

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE)
COUNCIL, INC.,)
40 West 20th Street,)
New York, NY 10011,)

CENTER FOR AUTO SAFETY,)
1825 Connecticut Avenue, N.W.)
Suite 330)
Washington, D.C. 20009, and)

PUBLIC CITIZEN, INC.,)
1600 20th Street, N.W.,)
Washington, D.C. 20009,)

Plaintiffs,)

v.)

No. 04-CV-5380 (VM)
ECF CASE

NORMAN Y. MINETA,)
SECRETARY OF TRANSPORTATION,)
400 Seventh Street, S.W.,)
Washington, D.C. 20590, and)

MICHAEL O. LEAVITT,)
ADMINISTRATOR OF THE ENVIRONMENTAL)
PROTECTION AGENCY,)
Ariel Rios Building,)
1200 Pennsylvania Avenue, N.W.,)
Washington, D.C. 20460,)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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 on February 19, 2004 by the National Highway Traffic Safety Administration (“NHTSA”), an agency within the Department of Transportation (“DOT”). *See* 69 Fed. Reg. 7689. The rule

extends for four additional years the special treatment accorded by the Alternative Motor Fuels Act of 1988 (“AMFA”), Pub. L. No. 100-494, to dual-fueled motor vehicles manufactured in model years (“MY”) 1993-2004 for purposes of determining manufacturers’ compliance with Corporate Average Fuel Economy (“CAFE”) standards. A “dual-fueled” or “flexible-fueled” vehicle is one that can operate on either an alternative fuel (such as methanol, ethanol, and natural gas) or conventional fuel (gasoline or diesel). The AMFA incentive was originally enacted on a trial basis, ending in MY 2004, with the goal of reducing the nation’s dependence on foreign oil and diminishing global-warming pollution caused by the emission of greenhouse gases by vehicles operating on petroleum-based fuel. In fact, however, such vehicles operate almost exclusively on conventional gasoline, and total oil consumption and dependence, as well as greenhouse gas emissions, have increased as a result of the incentive program and will continue to increase for the foreseeable future.

The AMFA required DOT to decide whether to extend or terminate the special incentive through a rulemaking based on its consideration of several factors specified in the statute. These statutory considerations dictate that NHTSA, the agency to whom this decision was delegated, terminate, not extend, the special AMFA incentive. DOT’s own analysis in a 2002 Report to Congress and other objective assessments show that the result of extending the AMFA incentive for an additional four years will be to increase, not reduce, petroleum consumption and emission of greenhouse gases that contribute to global warming—the exact opposite of the effect desired by Congress. Because its own analysis demonstrates that extending the program is counter-productive and irrational, NHTSA’s extension of the AMFA incentive for MY 2005-2008 is contrary to the AMFA and arbitrary and capricious.

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

PARTIES

2. Plaintiff Natural Resources Defense Council, Inc. (“NRDC”) is a non-profit environmental advocacy organization headquartered in New York, New York, with a national membership of more than 480,000. NRDC works to reduce the nation’s oil consumption, dependence on foreign oil, and contribution to global-warming pollution by advocating the adoption and enforcement of energy efficiency and pollution reduction laws. NRDC submitted comments opposing NHTSA’s proposal to extend the AMFA incentive program for dual-fueled vehicles for MY 2005-2008.

3. Plaintiff Center for Auto Safety (“CAS”) is a non-profit consumer advocacy organization founded in 1970 that works to give consumers a voice to improve auto safety and vehicle quality, increase fuel economy, and reduce harmful emissions. Headquartered in Washington, D.C., CAS has more than 15,000 members nationwide and advocates for auto safety and improved fuel economy before the Department of Transportation, in testimony before Congress, and in the courts. CAS was actively involved in the legislative process leading to the enactment of AMFA, including providing testimony at several congressional hearings. CAS also submitted comments opposing NHTSA’s proposal to extend the AMFA incentive program for dual-fueled vehicles for MY 2005-2008.

4. Plaintiff Public Citizen, a consumer advocacy organization based in Washington, D.C., is a non-profit group founded in 1971, with a national membership of approximately 160,000. Public Citizen has a long history of advocacy on matters related to auto safety and

quality, and fuel economy before Congress, administrative agencies, and the courts. Public Citizen has pushed for higher fuel economy standards for more than two decades, educating consumers on the feasibility of improved technology, pushing for higher standards in Congress, and participating in agency rulemakings on proposed new standards. Public Citizen submitted comments opposing NHTSA's proposal to extend the AMFA incentive program for dual-fueled vehicles for MY 2005-2008.

