



October 17, 2023

Submitted via Regulations.gov

U.S. Department of Energy
Vehicle Technologies Office
Docket No. EERE-2021-VT-0033
RIN 1904-AF47
1000 Independence Avenue SW
Washington, DC 20585-0121

**Re: Petroleum-Equivalent Fuel Economy Calculation, 88 Fed. Reg. 67682 (Oct. 2, 2023)
Comments on Notice of Proposed Rulemaking**

On behalf of their millions of members and supporters nationwide, Natural Resources Defense Council and Sierra Club respectfully submit the following comments in response to the Department of Energy (DOE)'s October 2, 2023 notification of ex parte communication and request for comments regarding its proposal to revise its regulations regarding procedures for calculating a value for the petroleum-equivalent fuel economy of electric vehicles (EVs) for use in determining automakers' compliance with the Department of Transportation's Corporate Average Fuel Economy (CAFE) program.

It is clearly unlawful to delay implementation of the updated petroleum equivalency factor (PEF) regulations beyond MY 2027. DOE's task in promulgating these regulations is well-defined and circumscribed. The Energy Policy and Conservation Act (EPCA) directs DOE to consider four statutory factors: (i) the approximate electrical energy efficiency of the vehicle, considering the kind of vehicle and the mission and weight of the vehicle; (ii) the national average electrical generation and transmission efficiencies; (iii) the need of the United States to conserve all forms of energy and the relative scarcity and value to the United States of all fuel used to generate electricity; and (iv) the specific patterns of use of electric vehicles compared to petroleum-fueled vehicles. 49 U.S.C. § 32904(a)(2)(B)(i)-(iv). The proposal properly addressed these statutory factors. As explained in our comment on the proposal, DOE should make minor revisions to better implement the EPCA factors and expeditiously finalize updated PEF regulations.

The automakers' request for delay in implementing a revised PEF beyond MY 2027 must be denied because they provide no legal basis for DOE to defer implementation. And, indeed, there is

none. Even if DOE were to erroneously read a lead-time requirement into the statutory provisions governing the PEF, it would be absurd for that lead time requirement to be longer than the 18-month lead time that applies to the substantive CAFE standards themselves. 49 U.S.C. § 32902(a). To the extent automakers are concerned about the feasibility of complying with future CAFE standards—which have not yet been set—those concerns are properly directed to the National Highway Traffic Safety Administration (NHTSA).

Automakers have benefitted from an inflated and inaccurate PEF for more than 20 years. Any claim to future reliance on a historical PEF value are fanciful. DOE is obligated to review the values that go into the PEF calculation “each year” and “propose necessary revisions.” 49 U.S.C. § 32904(a)(2)(B). EPCA does not include any lead time requirement for the PEF, and the fact that it mandates *annual* reviews counsels strongly against reading such an extra-statutory requirement into the text. Further, automakers have been on specific notice since at least December 29, 2021 that DOE was reviewing a petition to modify the PEF.¹ And DOE’s proposal would not even have the corrected PEF go into effect with the next model year, but rather would only be effective starting in MY 2027 to align with NHTSA’s forthcoming CAFE standards for MY 2027-2031. There is no basis to delay implementing long-overdue corrections to the PEF even further.

The automakers’ request for additional delays in PEF implementation is also profoundly unreasonable on the facts. In its proposal to update the PEF, DOE acknowledges that the current PEF “lacks legal support” and “leads to overvaluation of EVs in determining CAFE fleet compliance that is not related to their actual fuel saving capabilities.” 88 Fed. Reg. at 21528-30. This is due in significant part to the fact that, for the past 23 years, the PEF has included a fuel content factor that arbitrarily inflates the imputed fuel economy of electric vehicles nearly seven-fold. 88 Fed. Reg. at 21528. As DOE explains, “[t]he fuel content factor does not accurately represent current EV technology or market penetration” and renders the PEF similarly “not representative of” current EV technology, capabilities, and market penetration. Automakers have reaped outsized benefits from this extra-statutory and baseless fuel content factor in complying with NHTSA’s CAFE standards for over two decades. As DOE recognizes, the real-world benefits of this eased paper compliance are entirely illusory. Each additional year in which EV fuel economy continues to be over-credited directly undermines the mandated, and salutary, fuel-saving goals of EPCA. DOE is already more than two decades overdue in updating the PEF. It would be arbitrary and capricious for DOE to further delay implementation of a corrected PEF beyond MY 2027.

