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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, and FRIENDS
OF THE EARTH,

Plaintiffs,

v.

U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT
OF AGRICULTURE, U.S. DEPARTMENT OF
COMMERCE, U.S. DEPARTMENT OF DEFENSE, U.S.
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, U.S. DEPARTMENT OF THE
INTERIOR, U.S. DEPARTMENT OF LABOR, U.S.
DEPARTMENT OF TRANSPORTATION, U.S.
DEPARTMENT OF VETERANS AFFAIRS, CENTRAL
INTELLIGENCE AGENCY, DEPARTMENT OF
HOMELAND SECURITY, EXECUTIVE OFFICE OF
THE PRESIDENT, FEDERAL COMMUNICATIONS
COMMISSION, and GENERAL SERVICES
ADMINISTRATION,

Defendants.

No. C 05-01526 WHA

**ORDER ON
CROSS-MOTIONS
FOR PARTIAL
SUMMARY
JUDGMENT**

INTRODUCTION

In a sequel to an earlier action and order requiring overdue agency action,
two environmental organizations again seek enforcement of the Energy Policy Act of 1992.
The core question concerns the extent to which the Secretary of Energy is obligated to require
large private and municipal fleets of motor vehicles to use alternative-fuel vehicles (AFVs).
At issue now are cross-motions for summary judgment.

1 **STATEMENT**

2 The Energy Policy Act of 1992, Pub. L. 102-486, 102 Stat. 2776, signed into law by
3 President George H. W. Bush on October 24, 1992, enacted a comprehensive set of programs
4 for reducing petroleum consumption and dependence on foreign oil, almost all of which were
5 placed under the stewardship of the Secretary of Energy. One of its programs called for
6 development and use of “replacement fuels.” This term meant “the portion of any motor fuel
7 that is methanol, ethanol or other alcohols, natural gas, liquified petroleum gas, hydrogen, coal
8 derived liquid fuels” and other combustibles determined by the Secretary to be “substantially
9 not petroleum and would yield substantial energy security benefits and substantial
10 environmental benefits.” 42 U.S.C. 13211(14). (For convenience and uniformity, all citations
11 and references shall be to the Act as codified.)

12 On or before October 1, 1993, the Secretary was required, under 42 U.S.C. 13252, to
13 establish a program to promote the development and use of domestic replacement fuels in
14 light-duty motor vehicles. Under this program and by this deadline, the Secretary was required
15 to consult with other agencies and to determine the technical and economic feasibility of
16 achieving the goals of producing sufficient replacement fuels to replace:

- 17 • at least ten percent by the year 2000, and
 - 18 • at least thirty percent by the year 2010
- 19 of the projected consumption of motor fuel in the
20 United States for each such year, with at least half of
21 such replacement fuels being domestic fuels.

22 The latter will be referred to herein as the “Thirty Percent By 2010” goal. The Secretary was
23 required to publish in the Federal Register the results of the 1993 and followup determinations
24 and provide for an opportunity for public comment. 42 U.S.C. 13252. No such publication in
25 the Federal Register ever occurred, at least prior to 1998.

26 Of particular relevance herein, the Secretary was further required — before October 24,
27 1995 — “and periodically thereafter” — to examine these goals to determine if they should be
28

1 modified, publishing in the Federal Register the result of each examination and providing an
2 opportunity for public comment. 42 U.S.C. 13254(a). The Act stated:

3 If, after analysis of information obtained in connection with
4 carrying out subsection (a) of this section or section 13252 of this
5 title, or other information, and taking into account the
6 determination of technical and economic feasibility made under
7 section 13252(b)(2) of this title, the Secretary determines that
8 goals described in section 13252(b)(2) of this title, including the
9 percentage requirements or dates, are not achievable, *the*
10 *Secretary, in consultation with appropriate Federal agencies,*
11 *shall, by rule, establish goals that are achievable, for purposes of*
12 *this subchapter.* The modification of goals under this section may
13 include changing the target dates specified in section 13252(b)(2)
14 of this title.