5. Plaintiffs NRDC, CAS, and Public Citizen bring this action on behalf of their members, who will be injured by NHTSA's four-year extension of the special CAFE treatment accorded dual-fueled vehicles. The extended AMFA incentive permits auto manufacturers to claim a credit toward their corporate average fuel economy requirements of 0.9 miles per gallon ("mpg") in each model year from 2005 through 2008. *See* 49 U.S.C. §§ 32905(b) & (d), 32906(a)(1)(B). As a result, the continuation of the AMFA incentive will permit each automaker to produce a fleet of vehicles with a fuel economy that is up to 0.9 mpg less than the fuel economy level otherwise required by statute or regulation.

6. This lowering of overall fuel economy authorized by NHTSA's extension of the CAFE incentive for dual-fueled vehicles will adversely affect plaintiffs' members who purchase MY 2005-2008 automobiles (whether dual-fueled or conventional) because these vehicles will be less fuel-efficient and thus will consume more conventional fuel over their lifetimes. As NHTSA's final and preliminary economic analyses reflect, if the AMFA special incentive is extended, the average passenger car and light truck will consume hundreds of additional gallons of fuel over its lifetime, at an additional cost of several hundred dollars, as compared to the cars and light trucks that would be manufactured without the AMFA incentive. *See* Final Economic

Assessment, Alternative Fueled Vehicles, Extension of CAFE Option, Part 538 (2004), Docket No. NHTSA-2001-10774-37, at 22-25, 29-30; 67 Fed. Reg. 10873, 10881 (2002) (Notice of Proposed Rulemaking) (describing similar analysis performed in NHTSA's preliminary economic assessment). Thus, the extension of the CAFE incentive program for dual-fueled vehicles will injure those members of the plaintiff organizations who purchase MY 2005-2008 vehicles by requiring them to consume more fuel and thus pay more to operate their vehicles than would be the case if the vehicle fleet for MY 2005-2008 were not accorded this special CAFE treatment.

7. Extension of the AMFA incentive program will harm plaintiffs' members in other ways as well. As described in paragraphs 19-22 below, the analysis prepared for Congress by DOT, the Department of Energy ("DOE"), and the Environmental Protection Agency ("EPA") shows that if the program is extended for MY 2005-2008, both U.S. gasoline consumption and the emission of greenhouse gases that exacerbate global warming will increase. *See* DOT, DOE & EPA, *Report to Congress: Effects of the Alternative Motor Fuels Act CAFE Incentives Policy* 44 (Table V-6) (March 2002) ("Report to Congress"). The increase in U.S. gasoline consumption will raise world oil prices and thus lead to higher prices of gasoline at the pump for consumers, including for plaintiffs' members who drive automobiles. *See* Report to Congress at 28 ("[A] reasonable rule of thumb is that a 1 percent decrease in U.S. petroleum demand will reduce world oil price by about 0.5 percent in the long run. Short-run (one year or less) impacts would be even greater . . .").

8. The projected increase in greenhouse gas emissions likewise will injure plaintiffs' members by worsening global warming, thereby directly endangering the health of plaintiffs'

members by increasing the severity of health-damaging heat waves and smog episodes in many regions of the country, which, in turn, will lead to a greater number of heat-related deaths and smog-related illnesses, including asthma attacks. Global warming aggravated by heightened emissions of petroleum-based fuel also causes sea levels to rise, damaging coastal property owned by plaintiffs' members and coastal nature reserves that plaintiffs' members use and enjoy.

9. Defendant Norman Y. Mineta is Secretary of the Department of Transportation, an agency of the United States. After completing a report to Congress, in consultation with the Secretary of Energy and the Administrator of the EPA, on the impact of the AMFA incentive program for dual-fueled vehicles and making preliminary recommendations, based on specific statutory factors, on whether the program should be extended, the Secretary is charged by Congress with determining whether to extend the AMFA incentive by regulation for not more than four consecutive model years immediately after MY 2004 or publish a notice terminating the incentive program. 49 U.S.C. § 32905(f) & (g). The Secretary has delegated to NHTSA, an agency within DOT, the authority to set CAFE standards and to carry out his responsibilities under the AMFA. 49 C.F.R. § 1.50(f). In February 2004, NHTSA granted a four-year extension of the special AMFA incentive for dual-fueled vehicles. That extension is challenged in this action.

