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Response to Comments:

Motor Vehicle and Engine Compliance Program Fees for: Light-Duty Vehicles; Light-Duty Trucks; Heavy-Duty Vehicles and Engines; Nonroad Engines and Motorcycles

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Certification and Compliance Division
Office of Transportation and Air Quality
U.S. Environmental Protection Agency

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I. Introduction

On August 7, 2002, EPA published in the Federal Register (67 FR 51402) a Notice of Proposed Rulemaking (NPRM) titled the Motor Vehicle and Engine Compliance Program Fees for: Light-Duty Vehicles; Light-Duty Trucks; Heavy-Duty Vehicles and Engines; Nonroad Engines and Motorcycles. A public hearing on the proposal was held in Ann Arbor, Michigan on September 19, 2002. The proposal announced the opportunity for written public comment until October 19, 2002. EPA received comments before and after the close of the comment period. All comments were fully addressed to the extent possible.

Complete transcripts of the public hearing and the full text of each comment letter, along with supporting information used in developing the regulation, are found in Docket No. OAR-2002-0023 (this docket was originally referenced as A-2001-09). The docket is available for public viewing at the following address: EPA Docket Center (EPA/DC), Public Reading Room, Room B102, EPA West Building, 1301 Constitution Avenue, NW, Washington, D.C. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at http://www.epa.gov/edocket/ to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

EPA received several comments. A copy of each comment letter is included in the rulemaking docket. All of the comments have been carefully considered, and where determined to be appropriate, changes have been made to the final regulations.

This document summarizes the written and oral comments submitted at the public hearing and delivered to EPA during and after the comment period.

This document is divided into eight sections. Each section comprises issues which address the section heading or topic.

EPA published in the Notice of Proposed Rule Making (NPRM) fees that reflected our projected test plans for the regulated industries. In the time between the NPRM and the FRM, EPA has gathered additional information about the programs and tests that it plans to conduct and is in a better position to project its

compliance programs for 2004 and beyond than it was at the time of that the NPRM was written. As a result of an internal reassessment of testing capabilities and requisite levels of appropriate compliance oversight, along with comments received, EPA made several adjustments which have resulted in a change in costs of certificates for several industry categories. The changes are described in detail in the preamble to the final rule, section III, **What Are the Changes Made to the Proposed Cost Analysis?** The issues are discussed more fully in the sections 2 and 3 below. The changes are also reflected in several new worksheets based on "Appendix C" which was attached to the "Motor Vehicle and Engine Compliance Program Cost Analysis" document. Thus several new worksheets have been generated from those originally found in Appendix C and EPA also provides an additional description of the changes to these worksheets. The new worksheets and description are available in the docket for this rule and are called "Updated Cost Analysis."

II. List of Commenters and Abbreviations

Below is a list of commenters that submitted substantive comments to the notice of proposed rulemaking. It is not a complete list of the commenters. All commenters and comments submitted are available in the above-mentioned docket.

Commenters	**Abbreviations**
Alliance of Automobile Manufacturers	Alliance
Association of International Automobile Manufacturers	AIAM
Briggs and Stratton	
Echo Incorporated	Echo
Engine Manufacturers Association*	EMA
Motorcycle Industry Council	MIC
Mercury Marine*	
Outdoor Power Equipment Institute	OPEI
Sierra Research	SR
Vehicle Services Consulting, Inc.*	VSC

*Organization presented oral testimony at the public hearing

III. Comments and Responses

Section 1: Legal Authority

1.1 Authority to Assess Nonroad Fees

What We Proposed:

We proposed an update to our existing Motor Vehicle and Engine Compliance Program (MVECP) fees regulations under which we assess fees for highway vehicle and engine's certification and compliance activities. We also proposed the collection of fees for nonroad engines certification and compliance activities which we have regulated since our initial fees rulemaking. The "nonroad engine category" includes: nonroad compression engines, marine spark-ignition outboard/personal-water-craft, locomotive, small spark-ignition, recreational vehicles (including, but not limited to, snowmobiles, off-road motorcycles and all terrain vehicles), recreational marine and compression-ignition engines, large spark-ignition engines (over 19 kilowatts (kW)) and marine spark-ignition/inboard-sterndrive engines.

Our proposal examined: the Independent Offices Appropriation Act (IOAA), several provisions of the Clean Air Act (CAA or Act), the Office of Management and Budget's (OMB's) Circular No. A-25, and various court decisions including *Engine Manufacturers Association v. EPA*, 20 F.3d 1177 (D.C. Cir. 1994) which considered the Environmental Protection Agency's (EPA's or Agency's) initial fees rulemaking.

We explained that section 217 of the CAA authorizes the collection of fees for our new nonroad vehicle and engine certification and compliance activities. Section 217 allows the Agency to "recover reasonable costs" associated with: new vehicle or engine certification activities conducted under section 206(a) of the CAA, new vehicle or engine compliance monitoring and testing under section 206(b) of the CAA (including such activities as selective enforcement audits (SEA) and production line testing (PLT)), and in-use vehicle or engine compliance monitoring and testing under section 207(c) of the CAA. We also explained that section 213 creates a statutory enforcement program which generally mirrors that which Congress created for the regulation of new highway vehicles and engines. We noted that EPA's nonroad standards created under section 213 are subject to the same requirements (*e.g.*, sections 206, 207, 208, and 209) and implemented in the same manner (including certification, SEA, and in-use testing) and under the same sections (as those referenced

in section 217) as regulations for new highway vehicles and engines under section 202 (with modifications to the implementing nonroad regulations as the Administrator deems appropriate). We then concluded that because the text of section 217 does not specify either highway or nonroad engines and vehicles, and because the certification and compliance activities related to both are pursuant to sections 206 and 207, we believed collecting fees for new nonroad vehicles and engines' certification and compliance activities under section 217 were appropriate as an additional compliance requirement.

We also stated that the IOAA creates additional and independent authority for EPA to collect fees due to the same special and unique benefits that manufacturers of both new highway and nonroad vehicle and engine manufacturers receive from EPA under the certification and compliance program.

What Commenters Said:

We received several comments that questioned our authority to assess and collect fees for our nonroad certification and compliance program activities. EMA argued that the IOAA neither overrides nor provides the EPA with expanded fee assessment authority since section 217 specifically sets out the Agency's authority to assess fees and also incorporates the IOAA by reference. EMA also argued that Congress would not have enacted the specific provisions of section 217 if the IOAA was still intended to apply to EPA's mobile source certification and compliance activities.

In addition, EMA argued that since section 217 is entitled: "Motor Vehicle Compliance Program Fees," Congress could not have intended that this section would authorize fees' assessment for nonroad compliance activities. The commenter further noted the distinction drawn between motor vehicle and nonroad vehicle in sections 216(2) and (11) and the omission of nonroad vehicle and engine in section 217 even though both sections 213 and 217 were promulgated as part of the 1990 Amendments. EMA also pointed out that section 213(d) specifically subjects the nonroad standards to sections 206, 207, 208 and 209 but fails to incorporate or even mention section 217.

The Motorcycle Industry Council questioned the applicability of section 217 to off-road motorcycles and all-terrain vehicles (ATVs) and further urged the Agency not to assess fees until

clarification of the Agency's authority and issuance of applicable emission standards for these categories.

Another commenter argued that EPA does not have the authority under section 213 to assess fees for nonroad engines and therefore, lacked authority to assess fees for lawn and garden engines. This commenter also considered our discussion of our authority to assess fees for non- road engines and vehicles as "tortured."

Our Response:

EPA disagrees with these comments. EPA confirms its view that section 217 authorizes the Agency to recover all reasonable costs associated with certification and compliance activities for nonroad vehicles and engines, including nonroad equipment. EPA also believes that action taken under section 217 is to be consistent with the IOAA. We also believe that even if section 217 does not extend to nonroad vehicles and engines, then the IOAA separately provides the Agency with authority to assess and recover fees for nonroad and engine certification and compliance, and section 217 does not limit or override the IOAA.

A plain reading of section 217 indicates that EPA may recover the costs associated with all of its vehicle and engine certification and compliance programs conducted under sections 206 and 207 of the Act. Under section 217, the Agency may recover the reasonable costs associated with "new vehicle or engine certification" under section 206(a), "new vehicle or engine compliance monitoring and testing" under section 206(b), and "in-use vehicle or engine compliance monitoring and testing" under section 207(c). 42 U.S.C. § 7522(a). Under section 213(d), the standards for new nonroad vehicles and engines are subject to all the applicable requirements of sections 206 through 209. The provisions of sections 206(a), 206(b) and 207(c) are therefore applicable to emissions standards for nonroad engines. Here, the nonroad certification and compliance activities for which EPA is adopting fees are actions taken pursuant to these specific provisions. These nonroad costs are clearly costs for "new vehicle or engine certification" under section 206(a), "new vehicle or engine compliance monitoring and testing" under section 206(b), and "in-use vehicle or engine compliance monitoring and testing" under section 207(c).

Section 217 expressly allows for recovery of costs associated with "vehicle or engine" certification and compliance, and nonroad

vehicles and engines are clearly "vehicles" and "engines." CAA section 216(10), (11). The text of section 217 does not limit its scope to "motor vehicle or engine" certification and compliance programs. Congress was clearly aware that the terms motor vehicle or engine are different from the terms nonroad vehicle or engine, and in section 217 chose to use the more general terms "vehicle" and "engine" to identify the scope of authority under section 217. Congress defined motor vehicles and engines distinct from nonroad vehicles and engines, but subjected them both to sections 206(a), 206(b) and 207(c), as well as other provisions in Title II. Congress authorized the same fundamental certification and compliance framework for both nonroad and motor vehicle programs, and used language in section 217 that would then allow EPA to collect fees for its certification and compliance costs for both motor vehicles and engines and nonroad vehicles and engines. Congress likely would have expressly employed the term "motor vehicle or engine,"[1] instead of "vehicle" or "engine," had it intended to limit the reach of section 217 to motor vehicle or engine certification and compliance activity. There also is no specific provision in section 217 that can be read as precluding EPA from assessing fees for nonroad engines and vehicles. Collecting fees to recover the certification and compliance costs associated with nonroad engines and vehicles therefore is within the plain meaning of the language Congress used in section 217.

Moreover, there is nothing in the legislative history for section 217 to support the commenters' narrow reading. Rather, legislative history only evinces an intent for the Agency to "recover the costs associated with operating" compliance and certification programs. [H.R. 101-490, May 1990, 1990 U.S.C.C.A.N. 3355]. The terms used here are general in nature and reasonably indicate an intention to recover such certification and compliance costs. There is no indication in this text that Congress intended to recover only some of these costs, those associated with motor vehicles and engines. Congress likely would have at least identified or mentioned the limitation of section 217 to motor vehicles and engines and the inapplicability to nonroad vehicles and engines in this legislative history.

If, as the commenter suggests, EPA were to subject all nonroad engines and vehicles to the same applicable requirements

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[1] See, *for example,* section 218: "[t]he Administrator shall promulgate regulations applicable to motor vehicle engines and nonroad engines..." 42 USC § 7553 (emphasis added).

as on-highway vehicles and engines except for fees assessment, this narrow reading of section 217 would not comport with the stated congressional intent that we "recover the costs associated with operating" our certification and compliance programs. [H.R. 101-490, May 1990, 1990 U.S.C.C.A.N 3355]. EPA's interpretation avoids this result and, consistent with the intent of section 217 and the IOAA, provides a reasonable mechanism to equitably collect fees for specific private benefits provided by the agency.

Commenters argue that Congress adopted both sections 213 and 217 in the 1990 amendments, but failed to specifically identify nonroad certification and compliance costs in section 217, and failed to reference section 217 in section 213(d), both indicating that Congress did not intend to include nonroad engines and vehicles in section 217's authority to collect fees. As noted above, this fails to account for the plain meaning of the language employed in section 217 and 213(d). In section 213(d), Congress specifically stated that nonroad engines and vehicles would be subject to the certification and compliance requirements of section 206 and 207, along with other provisions unrelated to fees. Congress also stated in section 217 that EPA could collect fees for costs related to engine and vehicles subject to these specific certification and compliance provisions in sections 206 and 207. Congress did not need to specifically mention nonroad engines and vehicles in section 217, and did not need to specifically mention section 217 in section 213(d) to authorize the collection of nonroad related fees, as the language it did use leads directly to that result. Similarly, Congress did not need to specifically mention motor vehicles or engines in the text of section 217 to authorize collection of fees for motor vehicle and engine certification and compliance costs under sections 206 and 207. The reference to section 206(a), 206(b) and 207(c) brings in both motor vehicle and nonroad related costs.

Clearly Congress could have made such specific references, but it instead used broader language in section 217 and a specific tie into actions under sections 206 and 207, where the plain meaning then covers both nonroad and motor vehicles and engines. It did not need to specifically refer to nonroad engines and vehicles to include them in section 217. The lack of specific references cited by commenters does not detract from the plain meaning of these provisions, and does not lead to the implication drawn by commenters. The plain text of section 217, read in combination with section 213(d), indicates that Congress intended to authorize collection of fees for both nonroad and motor vehicles and engines. There is no indication in the text of

either section 217 or section 213(d) that Congress intended to limit section 217 to motor vehicles. This is not a tortured interpretation, but a reasonable reading of the language used by Congress.

The Agency also disagrees with the contention that the title of section 217 - "Motor Vehicle Compliance Program Fees"- indicates that Congress did not intend to authorize assessment of fees for nonroad vehicles and engines. "Headings and titles are not meant to take the place of the detailed provisions of the statutory text; nor are they necessarily designed to be a reference guide or a synopsis." *Thistlethwaite v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 866 (2d Cir. 1997)* (Internal quotation marks and alterations omitted), rather, "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission 447 U.S. 108, 100 S. Ct. 2055 (1980).* Here, both the plain language of section 217 and it's legislative history indicate an intention to authorize collection of fees for all of the new vehicle and engine certification and compliance actions undertaken by EPA under section 206(a), (c) and 207(c). They provide no indication of an intention to limit such authority to motor vehicles and engines. In these circumstances, the use of the term "motor vehicle" in the heading of section 217 does not support rejecting a conclusion based on the language actually used by Congress.

Regardless of whether section 217 authorizes the collection of fees for costs related to nonroad engines and vehicles, the IOAA does authorize EPA to assess and recover fees associated with implementing the nonroad engines and vehicles certification and compliance programs. The plain language of the IOAA allows Agencies to charge and recoup reasonable costs for services that confer specific benefits upon identifiable beneficiaries[2]. It authorizes federal agencies to "impose a fee only for a service that confers a specific benefit upon an identifiable beneficiary." *Engine Manufacturers Association (EMA) v. EPA, 20 F.3d 1177, 1180 (D.C. Cir. 1994).* That case indicates that the certification and compliance actions for which EPA is collecting fees do in fact

[2] "It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible." 31 U.S.C. § 9701(a).

confer a specific private benefit. "In a regulated industry a certificate of approval [such as a certificate of conformity] is deemed a benefit specific to the recipient." *Id.*

There is nothing in the text of the IOAA that indicates the IOAA does not apply to collection of nonroad related costs, assuming section 217 does not authorize such fees. The question then is whether section 217 itself limits the scope of the IOAA with respect to nonroad certification and compliance costs that are otherwise outside the scope of section 217.

Nothing in the text of section 217 indicates that it limits the IOAA in areas not covered by section 217. The introductory text of section 217 refers to the IOAA, stating that EPA's action under section 217 is to be "consistent with" the IOAA. The clear meaning of that phrase is that EPA is to apply the criteria of the IOAA in promulgating fees under section 217. It indicates an intention that action taken under section 217 is to be consistent with the IOAA. It does not indicate that Congress intended to deviate from, limit, or override the IOAA in areas outside the scope of section 217.

It seems quite unlikely that Congress would limit the reach of the IOAA in such an oblique fashion in section 217. If Congress intended to amend or overrule the IOAA through section 217, Congress likely would have used language indicating that intent. Instead Congress just generally provided that section 217 is to be read "consistent" with the IOAA. See, *Chisom v. Roemer*, *501 U.S. 380, 111 S.Ct. 2354 (1991)*. Such an important limitation likely would be clearly discernable from the Act and the legislative history of section 217, and it is not.

The enactment of section 217 even though the IOAA was already in existence does not indicate otherwise. Section 217 serves several valid functions, none of which is related to or indicate an intention to limit or overrule the IOAA for areas not covered by section 217. For example, section 217 creates the fees fund and specifies that fees collected are to be deposited in a special account at the United States Treasury. It also resolves any doubt that a certification and compliance program can be basis for fees. The reference to the IOAA in section 217 is best read in this context. Moreover, reading section 217 as overriding the provisions of the IOAA would amount to a repeal by implication which is generally disfavored.

Commenter's argument would mean that EPA is precluded from recovering the costs associated with the nonroad vehicle or engine certification and compliance program under either the IOAA *or* section 217. This narrow reading of section 217, as overriding the IOAA, would result in our conferring the specific benefits of our certification and compliance program on non- road engine manufacturers without the authority to recover associated costs for providing this service. Such an interpretation would be inconsistent with the overall purpose of the IOAA - that agencies be "self-sustaining" by charging fees to recover costs associated with rendering services to identifiable beneficiaries. Commenter's interpretation also does not have any clearly limited boundaries. The interpretation begs the question of the extent to which section 217 limits the IOAA for areas outside the scope of the IOAA. Is it limited to nonroad certification and compliance activities? Is it limited to other activities under Title II of the Act? Does it extend to all other EPA actions under the Act? The lack of a clear boundary to the limits of IOAA authority under commenter's interpretation indicates it is neither a likely nor reasonable interpretation of Congressional intent underlying section 217.

EPA believes the best interpretation of section 217 and the IOAA is to read them as acting in harmony and in conjunction with each other. For areas covered by section 217, EPA's actions under that section are to be consistent with the IOAA. For areas not covered by section 217, the IOAA continues to be in effect as before section 217 was adopted. This will appropriately ensure that fees' assessment for all of the Agencies programs will be adequately addressed.

Since a nonroad engine manufacturer, similar to the on-highway engine manufacturer, "obtains a benefit from the entire [EPA] compliance program," we believe we may recover the reasonable costs of compliance testing, by a fee that does not exceed the value of the benefit derived by the manufacturer, under the IOAA. *See, EMA, 20 F.3d at 1181 (D.C. Cir. 1994)*. Thus, we believe that if section 217 is inapplicable, and we do not believe so, the IOAA would provide authority to assess fees for nonroad engines and vehicles.

In light of the foregoing, we disagree with the commenters' narrow interpretation of section 217. Accordingly, we believe that it is reasonable to read section 217 as providing the requisite authority to collect fees associated with nonroad certification and compliance activities. EPA also believes it is

reasonable to read the IOAA as providing independent authority for assessment of fees for nonroad engine compliance and certification activities, if section 217 does not authorize such assessment. EPA believes today's action is appropriate under either section 217 or the IOAA.

Similarly, with regard to comments asserting our lack of fees' assessment authority for other nonroad engines such as off-road motorcycles, ATVs and lawn and garden engines, we believe as discussed above that both section 217 and the IOAA provide us with the requisite authority to "recover the reasonable costs" associated with the certification and compliance programs for these nonroad engines.

We also do not believe it necessary to further "clarify" our authority to collect nonroad fees. We set forth the basis for our authority within the NPRM and today's action confirms that authority. We separately address the suggestion to defer fees' collection until issuance of the off-road motorcycles and ATVs emission standards in section 1.2. below.

1.2 Authority to Recover Anticipated Costs for Proposed Programs

What We Proposed:

EPA published new fees for all industries in the fees rule NPRM, Table III.D-1, 67 FR 51410. EPA updated fees for light-duty vehicles, motorcycles and heavy-duty highway engines and vehicles that were covered by EPA's original fees rulemaking. The new fees for these industries are determined considering inflationary costs, additional costs associated with programmatic decisions, and some future costs known at the time of the proposal that were also known to be necessary to maintain an effective MVECP.

We also proposed fees for certain certification request types in the nonroad industry based on the fact that EPA has had emission regulations in place, prior to the fees proposal, covering such nonroad industries and thus an on-going compliance program exists for these industries. These industries include nonroad (NR) compression-ignition (CI), marine spark-ignition (SI) outboard/personal water craft, small nonroad SI, and locomotives. Some of these industries have had emissions programs in place since the 1996 model year.

In addition, we proposed fees for certain nonroad industries (marine CI > 37kW) where EPA had finalized the applicable emission regulations for that industry prior to the fees proposal but the compliance programs had not yet been implemented. Such industries would only pay a fee for certification at the time of their initial applications for certification.

Similarly, EPA also proposed fees for certain nonroad industries (large nonroad SI > 19kW, recreational marine > 37kW, and recreational vehicles (off-road motorcycles (MC), ATVs, snowmobiles, etc)) for which emission regulations had been proposed at the time of the fees proposal (August 7, 2002) but for which no emission regulations had yet been finalized.

Lastly, for a certain nonroad industry (marine SI inboard/sterndrive) we proposed fees although the emission regulation and proposal was just under development at the time of the fees proposal.

We explained that for those regulatory programs with proposed but not yet finalized emissions standards and regulatory programs with yet to be proposed emissions standards, the associated fees would only apply after the applicable regulations became effective or in other words, at the time a manufacturer requests certification (67 FR at 51408). We also explained that we knew enough of the Agency's anticipated costs for these programs. Id. We further explained that we did not believe our fees proposal for these programs would prejudge the outcome of those ongoing rulemakings. Id. We also indicated we were considering where to finalize fees for those programs with no emissions standards. [67 FR at 51410]

To determine our projected costs, we explained that the Agency conducted an in-depth analysis of the costs incurred in operating the MVECP (67 FR at 51409). We also set forth in greater detail all of our associated direct and indirect costs in the Cost Analysis Document, which is included in the docket of this rulemaking.

For many of the certification request types in the "Other" fee category, which primarily consists of nonroad groups, EPA projected its cost based on a minimum level of effort needed to effectively review and process certification applications and some limited testing. It should be noted that EPA also recognized that many of the emission regulations for these industries include the authority to conduct other MVECP type activities beyond

certification but EPA chose to not charge for such activities as none are yet envisioned by the Agency.

What Commenters Said:

EMA maintains that it is improper for EPA to quantify fees for anticipated nonroad certification and compliance programs that have not been implemented and in some cases not even proposed. EMA asserts that section 217 only authorizes the Agency to "recover" the actual costs that it incurs for administering established certification and compliance programs - "[T]he Administrator may ... recover ..." EMA provides what it feels to be the plain meaning of "recover" which is "to get back." EMA contends that for the industry categories noted above, there are no such actual costs for the Agency to tally and then seek to recover or get back. There is no proper basis for the Agency to merely anticipate expenses that will be incurred in the future. EMA maintains that EPA should not impose fees for nonroad categories that were not finalized before the NPRM, nor should EPA include fees associated with nonroad rulemakings that have not yet been finalized and published.

