

1 James J. Tutchton (CA Bar No.150908)
2 Environmental Law Clinical Partnership
3 University of Denver, College of Law
4 2255 E. Evans Ave., Room 365m
5 Denver, CO 80208
6 Telephone: (303) 871-6034
7 Facsimile: (303) 871-6991

8 Brendan R. Cummings (CA Bar No. 193952)
9 Center for Biological Diversity
10 P.O. Box 493
11 Idyllwild, CA 92549
12 Telephone: (951) 659-6053
13 Facsimile: (951) 659-2484

14 Attorneys for Plaintiffs

15 **UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

17 CENTER FOR BIOLOGICAL DIVERSTIY; and)
18 FRIENDS OF THE EARTH;)

19 Plaintiffs,)
20 vs.)

21 U.S. DEPARTMENT OF ENERGY;)
22 U.S. DEPARTMENT OF AGRICULTURE;)
23 U.S. DEPARTMENT OF COMMERCE;)
24 U.S. DEPARTMENT OF DEFENSE;)
25 U.S. DEPARTMENT OF HEALTH AND)
26 HUMAN SERVICES;)
27 U.S. DEPARTMENT OF HOUSING AND)
28 URBAN DEVELOPMENT;)
U.S. DEPARTMENT OF THE INTERIOR;)
U.S. DEPARTMENT OF LABOR;)
U.S. DEPARTMENT OF TRANSPORTATION;)
U.S. DEPARTMENT OF VETERANS AFFAIRS;)
CENTRAL INTELLIGENCE AGENCY;)
DEPARTMENT OF HOMELAND SECURITY;)
EXECUTIVE OFFICE OF THE PRESIDENT;)
FEDERAL COMMUNICATIONS)
COMMISSION; and)
GENERAL SERVICES ADMINISTRATION;)

Defendants.)
_____)

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 **INTRODUCTION**

2 1. Thirteen years ago, after the first Gulf War, the former President George H.W.
3 Bush declared in signing the Energy Policy Act of 1992 (“EPAAct”) that this new law would
4 “place America upon a clear path toward a more prosperous, energy efficient, environmentally
5 sensitive, and economically secure future” by promoting the use and development of non-
6 petroleum fuels in domestic vehicle fleets. His hope has yet to be realized because the current
7 Administration is refusing to walk the “clear path,” outlined by EPAAct by failing to implement
8 the basic requirements of this forward-looking law.

9 2. The idea of EPAAct is simple. The federal government will lead the way toward
10 the use of alternative fuels by purchasing alternative fuel vehicles (“AFVs”). The substantial
11 purchasing power of the federal government will be harnessed to drive the market toward
12 alternative fuels, spurring private innovation and investment in alternative fuel infrastructure to
13 meet the federal demand. As explained in detail below, EPAAct sets target percentages for the
14 purchase of AFVs by all federal agencies that maintain vehicle fleets. If federal purchasing
15 alone proves insufficient to drive the market for AFVs, the Department of Energy (“DOE”) is
16 required to expand the AFV purchasing program to qualifying private and municipal fleets to
17 meet EPAAct’s goal of moving 30% of this nation’s vehicle fleet to AFVs by 2010. Congress also
18 instructed DOE to revise this 30% goal if it appears unrealistic. DOE is required to expand the
19 program to private and municipal fleets if “necessary” to meet the 30% goal or a revised goal.
20 To ensure federal agencies comply with the program, EPAAct requires them to disclose their AFV
21 purchasing annually through reports to the public and Congress. To ensure DOE expands the
22 required AFV purchasing program to private and municipal fleets if necessary to meet the goals
23 of the Act, Congress set a statutory deadline for DOE to consider expanding the program.

24 3. DOE missed this statutory deadline and nearly all federal agencies both failed to
25 report their AFV purchasing to Congress and the public and failed to purchase the required
26 percentages of AFVs. Accordingly, in 2000, in an attempt to get federal agencies to take the
27 largely-ignored EPAAct seriously, Plaintiffs filed an initial lawsuit to compel seventeen federal
28 agencies to acquire AFVs and make their AFV compliance reports available to the public as

1 required by EAct. Plaintiffs also sought to force the DOE to issue the overdue rule
2 promulgating AFV acquisition requirements for private and municipal fleets.

3 4. This Court held the federal agencies were in violation of the AFV acquisition
4 provisions and public reporting provisions of EAct and also determined that DOE had violated
5 the private and municipal rulemaking provision by failing to promulgate a rule by the statutory
6 deadline. See Center for Biological Diversity, et al. v. Abraham, et al., 218 F.Supp.2d 1143
7 (N.D. Cal. 2002). Unfortunately, this Court's order did not spur the government agencies to
8 continue complying with the public reporting or AFV acquisition requirements once the Court's
9 injunction in Abraham expired. The current Defendant agencies are once again in violation of
10 these provisions. And while under the Court order in Abraham, on January 29, 2004, DOE did
11 engage in the long-overdue required rule-making for private and municipal fleets, DOE failed to
12 comply with the law by refusing to expand the program as necessary to meet the Act's goals and
13 also by violating the National Environmental Policy Act ("NEPA") in connection with the rule-
14 making. Instead of extending EAct's AFV purchasing requirements to private and municipal
15 fleets, DOE announced a "Catch 22" ruling declaring it would neither revise the Act's 30% goal
16 to a more realistic target nor apply the AFV purchasing requirements to private and municipal
17 fleets because even if it did so it would still fail to meet the Act's original 30% goal. In doing
18 so, DOE violated both the Energy Policy Act, 42 U.S.C. §§ 13201, *et seq.*, and the National
19 Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*

20 5. This lawsuit seeks to compel Defendants to comply with the law in three central
21 respects. First, this action seeks to address the public reporting violations by compelling
22 Defendants to produce missing reports. Specifically, the following Defendants have failed to
23 issue reports for the following fiscal years: Department of Energy (2004); Department of
24 Agriculture (2004); Department of Commerce (2003, 2004); Department of Defense sub-
25 agencies, Army (2002, 2003, 2004), Navy (2003, 2004), Air Force (2003, 2004), and Marines
26 (2003, 2004); Department of Health and Human Services (2004); Department of Housing and
27 Urban Development (2003, 2004); Department of the Interior (2003, 2004); Department of
28 Transportation (2004); Department of Veterans Affairs (2004); Central Intelligence Agency (all

1 years); Department of Homeland Security (2004); Executive Office of the President (all years);
2 Federal Communications Commission (all years); and General Services Administration (2003,
3 2004). This action seeks to force these agencies to comply with the Energy Policy Act's
4 requirement that they place their annual AFV fleet percentage compliance reports on a publicly
5 available website, the location of which must be provided to the public in the Federal Register.
6 Furthermore, the website addresses provided in the Federal Register for the Department of
7 Agriculture, Department of Health and Human Services, and Department of Interior do not link
8 to websites displaying the reports. In addition, the Central Intelligence Agency, Department of
9 Homeland Security, Executive Office of the President and Federal Communications Commission
10 have never published the location of their AFV report website in the Federal Register. This
11 action seeks to remedy these additional violations of the public reporting provisions of EPAct.

12 6. Second, this action seeks to address AFV purchasing violations by compelling
13 Defendants Department of Commerce, Department of Defense (including the Army, Navy, Air
14 Force, and Marines), Department of Labor, Department of Transportation, Department of
15 Veterans Affairs, and Department of Homeland Security to comply with the Energy Policy Act's
16 requirement that if an agency acquires vehicles covered by the Act, a certain percentage of those
17 vehicles must be AFVs. In their last posted reports, all of these agencies were in violation of
18 EPAct's AFV acquisition requirements. This action seeks to force these agencies to remedy
19 these violations. On information and belief, several additional Defendant agencies may be in
20 violation of this provision, yet because they have not posted the required compliance reports and
21 published the location of such reports in the Federal Register, Plaintiffs do not have the
22 information necessary to confirm whether or not they are in compliance. Plaintiffs intend to
23 establish these agencies' purchasing violations through appropriate discovery. These agencies
24 are: the Department of Energy, Department of Agriculture, Department of Health and Human
25 Services, Department of Housing and Urban Development, Department of the Interior, Central
26 Intelligence Agency, Executive Office of the President, Federal Communications Commission,
27 and General Services Administration.