15 42 U.S.C. 13254(b) (emphasis added).

16 Significantly, no such modification has ever occurred. This has been true despite
17 acknowledgment by the agency since as early as 1998 that the goals were unachievable, as will
18 be set forth below.

19 A different provision of the Act also called for modification of these goals. This was in
20 the context of evaluating whether to require a private/municipal fleet AFV rule. While the Act
21 specified AFV requirements for fleets operated by the federal government, state governments
22 and certain so-called alternative fuel producers, another provision, concerned large private and
23 municipal fleets, the focus of this lawsuit. As to them, the Secretary was obligated to decide
24 whether to set fleet requirements in two stages. The first was so-called “early rulemaking.”
25 That deadline came and went with no action and really has no continuing relevance here.

26 The second was due April 1, 1998. By then, the Secretary was required to publish an
27 advance notice of proposed rulemaking for the purpose of:

- 28 (1) evaluating the progress toward achieving the goals of replacement fuel use described in section 13252(b)(2) of this title, as modified under section 13254 of this title;
- (2) identifying the problems associated with achieving those goals;
- (3) assessing the adequacy and practicability of those goals; and
- (4) considering all actions needed to achieve these goals.

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

1 This advance notice was given in 1998 and three public hearings were held. *See* 63 Fed.
2 Reg. 19372 (Apr. 17, 1998).

3 By January 1, 2000, the Secretary was required to publish a final rule to “determine
4 whether a fleet requirement program was necessary.” The Act set forth a definition of
5 “necessary”:

6 Such a program shall be considered necessary and a rule therefor
7 shall be promulgated if the Secretary finds that —

8 (A) the goal of replacement fuel use described in section
9 13252(b)(2)(B) of this title [*i.e.*, the Thirty Percent By 2010 goal],
10 as modified under section 13254 of this title [never modified], is
11 not expected to be actually achieved by 2010, or such other date
12 as is established under section 13254 of this title, by voluntary
13 means or pursuant to this subchapter or any other law without
14 such a fleet requirement program, taking into consideration the
15 status of the achievement of the interim goal described in
16 section 13252(b)(2)(A) of this title, as modified under section
17 13254 of this title; and

18 (B) such goal is practicable and actually achievable
19 within periods specified in section 13252(b)(2) of this title, as
20 modified under section 13254 of this title, through
21 implementation of such a fleet requirement program in
22 combination with voluntary means and the application of other
23 programs relevant to achieving such goals.

24 42 U.S.C. 13257(e)(1).

25 Under Section 13257(g), if the Secretary determined that a fleet requirement was
26 “necessary” within the above definition, then the Secretary was obligated to require by rule
27 that certain specified percentages of vehicles acquired in the affected fleets be AFVs. This was
28 to be done by January 1, 2000, a deadline extendable only by ninety days upon notice in the
Federal Register. 42 U.S.C. 1257(h). This AFV requirement is at the core of this action.

Regarding the “necessity” evaluation, the Act recognized that the Thirty Percent By 2010
goal might be deemed impracticable and, in that event, called for substitution of a revised goal in
making the “necessity” determination. Specifically, if the goal was deemed by the Secretary to
be “inadequate or impracticable and not expected to be achievable,” then the Secretary was

1 required to establish a revised goal and the revised goal was to be used in making the findings in
2 Section 13257(e)(1). This provision warrants full quotation:

3 (2) The rule under subsection (b) or (g) of this section shall also
4 modify the goal described in section 13252(b)(2)(B) of this title
5 [Thirty Percent by 2010] and establish a revised goal pursuant to
6 section 13254 of this title if the Secretary determines, based on
7 the proceeding required under subsection (a) or (c) of this section,
8 that the goal in effect at the time of that proceeding is inadequate
9 or impracticable, and not expected to be achievable. *Such goal as
10 modified and established shall be applicable in making the
11 findings described in paragraph (1).* If the Secretary modifies the
12 goal under this paragraph, he may also modify the percentages
13 stated in subsection (a)(1) or (g)(1) of this section and the
14 minimum percentage stated in subsection (a)(2) or (g)(2) of this
15 section shall be not less than 10 percent.

