language), it is clear that the "standards" that must be identical under section 177 are vehicle-based standards, not fuel standards. Finally, the legislative history indicates that Congress specifically decided not to include fuel requirements under section 177 when it reviewed section 177 in 1990.

Both federal courts that have reviewed the issue have found that failure of a state to promulgate California's fuel regulations does not violate section 177's requirement that an adopting state's standards be identical to California's standards. Motor Vehicle Manufacturers Association v. NYDEC, 17 F.3d 521 (2nd Cir. 1994) and American Automobile Manufacturers Association v. Greenbaum. No. 93-10799-MA (D. Mass. October 27, 1993) (the "New York case" and the "Massachusetts case", respectively). These decisions are in accord with EPA's position on this matter. For a more detailed discussion of this issue, review the response-to-comments documents and the SNPRM at 59 FR at 48690 (col. 3).

Likewise, EPA finds that the OTC's choice not to include the California fuel requirements does not violate section 177's "third vehicle" prohibition. The auto manufacturers claim higher sulfur levels in fuel found in the OTR would cause problems with California LEV emissions control systems, necessitating changes in design that would create a "third vehicle." EPA rejects this argument.

The voluminous data provided by manufacturers do not contradict the basic premises outlined by EPA in the SNPRM. This data refers to three issues related to increased sulfur in fuel in the northeast that manufacturers claim will cause the manufacture of "third vehicles." These are: The effects sulfur will have on California's on-board emissions diagnostics system (OBD II); the effects of sulfur on in-use recall testing; and the effects of sulfur on "maximum I/M cutpoints" (i.e., cutpoints of 1.5 times the applicable standard).

As the Agency made clear in the SNPRM, nothing in the OTC LEV recommendation requires manufacturers to build a third car. In fact, the OTC LEV petition requires that cars sold in the OTC be California-certified vehicles. Manufacturers can build the same car to meet both California's and the OTC's requirements. Any design change that a manufacturer makes is based on the manufacturer's choice to do so. As the Second Circuit made clear in its decision denying manufacturers' "third vehicle" claim in the context of the ZEV

production mandate, whatever design change "manufacturers choose to install on cars sold in New York is a marketing choice of theirs and not a requirement imposed by the (state)." *MVMA*, 17 F.3d 521, 538 (2nd Cir. 1994).

Manufacturers' claims regarding sulfur's effects on California OBD II systems center around the contention that manufacturers will use flange-mounted catalyst assemblies instead of welded ones in their vehicles sold in the northeast. This is not a significant change in the design of the vehicles, and it would be done to save consumer time and cost if the catalysts need to be replaced. This would be a marketing choice by manufacturers and does not provide the basis for a third vehicle claim.

This issue was addressed by the District Court in the New York case recently. In dismissing a virtually identical claim by manufacturers in the New York case, the District Court (Judge McAvoy) found that "the changes of which (manufacturers) complain are simply not required by New York's adoption of California's LEV program. Certainly New York has not expressly required that manufacturers change their emissions systems mounting. Likewise, (manufacturers) have failed to show that New York's adoption will de facto inevitably cause the switch from flanged to bolted assemblies." MVMA. Docket No. 92–CV–869, *slip op.* at 16 (N.D.N.Y. Oct. 24, 1994). In the Massachusetts case, the trial judge in AAMA has also denied manufacturers' request for a preliminary injunction on this issue, determining that manufacturers were unlikely to succeed on the merits of their claim. AAMA, Docket No. 93–10799–MA (D. Mass. Oct. 27, 1993.)

In addition, manufacturers' claims regarding "maximum I/M cutpoints" (i.e., cutpoints 1.5 times above the applicable standards) and state in-use recall testing are inapposite. The OTC recommendation did not include requests for either maximum I/M or in-use recall testing. It is uncertain whether state programs will include these provisions. Therefore, as such provisions are not required or otherwise implicated by this action, manufacturers' arguments that such programs will cause "third vehicles" are not ripe.

Another important issue noted by several commenters and Judge McAvoy is that a significant number of vehicles sold in California (those that permanently or, to a lesser extent, temporarily relocate) are likely to be subjected to fuels with the same sulfur levels as those in the northeast. In fact,

AAMA admits that permanently relocated California vehicles will likely need to have their converters replaced. However, according to AAMA, auto manufacturers apparently will choose not to equip California vehicles with the flange mounted converter assemblies, though manufacturers do not claim that such assemblies are forbidden by California regulations or that the way in which vehicle catalysts are mounted is relevant in California certification testing. Once again, any difference in vehicles is a manufacturer choice and is certainly not mandated by the provisions of the OTC LEV recommendation; nor is it an undue burden.

Moreover, as discussed more thoroughly in the response-to-comments documents, the legislative history shows that Congress intended to provide separate requirements for state regulation of vehicles and state regulation of fuels. As Judge McAvoy determined, Congress did not intend that differences in fuel requirements be used as criteria to invalidate state vehicle regulations under section 177. *See MVMA*, Docket No. 92–CV–869, slip op. at 19 (N.D.N.Y. Oct. 24, 1994).

Finally, as discussed in detail in the response-to-comments documents, EPA is not convinced that the factual data provided by manufacturers show that manufacturers will need to build a different car for the OTR than for California in model year 1999 and thereafter. First, manufacturers admit that the data they provide are generally applicable to vehicles built prior to the current model year or to model years 1996–1998. EPA notes that significant progress in developing catalyst formulations that are more tolerant of sulfur than current formulations may eliminate much of the concerns of manufacturers by the 1999 model year. Also, EPA believes that manufacturers have not shown that sulfur in fuel will. in and of itself, cause OBD II catalyst monitors to illuminate malfunction indicator lights by mistaking otherwise good catalysts as malfunctioning.

3. ZEV Production Mandate

EPA finds that the ZEV production mandate is not required to ensure consistency with section 177 for the reasons given in the SNPRM. See 59 FR at 48691–48692. EPA is leaving to each individual OTC state the decision as to whether to adopt the ZEV mandate.²¹ EPA is not resolving whether the ZEV mandate is an "emission standard."

²¹ EPA believes that the incorporation of the ZEV production mandate into a state's LEV program is consistent with the requirements of section 177.