10. Defendant Michael O. Leavitt is Administrator of the Environmental Protection Agency, an agency of the United States. The Administrator is charged by Congress with calculating automakers' average fuel economy, 49 U.S.C. § 32904, and is responsible for measuring the fuel economy of dual-fueled vehicles in accordance with the special incentive established by the AMFA and determining the increase of a manufacturer's average fuel

economy that is attributable to dual-fueled automobiles for purposes of applying the statutory cap of 0.9 mpg. *See* 49 U.S.C. §§ 32905(b) & (d), § 32906(a)(2).

THE STATUTORY SCHEME

11. In 1975, Congress enacted the Energy Policy and Conservation Act (“EPCA”) to address the nation’s dependence on foreign oil. Pub. L. No. 94-163 (1975). EPCA required DOT to issue average fuel economy standards for passenger automobiles (cars) and other automobiles (light trucks, such as minivans, SUVs, and pick-up trucks). The CAFE standards establish minimum performance requirements for cars and light trucks in terms of the average miles per gallon of gasoline or diesel fuel that a vehicle must be able to travel. Individual vehicles and models are not required to meet the mileage standards. Instead, each manufacturer must achieve an average level of fuel economy for categories of vehicles manufactured in a given model year. Thus, these standards are generally referred to as “corporate average fuel economy” (CAFE) standards. *See generally* 49 U.S.C. § 32901 *et seq.* The passenger car CAFE standard is 27.5 mpg. 49 U.S.C. § 32902(b). The CAFE standard for light trucks has been 20.7 mpg since MY 1996, but is slated to rise to 21.0 mpg for MY 2005, 21.6 mpg for MY 2006, and to 22.2 mpg for MY 2007. 49 C.F.R. § 533.5 (Table IV).

12. If a manufacturer surpasses an applicable average fuel economy standard, it earns credits that may be applied toward CAFE compliance in any of the three consecutive model years immediately before or after the model year in which the credits are earned. 49 U.S.C. § 32903(a)(1) & (2). Any manufacturer that fails to comply with an applicable average fuel economy standard after considering available credits under § 32903 is subject to substantial civil penalties. 49 U.S.C. § 32912. As DOT has acknowledged, the CAFE standards have historically

raised average fuel economies to higher levels than automakers would have attained in the absence of those standards. Report to Congress at 6-7.

13. Alarmed at the nation's continued heavy dependence on foreign oil and at global warming exacerbated by fuel emissions from vehicles running on petroleum-based fuels, in 1988 Congress enacted the AMFA, Pub. L. No. 100-494, to promote the development and use of alternative transportation fuels (such as natural gas, methanol, and ethanol), which can be produced domestically and burn more cleanly than conventional fuels. *See* 42 U.S.C. § 6374 note (AMFA findings and purposes). To encourage automakers to manufacture vehicles capable of operating on alternative fuels, the AMFA provides, on a trial basis, for special treatment of fuel economy calculations for "dual-fueled," or "flexible-fueled," vehicles manufactured in MY 1993-2004. The statute authorized DOT to extend the incentive by regulation for up to an additional four years, through MY 2008, but only if the record demonstrated that the program was actually working as intended by increasing alternative fuel use, reducing oil consumption, and diminishing greenhouse gas emissions. NHTSA extended the AMFA incentive program despite unequivocal evidence that the incentive has failed to work as intended.

14. The AMFA sets out a special calculation procedure that significantly inflates the fuel economy of dual-fueled vehicles for purposes of determining the manufacturer's compliance with the CAFE standards for its passenger car and light truck fleets. For example, the most common alternative fuel, an ethanol blend known as "E85," is a mixture of 85 percent ethanol and 15 percent gasoline. If a vehicle running exclusively on E85 achieved 15 mpg, it would be deemed to have a fuel economy of 100 mpg. *See* 49 U.S.C. § 32905(a) & (b); 67 Fed. Reg. 10875 & n.2 (explaining calculation); Report to Congress at 9-10 (same). The statute calculates

the fuel economy credit for dual-fueled vehicles manufactured in MY 1993-2004 as though 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). A dual-fueled vehicle that achieves 15 mpg while running on E85 and 25 mpg on gasoline is credited with having a CAFE fuel economy of 40 mpg. *See* 67 Fed. Reg. 10875 & n.3 (explaining calculation); Report to Congress at 10 (same). In fact, however, the undisputed administrative record shows that dual-fueled vehicles actually operate on alternative fuel *less than 1 percent of the time*. Report to Congress at 40, 43, 45; 67 Fed. Reg. 10877.

