UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. 04-5380 (VM) |
| | ) | ECF Case |
| NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, *et al.*, | ) | |
| Defendants. | ) | |

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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Dated: December 7, 2004

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## GLOSSARY

| | |
|---|---|
| ACEEE | American Council for an Energy-Efficient Economy |
| AEO | Annual Energy Outlook |
| AMFA | Alternative Motor Fuels Act of 1988, Pub. L. No. 100-494, 102 Stat. 2441 (1988) |
| APA | Administrative Procedure Act |
| CAFE | Corporate Average Fuel Economy |
| CAR | *U.S. Climate Action Report—2002* |
| CAS | Center for Auto Safety |
| DOE | Department of Energy |
| DOT | Department of Transportation |
| E10 | A fuel that is a mixture of 10 percent ethanol and 90 percent gasoline |
| E85 | A fuel that is a mixture of 85 percent ethanol and 15 percent gasoline |
| EIA | Energy Information Administration |
| EPA | Environmental Protection Agency |
| EPCA | Energy Policy and Conservation Act |
| Final Econ. Assess. | *Final Economic Assessment, Alternative Fueled Vehicles, Extension of CAFE Option, Part 538* (2004) |
| Final Env't Assess. | *Final Environmental Assessment of the Dual Fuel Vehicle CAFE Credit Incentive* (2003) |
| GGE | Gallon gasoline-equivalent |
| MMTCE | Million metric tons carbon equivalent |
| Mpg | Miles per gallon |
| MTBE | Methyl Tertiary-Butyl Ether |

| | |
|---|---|
| MY | Model Year |
| NAS | National Academy of Sciences |
| NHTSA | National Highway Traffic Safety Administration |
| NPRM | Notice of Proposed Rulemaking |
| NRC | National Research Council |
| NRDC | Natural Resources Defense Council |
| RFA | Renewable Fuels Association |
| SUV | Sports utility vehicle |
| UCS | Union of Concerned Scientists |

This action is brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), by three public interest membership organizations to challenge a final rule issued by the National Highway Traffic Safety Administration ("NHTSA"), an agency within the Department of Transportation ("DOT"). *See* 69 Fed. Reg. 7689 (Feb. 19, 2004) (Exh. 15). That final rule extended for an additional four years the special treatment accorded by the Alternative Motor Fuels Act of 1988 ("AMFA"), Pub. L. No. 100-494 (1988), to dual-fueled motor vehicles. AMFA sets out a special calculation procedure that significantly inflates the fuel economy of dual-fueled vehicles for purposes of determining an automaker's compliance with Corporate Average Fuel Economy ("CAFE") standards, thereby creating an incentive for manufacturers to produce dual-fueled vehicles. A "dual-fueled" vehicle can operate on either an alternative fuel (*e.g.,* ethanol, methanol, or natural gas) or a conventional fuel (gasoline or diesel).

The AMFA incentive was originally enacted on a trial basis, covering model years ("MY") 1993-2004, for the purposes of reducing the nation's dependence on foreign oil and diminishing global-warming pollution caused by greenhouse gases (such as $CO_2$) emitted by vehicles operating on conventional fuel. The incentive is based on the assumption that dual-fueled vehicles operate 50 percent of the time on gasoline and 50 percent of the time on ethanol. In fact, however, for a variety of reasons discussed below, dual-fueled vehicles operate almost exclusively on gasoline, using ethanol *less than 1 percent of the time*. As NHTSA has acknowledged, AMFA's CAFE incentive program has spurred the production of dual-fueled vehicles, but has failed to promote any but the most trivial use of alternative fuels. Because of the inflated fuel economy rating assigned to dual-fueled vehicles, automakers have been able to meet CAFE standards on paper while the *actual* average fuel economy of their new vehicles falls below those standards. As a result of the AMFA incentive program, total U.S. oil consumption

and oil dependence and total U.S. greenhouse-gas emissions have actually *increased*. Oil consumption and greenhouse-gas emissions will continue to mount at an even higher rate during the four-year extension of the incentive, with adverse consequences that will be felt for decades.

The mandatory AMFA incentive expired in MY 2004. The statute required the Secretary of Transportation to evaluate the results of the trial incentive. DOT was empowered to extend the incentive through a rulemaking for a maximum of four additional years (covering MY 2005-2008) or to terminate it. The decision to extend or terminate was not to be made at the agency's whim, but based on consideration of several specific criteria set out in AMFA, including the availability to the public of alternative-fueled vehicles and alternative fuels, energy conservation and security, environmental considerations, and other relevant factors. All of these statutory considerations dictated that NHTSA terminate, not extend, the special AMFA incentive. As DOT's own analysis in a 2002 Report to Congress shows, a four-year extension will induce automakers to produce vehicle fleets that will use billions *more* gallons of petroleum and generate millions of metric tons *more* greenhouse gases than if the agency ended the incentive in MY 2004—the exact opposite of the effect intended by Congress. For these reasons, NHTSA's extension of the program to MY 2005-2008 is contrary to AMFA and arbitrary and capricious.

## STATEMENT OF FACTS

To place in context NHTSA's decision whether to extend the AMFA incentive, we summarize below the challenges presented by global warming and U.S. dependence on foreign oil and Congress's efforts to address those challenges through the enactment of fuel economy standards and the AMFA. We then describe the joint Report to Congress submitted by the Departments of Transportation and Energy and the Environmental Protection Agency reporting the agencies' findings regarding the effectiveness of the AMFA incentive. Finally, we discuss

the rulemaking that culminated in NHTSA's issuance of the final rule extending the incentive for four years, which is challenged in this action, and describe the plaintiffs.

**1. Oil Dependence and Global Warming**

U.S. dependence on foreign oil has climbed steadily since the 1970s and now stands at an all-time high, with declining domestic oil production and growing demand—a trend that is expected to continue. Net imports, which accounted for 54 percent of total U.S. petroleum demand in 2002—up from 37 percent in 1980 and 42 percent in 1990—are expected to account for 70 percent of total U.S. petroleum demand in 2025. Department of Energy ("DOE"), Energy Information Administration ("EIA"), *Annual Energy Outlook 2004,* at 2 (2004) ("*AEO 2004*"), *available at* http://www.eia.doe.gov/oiaf/aeo/download.html. The transportation sector remains heavily dependent on petroleum-based fuels (with 95 percent of transportation energy derived from petroleum), accounting for approximately two thirds of all U.S. petroleum use and one fourth of total U.S. energy consumption. DOT, DOE, Environmental Protection Agency ("EPA"), *Report to Congress: Effects of the Alternative Motor Fuels Act CAFE Incentives Policy* 8, 28 (2002) (No. 39) ("*Report to Congress*") (Exh. 17).[1] U.S. light-duty vehicles alone (cars and light trucks) account for 40 percent of all U.S. oil consumption and contribute 20 percent of all U.S. carbon dioxide emissions. EPA, *Light-Duty Automotive Technology and Fuel Economy Trends: 1975 Through 2004,* at ii (2004), *available at* http://www.epa.gov/otaq/fetrends.htm.

[1] Citations in this memorandum to documents from the administrative record, Docket No. NHTSA-2001-10774, include rulemaking document numbers in the first citation, along with exhibit numbers. An index of the rulemaking docket (Exh. 1), along with copies of, or excerpts from, the cited documents, are being filed concurrently with plaintiffs' motion. The memorandum also cites other sources, such as documents and data published by DOT, EPA, DOE, and the California Energy Commission, that are not in the administrative record, but provide helpful background information for the Court. These are the same types of sources that NHTSA itself relied on during the rulemaking. *See* 69 Fed. Reg. 7693.

Over the same period, rising emissions of heat-trapping or "greenhouse" gases, such as carbon dioxide, from motor vehicles and other sources have been driving an increase in global temperatures—a phenomenon known as "global warming." Carbon dioxide, the largest source of U.S. greenhouse gas emissions, accounted for 82 percent of total U.S. greenhouse gas emissions in 1999, with fossil fuel combustion the primary contributor. *U.S. Climate Action Report—2002* ("*CAR*"), at 5 (2002), *available at* http://www.epa.gov/globalwarming/publications/car/index.html. Global mean surface air temperature has warmed between 0.7E and 1.5E F during the 20th century. National Research Council, *Climate Change Science* 3 (2001), *available at* http://www.nap.edu/openbook/0309075742/html. The scientific consensus is that most of the warming of the last 50 years is attributable to the growth in greenhouse gases. *Id.* The effects of global warming are already being experienced, with global retreat of mountain glaciers, reduction in snow-cover, earlier spring melting of ice on rivers and lakes, accelerated rate of rise in sea levels, an increase in water vapor and rainfall rates over most regions, and more. *Id.* at 16; *see also CAR,* Chapter 6. Total U.S. greenhouse gas emissions are forecast to increase by 43 percent between 2000 and 2020, *id.* at 6, and warming is projected to increase during the 21st century. *Id.* at 89.

U.S. transportation activities contribute a major part of the country's overall greenhouse gas emissions (32.3% of U.S. energy-related $CO_2$ emissions in 2002). DOE, EIA, *Emissions of Greenhouse Gases in the United States 2002*, at 23 (2003), *available at* http://www.eia.doe.gov/oiaf/1605/ggrpt. Almost all transportation-related emissions stem from the consumption of petroleum, *id.,* and nearly two thirds from gas consumption in motor vehicles. *CAR* at 40.

**2. The Statutory Scheme**

In 1975, Congress began to grapple with the transportation sector's heavy reliance on petroleum fuels by enacting the Energy Policy and Conservation Act ("EPCA") to address the nation's dependence on foreign oil. Pub. L. No. 94-163 (1975). EPCA required the Secretary of Transportation to issue average fuel economy standards for light-duty motor vehicles, including passenger automobiles (cars) and other automobiles (light trucks, such as sports utility vehicles ("SUVs"), minivans, and pickup trucks). The Secretary has delegated that authority to NHTSA. 49 C.F.R. § 1.50(f). The CAFE standards establish averages in miles per gallon ("mpg") of gasoline or diesel fuel that cars and light trucks must be able to travel. Individual vehicles and models are not required to meet the mileage standards. Rather, each automaker must achieve an average fuel economy level for all of its covered vehicles manufactured in a given model year. Thus, these standards are generally referred to as "corporate average fuel economy," or CAFE, standards. *See generally* 49 U.S.C. § 32901 *et seq.*[2] The statute directs EPA to test individual vehicles and perform the calculation of auto manufacturers' average fuel economies, including the credit from the AMFA incentive. 49 U.S.C. §§ 32904, 32905, 32906; 40 C.F.R. Part 600.