28 7. Finally, this action challenges the U.S. Department of Energy's final rule

1 determining not to promulgate private and municipal fleet AFV acquisition requirements in order
2 to help achieve the goals of EAct and/or to revise the EAct goal to an achievable level and
3 DOE's failure to comply with NEPA in connection with this rulemaking.

4 **JURISDICTION**

5 8. The Court has jurisdiction over this action to secure the performance of non-
6 discretionary duties by the Defendants pursuant to 28 U.S.C. § 1331 (federal question) and 5
7 U.S.C. §§ 701-706 (Administrative Procedure Act review). The relief requested is authorized
8 by 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief).

9 9. Defendants have not remedied their violations of the Energy Policy Act and
10 National Environmental Policy Act and are in violation of these laws within the meaning of the
11 APA. There exists an actual controversy between the parties within the meaning of 28 U.S.C. §
12 2201 (declaratory judgments).

13 **VENUE AND INTRADISTRICT ASSIGNMENT**

14 10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). Pursuant to Civil
15 L.R. 3-2, the Clerk should assign this action to the San Francisco Division because a substantial
16 part of the events or omissions giving rise to the claims in this case occurred in San Francisco
17 County; members of Plaintiffs reside within San Francisco County; Plaintiffs Center for
18 Biological Diversity and Friends of the Earth maintain offices in San Francisco County; and
19 Defendants U.S. Department of Commerce, U.S. Department of Defense, U.S. Department of
20 Energy, U.S. Department of Housing and Urban Development, U.S. Department of Interior, U.S.
21 Department of Labor, U.S. Department of Transportation, General Services Administration,
22 Federal Communications Commission, and U.S. Department of Homeland Security maintain
23 offices in San Francisco County.

24 11. This action is also properly assigned to the San Francisco Division because many
25 of the federal actions and inactions challenged here are a direct result of the Court's decision in
26 Plaintiffs' previous related case, Center for Biological Diversity, et al. v. Abraham, et al., 218
27 F.Supp.2d 1143 (N.D. Cal. 2002), filed in this district and division. This action is based on facts
28 and law common to the earlier case. Plaintiffs have filed a Notice of Related case in this matter.

1 **PARTIES**

2 12. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“The Center”) is a non-
3 profit organization with an office in San Francisco, California. The Center also maintains offices
4 in Idyllwild and San Diego, California, Phoenix and Tucson, Arizona, Silver City, New Mexico,
5 and Portland, Oregon. The Center is a national membership organization with over 12,000
6 members in the United States. The Center’s mission is to ensure the preservation, protection,
7 and restoration of biodiversity, native species, ecosystems, public lands, and public health. The
8 Center’s activities include public education, advocacy, scientific research, and litigation to
9 enforce environmental laws. The Center’s members and staff are impacted by the environmental
10 and health effects of oil production and air pollution caused by petroleum fuel consumption and
11 the government’s failure to purchase AFVs. The informational interests of the Center and its
12 members are harmed by the Defendants failure to comply with EPAAct and NEPA as the lack of
13 information hinders the Center’s public education, advocacy, and scientific research interests.
14 The Center has a long history of involvement in activities related to energy policy and air
15 pollution. The Center is bringing this action on behalf of itself and its adversely affected
16 members.

17 13. Plaintiff FRIENDS OF THE EARTH (“FoE”) is an environmental advocacy
18 organization founded in 1969, with approximately 30,000 members across the nation. FoE has
19 merged with Bluewater Network, co-plaintiff in the related case Center for Biological Diversity,
20 et al. v. Abraham, et al., 218 F.Supp.2d 1143 (N.D. Cal. 2002). As a result of the merger,
21 Bluewater Network and Friends of the Earth are now one organization, combining the missions
22 of each. Both organizations have ongoing programs on energy, air pollution, transportation, and
23 climate change. Bluewater Network is based in San Francisco, California. Bluewater Network’s
24 mission is to confront the root causes of climate change and combat environmental damage
25 caused by the shipping, oil, and motorized recreation industries. Bluewater Network actively
26 campaigns for the reductions of emissions from the transportation sector and also promotes the
27 use of renewable fuels. FoE’s mission is to protect the planet from environmental degradation.
28 FoE has major ongoing legislative and advertising campaigns as well as litigation on energy, air

1 pollution, and climate change. As a result of their merger, Bluewater Network and FoE have a
2 combined membership of 7000 in California. The health and environmental interests of
3 Bluewater Network and FoE, and their members, are impacted by the air pollution created by
4 Defendants' violations. Bluewater Network and FoE are bringing this action on behalf of their
5 organization and its adversely affected members.

6 14. Plaintiffs' members live, work, recreate, and conduct other activities in
7 metropolitan areas throughout the country that are not complying with air quality standards.
8 Plaintiffs' members are adversely affected by exposure to air in those areas that have higher
9 concentrations of pollutants because, at a minimum, Defendants Department of Commerce,
10 Department of Defense, Department of Labor, Department of Transportation, Department of
11 Veterans Affairs, and Department of Homeland Security have not acquired the necessary
12 percentages of AFVs and Defendant U.S. Department of Energy arbitrarily determined not to
13 promulgate a private and municipal fleet AFV requirement as required by EPAAct for the
14 protection of public health, the environment, and the nation's energy security.

15 15. Plaintiffs' members are adversely affected by exposure to air in those areas that
16 do not meet national ambient air quality standards (NAAQS) established under the Clean Air Act
17 for the protection of public health and welfare. Such adverse effects include, but are not limited
18 to, actual or threatened harm to members' health and their aesthetic enjoyment of the
19 environment in those areas with increased vehicle emissions. Plaintiffs' members are already
20 and will continue to be adversely affected by the impacts of air pollution and climate change on
21 California, including, but not limited to, economic and public health effects of increased
22 temperatures, elevated ground-level ozone, loss of freshwater supplies, erosion, increased
23 storms, increased risk of winter floods, and drought.

24 16. Plaintiffs' members are and will continue to be adversely affected by the impacts
25 of oil exploration and development in sensitive wildlife areas they enjoy and study. These areas
26 include the Los Padres National Forest (in the habitat of the California Condor), San Joaquin
27 Valley (in endangered San Joaquin kit fox habitat), coastal waters of California and Florida, San
28 Juan Basin of Colorado, Green River Basin of Utah, Rocky Mountain over-thrust belt, canyon

1 country of Utah (in proposed wilderness and roadless areas), Beaufort Sea, Alaskan Arctic
2 (particularly in the National Petroleum Reserve and in the Artic National Wildlife Refuge),
3 Powder River Basin and Red Desert of Wyoming, and the Gulf of Mexico (including Padre
4 Island National Seashore, the only sea turtle nesting beach in the U.S. for the endangered
5 Kemp's Ridley sea turtle).

6 17. The acts and omissions of Defendants alleged herein, related to their failure to
7 publish their AFV compliance reports on a publicly accessible website and notify the public of
8 their location and availability through the Federal Register as required by EPO Act, deprive
9 Plaintiffs' members of information guaranteed to the public by EPO Act. Defendant DOE's failure
10 to comply with NEPA further deprives Plaintiffs of information. Plaintiffs' members and staff
11 are adversely affected by Defendants' failure to publish this legally required information.

12 18. If Plaintiffs' members had this information, they would use it to educate the
13 public about air pollution, alternative fuels, and AFVs. They would also use the information to
14 advocate for adoption of measures by the government for attaining and maintaining compliance
15 with EPO Act's AFV purchasing requirements. Defendants' failure to produce this information as
16 required by EPO Act and NEPA deprives the Plaintiffs' staff and members of these benefits and
17 thus causes them injury. Granting the requested relief would redress the injuries described
18 above.

