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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 490

RIN 1904-AB69

Alternative Fuel Transportation Program; Private and Local Government Fleet Determination

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

ACTION: Notice of proposed determination and public hearing.

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

DATES: Written comments (eight copies and, if possible, an e-mail copy) on the proposed determination must be received by DOE on or before November 13, 2007; 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 from 9 a.m. until 4 p.m. on October 17, 2007. The length of each oral presentation is limited to 10 minutes. The public hearing will be held at the U.S. Department of Energy, Room GH-019, 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 October 10, 2007.

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, RIN 1904-AB69, 1000 Independence Avenue, SW., Washington, DC 20585-0121. E-mails may be sent to:

regulatory_info@afdc.nrel.gov.

Comments may also be submitted through the Federal Rulemaking Portal at <http://www.regulations.gov>. DOE is currently using Microsoft Word. Organizations are strongly encouraged to submit comments electronically, to facilitate timely receipt of comments and ease inclusion in the electronic docket.

Copies of this notice, the transcript from the hearing, and written comments will be placed at the following Web site address: <http://www1.eere.energy.gov/vehiclesandfuels/epact/private/index.html>. Interested parties 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. 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, contact Mr. Dana V. O'Hara, Office of Energy Efficiency and Renewable Energy (EE-2G), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0121; (202) 586-9171;

regulatory_info@afdc.nrel.gov; or Mr. Chris Calamita, Office of the General Counsel, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0121; (202) 586-9507.

SUPPLEMENTARY INFORMATION:

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I. Introduction

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

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

At least ten percent by the year 2000, and at least thirty percent by the year 2010 of the projected consumption of motor fuel in the United States for each such year, with at least half of such replacement fuels being domestic fuels. (Replacement Fuel Goal; 42 U.S.C. 13252(b)(2)) Under section 504(b) of EPA 1992, if DOE determines that the

section 502 goals are unachievable, DOE must establish achievable goals. (42 U.S.C. 13254(b))

In determining whether to establish a Private and Local Government Fleet Requirement, DOE is directed to determine if such a requirement is “necessary.” (42 U.S.C. 13257(e)(1)) The “necessity” determination is a two part test. First, DOE must determine if the Replacement Fuel Goal established under section 502, or as modified under section 504 of EPAAct 1992, is achievable absent a Private and Local Government Fleet Requirement. (42 U.S.C. 13257(e)(1)(A)) Next, the “necessity” determination requires DOE to determine if such a goal is practicable and actually achievable through implementation of a Private and Local Government Fleet Requirement in combination with voluntary means and other relevant programs. (42 U.S.C. 13257(e)(1)(B)) If DOE determines that the Replacement Fuel Goal is not achievable absent the Private and Local Fleet Requirement, and that such goal would be practicable and actually achievable through implementation of such a requirement, DOE must then establish the Private and Local Fleet Requirement under section 507(g). (42 U.S.C. 13257(e)(1)) If either of these findings cannot be made, then DOE is precluded from establishing the Private and Local Fleet Requirement under section 507(g).

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

In a previous rulemaking, DOE has already determined that the original Replacement Fuel Goal of 30 percent in 2010 is not achievable and a modified Replacement Fuel Goal of 30 percent by 2030 was published March 15, 2007. 72 FR 12042. The purpose of today’s document is to propose a determination whether or not the Private and Local Government Fleet Requirement is necessary to achieve the modified Replacement Fuel Goal.

DOE proposes to determine that it is not “necessary” to promulgate a regulation requiring private and local government fleets to acquire AFVs. DOE has initially determined that establishment of a Private and Local Government Fleet Requirement is not required for achievement of the Replacement Fuel Goal of 30 percent of U.S. motor fuels by 2030, as modified by

DOE in March 2007. 72 FR 12041. As discussed below, this initial determination is based on DOE’s analysis in revising the Replacement Fuel Goal, under which DOE demonstrated a pathway to achieve the modified Replacement Fuel Goal without establishment of a Private and Local Government Fleet Requirement. 72 FR 12041. Additionally, DOE also provides an analysis initially demonstrating that were a Private and Local Government Fleet Requirement established, the number of fleets potentially covered by such a requirement, the number of AFVs likely to be acquired, and the amount of replacement fuel likely displaced would not make an appreciable contribution towards achieving the modified Replacement Fuel Goal.