If an auto manufacturer surpasses an applicable CAFE standard in a model year, it earns credits applicable toward CAFE compliance in any of the three consecutive model years immediately before or after that model year. 49 U.S.C. § 32903(a)(1) & (2). Any manufacturer that fails to satisfy CAFE requirements (taking into account any credits carried forward or backward) is subject to substantial civil penalties. 49 U.S.C. § 32912; 49 C.F.R. § 578.6(h)(2).

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[2] The passenger car CAFE standard is set by statute at 27.5 mpg. 49 U.S.C. § 32902(b). The light truck CAFE standard is set by regulation by DOT, 49 U.S.C. § 32902(a), and is 21.0 mpg for MY 2005, 21.6 mpg for MY 2006, and 22.2 mpg for MY 2007. 49 C.F.R. § 533.5 (Table IV); 68 Fed. Reg. 16868 (2003).

As DOT has acknowledged, CAFE standards have required automakers to raise average fuel economies to much higher levels than they would have attained otherwise. *Report to Congress* 6-7 (Exh. 17). None of the big three manufacturers (GM, Ford, and DaimlerChrysler) currently using credits under the AMFA incentive program has ever opted to pay a penalty in lieu of meeting CAFE Standards. *See id.* at 26; *id.,* Appendix A, Answers to Question (A)(3); *id.,* Appendix B (CAFE penalties collected).

Alarmed by the nation's continued heavy dependence on foreign oil, by the high percentage of U.S. oil consumption attributable to transportation, and by global warming exacerbated by fuel emissions from vehicles running on petroleum-based fuels, Congress enacted AMFA in 1988 to promote for transportation purposes the development and use of alternative fuels, such as ethanol, which is produced domestically and burns more cleanly than gasoline and diesel fuel. *See* Pub. L. No. 100-494, §§ 2 & 3 (AMFA findings and purpose), 1988 U.S.C.C.A.N. (102 Stat.) 2441-42 (42 U.S.C. § 6374 note); S. Rep. No. 100-271, at 1-3 (1987) ("*Senate Report*"), *reprinted in* 1988 U.S.C.C.A.N. 3016-3018.

AMFA inflates the fuel economy rating of dual-fueled vehicles, first, by basing the fuel economy for the vehicle when operating on alternative fuel on the reduced gasoline or diesel content of that alternative fuel. For example, if a vehicle operating exclusively on an alternative fuel such as "E85," a mixture of 85 percent ethanol and 15 percent gasoline, achieved a rating of 15 mpg, it would be deemed to have a fuel economy of 100 mpg. 49 U.S.C. § 32905(a); Notice of Proposed Rulemaking ("NPRM"), 67 Fed. Reg. 10873, 10875 & n.2 (2002) (No. 3) (Exh. 2); *Report to Congress* 9-10 (Exh. 17). More significantly, the statute raises the fuel economy rating of dual-fueled vehicles by assuming that they operate 50 percent of the time on alternative fuel and 50 percent of the time on conventional fuel. 49 U.S.C. § 32905(b) & (d); 67 Fed. Reg.

10875 & n.3; *Report to Congress* 10. In fact, however, as discussed below, the administrative record establishes that dual-fueled vehicles actually operate on alternative fuel *less than 1 percent of the time.* Under the statutory formula, a dual-fueled vehicle can claim a fuel economy rating about 1.74 times higher than its actual rating for purposes of determining the average fuel economies of an automaker's car and light truck fleets. The extra credit for these vehicles allows the remainder of an automaker's offerings to be correspondingly less fuel efficient. National Research Council, *Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards* 3, 89, 111 (2002) (No. 17) ("*NRC Report*") (Exh. 10).

By creating an incentive, on a trial basis, for automakers to produce dual-fueled vehicles, Congress hoped to spur the development of an alternative-fuel infrastructure. Final Rule, 69 Fed. Reg. 7691 (No. 36) (Exh. 15); *Senate Report* 2, *reprinted in* 1988 U.S.C.C.A.N. 3017; 134 Cong. Rec. 7047 (1988) (statement of Sen. Rockefeller). Congress predicted that the production of dual-fueled vehicles would go hand-in-hand with the creation of an alternative-fuel infrastructure. *See, e.g., Senate Report* 2, *reprinted in* 1988 U.S.C.C.A.N. 3017 ("[T]he incentives provided by the bill will encourage manufacturers to produce vehicles powered by alternative fuels, and an infrastructure will also develop to supply fuels to these vehicles."); 134 Cong. Rec. 25124 (1988) (statement of Rep. Dingell) ("[A]ll of the conferees expect [the energy] industry to begin now to work with the auto industry to have such fuel available when the vehicles are available."). Congress never intended that dual-fueled vehicles be produced as an end *in themselves,* but rather, to serve as a bridge between gasoline-dependent technology and a future in which vehicles running exclusively on alternative fuels would be widespread. *See Senate Report* 8, 9, 10, *reprinted in* 1988 U.S.C.C.A.N. 3023, 3024, 3025. Accordingly, Congress made the CAFE incentive for these transitional dual-fueled vehicles temporary, 134

Cong. Rec. 25122 (1988) (statement of Rep. Sharp)—in contrast to the permanent fuel-economy benefit for "dedicated" vehicles, which operate only on alternative fuel. 49 U.S.C. § 32901(a)(7) (definition); *compare* 49 U.S.C. § 32905(a) & (c) (dedicated), *with* § 32905(b) & (d) (dual-fueled). As discussed in Section 3 below, Congress's prediction proved wrong.

Congress understood that the AMFA incentive could undermine fuel economy and increase pollution if dual-fueled vehicles operated principally on gasoline. As NHTSA acknowledged, Congress "was aware of the risk that manufacturers would avail themselves of gains in fleet fuel economy by building dual-fueled vehicles regardless of whether the vehicles ever used an alternative fuel." 67 Fed. Reg. 10879 (Exh. 2).[3] To avoid such erosion of CAFE standards, Congress established two limits on the incentive program: First, AMFA set a limit of 1.2 mpg as the maximum increase in fleet fuel economy that an automaker could claim from dual-fueled vehicles produced in MY 1993-2004. Second, AMFA provided that the special treatment of dual-fueled vehicles would end after MY 2004, unless extended for no more than four consecutive model years by DOT through a rulemaking after evaluating the results of the trial period. AMFA further provided that if the incentive were extended, the cap on the CAFE credit would drop to 0.9 mpg per year. *Id.*; *see* 49 U.S.C. §§ 32905(b), (d) & (f), 32906(a)(1).

Consistent with its concern that automakers might produce dual-fueled vehicles that would almost never run on alternative fuel, Congress constrained NHTSA's discretion in determining whether to extend the AMFA incentive after MY 2004. AMFA directed the agency,

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[3] Congress's concern about the potential for undermining CAFE standards pervaded the legislative history of AMFA. *See, e.g., Senate Report* 2, 5, 9, *reprinted in* 1988 U.S.C.C.A.N. 3017, 3020, 3024; 134 Cong. Rec. 7047 (1988) (statement of Sen. Rockefeller); *id.* at 7051 (statement of Sen. Metzenbaum); *id.* at 7052 (statement of Sen. Chafee); 134 Cong. Rec. 24509 (1988) (statement of Sen. Gore); 134 Cong. Rec. 25126 (1988) (statement of Rep. Beilenson); 133 Cong. Rec. 35531, 35535 (1987) (statement of Rep. Sharp); *id.* at 35535 (statement of Rep. Levine).

in consultation with DOE and EPA, to study the success or failure of the dual-fuel incentive, to draw preliminary conclusions based on considerations specified in the statute regarding whether the program should be extended, and then to act on its conclusions either by conducting a rulemaking to extend the program or by publishing a notice explaining the reasons for ending it. AMFA, as enacted in 1988, provided in relevant part:

> (f) Applicability.—
>
> * * *
>
> (2)(A) Not later than September 30, 2000, the Secretary, in consultation with the Secretary of Energy and the EPA Administrator, shall complete and submit to the Committees on Commerce, Science, and Transportation and Governmental Affairs of the Senate, and the Committee on Energy and Commerce of the House of Representatives, a report containing the result of a study on the success of the policy contained in subsections (b) and (d) [the dual-fuel incentive] along with preliminary conclusions as to whether the application of such subsections should be extended for up to four additional model years. Such study and conclusions shall be prepared taking into consideration—
>
> (i) the availability to the public of alcohol powered automobiles, natural gas powered automobiles, and alternative fuels;
>
> (ii) energy conservation and security;
>
> (iii) environmental considerations; and
>
> (iv) other relevant factors.
>
> (B) The Secretary shall—
>
> (i) promulgate a rule to extend the applicability of subsections (b) and (d) for 4 or fewer consecutive model years immediately after model year 2004; or
>
> (ii) publish a notice explaining the reasons for not promulgating such rule. Such rule or notice shall be promulgated before January 1, 2002.
>
> Any such promulgated rule shall explain the basis on which any such extension has been granted.

Pub. L. No. 100-494, § 6(a), 1988 U.S.C.C.A.N. (102 Stat.) 2449 (adding a new § 513(f) to the Motor Vehicle Information and Cost Savings Act) (originally codified at 15 U.S.C. § 2013(f) and later codified at 49 U.S.C. § 32905(f) & (g)).[4]

**3. The Joint Report to Congress**

In 2002, DOT, DOE, and EPA completed the study of the dual-fuel program required by AMFA and submitted a joint Report to Congress (Exh. 17). Simultaneously, NHTSA issued a Notice of Proposed Rulemaking proposing to extend the AMFA incentive for another four years. 67 Fed. Reg. 10873, 10875 (Exh. 2). The Report to Congress demonstrated, however, that each of the statutory considerations favored ending, not extending, the dual-fuel program.