19 19. The acts and omissions of Defendants alleged in this complaint related to AFV
20 acquisition and the Department of Energy's decision not to promulgate private and municipal
21 fleet AFV requirements also cause injury to Plaintiffs' members. The injuries these violations
22 cause include: prolonging and exacerbating air quality conditions that adversely affect Plaintiffs'
23 health, welfare, and environment; contributing to climate change; negatively impacting
24 Plaintiffs' scientific, recreational, health, conservation, spiritual, and aesthetic interests in the
25 preservation and protection of plant and animal species adversely impacted by air pollution and
26 climate change; compounding the need for petroleum oil exploration and development in
27 sensitive wildlife areas in the U.S. and abroad; and nullifying measures mandated by EPO Act to
28 protect their health, welfare, and environment.

1 20. The health, recreational, aesthetic, and environmental interests of the Plaintiffs'
2 staff and members have been and continue to be adversely affected by the acts and omissions of
3 Defendants alleged in this complaint. Granting the requested relief would redress the injuries
4 described above.

5 21. Defendant U.S. DEPARTMENT OF ENERGY is an agency of the government of
6 the United States and is legally charged with implementing EAct and complying with its
7 provisions, including the actions sought herein.

8 22. Defendant U.S. DEPARTMENT OF AGRICULTURE is an agency of the
9 government of the United States and is legally charged with implementing EAct and complying
10 with its provisions, including the actions sought herein.

11 23. Defendant U.S. DEPARTMENT OF COMMERCE is an agency of the
12 government of the United States and is legally charged with implementing EAct and complying
13 with its provisions, including the actions sought herein.

14 24. Defendant U.S. DEPARTMENT OF DEFENSE and its sub-components Army,
15 Navy, Air Force and Marine Corp are agencies of the government of the United States and are
16 legally charged with implementing EAct and complying with its provisions, including the
17 actions sought herein.

18 25. Defendant U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES is an
19 agency of the government of the United States and is legally charged with implementing EAct
20 and complying with its provisions, including the actions sought herein.

21 26. Defendant U.S. DEPARTMENT OF HOUSING AND URBAN
22 DEVELOPMENT is an agency of the government of the United States and is legally charged
23 with implementing EAct and complying with its provisions, including the actions sought
24 herein.

25 27. Defendant U.S. DEPARTMENT OF THE INTERIOR is an agency of the
26 government of the United States and is legally charged with implementing EAct and complying
27 with its provisions, including the actions sought herein.

28 28. Defendant U.S. DEPARTMENT OF LABOR is an agency of the government of

1 the United States and is legally charged with implementing EAct and complying with its
2 provisions, including the actions sought herein.

3 29. Defendant U.S. DEPARTMENT OF TRANSPORTATION is an agency of the
4 government of the United States and is legally charged with implementing EAct and complying
5 with its provisions, including the actions sought herein.

6 30. Defendant U.S. DEPARTMENT OF VETERANS AFFAIRS is an agency of the
7 government of the United States and is legally charged with implementing EAct and complying
8 with its provisions, including the actions sought herein.

9 31. Defendant CENTRAL INTELLIGENCE AGENCY is an agency of the
10 government of the United States and is legally charged with implementing EAct and complying
11 with its provisions, including the actions sought herein.

12 32. Defendant DEPARTMENT OF HOMELAND SECURITY is an agency of the
13 government of the United States and is legally charged with implementing EAct and complying
14 with its provisions, including the actions sought herein.

15 33. Defendant EXECUTIVE OFFICE OF THE PRESIDENT is legally charged with
16 implementing EAct and complying with its provisions, including the actions sought herein.

17 34. Defendant FEDERAL COMMUNICATIONS COMMISSION is an agency of the
18 government of the United States and is legally charged with implementing EAct and complying
19 with its provisions, including the actions sought herein.

20 35. Defendant GENERAL SERVICES ADMINISTRATION is an agency of the
21 government of the United States and is legally charged with implementing EAct and complying
22 with its provisions, including the actions sought herein.

23 **LEGAL FRAMEWORK**

24 **I. The Energy Policy Act**

25 36. The Energy Policy Act of 1992, 42 U.S.C. §§ 13201 *et seq.*, establishes a
26 comprehensive scheme to achieve environmental, economic, and national security benefits by
27 promoting the use of alternative fuels and reducing the transportation sector's consumption of
28 petroleum fuel. The Act confronts the direct link between the level and type of energy

1 consumption in the United States and the quality of the environment. The Act also embodies
2 Congress's effort to enact a national energy policy that gradually and steadily increases U.S.
3 energy security in part by reducing our use of oil-based fuels in our motor vehicle sector. A
4 barrel reduction in oil demand through substitution or efficiency is as valuable as an additional
5 barrel of oil produced.

6 37. Congress intended EAct to displace conventional petroleum fuel with non-
7 petroleum energy sources, focusing on light-duty motor vehicle fleet operations. Under the Act,
8 Congress directed DOE to establish a program to promote the development and use of AFVs to
9 the maximum extent practicable. 42 U.S.C. § 13252(a). The program must ensure the
10 availability of replacement fuels that will have the greatest impact in "reducing oil imports,
11 improving the health of our Nation's economy and reducing greenhouse gas emissions." *Id.*

12 **A. Consumption Reduction Goals and Their Revision**

13 38. Congress set specific goals for DOE's program: to replace 10 percent of the
14 nation's projected consumption of petroleum motor fuel by the year 2000 and 30 percent by the
15 year 2010. 42 U.S.C. § 13252(b)(2). Congress also directed DOE to revisit these goals by
16 October 24, 1995 and "periodically thereafter." 42 U.S.C. § 13254(a). DOE is required to
17 "publish in the Federal Register the results of each examination under this subsection and
18 provide an opportunity for public comment." *Id.*

19 39. The Act mandates that if DOE determines that the goals in section 13252(b)(2)
20 (that of 10 percent replacement by 2000 and 30 percent replacement by 2010) are "not
21 achievable," DOE, in consultation with other appropriate federal agencies "shall, by rule,
22 establish goals that are achievable, for purposes of this subchapter. The modification of goals
23 under this section may include changing the target dates specified in section 13252(b)(2) of this
24 title." 42 U.S.C. § 13254(b).

25 **B. Minimum Federal Fleet Percentage Requirements**

26 **1. The Fleet Requirement Program of EAct**

27 40. One approach EAct takes to achieve its replacement goals is to require that at
28 least 25 percent of the total number of EAct-covered vehicles acquired by a federal fleet in

1 fiscal year 1996 must be AFVs; at least 33 percent of the total number of covered vehicles
2 acquired by a federal fleet in fiscal year 1997 must be AFVs; at least 50 percent of the total
3 number of covered vehicles acquired by a federal fleet in fiscal year 1998 must be AFVs; and at
4 least 75 percent of the total number of covered vehicles acquired by a federal fleet in fiscal year
5 1999 and thereafter must be AFVs.

6 41. The Act defines a federal fleet as a group of 20 or more light-duty motor vehicles
7 located in a metropolitan area with a 1980 population of 250,000 or more persons, and owned,
8 operated, acquired, controlled by, or assigned to any Federal executive department, military
9 department, Government corporation, independent establishment, or executive agency, the U.S.
10 Postal Service, the Congress, the courts of the U.S., or the Executive office of the President.

11 42. These vehicles must be centrally fueled or capable of being centrally fueled.
12 DOE regulations define capable of being centrally fueled as a vehicle that can be refueled at least
13 75 percent of its time at the location that is owned, operated, or controlled by the fleet or is under
14 contract for refueling purposes.

15 43. EPAAct exempts many types of vehicles from its requirements, including
16 emergency motor vehicles, motor vehicles acquired and used for military purposes that the
17 Secretary of Defense has certified to the Secretary of Energy must be exempt for national
18 security reasons, motor vehicles held for lease or rental to the general public, motor vehicles held
19 for sale by motor vehicle dealers, motor vehicles used for motor vehicle manufacturer product
20 evaluations or tests, non-road vehicles, including farm and construction vehicles, and motor
21 vehicles that under normal operations are garaged at personal residences at night.