Additionally, EMA believes it is unlawful and improper to establish fees for programs that have not even been proposed as it presupposes the outcome of such rulemakings and so undermines and trivializes the administrative rulemaking process. Without knowledge of the final outcome of the predicate rulemaking the public cannot participate meaningfully in the rulemaking. EMA urges EPA to wait for the underlying regulatory measures to be finalized and implemented before charging manufacturers for anticipated costs.

The Alliance and the Association of International Automobile Manufacturers (AIAM) state that EPA incorrectly bases its costs on "budget requests" and "plans" rather than actual "expenditures." It is inappropriate to base costs on projections. EPA should account for "actual expenditures" or where costs have occurred. In addition, EPA must account for each employee who works on MVECP activities and subtract out time not spent on such activities.

The Motorcycle Industry Council asserts that the compliance fees should not include anticipated or projected costs, future plans and services. The commenter further states that only when actual costs are determined should a fair fee be established and the costs recovered. The Council further requested that the Agency defer finalizing fees for off-road motorcycles and ATVs

until the Agency finalizes the applicable emissions requirements and at that time, issue the applicable fees or a "separate but concurrent fee rule."

The Outdoor Power Equipment Institute (OPEI) supports EMA's comment stating that EPA lacks the statutory authority to recover anticipated costs for proposed programs prior to their adoption as final regulations.

Our Response:

As stated above, we believe section 217 authorizes the Agency to recover reasonable costs associated with vehicle and engine certification and compliance activities. We also believe that the IOAA authorizes the Agency to recover fees. We believe it is appropriate to recover all costs which EPA will incur to provide the necessary MVECP services to a manufacturer during the course of certification and in-use compliance activities. For several reasons EPA also believes it is appropriate to collect such fees prior to issuing certificates. EPA disagrees with EMA's suggestion that the language in section 217 authorizing EPA to establish fees "to recover" all reasonable costs means that EPA should "tally" its costs and then "get back" such costs. EMA does not suggest that EPA change its current regulatory practice of collecting fees in advance of granting a certificate. As such, EMA tacitly recognizes that EPA is indeed projecting the actual future costs associated with certification and in-use activities at the time it is adopting the fees rule and when it collects the fee with the application for a certificate. EPA believes it may project actual costs as long as the fee payers are on adequate notice through rulemaking of what those projected costs are and that EPA has a reasonable basis for deciding that such projections will be accurate. EPA's fees rule is designed to recover or get back its expected actual costs.

We believe this practice is consistent with the guidance provided by OMB Circular No. A-25, which states under its "General Policy" section 6(a)(2)(c) that when determining the amount of user charges to assess that "User charges will be collected in advance of, or simultaneously with, the rendering of services unless appropriations and authority are provided in advance to allow reimbursable services." In this instance, EPA does not believe that section 217 of the CAA limits EPA's authority such that EPA could only seek reimbursement of past expenses. In addition, EPA's continued practice of collecting fees in advance is the most appropriate method and provides applicants with the

best information regarding the fees that are owed at time of certification.

As noted above and within the proposal, EPA has based its costs on actual 2001 budget expenditures and then evaluated what the same levels of effort would cost in 2003 or later. EPA is in fact no longer "projecting" what its lab modernization costs will be and whether it will receive necessary appropriation for the upgrades. We have received a budget allocation in fiscal year (FY) 2003 and plan to fully fund the test cell upgrades to make them compliance testing ready. To some extent EPA recognizes that it continues to project some of its actual costs. However, EPA anticipates that it will receive the necessary budget for fiscal year 2004 (during which time this new fees rule will now become effective) and will spend the actual amount associated with its "expanded programs." Some of these expanded programs include new certification activities which EPA must perform in order to grant certificates to newly regulated industries. In addition EPA will also be conducting some new certification confirmatory and in-use testing for the heavy-duty industry. These costs and EPA's expected level of activities are further discussed in sections 2 and 3. EPA's budget request to Congress includes the budget for these new testing levels and EPA continues to believe this expected level of activity of cost and activity is reasonable.

The Agency has finalized rules for certain nonroad categories that were proposed but not finalized at the time this fees rule was proposed. With the one exception noted below, we also no longer are "projecting" what our compliance activities will be for many of the nonroad industries included in the "Other" category as the rules regulating emissions for those industries have been finalized and our expected compliance activities will be implemented.

We agree with commenters that we should not finalize fees at this time for nonroad categories that were not proposed at the time that the fees rule NPRM was published. Although EPA also proposed fees for the marine SI inboard/sterndrive industry, based on what we anticipated to be a modest compliance program, we agree with EMA that it is premature to require fees at this time. EPA believes that the cost study and analysis are proper for this industry but we choose to wait until the actual emission regulation for this industry is proposed, to provide ample opportunity for comment on potential fees. We anticipate finalizing fees for that industry in the final emission regulation. Therefore, in EPA's revised worksheet # 2, in the

"Other" column, we have reduced the total cost of compliance activities by $20,645 to reflect that the marine SI category will not be covered by this regulation. The fees associated with the remaining regulated industries in the "Other" column remain almost the same - $826 per certificate. This change is reflected in section 85.2405 of the regulations, item 14 of the fees table, which indicates the fees for marine engines, excluding inboard and sterndrive engines.

As EPA has maintained throughout this rulemaking, we believe it is appropriate to recover all costs which EPA will incur to provide the necessary MVECP services to a manufacturer for certification and in-use. For several reasons EPA also believes it is appropriate to collect such fees prior to issuing certificates. We also believe that when any significant budget changes occur that affect allocations of resources dedicated to any MVECP activity, or regulatory changes that affect MVECP activities, or EPA evaluations of the compliance rates and associated environmental impacts change, then it is likely appropriate for EPA to reexamine its updated MVECP activities and determine whether any changes in costs have occurred.

We believe it is appropriate within this rule to require fees for those industries that are in fact required to meet EPA's emission standards in order to receive certificates of conformity. EPA proposed fees for certain nonroad industries where the compliance date of the emission standards had not yet occurred (meaning no applications for certification had been submitted), and we believe that such manufacturers had adequate notice of the regulatory emission requirements they would be required to meet in the future and how EPA intended to impose a fee related to EPA's services. Based on the regulatory structure of the emissions program for these industries, EPA also had a reasonable basis for deciding that the projected costs are accurate. As noted in the proposal, EPA intends to only conduct a modest MVECP program for these industries.

In addition, we also believe it is appropriate to require fees for those industries that are newly regulated since EPA issued the fees proposal. At the time of the fees proposal such industries (large nonroad SI > 19kW, recreational marine > 37kW, and recreational vehicles) were on notice of the emission requirements they would likely face (including the requirement of certification) due to existence of NPRMs for such industries prior to the fees proposal. Based on the regulatory structure of the emissions program for these industries, EPA also had a reasonable

basis for deciding that the projected costs are accurate. The final emission regulations have since become effective for these industries and EPA anticipates no changes in its modest projections of the compliance activities and costs associated with these newly regulated industries.

1.3 Authority to Collect Fees for Manufacturers

What We Proposed:

Currently, EPA requires all manufacturers to pay fees for certification applications. We proposed the continuation of the fees' requirement. We defined "manufacturer" as "all entities or individuals requesting certification, including, but not limited to, Original Equipment Manufacturers (OEMs), Independent Commercial Importers (ICIs), and vehicle or engine converters." [67 FR 51403].

What Commenters Said:

Section 1.3.1. Vehicle Services Consulting (VSC) argues that section 217 does not grant the Agency authority to assess fees for "used vehicles," because it references "new vehicles" and not "new motor vehicles," as defined in section 216. VSC further contends that it is unclear whether all ICI motor vehicle importations are subject to "certification" and hence to certification fees.

VSC notes that the Agency's certification assessment fees authority may derive from sections 203(b)(2), 206(a), 216(1) and 217, and argues that section 203(b)(2) does not require "certification" for ICI vehicles but instead that such vehicles be "brought into conformity with the standards." VSC also asserts that in some instances, such as where there is no "resale," an ICI may not be a "manufacturer," as contemplated by section 216, and therefore should not be subject to fees.

Our Response:

As noted in EPA's response in section 1.1 above, EPA believes that it is appropriate to recover the costs incurred when it provides unique and special benefits identified with a private entity as opposed to the general public. Similarly, EPA also believes that the costs EPA incurs to ensure that vehicles imported in to the United States meet the requirements of the Clean Air Act and regulations thereunder should also be recovered both under the authority of section 217 of the CAA and the IOAA.

Because EPA is also guided by section 213(d) when it has implemented emission regulations for nonroad engines and vehicles and the enforcement scheme under section 206, 207 and 208 that are noted in section 213(d), we have also applied the definition of "new" in the same manner to the nonroad sector and thus believe the requirements for certification of all imported nonroad vehicles is the same as for motor vehicles and engines. Thus the definition of "new" found at 40 CFR § 89.2, etc. is similar to that at Section 216(3).

Under section 217, EPA is authorized to assess fees for "new vehicle" or "engine" certification and compliance activities pursuant to section 206(a), 206(b) and 207(c). In section 216(3), Congress defined "a new motor vehicle," as meaning "with respect to imported vehicles or engines, . . . a motor vehicle and engine, respectively, manufactured after [September 25, 1987]." 42 U.S.C. § 7550(3).[3] (Emphasis added). Sections 206(a), 206(b) and 207(c) are applicable to "new motor vehicles" and "engines," and as noted above to nonroad as well. Thus, contrary to VSC's contention, imported vehicles and engines are subject to the provisions of sections 206(a), 206(b) and 207(c) and therefore, fees' assessment under section 217. As set forth at 40 CFR §85.1503(a), any "...nonconforming vehicle or engine offered for importation into the United States must be imported by an ICI who is a current holder of a valid certificate of conformity ...." Section 85.1502(a)(3) defines a certificate of conformity as that document issued by EPA under section 206(a) of the Act.

In addition, Congress defined a "manufacturer," in section 216(1), as "any person engaged in. . . . importing [new motor or nonroad] vehicles or [new motor or nonroad] engines for sale, or who acts for and is under the control of any such person in connection with the distribution of [such] vehicles or engines . . . " 42 U.S.C. § 7550(1). Thus, an ICI is a "manufacturer," to the extent it imports and is involved in the "distribution" of imported vehicles in the United States. Also, EPA has historically considered ICIs as manufacturers under section 216(1). Consequently, we have also historically considered ICIs eligible to make certification applications. (*See for example,* 52 FR 36136, 36142). Further, this definition contains no exclusion of "used vehicles" or vehicles that are not for resale.

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[3] *For example*, a 1995 motor vehicle imported in 2003 by an ICI (for resale or on behalf of current owner) is a "new motor vehicle."

Legislative history also indicates that Congress intended Title II to apply to all imported vehicles "whether or not new and whether or not imported for sale or resale." 1970 U.S.C.C.A.N. 5356, 5368. Because these new imported vehicles and engines are covered by certificates then the vehicles are also subject to the other protections and requirements provided by the CAA including warranty and recall, selective enforcement audits, etc. and in this way EPA insures that such vehicles and engines do in fact conform with the requirements of the Act as required under section 203(b).

Legislative history of section 217 also indicates that the Agency is to "recover the costs associated with operating" compliance and certification programs from "foreign and domestic manufacturers." (H.R. 101-490, May 1990, 1990 U.S.C.C.A.N. 3355). Clearly, Congress would have expressly limited the reach of section 217 had it intended that imported but used vehicles not be subject to the fee requirement. However, there is no apparent intention to limit either our certification and compliance program or our fees' authority. As previously stated in section 1.1. above, section 217 authorizes EPA to recover the costs of its certification and compliance program activities from manufacturers. *See also*, *EMA, 20 F.3d 1177 (D.C. Cir 1994*). Therefore, we believe we are authorized to recoup the costs associated with imported vehicles and engine certification activities from ICIs. Thus, the Agency disagrees with the contention that section 217 does not grant EPA authority to assess fees for certification and other compliance activities that goes with the importation of "used vehicles." Further, we believe that VSC's reading of section 217 would result in imported vehicles and engines being subject to the certification and compliance requirements under section 206(a), 206(b) and 207(c) but not certification fees. Allowing such a reading would not comport with Congressional directive that EPA recover the costs of compliance and certification activities.

VSC also argues that it is unclear whether imported vehicles are subject to the certification requirements and therefore certification fees. Section 203(a) bars the importation of motor vehicles or engines into the United States unless covered by a certificate of conformity issued by EPA. "[T]he importation into the United States, of any new motor or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine <u>unless such vehicle or engine is covered by a certificate of conformity [is prohibited].</u>" 42 U.S.C. § 7522(a) (emphasis added). This section

expressly prohibits the importation of vehicles unless covered by a certificate of conformity. There is no other limitation on this prohibition that can be discerned in section 203(a).

In addition, section 206(a)(3)(A) states, in pertinent part, that in the case of an imported vehicle or engine, "[a] certificate of conformity may be issued only if the Administrator determines that [a] person has established . . . that any emission control device, system, or element of design installed on or incorporated in such a vehicle conforms to the applicable requirements of [section 202]." 42 U.S.C. § 7525(a)(3)(A). This section authorizes the Agency to issue a certificate of conformity for only imported vehicles or engines that comply with the applicable standards prescribed under section 202. In this section, the requirement for coverage by a certificate of conformity for imported vehicles is also readily apparent. There is no other specific provision in the Act that can be read as precluding EPA from issuing a certificate of conformity for imported vehicles and engines. Rather, the relevant provisions indicate that imported vehicles and engines must be covered by a certificate of conformity. Also, as previously stated above, EPA has always considered ICIs as manufacturers and therefore, eligible to make certification applications.

In addition, "[t]he 1970 amendments made the requirements of Title II applicable to any imported vehicle or engine <u>(whether or not new and whether or not imported for sale or resale</u>) if the vehicle or engine was subject to the standards when manufactured (or would have been so subject had it been manufactured for importation)." 1970 U.S.C.C.A.N. 5356, 5368 (emphasis added). Therefore, all imported vehicles, "whether or not new, or imported for sale or resale" must meet Title requirements which includes coverage by a certificate of conformity and fees' assessment.

Thus, even though VSC argues that applicability of the certification requirements to imported vehicles is unclear, both sections 203 and 206 explicitly require coverage by a certificate of conformity of imported vehicles and engines. We believe this requirement is clearly discernable from the plain text of these provisions. Also, the coverage by a certificate of conformity requirement is intended to ensure that imported vehicles meet federal emissions standards. VSC's contention would mean that an imported vehicle, as compared to vehicles manufactured in the United States, need not meet emissions standards prior to introduction into commerce and during the useful life of the

vehicle. This would not be consistent with the statutory objective to address and control mobile source emissions.

VSC further argues that section 203(b) only requires that vehicles be "brought into conformity with the standards," and does not authorize EPA to require certification for ICI vehicles. Section 203(b) grants EPA discretion to allow importation of nonconforming vehicles. "[T]he Secretary of the Treasury and the Administrator may . . . provide for deferring final determination as to admission and authorizing the delivery of a [new motor vehicle or new motor vehicle engine offered for importation into the United States in violation of the applicable standards] . . . upon such terms and conditions . . . to insure that any such vehicle or engine will be brought into conformity with the standards. . . ." 42 U.S.C. 7522(b)(emphasis added). This section merely allows for our deferment of the final determination as to admission of an imported vehicle pending the vehicle being brought into conformity with applicable emissions standards. Bringing an uncertified vehicle into conformity with standards includes an ICI applying for and receiving a certificate of conformity pursuant to section 206. Therefore, this section also does not lend support to VSC's contention that an issuance of a certificate of conformity to an ICI is not required for used vehicles or imported vehicles that are not for resale.

Section 1.3.2. The Motorcycle Industry Counsel (MIC) contends that there is nothing in the CAA, its legislative history, or in EPA regulations to show that the MVECP benefits motorcycle manufacturers. MIC also contends that the "benefits" manufacturers derive from EPA's certification and compliance program, if any, is not unlike a tariff or tax, in other words one must pay in order to play, or receive a certificate.

Our Response:

EPA disagrees with this comment. As stated in section 1.1. above, section 217 authorizes the Agency to collect fees associated with our certification and compliance activities. As also earlier mentioned, *EMA* indicates that the certification and compliance activities for which EPA is collecting fees do confer a specific private benefit to on-highway vehicle and engine manufacturers. Because "the [Agency's] Compliance Program confers a specific, private benefit upon the manufacturers, EPA can lawfully recoup . . . the reasonable costs of the program." *EMA, 20 F. 3d at 1180.*

As also previously mentioned in section 1.1. above, governmental agencies are authorized by the IOAA, to recover costs whenever an identifiable recipient derives a benefit from services rendered by the Agency. "A certificate of approval is deemed a benefit specific to the recipient." *Id.* Thus, MIC is wrong in asserting that our certification and compliance activities do not confer benefits on manufacturers and as a result that we have no authority to collect fees for such activities.

Further, contrary to MIC's contention, fees assessed and recovered by a governmental agency under the IOAA, is neither a tax nor a tariff. "It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read the [IOAA] narrowly as authorizing not a 'tax' but a 'fee.'" *National Cable Television Association, Inc., v. U.S., 415 U.S. 336, 341, 94 S.Ct. 1146, 1149.*

Section 1.3.3. EMA considers the Agency's in-use testing for "older model engines that are no longer produced or sold," improper and "gold-plating," since manufacturers do not derive any benefits from such engines.

Our Response:

EPA disagrees with this comment. Our emission standards apply over the useful life of the engine. Our compliance programs, which include certification, selective enforcement audits and in-use testing, seek to ensure that the emission requirements are met over the life of the engine. "[M]anufacturer[s] benefit[] from second and third stage compliance testing because, . . . such testing is integral to the regulatory scheme under which each engine or vehicle model must be recertified annually." *EMA, 20 F.3d at 1181.* Consequently, EPA believes that manufacturers benefit from the in-use testing requirements of the Agency's MVECP. "[S]elective enforcement audits and in-use compliance testing are . . . services that the EPA renders to each manufacturer in order for the manufacturer to comply with the Clean Air Act [and] it follows that the manufacturer obtains a benefit from the entire compliance program not just from the annual certification." *Id. at 1180.* This service applies whether or not the manufacturer retools an engine model and produces a different engine for future model years.

Although *EMA* specifically mentioned a benefit for on-highway vehicles, the reasoning used would also lend itself to nonroad

vehicles and engines. Thus, similar to highway vehicles, nonroad vehicles and engine manufacturers also derive a benefit for the latter phases of our certification and compliance programs.

1.4. Other Authority Issues

What We Proposed:

Section 1.4.1. EPA's current fees regulation at 40 CFR 86.903-93 states in part that "[n]othing in this subpart shall be construed to limit the Administrator's authority to require manufacturer or confirmatory testing as provided in the Clean Air Act, including authority to require manufacturer in-use testing as provide in section 208 of the Clean Air Act." In the proposal to today's rule the same language can be found at 40 CFR 85.2401(d).

What Commenters Said:

EMA states that the Act does not authorize EPA to compel manufacturers to conduct in-use testing and therefore that proposed 85.2401(d) is superfluous and should be deleted.

Our Response:

We believe the existing language in section 208(a) of the CAA gives EPA the authority to reasonably require certain things in order for EPA to determine whether a manufacturer or other person has acted or is acting in compliance with Part A and Part C of Title II of the CAA, and regulations issued thereunder. We also believe that nothing in today's rulemaking in any manner affects EPA's authority under section 208(a) or other authority found elsewhere within the CAA. For this reason EPA chooses to keep the language in 85.2401(d) for the final rule.

What We Proposed:

Section 1.4.2. We proposed recovery of all costs incurred by the Agency in conducting the MVECP. These costs included labor, operating and program costs. (See, section III of the NPRM, (67 FR 51409) and the Cost Analysis Document, section III.A.).

What Commenters Said:

MIC asserts that EPA may recover only the reasonable amount to cover the appropriate portion of reasonable costs of the services that benefit manufacturers. It then describes as too

liberal EPA's interpretation of the associated costs that can be collected for our certification and compliance activities. MIC also states that the acquisition of real property, laboratory facilities or equipment are cost items that are more appropriately handled by the Congressional budget process and scrutiny.

Our Response:

Under section 217, EPA is "to recover *all* reasonable costs to the Administrator associated with [the MVECP]." 42 U.S.C. § 7552(a) (emphasis added). In addition, the IOAA authorizes "[t]he head of each agency . . . to establish[] the charge for a service or thing of value provided by the agency . . . based on the costs to the government, value to the recipient, public policy or interest served and other relevant facts." 31 U.S.C. § 9701(b).

We believe these provisions authorize us to recover the reasonable costs that are associated with our activities for the certification and compliance requirements mentioned in section 217(a). Further, in *EMA*, the court found that "EPA must calculate the cost basis for the fee by allocating its direct and indirect expenses to the smallest practical units of service." *EMA, 20 F.3d at 1181.* We consider our labor, operating and program costs that are associated with these requirements as recoverable costs. Thus, the costs of real property and laboratory equipment are recoverable to the extent they are associated with the services EPA provides to manufacturers as part of the certification and compliance program.

Further, OMB Circular No. A-25 (Circular), which was issued pursuant to the IOAA, provides guidance on fees assessment for services rendered by Agencies. It directs Agencies to ensure that fees are sufficient to recover the "full cost" to the Government of providing services to identifiable beneficiaries. It explains "full cost" as including all direct and indirect costs. It also includes physical overhead, materials and supplies, utilities, rents or imputed rents on land, buildings, and equipment as indirect costs. (Circular at p. 4). Therefore, we believe the costs of acquiring real property, laboratory facilities or equipment that are associated with the MVECP are recoverable costs.

Section 2: Assessment of Costs

2.1 Costs Apportioned to Industries

What We Proposed:

Our proposed fees were based on past and projected actual costs of providing certification and compliance services to the various mobile source manufacturers and industries. We grouped these various manufacturers and industries into fee categories and we explained that separation of industries into groups with other similar industries was in order to ensure that each category pays fees only for the services that it receives.[4] We also explained that EPA conducted a cost analysis to determine the various compliance activities associated with each fee category and associated annual costs for each certification request type. We set forth our analyses in the Motor Vehicle and Engine Compliance Program Costs Analysis (Cost Analysis Document). We further explained that where the level and type of EPA activity and costs were similar for each industry then those industries were grouped together, the total number of certificates were added together, and equal fees were allocated to each anticipated certificate. (See Cost Analysis Document at p. 21.) In this way, EPA determined the portion of the MVECP costs dedicated to each certification request type.