DOE requests comment regarding automaker concerns that they will be unable to comply with future CAFE standards with the revised PEF. These concerns are not properly directed to DOE. As explained above, EPCA empowers NHTSA—not DOE—to determine the feasibility of CAFE standards. In any event, there are no CAFE standards in place yet for MY 2027 or beyond. NHTSA is currently in the process of establishing CAFE standards for model years 2027 through 2031.² Comments were due on NHTSA’s proposal on October 16, 2023 following a 60-day public

¹ U.S. Dept. of Energy, Petroleum Equivalence Factor, Notification of Petition for Rulemaking, 86 Fed. Reg. 73992 (Dec. 29, 2021).

² NHTSA, Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027—2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030—2035; Notice of proposed rulemaking, 88 Fed. Reg. 56128 (Aug. 17, 2023).

comment period. Automakers' concerns about their ability to comply with NHTSA's forthcoming standards are appropriate raised with NHTSA.

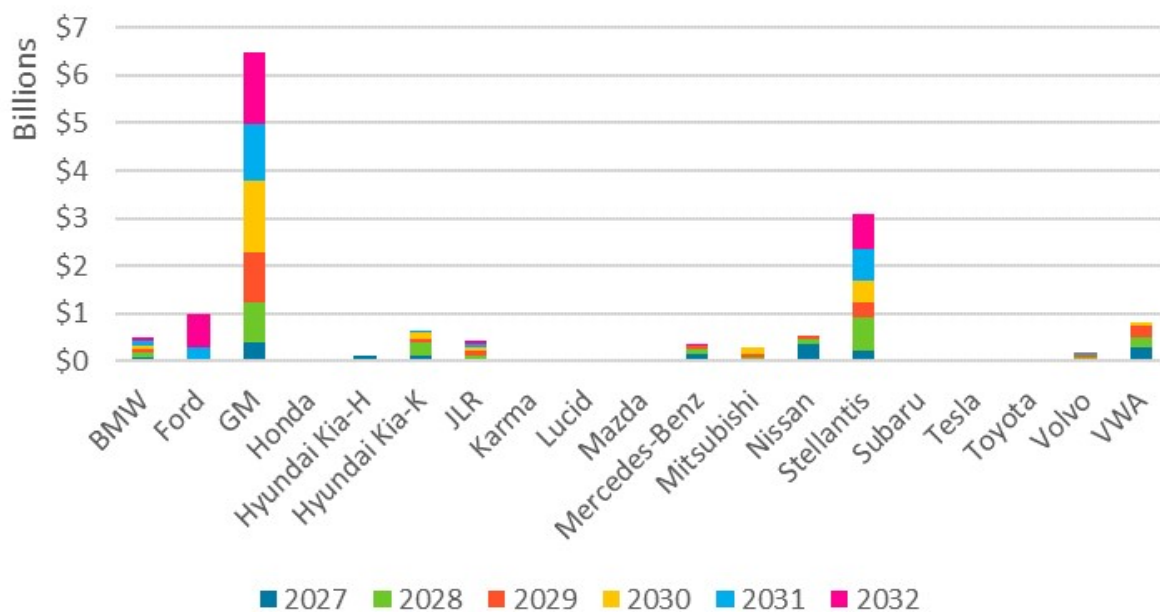
Moreover, even if it were appropriate for DOE to speculate on automakers' ability to comply with a non-finalized future standard established by another agency, automakers' contention that implementing the PEF in MY 2027 will necessarily cause them to incur fines is simply incorrect. The modeling automakers cite is irrelevant and fails to substantiate their concerns. Automakers rely on NHTSA's proposed standard setting model runs to support a claim that a couple of automakers will be obligated to pay large fines if implementation of the revised PEF is not delayed.³ However, because EPCA provides that NHTSA "may not consider the fuel economy of [EVs]" when deciding maximum feasible standards, 49 U.S.C. § 32902(h), those standard setting model runs project just one possible way automakers can increase fleet fuel economy above a no-action scenario *without* producing additional EVs.