**a. The Availability of Alternative-Fueled Vehicles and Alternative Fuels**

First, the agencies concluded that the dual-fuel incentive had proved valuable to automakers as a means of achieving compliance with CAFE standards. *Report to Congress* 24-26.[5] Because it is less expensive for manufacturers to produce dual-fueled vehicles and thereby obtain the AMFA credit than to use alternative fuel economy technologies to meet CAFE standards, *Final Econ. Assess.* 4 (Exh. 16), the big three automakers seized on the opportunity afforded by the incentive. By the end of 2000, they had produced more than 1.2 million dual-fueled vehicles. *Report to Congress* ii, vii, 21 (Table III-1). The vast majority of

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[4] In 1994, Congress codified Subtitle VI, Motor Vehicle and Driver Programs, of Title 49. *See* Pub. L. No. 103-272, 1994 U.S.C.C.A.N. (108 Stat.) 745, 940. The 1994 act codified AMFA's provision governing the study, Report to Congress, and extension authorization at 49 U.S.C. § 32905(f) & (g), with the extension addressed in subsection (f) and the study and Report addressed in subsection (g). 108 Stat. 1065-67. As discussed in Part A of the Argument below, the Court should rely on the original structure of the provision as set out in the Statutes at Large.

[5] NHTSA later projected that the incentive would reduce manufacturers' costs a net $1.094 billion for MY 2005-2007. *Final Economic Assessment, Alternative Fueled Vehicles, Extension of CAFE Option, Part 538,* at 15 (Table 5) (2004) (No. 37) ("*Final Econ. Assess.*") (Exh. 16).

these have been dual-fueled light trucks, *id.* at vii, 21-23, capable of running on gasoline and on E85. *Id.* at vi, vii, xi, 26, 37, 40 n.14, 49; 67 Fed. Reg. 10873. Producing large numbers of dual-fueled light trucks has enabled automakers to compensate for shortfalls in the fuel economies of their conventional, gasoline-only light-truck fleets. *Report to Congress* vii-viii, x, 23-25, 40; *see also id.* at ii, viii, xii, 20, 49 (auto manufacturers reported that AMFA incentive was major factor in their producing high volumes of alternative-fueled vehicles). The NPRM acknowledged that "manufacturers plan to produce increasing numbers of dual-fueled vehicles as part of their overall strategy for meeting CAFE requirements." 67 Fed. Reg. 10879-80.

Critically, however, DOT, DOE, and EPA jointly found that the availability and use of alternative fuels has not "nearly kept pace with the increase in the number of alternative fuel vehicles." *Report to Congress* 36. As the Report recognized: "Due to the lagging development of the alternative fuel infrastructure and the fact that E85 fuel is typically more expensive on a gasoline-equivalent basis, the vast majority of dual-fuel vehicles rarely operate on alternative fuel." *Id.* at iii, xii, 49-50; *see also* 67 Fed. Reg. 10876 ("[T]he increased availability of these vehicles has not stimulated any meaningful growth in the availability and use of the alternative fuels used in dual-fueled vehicles."); *id.* ("[T]he small number of E85 stations and the limited amount of E85 produced strongly suggest that these vehicles were being operated almost exclusively on gasoline."). At the time of the Report, there were only 5,236 alternative fuel refueling sites in the entire country; of these, *only 121*—a minuscule 0.07 percent of the 176,000 gasoline stations nationwide—sold E85. *Report to Congress* ii, 31-32, 49. Virtually all of these E85 stations were concentrated in the Midwest, close to supplies of ethanol, *id.* at viii, 30, which is made from corn. *Id.* at 13. Quoting a report by the Energy Policy Development Group, the Report to Congress observed that "a considerable enlargement of ethanol production and

distribution capacity would be required to expand beyond their current base in the Midwest in order to increase use of ethanol-blended fuels." *Id.* at 12, 29.

The Report to Congress recognized not only that E85 is essentially unavailable, but that it is also significantly more expensive than gasoline. The average price of a gasoline-equivalent gallon of ethanol in April 2000 was $1.80—18 percent higher than the $1.52 per gallon price of gasoline. *Id.* at 33; *see also* 67 Fed. Reg. 10879 ("As ethanol fuels are generally more expensive than gasoline, cost remains an impediment to the more widespread demand that would stimulate development of the necessary infrastructure.").[6] The Report also recognized significant economic disincentives from a fuel supplier's standpoint to developing the E85 infrastructure. The costs to retrofit an existing gas station gasoline tank for E85 range from $5,000 to $30,000; for a new underground tank and pump, the price ranges from $50,000 to $70,000. *Report to Congress* 32; *see also id.* at viii, 30 (stations need at least 200 steady customers to make a single grade profitable, a number that has been "difficult to achieve"). The agencies further pointed out that dual-fueled vehicles can run on conventional fuel, *id.* at viii, 30, thereby relieving consumers of the need to demand E85 or to undertake herculean efforts to obtain it.

Not surprisingly, given E85's inaccessibility and higher cost, the Report determined that actual E85 use by dual-fueled vehicles has been trivial. Total use of *all* alternative fuels in 2000 was 368.1 million gallons, or 0.22 percent of the 164 billion gallons highway fuel use projected for 2001. *Id.* at x, 34 (Table IV-4). In 2000, only 3.3 million gallons of E85 (GGE) were used in the entire country—less than 1 percent of the already tiny percentage of all alternative fuels used. *Id.* at xii, 34, 50. This pittance led the agencies to conclude that dual-fueled vehicles

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[6] A gallon of ethanol provides less energy than a gallon of gasoline. Hence, to make comparisons useful, the Report compares gasoline and E85 on a gallon gasoline-equivalent ("GGE") basis. *See Report to Congress* 32-33.

operate on alternative fuel *less than 1 percent of the time*. *Id.* at 40, 43, 45; 67 Fed. Reg. 10877.

**b. Energy Conservation and Security; Environmental Considerations**

The agencies next analyzed the effects of the dual-fuel CAFE incentive on both energy conservation and the environment and projected the consequences of an extension. The program's most significant environmental impact is on greenhouse gas emissions. *Report to Congress* xi, 37. The Report found that the AMFA incentive had counterproductively *increased* both oil consumption and greenhouse gas emissions. Based on the historical rate of E85 use by dual-fueled vehicles of less than 1 percent of the time, the agencies concluded that the *net* effect of the AMFA incentive from 1996-2000 had been to *increase* total petroleum consumption by 772 million gallons and to *increase* greenhouse gas emissions by 2.381 million metric tons carbon equivalent ("MMTCE"). *Id.* at 42 (Table V-4). Petroleum consumption and greenhouse gas emissions have risen because the inflated CAFE credit from dual-fueled vehicles has enabled automakers to produce fleets of new vehicles that are less fuel-efficient overall than otherwise would have been required to meet CAFE standards.

This early failure of the AMFA incentive pales in comparison, however, to the estimated damage that the program has caused since 2000 and that an extension would compound. Assuming that the big three automakers produce enough dual-fueled vehicles to garner the maximum 0.9 mpg CAFE credit each year, *id.* at 43, 44, and that use of E85 would remain at 1 percent, the Report to Congress projects that total petroleum consumption attributable to the AMFA credit will increase by 1.546 billion gallons in 2004 and by 2.705 billion gallons in 2008. The total increase in petroleum use during 2005-2008 would be 9.053 billion gallons. Greenhouse gas emission increases attributable to the incentive likewise mount from 2.267 MMTCE in 2001 to 8.348 MMTCE in 2008, for a total increase during MY 2005-2008 of 27.937

MMTCE.[7] *Id.* at 44. The relevant portion of Table V-6 is reproduced below:

| | **NET EFFECT OF AMFA PROGRAM AT A RATE OF 1% USAGE OF E85 0.9 mpg CAFE Credit** | | | |
|---|---|---|---|---|
| **Year** | **Conventional (million gallons)** | **Alternative (million gallons)** | **Total Petroleum (million gallons)** | **Greenhouse Gas Emissions (MMTCE)** |
| 2001 | 731 | 25 | 735 | 2.267 |
| 2002 | 995 | 35 | 1,000 | 3.085 |
| 2003 | 1,263 | 44 | 1,270 | 3.919 |
| 2004 | 1,538 | 54 | 1,546 | 4.770 |
| 2005 | 1,818 | 64 | 1,827 | 5.638 |
| 2006 | 2,103 | 74 | 2,114 | 6.524 |
| 2007 | 2,394 | 85 | 2,407 | 7.427 |
| 2008 | 2,691 | 95 | 2,705 | 8.348 |
| 2005-2008 | 9,005 | 319 | 9,053 | 27.937 |
| 2001-2008 | 13,532 | 478 | 13,603 | 41.978 |
| 1996-2008 | 14,300 | 504 | 14,375 | 44.359 |

*Id.*[8]

The Report did not stop there, however. DOT, EPA, and DOE also analyzed the effects of the AMFA incentive under additional, highly unrealistic scenarios in which E85 somehow grows to 25 percent, 50 percent, and 100 percent of the fuel used by the dual-fuel fleet. NHTSA

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[7] Total transportation sector greenhouse gas emissions for 2005-2008 are projected to be 2,361.9 MMTCE. *Final Environmental Assessment of the Dual Fuel Vehicle CAFE Credit Incentive,* at 16 (Table 8) (2003) (No. 42) ("*Final Env't Assess.*") (Exh. 20).