We proposed three "fee categories": 1. Light-Duty, which includes light-duty vehicles and trucks, motorcycles, and because of similar compliance programs medium-duty passenger vehicles and certain heavy-duty vehicles were included, with subcategories created where it was determined that a different level of services and costs were expected to be expended; 2. Engines, which includes heavy-duty highway (HDE HW) and nonroad compression-ignition (NR CI) engines (excluding marine and locomotive), with subcategories created where it was determined that a different level of services and costs were expected to be expended; and 3. Other Engines and Vehicles, where currently EPA only plans to do certification review and includes marine CI and SI engines, nonroad SI engines, locomotive engines, large spark-ignition engines, recreational marine engines, recreational vehicles, heavy-duty engine evaporative systems and heavy-duty engines certified for California only .

What Commenters Said:

[4] See Cost Analysis Document starting at page 16 (step 5 of "general steps").

Section 2.1.1. EMA maintains that the language of section 217(a) of the CAA relevant to heavy-duty engine and vehicle manufacturers, which states in part, that EPA's fees for such manufacturers "shall not exceed a reasonable amount to recover an appropriate portion of [the] reasonable costs [of the MVECP]" requires EPA to only recover a portion and not all of the certification and compliance program costs. EMA believes such portion should be from the costs just associated with the heavy-duty engine and vehicle manufacturers. Although EMA initially stated that they did not have a definitive percentage or portion that EPA should assess, EMA in a subsequent comment stated that the appropriate "portion" of EPA's certification and compliance costs for heavy-duty engine and vehicle manufacturers to bear is 50 percent.

EMA states that the plain language of section 217(a) requires that only a "portion" of the costs associated with the heavy-duty engine (HDE) compliance program can be recoverable and thus 100 percent of such costs is not a portion. EMA suggests that EPA's interpretation (that heavy-duty manufacturers pay 100 percent of the costs allocated to that industry) would provide no purpose or effect to the last sentence in 217(a). Since the basic premise of fee collection is to impose fees for specific benefits conferred upon an identifiable beneficiary[5], EMA suggests that it is self-evident that EPA would only collect such appropriate fee even without the language in the last sentence. Further, EMA points to the *EMA* decision and claims it does not validate EPA's interpretation of 217(a). EMA suggests that the dicta from that decision only states that "Congress intended that the EPA charge manufacturers of heavy-duty engines and vehicles something less than it charges other manufacturers" and the EPA must "do something that moves non-trivially in the direction that Congress intended." and thus does not hold that EPA may assess HDE manufacturers 100 percent of all costs and yet still comply with the requirement in 217(a) which requires that only a portion of such reasonable costs be assessed.

Our Response:

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[5] EMA cites EMA v EPA, 20 F.3d 1177, 1180 (D.C. Cir. 1994) for this proposition. The court held in this instance that "Under the IOAA an agency may impose a fee only for a service that confer a specific private benefit upon an identifiable beneficiary."

EPA agrees with EMA's suggestion that the general principle of section 217 and of the IOAA is to generally recover all costs that are specifically tied to a specific benefit for an identifiable party. The introductory sentence on 217(a) suggests that "all reasonable costs" might appropriately be calculated for the all MVECP services as noted in 217(a)(1-3) for all industries and then EPA is subsequently directed to charge the heavy-duty engine and vehicle manufacturers its appropriate "portion" of the otherwise aggregated costs.

We disagree with EMA's interpretation of the *EMA* decision. The court discusses EMA's claim that heavy-duty manufacturers should pay less than the "fair share" of costs occurs in section III C of the decision. The court noted that "According to EMA, the Congress intended that heavy-duty manufacturers be charged a fee that recovers less than their fair share of the total cost of the Compliance Program because they face smaller sales volumes and more onerous compliance testing than do manufactures of light-duty vehicles and engines." The cost methodology EPA used in the fees rule that the court reviewed, and used for the current rule, was to segregate the costs for each certificate type (including HDE HW CI and SI) and divide such total costs by the number of certificates expected to be issued within that certificate type. As noted on worksheet #2 of the original Cost Analysis, the total costs for HDE HW CI and SI is $3,956,759 and cost per certificate is $30,437. Worksheet #2 of the revised Cost Analysis shows that this amount is now $3,193,596. The amount per certificate is $21,578, a reduction of $8,859 per certificate in the final rule as explained in section 2.2 (this reduction is a result in a recalculation in the number of certificates expected to be issued, a reduction in the costs associated with the upgrades to the test cells in Ann Arbor, and other adjustments) whereas the fee per light-duty vehicle certificate is $33,883.

The court in *EMA* (page 1183) acknowledged EPA's methodology of and intent to give effect to section 217(a) by segregating the costs of heavy-duty, light-duty, and motorcycle certificates and by waiving the fee to the extent that it exceeds one percent of the projected sales revenue for any manufacturer. The court suggests that it is reasonably clear that Congress intended that the EPA charge manufacturers of heavy-duty engines and vehicles "something less than it charges other manufacturers" although "the statute is silent as to both the means by which and the degree to which the agency is to do so." The court continued and found that what EPA had done, in segregating costs as noted above, was an

appropriate way to implement section 217(a) for heavy-duty manufacturers.

We also note that the discussion that EMA cites from *EMA* regarding the fact that the IOAA already provides the necessary authority and requirement that fees for service only be collected when a specific benefit falls upon an identifiable industry includes additional discussion of what is an "identifiable beneficiary" versus the general public. The court states that "[a] general benefit conferred upon an *industry*, such as the public confidence that may attend the mere facts of its regulation, is insufficient to justify a fee." (italics added). The court continues and states that "[i]n a *regulated industry*, a certificate of approval is deemed a benefit specific to the recipient." (italics added).[6] The court clearly differentiates between the regulated industry versus the general public.

All such manufacturers receive the specific benefit of a certificate from EPA and are otherwise regulated. However, we believe the language of section 217 authorizes us to use a methodology that identifies the costs directly associated or portioned by EPA that relate to the heavy-duty engine and vehicle industry. We have in fact identified such costs for this industry and apply no other costs to the fees collected from it. Since the resulting fee levels and waiver provisions result in a fee for heavy-duty engine manufacturers that is significantly lower than all other motor vehicle manufacturers except for motorcycle manufacturers and independent commercial importers (ICIs), whose costs are segregated both from heavy-duty and general light-duty vehicle costs, and thus EPA believes this is an appropriate way to implement section 217(a).

What Commenters Said:

Section 2.1.2 EMA then points to section 217's use of the term "reasonable" and legislative history on section which is to the effect that "[t]he authority granted to the Administrator under this section [217] must be carefully exercised so as to avoid proceeding with 'gold plated' compliance programs since the costs will not fall on the government." (See H.R. 101-490, May 17, 1990). EMA suggests that a 50 percent allocation would also give recognition to the tremendous outlays of capital and man-hours that HDE manufacturers already spend to conduct extensive

[6] *EMA* at 1180.

certification and compliance testing and given the new costs to comply with the 2007 model year requirements and its own in-use not-to-exceed (NTE)[7] compliance testing.

EMA believes that 50 percent is the appropriate portion of the costs that should be collected in order to protect against "gold-plated" programs and by ensuring that EPA maintains a meaningful role in funding such programs. It would also recognize the capital and man-hours that heavy-duty manufacturers spend to stay up with EPA requirements, including costs for additional data and new test cells in order to meet the 2007 standards. In addition, EMA again claims that the manufacturers face extensive in-use NTE compliance testing in the future and thus in many ways are already paying more than their fair share of compliance cost burden.

Our Response:

EPA believes the best interpretation of section 217 is that the costs associated with heavy-duty manufacturers be segregated from other types of manufacturers. In reaching this conclusion EPA is guided by the sentence in section 217 that EMA relies upon "In the case of heavy-duty engine and vehicle manufacturers, such fees shall not exceed a reasonable amount to recover an appropriate portion of such reasonable costs" and the preceding sentence which states "The Administrator may establish for *all* foreign and domestic manufacturers a fee schedule based on such factors as the Administrator finds appropriate and equitable and nondiscriminatory, including the number of vehicles or engines produced under a certificate of conformity" (italics added).

We believe it is appropriate to segregate the MVECP costs associated with each industry and then to divide the number of certificates within each respective industry by its segregated costs. In order to be nondiscriminatory we also believe that all industry groups (or "fee categories") must reimburse the government for all the costs for their respective industry group. The costs that each industry group must incur to comply with EPA's emission requirements such as manufacturers' own NTE testing, test cell development, etc., is properly considered by EPA when it adopts such requirements, e.g. when it adopts emission standards. The cost to industry is taken into account in that rulemaking.

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[7] Not-to-exceed requirements specify that engine emissions must not exceed a specified value for any of the regulated pollutants.

This rule, however, focuses on EPA's actions and associated costs. We believe that is consistent with the directive in the IOAA that special benefit programs be self-sustaining to the extent possible and the first sentence of section 217(a) authorizing EPA to "...establish fees to recover all reasonable costs."

Thus, we believe that the directive to recover "reasonable," "appropriate," and "equitable and nondiscriminatory" costs or fees means that EPA must use clear and explained accounting measures, make reasonable estimates of costs, and properly distribute its costs to specific programs where specific benefits are bestowed to a specific industry group.

Therefore, EPA believes the purposes of section 217 and IOAA are also best served by collecting all costs incurred by the Agency but only collecting the fair share of costs of HDE compliance that is associated with such activity and therefore EPA makes no adjustment of its fees based on commenters suggestions.

EPA believes that the certification and compliance program designed for the heavy-duty industry is appropriate and reasonably correlates with the contribution of emissions from this sector to the overall inventory of emissions from mobile sources and also is very reasonable when compared to the level of activity and costs associated with other industry categories, including the light-duty industry. As further explained in section 2.2 below, EPA believes its certification and compliance program is reasonable, if not modest, for the heavy-duty industry and in no respect can it be considered a "gold-plated" program. From EPA's original proposed cost of $30,347 for each heavy-duty certificate we have now reduced the cost in the final rule to $21,578.

2.2 Costs Unrelated to the MVECP

What We Proposed:

We proposed recovery of those costs incurred by the Agency in conducting new vehicle and engine certification, new vehicle and engine compliance monitoring and testing and in-use vehicle or engine compliance monitoring. The proposed fees are based on what EPA believes to be all recoverable direct and indirect costs associated with administering these activities. Recoverable costs include all labor, direct and indirect program operating costs associated with the activities listed above, and EPA's general overhead costs. Operating costs include such things as the purchase of equipment or property as that specified on worksheet

#10, which is the itemization of laboratory modernization budget request.

The Cost Analysis contains worksheets which further explain the associated costs. Several worksheets within the Cost Analysis set forth the costs that are applicable to the heavy-duty highway certification type.

Worksheet # 1 shows a total recoverable cost for HD HW of $3,956,759 of which $769,448 is designated as Certification and Compliance Division (CCD) direct program costs and $275,431 of Laboratory Operations Division (LOD) direct program costs. Various costs are included within the indirect program costs including $193,000 for lab modernization. The labor costs include $1,404,646 of direct costs and $345,509 of indirect costs. Worksheet # 3 (the summary sheet for LOD which is located in Ann Arbor) shows an additional (or projected) direct labor cost of $224,055 and an indirect total of $249,785 for HD HW. Worksheet #4 (the summary sheet for CCD which is located both in Ann Arbor and DC) shows that no costs for labor are incurred in Ann Arbor and $1,276,315 of labor costs in DC. Worksheet #7 breaks down LOD's additional labor needs and shows that 1.50 total full time equivalent employees (FTEs) will be required to perform and process tests in Ann Arbor.

The Cost Analysis at page 33 explains the Laboratory Modernization (Lab Mod) costs on worksheet #10. Included was a total cost estimate of $14,130,000 of which $10,030,00 was deemed recoverable. This recoverable portion was amortized over 10 years for an annual recoverable cost of $1,003,000. These costs were allocated to the light-duty and the heavy-duty highway industries using the actual cost allocation method according to the program for which the equipment was purchased. The "actual cost" allocation method, as explained further at page 110 of the Cost Analysis, is used when the costs can be directly attributable to an industry category. For example, for the HDE HW category, EPA attributed $193,000 per year in lab modernization costs for the test cells associated with testing such engines. Thus worksheet #10 breaks down the costs by various pieces of equipment and their purpose. For example, under the Heavy-Duty Test Engine Sites various pieces of equipment are listed, whether such equipment will be used in test cell number 1 or number 2 (HDE #1 and HDE #2), and whether the costs of such equipment are recoverable or not. The total costs associate with the Lab Mod for the two heavy-duty test cells is $3,030,000 of which EPA proposed $1,930,000 as recoverable, and, amortized over 10 years, resulted

in annual cost (and proposed fee collection) of $193,000. At the time of the proposal EPA anticipated using both test cells for MVECP activities as well as other activities and proposed recovering the full costs of any equipment related to MVECP activities regardless of their potential use for non-MVECP activities. Worksheet #3 and worksheet #1 both include the $193,000 figure for the lab mod costs associated with the heavy-duty test cells.

The core testing operations costs for LOD as noted on worksheet #1 are further explained on worksheet #12, including a breakdown of HDE HW costs of $275,431 of which $225,360 will be used on engine procurement. Separate from the LOD costs for lab modification and core testing operations costs are CCD's programs costs as listed on worksheet #13. These costs include "In-use on-vehicle testing" at $297,200 and "enhanced engine compliance programs" at $380,000. The enhanced engine compliance program costs are further broken down in worksheet #16 including $200,000 for confirmatory testing for certification, $30,000 for selective enforcement audits, and $150,000 for in-use engine dyno testing. This program's costs are discussed again and further clarified within section 2.3.

What Commenters Said:

Section 2.2.1. In its initial comments, EMA expressed the concern that EPA was seeking to assess and recover fees for EPA's developmental test lab facilities and personnel in Ann Arbor. EMA stated that since these facilities were not utilized in connection with the MVECP for manufacturers' heavy-duty on-highway or nonroad engines compliance or certification activities but instead are used for general regulatory efforts and technological feasibility demonstrations, such efforts and demonstrations do not confer specific benefits on any identifiable beneficiary or manufacturer.

OPEI supported EMA's comment and contended that EPA cannot impose certification fees on small spark-ignition (SSI) engine manufacturers for costs that are not directly related to processing SSI engine certification. Both commenters considered costs associated with EPA's developmental test lab facilities and personnel associated with such facilities in Ann Arbor, Michigan as "unrelated costs."

Our Response:

EPA agrees with commenters that fees should not be assessed for the costs associated with using Ann Arbor's test laboratory facilities and personnel for activities not related to the MVECP such as general regulatory efforts and technological feasibility demonstrations, or for other developmental purposes. As EPA noted in the NPRM, the costs of activities such as regulation development, emission factor testing, air quality assessment, support of state inspection programs and research were not included with the costs study nor are included in the fees proposed. (See 67 FR at 51409). As noted on revised worksheet #10, of the $14,130,000 associated with the laboratory modification budget, only $8,485,000 was deemed recoverable as a laboratory equipment associated with compliance testing activities. Specifically, those costs linked to the "advance engine test sites" and the "climate control test facility," which fall under the heading "Critical Regulatory Developmental Test Capability" are not labeled as recoverable and thus are not included in the fees proposed. Revised worksheet #10 also reflects that other costs associated with developmental testing are not labeled as recoverable. As further noted below, EPA has further refined these costs and has eliminated other costs not determined to be MVECP related.

We did not include the costs of developmental lab facilities and personnel in Ann Arbor in our fees calculation. The lab facilities that were included as recoverable in the cost study are for engine testing that EPA plans to begin in the near future. Therefore, the costs are associated with compliance testing and are recoverable by fees.

What Commenters Said:

Section 2.2.2. In its initial comments, EMA also contended that EPA does not currently conduct any HDE testing at Ann Arbor and therefore questioned both the need for such testing along with the additional labor costs of conducting such testing along with the other costs of such testing as summarized on worksheet # 3.

Our Response:

Section 2.2.3 addresses the issue of whether EPA's proposal included sufficient information regarding whether EPA planned to conduct HDE compliance testing in Ann Arbor. This section addresses EMA's concern whether EPA actually would do testing at Ann Arbor and the need for such testing, along with an explanation

for why EPA believes the cost estimates associated with such testing are reasonable.

EPA notes that the need for such testing partially arises from purely the emission contribution from heavy-duty engines which is second only to light-duty on-highway vehicles for mobile sources and represents approximately one-half of the emissions of light-duty vehicles. Furthermore, EPA has experienced a relatively high degree of the use of defeat devices and non-conformity of heavy-duty vehicles in recent years. The discovery of the level of noncompliance in this industry led to the perception that EPA was not doing an adequate job of overseeing the HDE industry. In 1998 consent decrees were entered into with almost the entire HDE HW industry, to resolve claims of several cases of noncompliance. The Agency is only now beginning on its efforts to test some of these vehicles during in-use operation over their useful lives. EMA's comment suggests that it may be unnecessary to implement a new HDE compliance program (or that it is not necessary until the 2007 requirements commence), or that such a program is untenable in Ann Arbor. EPA believes these comments are misplaced. As noted from revised worksheet #1, EPA's proposed fees program allocated a cost of $3.2 million for the HDE on-highway industry.

As also explained at section 2.2.4, EPA believes it has developed and is now in the process of implementing a cohesive and comprehensive compliance program, including a significant component in Ann Arbor, for HDE on-highway engines. EMA is correct that a testing program in Ann Arbor did not exist at the time of the fees proposal, however, EPA has extensive experience in testing light-duty vehicles and has identified a similar need for heavy-duty in order to ensure that any emission problems are found in a timely manner. Similarly, EPA has extensive experience with procuring vehicles for testing and estimating costs and we note that commenters did not question the accuracy of such costs. EPA has invested the requisite resources to conduct a testing program in Ann Arbor and plans to use that facility along with testing conducted in the Washington, DC area and at any necessary outside contracted laboratories as explained at 2.2.4.

Section 2.2.3. On December 10, 2002, EPA met with EMA. At that time, EMA once more sought an explanation of the costs attributed to HDE testing at Ann Arbor which are reflected in LOD's summarized costs on worksheet #3 and the description of LOD's core testing operations description on worksheet #12. As explained on page 30 of the Cost Analysis, LOD's direct program costs include

the costs of testing and vehicle and engine procurement for such tests, including those costs at worksheet #12. EMA sought clarification of worksheet #10 (the laboratory modernization costs for the two heavy-duty test engine sites) and how those costs were coordinated with the LOD costs noted above and with LOD's FTE costs.

In response to our explanation, EMA submitted additional comments contending there was an inadequate explanation on the HDE testing at Ann Arbor, and more specifically the use of test cells at Ann Arbor. EMA further contended that EPA wrongly seeks to recover 100 percent of the costs associated with the advance engine test cells when EPA would be utilizing, at most, only 25 percent of the cells for compliance activities. EMA stated that only 25 percent of the costs should be assessed to reflect the actual amount of time the dyno would be used for compliance activities. EMA also contended that our proposal does not evince an intent to conduct HDE testing at Ann Arbor.

Our Response

EPA's original cost analysis for the lab modernization plan assessed the entire cost of any equipment that would be used for MVECP services and this plan included specifically the upgrading of two heavy-duty engine test cells (HDE #1 and HDE #2 on worksheet #10) and the allocation of the upgrade costs to the heavy-duty highway industry which EMA now questions. At the time of the proposal EPA's intent was to use each of two test cells approximately only 25 percent of the time for compliance activity purposes. In their pre-modernization condition these cells were not suitable to perform testing that could be used for compliance or certification type activities. Since the two cells were to be utilized for compliance activities, the lab equipment and facilities of each test cell needed to be upgraded to deliver data that would meet requirements for certification or recall purposes. Since the upgrade was not necessary for the non-compliance test activities that were conducted in these test cells, the entire costs of the test cells were included in the fees proposal as compliance related costs.

EPA has reexamined its plans for the use of the two HDE test cells and has determined that most compliance testing will occur in test cell HDE #2. Although EPA had originally planned to use both test cells, HDE #1 and HDE #2, approximately 25 percent of the time for compliance testing, EPA has determined that it will be using HDE #2 approximately 25 percent for compliance testing.

Although it may be appropriate to assess the full costs of the test equipment in the Ann Arbor HDE #2 (and to some extent that equipment shared with HDE #1 that is used in HDE #2) to fees because the equipment is necessary for EPA's enforcement activities, EPA has allocated the costs as noted below.

EPA is guided by the language of section 217(a) (and in general by the IOAA) which states that the Administrator may establish fees based on such factors as she finds appropriate and equitable, and in this instance we find it equitable to only prorate for that approximate percentage of the time that the equipment related to compliance purposes will be used in comparison to all of its uses. We believe that prorating the costs result in more accurate costs than those presented in the notice of proposed rulemaking.

Most of the HDE HW testing will take place in HDE #2 test cell which requires the additional equipment outlined on revised worksheet #10. In cases where there was an equipment cost solely for HDE #2, such as the heavy-duty engine cell controller replacement, the analytical/sampling system and the selective catalytic reduction (SCR) load controller, one-quarter of the cost was assessed to the heavy-duty fees as this cell will be used for compliance purposes one quarter of the time. Therefore, instead of $1,150,000 being recovered by EPA for these pieces of equipment as proposed, EPA will now only recover $287,500.

In cases where there was an equipment cost common to both HDE #1 and HDE #2, such as the diesel engine cell cooling control and the oxides of nitrogen (NOx) and particulate matter (PM) measurement methods and equipment, one-eighth of the cost was assessed to determine the recoverable portion.

EPA disagrees with the comment that our proposal does not evince an intent to conduct HDE testing at Ann Arbor. EMA also suggests that EPA is not currently conducting any such testing in Ann Arbor and questions the need for such testing in light of EPA's other enhanced compliance programs as spelled out in worksheet #16 and because the manufacturers themselves will be conducting their own in-use testing program. We address those concerns in section 2.3

Our Cost Analyses Document contains extensive demonstration of costs associated with HDE HW testing at Ann Arbor such as to place the public on notice of our intent to conduct a heavy-duty compliance program. For example, we defined "direct program

costs" as those costs for compliance work, including the costs of testing either at EPA's lab or a contracted test facility, procurement of vehicles or engines and equipment needed to conduct the tests (see page 14 of the Cost Analysis). EPA explained that in some cases new compliance programs are being planned. We also explained that the cost of testing (as a direct program cost) to be performed at EPA's lab is included in LOD's portion of the Cost Analysis and are not included in CCD's portion (see page 40 of Cost Analysis). EPA provided an explanation that within LOD several groups exist, including the "Compliance Development and Testing Group" and the "Advance Testing Group" and that recoverable FTE were only from the former group as the latter group conducts work based on developmental testing and research in vehicle technology, thus EPA clearly differentiated between the two and provided notice for the types of labor associated with compliance testing at the Ann Arbor facility. (See page 44 of the Cost Analysis). In addition, additional labor needs which would be necessary for heavy-duty compliance testing in Ann Arbor are reflected on worksheet #7 (now replaced by revised worksheet #7) and explained at page 46-47 of the Cost Analysis. EPA notes that in its revised test plan fewer FTE will be required to conduct compliance testing in test cell #2.