In the real world, of course, automakers have many compliance options including producing additional EVs, as they have announced. EPCA does not constrain DOE's consideration of EVs, and there is no obligation for DOE to make a counterfactual assumption that automakers will not produce more of them. Indeed, when real-world scenarios in which automakers are free to add additional EVs to their fleets are modeled, the claimed fines evaporate, *even with the revised PEF*, as illustrated in the figures below.⁴

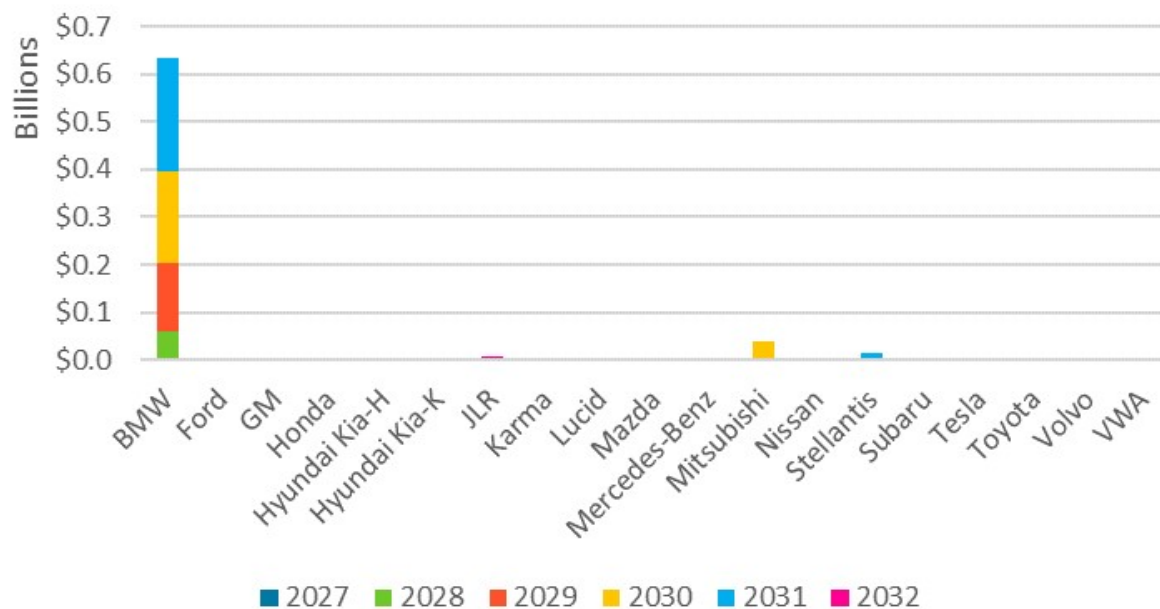
³ See American Automotive Policy Council Ltr. To Michael Berube re Proposed Change to Petroleum Equivalency Factor (Sept. 29, 2023), at 5.

⁴ Data comes from "PC2LT4" scenario runs in the "compliance_report.csv" output files accompanying the "Central Analysis" and "EIS Central Analysis" modeling runs used by NHTSA in the 2023 NPRM for Model Years 2027-2032 Passenger Cars and Light Trucks and Model Years 2030-2035 Heavy-Duty Pickup Trucks and Vans. Data is available in .ZIP files from the agency at <https://www.nhtsa.gov/file-downloads?p=nhtsa/downloads/CAFE/2023-NPRM-LD-2b3-2027-2035/Central-Analysis/>. "PC2LT4" is the agency's preferred alternative in its NPRM and refers to annual 2%/year improvements for passenger cars and 4%/yr improvements for light trucks.

Standard Setting Run



EIS Run



In closing, while we appreciate DOE's diligence in running to ground automaker claims that implementing an update to the PEF in MY 2027 will impede automaker compliance with NHTSA's forthcoming CAFE standards, these concerns are outside of DOE's statutory considerations in setting the PEF. The concerns are also unsupported both based on the information presented and

the fact that the NHTSA standards for that model year are not yet final. In all events, the concerns are misdirected, as the relevant entity with which to raise concerns regarding the feasibility of a future NHTSA CAFE standard is NHTSA. DOE should deny automakers' request and expeditiously finalize an updated PEF for implementation no later than MY 2027.⁵

Respectfully submitted,

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⁵ The automaker September comments also spill considerable ink belatedly rearguing the merits of DOE's PEF proposal. *See, e.g.*, AAPC Cmts. at 2 (arguing that DOE's proposed PEF "inappropriately devalues electrification"). These issues are untimely and unmeritorious and DOE should not countenance these belated attempts to reargue issues raised during the public comment period. Automakers' extra-record submission of allegedly confidential business material to DOE (but not to the public) to substantiate purported compliance issues is equally untenable. None of the factors DOE must weigh in setting the PEF relates to those concerns, which, if anything, pertain to NHTSA's determinations instead.