[8] The numbers increase each year in part because the table reflects the impact of the lower fuel economies for all dual-fueled vehicles on the road in that particular year. The impact on gas consumption and greenhouse gas emissions of the AMFA credit over the lifetime of the affected fleets is still more staggering. *See* Argument, Section C.2., *infra*. The numbers in the "total petroleum" column are higher than the "conventional" fuel column because E85 contains 15 percent petroleum, which is included in "total petroleum."

has conceded that it does not believe that "the use of E85 will come close to approaching 25% over the time period analyzed." *Final Env't Assess.* 15 (Exh. 20). Even under these scenarios, U.S. petroleum consumption and greenhouse gas emissions would *still* increase during the extension years of MY 2005-2008. Total petroleum consumption would break even if dual-fueled vehicles used E85 50 percent of the time and would decline only in the impossible scenario of 100 percent E85 use. Greenhouse gas emissions would increase even in this 100 percent scenario. *Id.* at 45-47 (Tables V-7 & V-8). The projected increase in petroleum use attributable to the extension will also likely raise oil prices because of the relationship between U.S. petroleum demand and world oil prices. *Id.* at 28; *see also NRC Report* 20 (Exh. 10).[9]

**c. Joint Report Conclusions**

The agencies' joint study forced them to conclude: "Unless actions are taken to significantly expand the availability and use of alternative fuels, the CAFE credit incentive program will not result in any reduced petroleum consumption or greenhouse gas emissions in the future." *Report to Congress* 48; *see also id.* at iii, xi, xiii, 50. Theirs was not the only bleak assessment of the impact of the program. As the Report to Congress acknowledged, the National Academy of Sciences ("NAS") had recently issued a report that addressed the failure of the dual-fuel incentive. *Id.* at 50 (citing *NRC Report* (Exh. 10)). NAS determined in its report, which was requested by Congress, *see* H.R. Conf. Rep. No. 106-940, at 117-18 (2000), that the credit for dual-fueled vehicles "has had, if any, a negative effect on fuel economy, petroleum

[9] Using the data in the Report to Congress, Union of Concerned Scientists calculated that extending the AMFA incentive through 2008 would increase consumers' annual fueling costs by nearly $3.8 billion and U.S. spending on oil by $700 million per year (because of the increase in oil prices)—nearly *doubling* the existing program's cost of $2.4 billion per year, while exacerbating its adverse impact on U.S. petroleum consumption and global warming. Comments of Union of Concerned Scientists, at 4 (2002) (Nos. 18 & 19) ("UCS") (Exh. 11).

consumption, greenhouse gas emissions, and cost. These vehicles seldom use any fuel other than gasoline yet enable automakers to increase their production of less fuel efficient vehicles." *NRC Report* 111. Accordingly, NAS recommended that the incentive be eliminated. *Id.* at 6, 114.

Although AMFA directed DOT to draw its own preliminary conclusions in its Report to Congress regarding whether the incentive should be extended, *see* Pub. L. No. 100-494, § 6, 1988 U.S.C.C.A.N. (102 Stat.) 2449 (new § 513(f)(2), later codified at 49 U.S.C. § 32905(g)), the agency avoided concluding whether the program, as currently designed, should be extended. Instead, the Report recommended that Congress or others consider "other actions that could improve the program and its chances for success," including examining alternatives to the current CAFE credit program structure, "such as linking the CAFE credit to actual alternative fuel used," and developing programs or regulations "to promote the actual use of alternative fuels by consumers" and "facilitate more rapid expansion and use of the alternative fuel infrastructure." *Report to Congress* 51. "Given the mixed results of the program to date," the agencies suggested that it would be "prudent" for federal agencies, Congress, industry, and other stakeholders "to identify additional programs and authorities that could contribute to achieving greater use of alternative fuels in dual-fuel vehicles that receive the CAFE credit." *Id.*

**4. NHTSA's Extension of the AMFA Incentive**

**a.** At the same time it submitted the Report to Congress, and notwithstanding the Report's dismal assessment, NHTSA issued a proposed rule to extend the program for four more years, through MY 2008. 67 Fed. Reg. 10873 (Exh. 2). The NPRM repeated the discouraging findings of the Report to Congress, *see id.* at 10875-80; admitted that despite the presence of 1.7 million E85 dual-fueled vehicles in the U.S. fleet, "owners of these vehicles are unlikely to be able to use E85 fuel," *id.* at 10880; acknowledged a "consensus that availability and price of

alternative fuels continued to be the most significant obstacle to their use," *id.* at 10875; recognized that "the incentive program, as it is now operating, potentially may be having some negative energy effects," *id.* at 10874; outlined a litany of obstacles to increased ethanol production, use, and demand, *id.* at 10880; and candidly conceded that "[w]hile the number of E85 stations has increased during the course of the incentive program, the growth that has occurred has not yet resulted in a degree of expansion suggesting that E85 is likely to serve as a viable alternative to petroleum fuels in the near future." *Id.* The NPRM offered no basis for believing that the bulk of the agencies' joint recommendations for improving the program, which NHTSA reiterated, *id.* at 10877, would be adopted by Congress or anyone else.

Nonetheless, NHTSA called the termination of the program "premature" because dual-fueled vehicles had only recently begun to be produced in significant numbers. *Id.* at 10881. The agency declared that "[d]omestic energy security is more important than ever" and that it therefore would be desirable to develop domestic fuels to reduce both U.S. reliance on foreign petroleum and world oil prices. *Id.* at 10874. NHTSA also maintained that it would be helpful to have a fleet of vehicles that can operate on non-petroleum fuels as a substitute in the event of "oil shocks" from sudden disruptions to the petroleum supply. *Id.* at 10874, 10878.

**b.** A number of commenters responded to the NPRM. *See* 69 Fed. Reg. 7694-96 (summarizing comments) (Exh. 15). Auto manufacturers, grain producers, and alternative fuel groups favored the extension. Even some supporters admitted, though, that the incentive "has resulted in increased petroleum consumption by allowing auto manufacturers to build less fuel-efficient conventional vehicles" and that the program should be redesigned to encourage "greater alternative fuel use," such as by tying "CAFÉ credits to use of the alternative fuel." *E.g.,* Renewable Fuels Association Comments, at 1 (2002) (No. 11) ("RFA") (Exh. 6).

Environmental organizations and automobile efficiency advocacy groups, including all three plaintiffs, strongly opposed the proposed extension. Their comments focused on the deficiencies in the dual-fuel program identified in the Report to Congress. The extension opponents also responded to rationales for extension offered by NHTSA in the proposal, such as the notion that dual-fueled vehicles would be useful in the event of a sudden "oil shock," by emphasizing the virtual nonexistence of an E85 fuel distribution infrastructure.[10]

**c.** On February 19, 2004, NHTSA issued its final rule promulgating the four-year extension. NHTSA cited no changes in the two years since submission of the Report to Congress to provide reason for optimism that the extension of the AMFA incentive would actually work as intended to increase the use of alternative fuels and reduce oil consumption. NHTSA reported that, by then, automakers had produced 3.4 million dual-fueled vehicles, 69 Fed. Reg. 7690, 7694, 7698, 7699, 7701, one million in 2003 alone. *Id.* at 7699.[11] But at the time the final rule was issued, the number of E85 stations in the U.S. had negligibly grown from 121 to 182 (only about 0.1 percent of refueling stations nationwide). 69 Fed. Reg. 7698. Nearly half were situated in Minnesota alone. Several of the most populous states, *e.g.,* New York, Florida, Pennsylvania, and Texas, had *no* E85 refueling stations. California had *one*. The entire

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[10] *See* Comments by Public Citizen (2002) (No. 9) (Exh. 4); Alliance to Save Energy (No. 10) (Exh. 5); American Council for an Energy-Efficient Economy (2002) (No. 12) ("ACEEE") (Exh. 7); Sierra Club (2002) (No. 13) (Exh. 8); Natural Resources Defense Council (2002) (No. 14) ("NRDC") (Exh. 9); UCS (2002) (Nos. 18 & 19) (Exh. 11); Center for Auto Safety (2002) (No. 20) (Exh. 12); Environmental Defense (2002) (No. 21) (Exh. 13).

[11] As NHTSA observed: "It appears that there is a large incentive for producing dual fuel light trucks at this time." *Final Econ. Assess.* 23 (Exh. 16). By contrast, the "intrusion into the marketplace" of dedicated alternative-fueled vehicles—the *ultimate* goal to which production of the transitional dual-fueled vehicles was intended to lead—"has been too small to have had any impact" on automakers' CAFE, *Report to Congress* 24 (Exh. 17), and has actually *decreased* in recent years. *Id.* at 26; *see also* ACEEE at 1 (Exh. 7).

east and west coasts were almost entirely bereft of stations supplying E85. *See* Alternative Fueling Station Counts (No. 41) (Exh. 19). No change in either the availability or use of E85 had occurred. Indeed, NHTSA provided no information that use of E85 had increased above the 1 percent level, but simply noted, in a classic understatement, that "an infrastructure for alternative fuel (and particularly for ethanol) has only begun to develop." 69 Fed. Reg. 7697.

NHTSA opined that Congress had intended the agency to extend the AMFA incentive if "the program envisioned by Congress has begun but not yet been fully achieved." *Id.* at 7698. The agency acknowledged that the Report to Congress projected that if dual-fueled vehicles operate on alternative fuel only 1 percent of the time, petroleum use would continue to increase. Nonetheless, NHTSA asserted that the analysis demonstrated only "that the real benefits of the CAFE incentive have not yet been realized, and further extension of the CAFE incentive is needed to expand the alternative fuel infrastructure and realize substantial gains in replacement fuel use and petroleum displacement." *Id.* at 7699. The agency did not offer, however, any basis for predicting that alternative fuel availability or use would increase during 2005-2008—or indeed, at any point in the future. NHTSA also reiterated its position from the NPRM that the existence of a fleet of dual-fueled vehicles is meaningful regardless of the absence of current consumer demand because it would "help attenuate the potential impacts of 'oil shocks' caused by rapid changes in the petroleum supply." *Id.* at 7700.

Finally, NHTSA downplayed the arguments that the limited supply of ethanol might be a restraining factor in expanding E85 use. It observed that current U.S. ethanol production is approximately 3.6 billion gallons per year, a substantial percentage of which is used to produce

gasoline additives or gasohol (90% gasoline/10% ethanol), also known as E10. *Id.*[12] It cited recent growth in ethanol production capacity and estimated that, in 2002, the amount available for E85 use had grown to slightly over 1 billion gallons. *Id.* NHTSA conceded that the move in many states to ban Methyl Tertiary-Butyl Ether ("MTBE"), a gasoline additive, has significantly increased demand for ethanol as a replacement additive, but claimed that the MTBE phase-out demonstrated only that ethanol production can be expanded to meet the increased demand. *Id.* The agency did not discuss what impact the diversion of ethanol to MTBE replacement would have on the availability of E85, even though it had previously admitted that if fuel producers replace MTBE with ethanol, "it is uncertain if there will be enough refinery capacity" both to replace MTBE and supply dual-fuel vehicles with E85. *See Report to Congress* ix, 36; *see also* 67 Fed. Reg. 10877, 10879, 10880. Nor did NHTSA acknowledge that even the rosiest forecasts of ethanol production came nowhere close to predicting that in the foreseeable future, 2.386 billion gallons of ethanol would be available for E85 usage—the amount that would be needed by 2008 if dual-fueled vehicles consumed E85 an average of 25 percent of the time over 2005-2008—a highly unlikely scenario that would *still* lead to increased petroleum consumption and greenhouse gas emissions. *Report to Congress* 45 (Table V-7).