22 44. The Act defines “alternative fuel vehicle” as a dedicated vehicle, meaning one
23 that only operates on alternative fuel, or a dual-fueled vehicle, meaning a vehicle that can
24 operate on alternative fuel as well as gasoline or diesel. Defendants have arbitrarily excluded
25 hybrid vehicles from the definition of dual-fueled vehicles despite the fact that hybrid vehicles
26 run on both gasoline and electricity.

27 45. The Act defines “alternative fuel” as: methanol; denatured ethanol; and other
28 alcohols; mixtures containing 85 percent or more methanol, denatured ethanol, and other

1 alcohols with gasoline or other fuels; natural gas; liquefied petroleum gas; hydrogen; coal-
2 derived liquid fuels; fuels derived from biological materials; electricity; and any other fuel the
3 Secretary determines by rule is substantially not petroleum and would yield substantial energy
4 security benefits and substantial environmental benefits.

5 46. EPA provides an alternative to fulfilling the statute's AFV acquisition
6 requirements by means other than acquiring AFVs; an agency also may receive one AFV credit
7 for every 450 gallons of biodiesel fuel in fuel containing at least 20 percent biodiesel by volume
8 used in vehicles that weigh more than 8,500 pounds gross vehicle weight rating. Credits
9 allocated under this section can be used to satisfy up to 50 percent of an agency's AFV
10 requirements.

11 2. The Fleet Requirement Program In Executive Order 13149

12 47. On April 21, 2000, President Clinton issued an Executive Order to "ensure that
13 the Federal Government exercises leadership in the reduction of petroleum consumption through
14 improvements in fleet fuel efficiency and the use of alternative fuel vehicles (AFVs) and
15 alternative fuels." Exec. Order No. 13149, *Greening the Government Through Federal Fleet
16 and Transportation Efficiency*, 65 Fed. Reg. 24607 (Apr. 21, 2000).

17 48. Executive Order 13149 directs each agency operating 20 or more vehicles in the
18 U.S. to reduce its entire fleet's annual petroleum consumption by at least 20 percent by the end
19 of FY 2005 as compared with FY 1999 levels.

20 49. Executive Order 13149 directs each agency to fulfill EPA's acquisition
21 requirements for AFVs and to use alternative fuels to meet a majority of the fuel requirements
22 for those motor vehicles by the end of FY 2005.

23 50. Executive Order 13149 requires each agency to increase the average
24 Environmental Protection Agency fuel economy rating of passenger cars and light trucks
25 acquired by at least 1 mile per gallon by the end of FY 2002 and at least 3 miles per gallon by
26 the end of FY 2005 as compared to FY 1999 acquisitions.

27 51. Section 401 of Executive Order 13149 makes it easier for agencies to fulfill their
28 Energy Policy Act AFV requirements by providing vehicle reporting credits for the following:

1 each agency acquisition of an alternative fuel light-duty vehicle, regardless of geographic
2 placement; one additional credit for each light-duty AFV that exclusively uses an alternative
3 fuel; one additional credit for each Zero Emission Vehicle of any size; three credits for dedicated
4 medium-duty AFVs; four credits for dedicated heavy-duty AFVs; and one credit for every 450
5 gallons of pure bio-diesel used in diesel vehicles.

6 **C. Reporting Requirements**

7 52. To ensure compliance with the purchasing requirements described above, EPA
8 requires the head of each Federal agency subject to the Act to prepare and submit annual reports
9 to Congress summarizing the agency's compliance with the Act's alternative fuel purchasing
10 requirements for federal fleets. This summary must include a plan of compliance containing
11 specific dates when the agency will achieve compliance.

12 53. The agency must place the reports on a publicly available website and notify the
13 public of the reports' existence and location on the agency website through publication of the
14 website address information in the Federal Register.

15 **D. Private And Municipal Fleet Requirement Program**

16 54. The Act also requires DOE to undertake a staged rulemaking process to determine
17 whether or not alternative fuel vehicle fleet requirements must also be applied to private and
18 local municipal government fleets in order to meet the goals of 10 percent reduction of
19 petroleum fuel consumption by 2000 and 30 percent reduction by 2010. 42 U.S.C. § 13257.

20 55. The private and municipal fleet section of the Act provides that a private and
21 municipal fleet program "shall be considered necessary" if DOE determines the following: (1)
22 the goal of 30 percent replacement fuel by 2010 (or other goal if modified under the proper
23 modification procedures set out in 42 U.S.C. § 13254) is not expected to be achieved without a
24 private and municipal fleet requirement program; and (2) the 30 percent goal (or goal as
25 modified under section 13254) is practicable and achievable with a private and municipal fleet
26 requirement program in combination with voluntary means and other programs. *Id.* at §
27 13257(e)(1)(A), (B).

28 56. The determination that a private and municipal fleet requirement is necessary can

1 serve to modify the goal of 30 percent reduction in motor fuel consumption by 2010 in section
2 13252(b)(2)(B), and establish a revised goal, if DOE determines through the proper rulemaking
3 procedures in section 13257(c) that the goal in place is inadequate, impracticable, or not
4 expected to be achievable. *Id.* at § 13257(e)(2).

5 57. If accomplished by proper rulemaking, the Secretary can establish lower
6 percentages of AFV purchasing requirements (not less than 10 percent) or later years for
7 initiating the program. *Id.* at §§13257(e)(2), 13257(g)(2).

8 58. If DOE determines under subsection (e) that a private and municipal fleet
9 requirement program is not necessary, DOE must by January 1, 2000 publish this determination
10 in the Federal Register as a final agency action, including an explanation of DOE's findings and
11 basis for the determination. *Id.* at § 13257(f)(2).

12 59. If DOE determines under subsection (e) that a private and municipal fleet
13 requirement program is necessary, then DOE must by January 1, 2000 require by rule that of the
14 total number of new light duty motor vehicles acquired for a fleet, (other than Federal, State, or
15 covered alternative fuel provider) certain percentages be AFVs beginning in model year 2002.
16 *Id.* at § 13257(g)(1). Model year 2002 began September 1, 2001.

17 60. Under section 13257(g)(1), the following phased-in percentages of AFVs apply to
18 private and municipal fleet vehicle acquisitions: 20 percent of the light duty motor vehicles
19 acquired in model year 2002 must be AFVs; 40 percent in model year 2003 must be AFVs; 60
20 percent in model year 2004 must be AFVs; and 70 percent in model year 2005 and thereafter
21 must be AFVs. *Id.* at § 13257(g).

22 **II. The National Environmental Policy Act**

23 61. The purpose of the National Environmental Project Act ("NEPA") is to "promote
24 efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4331. NEPA's
25 fundamental purposes are to guarantee that: (1) agencies take a "hard look" at the environmental
26 consequences of their actions *before* these actions occur by ensuring that the agency has and
27 carefully considers detailed information concerning significant environmental impacts; and (2)
28 agencies make the relevant information available to the public so that it may also play a role in

1 both the decisionmaking process and the implementation of that decision. See, e.g. 40 C.F.R. §
2 1500.1.

3 62. NEPA and the regulations promulgated thereunder by the Council on
4 Environmental Quality (“CEQ”) require that federal agencies, including DOE, must prepare an
5 environmental impact statement (“EIS”) for all “major federal actions significantly affecting the
6 quality of the human environment.” 42 U.S.C. § 4332(2)(C); see also 40 C.F.R. § 1501.4.

7 DOE’s NEPA regulations are found at 10 C.F.R. 1021.100, *et seq.* An agency may first prepare
8 a detailed Environmental Assessment (“EA”) to determine whether an action *may* significantly
9 affect the environment and thus require a full EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9.

10 63. Significance is based upon the “intensity” and “context” of the action. 40 C.F.R.
11 § 1508.27. “Context” refers to the geographic and temporal scope of the agency action and the
12 interests affected. Id. § 1508.27(a). “Intensity” addresses the severity of the impacts. Id. §
13 1508.27(b). Factors relevant to intensity include: the degree to which the effects on the quality
14 of the human environment are likely to be highly controversial; the degree to which the action
15 may adversely affect an endangered or threatened species or its critical habitat; the presence of
16 “uncertain impacts or unknown risks;” whether the action is “related to other actions with
17 individually insignificant but cumulatively significant effects;” and whether the project
18 “threatens a violation” of other laws. Id. at § 1508.27(b).

