docket will be available on the World Wide Web at the following address—http://www.ott.doe.gov/epact/private_fleets.shtml. Pursuant to the provisions of 10 CFR 1004.1, anyone

submitting information or data that he or she believes to be confidential and exempt by law from public disclosure should submit one complete copy of the document, as well as seven (7) copies, if possible, from which the information has been deleted. DOE will make a determination as to the confidentiality of the information and treat it accordingly.

C. Public Hearing Procedures

The time and place of the public hearing are set forth at the beginning of this notice. DOE invites any person who has an interest in this proceeding, or who is a representative of a group or class of persons that has an interest, to make a request for an opportunity to make an oral presentation at the hearing. Requests to speak should be sent to the address or phone number indicated in the **ADDRESSES** section of this notice and should be received by the time specified in the **DATES** section of this notice.

The person making the request should briefly describe his or her interest in the proceeding and, if appropriate, state why that person is a proper representative of the group or class of persons that has such an interest. The person also should provide a phone number where he or she may be reached during the day. Each person selected to speak at the public hearing will be notified as to the approximate time that he or she will be speaking. A person wishing to speak should bring ten copies of his or her statement to the hearing. In the event any person wishing to speak at the hearing cannot meet this requirement, alternative arrangements can be made in advance by calling Mr. Dana O'Hara, at (202) 586-9171.

DOE reserves the right to select persons to be heard at the hearing, to schedule their presentations, and to establish procedures governing the conduct of the hearing. The length of each presentation will be limited to ten minutes, or based on the number of persons requesting to speak.

A DOE official will be designated to preside at the hearing. The hearing will not be a judicial or an evidentiary-type hearing, but will be conducted in accordance with 5 U.S.C. 553 and section 501 of the Department of Energy Organization Act. (42 U.S.C. 7191). At the conclusion of all initial oral statements, each person may, if time allows, be given the opportunity to make a rebuttal statement. The rebuttal statements will be given in the order in which the initial statements were made.

Any further procedural rules needed for the proper conduct of the hearing

will be announced by the Presiding Officer at the hearing.

If DOE must cancel the hearing, DOE will make every effort to publish an advance notice of such cancellation in the **Federal Register**. Notice of cancellation will also be given to all persons scheduled to speak at the hearing. The hearing may be canceled in the event no public testimony has been scheduled in advance.

VI. 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. Executive Order 12988 does not apply to this rulemaking notice because DOE is not proposing any regulations and instead is proposing to determine that regulations are not "necessary" under section 507(e) and (g) of EPAct.

VII. Review Under Executive Order 12866

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

today's action and any other documents submitted to OIRA for review are a part of the rulemaking record and are available for public review as provided in the **ADDRESSES** section of this notice of proposed rulemaking.

VIII. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, Public Law 96-354, 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 proposed negative determination under EPAct section 507(e) would not result in compliance costs on small entities. Therefore, DOE certifies that today's proposed 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.

IX. Review Under the Paperwork Reduction Act

Because DOE has proposed not to promulgate requirements for private and local government fleets, no new record keeping requirements, subject to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, would be imposed by today's regulatory action.

X. Review Under the National Environmental Policy Act

The proposed rule would determine that a regulatory requirement for the owners and operators of certain private and local government light-duty vehicle fleets to acquire alternative fueled vehicles would make no appreciable contribution to actual achievement of the replacement fuel goal in EPAct or a revised goal, and therefore is not "necessary" under EPAct section 507(e). The "to its achievement. The negative determination regarding the necessity for a fleet requirement program would not require any government entity or any member of the public to act or to refrain from acting. Accordingly, DOE has determined that its proposed determination is covered under the Categorical Exclusion found at paragraph A.5 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being interpreted or amended.

XI. 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 proposed determination and has determined that it would not preempt State law and 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.

XII. Review of Impact on State Governments—Economic Impact on States

Section 1(b)(9) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (September 30, 1993), established the following principle for agencies to follow in rulemakings: "Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, agencies shall seek to harmonize Federal regulatory actions with regulated State, local and tribal regulatory and other governmental functions."

Because DOE is proposing to determine that a private and local government fleet AFV program is not "necessary" under section 507(e) and therefore is not proposing the promulgation of such a program, no significant impacts upon State and local governments are anticipated. The position of State fleets currently covered under the existing EPAct fleet program is unchanged by this action. Before reaching these conclusions, DOE sought and considered the views of State and local officials. DOE's efforts in this regard are discussed above in the portion of this **SUPPLEMENTARY INFORMATION** describing the workshops

DOE conducted on various options for implementing a fleet program.

XIII. 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). The notice of proposed rulemaking published today does not propose or contain any Federal mandate, so the requirements of the Unfunded Mandates Reform Act do not apply.

XIV. 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 proposed rule that may affect family well-being. Today's notice of proposed rulemaking and proposed determination would 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.

XV. 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 notice under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

XVI. Review Under Executive Order 13175

Under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), 65 FR 67249 (November 9, 2000), DOE is required to consult with Indian tribal officials in development of regulatory policies that have tribal implications. Today's notice and proposed determination would not have such implications. Accordingly, Executive Order 13175 does not apply to this notice and proposed determination.

XVII. Review Under Executive Order 13045

Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks), 62 FR 19885 (April 23, 1997) contains special requirements that apply to certain rulemakings that are economically significant under Executive Order 12866. Today's action is not economically significant. Accordingly, Executive Order 13045 does not apply to this rulemaking.

XVIII. 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 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 proposed negative determination is a significant regulatory action, if finalized the determination will not have a significant adverse impact on the supply, distribution, or use of energy. Consequently, DOE has concluded there is no need for a Statement of Energy Effects.

Issued in Washington, DC, on February 26, 2003.

David K. Garman,

Assistant Secretary, Energy Efficiency and Renewable Energy.

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