**5. The Plaintiffs**

Plaintiffs bring this lawsuit in their associational capacities on behalf of their members, many of whom will be injured by NHTSA's extension of the dual-fuel program. Each plaintiff

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[12] In 2000, over 1 billion gasoline-equivalent gallons of ethanol were blended into gasoline to make gasohol. *Report to Congress* 35, 36. Indeed, one out of every eight gallons of gasoline sold contains ethanol, most of which is used in blends of 10% ethanol and 90% gas (E10), or as an octane enhancer to improve air quality. All automakers approve these low-level ethanol blends for use in vehicles running on gas. DOE, Energy Efficiency and Renewable Energy, *Ethanol, available at* http://www.eere.energy.gov/cleancities/blends/ethanol.html.

organization works to promote strong fuel economy standards and to reduce global warming pollution. *See* Declarations of Joan Claybrook, Clarence M. Ditlow, and Linda Lopez (Appx. of Declarations in Support of Plaintiffs' Standing). The continuation of the AMFA incentive will permit each automaker to produce car and light truck fleets of vehicles during MY 2005-2008 with an average fuel economy up to 0.9 mpg lower per fleet than otherwise applicable standards. *See* 49 U.S.C. § 32906(a)(1)(B); 69 Fed. Reg. 7702 (Exh. 15); *Final Econ. Assess.* 7 (Exh. 16). Automakers have been producing significant numbers of dual-fueled vehicles to take advantage of the credit. *See Final Env't Assess.* 11 (Exh. 20) (preliminary data from MY 2003 reflects that the average dual-fuel credit reached the maximum of 0.9 mpg).

Because the AMFA incentive leads to a reduction in new vehicle fuel economy, plaintiffs' members who wish to purchase, or who actually purchase, new MY 2005-2008 vehicles, especially light trucks (SUVs, minivans, and pickup trucks)—the category of vehicle most affected so far by the dual-fuel credit, *Report to Congress* vii, 21-23 (Exh. 17); *Final Econ. Assess.* 11 (Exh. 16)—will have to pay higher fuel costs than they would if the AMFA incentive ended in 2004. NHTSA's economic analyses reflect that if the AMFA incentive is extended, the average passenger car or light truck will consume hundreds of additional gallons of fuel over its lifetime, at an additional cost to the owner of several hundred dollars, as compared to vehicles produced without the AMFA incentive. *See Final Econ. Assess.* 22-25, 29-30 (Tables 11 & 12); 67 Fed. Reg. 10881 (describing similar analysis in preliminary economic assessment) (Exh. 2). In addition, plaintiffs' members who wish to purchase more fuel-efficient light trucks (to keep down fuel costs and/or out of concern for the environment) are harmed by the extension because it will result in a more limited selection of fuel-efficient and low-emitting vehicles for them to choose from. *See* Declarations of Richard Medlock, Arifa Goodman, Daniel N. Arshack, Daniel

P. Goldman, Mark Caron (Appx. of Declarations in Support of Plaintiffs' Standing).

## ARGUMENT

## NHTSA'S EXTENSION OF THE AMFA INCENTIVE IS CONTRARY TO THE STATUTE AND ARBITRARY AND CAPRICIOUS.

The undisputed evidence in the joint Report unequivocally demonstrates that (1) dual-fueled vehicles run on E85 a trivial fraction of the time and that there is no basis for believing that usage will appreciably increase in the foreseeable future; (2) under all remotely feasible scenarios, both petroleum use and greenhouse gas emissions will rise if the incentive is extended, thereby increasing U.S. dependence on foreign oil and exacerbating global warming; and (3) as a result, the extension of the AMFA incentive will harm, not improve, the environment, energy conservation, energy security, and national security. None of the alternative reasons NHTSA gave for granting a four-year extension provides any rational basis for the extension. Thus, extension of this failed incentive is counterproductive and illogical. Where, as here, the agency's decision fails to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43 (1983), and is not "based on a consideration of the relevant factors," *id.,* its action is contrary to law and arbitrary and capricious and must be set aside. *See* 5 U.S.C. § 706(2).

### A. AMFA Required NHTSA to Base Its Extension Decision on the Factors Specified in the Statute.

The threshold legal issue is whether Congress expected NHTSA to base its extension or termination decision on the same factors that AMFA directed the agency to evaluate in its Report to Congress. NHTSA contends it is not bound to consider these statutory considerations (availability of alternative-fueled vehicles and alternative fuel, energy conservation,

environment, etc.) in determining whether to extend the program. Its construction of the statute is contrary to AMFA's plain meaning and unreasonable.

NHTSA maintains that if Congress had intended the agency to predicate its extension decision on the statutory factors, Congress "could easily have included those considerations in the statutory provision governing the extension (49 U.S.C. 32905(f)), rather than just [the provision governing] the Report to Congress (49 U.S.C. 32905(g))." 69 Fed. Reg. 7698. *Yet that is precisely what Congress did.* NHTSA evidently failed to consult the original statute as enacted and set out in the Statutes at Large. As originally enacted, AMFA placed the statutory factors in precisely the same "statutory provision" that governs the extension, even addressing the Report to Congress and extension in the *very same paragraph*—new § 513(f)(2). *See* Pub. L. No. 100-494, § 6(a), 1988 U.S.C.C.A.N. (102 Stat.) 2449, quoted above at page 9. This single provision was divided into two only in 1994, when Subtitle VI of Title 49 (containing AMFA) was codified. *See* Pub. L. No. 103-272, 1994 U.S.C.C.A.N. (108 Stat.) 745, 1065-67. The new codified version split the original single AMFA provision labeled "Applicability" (§ 513(f)) into two parts: one regarding the extension, codified at 49 U.S.C. § 32905(f), and the other governing the study and Report to Congress, codified at § 32905(g). *See* 1994 U.S.C.C.A.N. (108 Stat.) 1065-67.

The original text of AMFA is not even arguably ambiguous. "Every exercise in statutory construction must begin with the words of the text." *Saks v. Franklin Covey Co.,* 316 F.3d 337, 345 (2d Cir. 2003). In paragraph (f)(2), the original Statutes at Large provision directs DOT to complete a study of the success of the dual-fuel program and submit a Report to Congress containing the results of that study, "along with preliminary conclusions as to whether the application of such subsection should be extended." The paragraph directs the agency to

evaluate several enumerated factors (availability, energy conservation, environment, etc.) in reaching its preliminary conclusions regarding whether to extend. § 513(f)(2)(A), 1988 U.S.C.C.A.N. (102 Stat.) 2449. In the very same paragraph (2), AMFA directs the agency, after issuing the Report, to "promulgate a rule to extend the applicability of subsection (b) and (d) [the dual-fuel incentive] for 4 or fewer consecutive model years" or to "publish a notice explaining the reasons for not promulgating such rule." § 513(f)(2)(B), 102 Stat. 2449. The extension authorization contains no different or additional criteria to govern the agency's decision. The straightforward, plain reading of this *single* statutory provision is that it requires DOT to base its extension decision on the same factors it was required to study and report on to Congress.[13]

Where, as here, there is a potential inconsistency between the original language or structure of a statute, as set forth in the Statutes at Large, and a later version of the statute codified in the U.S. Code, the original language prevails unless Congress expressly indicates otherwise. As the Supreme Court aptly and often has recognized:

> Even where Congress has enacted a codification into positive law, this Court has said that the "change of arrangement, which placed portions of what was originally a single section in two separate sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed."

*United States v. Welden,* 377 U.S. 95, 98 n.4 (1964) (citations omitted); *accord Finley v. United*

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[13] This reading also comports with the rest of AMFA, which confirms that the statutory factors to be addressed in the Report were foremost among Congress's concerns in enacting AMFA and its CAFE incentive. *See* Pub. L. No. 100-494, §§ 2 & 3, 1988 U.S.C.C.A.N. (102 Stat.) 2441-42 (42 U.S.C. § 6374 note) (purpose of AMFA to promote production of alternative-fueled vehicles and "widespread use" of alternative fuels, and findings evidencing Congress's focus on energy conservation, security, and the environment); *see also* H.R. Conf. Rep. No. 100-929, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3029 (AMFA intended "to facilitate the development and use of alternative fuels in the United States for purposes of energy security and air quality improvement, while being mindful of various other economic, safety, energy conservation, and environmental concerns possibly associated with such fuels").

*States,* 490 U.S. 545, 554 (1989) (citation omitted). Here, in the 1994 codification, Congress expressly announced that several subtitles of title 49 "are revised, codified, and enacted . . . *without substantive change*." Pub. L. No. 103-272, § 1, 1994 U.S.C.C.A.N. (108 Stat.) 745, 745 (emphasis added); *accord* H.R. Rep. No. 103-180, at 1, 5 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 822. The original AMFA text controls because "the meaning of the predecessor statute is clear and quite different from the meaning [NHTSA] would ascribe to the codified law; and the revisers expressly stated that changes in language resulting from the codification were to have no substantive effect." *Cass v. United States,* 417 U.S. 72, 82 (1974).

Accordingly, in deciding whether to extend the AMFA incentive, NHTSA was required to take into account each of the statutory factors enumerated in § 513(f)(2)(A), 1988 U.S.C.C.A.N. (102 Stat.) 2449.

### B. NHTSA's Final Rule Failed to Address the Statutory Factors, Which Overwhelmingly Favored Terminating, Not Extending, the AMFA Incentive.

