COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-217744.3

November 18, 1985

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

Dear Mr. Chairman:

Your letter of July 9, 1985, asked for our comments on two additional matters concerning the Environmental Protection Agency's (EPA) execution of its fuel economy testing responsibilities under the Corporate Average Fuel Economy (CAFE) program. Specifically, you asked whether EPA's recent final rulemaking effort, 50 Fed. Reg. 27172 (1985), meets the statutory requirements for future changes to test procedures. As we see it, if EPA does not justify each future use of informal procedures to issue test changes, it will be in violation of its statutory charge. You also asked for our analysis of recent comments by the Center for Auto Safety (Center) suggesting that another round of public notice and comment should have been solicited before the recent final rule became final. We disagree with the Center's position and find that EPA's action is procedurally adequate.

CHRONOLOGY

A brief recounting of the events which preceded this opinion will aid in applying the legal analysis to the facts. CAFE was created in 1975 as title III of the Energy Policy and Conservation Act, Pub. L. No. 94-163, § 301, 89 Stat. 871, 901. It is codified at 15 U.S.C. §§ 2001-12 (1982). Responsibility for administering CAFE is divided between the National Highway Traffic Safety Administration (NHTSA), which sets fuel economy standards and enforces penalties for noncompliance, and EPA, which designs and conducts the tests to determine fuel economy and calculates each manufacturer's annual CAFE rating.

In 1978 and later years EPA made changes to the test procedures used to determine CAFE ratings. It used informal Advisory Circulars to notify manufacturers of its planned changes, but no public record was developed, as would have been done if EPA had followed the notice and comment provision of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982). Several automobile manufacturers challenged EPA's

actions in the Sixth Circuit Court of Appeals, on the ground that the agency had exceeded its authority by informally making the test changes which resulted in lower CAFE ratings.

On January 26, 1982, the Sixth Circuit Court issued its order in General Motors v. Costle, Nos. 80-3271, 80-3272 and 80-3655. The court ordered EPA to initiate rulemaking proceedings considering appropriate adjustments to compensate manufacturers for the reductions in CAFE ratings suffered because of the informal test changes. The court did not decide the issue of whether the APA must be observed when making test changes.

On December 21, 1983, EPA published a Notice of Proposed Rulemaking (NPRM), setting forth several alternatives for achieving CAFE adjustments. 48 Fed. Reg. 56526 (1983). On December 7, 1984, EPA supplemented its earlier notice. 49 Fed. Reg. 48024 (1984). The supplemental notice considered CAFE adjustments for several matters which developed after the GM suit had been concluded.

On June 3, 1985, we issued the first of a series of opinions to you on the CAFE program (B-217744). Our conclusions in that opinion control the instant question, and they will be discussed fully below. On June 20, 1985, the Center for Auto Safety registered its complaint about the soon-to-be-issued final rule concerning CAFE adjustments made in response to the Sixth Circuit's order and the two notices of proposed rulemaking. On June 22, 1985, the final rule was issued. 50 Fed. Reg. 27172 (1985). On June 25, 1985, the EPA Administrator wrote to you promising that in the future rulemaking would be appropriately used.

FUTURE TEST CHANGES

The issue you have asked us to decide is whether EPA can continue to make changes in test procedures through informal Advisory Circulars, as it announced it would do in 50 Fed. Reg. 27172, 27183 (1985). In support of its continued use of Advisory Circulars, EPA stated its view that it is "unnecessary and disruptive to precede the implementation of a test procedure change with a rulemaking unless the nature of the change requires a revision of the regulations." Id. However, since the test procedures have not generally been the subject of regulations in the past, it is unlikely that future changes would affect existing regulations.

We recognize there is a certain inconsistency in holding that EPA must amend nonexistent regulations or create

regulations so that it can amend them later, but the process of complying with the statute must begin somewhere. The statute declares that "test procedures shall be established * * * by rule" (15 U.S.C. § 2003(d) (1982) (emphasis added)), and we see no way to interpret that language generally to permit informal methods of issuing test procedures or changes.