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

II. Statutory Requirements

A. Definitions

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

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

A “dual fuel vehicle” is one “capable of operating on alternative fuel and on gasoline or diesel fuel.” (42 U.S.C. 13211(8)(A)) DOE notes that because a dual fueled vehicle can be operated on gasoline or diesel, the purchase of a dual fueled vehicle does not assure that “alternative” or “replacement” fuel will be used to operate the vehicle.

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

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

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

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

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

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

Defense has certified to the Secretary must be exempt for national security reasons;

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

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

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

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.

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

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

B. Key Statutory Requirements

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

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

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

C. Other Related Requirements

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

Under section 507(i), a promulgated Private and Local Government Fleet Requirement must provide for an exemption of a fleet from the applicable requirements on grounds of: (1) Non-availability of appropriate AFVs and alternative fuels; (2) non-availability of appropriate alternative fuels; and (3) with respect to local government entities, financial hardship. (42 U.S.C. 13527(i))

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

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

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

Section 507(m) of EPCA 1992 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.

D. No Fuel Use Requirement Authority

It is important to note that the ability of a Private and Local Government Fleet Requirement to affect petroleum consumption also depends, in significant part, on whether DOE can require covered fleets to use alternative or replacement fuels in addition to requiring that they acquire AFVs. The only explicit requirements for fuel use in EPCA 1992 are contained in section 501(a)(4), which applies only to alternative fuel provider fleets, and section 302(a)(2) (amending section 400AA of the Energy Policy and Conservation Act), which applies only to Federal fleets. (42 U.S.C. 13251(a)(4) and 6374(a)) Section 507 of EPCA 1992, which concerns private and local government fleets, does not contain any similar provision, nor does it contain a provision either authorizing DOE to mandate fuel use or explicitly prohibiting DOE from mandating fuel use.

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

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

Under section 501, covered persons must actually run their alternative fueled vehicles on alternative fuels when the vehicle is

operating in an area where the fuel is available. This requirement was not included in the fleet requirement program under section 507, because the conferees were concerned that the alternative fuel providers might charge unreasonable fuel prices to the fleets that are not alternative fuel providers if such fleets were required to use the alternative fuel.

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

III. Background

On August 7, 1996, and as required by EPC Act 1992 sections 507(a)(3) and (b), DOE published in the **Federal Register** an advance notice of proposed rulemaking (ANOPR) to evaluate progress toward achievement of the Replacement Fuel Goals in EPC Act 1992, identify problems with achieving those goals, assess the adequacy and practicability of the goals, and consider actions needed to achieve the goals. 61 FR 41032. 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 EPC Act 1992 section 507(a)(1). 62 FR 19701.

On April 17, 1998, and for the purposes of EPC Act 1992 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. 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 EPC Act 1992 (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. 65 FR 1831. On July 20, 2000, DOE published in the **Federal Register** a notice further extending the comment period in order to provide an opportunity for additional public comment, particularly comment from State and local governments, regarding the section 507 rulemaking proceedings. 65 FR 44987. 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 part, sought to compel DOE to "issue a proposed rule and final determination on the necessity of a private and municipal fleet program." (Plaintiffs Complaint for Injunctive and Declaratory Relief, pg 55, paragraph 171 dated January 2, 2002). On July 26, 2002, the Court granted plaintiffs' motion for summary judgment on the issue of whether DOE had missed the deadline set forth in EPC Act 1992 section 507(e) for completing the rulemaking. *See Center for Biological Diversity v. Abraham, et al.* (218 F.Supp.2d 1143 (N.D. Cal., 2002)). On September 27, 2002, the District Court ordered DOE to complete its proposed rulemaking by January 27, 2003, and its final rule by November 27, 2003. *See Center for Biological Diversity v. Abraham, et al.*, No. C 02-00027 (N.D. Cal., 2002). On January 17, 2003, the Court subsequently granted a 30-day extension (to February 26, 2003) of the deadline for DOE to complete work on this notice of proposed rulemaking. (*Center for Biological Diversity v. Abraham, et al.* No. C 02-00027 (N.D. Cal., 2002), Order No. 55 (Entered 01/23/2003)).