Although NHTSA contended that it was not bound by the statutory considerations, the agency acknowledged in the final rule that these factors were "relevant to [its] consideration of an extension." 69 Fed. Reg. 7698. Nonetheless, NHTSA proceeded to avoid these statutory factors almost entirely and certainly did not explain how they favored extending the program. In fact, the agency candidly admitted in the Report to Congress and elsewhere that "[u]nless the availability and use of alternative fuels is significantly expanded, the CAFE credit incentive program will not result in any reduced petroleum consumption or greenhouse gas emissions in the future." *Report to Congress* 50 (Exh. 17); *see also Final Env't Assess.* 20 (Exh. 20).

Because NHTSA mistakenly believed that AMFA "imposes no particular criteria to be applied," but "rather leaves the decision to the discretion of" the agency, 69 Fed. Reg. 7692; *see also id.* at 7700, NHTSA did not rely on the statutory factors. Instead, the agency offered

separate reasons for extending the AMFA incentive, which are discussed in Section C, *infra*. Even if these separate reasons are deemed "other relevant factors" under the statute, their existence does not free NHTSA from AMFA's requirement that it consider the availability of alternative-fueled vehicles and alternative fuel, energy conservation and security, and environmental considerations in deciding whether to extend the AMFA incentive. Because the agency failed to consider "the relevant factors" to guide its decision, *State Farm,* 463 U.S. at 43; *NRDC v. Muszynski,* 268 F.3d 91, 97 (2d Cir. 2001), on that ground alone, the final rule must be vacated. *See Public Citizen v. FMCSA,* 374 F.3d 1209, 1216 (D.C. Cir. 2004) (final rule arbitrary and capricious where agency "neglected to consider a statutorily mandated factor"); *Perales v. Sullivan,* 948 F.2d 1348, 1353-54 (2d Cir. 1991) (same); *American Horse Protection Ass'n v. Lyng,* 812 F.2d 1, 6 (D.C. Cir. 1987) (agency action arbitrary and capricious when agency "blind to the source of its delegated power") (citation omitted).

NHTSA skirted addressing the statutory factors in the final rule because each of them, whether considered singly or together, favors ending, not extending, the dual-fuel program.

**1. The Availability of Alternative-Fueled Vehicles and Alternative Fuels**

Because the AMFA incentive effectively relaxes the CAFE standards, the credit has become part of the major American manufacturers' overall economic strategy for meeting those standards and accordingly has induced the production of millions of dual-fueled vehicles. *See supra* pages 10, 18. As detailed in the Report to Congress, however, the incentive has failed utterly to spur the production, availability, and usage of E85—the alternative fuel that the vast majority of dual-fueled vehicles are capable of using and on which NHTSA's analysis is based. The nation's 182 E85 refueling stations and 3.3 million gallons (GGE) of E85 consumed in 2000 underscore that there is *virtually zero* consumer demand, consumption, E85 infrastructure, and

availability of alternative fuels. As extension opponents pointed out, the Report to Congress reflected that, on average, each of the 1.2 million dual-fueled vehicles then on the road was using only about *2.6 gallons of E85 per year*. *See* ACEEE at 2 (Exh. 7); UCS at 2 (Exh. 11).

Rather than confront these bleak facts, NHTSA attempted to rationalize its extension decision on the ground that if there were "a well-developed alternative fuel infrastructure and a corresponding substantial use of alternative fuels, there would be no need for an extension of the CAFE incentive." 69 Fed. Reg. 7699. On the other hand, the agency continued, "had there been no movement toward a fleet capable of operating on alternative fuels, or no movement toward the growth of infrastructure to that fleet, there would not be any basis for extending the CAFE incentive." *Id.* Yet there *has* been almost no movement toward the growth of an E85 infrastructure. Although the minute number of E85 stations nationwide is growing as a percentage of itself (*e.g.,* the increase from 121 to 182 E85 stations represents a 50 percent jump) that minuscule number, which is changing by only a few dozen a year, chiefly in *Minnesota, see id.* at 7697, reflects no meaningful movement *at all* toward the growth of a national E85 infrastructure. Moreover, the quantity of E85 consumed is so negligible and has changed so little in the two years following the Report to Congress that NHTSA did not even bother reporting the current level of consumption in the final rule.

In stating that it was rejecting the view "that extension of the CAFE incentive should be premised on the existence of a well-developed alternative fuel infrastructure," *id.* at 7699, NHTSA knocked down a strawman. Plaintiffs and other extension opponents did not (and do not) maintain that the refueling infrastructure had to be "self-sustaining," *id.* at 7699-7700, to justify extending the AMFA incentive. Instead, they argued that NHTSA had no reasonable basis for projecting that there would *ever* be such an infrastructure. *See, e.g.,* NRDC at 5-6 (Exh.

9); Public Citizen at 2-4 (Exh. 4); ACEEE at 1 (Exh. 7). Indeed, the final rule did not (and could not) project that the limited use and availability of E85 would change in the foreseeable future. As NHTSA recognized, Congress expected that production of a vehicle fleet capable of operating on alternative fuels would in turn increase consumer demand for those fuels, which would then spur the development of an alternative fuel infrastructure. 69 Fed. Reg. 7701; *see also supra* page 7. That prediction has proved wrong, as even some industry extension supporters recognize. *E.g.,* Comments of National Ethanol Vehicle Coalition 2 (2002) (No. 5) (Exh. 3). As NHTSA admitted: "[T]he growth [in E85 stations] that has occurred has not yet resulted in a degree of expansion suggesting that E85 is likely to serve as a viable alternative to petroleum fuels in the near future." 67 Fed. Reg. 10880. There is no countervailing benefit in terms of use, or projected use, of alternative fuels to offset the damage the AMFA incentive has inflicted and will continue to inflict on U.S. energy conservation and the environment.

NHTSA itself has catalogued the formidable obstacles to increasing consumer demand for, and usage and availability of, E85 by dual-fueled vehicles:

- **The absence of alternative fuel refueling stations.** 69 Fed. Reg. 7698 (Exh. 15); 67 Fed. Reg. 10878, 10880 (Exh. 2); *Report to Congress* 31-32, 49 (Exh. 17).
- **The higher cost of ethanol relative to gasoline.** 67 Fed. Reg. 10875, 10879, 10880; *Report to Congress* 33.
- **The considerable enlargement of ethanol production and distribution capacity required to expand beyond the Midwest.** 67 Fed. Reg. 10877, 10878, 10880; *Report to Congress* iii, viii, xiii, 12, 18, 29, 30, 50.
- **The lower energy content of E85 compared to gasoline, resulting in a lower driving range per tank.** 67 Fed. Reg. 10879, 10880; *Report to Congress* 32-33;
- **The major economic disincentives from the fuel suppliers' standpoint to developing the E85 infrastructure.** *Report to Congress* ix, 30, 32.

- **The ongoing replacement of MTBE with ethanol, potentially leaving insufficient ethanol for E85.** 67 Fed. Reg. 10877, 10879, 10880; *Report to Congress* ix, 36; *see also* 69 Fed. Reg. 7700.

- **Lack of consumer awareness that dual-fueled vehicles can operate on alternative fuel and disincentive for even knowledgeable consumers to choose alternative fuels over gas.** 67 Fed. Reg. 10880; *Report to Congress* viii.

- **The capability of dual-fueled vehicles (by definition) to run on conventional fuel, thereby relieving consumers of the need to demand E85.** 67 Fed. Reg. 10879; *Report to Congress* viii, 30.

- **The small and decreasing number of dedicated alternative-fueled vehicles, thereby further relieving pressure on consumers to demand alternative fuel.** *Report to Congress* 24, 26.

The incentive is ineffective from both the demand and supply perspectives. As one consumer put it: "Since alternative fuel is harder to find, more expensive to buy, and has a much shorter range than petroleum, those owners [of dual-fueled vehicles] have virtually no motivation to buy or use it." Comment (2002) (No. 24) (Exh. 14). An ethanol industry group summed up the supply problem: "[U]ntil the economics of E85 provide some incentive to fuel marketers, meaningful numbers of E85 refueling stations will not materialize." RFA at 2 (Exh. 6).

NHTSA offers no rational basis for believing that these obstacles can be overcome in the future—much less during the four years of the extension. Tellingly, the final rule avoids almost all discussion of how the barriers to expanding the availability and use of E85 can be surmounted so that the incentive can effectuate Congress's twin purposes of promoting production of alternative-fueled vehicles and "the widespread use" of alternative fuels by consumers. Pub. L. No. 100-494, § 3 (42 U.S.C. 6374 note); *see State Farm,* 463 U.S. at 43 (agency rule arbitrary and capricious if it "entirely fail[s] to consider an important aspect of the problem").

**2. Energy Conservation and Security; Environmental Considerations**

More remarkable still is that NHTSA's own analysis, contained in the Report to Congress

and the assessments that accompanied the final rule, powerfully demonstrates that the four-year extension will *increase* petroleum consumption and greenhouse gas emissions under all remotely feasible scenarios analyzed. *Report to Congress* 44-48 (Exh. 17); *Final Env't Assess.* 14-17 (Exh. 20); *Final Econ. Assess.* 20-22 (Exh. 16). In the most realistic scenario by far, in which dual-fueled vehicles continue to use E85 only 1 percent of the time, petroleum consumption is projected *to rise* by 9.053 billion gallons and greenhouse gas emissions by 27.937 MMTCE over 2005-2008. *Report to Congress* 44; *see supra* page 14. Thus, the extension of the AMFA incentive will only *worsen* U.S. interests in energy conservation, energy security, and protection of the environment.

In the final rule, NHTSA gave the extension's adverse impact on energy conservation and the environment the back of its hand, remarking that, "[n]ot surprisingly, this analysis [in the Report to Congress] indicated that when dual fuel vehicles are operated on alternative fuel only 1% of the time, petroleum use would increase slightly because the incentive program would discourage, rather than encourage, the production of more fuel-efficient vehicles." 69 Fed. Reg. 7699 (Exh. 15). Yet the agency did not contend that the premise of 1 percent E85 usage is false or unreasonable. Instead, NHTSA argued that the study merely "demonstrates that the real benefits of the CAFE incentive have not yet been realized, and further extension of the CAFE incentive is needed to expand the alternative fuel infrastructure and realize substantial gains in replacement fuel use and petroleum displacement." *Id.* In other words, in NHTSA's view, the complete failure of the AMFA incentive to reduce petroleum consumption and greenhouse gas emissions demonstrates that things can only get better. By this warped logic, the more the incentive has failed, the greater the argument for an extension. Congress did not provide for the incentive presumptively to expire in 2004 only to have NHTSA automatically extend it no matter

how poorly it was serving congressional goals.