19 64. To assure the transparency and thoroughness of these deliberations, agencies also
20 must “to the fullest extent possible . . . [e]ncourage and facilitate public involvement” in
21 decision-making. 40 C.F.R. § 1500.2(d).

22 65. “Major Federal action” includes actions with effects that may be major and are
23 potentially subject to federal control and responsibility. 40 C.F.R. § 1508.18. Actions include
24 the circumstance where the agency fails to act and that failure to act is reviewable under the
25 Administrative Procedure Act. Id. Actions include new and continuing activities, including
26 projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by
27 federal agencies. Id.

28 66. DOE’s NEPA regulations provide “categorical exclusions” for categories of

1 actions which do not individually or cumulatively have a significant effect on the human
2 environment and which have been found to have no such effect in procedures adopted by a
3 Federal agency in implementation of these regulations. When the requirements for a categorical
4 exclusion are met, neither an EA nor an EIS is normally required. 10 C.F.R. § 1021.104; 40
5 C.F.R. § 1508.4. However, when a normally excluded action may have a significant
6 environmental effect a categorical exclusion is not available.

7 67. For those actions not categorically excluded from NEPA compliance, the
8 responsible agency “shall consult with and obtain the comments” of any other federal agency
9 which has jurisdiction by law or special expertise with respect to any environmental impact
10 involved prior to finalizing any detailed statement. 42 U.S.C. § 4332(C).

11 68. Furthermore, until the agency issues a Record of Decision on the EIS, it may not
12 take any actions that would have an adverse environmental impact or limit the reasonable choice
13 of alternatives. 40 C.F.R. § 1506.1.

14 69. An EIS must provide a detailed statement of: (1) the environmental impact of the
15 proposed action; (2) any adverse environmental effects that cannot be avoided should the
16 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship
17 between local short-term uses of man’s environment and the maintenance and enhancement of
18 long-term productivity; and (5) any irreversible and irretrievable commitments of resources that
19 would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(C).

20 70. An EIS must “inform decision-makers and the public of the reasonable
21 alternatives that would avoid or minimize adverse impacts or enhance the quality of the human
22 environment.” 40 C.F.R. § 1502.1. NEPA also requires federal agencies to analyze the direct,
23 indirect, and cumulative impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.8.
24 Cumulative impacts include the “impact on the environment which results from the incremental
25 impact of the action when added to other past, present, and reasonably foreseeable future
26 significant actions.” 40 C.F.R. § 1508.7. Direct effects are caused by the action and occur at the
27 same time and place. *See id.* § 1508.8(a). Indirect effects are caused by the action and are later
28 in time or farther removed in distance, but are still reasonably foreseeable. *See id.* § 1508.8(b).

1 Both include “effects on natural resources and on the components, structures, and functioning of
2 affected ecosystems,” as well as “aesthetic, historic, cultural, economic, social, or health
3 [effects].” Id.

4 71. In addition to alternatives and impacts, NEPA requires agencies to consider
5 mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. §
6 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental
7 consequences and mitigation measures).

8 72. Throughout the EIS, the agency is required to “insure the professional integrity,
9 including scientific integrity,” of its discussions and analyses. Id. § 1502.24.

10 73. If an EIS is not required, the federal agency must provide a “convincing statement
11 of reasons” why the project’s impacts are insignificant and issue a Finding of No Significant
12 Impact or “FONSI.” 40 C.F.R. §§ 1501.4, 1508.9, 1508.13.

13 **FACTUAL BACKGROUND**

14 **I. Motor Vehicle Emissions Harm Public Health And The Environment.**

15 **A. The U.S. Consumes A Significant Amount Of Oil For Transportation, This** 16 **Consumption Is A Major Cause Of Poor Air Quality In The U.S. and a Major** 17 **Part of the U.S. Contribution to Global Greenhouse Gas Emissions**

18 74. The U.S. is responsible for approximately 25 percent of the world total oil
19 consumption. In 2002, the U.S. imported approximately 54 percent of its total oil demand.

20 75. According to DOE, the gap between the transportation sector’s demand for
21 petroleum and U.S. petroleum production continues to widen. In the transportation sector alone,
22 U.S. consumption of petroleum surpasses total U.S. domestic petroleum production by 5.9
23 million barrels per day. This gap is estimated to increase to 12.8 million barrels per day by the
24 year 2020.

25 76. Each year in the U.S., approximately 65 percent of the oil consumed is used for
26 transportation. As a result, vehicle emissions have become the leading source of U.S. air
27 pollution.

28 77. Transportation related activities are responsible for an estimated quarter of the

1 greenhouse gases produced in this country, with the U.S. contributing approximately 20 percent
2 of these greenhouse gases globally.

3 **B. Poor Air Quality From Vehicle Emissions Adversely Affects Humans**
4 **and The Environment.**

5 78. It takes 196,000 pounds of prehistoric plant matter to produce 13 pounds of crude
6 oil. From that comes one gallon of gasoline, which produces 5.4 pounds of carbon when
7 burned. In the atmosphere that carbon combines with oxygen to produce 19.8 pounds of carbon
8 dioxide, a potent greenhouse gas. The average vehicle in the U.S. gets less than 25 miles per
9 gallon of gasoline. There are over 230,000,000 registered vehicles in the United States.

10 79. In addition to being an inefficient source of energy, the use of gasoline in vehicles
11 emits numerous air pollutants. Air pollution is a problem that affects millions of Americans. In
12 California, for example, over ninety percent of the population lives in regions adversely affected
13 by air quality problems, largely as a result of vehicle exhaust. Long-term exposure to air
14 pollution in the four Bay Area counties may cause an additional 208 cases of cancer for every
15 million residents, which is 208 times greater than the acceptable risk of cancer caused by air
16 pollution as established by the Clean Air Act of 1990. Most of the cancer risk is attributable to
17 benzene and butadiene, a byproduct of fuel combustion.

18 80. Vehicles running on petroleum emit several “criteria” pollutants regulated by the
19 U.S. EPA under the Clean Air Act, including ozone, carbon monoxide (CO), nitrogen oxides
20 (NOx), sulfur oxides (SOx), and particulate matter (PM).

21 81. Exposure to air pollution from vehicles is associated with numerous effects on
22 human health, including respiratory problems, hospitalization for heart and lung diseases, and
23 even premature death. Children, the elderly, athletes, and people with compromised immune
24 systems suffer the worst health problems associated with poor air quality. Among these
25 individuals, poor air quality causes heightened health impacts, such as difficult breathing,
26 lowered disease-resistance, and hindered development of lung capacity in children.

27 82. Air pollution can also significantly affect ecosystems. For example, ground-level
28 ozone has been associated with reductions of agricultural and commercial forest yields, and

1 airborne release of NO_x are one of the largest sources of nitrogen pollution in certain
2 waterbodies, including Chesapeake Bay.

3 83. Emitted NO_x and volatile organic compounds, or VOCs, form low-level ozone
4 (O₃) in the presence of sunlight and high temperatures. Cars emit both VOCs and NO_x.

5 84. Low-level ozone is a major component of smog, which is the most serious and
6 persistent outdoor air quality problem in the Bay Area and in other parts of the country. In the
7 past five years, the Bay Area has violated the NAAQS for ozone at least twenty-nine times. As a
8 result, EPA has reclassified the Bay Area as a Non-attainment area for the federal one-hour
9 ozone standard.

10 85. Even at very low levels, ground-level ozone triggers a variety of health problems
11 including aggravated asthma, reduced lung capacity, and increased susceptibility to respiratory
12 illnesses like pneumonia and bronchitis. People with respiratory problems and children are most
13 vulnerable to ozone. However, when present in high levels, ozone also can affect healthy adults,
14 especially those active outdoors. Repeated exposure to ozone pollution may cause permanent
15 lung damage. Results of a recent study of 95 large urban communities comprising
16 approximately 40% of the U.S. population, demonstrated a significant association between short-
17 term changes in ozone and elevated human mortality.