16 42 U.S.C. 13257(e)(2) (emphasis added).

17 Thus, in two separate contexts, two separate provisions called for modification of the
18 Thirty Percent By 2010 goal if it proved impracticable: the fleet-rule provision just quoted
19 (Section 13257) and the provision for periodic review and modification quoted earlier
20 (Section 13254).

21 The statutory deadlines came and went. There were no publications and actions by the
22 Secretary. This led to the lawsuit and the eventual order reported at *Center for Biological
23 Diversity v. Spencer Abraham*, 218 F. Supp. 2d 1143 (N.D. Cal. 2002) (EPAct I). That decision
24 ordered the Secretary to make a decision whether to implement a municipal/private fleet rule.
25 The Secretary requested comments and held hearings to determine the desirability of such a rule,
26 *i.e.*, to make the necessity determination. The Secretary then issued a notice of proposed
27 rulemaking, indicating his intention not to implement a fleet requirement. 68 Fed. Reg. 10320
28 (Mar. 4, 2003). After further public comment, the Secretary issued a final decision, concluding
that a non-federal fleet rule was not “necessary.” 69 Fed. Reg. 4219 (Jan. 29, 2004).

The essence of the decision was that an AFV requirement for municipalities and private
fleets would make little difference in achieving the Thirty Percent By 2010 goal or, for that
matter, *any* revised goal. The impact would be about 0.2 percent:

For purposes of the goals contained in EPAct, DOE believes that
fuel replacement should be considered in the context of all
on-highway motor fuel use, including heavy-duty vehicle fuel
use, because the goals contained in section 502 of EPAct are to be

1 considered in the context of the “projected consumption of motor
2 fuel in the United States.” (42 U.S.C. 13252(b)(2).) This section
3 does not refer only to light-duty fuel use. The figures provided in
4 these earlier reports, when adjusted to reflect the impact on all
5 on-highway motor fuel use, show that a private and local
6 government fleet rule — even with a fuel use requirement, have
7 the authority to impose — would provide at most on the order of
8 0.7–0.8 percent motor fuel replacement. After taking into account
9 the fact that DOE has no authority to mandate fuel use, DOE
10 estimates that a private and local government fleet AFV
11 acquisition mandate would likely provide only about 0.2 percent
12 motor fuel replacement.

13 69 Fed. Reg. 4226 (3d col.) (Jan. 29, 2004).

14 Furthermore, the Secretary stated that he had decided against modifying the
15 Thirty Percent By 2010 goal:

16 DOE has decided not to propose or finalize any revisions to the
17 replacement fuel goal because, first, DOE does not believe that
18 EPCRA requires it to revise the petroleum replacement fuel goal in
19 order to determine whether a private and local government fleet
20 rule is “necessary.” Revising the goal as part of this rulemaking
21 would serve no purpose because, as indicated in the NOPR and in
22 this final rule, the adoption of a revised goal would not impact
23 DOE’s determination that a private and local government fleet
24 rule provides no appreciable increase in replacement fuel use. In
25 addition, the limited regulatory authority under Title V of EPCRA
26 and existing market factors independently warrant a finding that
27 an AFV acquisition mandate under section 507(e) is not
28 “necessary.” Therefore, DOE is not required under section 507(e)
to revise the EPCRA 2010 percent replacement fuel goal, since it
would not influence DOE’s decision regarding whether or not to
implement a private and local government fleet regulation.

69 Fed. Reg. 4229 (1st col.).

The agency also argued that the statutory goals were merely “aggressive aspirational
petroleum reduction targets.” 69 Fed. Reg. 4229 (1st col.). The agency stated that “very little
progress has been made toward achieving the goals.” *Ibid.* The agency alluded to pending
executive and congressional initiatives and suggested that events and efforts subsequent to
1992 had, in effect, rendered the AFV provisions a stranded relic.