On March 4, 2003, as required by section 507 of EPC Act 1992 and in accordance with a Court order under *Center for Biological Diversity v. Abraham, et al.*, DOE issued a notice of a proposed determination regarding the Private and Local Fleet Requirement, in which DOE tentatively determined that a requirement was not "necessary," and therefore should not be imposed. 68 FR 10320. DOE finalized the proposed determination that a regulation requiring private and local government fleets to acquire AFVs is not "necessary" and, therefore, cannot be promulgated, which was published January 29, 2004. 69 FR 4219. The necessity determination was based on

DOE's findings that a private and local government fleet vehicle acquisition mandate would not appreciably increase the percentage of alternative fuel or replacement fuel used in motor vehicles in the United States and thus would make no more than a negligible contribution to the achievement of EPC Act 1992's existing 2010 Replacement Fuel Goal of 30 percent, or of a revised Replacement Fuel Goal were one adopted.

Subsequent to the publication of the January 29, 2004, final rule, DOE was sued in Federal court by the Center for Biological Diversity and Friends of the Earth for failing to impose a private and local government fleet acquisition mandate and for not revising the replacement fuel production goal for 2010 as part of its determination. On March 6, 2006, the U.S. District Court for the Northern District of California vacated DOE's final determination regarding the Private and Local Government Fleet Mandate and ordered DOE to revise the replacement fuel production goal for 2010. *See Center for Biological Diversity v. U.S. Department of Energy et al.*, 419 F.Supp. 2d 1166 (N.D. Cal 2006). The Court directed DOE to prepare notices of proposed rulemaking and final rules on both the Replacement Fuel Goal for 2010 and the private and local government fleet determination. (Id. at 1171.)

On September 19, 2006, DOE published a notice announcing its proposed determination that the EPC Act 1992 Replacement Fuel Goal of 30 percent by 2010 was not achievable and announced its proposal to extend the time for achieving the 30 percent replacement fuel production capacity goal to 2030. 71 FR 54771. In that notice, DOE evaluated four scenarios, which identified projected replacement fuel capacities of 8.65 percent, 17.84 percent, 35.25 percent, and 47.06 percent, by 2030. (Updated analyses conducted for the final rule resulted in the first and third of these becoming 7.38 percent and 33.13 percent, respectively.) These projections reflected considerations of numerous variables including oil prices, technological breakthroughs, and market acceptance. The modified goal proposed by DOE fell in the mid-range among these scenarios.

On March 15, 2007, DOE published a final rule for the Replacement Fuel Goal. 72 FR 12041. In the final rule, DOE determined that the EPC Act 1992 goal of establishing sufficient replacement fuel production capacity to replace 30 percent on an energy equivalent basis of all U.S. motor fuel by 2010 was not achievable. This

determination was based on a similar evaluation of the projected U.S. production capacity of replacement fuels as was presented in the notice of proposed rulemaking. The Replacement Fuel Goal final rule extended the 30 percent Replacement Fuel Goal out to 2030 based on an analysis similar to that presented in the notice of proposed rulemaking. The Replacement Fuel Goal final rule complied with DOE's obligation under section 504(b) of EPAct 1992 to "establish goals that are achievable, for the purposes of this title." (42 U.S.C. 13254(b))

Today's document revisits the Local and Private Fleet Requirement determination in light of the modified Replacement Fuel Goal.

IV. Analysis for Private and Local Fleets Rule Determination

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

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

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

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

A. Achievability of the Replacement Fuel Goal

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

In evaluating and modifying the goal, DOE was directed to balance considerations in order to establish goals that are "achievable." (42 U.S.C. 13254(b)) The Replacement Fuel Goal must promote replacement fuels to the "maximum extent possible" while remaining technologically and

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

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

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

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

The second prong of the "necessity" determination requires DOE to find that the Replacement Fuel Goal is actually achievable were a Private and Local Fleet Requirement established. (42 U.S.C. 13257(e)(1)(B)) As stated above, DOE has determined that the modified Replacement Fuel Goal is achievable. Although DOE has tentatively determined that the Private and Local Government Fleet Requirement is not

necessary to achieve the modified Replacement Fuel Goal, DOE also performed a preliminary analysis to estimate the contribution that such a requirement would make to the Replacement Fuel Goal, if such a requirement were established.