We explained that the NVFEL laboratory modernization plan includes three critical testing support areas requiring new instrumentation and upgrades, including critical diesel engine standards test capability (including testing to the new 2004 HDE standards -see page 49 of the Cost Analysis). We also explained that the "critical regulatory development" test capability is not involved in compliance testing, and in fact the intent of the proposal was to not charge fees for developing that capability. We provided further information that the Ann Arbor heavy-duty engine test sites will be required to test not only the 2007 NTE standards but also both the current emission levels and the new 2004 model year standards (see page 50 of the Cost Analysis).

EPA also disagrees with EMA's contention that there was no notice of the amount of compliance testing to be conducted at the upgraded cells since we clearly set forth the procurement cost of HDE HW engines as a component of LOD's core testing operations costs, including the number of engines to be procured and at what costs (see page 52 of the Cost Analysis).

What Commenters Said:

Section 2.2.4. EMA also contends that EPA's computation of expenses at Ann Arbor are replicated elsewhere and thus result in "double dipping." EMA points to the Agency costs for conducting HDE confirmatory tests, by outside contractors, which is reflected as $20,000 or $30,000 per engine family on worksheet #16 of the Cost Analysis, and questions what additional certification/compliance activity will take place at the two test cells in Ann Arbor. In addition, EMA asserts that the use of contractors renders EPA's attempt to collect additional facility and labor costs (direct program costs) for such testing improper since EPA will not incur such costs when outside contractors are used.

Our Response:

The testing listed on worksheets #10 and #16 is not double counting of the same testing but represents different sets of testing and related costs. This testing will allow EPA to meet its testing goals for the heavy-duty industry. See further discussion of this in section 2.3.

The cost analysis reflects the costs associated with EPA's comprehensive strategy to ensure compliance and the various components of the testing plans included within such strategy. EPA plans to continue with the heavy-duty screening of engines in-use by using portable emission measuring equipment that is currently being conducted. This testing is designed to survey the industry and to detect possible compliance issues. Independent of this screening testing, we will also be conducting confirmatory certification dyno-testing (and potentially in-use dyno testing to the extent it is not conducted elsewhere, any costs estimated to be incurred at Ann Arbor will also be incurred if testing is conducted elsewhere) at the laboratory in Ann Arbor. This testing will consist of both certification confirmatory testing and some testing of in-use engines. Because of possible limitations in lab accessibility in Ann Arbor, and as likely follow up testing to the screening testing, we will also conduct testing at a contracted facility. Although in many instances EPA believes that the screening testing will provide a sufficient basis for making compliance determinations, we also recognize the likely necessity of continuing to test engines in laboratory conditions. This is further explained in section 2.3.

We believe that this testing is necessary as a review of the current testing plans indicated that the testing for the heavy-duty industry lags behind the testing that is conducted on the

light-duty industry. EPA took into account the discrepancy between the current compliance programs for the two industries, the need for additional heavy-duty testing based on recent noncompliance in its testing plans for the industry and on the degree to which manufacturer run compliance activities programs are or will be in place for these industries. The test plans include the screening that is currently being conducted as well as additional testing that would be conducted at the Ann Arbor facility and testing at a contracted facility.

2.3 Costs for In-use Programs

What We Proposed:

We proposed continuance of the Agency's current compliance methods for light-duty vehicles, motorcycles and heavy-duty highway vehicles and engines which insure the overall compliance of a vehicle or engine with applicable emission standards throughout their useful life. EPA explained that this certification process may include confirmatory testing (testing conducted by EPA in-house to confirm manufacturer test data) and compliance inspections and investigations (such as selective enforcement audits) and in-use testing. (67 FR at 51406-51408). Currently, EPA conducts testing of in-use heavy-duty highway engines and nonroad compression-ignition engines at costs of $297,200 and $72,800, respectively as indicated on worksheet # 13. This testing is screening in nature, and uses portable test equipment on-board the vehicle. This screening is used as an indicator of engines that may be noncompliant. To assist in this testing, EPA is planning to purchase commercial emission detection units that can monitor emissions from heavy-duty engines and nonroad compression-ignition engines during use at costs of $80,000 and $20,000, respectively. These costs are shown on worksheet #13.

We also proposed fees for new compliance testing for in-use heavy-duty engines. Some of the testing will be conducted in the Ann Arbor laboratory at a test site that is being upgraded to conduct compliance-level tests. The proposed[8] costs for the in-use testing conducted at EPA's Ann Arbor facility included the equipment costs listed in worksheet #10 ($193,000 per year for heavy-duty), the labor listed in worksheet #7 (2.75 FTE), and the

[8] Note that the final costs for the HDE equipment costs is $38,500 per year, not $193,000 as proposed.

cost of procuring in-use heavy-duty engines listed under Engine Procurement - Heavy-Duty, on worksheet #12 ($225,360).

In addition to the new testing that will be conducted in Ann Arbor, we are planning an Enhanced Engine Compliance Program. Worksheet #16 reflects the costs for this program. This will be conducted at a contracted facility (with the exception of the selective enforcement testing) and includes certification confirmatory testing, selective enforcement testing, and in-use engine dyno testing for both heavy-duty highway engines and nonroad CI engines at costs of $200,000, $30,000 and $150,000 respectively.

What Commenters Said:

EMA opposed fees based on EPA's expectation of conducting an enhanced in-use compliance program when, at the same time, the Agency is in the process of developing and implementing a manufacturer-run in-use testing program.

Section 2.3.1. EMA states that EPA's current in-use testing is just geared toward regulatory development and feasibility testing of its measurement equipment. EMA further contended that the fees are inappropriate because the NTE emissions standards and related testing and requirements do not become effective for HDE HW engines until 2007, much later than when the new fees become effective, and are not yet proposed for NR CI engines.

Our Response:

Regulatory development and feasibility testing were not included in the cost study, and were not included in the costs that will be recovered by fees. Furthermore, the cost study only assesses the costs of compliance and confirmatory testing.

EPA acknowledges that one purpose of the current in-use testing has been developing the portable testing devices and related testing procedures, but the primary purpose now and certainly in the future of the enhanced engine compliance program will be compliance testing. This is to implement the prohibition against use of defeat devices and to conduct compliance testing of new emission control components based on both the 2004 HDE HW standards and the 2007 standards. Thus both our screening testing and laboratory testing will commence in 2004 and not await the additional requirements (such as NTE standards) in 2007. Our current on-vehicle testing has several compliance purposes,

including: as a general screening tool to see how such vehicles might perform based on federal test procedure (FTP) conditions, as a tool to insure that no heavy-duty engine manufactures are employing defeat devices. As explained below, in addition to continuing surveillance-like testing of small samples of vehicles per engine family, EPA plans to conduct more compliance testing to measure the durability of new emission components and to measure such vehicles or engines in laboratory conditions.

EPA has included the additional HDE HW compliance programs in its cost analysis and is recovering such costs by today's rule because such programs are part of EPA's plan to increase its compliance oversight for this industry.

We also note that the near term compliance testing will not be for "regulatory development" purposes but rather to insure the durability on new technologies being applied to heavy-duty on-highway and nonroad engines. These new technologies have not undergone extensive in-use scrutiny and assurances of durability. As a result an in-use compliance program is necessary now to ensure that the applicable new emission standards are being met.

What Commenters Said:

Section 2.3.2.

EMA states that manufacturers will be conducting a comprehensive in-use not to exceed (NTE)[9] testing program of on-highway HDE during the 2005 and 2006 time period and will subsequently conduct a manufacturer-run in-use program. EMA maintains that as a result, EPA and the California Air Resources Board (CARB) will not engage in routine in-use testing of HDE engine families. Thus, EMA argues that EPA's in-use testing will be minimized, not enhanced, due to the manufacturer-run in-use testing.

Our Response:

EPA agrees with EMA's comment that manufacturers will be conducting an in-use NTE pilot testing program during 2005 and 2006 yet we disagree with EMA's characterization of this testing as "comprehensive." In fact during this pilot period it is

[9] Not-to-exceed requirements specify that engine emissions must not exceed a specified value for any of the regulated pollutants.

expected that EPA will be required to conduct its own testing if determination of the scope or causes of potential nonconformance was required and that EPA may be required to generate additional testing data should a remedial action for nonconformance be sought. EPA also expects, and therefore agrees with EMA's comment, that manufacturers will be conducting their own in-use verification testing program in 2007, and thus EPA will not be conducting routine testing that is duplicative of manufacturer testing. Independent from the manufacturers' testing throughout this time period, EPA sees the need to conduct the projected levels in-use testing to ensure compliance with all emission standards, including NTE standards. EPA believes that an EPA-run in-use presence will continue into the future at the levels projected.

The enhanced in-use program is planned by EPA to address the Agency's compliance testing needs. New technologies, such as catalysts and traps, will soon be added to heavy-duty on-highway (both for the 2004 and 2007 regulatory requirements) and nonroad compression-ignition engines which have not undergone extensive in-use scrutiny and assurances of durability. Thus we believe it is appropriate to establish an in-use compliance presence to ensure that the applicable new emission standards are being met. In terms of equity with other industries and in terms of the need for the compliance programs, we believe that EPA's proposed compliance program and the associated fees are appropriate. In addition, as noted above, EPA's in-use testing will not be duplicative, but as envisioned by EPA's settlement agreement with EMA, EPA's testing will be used for purposes of verifying any manufacturer testing as necessary in order to make final compliance determinations and other separate testing to supplement the testing of engine families not tested by manufacturers.

As evidence of EPA's intent to conduct the current and future HDE HW and NR CI testing programs, EPA has formally requested an additional $8 million in the fiscal year 2004 budget request sent to Congress "to help ensure compliance with the more stringent and complex Tier II and Diesel regulations for cars, heavy-duty diesel engines, and gasoline and diesel fuels that will take effect in FY 2004." Included in the request is the "development of a credible heavy-duty compliance program" as Congress has previously questioned EPA's oversight of this industry. We believe it is appropriate to include the new testing program costs associated with heavy-duty compliance in the budget request just as it was appropriate to include the $10 million associated with the recoverable portion of the $14 million spent on the laboratory

modernization projections which, at the time, was based on both EPA's design plans and needs and a similar request to Congress for such funding which has since been funded in subsequent appropriations. We also note that much of the testing that will be conducted during the 2005-2006 pilot testing period will be for purposes of refining testing protocols, etc. and that EPA must maintain a reasonable level of compliance testing in order to ensure that emission standards are being met while vehicles are operating during their useful lives. Similar to EPA's in-use verification program conducted by manufacturers in the light-duty industry (the Compliance Assurance Program (CAP 2000)), EPA believes it will continue to test at projected levels beyond 2007 when manufacturers will be expected to be required to conduct their own in-use testing as EPA testing in conjunction with manufacturer testing forms the basis for adequately determining the performance of engines during in-use operation.

What Commenters Said:

Section 2.3.3. The Alliance/AIAM maintains that since CAP 2000 transferred the obligation of in-use verification and confirmatory testing to manufacturers, EPA appears to be charging fees for costs that are already borne by manufacturers. They also cite to a statement regarding our authority to require SEA testing in the NPRM and contend that since CAP 2000 also reduced or transferred EPA's workload as it relates to SEA testing, that any costs associated with SEA testing is inappropriate.

Our Response:

Although the Alliance/AIAM maintains that CAP 2000 transferred the obligation of in-use verification and confirmatory testing to manufacturers, in fact what CAP 2000 accomplished was the shift in emphasis that had been placed on certification to in-use performance and in-use testing. EPA neither transferred nor intended to transfer EPA's own in-use verification and confirmatory testing to the manufacturers. Rather, after CAP 2000 was implemented, EPA began gradually increasing the amount of in-use testing that it was conducting, initially at the Virginia test laboratory (VTL) in Alexandria, Virginia, then transferred this testing (during the time when testing at VTL was being phased out) to EPA's Ann Arbor laboratory where the in-use testing program continues to operate and increase in scope. The costs of the in-use testing program reflects our implementation of the new Tier 2 emission standards and associated new technology.

We did not propose any fees for SEA testing for the light-duty program, therefore, the Cost Analysis Document does not reflect any light-duty costs for SEA testing. However, this does not preclude EPA from increasing its in-use testing program or conducting SEA testing if it deems it necessary in the future. Any related fee change would be through Notice and Comment rulemaking.

What Commenters Said:

Section 2.3.4. EMA indicated that EPA should readdress the assessment of fees for in-use testing once the manufacturer-run program is up and running. EMA also stated that by the time EPA conducts a new rulemaking for HDE fees, the HDE manufacturers will have been making "double payments."

Our Response:

As noted above in section 2.3.2, EPA believes that its initial modest compliance program that has been designed for the HDE industry, and for which costs will be recovered by today's rulemaking, is appropriate and is expected to continue for the foreseeable future. The Agency recognizes the significant role the HDE manufacturers will play in contributing to a comprehensive compliance program by conducting their own in-use testing. As such EPA anticipates that it may re-examine the scope of its own HDE HW in-use compliance program and its effectiveness at a time when its new program is fully developed and can also be examined in the context of a mature manufacturer-run in-use program. This reexamination will focus on whether the manufacturer in-use testing program as finally adopted and implemented indicates that changes are appropriate in the nature or extent of EPA testing. EPA will examine the scope of manufacturer-run testing and determine whether any redundant or unnecessary in-use testing is being done by EPA or whether additional EPA testing is required. EPA believes that this will timely address the concern of "double payments," in order to avoid manufacturers paying for testing that they are conducting and also paying fees for EPA to conduct the same testing.

2.4 Costs Too High for Industry

What We Proposed:

As earlier mentioned in section 2.1, the Cost Analysis Document contains EPA's in-depth analysis of the recoverable costs associated with running the MVECP.

We explained that each request for a certificate of conformity within a certification request type is potentially subject to an equal amount of EPA expenditure related to the applicable certification, SEA, and in-use compliance monitoring and audit programs, and where applicable, fuel economy. EPA believes it is fair and equitable to calculate fees in a manner whereby the fee for each certificate within a certification request type is approximately the same.

The Cost Analysis divided the various affected industries into three separate categories, light-duty vehicles, heavy-duty and nonroad compression-ignition engines and "Other." Each category was further subdivided if the amount of testing or EPA services varied significantly. The "Other" category was not subdivided as it included vehicles and engines that would only receive certification review and some minimal testing. The fees were determined by dividing the total costs of services provided by EPA to this category by the projected number of certificate applications that would be received by manufacturers included in the category.

What Commenters Said:

Section 2.4.1. Mercury Marine opposed the fee structure for marine engine manufacturers. It asserted that EPA's proposed fee of $827 per certificate would have a 2003 model year impact to Mercury Marine of over $23,000.

Mercury Marine stated that the marine industry agreed to redesign its products to meet EPA regulations in 1994 and 1995. They noted that the cost of this redesign is in excess of 500 million dollars industry wide. Mercury stated that the discussions at that time certainly did not include any additional costs for certification.

Mercury Marine stated that the marine industry is sensitive to changing costs and is unable to deal with the fees that EPA proposed.

Our Response:

As mentioned above, both section 217 and the IOAA direct EPA to recover fees associated with the various engine and vehicle certification and compliance programs. Today's rulemaking is in compliance with the strictures of both provisions. Industries that have not had to pay fees until now will be charged fees to cover the services provided by the EPA. EPA understands that the new fees are an expense that many manufacturers have not had to pay and that this expense may be difficult to budget into a manufacturer's expenses. This is why EPA notified manufacturers of the new fees early in the rulemaking process to give manufacturers time to budget for the new fees.

To reduce their fees burden, EPA included liberal waiver provisions for small engine families to assure manufacturers that the cost of fees will never exceed one percent of the projected aggregate retail value of the vehicle or engines being certified. It should be noted that when a fee is reduced the cost of the compliance services are covered by the government and are not distributed among other fee payers.

Although we did not mention certification fees as part of the marine engines rulemaking, we believe that we have given adequate notice of the new fees in order for manufacturers to prepare for the new fees. Furthermore, since 1992 light-duty vehicle and heavy-duty engine manufacturers have been paying fees. Thus, we also believe that the new fees schedule will ensure the equitable treatment of all manufacturers that are certified by EPA.

What Commenters Said:

Section 2.4.2. Briggs and Stratton stated that small engine applications are simple and straightforward, they require a minimum amount of review by EPA, there is no OBD II, fleet averaging, etc. Therefore, only a minimum fee should be set for certification, lower than those in the "Other" fee category. Because manufacturers of the small engine industry have a larger number of smaller engine families and the engines are of a low cost then this provides an additional justification for lower fees.

Outdoor Power Equipment Institute (OPEI) suggested that lawn and garden engines should be treated differently than the other engines and vehicles in EPA's category for "other engines." OPEI asserted that EPA took the position that it incurs the same expense, whether processing a certificate for a very complex locomotive engine, or an engine used to power a hedge trimmer.

Furthermore, OPEI comments that although it is not familiar with the intricacies of locomotive engine design and usage, EPA cannot possibly spend the same amount of time certifying a locomotive engines as a lawn and garden engine.

Our Response:

To reflect the services we provide to industries within a category (see worksheet #2 for the categories "LDV and Highway Motorcycles," HDE Highway and Nonroad CI," and "Other") in some instances we further subcategorized the fee categories. In addition to assessing the time that may be spent reviewing certification applications within a category or subcategory, we also assessed whether the applicable industry type would receive a similar level of compliance testing and associated costs. The goal of this is to develop subcategories that are expected to receive similar compliance activity and related costs. EPA's cost analysis for the fees rule divided categories into subcategories whenever there was a substantial difference between the level of services given to a subcategory. For example, EPA conducts pre-certification testing and in-use testing for light-duty vehicle and trucks. Conversely, EPA plans to conduct much less motorcycle testing within that same category. Therefore, the fees for the motorcycles are less than the light-duty vehicle and light-duty truck fees. EPA plans, for the industries in the "Other" category, to conduct the same level of effort for certification review and also plans only a minimal amount of testing. Testing is a major cost that separates subcategories and is not a significant cost for this category. Therefore, the industries in the "Other" category remained grouped together.

The certification information submitted by the individual industries largely consists of test data, descriptions of engines or vehicles in the engine family, and forms indicating the standards that the vehicles or engines meet. This information does not vary significantly whether the engines are large and complex or small and less complex. Certification review of all industries in the "Other" category consists of a review of the information that the manufacturer submits. The review includes determining that the engine or vehicle is being certified in the correct certification category, that the certification tests were conducted on the worst case engine or vehicle, that the forms were filled out correctly, and that the vehicle or engine meets EPA's emission standards. In this respect, all of the certificate applications submitted by the industries included in the "Other" category are the same.

In the course of EPA's review of certification applications, certain items may be reviewed more closely for one application than for another application, items such as defeat devices, auxiliary control devices or new technology. EPA decides whether these items should be reviewed depending upon the history of the industry, the manufacturer and other factors. Although the level of review of these items may change the total time spent on an individual or an industry's applications, the difference is not significant and does not merit a separate subcategory. Furthermore, other factors such as assisting new manufactures and reviewing incomplete applications require more time than the average difference in review time for industries' applications. For these reasons, EPA decided that the applications in the "Other" category are provided basically the same review and testing services and, therefore, should be assessed the same fee.

What Commenters Said:

Section 2.4.3. OPEI stated that EPA had an overly simplistic arithmetic system of evenly dividing the certification costs between such disparate industries (as locomotive and trimmers) and OPEI finds this inappropriate and inequitable. OPEI asserted that, using the figures generated by EPA, more than half (546) of the 1,027 engine families in the Other Industries category are lawn and garden engines. In addition, OPEI stated that the simple arithmetic used by EPA results in unfairly loading the "lion's share" of the certification costs onto a single industry which should only be responsible for its own share of certification costs.

Our Response:

As described in 2.4.2 above, EPA divided the costs attributed to the services provided to the "Other" category by the number of projected certification applications from the industries included in this category since each application entails approximately the same amount of review or effort by the Agency. Regardless of the disparity of the applications, the amount of time spent on locomotive applications and trimmer applications will be about the same.

The projected number of applications for the lawn and garden industry constitutes more than half of the applications that will be received and processed by the Agency. Over half of resources that EPA spends on the "Other" category will be spent on lawn and garden engines. For this reason, we believe it is appropriate,

equitable and nondiscriminatory for the lawn and garden industry to pay more than half of the costs for the "Other" category.

What Commenters Said:

Section 2.4.4. OPEI and ECHO stated that there are a lot of small business in the lawn and garden engine industry and these businesses may be unable to absorb fees costs as easily as other industries. OPEI suggested that certification fees for lawn and garden engines be set at no more than $300 as this would take into account the industries' razor-thin profit margin. OPEI further stated that most certificate applications are carried over from year to year which, OPEI suggests, costs EPA a fraction to process relative to a new certification application.

Our Response:

EPA does recognize that in some cases the full fee for certification may present an unreasonable burden and established a reduced fee to provide relief to manufacturers of smaller engine families. The reduced fee provision should help small business that certify smaller engine families for a limited market. Therefore, EPA does not see fit to reduce the fee for the lawn and garden industry to $300.

For EPA's response to the relative cost of carryover applications, see section 8.3 below.

What Commenters Said:

Section 2.4.5. The Motorcycle Industry Council stated that the proposed motorcycle testing is adequately funded by the Agency's existing fee and that even considering inflation, EPA's increased costs would not equal the proposed fee.

Our Response:

EPA's future plans for motorcycle compliance include more that the certification screening testing that is being conducted today. Worksheet #13 in the Cost Analysis includes an in-use motorcycle compliance program which includes the costs of motorcycle procurement, testing and computer support. The cost of the proposed motorcycle compliance program is $118,400. The motorcycle fees include this cost as well as the costs of the labor, certification and other services all outlined in the Cost Analysis that are dedicated to the motorcycle industry.