15. Although the AMFA assumes, for purposes of the fuel-economy calculation, that dual-fueled vehicles run on alternative fuel 50 percent of the time, the statute does not condition the special CAFE treatment for dual-fueled vehicles on their actual use of any certain amount of alternative fuel. Even if a dual-fueled vehicle never uses a single gallon of alternative fuel, the vehicle manufacturer earns the special fuel-economy credit because the vehicle is capable of operating on alternative fuel.

16. The AMFA special incentive purports to solve the “chicken and egg” problem inherent in the development of an alternative fuel infrastructure. *See* 69 Fed. Reg. 7690; S. Rep. 100-271, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3016, 3017. By creating incentives, on a trial basis, for automakers to produce dual-fuel vehicles—the “chicken”—Congress hoped to motivate producers of alternative fuel and energy companies to develop the infrastructure necessary to provide affordable and accessible alternative fuels on which these vehicles could operate—the “egg.” However, Congress never intended to trade off higher fuel efficiency for the production of a fleet of dual-fueled vehicles that stand virtually no prospect of ever operating

on alternative fuel.

17. Indeed, Congress recognized that the special incentive program for dual-fueled vehicles could undermine fuel economy and increase pollution if these vehicles primarily operated on gasoline. That is why Congress made the program temporary, ending the special treatment of dual-fueled vehicles after MY 2004 unless DOT determined, after a rulemaking and based on factors enumerated in the statute, that the special CAFE treatment was operating as intended and should be extended for up to four more years. 49 U.S.C. § 32905(f). The AMFA also limited the incentive for MY 1993-2004 by establishing 1.2 mpg as the maximum increase in average fuel economy that a manufacturer could claim from dual-fueled vehicles in each category of vehicle, 49 U.S.C. § 32906(a)(1)(A), and by reducing that maximum allowable increase to 0.9 mpg per year in the event that DOT extended the program. § 32906(a)(1)(B).

EXTENSION OF THE AMFA INCENTIVE FOR DUAL-FUELED VEHICLES

18. Congress instructed DOT, in consultation with DOE and EPA, to complete a study of the success or failure of the special CAFE treatment of dual-fueled vehicles and to submit a report to the pertinent committees of the House of Representatives and the Senate on the results of the study, including preliminary conclusions on whether the dual-fueled vehicle incentive should be extended for up to four more years. 49 U.S.C. § 32905(g). The statute directed that the study and conclusions consider (1) the availability to the public of alternative fueled automobiles and alternative fuel; (2) energy conservation and security; (3) environmental considerations; and (4) other relevant factors. *Id.*

19. The agencies' 2002 Report to Congress demonstrates that each of these statutory considerations favors ending the AMFA incentive program after MY 2004. The undisputed

evidence contained in DOT's, DOE's, and EPA's joint Report unambiguously demonstrates: (1) that dual-fueled vehicles produced as a result of an extension of the special CAFE incentive are highly unlikely to run on E85 more than a trivial fraction of the time; (2) that, as a result, the extension will harm, not improve, energy conservation and security (whether energy security or national security); and (3) that under all remotely feasible scenarios, both petroleum use and emission of greenhouse gases will climb if the AMFA incentive is extended, thereby increasing U.S. dependence on foreign oil and exacerbating global warming.

20. Even though the AMFA incentive has been in place for more than a decade, it has generated virtually no demand for alternative fuels. Thus, as NHTSA noted in the final rule, as of January 2004 there were only 182 E85 refueling stations *in the entire country*, 69 Fed. Reg. 7698, a minuscule fraction of the more than 176,000 conventional gasoline stations nationwide. *See Report to Congress at iii, ix, xiii, 49.* The mere existence of dual-fueled vehicles, which can run on either conventional or alternative fuel, does not guarantee a demand for alternative fuel.