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

Several follow-up analyses were conducted by DOE from 1996 to 2000 to attempt to determine not just how many AFVs would be required to be acquired, but more importantly, what the potential contribution of a Private and Local Government Fleet Requirement would be to replacing U.S. motor fuel consumption. The limitations on the potential contribution of a private and local government fleet program to the Replacement Fuel Goal are discussed in section II above. In brief, however, one DOE report issued in 1996 estimated that total fuel use from all fleets, including private and local government fleets, potentially covered by EPAct 1992 fleet programs to be approximately 1.2 percent of U.S. gasoline use. See *Assessment of Costs and Benefits of Flexible and Alternative Fuel Use in the U.S. Transportation Sector, Technical Report Fourteen: Market Potential and Impacts of Alternative Fuel Use in Light-Duty Vehicles: A 2000/2010 Analysis* (DOE/PO-0042) (January 1996) [hereinafter *Technical Report 14*].

DOE's *Section 506 Report*² was only slightly more optimistic, indicating that "[a]lternative fuel use by EPAct [1992] covered fleets, even with the contingent mandates for private and local government fleets, is unlikely to provide more than about 1.5 percent replacement fuel use[.]" Section 506 Report at p. 35. In either case, subtracting 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 closer to a maximum of 1 percent.

However, both these earlier reports included calculations based only upon

² 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.ccities.doe.gov/pdfs/section506.pdf>.

the percentage of light-duty gasoline fuel use. For purposes of the goal contained in EPCA 1992, DOE has repeatedly asserted that fuel replacement should be considered in the context of all on-highway motor fuel use, including heavy-duty vehicle fuel use, because the goal contained in section 502 of EPCA 1992 are to be considered in the context of the "projected consumption of motor fuel in the United States." (42 U.S.C. 13252(b)(2)).

The figures provided in these earlier reports, when adjusted to reflect the impact on all on-highway motor fuel use, show that a Private and Local Government Fleet Rule—even with a fuel use requirement, which as noted above DOE does not have the authority to impose—would provide at most on the order of 0.7–0.8 percent motor fuel replacement, assuming virtually complete use of alternative fuel in the AFVs required.

Both the analyses in *Technical Report 14* and the *Section 506 Report* were conducted before DOE had much experience with implementation and operation of the EPCA 1992 fleet programs. DOE's experience with those programs now has shown that the number of fleets originally envisioned to be covered was far larger than the number of fleets covered in actual practice, and that these fleets could not, in the absence of a specific mandate, be assumed to use alternative fuel in their AFVs 100 percent of the time. Thus, DOE believes that the figures in these reports probably overstated the potential impact of a Private and Local Government Fleet Rule. This view was supported by analyses contained in a later DOE-supported report, *The Alternative Fuel Transition: Results from the TAFV Model of Alternative Fuel Use in Light-Duty Vehicles 1996–2000*³ (*TAFV Model Report*), which incorporated more realistic assumptions regarding these fleet programs. The *TAFV Model Report* stated that,

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

TAFV Model Report at p. 28. Thus, the analysis in the *TAFV Model Report* placed contributions from the Private and Local Government Fleet Rule at 0.25 percent. As with *Technical Report 14* and the *Section 506 Report*, these percentages were calculated based on

the total fuel sales of the fuel used by light-duty vehicles only.

The projected contribution from a potential rule dropped to below 0.2 percent when evaluated as part of all on-highway motor fuel use and can be reconciled somewhat with those found by the earlier reports. As indicated in section II above, DOE does not have authority to mandate that AFVs acquired actually operate on alternative fuels. Experience with the existing State Fleet Program, where fleets are similarly not required to use alternative fuel, has shown that alternative fuel use rates are typically in the ten to twenty-five percent range. Thus, when adjusting the levels found in *Technical Report 14* and the *Section 506 Report* by such utilization levels, the overall projected impacts likely end up in about the 0.2 percent range.

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

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

To conduct the current analysis, the Department relied, in large part, upon fleet industry data developed by

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

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

According to the 2005 Fact Book (which reports data for 2004), fleets in the United States acquired 2,849,837 light-duty vehicles (cars and light trucks), of which 1,944,581 (68.2 percent) were acquired for rental fleets. Since rental vehicles are specifically excluded from coverage under EPCA 1992 section 301(9) (42 U.S.C. 13211(9)), the remaining potentially covered vehicle acquisitions drop to 905,256 vehicles. Note that this does not exclude any leased vehicles, of which the Fact Book indicates there were another 326,832 acquired in 2004. Many of these may ultimately be excluded as perhaps either shorter term leases or vehicles specifically held for lease to others (another excluded class). Since there is no way to determine which portion of these leased vehicles would most likely be excluded, the DOE chose to rely on the 905,256 value as the number of vehicles purchased by fleets that would potentially be subject to a Private and Local Government Fleet Requirement.