More importantly, under even the most heroic, farfetched scenarios of E85 use—involving increases of many thousands of percent over the current usage level—the incentive *will continue* to do damage to AMFA's objectives of reducing dependence on gas and emissions that aggravate global warming, *see supra* pages 14-15, underlining that even if the incentive were to "succeed" over the next four years, it would still fail to serve Congress's goals.

NHTSA attempted to reassure critics by claiming that even under the assumption of 1 percent E85 usage by dual-fueled vehicles, overall increases in gas consumption are "relatively small—less than 1 percent." 69 Fed. Reg. 7701. Again, the agency's logic does not withstand scrutiny. NHTSA is essentially arguing that the ineffective and counterproductive AMFA incentive is too small to matter, no matter how poorly it is serving Congress's goals, because the U.S. consumes so much gas that the failure of the dual-fuel program is irrelevant on a percentage basis. To state the argument is to refute it.

In any event, the increase in gas consumption caused by the AMFA extension is quite significant in absolute terms. To put it in context, the projected increase is more than sufficient to wipe out both the petroleum consumption savings and reduction of greenhouse gas emissions achieved by NHTSA's recent regulation increasing the CAFE standards for light trucks (from 20.7 mpg in MY 2004, to 21.0 mpg for MY 2005, 21.6 mpg for MY 2006, and 22.2 mpg for MY 2007). 68 Fed. Reg. 16868. Indeed, these increases in the light truck CAFE standards provide a strong incentive for automakers to take full advantage of the dual-fuel credit to lessen the burden of meeting the new requirements. Assuming full usage of the 0.9 mpg dual-fuel credit, NHTSA projected the lifetime increase in petroleum consumption attributable to the AMFA incentive for a *single* model year of the passenger car and light-truck fleets to range from 2.8 billion to 3.2

billion gallons, *Final Econ. Assess.* 25, 30 (Exh. 16)—which would mean an increase of approximately 11.28 billion to 12.88 billion gallons of fuel over the lifetimes of the 2005-2008 fleets. For dual-fuel vehicles produced from 2001-2008, the lifetime increase in greenhouse gas emissions is estimated at 82 MMTCE, *Report to Congress* 44 n.20, suggesting a lifetime increase in greenhouse gas emissions for 2005-2008 of about 41 MMTCE.

By contrast, according to NHTSA's own analysis, the new, higher light-truck CAFE standards would achieve only 3.6 billion gallons in gasoline savings over the 25-year lifetime of the 2005-2007 light trucks, 68 Fed. Reg. 16871, 16898 (Table 3), and a reduction in greenhouse gas emissions of only 9.4 MMTCE. *Id.* at 16879, 16892. Although these benefits are minor in comparison to the harm done by the dual-fuel program, NHTSA nonetheless touted these fuel economy improvements as "enhanc[ing] the ability of the nation to conserve fuel and reduce its dependence on foreign oil." *Id.* at 16869. Terminating the dual-fuel incentive would have been a more effective way for NHTSA to have reduced U.S. dependence on foreign petroleum and greenhouse gas emissions, which is why *eliminating* the incentive took a prominent place among the National Academy of Science's short list of recommendations for *improving* the CAFE system. *See NRC Report* 6, 114 (Exh. 10).[14]

NHTSA maintains nevertheless that extension opponents were wrong to cite automakers' use of the incentive to produce less fuel-efficient fleets as a reason for abandoning the program. According to the agency, Congress recognized that the incentive could potentially lead to lower overall fleet fuel economy and thus "placed express limitations on the scope of the incentive and

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[14] The increases in gas consumption projected in NHTSA's dual-fuel assessment and the savings in gas consumption projected in NHTSA's light-truck CAFE rulemaking rely on different assumptions and do not provide a true apples-to-apples comparison. Nonetheless, the rough contrast of costs of the dual-fuel incentive and benefits of the increase in light-truck fuel economy demonstrates the harm done by the four-year extension of the dual-fuel program.

the term of any necessary extension specifically to strike the appropriate balance between encouraging alternative fuel system development and providing relief from CAFE obligations." 69 Fed. Reg. 7699. Yet NHTSA's argument ignores that Congress *also* provided for the incentive *to end* in 2004 unless NHTSA could demonstrate that it was working (or even had the potential to work) after evaluating the trial program against the statutory criteria. NHTSA reads this express limitation right out of the statute. If Congress believed that the "express limitations" on the incentive's scope (the 0.9 mpg cap) and "the term of any necessary extension" (four years) were sufficient to prevent erosion of CAFE standards, there would have been no reason for Congress also to have provided for the presumptive 2004 termination date.

### C. None of NHTSA's Other Reasons for Extending the Incentive is Rational.

Regardless of whether the statutory factors alone dictated the termination of the AMFA incentive, the agency's decision to extend the program is arbitrary and capricious under *State Farm* standards. *See New York PIRG v. Whitman,* 321 F.3d 316, 324 (2d Cir. 2003) ("When the question is not one of the agency's authority but of the reasonableness of its actions, the 'arbitrary and capricious' standard of the APA governs."). None of the reasons offered by NHTSA for the extension draws "a rational connection between the facts found and the choice made." *Public Citizen v. Mineta,* 340 F.3d 39, 53 (2d Cir. 2003) (citation omitted).

**1.** NHTSA accepted the argument by extension supporters that the dual-fuel vehicle fleet had only recently reached a "critical mass" and that, therefore, the AMFA incentive should be extended to allow that "critical mass" of vehicles to support investments in alternative fuel infrastructure. 69 Fed. Reg. 7699. Yet the agency simply ignored the myriad obstacles that it had previously recognized to cultivating an E85 infrastructure and consumer demand for the fuel. *See supra* pages 16-17, 28-29. NHTSA never explains why a "critical mass" of dual-

fueled vehicles—no matter how large—would be effective in spurring investment in E85 fueling stations or the use of E85 when these vehicles can run on readily available, cheaper conventional fuel. Since 2000, there have been well over 1 million dual-fueled vehicles on the road, yet there has been no progress worth noting on either the infrastructure or consumer use of E85.

Several environmental groups disputed NHTSA's assumption that adding millions more dual-fueled vehicles that almost never run on E85 would eventually lead to an expansion of E85 stations and consumption. As UCS argued: "Dual-fuel vehicles do not guarantee a demand for alternative fuel, [and] without this guaranteed demand, fuel providers will not push forward with expanding their fuel supply. Only the sales of dedicated alternative fuel vehicles would guarantee demand for a fuel and therefore solve the chicken-and-egg problem." UCS at 2 (Exh. 10) (emphasis omitted); *see also* ACEEE at 2 (Exh. 7); NRDC at 6 (Exh. 9); Environmental Defense at 2 (Exh. 13). These comments are consistent with NHTSA's own recognition in the NPRM and Report to Congress that unless significant changes are made to the dual-fuel program to expand the availability and use of alternative fuels, AMFA's goals will not be realized. Yet NHTSA ignored the obvious flaws in its "critical mass" rationale. Its failure to come to grips with the defects in its analysis emphasized by plaintiffs and other groups is fatal to the final rule. *See Professional Pilots Fed'n v. FAA,* 118 F.3d 758, 763 (D.C. Cir. 1997).

**2.** Still more untenable is NHTSA's view that the mere *existence* of a fleet of dual-fueled vehicles is meaningful even in the absence of a current demand for alternative fuels. 69 Fed. Reg. 7700. The agency claimed that maintaining the AMFA incentive, thereby continuing to induce the production of dual-fueled vehicles, would "help attenuate the potential impacts of 'oil shocks' caused by rapid changes in the petroleum supply." *Id.* This rationale is NHTSA's weakest. As NRDC responded to the same "flimsy speculation" advanced in the NPRM, *see*

NRDC at 2 (Exh. 9), the "oil shock" rationale "requires the completely unsupported assumption that an enormous increase in E85 fuel could be produced and distributed in the time frame of such a disruption—an assumption that has no credible basis." *Id.* ACEEE protested (at 2 (Exh. 7)) that "the supposition that alternative fuels can be used in times of petroleum shortages relies on the false assumption that there is an infrastructure in place to quickly provide the vast quantities of alternative fuel that would be needed to provide meaningful relief to consumers in a 'crisis' situation." *See also* Public Citizen at 2 (same) (Exh. 4). U.S. residents outside the Midwest (or, more realistically, outside Minnesota) would have no recourse to E85 refueling stations if there were a "rapid" change in the petroleum supply; thus, the existence of the dual-fuel fleet is without value in such a crisis.

More importantly, as UCS urged, in the event of an oil supply emergency, rather than rely on inaccessible E85, the government could make more effective use of the existing ethanol to displace petroleum by simply blending low levels of ethanol into gasoline to produce gasohol, which can be used in all conventional (including dual-fueled) cars and trucks on the road today. UCS at 3 (Exh. 11); *see supra* pages 19-20 & n.12. According to Table V-8 in the Report to Congress, at 47, if dual-fueled vehicles used E85 100 percent of the time in 2008, they would consume 9.544 billion gallons of E85, or about 8.1 billion gallons of ethanol (85 percent of 9.544 billion). Based on an implicit assumption of 120 billion gallons of petroleum consumed by light-duty vehicles per year, UCS observed that 8.1 billion gallons of ethanol could be blended with gasoline at 7 percent by volume (8.1 billion / 120 billion). This concentration is less than the 10 percent used in gasohol, or E10, blends sold today. UCS at 3. Thus, even if it were available (which it is not, *see infra* pages 36-38), this amount of ethanol could far more readily be used as gasohol in an emergency to displace a portion of the petroleum used in conventional vehicles,

than as E85 in dual-fueled vehicles.

