

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

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

The ability of a private and local government fleet rule to affect petroleum consumption also depends, in significant part, on whether DOE can require covered fleets to use alternative or replacement fuels in addition to requiring that they acquire AFVs. DOE’s experience with fleet programs demonstrates that vehicle acquisition requirements alone result in a relatively small (in the context of overall U.S. fuel consumption) amount of petroleum replacement. However, as will be explained below, DOE believes it does not have the authority, were it to promulgate a private and local government fleet mandate program, to require that the vehicles acquired use any particular fuel, including alternative fuels.

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

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

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

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

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

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

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

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

* * * mandate the production of alternative fueled vehicles or to specify, as applicable, the models, lines, or types of, or marketing or pricing practices, policies, or strategies for, vehicles subject to this Act. Nothing in this Act shall be construed to give the Secretary authority to mandate marketing or pricing practices, policies, or strategies for alternative fuels or to mandate the production or delivery of such fuels. (42 U.S.C. 13254(c))

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

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

As part of the rule promulgated * * * pursuant to subsection * * * (g) of this section, the Secretary shall establish procedures for any fleet owner or operator or motor vehicle manufacturer to request that the Secretary modify or suspend a fleet requirement program * * * nationally, by region, or in an applicable fleet area because, as demonstrated by the petitioner, the infrastructure or fuel supply or distribution system for an applicable alternative fuel is inadequate to meet the needs of a fleet. In the event that the Secretary determines that a modification or suspension of the fleet requirements program on a regional basis would detract from the nationwide character of any fleet requirement program established by rule or would sufficiently diminish the economies of scale for the production of alternative fueled vehicles or alternative fuels and thereafter the practicability and effectiveness of such program, the Secretary may only modify or suspend the program nationally. The procedures shall include provisions for notice and public hearings. The Secretary shall deny or grant the petition within 180 days after filing. (42 U.S.C. 13257(n))

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

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