Next, the current annual acquisitions of vehicles already subject to EPCA 1992 fleet requirements needed to be subtracted. Data was obtained from the Department's EPCA 1992 Web sites, at <http://www.eere.energy.gov/vehiclesandfuels/epact/>. For Federal Fleets, there were 18,426 covered light-duty vehicles

³ ORNL.TM2000/168) (September 17, 2000) http://pz11.ed.ornl.gov/tafv99report31a_ornltn.pdf.

acquired in 2004. For State and Alternative Fuel Provider Fleets, there were 13,374 covered light-duty vehicles acquired. Thus, the remaining number of potentially covered acquisitions drops to 873,456.

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

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

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

In arriving at the 50 and 20 light-duty vehicle minimums, several classes of vehicles are excluded from consideration, including emergency and law enforcement vehicles (42 U.S.C. 13211(9)(D) and (E)), vehicles taken home at night by employees (42 U.S.C. 13211(9)(H)), and non-road vehicles (42 U.S.C. 13211(9)(G)). With these exclusions the number of potentially required AFV acquisitions drops even further. For example, if just the 2004 acquisitions of Ford Crown Victorias and Chevy Impalas are reviewed, the non-rental numbers acquired for commercial and government fleets totals nearly 90,000 vehicles (according to the 2005 Fact Book). These two vehicles are often acquired for use as police vehicles, or else taxicabs (a class of vehicles whose status under the program is

undetermined for this analysis and for which many might not ultimately be covered due to fleet size, location, or other reasons).

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

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

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

Total New Cars and Trucks Registered by Fleets in 2004	2,849,837
Total New Cars and Trucks Registered by Rental Fleets in 2004	1,944,581
Percentage in Rental Fleets	68.2
Remainder of New Cars and Trucks, not in Rental Fleets 2004	905,256
New Covered LDV acquisitions in 2004, Federal Fleet	18,426
New Covered LDV acquisitions in 2004, State and Fuel Provider Fleets	13,374
Net New Cars/Truck Registered, not in Fleets Already Covered	873,456
Total New LDV Registrations, 2004	16,537,440
Max Potential Portion of 2004 Fleet acquisitions covered out of total registrations	5.3%
EPCA 1992 Maximum Acquisition Requirement	70%
Max Potential AFV Acquisitions per year, numbers of AFVs required	611,419
Max Potential AFV Acquisitions per year, percentage of total acquisitions	3.7%
If 50% of maximum potential actually covered, number of AFVs required	305,710
If 50% of maximum potential actually covered, percentage of total acquisitions	1.8%
If 25% of maximum potential actually covered, number of AFVs required	152,855
If 25% of maximum potential actually covered, percentage of total acquisitions	0.9%

The analysis above is in the context of light-duty vehicles and would represent between one and 3.7 percent of motor fuel consumption by light-duty vehicles. For the purpose of section 507(e)(1)(B), DOE must evaluate the potential contribution of a Private and Local Government Fleet Requirement to the Replacement Fuel Goal. (42 U.S.C. 13257(e)(1)(B)) The Replacement Fuel Goal is in terms of motor fuel consumption, including consumption from medium- and heavy-duty vehicles. As indicated in the Energy Information Administration's Annual Energy Outlook 2007 (AEO 2007), light-duty vehicles only account for 75.22 percent of on-road motor fuel use in the U.S.,

with the remainder consumed by medium- and heavy-duty classes, neither of which is covered by the Private and Local Government Fleet Requirement. In terms of total motor fuel consumption, the contribution of the potential AFV acquisitions under a Private and Local Government Fleet Requirement must be adjusted down to 0.7 to 2.8 percent.

The expected contribution of AFVs acquired under a Private and Local Government Fleet to alternative fuel consumption must be further adjusted. As explained above, EPCA 1992 does not allow DOE to require alternative fuel use in the required AFVs, the potential consumption values represent the

portion of petroleum consumption replaced at an alternative fuel use level of 100 percent. Experience with programs for which fuel use is not required (such as the State Fleet Program) indicates that the assumption of 100 percent alternative fuel use is not realistic. DOE has seen alternative fuel usage levels as low as 10 percent.