18 86. Ground-level ozone also affects vegetation and ecosystems, leading to reductions
19 in agricultural crop and commercial forest yields, reduced growth and survivability of tree
20 seedlings, and increased susceptibility of plants to disease, insects, other pollutants, and harsh
21 weather. In long-lived species, these effects may not be evident for several years or even
22 decades. Ozone damages the leaves of trees and other plants, ruining the appearance of cities,
23 national parks, and recreation areas.

24 87. According to the EPA, motor vehicle exhaust is responsible for 60 percent of all
25 CO emissions nationwide and 95 percent of CO emissions in some cities. At high levels in the
26 air, CO is poisonous even to healthy people. CO can affect the heart and central nervous
27 system. For a person with heart disease, a single exposure to CO at low levels may cause chest
28 pain and reduce that person's ability to exercise; repeated exposure may contribute to other

1 cardiovascular effects. People who breathe high levels of CO can develop vision problems,
2 reduced ability to work or learn, reduced manual dexterity, and difficulty performing complex
3 tasks. CO contributes to the formation of smog ground-level ozone, which can trigger serious
4 respiratory problems.

5 88. NO_x is the term used to describe a group of highly reactive gases, all of which
6 contain nitrogen and oxygen in varying amounts. NO_x forms from fuels burned at high
7 temperatures. Motor vehicles are a primary source of NO_x. NO_x is one of the main components
8 involved in the formation of ground-level ozone. NO_x also reacts to form nitrate particles, acid
9 aerosols, as well as NO₂, which also cause respiratory problems. NO_x contributes to the
10 formation of acid rain, acidification and nutrient overload that deteriorates water quality and
11 harms aquatic organisms, acidification of soils that harms plants, and visibility impairment in
12 national parks and other scenic areas. Furthermore, NO_x reacts to form toxic chemicals and
13 contributes to climate change. NO_x causes respiratory problems, may cause irreversible
14 alterations in lung structure, and is associated with other adverse health impacts.

15 89. Sulfur dioxide, or SO₂, is a member of the family of SO_x gases. These gases are
16 formed when gasoline is extracted from oil and when fuel that contains sulfur, including oil, is
17 burned. SO₂ contributes to respiratory illness and exacerbates heart and lung diseases. Together,
18 NO_x and SO₂ are the major precursors to acid rain, which damages trees, crops, streams, lakes,
19 historic buildings, and monuments. SO₂ also contributes to the formation of atmospheric
20 particles that cause visibility impairment.

21 90. PM is the term used to describe particles found in the air, including dust and
22 smoke. PM can be directly emitted into the air from a variety of sources including cars, trucks,
23 and buses. PM is associated with serious health effects, including aggravated asthma, increases
24 in respiratory symptoms like coughing and difficult or painful breathing, chronic bronchitis,
25 decreased lung function, and premature death. According to the EPA, PM is the major source of
26 haze that is responsible for reducing visibility in many areas of the U.S., including our national
27 parks. PM settles on soil and water and changes their nutrient and chemical balance. PM makes
28 lakes and streams acidic, changes the nutrient balance in coastal waters and large river basins,

1 depletes the nutrients in soil, damages sensitive forests and farm crops, and affects the diversity
2 of ecosystems. PM erodes and stains structures including monuments and statues.

3 91. Motor vehicles also emit several hazardous pollutants that EPA classifies as
4 known or probable human carcinogens. Air toxics cause cancer, neurological, reproductive,
5 developmental, respiratory, and other health problems and damage the immune system. EPA
6 estimates that mobile sources of air toxics, such as cars, trucks, and buses, account for as much
7 as half of all cancers attributed to outdoor sources of air toxics.

8 92. The gasoline additive benzene is a known human carcinogen. Benzene causes
9 leukemia and blood disorders in adults. Studies also indicate an association between high traffic
10 streets with elevated rates of childhood cancer, including leukemia. Short-term exposure to
11 benzene can cause dizziness, headaches, vomiting, unconsciousness, and, at high levels, even
12 death. An estimated 80% of benzene emissions in the U.S. originate from motor vehicles. Air
13 toxics also deposit toxic pollutants on soils and surface waters where they are absorbed by plants
14 and ingested by animals and eventually magnified through the food chain. Like humans, animals
15 may experience health problems due to air toxics exposure.

16 93. Vehicle emissions also contain greenhouse gases linked to climate change. In
17 2001, the Intergovernmental Panel of Climate Change concluded that the global rise in average
18 yearly temperature over the last fifty years was primarily attributable to anthropogenic
19 greenhouse gases. U.S. climate trends are consistent with global climate trends.

20 94. Climate change is expected to alter the distribution and abundance of many
21 species and result in hastened population extinctions. For example, Plaintiff, the Center for
22 Biological Diversity recently petitioned the Polar Bear for listing under the Endangered Species
23 Act, in part, because of the detrimental effects of global warming on this species.

24 **II. AFVs Are Better For Public Health And The Environment.**

25 95. Displacing petroleum with alternative and replacement transportation fuels
26 reduces our dependence on imported petroleum transportation fuels; reduces the need to explore
27 for and produce oil from environmentally sensitive areas and to transport oil in oil tankers prone
28 to environmentally destructive oil spills; reduces U.S. vulnerability to oil price shocks; decreases

1 emissions of greenhouse gases, criteria pollutants, and toxics; and promotes domestic economic
2 development.

3 96. Alternative and replacement fuels that have lower carbon fuel-cycles than
4 gasoline or diesel fuel also have the added benefit of reducing greenhouse gas emissions. The
5 vehicles using alternative fuels work well and have operating characteristics that are acceptable
6 to a significant portion of the vehicle-owning population. Substitution of petroleum-based
7 transportation fuels (gasoline and diesel) by non-petroleum-based fuels (“replacement fuels,”
8 including alternative fuels such as electricity, ethanol, hydrogen, liquefied petroleum gas,
9 methanol, and natural gas) could be a key means of reducing the vulnerability of the U.S.
10 transportation sector to disruptions of petroleum supply.

11 97. Alternative fuels are inherently cleaner than gasoline because they are chemically
12 less complex and burn cleaner. When used with advanced engine and emission control
13 technologies, alternative fuels burn more efficiently and thus release fewer emissions from
14 incomplete combustion. In addition, because alternative fuels evaporate less readily than
15 gasoline, there are fewer evaporative emissions from the vehicle’s tank, limiting smog-forming
16 emissions.

17 98. Electric vehicles, which have no internal combustion engine, potentially offer the
18 greatest emission reductions. Their primary source of air pollution comes from the power plants
19 that create electricity to charge batteries. Yet even after these emissions are considered, electric
20 vehicles typically have 90 percent fewer emissions than an internal combustion engine.

21 **FACTS GIVING RISE TO PLAINTIFFS’ CAUSES OF ACTION**

22 **I. Defendants Have Violated EPA’s Reporting Requirements**

23 99. Defendant Department of Energy has not posted a 2004 compliance report on a
24 publicly available website, the location of which is provided to the public in the Federal
25 Register.

26 100. Defendant Department of Agriculture has not posted a 2004 compliance report on
27 a publicly available website, the location of which is provided to the public in the Federal
28 Register.

1 101. Defendant Department of Commerce has not posted a 2003 or 2004 compliance
2 report on a publicly available website, the location of which is provided to the public in the
3 Federal Register.

4 102. Defendant Department of Defense has not posted a 2003 or 2004 compliance
5 report on a publicly available website, the location of which is provided to the public in the
6 Federal Register. Additionally, Department of Defense component Army has not posted a 2002,
7 2003 or 2004 compliance report. Department of Defense component Navy has not posted a 2003
8 or 2004 compliance report. Department of Defense component Air Force has not posted a 2003
9 or 2004 compliance report and Department of Defense component Marine Corp has not posted a
10 2003 or 2004 compliance report.

11 103. Defendant Department of Health and Human Services has not posted a 2004
12 compliance report on a publicly available website, the location of which is provided to the public
13 in the Federal Register.

14 104. Defendant Department of Housing and Urban Development has not posted a 2003
15 or 2004 compliance report on a publicly available website, the location of which is provided to
16 the public in the Federal Register.