NHTSA acknowledged in passing that ethanol could be used in an E10 (gasohol) blend, as well as in E85, in an oil crisis. 69 Fed. Reg. 7700. It admitted that "[r]apid changes to ethanol production capacity" taking "less than . . . six months to a year" "are not likely and probably not useful in ameliorating the impact of a sudden oil crisis or 'shock.'" *Id.* But the agency still contended that if restrictions to the petroleum supply "persist[ed] over a longer term," more ethanol could become available and "[t]he use of E85 fuels in E85 vehicles [would be] likely to occur simply because much less petroleum would be available. In such an instance, the existence of a dual fuel fleet could be an important asset to the Nation's energy security." *Id.* By this sleight-of-hand, NHTSA shifted its rationale, effectively conceding that dual-fueled vehicles would *not* be useful in alleviating the impact of "sudden" oil shocks. In the event of longer-term scarcity of petroleum, NHTSA does not explain why blending available ethanol with gasoline to form gasohol would not remain a far more practical and effective solution than use of E85, or why the existing impediments to an E85 infrastructure would disappear. NHTSA's failure to address such an obvious alternative use for ethanol to help abate the effects of an oil supply disruption confirms that the extension of the incentive was arbitrary and capricious. *See Public Citizen v. Steed,* 733 F.2d 93, 99 (D.C. Cir. 1984) (agency must "consider reasonably obvious alternative[s] . . . and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review") (citation omitted).

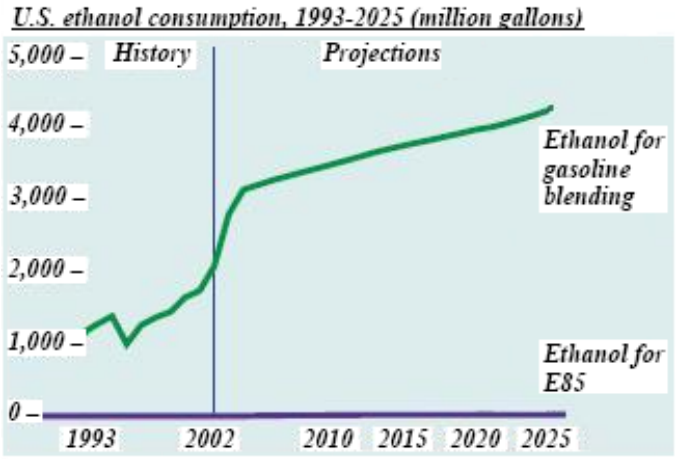
**3.** The debate over the utility of E85 in abating an oil supply disruption is far removed from reality, however, because leaving aside the intractable problem of insufficient E85 infrastructure, there simply is not enough ethanol available for E85 to make production of still *more* dual-fueled vehicles advantageous. NHTSA's failure to recognize that the *existing* fleet of

dual-fueled vehicles is more than ample to take advantage of any growth in the ethanol supply available for E85 again demonstrates the agency's failure to make a "rational connection between the facts found and the choice made." *Cellular Phone Taskforce v. FCC,* 205 F.3d 82, 89 (2d Cir. 2000) (quoting *State Farm,* 463 U.S. at 43).

Responding to comments that the limited ethanol supply might be a restraining factor in expanding E85 use, NHTSA stated that current ethanol production has doubled in recent years to about 3.6 billion gallons per year. 69 Fed. Reg. 7700. It observed that the Report to Congress had estimated that 400 million gallons of ethanol were available for E85 use in 2000, *id.*; *see Report to Congress* 36, and that, by 2002, the amount available for E85 had grown to slightly over 1 billion gallons. 69 Fed. Reg. 7700. NHTSA does not cite the basis for its 1 billion gallon projection, which departs from reports by both DOE and the Renewable Fuels Association on how the ethanol supply is allocated, particularly given state plans to replace MTBE with ethanol. Ironically, a Power Point presentation by the California Energy Commission from 2003, cited by NHTSA (*id.* at 7700 n.11), estimated that California, which ceased use of MTBE on January 1, 2004, *alone* would require 760 to 990 million gallons of ethanol to replace it by 2004. *See* Gordon Schremp, *California's Phaseout of MTBE—Background and Current Status* 15 (2003), *available at* http://www.energy.ca.gov/mtbe/documents/2003-03-17_SCHREMP_AT_EPA.PPT. In February 2004, before NHTSA issued the final rule, the California Energy Commission projected California's 2004 demand for ethanol to approach one *billion* gallons. *See* Pat Perez, *Ethanol Use in California's Gasoline: Policy Drivers and Challenges* 3 (2004), *available at* http://www.energy.ca.gov/papers/ 2004-02-09_PEREZ_NASEO.PDF.

In the meantime, use of ethanol for E85, which accounted for less than 1 percent of all ethanol sold in 1999, RFA at 2 (Exh. 6), was not even on RFA's radar screen in its 2003 industry

outlook report. An RFA list of ethanol uses for 2002 does not even *mention* E85. *See* RFA, *Building a Secure Energy Future*, at 5 (2003) (No. 40) (Exh. 18). More telling still is that, although DOE projects both ethanol production and ethanol for gasoline blending (in part because of MTBE replacement) to mount over the next two decades, its projection for E85 consumption remains *de minimis,* increasing from a national total of 7.8 million gallons in 2002 to a mere 42 million gallons in 2025. *AEO 2004* at 98, *available at* http://www.eia.doe.gov/oiaf/aeo/download.html. This amount is not enough even to supply dual-fueled vehicles *in 2004* with the 54 million gallons the Report to Congress estimates would be needed if the vehicles used E85 even a trivial 1 percent of the time. *Report to Congress* 44 (Table V-6); *see supra* page 14.[15] The inescapable conclusion is that nowhere close to 1 billion gallons of ethanol is available for E85 use. DOE's chart projecting U.S. ethanol consumption says it all:




AEO 2004 at 98 (Figure 104).[16]

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[15] NHTSA relied on DOE's Annual Energy Outlook for energy-related data in the Report to Congress. *See, e.g., Report to Congress* 27, 28.

[16] NHTSA recognizes in the final rule that the "MTBE phase-out has significantly increased demand for ethanol," 69 Fed. Reg. 7700, but gone is its earlier admission that this heightened demand makes it "uncertain" that "there will be enough refinery capacity" both to

(continued...)

Even assuming that a billion gallons is (and would remain) available for E85, however, such a supply would not justify extending the AMFA incentive. First, 1 billion gallons of ethanol would produce barely enough for dual-fueled vehicles to use E85 a mere *10 percent* of the time in 2008—a level of E85 use that would undermine Congress's goals in AMFA by adding substantially to total petroleum consumption and greenhouse gas emissions. *Final Econ. Assess.* 21 (Table 7) (Exh. 16); *see also Report to Congress* 45-47 (Tables V-7 & V-8) (reflecting increased petroleum use and greenhouse gas emissions with even higher levels of E85 use). Equally important is that the *existing* fleet of dual-fueled vehicles can easily consume the 1 billion gallons of E85 supposedly available and take advantage of any possible increases in E85 supply without the need to add to that fleet. *See* ACEEE at 2 (Exh. 7); UCS at 2 (Exh. 11). (One billion gallons of ethanol would supply only about one third of the fuel required for the 5 million or so dual-fueled vehicles that will be on the road by the end of 2004. UCS at 2.) Yet again, the final rule disregards these important comments regarding the existing dual-fueled fleet's ability to consume the available E85 and is accordingly arbitrary and capricious. *See Home Box Office, Inc. v. FCC,* 567 F.2d 9, 35-36 (D.C. Cir. 1977) ("[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.") (footnote omitted).

**D. Conclusion and Relief Requested**

As the National Academy of Sciences concluded: "[T]he current incentives to produce [dual-fueled] vehicles lead to increased costs and lower fleet fuel economy without corresponding benefits." *NRC Report* 89 (Exh. 10). Given the overwhelming record evidence

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[16](...continued)
replace MTBE and supply dual-fuel vehicles with E85. *Report to Congress* ix, 36; *see also* 67 Fed. Reg. 10877, 10879, 10880. Now, NHTSA makes no prediction of how much ethanol will be available for E85 in the future given the increasing diversion of ethanol to replace MTBE.

establishing the ineffectiveness of the AMFA incentive to date, the lack of a reasonable basis for optimism that the incentive will work as Congress intended over the next four years, and the program's adverse effects on energy conservation, security, and the environment, NHTSA's four-year extension of the program is both contrary to AMFA and arbitrary and capricious. *See State Farm,* 463 U.S. at 43 (agency action arbitrary and capricious where it "offered an explanation for its decision that runs counter to the evidence before the agency"); *Public Citizen v. Mineta,* 340 F.3d at 56 ("in light of the rulemaking record," NHTSA's arguments were not "satisfactory explanations"); *Chemical Mfrs. Ass'n v. EPA,* 217 F.3d 861, 866 (D.C. Cir. 2000) (agency engaged in "classic case of arbitrary and capricious rulemaking" when it claimed benefits where "none was found").

Accordingly, under the APA this Court should hold unlawful and vacate NHTSA's final rule extending the AMFA incentive for MY 2005-2008. *See* 5 U.S.C. § 706(2). In addition, the Court should void any CAFE credits awarded to automakers that are attributable to their production of dual-fueled vehicles in any of model years 2005-2008 and direct NHTSA and EPA to recalculate the average fuel economy of any automaker that has received credit for producing dual-fueled vehicles in those years, so that automakers cannot use the credits in that year (or carry the credits forward or backward) to compensate for shortfalls in their CAFE compliance.[17]

## CONCLUSION

This Court should grant plaintiffs' motion for summary judgment.

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[17] Plaintiffs have named EPA as a defendant because it is EPA's responsibility to calculate automakers' average fuel economies for purposes of CAFE compliance, *see supra* page 5, and thus EPA's participation in this lawsuit is necessary to afford plaintiffs' complete relief. In addition, for the reasons discussed in this memorandum, any calculation of fuel economy by EPA that would award automakers the dual-fuel credit for MY 2005-2008 would be contrary to the AMFA and arbitrary and capricious.

Respectfully submitted,

s/_____

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