For the purposes of this analysis, DOE looked at cases where alternative fuels were used 50, 25, and 10 percent of the time in the potentially required AFVs. These results yielded percentages of overall motor fuel consumption replaced of 0.1 to 1.4 percent, with the high value represented by the maximum potential case (already identified as

overly optimistic) with a 50 percent alternative fuel use level. Thus, the likely range of consumption replaced is better represented by the 25 and 50

percent of maximum potential acquisition cases, which ranged from 0.1 to 0.7 percent.

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

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

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

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

The second analysis, as indicated above, sought to use the portion of the in-use inventory of vehicles on the road in the U.S. that were represented by the cumulative numbers of AFVs acquired under the potential rule as a way to determine the portion of overall motor fuel use replaced. This case then assumes that once the program reaches the maximum acquisition requirement (70 percent), and levels off, that all relationships between the consumption of the required AFVs and the overall on-road fleet are relatively unchanged over time. It also explicitly assumes that the AFVs acquired under this potential rule use the same amount of fuel, on average, as all other light-duty vehicles in operation in the United States.

This second analysis, therefore, uses the annual AFV acquisition requirements identified in the first analysis, ranging from just over 150,000 AFVs/year (25 percent of maximum potential acquisitions covered) to just over 610,000 AFVs/year (for maximum potential acquisitions covered). The 2004 Fact Book identifies that the average amount of time a light-duty vehicle stays in a fleet ranges from 31

to 56 months depending on model type, or just a bit less than five years. Therefore, in order to provide an estimate of the maximum portion of the on-road fleet that could be AFVs due to the potential rule, the DOE chose to use a five-year period for AFVs to operate in the covered fleets. DOE requests comment on use of a five-year period, and requests comment on the use of alternative fuels in AFVs after they leave a covered fleet.

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

United States in 2004 as just over 215 million vehicles, this means that the AFVs under this program would represent 0.4 to 1.4 percent of all light-duty vehicles on the road in the United States.

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

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

FIGURE 3.—SUMMARY OF CUMULATIVE ANALYSIS

	Maximum potential acquisitions	50% of maximum potential acquisitions	25% of maximum potential acquisitions
AFVs Required Annually	611,419	305,710	152,855
AFVs Added to Fleet over Five Years, at Maximum Fleet Requirement (70%)	3,057,096	1,528,548	764,274
Total Number of Light-Duty Vehicles in Operation in the United States, 2004	215,370,000	215,370,000	215,370,000
Maximum Portion of On-Road LDV Fleet that are AFVs in this Program	1.4	0.7	0.4
Portion of U.S. Motor Fuel Use from Light-Duty Vehicles	75.22%	175.22	75.22%

FIGURE 3.—SUMMARY OF CUMULATIVE ANALYSIS—Continued

	Maximum potential acquisitions	50% of maximum potential acquisitions	25% of maximum potential acquisitions
Potential Maximum Consumption Percentage for Required AFVs (<i>100% Alternative Fuel Use</i>)	¹ 1.1	¹ 0.5	¹ 0.3
Potential Consumption Percentage for Required AFVs (<i>50% Alternative Fuel Use</i>)	¹ 0.53	¹ 0.27	¹ 0.13
Potential Maximum Consumption Percentage for Required AFVs (<i>25% Alternative Fuel Use</i>)	¹ 0.27	¹ 0.13	¹ 0.07
Potential Maximum Consumption Percentage for Required AFVs (<i>10% Alternative Fuel Use</i>)	¹ 0.11	¹ 0.05	¹ 0.03

¹Percent.

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

V. Proposed Determination

In the Replacement Fuel Goal rulemaking, DOE demonstrated how the modified goal could be achieved through a number of replacement fuel technologies, including biofuels, other alternative fuels, and energy efficiency. In setting the new goal, DOE did not assume imposition of a Private and Local Government Fleet Requirement. Indeed, given the number of years between now and 2030, and the fact that even if DOE were to establish a Private and Local Government Fleet Requirement, the overall projected impact would likely be on the order of about 0.2 percent, DOE believes there is no basis for finding that such a requirement is “necessary.”