In this action, plaintiffs seek to set aside the agency action, to require the Secretary to
modify the Thirty Percent By 2010 goal, and then to re-determine the AFV fleet rule in light of
the modified goal.

ANALYSIS

1
2 More than six years has passed since the statutory deadline for the “necessity”
3 determination and final fleet rule under Section 13257(e). In *EPA Act I*, the Secretary was
4 ordered to make the determination and either impose an AFV rule or not but at least to make the
5 decision. After a rulemaking process, the Secretary then concluded that a municipal/private
6 fleet rule was not necessary. He rejected a fleet rule. That would ordinarily have been the end
7 of it. Under the rules of judicial review, agency action is presumed valid, deference is due, and
8 a judge cannot simply substitute his or her judgment for that of the agency charged by Congress
9 with making the decision. *See, e.g., Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 94–5
10 (1995).

11 The problem here, however, is that the Secretary violated a command of the Act. A
12 two-step process was required by the Act. The Secretary was supposed (i) to revise the
13 Thirty Percent By 2010 goal as needed to make it realistic and (ii) only thereafter — with the
14 benefit of the revised goal — to determine if a fleet rule was necessary to meet the goal. The
15 Secretary refused to revise the goal. He refused to revise it, even while acknowledging that the
16 goal was unachievable. This was fatal error. The agency simply refused to follow the statutory
17 procedure required for making the determination.

18 Again, Section 13257(e)(2) stated:

19 The rule . . . shall also modify the goal if the Secretary
20 determines, based on the proceeding required under subsection (a)
21 or (c), that the goal . . . is inadequate or impractical, and not
22 expected to be achievable. Such goal as modified and established
23 shall be applicable in making the findings [re necessity].

24 The Secretary has long been of the view that the goal is impractical and not expected to
25 be achieved. By the time Congress amended the Act in 1998, for example, the Secretary had
26 concluded:

27 *It is clear DOE will not achieve the replacement fuel goals*
28 *established in section 502.* DOE estimates actual use of
replacement fuel in 1996 was only 3.1 percent of total highway
motor fuel—2.9 percent was oxygenates blended into gasoline and
0.2 percent was alternative fuel use. This compares to the targets
of 10 percent in 2000 and 30 percent in 2010. DOE estimates
alternative fueled vehicle sales would have to grow to between
35 and 40 percent of total light duty vehicle sales by 1999 and stay

1 at that level to meet the 2000 goal. The Department concedes that
2 this is extremely unlikely to occur. DOE estimates Federal, State,
3 and local alternative fueled vehicle programs could displace about
4 3 percent of light duty vehicle motor fuel use in 2010, and
5 replacement fuels in the form of oxygenates could account for an
6 additional 4.8 to 6.7 percent of fuel use. It appears replacement
7 fuel use in 2010 will account for 10 percent or less of motor fuel
8 use — far short of 30 percent.

9 H. R. Rep. 105-727, at 9 (emphasis added). As early as 1998, therefore, the Secretary was aware
10 that the replacement-fuel goals could not be met on the timeline in Section 13252.

11 The acknowledgment of unachievability continued. When the Secretary proposed a
12 fleet-rule order in 2003 (in response to *EPA Act I*), the Secretary stated:

13 The result is that although the use of replacement and alternative
14 fuels has increased since 1992, the overall use of these fuels
15 relative to total petroleum consumption remains relatively small.
16 In 1992, replacement fuels accounted for slightly less than
17 2 percent of total motor fuel consumption; by 2001, replacement
18 fuels accounted for less than 3 percent. *See Transportation Fuels*
19 *2000* at Table 10. Thus, to date, very little progress has been made
20 toward achieving the aggressive goals established by *EPA Act* and
21 little progress will be made in the future without major new
22 initiatives.

23 68 Fed. Reg. 10342 (2d col.) (Mar. 4, 2003).

24 There is no doubt that the original goal has long been deemed unrealistic by the agency
25 and that, contrary to the Act, no modification of it has ever occurred.