Section 3: Cost Study

3.1 Number of Engine Families

What We Proposed:

As previously mentioned in section 2.1, we grouped industries into three fee categories (industry groups):1) Light-Duty, consisting of light-duty vehicles and highway motorcycles; 2) Engines, consisting of heavy-duty highway and nonroad compression-ignition engines; and 3) "Other", which contains other vehicles and engines. We proposed a fee schedule based upon the recoverable costs for each certificate type under each fee category and the number of known and projected certificates issued annually for that certificate type. We then divided our recoverable costs by the number of certificates expected to be issued to manufacturers within that certification request type. Thus, for example, in the proposal we determined the recoverable costs for the nonroad CI industry as $1,300,155 and the number of certificates issued as 603 and the resulting fee is $2,156. (Worksheet #2 of the revised Cost Analysis available in Docket OAR-2002-0023 updated the cost for the nonroad CI industry to $1,205,895, number of certificates to 662 and the resulting fee for that industry is $1,822.)

We determined the number of certificates expected to be issued by examining EPA's certification database. For currently active certification programs, we listed the number of certificates based on the latest information at the time of the proposal which was for the 2001 model year (67 FR at 51406). For other newly regulated industries for which certificates have not yet been issued, we projected the number of certificates based on discussions with manufacturers and information presented to EPA during the emission standards rulemakings for such industries. Id.

What Commenters Said:

Section 3.1.1. EMA states that EPA significantly understated the number of HDE on-highway and nonroad CI engine certificates that are issued annually which resulted in an overstatement of the fees that should be allocated to each certificate. EMA stated that in 2001, we issued 159 HDE HW and 661 nonroad CI certificates. EMA also asked for an explanation as to why more current years and certification data should not be used since that would be more reflective of the increase in engine families.

The Alliance/AIAM stated that the Agency did not provide an explanation for the estimated number of certification requests used in calculating the fees. The Alliance/AIAM expresses concern that the number of light-duty certificates appears to be based on CAP 2000 assumptions; assumptions that they maintain have not materialized. In addition, they contended that EPA's Tier 2 and heavy-duty regulations, as well as CARB's low emission vehicle (LEV II) regulation, will likely result in creation of more certification requests than projected and lead to collection of more fees by EPA. As a result, EPA may collect more fees than it is entitled to if it receives more certification requests than projected.

The Alliance/AIAM submitted further comment that they expected 35 additional certificates to be issued for light-duty vehicles for model year (MY) 2004 and that the number of certificates would either remain the same or increase as a result of Tier 2. The Alliance/AIAM was hesitant to predict the effect of the CAP 2000 rule on the number of certificate requests.

The Alliance/AIAM suggests that EPA should base its fee calculation on the most current number of issued certificates. Because this number may fluctuate and because it may be difficult to project future certification trends, they suggest that EPA keep track of the trends and assess a fee based on the average taken from several years. Lastly, they suggest that this process be done by rulemaking to prevent EPA collecting more fees than appropriate.

Our Response:

EPA's intention throughout this rulemaking process is to determine with a reasonable level of certainty the recoverable costs of implementing its MVECP and assessing fees per certificate to cover such costs. Thus, we agree with the comment that we should use the most current and accurate number of issued certificates. However, EPA does not agree with the comments of EMA that the number of certificates used in the cost determination should remain the same regardless of the impact on fees collected. Simply put, EPA believes it should only recover what it anticipates to be its actual costs and should devise a reasonable system in order to charge a fee that most closely matches its final actual costs and final number of certificates to be issued in a given year. As explained below, EPA is including a "rolling average" formula to be applied in 2006 and thereafter in order to

more accurately reflect the number of certificates issued each year and the corresponding fee that is owed per certificate.

In light of the comments that we received, EPA gathered information regarding the number of certificates for HDE HW, nonroad CI, and light-duty vehicles and trucks, motorcycles and ICIs from several databases, and reexamined its certification numbers for the last three years, 2000, 2001 and 2002 which comprise EPA's most recent and complete information.

Using an average of the past two years of the most recent complete certification information (2001 and 2002) we determined the average number of certificates for HDE HW, nonroad CI, and light-duty vehicles and trucks certification request types. For the other types EPA saw no need to reexamine its projected number of certificates nor did EPA receive any comment. For the light-duty vehicles and truck category we have chosen to keep the number 405 as used in the proposal. Although the actual average is 382 for the 2001 and 2002 model years, we believe it is likely that there will be at least a modest increase in the number of light-duty vehicle and truck certificates given the complexity of Tier 2 standards. In addition, information submitted by the Alliance/AIAM states that the number of additional certificates for 2004 may be as high as 35. This would bring our projection to 417 for 2004. However, this is a projection and we do not have complete confidence in this number. Therefore, we have decided to retain the proposed 405 certificates in the final rule.

For the HDE HW category we have determined, based on a re-examination of our database and discussions with representatives from EMA, that 148 certificates is a more accurate projection, rather than the 130 in the proposal. This will result in a reduction of fees for such certificates. For NR CI we have also revised the number slightly upward to reflect a more accurate projection of 662 rather than the proposed. We have re-calculated the fees amount for each of these categories and the change is included in the new fees shown in the table in new revised worksheet # 2 of the Revised Cost Analysis available in Docket OAR-2002-0023 and at 40 CFR §85.2405(a).

Although at this time, EPA believes there is enough certainty with regard to the total recoverable costs in future model years, EPA recognizes that the number of issued certificates "divisor" needs to be adjusted periodically in order to ensure that we only collect the appropriate fee. Therefore, we agree with the suggestion, made by the Alliance/AIAM, that EPA monitor

the number of certificates issued each year and collect a fee based on the most recent information and an average of several years. However, we do not believe that rulemaking is necessary each time the Agency seeks to adjust fees based on the number of issued certificates. Therefore, in this rule, we are setting forth the methodology by which future calculations will be made, based on clearly defined criteria. EPA also recognizes that the industry needs to know the applicable fee in advance of the effective date. Therefore, by today's rulemaking, EPA is implementing a fee applicable to each certification request type that is applicable from the effective date of the regulation through the 2005 calendar year. Starting in calendar year 2006, and each subsequent year, EPA will adjust its fees based on both changes to the average number of certificates issued from the prior two model year period (for calendar 2006, model years 2003 and 2004 are considered) and an inflation adjustment factor. The inflation adjustment factor is discussed in section 4 below.

By example, for any certificate received in the 2006 or later calendar year the fee will be adjusted from the fee applicable to the previous calendar year. Using 2006 calendar year as an example, in January 2005 EPA will examine the number of certificates issued for each certification request type in the 2003 and 2004 model years, average the two years, and then divide this new number into the fee base established by today's rule. The fee base will be adjusted by the inflation factor before it is divided by the new certificates number. In January 2006, EPA will perform the same task for any certificate submitted in the 2007 calendar year, and so on. EPA will publish the new fees each year in a Dear Manufacturer letter or by similar means. The "Dear Manufacturer" letters are also located on EPA's website: http://www.epa.gov/otaq/cert/dearmfr/dearmfr.htm. The new fees will also be located on EPA's Fees website: http://www.epa.gov/otaq/fees.htm. See section 4, below, for a further discussion of how this annual adjustment regarding the number of certificates will be made for each certification request type, including those for nonroad industries in the "Other" category.

What Commenters Said:

Section 3.1.2. EMA stated that we should use the number of certificates issued in 2001 since we also used 2001 fiscal year as the starting point for determining activities and costs assessable against HDE manufacturers. EMA further stated that there should be no future automatic adjustments for certification fees based on

whether the number of issued certificates varies from year to year in the future. Since a single base year was chosen as a foundation for the Agency's cost calculations, the marginal cost of each certificate should remain similarly fixed based on the number of issued certificates in that same base year. Otherwise, the entire cost calculations would have to be redone based not only on future numbers of annual certificates but also on future year budgets and activity allocations. EMA maintains that if more certificates are issued in one year than another, more fees will be received and if less certificates then less fees and that such an outcome is appropriate.

Our Response:

EPA disagrees that a single base year and the number of certificates issued that year should be chosen as a foundation of the fees cost calculation. The two basic components of certification fees are labor and testing costs. These costs will not vary each year as a result of the number of certificates that are issued because EPA will conduct the same number of tests that are outlined in the cost analysis and, furthermore, the same number of FTE will be dedicated to certification review and testing. The FTE will adjust the amount of time spent on each application to the number of applications submitted. Because EPA will be providing the same services it is important for EPA to collect the same amount of fees each year.

EPA will be adjusting the fees annually to reflect the change in the cost of labor as is discussed in section 4. The costs of testing and the indirect costs of testing and labor may also change, most likely increase with inflation, but because some of the costs are fixed by contract and because the cost changes are more difficult to determine each year, EPA will not change the fees based upon the changes to these costs.

3.2 Heavy-duty Highway and Nonroad Compression-ignition Compliance Activities

What We Proposed:

The Cost Analysis, on worksheet #16, included the projected costs for an enhanced engine compliance program that EPA will implement for heavy-duty highway and nonroad compression-ignition engines. It includes confirmatory testing for certification, selective enforcement audits and in-use dyno testing programs. We determined the costs by using contractor prices.

What Commenters Said:

Section 3.2.1. EMA described the costs of enhanced testing shown on worksheet #16 as objectionable and improper because EPA has chosen to not implement such programs in the past presumably because it did not see a priority or clear benefit; nevertheless EPA now chooses to do so at the manufacturers' expense. As a result, the commenter further asserted that EPA must demonstrate the need and cost-effectiveness of these new programs since it is now the manufacturers and not EPA that will bear the expense.

Our Response:

EPA, in planning for the future, determined that the amount of compliance oversight devoted to the heavy-duty industry has been less than that devoted to the light-duty industry. As part of the Agency's plan to increase compliance oversight for this industry, we intend to implement additional HDE HW and NR CI compliance programs and the costs of these programs are included in the Cost Analysis Document. The procurement of in-use HDE HW engines is included on worksheet # 12 and the enhanced engine compliance program is outlined in worksheet #16.

Please note that EPA reassessed its testing plans from those set forth in the notice of proposed rulemaking to a level that is more representative of the amount of testing that may be accomplished with the new testing facility in Ann Arbor and the new enhanced engine compliance program testing that will be conducted at a contractor's facility. EPA has used the information on resources and lab capabilities to make the changes and, therefore, the current rulemaking more accurately represents the test program that EPA will put into place. The changes are discussed more fully in the Final Rulemaking, section III.B. Revised worksheets in the updated Cost Analysis reflect the new costs of the revised testing plan.

The additional compliance activities, the in-use tests that will be conducted at NVFEL and those outlined on revised worksheet # 16 that will be performed by a contractor at a contracted facility, will begin to level the playing field between the light-duty vehicle and engines industries. Furthermore, recent events including new emission standards and concerns about prior noncompliance with existing standards have caused EPA to want to increase the oversight devoted to this industry. New standards start in 2004 and 2007 for HDE HW and call for use of types of emission control technology not previously used on these engines.

In 1998 consent decrees were entered into with almost the entire HDE HW industry, to resolve claims of several cases of noncompliance.

In view of the new standards to be implemented and concerns with claims of noncompliance and the lack of equity in testing between the light-duty and engine industries, EPA determined that it needed to devote more oversight to the engine industries. We believe that the new testing, particularly the in-use tests, will be an effective tool for promoting compliance with EPA emission standards. It is likely that in the future EPA will conduct more engine tests than outlined in the cost study. Fees will not be changed to reflect the additional cost of these tests without a new rulemaking.

What Commenters Said:

Section 3.2.2. EMA states that EPA estimated the costs for the enhanced testing programs listed on worksheet #16 to be $380,000 for HDE HW and $380,000 for NR CI. EMA notes that this cost element alone is equivalent to $2,723 per HDE HW engine family and $630 per NR CI engine family. In addition, EMA states that the extra staffing needed to plan and oversee the enhanced testing program results in costs of $5,093 per certificate.

Our Response:

As discussed in the response to Section 3.2.1. above, EPA made several adjustments to the projected testing listed in the proposal including changes to the Enhanced Engine Compliance Programs described in revised worksheet #16. The revised Enhanced Engine Compliance Program outlines a testing programs at a cost of $165,000 for the HDE HW industry and $300,000 for the NR CI industry. The cost per certificate for the enhanced engine compliance program would be $1,115 and $453 per engine family for the HDE HW and NR CI industries as proposed, respectively. EPA believes that this cost is justified as the new enhanced compliance program is needed as explained in the response to section 3.2.1, above.

EMA also referenced and expressed concern over the estimated extra staffing costs of $662,038. However, the Agency has only added one FTE to CCD Washington, DC, at a cost of $99,580 before overhead costs. This FTE will plan and oversee the enhance engine program. Also testing will be conducted at contracted facilities.

What Commenters Said:

Section 3.2.3. With regard to worksheet # 7, EMA questioned LOD's added expenses of 2.25 direct FTE and 0.5 indirect FTE and EMA sought clarification as to how and why the Agency allocated these FTE to the HDE HW category as there is no description of what these new FTE would be doing. EMA also questioned whether the additional FTE might be inappropriately linked to the contracted out testing in worksheet # 16 or whether these costs are already incorporated into the CCD summary sheet at worksheet #4.

Our Response:

EPA has revised LOD's additional labor needs to 1.25 direct and .25 indirect FTE. This revision reflects the labor needed to conduct the revised number of in-use HD HW tests that will be conducted in the Ann Arbor laboratory. The 1.25 direct FTE include 1.0 FTE technician to conduct the testing in the test cells and 0.25 FTE to provide engineering support. The indirect FTE of 0.25 reflects the need for data management support for the test cells. The FTE are not linked to nor duplicated in the costs for the enhanced engine testing included in worksheet #16 as the additional FTE will be participating in testing that will be conducted at NVFEL.

What Commenters Said:

Section 3.2.4. EMA expresses concerns regarding worksheet # 12 and the entry of $275,431 for "core testing costs" for HDE HW which is carried over to worksheet #3 and then to worksheet #1. Of these costs $225,360 is shown for heavy-duty engine procurement. EMA contended that one would presume that this cost is associated with an in-use testing program even though the nature of the testing is not described. The remaining costs appear to be allocated to the HDE HW category using the FTE method and this cost should similarly be excluded unless EPA provides an explanation of what this core testing is, why it is needed and how it complements and integrates with other compliance programs that exist or are proposed elsewhere in the NPRM. The commenter questions whether all of the testing programs in worksheet #12 and worksheet # 16 are needed in addition to the Agency's existing compliance testing protocols.

Our Response:

Proposed engine procurement costs for heavy-duty engines were shown in worksheet # 12. EPA had proposed to test 10 in-use engines, two engine families of five engines per family. The cost to procure the engines is $25,240 for the first engine of the family and $21,860 for subsequent engines as explained in general terms in the Cost Analysis, page 52. The revised test plan consists of testing of three engines in one engine family. The new cost for procuring these engines, at the same cost per engine as proposed, is $68,960. The revised costs are shown on new worksheet # 12. This testing will be conducted at the Ann Arbor facility and will be conducted in addition to the HD HW in use testing listed on worksheet #16 in which one in-use HD HW family will be tested. Therefore, only two heavy-duty highway engine families will be evaluated out of the estimated 148 that are certified on a annual basis. Thus, less than two percent of the certified family production would be evaluated for in-use emissions annually by EPA. EPA believes that this in-use testing is justified as explained in the response to section 3.2.1, above.

3.3 General Cost Study Comments

What We Proposed:

EPA's cost study detailed the costs the Agency incurred in implementing the MVECP. We set forth our explanations and reasoning in detail in the Cost Analysis Document. For example, we explained how we translated our costs into the proposed fees.

What Commenters Said:

Section 3.3.1. EMA stated that without detailed knowledge of EPA's budget and budgeting process it is difficult to comment or challenge the specific cost elements in EPA's analysis. As stated previously, EPA is projecting the costs of future programs that have not been finalized or proposed. As such EPA has failed to provide commenters with the "necessary information" to comment in an adequately informed manner on the NPRM.

Our Response:

In our proposal, we explained the specific components of the MVECP. (See 67 FR at 51406-08). As earlier mentioned in section 2 we also conducted a cost analysis to determine the costs associated with our certification and compliance program and set forth our analysis in the Cost Analysis Document. It describes EPA's current costs and projected costs for the identified program

components. As earlier mentioned in section 2, we projected our costs to 2003 using the best information available at the time that the cost analysis was written. Wherever possible, explanations were included to detail the source of the information. Thus, we believe that we have "identif[ied] the components of the [MVECP] and provide[d] a brief explanation of why each component is a part of the [MVECP] program." American Medical Association v. Reno, 57 F.3d 1129, 1135, (D.C. Cir.).

We also believe that the Agency's budget is too general in nature and as such does not contain the level of specificity and explanations we have set forth in the Cost Analysis Document. This is because the Agency's budget is prepared to reflect the divisional levels and also generally entails resource allocation issues.

What Commenters Said:

Section 3.3.2. EMA states that the fee assessments would recover EPA's total cost in procuring equipment such as "computer hardware/software", "in-use on-vehicle testing" and "on-vehicle testing units purchase" as listed on worksheet #13. EMA states that it presumes that this is for the initiation of portable emission testing or "ROVER-type" in-use testing to enforce the Agency's NTE requirements and goes on to state that this is inappropriate because the NTE requirements do not take effect for heavy-duty highway engines until 2007 and have not been proposed for NR CI engines. EMA further contended that the Agency was seeking to recover these "one-time" procurement costs annually.

Our Response:

The costs that EMA specifically refers to are for equipment required for EPA's engine emissions in-use screening testing. EPA currently uses portable emissions test equipment for screening in-use engines for compliance with the applicable emissions standards and the defeat device prohibition, not for compliance with NTE emission standards as suggested by EMA. EPA plans to use this tool to refer engines that are suspected of noncompliance to be tested on engine dyno either in the AA lab or at a contracted facility. For this reason, the cost of the equipment is appropriate.

Portable emissions test equipment is a very effective screening tool. The equipment can collect a significant amount of data from engines without having to take the engines out of

service. EPA plans to increase its number of testing units and expand the screening program. The costs of the equipment included in the cost study are recurring costs as EPA will need to buy additional testing units, replace outdated and damaged equipment and will have to maintain of the units that have been purchased.

Section 4: Automatic Adjustment of Fees

What We Proposed:

We considered the effect of inflation on the MVECP and explained that inflation may have an impact on our recovery of the full costs associated with the program. Thus, we proposed, beginning with the 2005 model year, an annual automatic adjustment of fees based on the annual change in the Consumer Price Index (CPI). We also proposed a formula to enable manufacturers to calculate the increase. We also solicited comments on alternate ways of adjusting fees on account of inflationary factors. (See 67 FR at 51410)

We explained that we intended to issue annual letters, again beginning with the 2005 model year, informing manufacturers of the adjusted applicable fees. The proposed formula included an ability to project future fees due to the CPI adjustment based on two model years before the adjusted fee model year. Thus for model year 2005 EPA proposed a formula whereby the CPI for MY2003 (as determined by July 2003 CPI number) is compared to the CPI from 2002. We also solicited comments regarding notification procedures of the new fee amounts. Id.

What Commenters Said:

Section 4.1.1. One commenter urged the Agency not to include an annual automatic adjustment and maintained that an "automatic" increase in fees based on the CPI for "all items" should not be implemented as the actual costs of MVECP will be impacted by many factors more significant than the CPI and such factors are not significantly correlated with the general rate of inflation. This commenter also suggested that the Agency's formula for annual adjustment is improper because many of the underlying costs are actually one-time capital expenditures that will not fluctuate at all in response to any changes in the CPI.

Our Response:

In order to comply with both section 217 and the IOAA, and to timely collect fees based on actual costs and to collect fees for such costs at time of certification, EPA believes that it is most practical and appropriate to collect fees based on what it reasonably believes will be its actual costs at the time new certification applications are received. Thus EPA continues to believe it most appropriate to determine its current costs and how such costs may be affected by future events, including events such as inflation or the addition of new compliance programs. Although EPA does recognize that several variables exist which may influence the actual future costs that EPA incurs to provide MVECP services, including changes to its budget (and resulting changes to EPA's expenditures on certain compliance programs such as contract costs for testing and procurement of testing vehicles, etc), EPA believes that such general historical budget variability (appropriations for most of EPA's costs don't change dramatically from year to year and general contract costs remain relatively unchanged) has not in fact significantly affected EPA's actual costs as compared to increases associated with annual inflation costs. However, by today's rule we are narrowing the budget items that will be affected by the inflation adjustment to further limit those items that may indeed be affected by general budget variability.

We believe it is reasonable to consider the effect of inflation on the costs of conducting our various certification and compliance programs. However, at this time, EPA chooses to only implement a fee schedule that will include some adjustment by calendar year for labor costs as these costs can be reasonably determined as explained below.

We also agree with comments that fees should not be adjusted for one-time capital expenditures or for other fixed costs. Because several components of the MVECP reflects items that have a "fixed cost" (for example, the costs associated with the Lab Modernization), EPA has changed the inflation formula to address concerns regarding "one time costs" and that such cost not be adjusted by the CPI. At this time, EPA will only adjust labor costs each calendar year because, as explained below, we can reasonable determine the effect of inflation on these costs.

EPA also believes that to some extent it may not be appropriate to automatically adjust fees for the costs of some compliance programs, including current direct program costs (e.g. contract costs) despite the general history of such costs increasing by some amount each year. Because EPA is not only

continuing to implement its many current compliance activities but is also implementing several new compliance programs that may not have a predictable cost increase each year that tracks the inflation rate, EPA is not adjusting such direct program costs.

EPA believes that the determination of the labor requirements to cover the numerous compliance activities was accurate and that such labor requirements will remain constant or perhaps slightly increase within the next few years. Such labor costs (as expressed in annual salary increases or decreases) for EPA historically track a rate of increase (or decrease) that is at least as high as that of the CPI[10]. Thus, we are finalizing our regulations with a provision for automatic adjustment of labor costs for each fee category based on the changes in the CPI.

The table below represents the labor costs and the fixed costs for each certificate type. The fixed costs, represented in the F column, are those items in the cost study that are either amortized or otherwise may be affected by variables beyond inflation. These costs are determined from worksheet #1 and include a total of all "operating costs" (both indirect and direct) and thus does not include the labor costs and overall EPA overhead costs on worksheet #1.

The labor costs, those that will be affected by the CPI, are represented in the L column. These are the costs that will increase or decrease with the CPI. These labor costs were determined from worksheet #1 and the total labor (direct and indirect) costs associated with each fee category.