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

VI. 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, RIN 1904–AB69” 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 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://www1.eere.energy.gov/vehiclesandfuels/epact/private/index.html>. 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.

VII. Regulatory Review

A. 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. 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.

B. Review Under Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires preparation of a regulatory flexibility analysis for any rule that is likely to have a significant economic impact on a substantial number of small entities. The proposed negative determination under EPCA 1992 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.

C. Review Under the Paperwork Reduction Act

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

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

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

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

E. Review Under Executive Order 12988

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

standards in section 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. 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) of EPCA 1992.

F. Review Under Executive Order 13132

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

Because DOE is 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 EPCA 1992 fleet program is unchanged by this action.

G. Review of Unfunded Mandates Reform Act of 1995

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

Unfunded Mandates Reform Act do not apply.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. Today's notice of 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.

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

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

J. Review Under Executive Order 13211

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

K. Review Under Executive Order 13432

Executive Order 13432, Cooperation Among Agencies in Protecting the Environment With Respect to Greenhouse Gas Emissions from Motor Vehicles, Nonroad Vehicles, and

Nonroad Engines, 72 FR 27717 (May 16, 2007) requires DOE to work with DOT and EPA when conducting rulemakings that could be considered to affect emissions. In particular, this Executive Order requires that "the head of an agency undertaking a regulatory action that can reasonably be expected to directly regulate emissions, or to substantially and predictably affect emissions, of greenhouse gases from motor vehicles, nonroad vehicles, nonroad engines, or the use of motor vehicle fuels, including alternative fuels, shall" conduct the rulemaking jointly with other agencies, to the extent permitted by law; consider, as appropriate, laws, information, and recommendations of the other agencies; exercise the agency's authority effectively; and obtain concurrence or other views by the other agencies throughout the rulemaking process. In meeting this requirement, the Department has consulted with both the Department of Transportation and the Environmental Protection Agency throughout development of this proposed determination.

VIII. Approval by the Office of the Secretary

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

Issued in Washington, DC, on September 6, 2007.

Alexander A. Karsner,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. E7-18153 Filed 9-13-07; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

10 CFR Part 1017

RIN 1992-AA35

Identification and Protection of Unclassified Controlled Nuclear Information

AGENCY: Office of Health, Safety and Security, Department of Energy.

ACTION: Notice of proposed rulemaking and public hearing.

SUMMARY: The Department of Energy (DOE) proposes to amend regulations that prohibit the unauthorized dissemination of certain unclassified but sensitive information identified as Unclassified Controlled Nuclear Information (UCNI). DOE is amending these regulations to clarify the types of information that may be identified as

UCNI to prevent overly-broad application of UCNI controls and to streamline the UCNI program by simplifying the process for identifying information as UCNI.

DATES: Written comments (7 copies) may be submitted on or before November 13, 2007. A public hearing will be held in Washington, DC, on October 29, 2007. Requests to speak at the hearing must be received by October 22, 2007.

ADDRESSES: You may submit comments and requests to speak at the hearing, identified by RIN 1992-AA35, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: emily.puhl@hq.doe.gov.

Include RIN 1992-AA35 in the subject line of the message.

Fax: (301) 903-1230.

Mail: Emily A. Puhl, Department of Energy, Office of Classification, HS-91/ Germantown Building, 1000 Independence Ave., SW., Washington, DC 20585-1290.

A public hearing will be held on October 29, 2007, from 9:30 a.m. until 11:30 a.m. at the U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC, room GJ-015.

All submissions must include the agency name for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Comment Procedures" heading of the **SUPPLEMENTARY INFORMATION** section of this document. Electronic submissions are encouraged.

FOR FURTHER INFORMATION CONTACT:

Nicholas G. Prospero, Office of Classification, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585-1290, (301) 903-9967; Jo Ann Williams, Office of the General Counsel, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586-6899.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Description of Proposed Changes
- III. Procedural Requirements
 - A. Review Under Executive Order 12866
 - B. Review Under the Regulatory Flexibility Act
 - C. Review Under the Paperwork Reduction Act
 - D. Review Under the National Environmental Policy Act
 - E. Review Under Executive Order 13132
 - F. Review Under Executive Order 12988
 - G. Review Under the Unfunded Mandates Reform Act of 1995
 - H. Review Under the Treasury and General Government Appropriations Act, 1999
 - I. Review Under the Treasury and General Government Appropriations Act, 2001