17 105. Defendant Department of the Interior has not posted a 2003 or 2004 compliance
18 report on a publicly available website, the location of which is provided to the public in the
19 Federal Register.

20 106. Defendant Department of Transportation has not posted a 2004 compliance report
21 on a publicly available website, the location of which is provided to the public in the Federal
22 Register.

23 107. Defendant Department of Veterans Affairs has not posted a 2004 compliance
24 report on a publicly available website, the location of which is provided to the public in the
25 Federal Register.

26 108. Defendant Central Intelligence Agency has never posted an EPAct compliance
27 report on a publicly available website, the location of which is provided to the public in the
28 Federal Register.

1 109. Defendant Department of Homeland Security has not posted a 2004 compliance
2 report on a publicly available website, the location of which is provided to the public in the
3 Federal Register.

4 110. Defendant Executive Office of the President has never posted an EAct
5 compliance report on a publicly available website, the location of which is provided to the public
6 in the Federal Register.

7 111. Defendant Federal Communications Commission has never posted an EAct
8 compliance report on a publicly available website, the location of which is provided to the public
9 in the Federal Register.

10 112. Defendant General Services Administration has not posted a 2003 or 2004
11 compliance report on a publicly available website, the location of which is provided to the public
12 in the Federal Register.

13 113. The websites provided in the Federal Register for the Department of Agriculture,
14 Department of Health and Human Services, and Department of Interior do not link to the report
15 websites.

16 114. Defendants Central Intelligence Agency, Department of Homeland Security,
17 Executive Office of the President, and the Federal Communications Commission have never
18 published the location of their AFV report website in the Federal Register.

19 **II. Defendants Have Violated EAct's AFV Acquisition Requirements**

20 115. In its last posted AFV compliance report, Defendant Department of Commerce
21 was in violation of EAct's AFV acquisition requirements.

22 116. In its last posted AFV compliance report, Defendant Department of Defense and
23 its components Army, Navy, Air Force and Marine Corp were in violation of EAct's AFV
24 acquisition requirements.

25 117. In its last posted AFV compliance report, Defendant Department of Labor was in
26 violation of EAct's AFV acquisition requirements.

27 118. In its last posted AFV compliance report, Defendant Department of
28 Transportation was in violation of EAct's AFV acquisition requirements.

1 119. In its last posted AFV compliance report, Defendant Department of Veterans
2 Affairs was in violation of EAct's AFV acquisition requirements.

3 120. In its last posted AFV compliance report, Defendant Department of Homeland
4 Security was in violation of EAct's AFV acquisition requirements.

5 121. Several additional agencies may be in violation of this provision, yet because they
6 have not posted the required compliance reports and published the location of such reports in the
7 Federal Register, Plaintiffs do not have the information necessary to confirm whether or not they
8 are in compliance. On information and belief, subject to discovery, Plaintiffs allege that
9 Defendants Department of Energy, Department of Agriculture, Department of Health and
10 Human Services, Department of Housing and Urban Development, Department of the Interior,
11 Central Intelligence Agency, Executive Office of the President, Federal Communications
12 Commission, and General Services Administration are in violation of EAct's AFV acquisition
13 requirements.

14 **III. Defendant DOE Has Violated EAct's Mandate to Revise Goals and Establish A**
15 **Private And Municipal Fleet AFV Requirements**

16 122. EAct required DOE to undertake a staged rulemaking process to determine
17 whether or not AFV-acquisition requirements also must be applied to private and local fleets if
18 the U.S. was going to meet the Act's goals of replacing 10 percent of the nation's projected
19 consumption of petroleum motor fuel by the year 2000 and 30 percent by the year 2010. When
20 DOE did not meet the rulemaking deadlines for private and local fleets provided in the Act,
21 Plaintiffs' sued to compel compliance. Center for Biological Diversity, et al. v. Abraham, et al.,
22 218 F.Supp.2d 1143 (N.D.Cal. 2002).

23 123. The resulting final rule issued by DOE under court order, however, violates
24 EAct. As an initial matter, DOE refused to promulgate a private and municipal fleet rule in
25 large part because it contends the goals of replacing 10 percent of the nation's projected
26 consumption of petroleum motor fuel by the year 2000 and 30 percent by the year 2010 could
27 never be achieved, even with a private and municipal fleet rule.

28 124. Congress anticipated this potential situation when it enacted EAct and thus

1 specifically directed DOE to revisit the goals of replacing 10 percent of the nation’s projected
2 consumption of petroleum motor fuel by the year 2000 and 30 percent by the year 2010 by
3 October 24, 1995 and “periodically thereafter.” 42 U.S.C. § 13254(a); 42 U.S.C. § 13252(b)(2)
4 (goals). Congress then mandated that if, while revisiting the goals of 10 percent replacement by
5 2000 and 30 percent replacement by 2010, DOE determined that they are “not achievable,”
6 DOE, in consultation with other appropriate federal agencies “*shall*, by rule, establish goals that
7 are achievable, for purposes of this subchapter.” 42 U.S.C. § 13254(b) (emphasis added). DOE
8 has not revisited and modified the goals as required.

9 125. The failure of DOE to adjust the goals of EPAAct as directed by Congress
10 predetermined its decision not to promulgate a private and municipal fleet requirement to assist
11 in meeting the goals of the Act. 42 U.S.C. § 13257. The private and municipal section of the
12 Act provides that a private and municipal fleet program “shall be considered necessary” if DOE
13 determines the following: (1) the goal of 30 percent replacement fuel by 2010 (or other goal if
14 modified under the proper modification procedures set out in 42 U.S.C. § 13254) is not expected
15 to be achieved without a private and municipal fleet requirement program; and (2) the 30 percent
16 goal (or goal as modified under section 13254) is practicable and achievable with a private and
17 municipal fleet requirement program in combination with voluntary means and other programs.
18 *Id.* at § 13257(e)(1)(A), (B).

19 126. Instead of modifying the goals through any of the many avenues provided by
20 Congress as required by the Act, including lower overall percentage goals, lower percentages of
21 AFV acquisition requirements, or later years for initiating the program, *see* §§ 13254, 13257 (c),
22 (e)(2), (g)(2), DOE determined that such a rule was not “necessary” because the original goals
23 that it failed to modify as required were not practicable and achievable.

24 127. DOE’s determination that the goals were not practicable and achievable also was
25 invalid because it was not rationally related to the record before the agency.

26 **III. Defendant DOE Has Violated the National Environmental Policy Act**

27 128. The final rule contained one paragraph on the subject of compliance with the
28 National Environmental Policy Act. In it, DOE determined that the “negative determination”

1 regarding the necessity for a private and local government fleet requirement program “will not
2 require any government entity or any member of the public to act or to refrain from acting.”
3 DOE thus concluded that its decision was covered under DOE’s Categorical Exclusion for
4 “rulemakings interpreting or amending an existing rule or regulation that does not change the
5 environmental effect of the rule or regulation being interpreted or amended.” 69 Fed.Reg. 4,219,
6 4,230 (2004); see also Paragraph A5 of Appendix A to subpart D, 10 CFR Part 1021. DOE
7 contended that its decision was “environmentally neutral.” 69 Fed.Reg. at 4,224-25 (emphasis
8 added).

9 129. DOE’s decision not to promulgate a private and municipal fleet rule has a
10 significant detrimental impact on the human environment by withholding action that would
11 reduce petroleum consumption and its attendant environmental damage. Given the huge number
12 of vehicles in the U.S., even small percentage changes have significant environmental impacts.
13 Thus, DOE’s invocation of a categorical exclusion was in error. The Department must prepare
14 an Environmental Impact Statement for this decision.

15 **FIRST CLAIM FOR RELIEF**

16 **(Violation of the Energy Policy Act, 42 U.S.C. § 13218)**

17 130. Each and every allegation set forth above in the Complaint is incorporated herein,
18 by reference.