26 In a gesture toward the goal-modification requirements, the Secretary included a
27 discussion on the topic in the agency decision at issue. That discussion again acknowledged the
28 hopelessness of meeting the Thirty Percent By 2010 goal and again refused to revise it. The Act
instructed the Secretary to adopt a realistic goal before making the “necessity” determination.
This studied refusal to modify the goal violated Section 13257(e)(2).

What is more, apart from Section 13257 and its fleet-rule process, Section 13254
independently required modification of the goal. Such modifications were supposed to flow, as
needed to remain realistic, from the ongoing periodic reviews required by Section 13254.
Again, Section 13254 required the Secretary to examine the goals for achievability starting

1 October 24, 1995, and periodically thereafter; if the goal was not achievable, then a modified,
2 achievable goal was supposed to have been substituted:

3 If after analysis of information obtained in connection with [the
4 periodic reviews] or other information . . . , the Secretary
5 determines that the goals . . . , including the percentage
6 requirements or dates, are not achievable, the Secretary . . . shall,
7 by rule, establish goals that are achievable

8 42 U.S.C. 13254(b).

9 Thus, the Act imposed a duty to modify the goals in two separate ways: via
10 Section 13254 and via Section 13257, the former being a part of the periodic review process and
11 the latter being part of the municipal/private fleet process. Both were violated in this case.
12 Even today, fourteen years after the first President Bush signed the Act into law, no modification
13 of the goal has ever been made.

14 * * *

15 To this, the Secretary makes the following arguments. *First*, the Secretary argues that the
16 benefits of an AFV rule would only be a 0.2 percent reduction and that this would be too small to
17 make any difference in achieving any goal. This order disagrees.

18 As quoted above, Congress required that a fleet rule would be deemed necessary if
19 (i) the Thirty Percent By 2010 goal, as modified to be realistic, is not expected to be achieved by
20 2010 or such other modified date without such a fleet requirement and (ii) such goal would be
21 achievable through a fleet requirement program in combination with voluntary and other AFV
22 programs. 42 U.S.C. 13257. *These twin elements hinge on the goal as modified to be realistic.*
23 The Secretary could only carry out the statutory test by first modifying the goal so as to be
24 realistic. For example, if the revised goal were reduced from thirty percent to five percent,
25 even a 0.2 percent contribution would go a tenth of the way in closing the gap between where we
26 are now (three percent) and the revised goal (five percent). That in combination with the other
27 AFV programs mentioned might well be enough to trigger a necessity finding. If the revised
28 goal were four percent, then the 0.2 percent contribution would close twenty percent of the gap.
This would not be meaningless.

1 Thirty Percent By 2010 goal under either Sections 13254 or 13257 of the Act once the goal was
2 deemed unacheivable. Likewise, Section 13257(e)(1) dictated that the private/municipal fleet
3 rule “shall be considered necessary and a rule therefor shall be promulgated.”

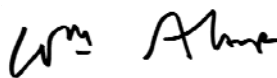
4 Moreover, the policies of NEPA were already promoted by the Act. One of the factors
5 for determining the necessity of the private/municipal fleet rule was the “effect on greenhouse
6 gases.” 42 U.S.C. 13257(l). Furthermore, Section 13257 required the opportunity for public
7 comment in conjunction with the promulgation of the rule. The Act thus already ensured that
8 the fleet rule’s impact on the public and the environment was considered. This order holds,
9 therefore, that the Secretary is not obligated to prepare an impact statement under NEPA in
10 either accepting or rejecting a fleet rule.

11 **CONCLUSION**

12 The agency action reported at Volume 69 of the Federal Register beginning at Page 4219
13 is hereby **VACATED**. Each side shall submit a memorandum setting forth a realistic set of
14 milestones with dates so that the final judgment can require efficient and just relief. Please
15 make these submissions under oath by **MARCH 13, 2006**, each side limited to ten pages.

16
17 **IT IS SO ORDERED.**

18
19 Dated: March 6, 2006.



20 WILLIAM ALSUP
21 UNITED STATES DISTRICT JUDGE