

B-255548

October 18, 1994

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

In your letter of August 3, 1993, and subsequent discussions, you requested our opinion as to (1) whether the Clean Air Act authorizes the Environmental Protection Agency (EPA) to exempt clean fuel fleet vehicles from complying with state-imposed high-occupancy vehicle lane restrictions, and (2) whether the act authorizes EPA to establish standards for Inherently Low Emission Vehicles (ILEVs) for the purpose of giving ILEVs relief from transportation control measures (TCMs) beyond that received by other clean fuel fleet vehicles. For the reasons discussed below, we believe that (1) EPA is authorized to exempt clean fuel fleet vehicles from HOV restrictions, and (2) the clean fuel provisions of the Clean Air Act do not authorize EPA to establish ILEV standards for the purpose of granting the HOV exemption to only those vehicles qualifying as ILEVs.

BACKGROUND

The Clean Air Act Amendments of 1990 established a clean fuel vehicle program, designed to encourage the manufacture and use of alternatively fueled vehicles. The act defines "clean-fuel vehicle" to mean any vehicle that meets the applicable emissions standard.² A "clean alternative fuel" is any fuel used by a clean fuel vehicle.³ Section 242 requires EPA to promulgate standards "for the clean fuel vehicles specified in this part."⁴ Sections 243 and 245

¹42 U.S.C. §§ 7581-90.

²42 U.S.C. § 7581(7).

³42 U.S.C. § 7581(2).

⁴42 U.S.C. § 7582(a).

specify clean fuel vehicles and their associated emissions standards.

Section 246 of the act requires states with "covered" areas⁶ to establish, in their state implementation plans,⁷ a mandatory clean fuel vehicle phase-in program for centrally fueled vehicle fleets. Under section 246(b), the affected states must require entities that operate centrally fueled vehicle fleets to supply a gradually increasing portion of their fleets with vehicles powered by clean alternative fuels.⁸ Section 246(c) requires certain fleet vehicles to meet "accelerated" emissions standards in order to be considered clean fuel fleet vehicles.

Section 246(f) establishes a clean fuel credit program, which allows fleet owners to receive credits for the purchase of ultra-low emission vehicles (ULEVs) and zero

⁵42 U.S.C. §§ 7583, 7585.

⁶42 U.S.C. § 7586. States with "covered" areas are those containing ozone nonattainment areas that EPA has classified as "serious" or worse, or carbon monoxide nonattainment areas with a design value of at least 16.0 parts per million. 42 U.S.C. § 7586(a)(2). Nonattainment areas are areas whose air quality does not meet EPA-established standards.

⁷The Clean Air Act establishes that "[e]ach state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State[.]" 42 U.S.C. § 7407(a). A state fulfills that responsibility by promulgating "a plan which provides for implementation, maintenance, and enforcement" of federally mandated air quality standards. 42 U.S.C. § 7410(a)(1). The state must submit this state implementation plan to the EPA for approval. 42 U.S.C. § 7410(k)(3). Once approved, the plan "become[s] federal law, and [is] fully enforceable in federal court." Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989).

⁸42 U.S.C. § 7586(b). The phase-in requirements commence in model year 1998. *Id.* Section 246 only applies to fleets with 10 or more vehicles. *Id.*; 42 U.S.C. § 7581(5).

⁹42 U.S.C. § 7586(c). The act imposes more stringent standards on light duty vehicles (LDVs), and light duty trucks (LDTs) less than 6,000 lbs. GVWR (gross vehicle weight rating), beginning with model year 2001. 42 U.S.C. § 7583(a), (b). Under section 246(c), fleet LDVs and LDTs under 6,000 lbs. GVWR must comply with the model year 2001 standards as early as 1998. 42 U.S.C. § 7586(c).

emission vehicles (ZEVs).¹⁰ Fleet owners may use credits to offset section 246(b)'s clean fuel vehicle phase-in requirement, or sell the credits to other fleet owners.¹¹ Section 246(f)(4) provides that EPA may establish the ULEV and ZEV standards "solely for the purpose of issuing credits" to fleet owners whose vehicles meet these stricter standards.¹²