The LD category has been split into Cert/FE (fuel economy) and In-use subcategories because not all LD certificates direct EPA In-use services. The costs were totaled from the labor and fixed costs of worksheets #3 and #4 of the Cost Analysis. The values of EPA's labor and fixed costs for the ICI, motorcycle,

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[10] EPA normally uses Federal payroll and non-payroll inflators for budget projections issued by the Office of Management and Budget (OMB) when OMB submits the President's Budget to Congress and the assumptions used for the "inflators" are higher than the CPI inflation adjuster that EPA is choosing to use to account for increases in labor costs in today's rulemaking. For example, in the fiscal year 2004 (FY 04) President's Budget to Congress, for FY 04 EPA used a payroll (or labor) inflator of 1.048 and for FY 05 through FY 13 EPA used an inflator of 1.040.

heavy-duty highway engines, nonroad CI engines and Other categories were taken from worksheet #1 of the Cost Analysis and are shown below:

	F	L
LD Cert/FE	$3,322,039	$2,548,110
LD In-use	$2,858,223	$2,184,331
LD ICI	$344,824	$264,980
MC HW	$225,726	$172,829
HD HW	$1,106,224	$1,625,680
NR CI	$486,401	$545,160
Other	$177,425	$548,081

This Other fee category continues to include the costs associated with MVECP services for the marine SI inboard/sterndrive industry although the certification fees are not being finalized for that marine SI inboard/sterndrive certification type by today's rule (see section 1.2 for further discussion). At the time the final emissions rule for this certification type is proposed and becomes final, EPA will reexamine whether approximately 25 certificates per year will be issued to this certification type. The other certification types covered in the "Other" category will not be charged for any costs (fixed or labor) associated with the marine SI inboard/sterndrive certification type. The Other category includes: HD HW evap, including ICI; Marine (excluding inboard and sterndrive) including ICI and Annex VI; NR SI, including ICI; NR Recreational (non-marine), including ICI, Locomotives, including ICI.

The total cost for each certificate type commencing in 2006, and each year thereafter, will be determined by multiplying the labor costs (as noted in the table above) for each fee category by the CPI ratio of the calender year (CY) that the fees will be effective (minus two years) to the CPI of calendar year 2002, then adding the fixed costs. The total of the adjusted labor costs

plus the fixed costs are then multiplied by the existing overhead rate of 16.9 percent. This is similar to our proposed method except that we will now be adjusting only our labor costs. EPA's overall overhead costs are not adjusted. We are also implementing this automatic adjustment in the 2006 calendar year instead of the proposed 2005 in order to provide a stability period before the fees are adjusted. As explained below in section 4.1.4, for administrative simplicity, EPA will make annual adjustments by "calendar year" rather than "model year."

For each fee category EPA will determine the fee for applications submitted during any calendar year starting in 2006 and each year thereafter using the formula below:

Category Fee_{cy}= [F + (L * (CPI_{CY-2}/CPI_{2002}))] * 1.169 / [(cert#$_{MY-2}$ + cert#$_{MY-3}$) * .5]

The first year that the fees will increase is 2006. That year EPA will determine the new fees using the following formula:

Category Fee_{2006}= [F + (L * (CPI_{CY2004}/CPI_{2002}))] * 1.169 / [(cert#$_{2004}$ + cert#$_{2003}$) * .5]

F= Fixed costs within a category, the sum of LOD and CCD Total Indirect Program Costs and Total Direct Costs rows for each category, worksheets #3 and #4

L= Labor costs within a category, from Total Labor Costs rows, worksheets #3 and #4

Fee_{cy} = the calendar year of the fees to be collected

CPI_{CY-2} = the consumer price index for all U.S. cities using the "U.S. city average" area , "all items" and "not seasonally adjusted" numbers calculated by the Department of Labor listed for the month of November of the year two years before the calendar year. (e.g., for the 2006 CY use the CPI based on the date of November, 2004).

CPI_{2002} = the consumer price index for all U.S. cities using the "U.S. city average" area , "all items" and "not seasonally adjusted" numbers calculated by the Department of Labor for December, 2002. The actual value for CPI_{2002} is 180.9.

1.169 = EPA's 16.90 percent overall overhead cost

cert#$_{MY-3}$ = the total number of certificates issued for a fee category three years prior to the model year for applicable fees (Fee_{cy})

cert#$_{MY-2}$ = the total number of certificates issued for a fee category two years prior to the model year for the applicable fees (Fee_{cy})

For example and by way of a hypothetical, to determine the applicable fee for LD ICIs for any certification application received in calendar year 2006, based on a fixed cost of $345,355 and a labor cost of $264,980, a CPI in 2002 (December 2002) of "180.9" and a CPI in November, 2004 of "183.1" (this number represents the CPI in February 2003 and EPA will use the actual CPI number for November 2004 once it as been determined by the Dept. of Labor, since determined to be 183.9) , 95 certificates issued in 2003 and 85 certificates issued in 2002, the formula would be:

$Fees_{2006}$(LD ICI) = [$345,355 ($264,980 (183.1/180.9))] * 1.169/ [(95 85) * .5]

This equals $7,969 (all rounding of numbers should occur at the end of the calculation and the final dollar amount of the new fee will also be rounded up or down to the nearest dollar) and represents a cost decrease per ICI certificate of $425 from the fee being finalized today which will only apply from the effective date of the rule through the 2005 calendar year.

Currently one can determine the CPI numbers by going to the Bureau of Labor Statistics website: (http://www.bls.gov/data/home.htm), then choosing the icon under "CPI-All Urban Consumers (Current Series) under the "Most Requested Statistics" column. From that page, choose (by checking the box) U.S. All items, 1982-84=100 - CUUR0000SA0. This results in a page with a table called "Series Id: CUUR0000SA0" from which the applicable numbers may be drawn.

EPA also notes that manufacturers may have some concern regarding the proper budgeting for its costs for future certification applications and thus the regulations note that EPA will provide notification to manufacturers at least 11 months in advance of the calendar year in which new fees are due. If an event such as a rulemaking occurs that causes a significant change in the number of certificate applications received, the Agency will reexamine the formula to determine whether adjusting the fees based upon the number of certificate applications is still applicable.

What Commenters Said:

Section 4.1.2. Some commenters argued that automatic fee increases would reduce EPA's incentive to provide more efficient

MVECP services and thus would amount to "gold plating" which Congress admonished against.

Our Response:

EPA does not believe that automatic fee increases would amount to "gold-plating," rather EPA is recognizing that annual adjustments to its labor costs are a reality and that in order to recover its actual costs in a timely manner that an automatic adjustment best serves this function. We believe that the intent of both the IOAA and section 217 is for EPA to continue to collect its full actual costs and to do so in a reasonable and timely manner; EPA does not believe it timely to periodically evaluate its labor costs (in light of inflation) and issue subsequent new fees rules. The result of such practice would be for EPA to forego collecting a significant portion of its costs. EPA continues to strive to provide its services in an efficient manner and recognizes that other cost adjustments may be necessary in the future and will at that time conduct an additional cost study and rulemaking if significant changes in its costs have occurred.

What Commenters Said:

Section 4.1.3 Two commenters suggested that any adjustments to fees should be done through periodic rulemaking and be based on actual rather than assumed costs. Otherwise there is no incentive for the Agency to review its actual program to determine the latest actual costs of the program. One of the commenters noted that even the number of certificates that are issued by EPA could have a more significant effect than changes due to inflationary increase.

Our Response:

EPA agrees with the comment that the number of certificates that are issued could have a significant effect on the amount of fees that should be charged per certificate and addresses that issue in section 3.1.

As noted in the discussion in section 3.1, EPA is adopting a provision to adjust fees based on any potential change in the number of certificates starting in the 2006 calendar year and will employ a similar methodology as the annual inflation adjustment and will perform both at the same time. The fee amount per certificate will be determined by dividing the total cost for each certificate type (as determined under the inflation calculation

noted above) by the "rolling average" of the number of certificates issued by EPA for the model years three and four years preceding the calendar year that the fees will become effective.

EPA is committed to the objectives of recovering its actual costs in a timely manner and in providing fee payers proper notice of the amount of fees that are required when they apply for certification. EPA anticipates that it will have an opportunity to make any necessary adjustments to the fees regulation during the course of several future rulemakings. However, EPA disagrees with the commenters suggestions that any adjustments should be done through a periodic rulemaking. The clear formula that EPA has provided by today's rulemaking provides a predetermined basis by which to determine adjustments to fees based on any change in the number of certificates or changes in the costs of labor to provide the same services as are provided currently. The changes in the costs of labor (for the same number of employees) is based on a very conservative formula of the annual CPI. EPA believes this is a fair and reasonable process for adjusting fees and avoids unnecessary and possibly untimely rulemaking (a rulemaking not done in time to reflect changes in the number of certificates or labor costs) that may prove inefficient.

In addition, EPA will issue a notice at least 11 months before the calendar year in which new fees are owed which will notify certification applicants of the new fees. As discussed in section 3.1 regarding the number of engine families or certificates issued within a certification request type, EPA plans to make this inflation adjustment calculation at the same time as the calculation of the number of certificates and will announce both adjustments together. In other words, EPA will analyze the adjusted costs based on inflation and also determine the new average number of certificates.

What Commenters Said:

Section 4.1.4. A commenter also expressed concern with EPA's proposal to issue notices of fee adjustments through a guidance letter on grounds that the letter will not provide adequate notification to manufacturers and will provide no adequate opportunity for public review and comment. The commenter further asserted that manufacturers would need at least 15 months notice prior to the model year commencement. EPA notes that this same commenter suggests that a manufacturer would need to receive notice by October 1, 2003 which would be 15 months in advance of

January 1, 2005. This would be impractical since a manufacturer could receive a certificate for model year 2005 on January 2, 2004 and it could receive such certificate if it submitted its application by November, 2003.

Our Response:

EPA wishes to clarify that the fees adjustment formula as proposed and finalized today, is a self-implementing mechanism (in fact, the fee payer is able to perform the CPI/labor calculation based on the formula set forth in today's regulation and the effect of the number of certificates is also predetermined). As such, EPA plans to issue a letter providing information to the manufacturers of the upcoming rates approximately 11 months before they become effective by operation of today's rule. EPA believes this will provide reasonable opportunity for manufacturers to make necessary preparations for paying any adjusted fees at time of application for certification..

Because EPA proposed the basis (and formula) by which fees will be adjusted for inflation and it involves a relatively ministerial collection of facts and application to the formula we continue to believe that the appropriate mechanism by which to adjust such fees is by this mechanism rather than a new rulemaking which would only perform a similar task. By today's rule fee payers will be informed of the fees applicable until 2006 and will know how fees will be adjusted on an annual basis (for variable costs as explained above) by operation of today's rule.

However, because both EPA and manufacturers may be involved in the submitting, processing, issuing and receiving certificates for different model years at the same time, and because EPA is attempting to recover the costs for actual services provided at a given point in time we believe it is reasonable to adjust fees by calendar year rather than by model year. This will avoid the confusion regarding the amount of fees that are owed and whether the certification applications were submitted before or after EPA's adjustment. Because of the overall timing of this rule we also believe it is appropriate to implement the fee adjustment starting in the 2006 calendar year. Therefore, starting in calendar year 2006, for any certification application that is received on January 1, 2006 and thereafter (until fees are adjusted for calendar year 2007 and certification applications are submitted on January 1, 2007 and thereafter, etc.) EPA will issue

a letter approximately 11months before the applicable calendar year informing manufacturers of the adjustment in fees.

Section 5: Effective Date and Application of New Fees

What We Proposed:

We proposed the "effective date" of our new fees schedule as 60 days from the date of publication of the final rule. (67 FR at 51411). We also proposed applying the new fees to 2003 and later model year vehicles and engines. Id. In addition, we proposed excluding "complete" certification applications received prior to the effective date of the new fees regulation (including any remaining 2003 certification applications). Id.

What Commenters Said:

Section 5.1.1. One commenter suggested that the new fee schedule should take effect for certification applications for the model year following the model year in which the final rule is published, in this way the manufacturers will have certainty regarding the appropriate amount of the certification fee to be submitted and thus will not have to guess the date that EPA will deem their certification application complete.

The Alliance/AIAM stated that EPA's proposal to increase fees (for light-duty vehicle manufacturers) for manufacturers that submit 2003 and later model year certification requests received on or after 60 days from publication of the final rule creates uncertainty regarding the appropriate fee to submit with each application. The commenter notes that it cannot project when EPA will issue the rule and thus for it to perform its necessary budgeting to assure that it has necessary funds to cover the increase.

Our Response:

EPA understands that it would be helpful to manufacturers to have a date before which they are assured that they will be paying the old fees so that they can budget with certainty up to that date. For this reason EPA is finalizing the implementation date as of 60 days from the publication of the final rule. We believe that at least a 60 day lead time between when the rule is published and when applicants will be required to pay new fees is adequate and appropriate. EPA is again guided by the principle that its compliance programs ought to be self-

sustaining to the extent possible and that because we are incurring costs at this point in time that new fees should commence. Although we anticipated that the final fees rule would become final in fiscal year 2003 (FY03), and based our projections of costs to be incurred during that time, we believe it even more appropriate that we collect fees in FY04 (during which this rule becomes effective) as our compliance programs based on new requirements such as Tier 2 and the 2004 HDE regulations will be in place and our anticipated budget increases will be more likely in place.

In addition, manufacturers have been informed of the new fees rulemaking and commencement of new fees in FY03 for over 2 years. An advance fees rulemaking briefing was held for regulated industries on August 29, 2001 in Ann Arbor, MI. At that time EPA provided a draft of the fees schedule and cost study. The purpose of the briefing was to give businesses enough time to plan for fees in their budgets. Furthermore, the proposed rule was published in August 2002 giving manufacturers notice of the fees rulemaking and implementation time periods. Therefore, the new fees will be applicable to any new certification applications (for MY2004, or 2005) submitted and received on or after the date 60 days after publication of this rule in the Federal Register. The new fees will not apply to any certification applications received by EPA prior to the effective date of the regulations, providing that they are complete and include all required data.

What Commenters Said:

Section 5.1.2. One commenter expressed concern that manufacturers will have no way of knowing whether their applications have been received and deemed complete before the rule becomes final, and that potential delays in EPA's review of the applications could result in an undue increase in fee or delays in determining the appropriate fee. Instead, EPA should impose new fees for the model year following the model year in which the final rule is published, with at least 16 months prior to the January 1 of the same model year.

Our Response:

Once a complete application is submitted to EPA the length of time it takes to review the application will not be a factor in meeting the effective date deadline. Follow up questions or clarification questions pertaining to complete applications will

not be a factor in meeting the effective date deadline. As long as a complete application is submitted before the effective date the manufacturer may pay the current fee, or in the case of nonroad manufacturers no fee payment would be required at that time.

EPA maintains that manufacturers must submit a complete certification application in order to be considered meeting the effective date deadline. A complete application may slightly vary among the various industry types but in general a complete certification application includes basic information about the engine family/test group, emissions test data, certification levels, applicable emission standards, and information on emission control components.

For light-duty vehicles a complete application includes a summary sheet of emissions test data and basic information on test group, certification levels, applicable emission standards, carryover information, auxiliary emission control device (AECD) information, description of emission control components used, descriptions and EPA approvals for On-Board Vapor Refueling (ORVR) and On-Board Diagnostics (OBD) systems.

For ICIs, the complete application for certification should contain a summary of the emissions test data, city and highway fuel economy (mpg) data, evaporative test data, test vehicle description, a description of vehicles covered by a certificate, 50K, 100K, and 120K Deterioration Factors (DFs), applicable emissions standards, statements of compliance for Cold CO and the Supplemental Federal Test Procedure (SFTP) and EPA approvals for ORVR and OBD systems[11].

A complete heavy-duty vehicle and engine application includes basic information on the engine family, emission limits for Average, Banking & Trading (AB&T) families, emissions test data, certification levels, applicable emission standards, information on where the testing was performed, carryover information (if applicable), AECD description, a detailed description of all emission control components, parts listing, parts numbers, emission control components description, copy of

[11]For ICIs, the requirement of ORVR and OBD systems depend on the age of vehicle and model year. ICIs should check with their EPA certification representative for the vehicle or engine model year certification requirements.

maintenance instructions to be provided to the purchaser, copy of the emissions label, and a signed statement of compliance.

A complete nonroad application includes basic information on the engine family, emission limits for AB & T families, emissions test data (including evaporative data where required) , certification levels, deterioration factors, applicable emission standards, information on where the testing was performed, carryover information (if applicable), AECD description, a detailed description of all emission control components, parts listing, parts numbers, listing of model applicability, emission control components description and description of operation, and a signed statement of compliance, description of the test procedure used, special or alternative test procedure description if applicable, operating cycle and the service accumulation period necessary to break-in the test engines and stabilize emission levels, scheduled maintenance, description of adjustable operating parameters, copy of maintenance instructions to be provided to the purchaser and a copy of the emissions label, and a durability demonstration for any after-treatment device used in an engine family.

In summary, complete applications as described above must be submitted before the effective date in order to fall under the pre-existing fee amounts. In addition, the time required for EPA to review the application will not be a factor in meeting the effective date. As long a complete application is submitted before the effective date takes place, the current fee regulations would still apply to that application. Incomplete applications or applications with major pieces of information missing will not be considered complete. If an incomplete application is submitted a week before the rule's effective date, manufacturers should be prepared to pay the new fees for that application.

What Commenters Said:

Section 5.1.3. One commenter stated that the title to 40 CFR 85.2405(a) - Fees for the 2003 and 2004 model years - may be misleading since the fees proposed apply only to certain 2003 engine families (those submitted after the effective date of the new fees rule).

We have revised the title to 40 CFR 85.2405(a) to read "Fees for the 2004 and 2005 calendar years." Because of the different certification time periods during the calendar year in which various industry types choose to certify we continue to believe it

most appropriate to make the new fees applicable at a point in time where new costs are incurred and regardless of what model year any manufacturer may be certifying. We have changed the title to also include the 2005 calendar year as EPA will be collecting the same amount of fees from the effective date through the 2005 calendar year (we will not be adjusting fees until the 2006 calendar year and have thus changed the title to 40 CFR 85.2405(b) to read "Fees for the 2006 calendar year and beyond."

As explained in section 5.1.2, any complete certification applications (submitted for model year 2004, or 2005) which is submitted and received on or after the date 60 days after publication of this rule in the Federal is only subject to EPA's existing fees rule, therefore we do not believe it necessary to provide further clarification to 85.2405(a). For example, a model year 2004 nonroad certification application received before the new fee rule becomes effective would not require any fee to be paid since under EPA's existing fee rule (from 1992) no fees are required for nonroad applications.

Section 6: Reduced Fees

6.1 Reduced Fee of One Percent Aggregate Retail Price

What We Proposed:

EPA proposed to continue the current two part test which, if met, would qualify an applicant for a reduction of a portion of the certification fee.

A reduced fee is available when:

(1) The certificate is to be used for the sale of vehicles or engines within the U.S.; and
(2) The full fee for the certification request exceeds one percent of the projected aggregate retail price of all vehicles or engines covered by that certificate.

Manufacturers that qualify for a reduced fee pay one percent of the aggregate retail price of the vehicles and engines covered by a certificate. Under the reduced fee provision, we proposed to retain this requirement to ensure proper balance between recovering the MVECP costs and mitigate economic burden. EPA invited comment on the continued use of the one percent multiplier, 67 FR 51412.

The Agency proposed two separate pathways by which a manufacturer may request and pay a reduced fee amount. Under the first pathway, manufacturers seeking a reduced fee would include in their certification application a calculation of the reduced fee and a statement that they meet the reduced fee criteria. The manufacturer's evaluation and submission of a fee amount under this reduced fee provision would be subject to EPA review or audit. *Id.* The Agency proposed that the applicant for a reduced fee also subsequently provide EPA with a report (called a "report card"). This report would include the total number of vehicles ultimately covered by the certificate, including information on all certificates held by the manufacturer that were issued with a reduced fee, a calculation of the actual final reduced fee due for each certificate, which is derived by adding up the total number of vehicles and their sales prices, a statement of the total initial fees paid by the manufacturer, and the total final fees due for the manufacturer. *Id.* We also proposed that manufacturers would also be required to "true -up" or submit the final reduced fee due as calculated in the report card within 45 days of the end of the model year. *Id.*

Under the second pathway, manufacturers who, due to the nature of their business, are unable to make accurate estimates of the aggregate projected retail price of all the vehicles or engines to be covered by the requested certificate, would pay one percent of the retail selling price of five vehicles, engines or conversions when applying for a certificate or a minimum fee of $300. Examples of such manufacturers are those that modify customer-owned vehicles (as done by some ICIs and after-market alternative fuel converters) since they are uncertain of their customer base. Under this pathway, manufacturers would be required to submit the same report card and true-up the actual amount of reduced fee due similar to the first pathway, described above. *Id.*

What Commenters Said:

Section 6.1.1. VSC contended that the proposed minimum "5-car-up-front deposit" was unreasonable and that the Agency had failed to provide a rationale for its proposal. VSC also stated that it is just as common, if not more common, for an ICI's certificate to cover a total of one (1) car as opposed to 5. VSC noted that EPA had previously acknowledged that it is difficult for ICIs to work with a system that requires them to predict the number of cars they will import. VSC stated that the same associated problem would arise under the Agency's proposal.

VSC suggested that the one percent low volume fee should allow the ICI to pay one percent of the value of the cars to be covered by the certificate for which the ICI has a contract when making a certification request. VSC further suggested that for additional cars imported under the certificate, ICIS should pay one percent of the value of each car as each car is imported, until payment of the standard $8,394 fee. VSC noted that under a pay-as-you-go system, EPA would receive fees at the time of certification or importation and ICIs would only pay for cars they are actually working on and importing.

Our Response:

In response to comments received EPA has modified its reduced fee provisions to respond to many of the issues raised. The revised reduced fees provisions are as follows:

The reduced fee program for this rule provides two separate pathways by which a manufacturer can request and pay a reduced fee amount. The fee will be one percent of the aggregate retail price of the vehicles and engines covered by the certificate with a refundable minimum initial payment of $750. Each pathway specifies when manufacturers are required to determine the price of the vehicles or engines actually sold under a certificate and when to either pay additional fees or seek a refund. Under both pathways the manufacturer:

1) Pays a fully refundable initial payment of $750 or one percent of the aggregate retail price of the vehicles or engines, whichever is greater, with the request for a reduced fee.
2) Receives a certificate for an estimated number of vehicles or engines in the engine family to be covered by the certificate.
3) Requests a revised a revised certificate if the number of vehicles or engines in the engine family exceeds that on the certificate.
4) Is in violation of the Clean Air Act if the number of vehicles or engines made or imported is greater than the number indicated on the certificate.