Once the statutorily-envisioned framework of regulations is in place, EPA can make appropriate use of the procedures allowed for avoiding long leadtimes (15 U.S.C. § 2003(d)(3) "technical and clerical amendment[s]"). Although EPA has never yet made use of this exception, we can foresee a legitimate rulemaking in which EPA declares that any change with zero CAFE impact is "technical" or "clerical." Additionally, the general exceptions to the APA's notice and comment requirements could also be used to make specific test changes informally. These exceptions are not amenable to blanket advance approval by rule, but must be individually claimed and defended if challenged.

As to future test changes, our earlier opinion (B-217744, June 3, 1985), stated that rulemaking was required "no matter how cumbersome," unless EPA claimed one of the three specific exceptions. Owing to the proximity in time of our June 3 opinion and the June 22 issuance of the final rule, EPA could not reasonably have been expected to take account of our advice in the rule itself. However, it can and should abide by the statute when and if it issues future test changes. This means justifying each future Advisory Circular under one of the three exceptions or using rulemaking instead. If EPA issues Advisory Circulars as the final rule announced, it will be in violation of the statute, in our view.

EPA's proposal to make compensatory CAFE adjustments by rule if it is asserted that a particular informal change lowers the CAFE rating does not, in our view, cure its failure to either make test procedure changes by rule or to justify its failure to do so under one of the statutory exceptions. As a practical matter, the promise of compensatory CAFE adjustments may satisfy manufacturers, but CAFE adjustments cannot compensate for the loss of public participation in future decisions about the test procedures.

TIMING OF FINAL RULE

In its letter dated June 20, 1985, anticipating issuance of the final rule making CAFE adjustments, the Center for Auto Safety objected to the issuance of a final rule. Based on the earlier record, the Center claimed (1), that EPA was obligated

to publish its calculation method for determining adjustments before adopting a final rule and (2), that the record contained insufficient notice to the public of the magnitude of the forthcoming CAFE adjustment. The Center cited Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972), as the basis for its contention that the record is deficient.

In Wagner, NHTSA had proposed a rule which would have eliminated previously-permitted failure rates from performance standards for automobile safety flashers and turn signals. In its final rule, NHTSA not only eliminated the failure rate, but also substantially lowered the performance standards for the devices. Wagner challenged the latter part of the rule as having been issued without notice and opportunity for comment.

The Third Circuit Court of Appeals held that the rulemaking was deficient. The court observed that most interested parties could not have predicted that NHTSA would lower the standard as well as change the failure rate as it had announced. Even though some parties commented on reducing the standards as an alternative to NHTSA's proposal, many of those who might have commented were excluded because they did not realize the agency was also considering lowering standards. The court went on to state that the opportunity to contest administrative actions after the fact is not a substitute for the right to participate before a final rule is promulgated. 466 F.2d at 1020. In other words, "notice and comment" must actually provide notice in order to be effective under the APA.

Here, the CAFE adjustment record provided at least enough information to determine what subjects the final rulemaking would address. Wagner stands for the proposition that notice is inadequate in situations where it is not possible to determine from an NPRM that a subject is even under consideration. It does not hold that all the details of a proposed rule must be published before a rule can be finalized.

The defect in the Center's analysis is its apparent concentration only on the Supplementary NPRM published at 49 Fed. Reg. 48024 (1984). The Center is probably correct in stating that the Supplementary NPRM, standing alone, contains insufficient information to justify a final rule making significant CAFE adjustments. However, the Supplementary NPRM clearly does not stand alone; it must be read in conjunction with the earlier NPRM published in December 1983. 48 Fed. Reg. 56526.

From the original NPRM, one can easily determine that EPA was considering the formulae proposed by GM and Ford for determining manufacturer-specific CAFE adjustments. Examination of the public docket for the NPRM would have provided an opportunity to study all the details of both proposals, including the calculation methods. Also, contrary to the Center's claim, the NPRM also put the public on notice that the resulting CAFE adjustments could be of major proportions. GM claimed a .6 mpg annual adjustment (48 Fed. Reg. 56528) on the first set of test changes and the Supplementary NPRM would have added to that. EPA even conceded in its original NPRM that some manufacturers were harmed as much as .4 mpg by the early test changes. 48 Fed. Reg. 56531. Actual adjustments listed in the final rule are in the .5 mpg range and adjustments on this scale were not unexpected. For these reasons, we do not consider either of the Center's objections to be well founded.

Unless released earlier by you or you request a longer period, this opinion will be available to the public 30 days from today.

Sincerely yours,

for Milton J. Socolar

Comptroller General
of the United States