Section 246(h) of the act states:

"The Administrator shall by rule, within 1 year after the enactment of the Clean Air Act Amendments of 1990, ensure that certain transportation control measures including time-of-day or day-of-week restrictions, and other similar measures that restrict vehicle usage, do not apply to any clean-fuel vehicle that meets the requirements of this section. This subsection shall apply notwithstanding [title I]."¹³

Title I of the Clean Air Act requires states, among other things, to adopt transportation control measures for certain ozone nonattainment areas classified as "serious," and all ozone nonattainment areas classified as "severe" or worse.¹⁴ Transportation control measures include a variety of methods of reducing vehicle use, such as banning certain vehicles from congested areas during certain times of the day or days of the week, and establishing high-occupancy vehicle (HOV) lanes.¹⁵

¹⁰ 42 U.S.C. § 7586(f)(1). Fleet owners also earn credits for purchasing more clean fuel vehicles than the act requires. Id.

¹¹ 42 U.S.C. § 7586(f)(2)(A).

¹² 42 U.S.C. § 7586(f)(4).

¹³ 42 U.S.C. § 7586(h).

¹⁴ 42 U.S.C. § 7511a(c)(5), (d)(1).

¹⁵ See 42 U.S.C. § 7408(f)(1)(A). The only significant explanation of section 246(h) in the Clean Air Act Amendments legislative history appears in Representative Lent's extension of remarks discussing the amendments. In his remarks, Representative Lent, a supporter of the amendments, indicated his understanding that the TCM exemption was intended to be broad, in order to provide a market incentive for the development of clean fuel vehicles. Representative Lent did not refer to any EPA authority to

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On March 1, 1993, EPA promulgated the rule required by section 246(h),¹⁶ exempting clean fuel fleet vehicles from certain TCMs. The rule requires states with "covered" areas to exempt all clean fuel fleet vehicles from those TCMs

"existing wholly or partially for air quality reasons included in an approved state implementation plan which restrict vehicle usage based primarily on temporal considerations, such as time-of-day and day-of-week [restrictions]."¹⁷

However, the rule states that, with one exception, "[t]his exemption does not include access to high occupancy vehicle (HOV) lanes"¹⁸ As discussed below, the one exception is for ILEVs.

In the rule, EPA defines standards for ILEVs, which are more stringent than the standards applicable to clean fuel fleet vehicles in general.¹⁹ ILEVs are the only vehicles that the rule exempts from HOV restrictions.²⁰ In addition, the preamble to the rule states that EPA intends eventually to exempt ILEVs from all TCMs not primarily related to safety, to the extent practicable.²¹

EPA contends that section 246(h) authorizes the expanded TCM exemption for ILEVs, stating that the section allows EPA

"to tailor which CFFVs [clean fuel fleet vehicles] are entitled to exemption from which TCMs (so long as each sub-set of CFFV is exempt from some vehicle usage restrictions, and every CFFV is

¹⁵ (...continued)
establish a separate TCM exemption for clean fuel vehicles with especially low emissions.

¹⁶ 58 Fed. Reg. 11888 (1993) (codified at 40 C.F.R. § 88.307-94(a)).

¹⁷ 40 C.F.R. § 88.307-94(a).

¹⁸ Id.

¹⁹ Compare 58 Fed. Reg. 11907 with 42 U.S.C. § 7583 (a)-(c) (phase I standards), 42 U.S.C. § 7585.

²⁰ 40 C.F.R. §§ 88.307-94(a), 88.313-93(c).

²¹ 58 Fed. Reg. at 11899.

exempt from time-of-day and day-of-week restrictions)."²²

An attorney in EPA's Office of General Counsel has informed us that the legal views in the preamble represent those of the previous Administration. EPA does not currently have a position on whether section 246(h) authorizes the ILEV program. The ILEV program described in the March 1993 rule is now under review by EPA's Office of Mobile Sources. The attorney told us that the review is focusing on the policy implications of the program, rather than the legal authority for the program.