The first pathway will be available for engine families having less than six vehicles, none of which have a retail price of more than $75,000 each. Manufacturers seeking a reduced fee include in their certification application a statement that the reduced fee is appropriate under the criteria. If one percent of the aggregate retail price of the vehicles or engines is greater

than $750, the manufacturer must submit a calculation of the reduced fee and the fee. If one percent aggregate retail price of the vehicles or engines is less than $750 the manufacturer will submit a calculation of the reduced fee and an initial payment of $750. In the event that the manufacturer does not know the value of all of the vehicles to be imported under the certificate, it may use the values of the vehicles or engines that are available to determine the initial payment.

The manufacturer's evaluation and submission of a fee amount under this reduced fee provision is subject to EPA review or audit. If the manufacturer's statement of eligibility is accepted, the manufacturer will receive a certificate for five vehicles or engines.

If the manufacturer's statement of eligibility or request of a reduced fee is rejected by EPA then EPA may require the manufacturer to pay the full fee normally applicable to it or EPA may adjust the amount of the reduced fee that is due.

A manufacturer's statement that it is eligible for a reduced fee can be rejected by EPA before or after a certificate is issued if the Agency finds that manufacturer's evaluation does not meet the eligibility requirements for a reduced fee, the manufacturer failed to meet the requirements to calculate a final reduced fee using actual sales data, or the manufacturer failed to pay the net balance due between the initial and final reduced fee calculation (see below for discussion of the final fee calculation, reporting and payment).

Within 30 days of the end of the model year, the applicant for a reduced fee will also provide EPA with a report called a "report card" to aid our review of the applicant's statement of applicability. This report shall include the total number of vehicles ultimately covered by the certificate. The report card shall include information on all certificates held by the manufacturer that were issued with a reduced fee under the first pathway. For each certificate the report will include a calculation of the actual final reduced fee due for each certificate which is derived by adding up the total number of vehicles and their sales prices and calculating one percent of the total, a statement of the initial fees paid and the difference between the initial payment and the total final fee for the manufacturer. Manufacturers will be required to submit the report

card within 30 days of the end of the model year[12], EPA believes this is reasonable as manufacturers should have final figures for each certificate by this time.

A manufacturer may request a refund if the final fee is less than the initial payment. If the final fee is greater than the initial payment, manufacturers will be required to "true-up" or submit the final reduced fee due as calculated in the report card within 45 days of the end of the model year. The decision to eliminate a minimum final reduced fee of $300 was made as a result of comments regarding EPA's proposed policy of only issuing refunds greater than $500. This is discussed more fully in section 8 of the Response to Comments Document.

In addition, EPA may require that manufacturers submit a report card, with the same or similar information as noted above, for previous model years. The purpose of such report card would be to give EPA assurance that the manufacturer has demonstrated a continuous capability of submitting the necessary year-to-year report cards and that appropriate fees have been paid. This will assist EPA in its determination as to whether a manufacturer is capable of adequately projecting its annual sales for reduced fee purposes and whether the manufacturer shall remain eligible for the reduced fee provisions.

Under this pathway, if a manufacturer fails to report within 30 days or pay the balance due by 45 days of the end of the model year, then EPA may refuse to approve future reduced fee requests from that manufacturer. In addition, if a manufacturer fails to report within 30 days and pay the balance due by 45 days of the end of the model year as noted above then the Agency may deem the applicable certificate void *ab initio.*

The second pathway is available for engine families that contain more than five vehicles or engines and/or have at least one vehicle or engine with a retail price of more than $75,000. Manufacturers seeking a reduced fee under this pathway include in their applications a statement that the reduced fee is appropriate under the criteria and a calculation of the amount of the reduced fee (1.0 percent of the aggregate retail price of vehicles or engines) or an initial payment of $750, whichever is greater. As

[12] Typically, this will be the first February 15 after a certificate expires. Certificates generally expire on December 31 of the model year.

in the first pathway, the manufacturer's evaluation and submission of a fee amount under this reduced fee provision is subject to EPA review or audit. If the manufacturer's statement of eligibility is accepted, the manufacturer will receive a certificate for the number of vehicles or engines to be covered by the certificate.

If the manufacturer's statement of eligibility or request of a reduced fee is rejected by EPA then EPA may require the manufacturer to pay the full fee normally applicable to it or EPA may adjust the amount of the reduced fee that is due.

A manufacturer's statement that it is eligible for a reduced fee can be rejected by EPA before or after a certificate is issued if the Agency finds that the manufacturer's evaluation does not meet the eligibility requirements for a reduced fee.

At the end of the model year, the manufacturer may request a refund if the final fee is less than the initial payment. Manufacturers with certificates issued with reduced fees under this pathway will not be required to submit the report card and true-up described above under the first pathway.

Under either pathway, if the manufacturer realizes that it will make or import more vehicles or engines than the number specified on the certificate, the manufacturer must request a revised certificate with an increased number of vehicles or engines indicated. At the time of revision, the manufacturer must pay one percent of the aggregate retail price of the number of vehicles or engines that are being added to the certificate. The additional fee must be received by the Agency and the certificate must be revised and issued before the additional vehicles or engines may be sold or imported in the United States. If a manufacturer imports or sells more vehicles or engines than that indicated on the certificate, the manufacturer will be in violation of the CAA for selling or importing uncertified vehicles (those over and above the number indicated on the original certificate.)

As suggested by VSC, after the initial payment has been submitted, the above reduced fee provisions will allow manufacturers to pay one percent of the retail price of each vehicle or engine as needed. This pay-as-you go provision will give ICIs and other manufacturers the advantage of only paying a $750 (equivalent to the average fee for two imported vehicles) or one percent of the value of the vehicles initial payment and then paying for additional vehicles as needed. Manufacturers that

request revised certificates for an increased number of vehicles will pay the additional one percent fee per vehicle at the time the revised certificate is requested.

In some cases, when a manufacturer requests a certificate under the first pathway, the retail price of five vehicles or engines covered by the certificate may exceed the initial payment. Under the provisions we are finalizing today, the difference between the initial payment and the final reduced fee will not be required until after the end of the year. Therefore, EPA believes that the reduced fee provides flexibility and mitigates any unreasonable economic burden that a full fee may present to manufacturers with small engine families.

What Commenters Said:

Section 6.1.2. Sierra Research (SR) supported our reduced fee provision. In addition, they requested clarification of the term "retail sales price" in the final rule. SR sought clarification as to whether the "retail sales price" refers to the engine price sold by the engine manufacturer to the equipment manufacturer (OEM) or the engine price sold to the "consumer." SR noted that the latter is often referred to as the "replacement price," and would be a component of the total equipment price.

SR suggested that the term "retail sales price" refer to the price at which the engine is sold to the OEM, and not the replacement price. SR suggested that this term not refer to the replacement price because it can be difficult to determine what the replacement price is at the time of certification and it can change over time.

Our Response:

The retail sales price of a vehicle or engine is the price to the consumer, or the replacement price, as defined by SR. This price is the easiest to determine across industries as all of the vehicles and engines are either made for sale or will have a value on the market if a manufacturer was to replace its own product by one of another manufacturer. If the final sales price is different than the price projected at certification, the reduced fee can be adjusted at the end of the model year to reflect the correct retail sales price and additional fees may be paid or a refund request may be made by the manufacturer.

What Commenters Said:

Section 6.1.3. SR noted that the regulations do not address how to aggregate different retail sales prices and requested clarification in the final rule.

SR suggested using the average sales price of all models while noting that EPA would prefer a sales-weighted price where the manufacturer multiplies the price of each model by the number of engines projected to be sold, sums the results for all models and then divides by the total number of engines for all models.

Our Response:

The aggregate retail price of an engine family is the total of the retail sales prices of each of the engines or vehicles in the family added together. For example, if a manufacturer wanted to certify a family of engines that included five engines that sold for $100 each and four engines that would sell for $150 each, the aggregate retail price of the family would be (5 x $100)+(4 x $150) or $1,100.

What Commenters Said:

Section 6.1.4. EMA commented on proposed 40 CFR 85.2406(b)(5)(i) which states that EPA may require future reduced fee eligibility determinations if it determines that a manufacturer has not properly assessed its eligibility for reduced fees in its initial application. EMA commented that this was unnecessary because EPA always has the final authority for making reduced fee determinations.

EMA also suggested that the language proposed in 40 CFR § 85.206(b)(5)(ii) which allows EPA to require a manufacturer to use the provisions in (b)(7) rather than the provisions in paragraphs (b)(1) through (b)(4) will generally not provide any disincentive for improperly requesting reduced fees.

This commenter further stated that proposed 40 CFR § 85.2406(b)(7)(i) was inconsistent with proposed 40 CFR § 85.2406(b)(5)(ii). Proposed 40 CFR § 85.2406(b)(7)(i) states that a manufacturer must use the "second pathway" for reduced fees "if EPA makes such a determination under paragraph (b)(5)(ii) of this section" but subparagraph (i) of 85.2406(b)(7) states that the request to use reduced fees under the provisions of pathway 2 shall be made prior to the submission of an application for certification. The commenter observed that this inconsistency arises when a manufacturer uses pathway 2 as a result of EPA

determination under (b)(5)(ii). To the commenter this appears to not comply with the provisions of 85.2406(b)(7)(i).

Our Response:

EPA agrees with these comments and the final rule has been amended to reflect the changes. The paragraph stating that EPA may "require that future reduced fee eligibility determinations be made by the Agency" is unnecessary and, therefore, the language is not included in the reduced fee regulatory language set forth in the final rule.

The final regulatory language does not state that EPA will require a manufacturer to use one reduced fee pathway over the other. The price and the number of vehicles or engines to be covered by a certificate will determine the pathway manufacturers will use to determine the initial reduced fee payment.

What Commenters Said:

Section 6.1.5. EMA sought clarification as to the applicability of 85.2406(b)(5)(iii) which indicates that EPA may "deny future reduced fee requests and require submissions of the full fee payment until such time as the manufacturer demonstrates to the satisfaction of the Administrator that its reduced fee submissions are based on accurate data and that the final fee payments are made within 45 days of the end of the model year." EMA wondered how manufacturers would make the requisite demonstrations if the Agency denied all future requests for the use of reduced fees.

Our Response:

If EPA denies reduced fee requests and requires submissions of full fee payment, the manufacturer should contact the EPA and demonstrate that its reduced fee submissions are based on accurate data and that the final fee payments are made within 45 days of the end of the model year of the year in question. This can be done by providing an explanation and any convincing information or data that the reduced fee submission is appropriate and that reports were submitted on time. Such data may include the most recent production data for the previous year, proof of payment of correct fees amounts for the previous year, and recent production plans for the current year. Upon examining the data submitted by the manufacturer for the model year in question, EPA may approve the reduced fee request and, at that time, would consider any future reduced fee requests.

What Commenters Said:

Section 6.1.6. OPEI commented that the proposed reduced fee system is inadequate for existing small volume engine families. OPEI's example of this was the following:
"Assume that a lawn and garden engine costs $100. For a manufacturer to be eligible for a reduced fee (*i.e.*, a fee less than $827), the manufacturer could sell no more than 827 engines -- one sixth of the existing small volume cutpoint.[13] Thus the one percent sales trigger is not an effective solution for small volume lawn and garden engines."

OPEI quotes 40 CFR §90.3.: "In the lawn and garden context, a small volume engine family means":

> [A]ny handheld engine family or any non-handheld engine family whose eligible production in a given model year are projected at the time of certification to be no more than 5,000 engines.

OPEI requested that EPA include an *additional* provision that eliminates certification fees for small volume small spark-ignition (SSI) engine families with less than 5,000 units. OPEI further stated that eliminating the fee for small engine families is critical because there is inadequate revenue from small volume engine family sales to adequately spread the costs of the proposed certification fees. OPEI commented that if EPA imposes a certification fee on lawn and garden engines, the agency should reconcile that fee with the 5,000 unit cutpoint definition of small volume engine families in 40 CFR part 90.

Our Response:

EPA established a reduced fee provision for instances to alleviate the economic burden that may be imposed by the full fee requirement. The reduced fee payment of one percent of the aggregate retail price of the engines or vehicles will assure that all manufacturers will be treated equitably and that none will be required to pay more than one percent of the projected aggregate retail price of small volume families of the engines or vehicles.

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13 Under the one percent of total sales trigger, engine sales would have to be less than $82,700 to take effect; assuming a per unit engine cost of $100, the manufacturer could sell no more than 827 engines ($82,700/$100 = 827 engines).

Emissions regulations have specified small volume engine family sizes for different industries. The small engine family sizes were specified to differentiate from larger engine families for purposes such as technology application or regulatory implementation. The fees rule differs from these rules as it does not distinguish the need for a reduced fee by the size of the family but, rather, by the amount of fees that the manufacturer of the family would have to pay.

6.2 Retroactive Payment Under Reduced Fee Program

What Commenters Said:

EMA submitted an additional alternative to the reduced fee pathways. EMA suggested that manufacturers who pay the full fee at the time of certification should also have the ability to seek refunds at the end of the model year if the fee paid exceeds one percent of the retail sales. According to EMA, this would enable EPA to receive the fees up front and avoid any unnecessary delays while not adding too much year end burden for manufacturers already required to produce year-end production volume reports.

EPA Response:

Currently, the retroactive reduced fee option is available for those engine families/test groups that meet the one percent reduced fee provision. Our response is just to clarify the process. A manufacturer that pays the standard fee for an engine family or test group and later determines that it meets the criteria for a reduced fee may qualify for a retroactive reduced fee. Under today's provision, the manufacturer may be required to submit a report card and a refund request at the end of the calender year for the amount of the difference between the fee paid and one percent of the aggregate retail sales price of the vehicles or engines covered by the certificate.

6.3 Year End Report

What We Proposed:

We proposed that each applicant for a reduced fee must provide EPA with a report card within 30 days of the end of the

model year [14](67 FR 51411- 51412) . We stated that this report shall include the total number of vehicles ultimately covered by the certificate. The report card shall include information on all certificates held by the manufacturer that were issued with a reduced fee, a calculation of the actual final reduced fee due for each certificate which is derived by adding up the total number of vehicles and their sales prices, a statement of the total initial fees paid by the manufacturer and the total final fees due for the manufacturer. Manufacturers would be required to "true -up" or submit the final reduced fee due as calculated within the report card within 45 days of the end of the model year. *Id.*

What Commenters Said:

VSC stated there is no need for a year-end settlement, but a year-end audit would be appropriate under the pay-as-you-go system because EPA is getting its money at the time of certification or importation. The commenter also stated that because ICI must file EPA form 3520-8, a Final Admission Form, for each imported vehicle, the payment of the additional fees can be easily tracked.

Our Response:

EPA believes that a year-end settlement is needed for some manufacturers undergoing the reduced fee process. A true-up requirement at the end of the year ensures that any outstanding fee payments owed to the government are paid. Under the first reduced fee provision discussed above in section 6.1, a manufacturer can receive a conditional certificate for five vehicles, engines or motorcycles and pay $750 at certification time and true-up with a report card at the end of the year. Manufacturers utilizing the second pathway will not be required to submit the report card and true-up as required under the first pathway.

The initial information that manufacturers submit in the report card for reduced fees under the first pathway will be necessary for EPA to establish all of the vehicles made or imported under each certificate and the fee payments that have been made by the manufacturer as well as the final reduced fee. We agree that audits and information provided on the 3520-8 forms

[14]Typically, this will be the first February 15 after a certificate expires. Certificates generally expire on December 31 of the model year.

may be helpful to confirm the information submitted by manufacturers but cannot be solely relied upon for all of the information submitted in the report card.

6.4 ICI Owner-Imported Vehicles (Not for Resale)

What We Proposed:

We proposed that the cost basis for calculating a reduced fee for an ICI certification be based upon the full cost of the vehicle or engine rather than the cost or value of the conversion. We explained that EPA has not received a fee payment for the "base vehicle" or the vehicle imported before its conversion to meet United States' emissions requirements. For alternative fuel converted vehicles or engines that have been originally certified by an OEM, we proposed the reduced fee cost basis as the value added by the conversion.(67 FR 51412)

What Commenters Said:

VSC argued that the standard ICI fee should not apply to owner-imported vehicles. VSC suggested that the fee for owner-imported vehicles (not for resale) should be five percent of the cost of conversion of the vehicle to meet EPA emission standards. VSC cited a letter sent to Mr. Di Bernardi of Liphart & Associates by Jane Armstrong of EPA (dated April 14, 1999) which discusses a class of ICI vehicles that are described as owner-imported (not for resale) and are modified through the installation of OEM parts to be identical to a certified OEM vehicle sold in the United States. VSC called these vehicles "Di Bernardi vehicles[15]."

According to VSC, EPA would recoup more money under a fee based on five percent of a conversion of such vehicles than the one percent cost of conversion rule applicable to alternative fuel vehicles. VSC stated that the average owner-imported vehicle conversion costs approximately $8000, and five percent of this amount would mean a fee of $400. VSC stated that this amount would be 400 times more than the per-vehicle cost for OEMs. VSC further noted a fee based on cost of conversion was appropriate in

[15] See EPA docket number OAR-2002-0023 for letter from Jane Armstrong dated April 14, 1999 to Peter Di Bernardi regarding ICI owner-imported vehicles and certification.

light of the fact that our certification and compliance activities for these types of vehicles were limited.

VSC also stated that EPA was recouping additional fees from ICIs by requiring ICIs to recertify *each year* owner-imported vehicles of a given model year already certified by an ICI for one MY.

Our Response:

EPA disagrees with the suggestion that fees for owner-imported vehicles should be only five percent of the cost of conversion because EPA's services are limited in these cases as opposed to an OEM vehicle. We require modification of owner-imported vehicles through installation of OEM parts in order for these vehicles to be identical to a certified OEM vehicle sold in the United States. This includes vehicles for resale, and modification and test vehicles options included in 40 CFR 85.1509 and 40 CFR 89.609 and those imported on behalf of a private or another owner (not for resale). EPA believes that an owner-imported vehicle under an engine family/test group certified by EPA must meet the same emission standards/requirements as vehicles and engines imported for resale. As a result, each model year owner-imported and other ICI vehicles are subject to services such as extensive pre-certification/certification assistance, application review, processing and approval to ensure that they meet the certification criteria and allowed final importation. Other services include recall, maintenance instruction, warranty, running changes, emissions testing and labeling, and fuel economy testing and labeling. EPA recoups costs in providing these type of MVECP services for these vehicles.

In addition, EPA addressed in the abovementioned letter to Mr. Di Bernardi of Liphart & Associates the alternative methods of compliance demonstration for ICI owner-imported vehicles but did not grant exemptions for compliance with the standards.

EPA believes that all ICI vehicles are subject to a standard fee. If there is an unreasonable economic burden in adhering to the fees regulations, manufacturers including ICIs may apply for a reduced fee. Therefore, EPA believes the reduced fee process for these vehicles and engines is applicable as proposed.

6.5 $300 Minimum Fee Payment

What We Proposed:

As part of the proposed reduced fee provision, we proposed a minimum fee of $300. We believed this amount represented the lowest level of fee that is cost effective for the Agency to collect and still representative of the actual costs incurred by the Agency in providing MVECP services.

What Commenters Said:

OPEI commented that if the Agency believes (for administrative reasons) that anything less than $300 is not cost effective then the certification fee for lawn and garden small engine families should simply be waived.

Our Response:

The purpose of the fees rulemaking is to recover the costs for the services that EPA provides to manufacturers. Because EPA realizes that the costs of the fees may represent an unreasonable burden for manufacturers of small engine families EPA is adopting reduced fee provisions (see discussion in section 6) whereby manufacturers of small engine families will have to pay no more than one percent of the aggregate retail price of the vehicles or engines sold under the certificate. To waive the fee completely is not in keeping with the core purpose of section 217 of the CAA and the IOAA to recover the costs for the services it provides. EPA also believes that the likelihood of such reduced fees dropping below $300 is very low and in such cases it is still appropriate to collect such a fee to keep an equitable and level playing field among those manufacturers that have sales above or below $300,000 under a certificate ($300 would represent one percent of $300,000 in that instance).

Section 7: ICI Issues

7.1 Fee Provisions Specific to ICIs

What We Proposed:

We proposed separate and lower fees for ICI light-duty on highway certificate requests. We examined the costs associated with ICIs and OEM and found that the costs associated with administering the light-duty ICI program was lower that the costs associated with administering the light-duty ICI program was lower than the costs for light-duty original equipment manufacturers (OEMs). We proposed a fee of $8,394 for light-duty ICI certificates with no limit on the number of vehicles to be covered by the certificate. For all other ICI categories, we explained

that our certification and compliance activities were no different for ICIs than OEMs and, therefore, we established the same fees for ICIs and OEMs. *Id.* As discussed in section 6.1, above, we also proposed reduced fee provisions to alleviate any economic burden imposed by the full standard fee.

What Commenters Said:

VSC suggested that the Agency should promulgate specific fee provisions for ICIs especially in light of the fact that most of the services the Agency is seeking to recover the associated costs are inapplicable to ICIs. As examples, VSC cited the Agency's CFEIS system, certification compliance audits, selective enforcement audits, monitoring of in-use data, review of in-use testing, or Agency-run in-use or recall tests. VSC also stated that a multi-part ICI fee system was necessary due to the lack of similarity between ICI importations.

VSC further stated that ICI specific provisions would still meet the government's need to collect fees that offsets its costs, while taking into account the fact that ICIs are small businesses.

Our Response:

Under the certification and compliance program ICIs must meet certain requirements and the fees reflect the costs incurred in providing services that assist ICIs in meeting those certification and compliance requirements. As explained earlier in sections under 2.4, we grouped the various industries into categories based on the similarity in the type of services we provide under the MVECP then separated the categories into subcategories if the levels of service within a category differed as is the case with light-duty vehicles, motorcycles and ICIs within the Light-duty category (worksheet #2.)

ICIs do not receive all of the services that are provided to the light-duty subcategory. As pointed out by VSC, ICIs do not use CFEIS, receive selective enforcement audits or services that involve in-use testing. The fees for ICIs do not include the costs of these services. That is why the fees for ICIs are lower than the fees for the LD manufacturers. ICIs fees include the cost of providing the services of certification and fuel economy testing, extensive assistance with pre-certification activities, application preparation and application review.

In addition, EPA believes no multi-part fee system is necessary for the various ICI importations because of the complexity of the vehicle models, ages, and types of ICI work performed on ICI vehicles and engines. Furthermore, the reduced fee provisions allows some flexibility and adjustments in fees for ICIs and other manufacturers.

The EPA believes that this fee adequately reflects the time, labor and expenses spent on ICI pre-certification and certification activities. ICI certification process is very time and resource intensive yet as a category ICIs request less certificates and cover fewer vehicles per certificate than OEMs or industry categories.

7.2 ICI Vehicles Imported for Resale

What We Proposed:

EPA proposed a fee of $8,394 for light-duty ICI certificates as EPA has determined that this recovers the costs of MVECP services provided.

