

117980

MAY - 4 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
MAY 04 2009
CLERK

RECEIVED

NAVISTAR, INC.,)

Petitioner,)

v.)

U.S. ENVIRONMENTAL PROTECTION)
AGENCY, and LISA JACKSON, Administrator,)

Respondents.)

Case No. 09-1113,

Consolidated with
Case No. 09-1114

ORIGINAL

**NON-BINDING STATEMENT OF ISSUES
OF PETITIONER NAVISTAR, INC.**

Pursuant to the Court's Order of April 3, 2009, counsel for petitioner Navistar, Inc., hereby submits the following preliminary, non-binding statement of issues that it intends to raise challenging the final decisions of the United States Environmental Protection Agency ("EPA") in (1) EPA's "Certification Requirements for Heavy-Duty Diesel Engines Using Selective Catalyst Reduction (SCR) Technologies," on February 18, 2009 ("2009 SCR Guidance") and (2) EPA's 2001 rulemaking entitled "Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements," 66 Fed. Reg. 5002 (Jan. 18, 2001) ("2001 Rule"), as amended and reopened by the 2009 SCR Guidance.

The 2001 Rule was promulgated pursuant to the Clean Air Act (“CAA”). Among other things, it established a 0.20 g/bhp-hr NO_x Standard for heavy-duty diesel engines effective for 100% of sales with model year 2010 (the “0.20 g NO_x Standard”). At the time the 2001 Rule was promulgated, EPA decided that urea selective catalytic reduction (“SCR”) technology would **not** be available to meet the 0.20 g NO_x Standard for the applicable model year – *i.e.*, EPA made an express “infeasibility” determination for SCR technology. EPA’s cited reasons included (1) lack of “infrastructure for delivering urea at the pump,” (2) lack of “a standardized method of delivery for the urea supply,” (3) lack of “adequate safeguards in place to ensure the urea is used throughout the life of the vehicles,” (4) lack of safeguards to ensure truck drivers actually replenish urea in the SCR system, (5) expectations that a “substantial number” of failures to replenish urea would result in a “total loss of NO_x control,” (6) “concerns for public safety” related to potential driver inducement strategies, (7) “considerable uncertainties regarding the effectiveness of SCR” and its ability to achieve the environmental benefit anticipated from the 0.20 g NO_x Standard, (8) lack of “modeling” to measure the “appreciable” “loss of NO_x control to be expected from an SCR based program,” and (9) the conclusion that “in effect, the NO_x standard would not be met on a fleetwide basis.” *See* 66 Fed. Reg. 5002 (Jan. 18, 2001).

STATEMENT OF ISSUES

1. Whether the 2009 SCR Guidance, which imposes “regulatory requirements” that engine manufacturers “must” meet in order for their engines to be certified for

sale by EPA, is a “legislative rule” and violates the mandatory rulemaking procedures set forth in CAA 307(d)(1)-(6).

2. Whether the 2009 SCR Guidance, which relaxes the 0.20 g NO_x Standard promulgated in 2001 and approves a control technology that EPA itself concluded would not allow that standard to be “met on a fleetwide basis,” is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and/or in excess of statutory authority in violation of CAA § 307(d)(9).

3. Whether EPA’s dramatic change in 2009 authorizing SCR technology, imposing entirely new “regulatory requirements,” and allowing diesel engine manufacturers to (a) release uncontrolled NO_x emissions on the highway, (b) create highway safety hazards, and (c) certify engines to an emission standard that the engines in fact will exceed, is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and/or in excess of statutory authority in violation of CAA § 307(d)(9).

4. Whether EPA’s 2009 SCR Guidance amending its 2001 Rule establishing the 0.20 g NO_x Standard instead requires rulemaking and violates CAA § 307(d)(1)-(6) and/or is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and/or in excess of statutory authority in violation of CAA § 307(d)(9).

5. Whether EPA’s 2009 SCR Guidance reversing its 2001 express “infeasibility” determination for SCR technology instead requires rulemaking and violates CAA § 307(d)(1)-(6) and/or is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and/or in excess of statutory authority in violation of CAA § 307(d)(9).

6. Whether EPA’s 2009 SCR Guidance, which ignores the mandate in CAA § 202(a)(4) and approves a control technology that will “cause or contribute to an unreasonable risk to public health, welfare, or safety” by approving uncontrolled NO_x emissions and highway “public safety” risk, is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and/or in excess of statutory authority in violation of CAA § 307(d)(9).

7. Whether EPA’s 2009 SCR Guidance, which ignores the mandate in CAA § 203(a)(3) and affirmatively authorizes operation of diesel engines with their emission control devices bypassed, defeated, and/or rendered inoperative, is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and/or in excess of statutory authority in violation of violates CAA § 307(d)(9).

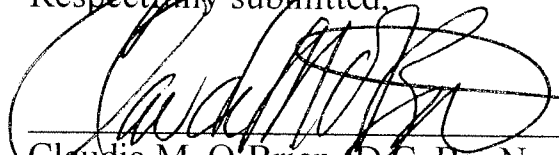
8. Whether ~~EPA~~'s 2009 SCR Guidance, which ignores EPA's own "Not-to-Exceed" emission standards set forth at 40 CFR § 86.007-11(a)(4) and affirmatively authorizes operation of diesel engines in excess of the "Not-to-Exceed" limits, is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and/or in excess of statutory authority in violation of CAA § 307(d)(9).

9. Whether in light of EPA's 2009 reversal of its own express "infeasibility" determination for SCR technology, EPA must comply with CAA § 202(a)(3) and conduct "rulemaking" concerning the "availability" of technology to meet the 0.20 g NOx Standard, as mandated by CAA § 307(d)(1)-(6).

10. Having reopened the issue of compliance with the statutory requirement under CAA § 202(a)(3) that "technology ... will be available for the model year to which such [0.20 g NOx] standards apply," whether EPA violated such requirement and violated CAA §307(d)(9) by reversing its "infeasibility" determination for SCR technology and approving its use notwithstanding EPA's own determination that "in effect, the NOx standard would not be met on a fleetwide basis."

Dated: May 4, 2009

Respectfully submitted,



Claudia M. O'Brien (D.C. Bar No. 447354)
Maureen E. Mahoney (D.C. Bar No.343111)
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004-1304
Phone: (202) 637-2200
Fax: (202) 637-2201
Claudia.O'Brien@lw.com
Maureen.Mahoney@lw.com

Laurence H. Levine (Ill Bar No. 1638459)
LAURENCE H. LEVINE LAW OFFICES
190 S. LaSalle St.
Suite 3120
Chicago, IL 60603

Phone: (312) 291-7000
Fax: (312) 291-7015
Laurence.Levine@lhlevine.com

Cary R. Perlman (Ill. Bar No. 6197698)
LATHAM & WATKINS LLP
233 South Wacker Dr.
Chicago, IL 60606-6401
Phone: (312) 876-7700
Fax: (312) 993-9767
Cary.Pperlman@lw.com

Attorneys for Petitioner Navistar, Inc.