ANALYSIS

HOV Exemption for Clean Fuel Fleet Vehicles

In our view, EPA is authorized to exempt clean fuel fleet vehicles from HOV restrictions. The statute requires EPA to exempt clean fuel fleet vehicles from "certain" TCMs, "including time-of-day or day-of-week restrictions," and "other similar measures that restrict vehicle usage." Nothing in the language of section 246(h) defines the outer boundaries of the TCMs that may be covered by the exemption, other than that they be "similar" to time-of-day or day-of-week restrictions, and that they restrict vehicle usage. An HOV restriction typically is a time-of-day and day-of-week restriction. Further, there is no question that such a restriction is a transportation control measure that restricts vehicle usage.²³ Therefore, we see nothing in section 246(h) that prohibits EPA from exempting clean fuel fleet vehicles from HOV restrictions under section 246(h).

The sparse legislative history of section 246(h) does not compel a contrary result. The House-passed version of section 246(h) listed HOV restrictions in the same sentence with time-of-day and day-of-week restrictions as types of TCMs specifically covered by the exemption.²⁴ Thus, the House provision contained language that would have expressly required EPA to include HOV restrictions in the section

²²58 Fed. Reg. at 11896.

²³Even if there are HOV restrictions that are in effect 24 hours a day, 7 days a week, in our view such restrictions would be sufficiently similar to the more typical HOV restrictions to be considered one of the "other similar measures that restrict vehicle usage" to which section 246(h) refers.

²⁴H.R. 3030, 101st Cong., 2d Sess. § 201(b) (1990) (reprinted at 136 Cong. Rec. 12038) (permanent ed.).

246(h) exemption. An analogous provision in the Senate bill discussed trip reduction ordinances and vehicle use restrictions, but made no explicit mention of HOV restrictions.²⁵ The Conference Committee adopted the House version, but omitted mention of HOV lanes, and Congress enacted the bill as reported by the Conference Committee. The legislative history gives no explanation for the omission.

While section 246(h) as enacted omits the HOV language, it does not expressly prohibit EPA from exempting clean fuel fleet vehicles from HOV restrictions. Nor can this omission properly be construed as implicitly prohibiting EPA from doing so, where, as here, there is no explanation for the omission,²⁶ and, more importantly, where such a reading would be inconsistent with the apparent breadth of the language of the statute.²⁷ Accordingly, we conclude that

²⁵S.1630, 101st Cong., 2d Sess. §107 (1990) (reprinted at 136 Cong. Rec. 24389 (daily ed. April 18, 1990)).

²⁶The Supreme Court has repeatedly refused to consider congressional failure to enact a given provision as evidence of congressional intent to effect the opposite result, because the Court generally considers congressional inaction to be an inadequate indication of legislative intent. E.g., Brecht v. Abrahamson, 113 S.Ct. 1710, 1719 (1993). On facts similar to those present here, our Office concluded that the deletion of language from a bill, absent an explanation in the legislative history, did not indicate that Congress intended to prohibit the conduct that the deleted language would have specifically authorized. 63 Comp. Gen. 498, 501-02 (1984).

²⁷In this connection, section 1016(a) of the Intermodal Surface Transportation Efficiency Act (ISTEA), enacted after the Clean Air Act Amendments of 1990, deals with HOV restrictions. It delegates to the states the responsibility for defining the number of occupants a vehicle must have in order to be considered a high-occupancy vehicle. 23 U.S.C. § 102(a). However, this provision does not purport to modify EPA's authority under the previously enacted section 246(h). Moreover, we find nothing in the legislative history suggesting that Congress, in enacting ISTEA, intended to restrict or modify EPA's authority. Nor is there a conflict between the two provisions. Thus, section 1016 authorizes states to define what constitutes a high-occupancy vehicle, but does not purport to insulate HOV restrictions from the operation of other applicable federal laws, including section 246(h) of the Clean Air Act. Section 1016 of ISTEA does not implicitly repeal or modify

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EPA is authorized to exempt clean fuel fleet vehicles from HOV restrictions.