19 131. Defendants Department of Energy, Department of Agriculture, Department of
20 Commerce, Department of Defense, Department of Health and Human Services, Department of
21 Housing and Urban Development, Department of the Interior, Department of Transportation,
22 Department of Veterans Affairs, Central Intelligence Agency, Department of Homeland
23 Security, Executive Office of the President, Federal Communications Commission, and General
24 Services Administration have violated EAct’s requirement that they place their annual AFV
25 fleet percentage compliance reports on a publicly available website, the location of which must
26 be provided to the public in the Federal Register. 42 U.S.C. § 13218.

27 132. The websites provided in the Federal Register for the Department of Agriculture,
28 Department of Health and Human Services, and Department of Interior do not link to the report

1 websites.

2 133. The Central Intelligence Agency, Department of Homeland Security, Executive
3 Office of the President, and the Federal Communications Commission have never published the
4 location of their AFV report website in the Federal Register.

5 134. Defendants failures violate 42 U.S.C. Section 13218 and constitute agency action
6 unlawfully withheld, unreasonably delayed, and contrary to law and agency action that is
7 arbitrary and capricious within the meaning of the APA. 5 U.S.C. §§ 706(1), (2).

8 **SECOND CLAIM FOR RELIEF**

9 **(Violation of the Energy Policy Act, 42 U.S.C. § 13252)**

10 135. Each and every allegation set forth above in the Complaint is incorporated herein,
11 by reference.

12 136. Defendants Department of Commerce, Department of Defense, Department of
13 Labor, Department of Transportation, Department of Veterans Affairs, and Department of
14 Homeland Security have violated EAct's requirement that if an agency acquires vehicles
15 covered by the Act, a certain percentage of those vehicles must be alternative fuel vehicles
16 ("AFVs"). 42 U.S.C. § 13252. In their last posted report, all of these agencies were in violation
17 of this provision's acquisition requirements.

18 137. Defendant's failure violates 42 U.S.C. Section 13252 and constitutes agency
19 action unlawfully withheld, unreasonably delayed, and contrary to law and agency action that is
20 arbitrary and capricious within the meaning of the APA. 5 U.S.C. §§ 706(1), (2).

21 **THIRD CLAIM FOR RELIEF**

22 **(Violation of the Energy Policy Act, 42 U.S.C. § 13254)**

23 138. Each and every allegation set forth above in the Complaint is incorporated herein,
24 by reference.

25 139. Defendant DOE has violated EAct by failing to comply with Congress's
26 mandate that if DOE determines that the petroleum consumption reduction goals in section
27 13252(b)(2) are "not achievable," DOE, in consultation with other appropriate federal agencies
28 "shall, by rule, establish goals that are achievable, for purposes of this subchapter." 42 U.S.C. §

1 13254(b).

2 140. Defendant's failure violates 42 U.S.C. Section 13254 and constitutes agency
3 action unlawfully withheld, unreasonably delayed, and contrary to law and agency action that is
4 arbitrary and capricious within the meaning of the APA. 5 U.S.C. §§ 706(1), (2).

5 **FOURTH CLAIM FOR RELIEF**

6 **(Violation of the Energy Policy Act, 42 U.S.C. § 13257)**

7 141. Each and every allegation set forth above in the Complaint is incorporated herein,
8 by reference.

9 142. Defendant DOE's final rule issued pursuant to Section 13257 of EAct regarding
10 the private and municipal fleet AFV acquisition requirements violates Section 13257 of EAct
11 by failing to comply with the requirements of that provision of the statute and the standards
12 provided by the APA. Defendant's final rule declining to impose the private and municipal fleet
13 AFV acquisition requirements is thus agency action unlawfully withheld, unreasonably delayed,
14 and contrary to law and agency action that is arbitrary and capricious within the meaning of the
15 APA. 5 U.S.C. §§ 706(1), (2).

16 **FIFTH CLAIM FOR RELIEF**

17 **(Violation of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C))**

18 143. Each and every allegation set forth above in the Complaint is incorporated herein,
19 by reference.

20 144. Defendant DOE has violated the National Environmental Policy Act and its
21 implementing regulations by failing to prepare an environmental impact statement or
22 environmental assessment for its final determination that a private and municipal fleet AFV
23 requirement is not necessary. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1, *et seq.*

24 145. Defendant DOE's failure to comply with NEPA constitutes agency action
25 unlawfully withheld, unreasonably delayed, and contrary to law and agency action that is
26 arbitrary and capricious within the meaning of the APA. 5 U.S.C. §§ 706(1), (2).

27 **PRAYER FOR RELIEF**

28 WHEREFORE, Plaintiffs request that this Court enter judgment providing the following

1 relief:

2 1. Declare Defendants Department of Energy, Department of Agriculture,
3 Department of Commerce, Department of Defense, Department of Health and Human Services,
4 Department of Housing and Urban Development, Department of the Interior, Department of
5 Transportation, Department of Veterans Affairs, Central Intelligence Agency, Department of
6 Homeland Security, Executive Office of the President, and Federal Communications
7 Commission in violation of the EAct's requirement that they place their annual AFV fleet
8 percentage compliance reports on a publicly available website, the location of which must be
9 provided to the public in the Federal Register. 42 U.S.C. § 13218.

10 2. Declare Defendants Department of Commerce, Department of Defense,
11 Department of Labor, Department of Transportation, Department of Veterans Affairs, and
12 Department of Homeland Security in violation of EAct's requirement that if an agency acquires
13 vehicles covered by the Act, a certain percentage of those vehicles must be alternative fuel
14 vehicles ("AFVs"). 42 U.S.C. § 13252.

15 3. Declare Defendant DOE in violation of EAct by failing to comply with Congress's
16 mandate that if DOE determines that the goals in section 13252(b)(2) are "not achievable," DOE, in
17 consultation with other appropriate federal agencies "shall, by rule, establish goals that are
18 achievable, for purposes of this subchapter." 42 U.S.C. § 13254(b).

19 4. Declare Defendant DOE in violation of Section 13257 of EAct by failing to comply
20 with the requirements of that provision and failing to institute a private and municipal fleet AFV
21 acquisition requirements. 42 U.S.C. § 13257.

22 5. Declare Defendant DOE in violation of its nondiscretionary duties under NEPA. 42
23 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1, *et seq.*

24 6. Order Defendants Department of Energy, Department of Agriculture, Department
25 of Commerce, Department of Defense, Department of Health and Human Services, Department
26 of Housing and Urban Development, Department of the Interior, Department of Transportation,
27 Department of Veterans Affairs, Central Intelligence Agency, Department of Homeland
28 Security, Executive Office of the President, and Federal Communications Commission to

1 comply with EAct's requirement that they place their annual AFV fleet percentage compliance
2 reports on a publicly available website, the location of which must be provided to the public in
3 the Federal Register. 42 U.S.C. § 13218.

4 7. Order Defendants Department of Commerce, Department of Defense, Department
5 of Labor, Department of Transportation, Department of Veterans Affairs, and Department of
6 Homeland Security to comply with EAct's requirement that if an agency acquires vehicles
7 covered by the Act, a certain percentage of those vehicles must be AFVs. 42 U.S.C. § 13252.

8 8. Remand Defendant DOE's rule for compliance with 42 U.S.C. §§ 13254 and
9 13257 of EAct and NEPA, 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1, *et seq.*

10 9. Retain jurisdiction over this action to ensure compliance with the Court's decree;

11 10. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees
12 pursuant to the Equal Access to Justice Act; and

13 11. Grant such other relief as the Court deems just and proper.

14 **CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

15 Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the
16 named parties, there is no such interest to report.

17 Dated _____, 2005.

18 Respectfully submitted,

19 _____
20 James J. Tutchton (CA Bar No. 150908)
21 Environmental Law Clinical Partnership
22 University of Denver, College of Law
23 2255 E. Evans Ave., Room 365m
24 Denver, CO 80208
25 Telephone: (303) 871-6034
26 Facsimile: (303) 871-6991

27 _____
28 Brendan R. Cummings (CA Bar No. 193952)
Center for Biological Diversity
P.O. Box 493
Idyllwild, CA 92549
Telephone: (951) 659-6053
Facsimile (951) 659-2482

Attorneys for Plaintiffs