21. In its notice of proposed rulemaking, NHTSA candidly acknowledged 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.” 67 Fed. Reg. 10880. In its final rule, NHTSA offers no rational basis for believing that either the demand for or availability of E85 will increase in any significant way in the four years the AMFA incentive program would be extended or, indeed, in the foreseeable future. The statute's incentive for dual-fueled automobiles has succeeded in promoting the production of “chickens,” but has failed utterly to spur the production and usage of “eggs.”

22. Importantly, as DOT's analysis shows, extension of the AMFA incentive to encourage production of dual-fueled vehicles that rarely ever see a drop of E85, but which nonetheless garner their manufacturers valuable CAFE credits, will have a profound adverse impact on energy conservation, security, and the environment. Under all scenarios analyzed by DOT, DOE, and EPA—including scenarios based on highly unrealistic levels of E85 usage—the extension will lead to increases in petroleum use and greenhouse gas emissions if the incentive program is extended to 2008. Report to Congress at 44-46 & Tables V-6 & V-7; 67 Fed. Reg. 10877. Their joint study forced the agencies 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 at 47-48.

23. At the same time the agencies released their Report to Congress, NHTSA issued a notice of proposed rulemaking proposing to extend the program for four additional years. 67 Fed. Reg. 10873 (Mar. 11, 2002). The notice of proposed rulemaking provided no rational basis for believing that any of the agencies' recommendations for improving the program, *see* Report to Congress at 50-51; *see also* 67 Fed. Reg. 10877, would be implemented by Congress, DOT, or other federal agencies. Also at about the same time, the National Academy of Sciences (“NAS”) conducted a study at Congress's request, *see* H.R. Conf. Rep. No. 106-940 (2000), at 117-18, to evaluate the effectiveness and impact of the CAFE standards. *See* National Academy of Sciences, *Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards* (2002) (“NAS Study”). Confirming what DOT's analysis had already shown, the NAS determined that “[t]he provision creating extra credits for multifuel vehicles has had, if any, a

negative effect on fuel economy, petroleum 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.” NAS Study at 111. The NAS accordingly recommended that CAFE credits for dual-fuel vehicles be eliminated. *Id.* at 114.

24. Notwithstanding these analyses demonstrating that the AMFA incentive had failed (and was expected to fail for the foreseeable future) to encourage the use of alternative fuels and, if continued, would *increase* petroleum use and greenhouse gas emissions, NHTSA issued a final rule in February 2004 extending the program for an additional four years. *See* 69 Fed. Reg. 7689 (Feb. 19, 2004). None of the agency’s purported justifications for doing so alters the fact that each of the factors Congress directed the agency to consider in determining whether to extend the CAFE incentive compels the conclusion that the agency should not have extended the program. Nor do any of the agency’s justifications provide any rational basis for the extension.

FIRST CAUSE OF ACTION
(For Violation of the AMFA)

25. Plaintiffs incorporate paragraphs 1 through 24, as though fully set forth herein.

26. NHTSA’s extension of the AMFA incentive program for dual-fueled vehicles for an additional four years, covering MY 2005-2008, violates the AMFA because the considerations set forth in the statute as guiding the DOT’s decision whether to extend the program, both individually and taken together, favor termination, not extension, of the AMFA incentive. *See* 49 U.S.C. § 32905(f) & (g); *see also* 5 U.S.C. § 706(2).

SECOND CAUSE OF ACTION
(For Violation of the Administrative Procedure Act)

27. Plaintiffs incorporate paragraphs 1 through 24, as though fully set forth herein.

28. NHTSA's extension of the AMFA incentive program for dual-fueled vehicles for an additional four years, covering MY 2005-2008, is arbitrary, capricious, and an abuse of discretion in violation of the APA. 5 U.S.C. § 706(2)(A).

WHEREFORE, plaintiffs pray that this Court:

- (A) Vacate NHTSA's final rule extending the AMFA incentive program for dual-fueled vehicles for an additional four years, for MY 2005-2008;
- (B) Enjoin DOT from extending the CAFE incentive program;
- (C) Void any CAFE credits to automakers that are attributable to their production of dual-fueled vehicles for MY 2005-2008 (and direct DOT and EPA to recalculate the average fuel economy of any manufacturer who has been given credit for producing dual-fueled vehicles in any model year(s) from MY 2005 to MY 2008);
- (D) Award plaintiffs their costs and reasonable attorneys' fees; and
- (E) Grant such other relief as this Court may deem just and proper.

Dated: July 9, 2004

Respectfully submitted,

s/ _____
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