Special HOV Exemption for ILEVs

With regard to the ILEV program, we believe that section 246(h) does not authorize EPA to single out clean fuel fleet vehicles that satisfy ILEV standards for the purpose of providing TCM exemptions beyond those received by other clean fuel fleet vehicles. Section 246(h) requires the Administrator to ensure that "certain" TCMs do not apply to "any clean-fuel vehicle that meets the requirements of this section." The provision does not purport to grant the Administrator discretion to determine which clean fuel fleet vehicles will benefit from the section 246(h) exemption. Under the language of the statute, "any" such vehicle meeting the requirements of section 246 receives it. A vehicle meets the requirements of section 246 if it is (1) a clean fuel vehicle (that is, if it complies with the applicable emissions standards established in section 243, 245, or 246), and (2) is part of a fleet subject to section 246.

As we indicated above, section 246(h) clearly gives EPA discretion to determine which TCMs fall within the exemption. However, once EPA makes that determination, the same set of exemptions must apply to "any clean fuel vehicle" that meets the section's requirements. We discern nothing in the provision's language that authorizes EPA to treat one type of clean fuel fleet vehicle differently from another.

In addition, the structure of the clean fuel provisions of the Clean Air Act strongly suggests that EPA's authority to establish additional benefits for particular clean fuel fleet vehicles is limited. The only discussion of such authority appears in section 246(f), authorizing the establishment of ULEV and ZEV standards. However, section 246(f) authorizes EPA to use those standards "solely" for the purpose of administering the credit program. Thus, EPA may not use these standards for the purpose of establishing an expanded TCM exemption. We find unpersuasive EPA's assertion that it may create standards for ILEVs, which are not specifically mentioned anywhere in the act, to establish an expanded TCM exemption for ILEVs, while the standards

²⁷ (...continued)

section 246(h). See TVA v. Hill, 437 U.S. 153, 189-90 (1977).

that section 246 specifically authorizes EPA to establish-- for ULEVs and ZEVs--are unavailable for that purpose.²⁸

Accordingly, we disagree with EPA's statements in the preamble to the March 1993 rule, to the effect that section 246(h) authorizes the creation of a multi-tiered TCM exemption for various types of clean fuel vehicles. As we noted above, while section 246(h) gives EPA discretion to decide which TCMs are affected by the exemption, it does not authorize EPA to tailor the extent of the exemption to the emissions levels of various clean fuel vehicles. Thus, we conclude that EPA is not authorized to grant an HOV exemption solely to ILEVs. Nor is EPA authorized to extend the ILEV exemption to all non-safety related TCMs, as the agency stated was its intention.²⁹

CONCLUSION

For the reasons discussed above, we believe that (1) EPA is authorized to exempt clean fuel fleet vehicles from HOV restrictions, and (2) EPA is not authorized to establish ILEV standards for the purpose of granting the HOV exemption to only those vehicles qualifying as ILEVs.

We hope our comments are helpful to you. In accordance with our usual procedures, this opinion will be available to the public 30 days from its date.

Sincerely yours,

/s/ Robert P. Murphy
for Comptroller General
of the United States

²⁸We are aware that "where a statute is silent or ambiguous with respect to an issue" courts will give deference to an agency's statutory interpretation. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984). Here, however, section 246(h) is neither silent nor ambiguous with regard to EPA's authority to differentiate between types of clean fuel fleet vehicles for the purpose of administering the TCM exemption. Accordingly, courts would not be required to accord EPA's March 1993 interpretation deference in this case. See Presley v. Etowah County Commission, 112 S.Ct. 820, 831 (1992).

²⁹EPA has cited to no other portion of part C of Title II of the Clean Air Act for authority to provide an expanded TCM exemption to ILEVs, and we have found none.

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DIGEST

The Clean Air Act authorizes the Environmental Protection Agency (EPA) to exempt clean fuel fleet vehicles from high-occupancy vehicle (HOV) restrictions. However, the clean fuel provisions of the Clean Air Act do not authorize EPA to establish ILEV standards for the purpose of granting the HOV exemption only to those vehicles qualifying as ILEVs.