What Commenters Said:

VSC argued that this fee of $8,394 should be applicable to only ICI cars imported for resale under Declaration A on EPA form 3520-1.[16]

Our Response:

We disagree with this comment. The EPA believes that the ICI fee applies to all ICI certificates. This includes certificates that cover vehicles and engines for sale, vehicles and engines not for sale (i.e., owner-imported) and those modified under the

[16]EPA Form 3520-1, known as the Declaration Form, is called the Importation of Motor Vehicles and Motor Vehicle Engines Subject to Federal Air Pollution Regulations form. This form is collected by customs to ensure that motor vehicles and engines imported into the U.S. conform with applicable emission requirements. Code A is described under the Independent Commercial Importer (ICI) Imports section of the form as any vehicle or engine imported by an ICI for modifications in accordance with a valid EPA certificate of conformity issued for the specific make, model, and model year in accordance with 40 CFR 85.1505.

modification and test provisions. Therefore the standard fee is applicable to each certificate that covers these types of ICI importations. EPA believes the type of vehicles ICIs should pay fees for are also specified on the EPA Declaration form 3520-1.[17]

7.3 Modification and Test Cars

What We Proposed:

The proposed reduced fees provision required inclusion of all vehicles sold by a manufacturer in the aggregate retail price, 67 FR 51411. EPA proposed that when calculating the aggregate retail sales price of vehicles or engines under the reduced fee provisions, such calculation must not only include vehicles and engines actually sold by the ICI but also those modified under the modification and test options in 40 CFR 85.1509 and 40 CFR 89.609 and those imported on behalf of a private or another owner, 67 FR 51412.

What Commenters Said:

Section 7.3.1. VSC argues that EPA recognized the "Mod and Test" procedure as an alternative to the full certification procedure for modification and test vehicles (also known as Declaration 'C' cars)[18], in the 1987 ICI Rule, and stated that this was a "clear reason" why the fees rule should not be applicable to such vehicles. VSC also stated that the process applicable to modification and test cars should not even be called

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[17]Currently, EPA Form 3520-1 contains codes A, C, J, and Z under the ICI section. These codes describe the type of vehicles that are imported. EPA believes the vehicles imported under a certificate does not only include code A, certification vehicles and code J, pre-certification test vehicles. It also includes code C, modification and test vehicles and code Z, vehicles that are modified to be identical to an OEM with permission. This does not include vehicles or engines that may be excluded or exempted by the Administrator per section 203 of the CAA and/or U.S. customs.

[18] Imported vehicles are described by codes selected on the EPA Form 3520-1. Code "C" which is listed under the ICI imports category means that the vehicle is being imported by an ICI for modification and testing in accordance with 40CFR § 85.1509. Such vehicles or heavy-duty engine must be at least 6 years old.

"certification." In addition, VSC argued that EPA had failed to justify the combination of modification and test cars with other ICI imports since the Agency's regulations treat them differently. VSC further stated that the fact that these vehicles have historically been included in the fee regulation was insufficient to justify their continued inclusion.

Our Response:

We disagree with this comment. We believe that ICI modification and test vehicles must meet the applicable emissions standards and undergo the certification process. As certificate holders, ICIs are required to perform all of the necessary modifications and emissions testing to ensure the vehicles they import comply to EPA emissions standards and requirements. Under EPA's import regulations, modification and test cars must be covered by a certificate (unless otherwise exempted by the EPA Administrator or Customs). Furthermore, Section 206 of the CAA allows the EPA Administrator to test any emission control system incorporated in a motor vehicle or engine to determine whether such system enables the vehicle or engine to conform to the required emission standards. In addition, a certificate of conformity may be issued under this section only if the Administrator determines that the importer (or any person) has established to the satisfaction of the Administrator that any emission control device, system or element installed on or incorporated in such vehicle or engine conforms to the emission requirements. Section 217 of the Act and the IOAA authorize EPA to recover the costs of compliance and certification services it provides to manufacturers. Hence, we believe ICIs must pay fees that represent the costs involved in assuring that modification and test cars meet emission standards.

The 1987 Rule for Importation of Noncomforming Motor Vehicles and Motor Vehicle Engines (52 FR 36136, September 25, 1987) that VSC mentioned provides a more enhanced modification and test program in part due to previous noncompliance issues. As a result, these vehicles have been historically included in the fee regulation because they are imported under a certification-based program. Being certificate holders makes ICIs responsible for complying with all the emission requirements for these vehicles which may or may not be owned by the certificate holder.

We agree with VSC that EPA has allowed alternative methods of compliance demonstration for ICIs (that meet certain criteria) however they are required to comply with applicable emission

standards and to properly install required emission related components that are fully functional. By requiring ICIs to adhere to the test/modification provisions while undergoing the certification process ensures that this happens.

ICI vehicles or engine certificates cover vehicles or engines which are imported into U.S. but was not originally certified by an OEM. EPA recovers costs associated with providing various MVECP services to ensure that these vehicles and engines meet emission requirements. These requirements include meeting emission standards, and also include undergoing recall, maintenance instruction, warranty, running changes, emissions testing and labeling, and fuel economy testing and labeling which are the same requirements with which light-duty OEMs are required to comply. In addition, ICIs receive extensive assistance with pre-certification activities, application preparation and application review. The EPA import team reviews numerous applications for import exemptions due to hardship or other forms of exemptions. EPA incurs costs for conducting these types of services. Therefore, we believe ICIs must pay fees that represent the costs involved in assuring that modification and test cars meet emission standards.

What Commenters Said:

Section 7.3.2. VSC also commented that vehicles declared on EPA's Declaration Form 3520-1 under categories "Z" "E", "M", "EE", and "B"[19] should likewise not have to pay any fee. They asserted that

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[19]Form 3520-1, EPA Declaration Form has codes describing the types of vehicles and engines that are to be imported into the U.S. that must be declared by the manufacturer.

Codes "Z" listed under the ICI imports category means imported by an ICI for the purpose of modifying to be identical to an original equipment manufacturer (OEM) certified version in accordance with written instructions from the OEM that are specific to the vehicle or heavy-duty engine being imported.

Codes "E" and "M" fall under the EPA exempted vehicles category and mean vehicle or engine at least 21 years old and Canadian vehicle/miscellaneous exemption, respectfully.

Codes "B" and "EE" fall under the U.S. conforming and "identical" vehicles category.

More specifically, code "B" indicates that the vehicle is U.S. certified and is unmodified bearing a U.S. EPA emission control label in the engine compartment or motorcycle frame in English.

EPA has not established that it has any costs to recoup in regard to these vehicles.

Our Response:

EPA disagrees with this comment. Under EPA's import regulations, including section 203 of the CAA these vehicles may not be imported into the U.S. unless covered under a certificate of conformity, exempted by the Administrator or otherwise authorized by EPA and U.S. Customs Service regulations. Based on the EPA Declaration form 3520-1 codes "E" and "M" fall under the exemption category. Although the vehicles imported under the exemption category must meet certain government requirements, we agree that certification fee costs currently do not apply to these vehicles. In addition, certification fees currently do not apply to vehicles indicated as codes "B" and "EE" on Declaration form 3520-1. The codes "B" and "EE" fall under the U.S. conforming and "identical" vehicles category and cover vehicles that are required to conform to EPA emissions standards. Proof must be provided to Customs that these vehicles comply as indicated on the Declaration form 3520-1. Furthermore, the "Z" code indicates that the vehicle or engine is imported by an ICI for the purpose of modifying it to be identical to an OEM certified version (with written OEM instructions) and this requires undergoing the certification process and submitting a fee payment. Currently, EPA Form 3520-1 contains codes A, C, J, and Z under the ICI section. These codes describe the type of vehicles that are generally imported by ICIs. EPA believes the vehicles imported under a certificate does not only include code A, certification vehicles and code J, pre-certification test vehicles. It also includes code C, modification and test vehicles and code Z, vehicles that are modified to be identical to an OEM with permission. Under these ICI categories vehicles and engines for resale, modification and test vehicles and engines, or owner-imported vehicles (not for

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Code "EE" indicates that the vehicle is identical in all material respects to a U.S. certified version either as a Canadian vehicle (with the proper Canadian emission control label and other customs-EPA requirements as listed on form 3520-1), or as a vehicle from any country (requiring a letter from the manufacturer's U.S. representative (not dealer or mechanic) on letterhead stating the vehicle is identical to a U.S. EPA certified version with respect to emissions, is not being imported for resale or lease, and other requirements as listed on form 3520-1).

resale) must undergo the certification process and therefore, pay fees, as discussed earlier in the response to section 7.2 above.

7.4 ICI Licensing

What We Proposed:

ICI licensing was not proposed in the NPRM.

What Commenters Said:

VSC suggested that EPA offer through the fees program an ICI license that is renewed annually, similar to the National Highway Traffic Safety Administration (NHTSA) Registered Importer program. VSC further stated that in addition to raising revenue, an ICI licensing program will provide a control on companies seeking to become ICIs.

Our Response:

This comment is beyond the scope of this rulemaking.

7.5 ICIs and SBREFA

What We Proposed:

In section VIII.B. of the proposed rule we certified our proposed fees as having no significant economic impacts on small entities. In addition, we also stated that our reduced fee provisions would limit the impacts of this rule on small entities. (Section VIII.B., Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.* (67 FR 51414).

What Commenters Said:

Section 7.5.1. VSC stated that the Regulatory Flexibility Act, 5 U.S.C. 601-612 was amended by SBREFA, Public Law 104-121, to ensure that concerns regarding small entities are adequately considered during the development of new regulations that affect them. VSC further quoted the SBREFA amendments in which Congress stated that "uniform Federal regulatory * * * requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting, and consulting costs upon small businesses * * * with limited resources[,]" and

directed agencies to consider the impacts of certain actions on small entities.

VSC suggested that EPA consider two points: (1) "the significant economic impact the proposed rule has on small entities; and (2) any significant alternatives to the proposed rule which would ensure that the objectives of the proposal were accomplished while minimizing the economic impact of the proposed rule on small entities and providing relief to small certifiers of vehicles."

Our Response:

We are committed to minimizing the burden of the fees regulations on small entities or entities with small engine families to the extent feasible while still meeting the statutory requirements to charge fees. The Agency did consider the economic impacts of this rule on small entities, however, we believe this rule will not have a significant economic impact on a substantial number of small entities. We reviewed the rulemakings that set emission standards for the industries affected by the fees rule, including those manufacturers affected by the recreational vehicle rule. The review showed that approximately 108 small businesses will be paying fees. The Agency examined the cost of the fees and determined that the average cost for manufacturers of all sizes, across industry sectors, is approximately $.41 per vehicle or engine.

Nevertheless, to mitigate possible economic hardship EPA is adopting an alternative to the full certification fee requirement including reduced fee provisions to help small volume entities meet the regulations while ensuring the fees rule objectives can be accomplished. The reduced fee provisions limits the impact of this rule on small entities to one percent of the aggregate retail sales price of the vehicles or engines covered by a certification request. Hence, the fee a manufacturer would pay will not exceed one percent of the aggregate retail sales price of the vehicles or engines covered by a certificate. This one percent amount represents a modest cost of doing business. EPA also believes enough notification of this fees rule was provided to allow manufacturers enough time to plan for fees in their budgets.

What Commenters Said:

Section 7.5.2. VSC suggested that EPA should recognize that ICIs are not OEMs. VSC further stated that SBREFA requires this

distinction and also compels EPA to adopt a fee system that carefully considers ICIs' and how they differ from OEMs. VSC requested that we consider and include "the fact" that ICIs are small businesses that, on the average, import fewer than 100 vehicles annually.

Our Response:

EPA believes that although ICI manufacturers are often small businesses and in some instances may differ from OEMs, both ICIs and OEMs are certificate holders. As certificate holders, ICIs are required to meet certain certification and compliance requirements. These requirements include meeting emission standards, and also include undergoing recall, maintenance instruction, warranty, running changes, emissions testing and labeling, and fuel economy testing and labeling which are the same requirements that light-duty OEMs are required to comply to. EPA incurs costs for conducting these types of services.

Under the ICI category of the cost study, we have calculated fees only for the services applicable to ICIs and thus, ICI certificates cost considerably less than certificates for other vehicle manufacturers. EPA also believes that the reduced fees provision, while enabling the objectives of both section 217 and the IOAA to be met, minimizes the economic impact of this rule on small entities or entities with small engine families.

Section 8: Other Topics

8.1 EPA Services

What We Proposed:

As previously mentioned in sections 2 and 3, our proposed fees were based on the costs the Agency incurs in providing certification and compliance services to the various certification groups.

What Commenters Said:

Mercury Marine stated that the office that handles marine SI certification and compliance was understaffed and required follow up calls to encourage timely processing of applications. Mercury Marine sought an explanation from EPA as to how fees would be used to improve the level of service, or more specifically, to improve the processing of requests in a timely fashion.

Our Response:

The fees schedule is based on the type of services provided to each category as well as the amount of services that each category receives. It is also based on the current and projected costs for each industry. The projected costs for the "Other" category does include the cost of additional personnel to assist in processing applications. EPA will continue to ensure the timely processing of applications.

8.2 Fee Payment Timing

What We Proposed:

EPA proposed that fees must be paid in advance of receiving a certificate (67 FR 51410). We also emphasized that the Agency would not process applications until the appropriate fees had been fully paid. (67 FR 51411).

What Commenters Said:

Three commenters suggested that the Agency should not require fees payment prior to issuing certificates.

Our Response:

In most instances, we begin reviewing certification applications and, in some cases, complete our review, prior to receiving fees payment. Thus, we do not necessarily suspend application review because of non payment of fees. However, because we cannot issue a certificate of conformity before receipt of fees, we are maintaining the requirement that fees be paid in advance of submitting an application for certification. We believe this will ensure that we do not delay the issuance of certificates.

8.3 Running Changes and Carryovers

What We Proposed:

We did not propose any special provisions for running changes and carryover applications.

What Commenters Said:

Sierra Research noted that the Agency did not propose any provisions for running changes and requested clarification that running change were not certification requests and therefore, would not trigger fees.

OPEI suggested that certification for lawn and garden engines be set at no more than $300 since most certificate applications for this category were carryover applications, which generally costs less time and effort to process as compared to new certification applications.

Our Response:

We are responding for purposes of providing information only. Running changes are those changes in a vehicle or engine configuration, equipment or calibration which are made by an OEM or ICI in the course of a motor vehicle or engine production. The cost of a running change is included in the fees cost for an engine family or test group within the same engine-emissions control system combination. Therefore, they do not trigger additional fees.

Carryover applications are certification applications that use data from a prior year's application. When a manufacturer elects to carry over test data from a previous model year, its certification effort may be reduced. Further, such carryover test data may reduce some of our efforts. However, such potential reductions are offset by additional activities necessitated by the carryover request. The application for a carryover is usually not an exact duplicate of the MY being carried over. For example, carryover applications may involve changes (e.g. additional test weight and horsepower) which could change the test vehicle or engine selection. In such cases, EPA must conduct additional review of carryover requests to ensure that they meet EPA requirements and that the test vehicles or engines were properly selected for the carryover application. Further, EPA must review a carryover application to determine the applicability for the regulations for the new model year as compared to the carryover model year. Thus, carryover applications do not necessarily result in lower costs than a certification request for a new engine family/test group. As a result, the fee schedule will remain as proposed. Carryover certification requests will not be distinguished from new certification requests.

8.4 Refunds Less than $500 and Final Fee Payments Less than $500

What We Proposed:

For applicants who fail to obtain certificates and who subsequently request refunds, we proposed full fee refunds of amounts exceeding $500. This was a change from the existing requirement that allowed for partial refunds when applicants fail to obtain a signed certificate (see 40 CFR §86.908-93(b)(1), as amended by §86.908-01(b)(1)). We also proposed the option of applying the refund to another certification request.

Further, we proposed the continuation of the existing requirement of providing partial refunds resulting from decreases in the aggregate projected retail sales price of vehicles or engines covered by the certification request. (*See,* 40 CFR § 86.908-93(b)(2) and 86.908-01(b)(2)). We also invited comments on whether to limit refund requests to $500. (67 FR 51412).

As earlier discussed in section 6 above, we proposed a reduced fee provision that includes calculating a final reduced fee within 30 days of the end of the model year and "true-up" of any additional fees owed within 45 days of the end of the model year. Under the 1992 fees rule reduced fee applicants pay an additional waiver fee any time the aggregate projected retail sales price of the vehicles or engines to be covered by a certification request changes. Also, there was no minimum amount due before payment was required. (*See,* 40 CFR §86.908-93(a)(5)).

What Commenters Said:

EMA supported our proposal to allow manufacturers request a full refund in cases where a certificate is not issued. EMA suggested that 40 CFR § 85.2407(a) should read "may," instead of "shall." EMA suggested that we clarify that manufacturers are entitled to a full refund regardless of the reason for non-issuance of a certificate.

EMA suggested that 40 CFR § 85.2407(b) should read "shall" instead of "may." EMA also suggested that refunds should be predicated upon a decrease in "actual" rather than "projected" sales prices.

EMA further objected to proposed 40 CFR § 85.2407(b)(3) and (b)(4)(vi) and argued that manufacturers should be entitled to any and all refunds regardless of the amount.

Our Response:

EPA agrees with EMA's comment regarding refund language. Regulatory language has been amended to reflect these changes in 40 CFR § 85.2405(a) and (b). Upon request from a manufacturer EPA will refund fees. This includes instances of overpayment, when the manufacturer withdraws an application or when EPA denies a certificate as well as any other circumstances that would lead to a certificate not being issued. Also, 40 CFR § 85.2407(a) and (b) have been changed to read:

> (a) Full Refund. The Administrator shall refund the total fee imposed by 85.2405 if the applicant fails to obtain a certificate, for any reason, and requests a refund.
>
> (b) Partial Refund. The Administrator shall refund a portion of a reduced fee, paid under 85.2406, due to a decrease in the aggregate projected or actual retail sales price of the vehicles or engines covered by the certification request.

However, we disagree with the comment that refunds should be predicated on the decrease in the aggregate "actual" price rather than the aggregate "projected" price. This is because not all of the vehicles or engines would have been sold and the actual price may not be available at the time of the refund request therefore we have revised the regulatory language to indicate projected or actual price. The manufacturer should use whichever is more accurate.

EPA agrees that it should not limit refunds to $500 minimum. Therefore EPA is not adopting proposed §85.2407(b)(3) and (b)(4)(vi). However, the rationale behind EPA's proposal that manufacturers should not be required to pay a "true-up" payment of less than $500 was balanced out by the proposal that refunds would be limited to amounts of $500 or more. We believed that the amounts not paid in refunds would equal the payments not received for "true-up." Therefore, since EPA will be paying full refunds, EPA is setting forth in today's rule that full payment must be submitted at true-up to avoid an overall deficit in its recovery of MVECP costs and to continue to abide by the intent of the IOAA and CAA.

8.5 Reduced Costs for California-only

What We Proposed:

EPA proposed a separate California-only fee for only the light-duty and heavy-duty fee categories. No California-only fee was proposed for the motorcycle, ICI, Nonroad CI and Other categories because EPA's responsibilities for vehicles and engines are not decreased even though certification is only requested for the State of California.

What Commenters Said:

One commenter argued that our proposed fees for California-only certificates was inappropriate since the Agency did not provide any benefits to manufacturers.

Echo stated that the "Other" category should have reduced fees for California-only families because other categories have reduced fees for California-only. Echo stated that the full fees for these families cannot be justified and that EPA should not charge for service not provided. Echo also observed that the CARB may decided to add its own fees further raising the cost to manufacturers.

OPEI commented that EPA should not impose certification fees on California-only engine families that are not sold outside of California. OPEI questioned the utility of requiring this dual certification burden. The commenter further argued that the proposed fees should be waived since California-only engine families are sold only in California, and as a result, do not generate national sales revenue. OPEI, further requested that the certification fee be waived with respect to California-only engine families.

Our Response:

The Clean Air Act requires that vehicles sold in the United States to be covered by a federal certificate of conformity including those sold in California. The EPA receives applications and certifies all vehicles and engines sold in the US. The EPA review and testing required for California-only certification, and therefore the benefits received, are no less than that required for other certificates. Test results generated by EPA from certification tests of these vehicles and engines are shared with the CARB to assist in its certification process. However, the California-only fee is less than the standard fee because EPA does not incur the cost of the in-use program. The CARB conducts an in-use program for these categories, but at this time EPA does not. Thus the fee for California-only certificates for light-duty

and heavy-duty vehicles and engines reflects the EPA costs in the certification component of the MVECP.

As noted above in the section discussing the adjustment of fees to reflect future inflation costs, EPA has taken the additional step for manufacturers certifying light-duty vehicles that will only be sold in California ("California-only" vehicles) by only adjusting the "certification/FE" costs for inflation and not applying an adjustment for light-duty in-use costs.

In the case of engines and vehicles in the "Other" category, EPA is assessing the costs of the certification and minimal testing services that it provides. A lower California-only fee is not offered as EPA's work is not decreased by compliance work done by the CARB.

OPEI stated that no national sales revenue is generated to absorb the cost of the fee, however, because EPA reviews the certificate applications and the manufacturer receives benefit from receiving a certificate, EPA should recover the costs of providing this service as directed by the CAA and the IOAA.

8.6 Fee Payment Suggestions

What We Proposed:

We invited comments on methods of streamlining the fee payment process while still maintaining the requirement that fees be paid in advance of certification services. (67 FR 51411).

What Commenters Said:

One commenter suggested that EPA allow manufacturers to submit fees for "undesignated" families. This commenter noted that as long as prepaid funds existed for a given manufacturer, fee payments for specific families could be designated when the manufacturer subsequently submitted an application.

In addition, the commenter suggested that EPA modify the fee filing form by deleting the requirement for manufacturers to specify family names at the time of fee submission.

Our Response:

EPA believes the process of collecting and tracking fee payments by engine families or test groups has been very

effective. This process has been especially useful for handling fee refunds and other transactions. However, EPA is also exploring other ways to collect, track and process fee payments. As suggested, we are now looking at other ways manufacturers can submit up-front fee deposits for undesignated families. We anticipate that in such instances, manufacturers should be able to draw from this deposit to pay for engine families or test groups perhaps designated later in the model year or for which certification applications are submitted. Prior to the effective date of this rule, we are planning to issue a manufacturers' guidance letter describing how to submit fee payments and conduct other fee transactions.

In addition, we are exploring the idea of a banking or accounting system to handle fee payments and transactions. If utilized, a banking or an accounting mechanism would be useful in streamlining the fee collection process and other transactions. EPA may explore how this accounting system would work for future fee adjustments.