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

URBAN AIR INITIATIVE, INC.; THE FARMERS' EDUCATIONAL & COOPERATIVE UNION OF AMERICA, D/B/A NATIONAL FARMERS UNION; FARMERS UNION ENTERPRISES, INC.; BIG RIVER RESOURCES, LLC; GLACIAL LAKES ENERGY, LLC; CLEAN FUELS DEVELOPMENT COALITION; FAGEN, INC.; JACKSON EXPRESS, INC.; JUMP START STORES, INC.; LITTLE SIOUX CORN PROCESSORS, LLC; and SOUTH DAKOTA FARMERS UNION,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Case No. 19-1161

PROTECTIVE PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), Rule 15 of the Federal Rules of Appellate Procedure, and Circuit Rule 15, Petitioners Urban Air Initiative, Inc.; The Farmers' Educational & Cooperative

Union of America, d/b/a National Farmers Union; Farmers Union Enterprises, Inc.; Big River Resources, LLC; Glacial Lakes Energy, LLC; Clean Fuels Development Coalition; Fagen, Inc.; Jackson Express, Inc.; Jump Start Stores, Inc.; Little Sioux Corn Processors, LLC; and South Dakota Farmers Union, hereby petition this Court for review of the final action of the U.S. Environmental Protection Agency entitled "Control of Air Pollution From Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards," and published in the Federal Register at 79 Fed. Reg. 23,414 (April 28, 2014) (Tier 3 Rule). Specifically, Petitioners challenge the part of the Tier 3 Rule which sets forth the position that fuel blends containing 16 to 50 percent ethanol and "at least 50 percent clear gasoline by volume" are regulated gasoline under Parts 79 and 80 of title 40 of the Code of Federal Regulations. A copy of the relevant portion of EPA's final Tier 3 Rule is attached as Attachment A.

Petitioners are separately petitioning for review of EPA's "Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations," published in the Federal Register at 84 Fed. Reg. 26,980 (June 10, 2019) (E15 Rule). As relevant here, Petitioners challenge the E15 Rule's conclusion that retailers who sell mid-level ethanol blends using blender pumps are

regulated gasoline fuel manufacturers and refiners under Parts 79 and 80 of Title 40 of the Code of Federal Regulations.

Petitioners believe this specific challenge is appropriately raised in litigation challenging the E15 Rule, not in litigation challenging the Tier 3 Rule. Petitioners nevertheless file this separate petition for review as a protective measure and out of an abundance of caution. This protective petition is timely because it is filed "within sixty days" of the E15 Rule's publication in the Federal Register, which provides Petitioners with new "grounds" arising after the publication of the Tier 3 Rule. 42 U.S.C. § 7607(b)(1).

Petitioners also have submitted an administrative petition to EPA requesting that EPA reconsider its position. Attachment B; *see also Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975). To date, EPA has not taken final action with respect to this administrative petition.

August 9, 2019

Respectfully submitted,

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

URBAN AIR INITIATIVE, INC.; THE FARMERS' EDUCATIONAL & COOPERATIVE UNION OF AMERICA, D/B/A NATIONAL FARMERS UNION; FARMERS UNION ENTERPRISES, INC.; BIG RIVER RESOURCES, LLC; GLACIAL LAKES ENERGY, LLC; CLEAN FUELS DEVELOPMENT COALITION; FAGEN, INC.; JACKSON EXPRESS, INC.; JUMP START STORES, INC.; LITTLE SIOUX CORN PROCESSORS, LLC; and SOUTH DAKOTA FARMERS UNION, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	Case No. _____

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioners make the following disclosures:

Urban Air Initiative, Inc. (UAI) is a social welfare organization incorporated

in a manner consistent with Section 501(c)(4) of the Internal Revenue Code. UAI is dedicated to educating the public about the health threats posed by domestic use of petroleum-based fuels, and to taking positive steps to reduce the threat to public health by encouraging a change in the additives used in such fuels. UAI has no parent companies, and no publicly held company has a 10% or greater ownership interest in UAI.

The Farmers' Educational & Cooperative Union of America, d/b/a National Farmers Union, is a Texas nonprofit agricultural organization incorporated in a manner consistent with Section 501(c)(5) of the Internal Revenue Code. Established in 1902, National Farmers Union works to protect and enhance the economic wellbeing and quality of life for family farmers, fishers, ranchers, and rural communities, including farmers who grow corn for use in fuel ethanol. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in Nation Farmers Union.

Farmers Union Enterprises, Inc., is a Minnesota corporation that oversees a diverse portfolio of farm-related businesses, including fuel ethanol plants. It also promotes and advocates for rural economic development and the interests of family farmers and ranchers across the upper Midwest. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in Farmers Union Enterprises.

Big River Resources, LLC is an Iowa holding company with various subsidiaries currently engaged in the production of fuel ethanol. Its subsidiaries own ethanol plants that produce approximately 200 million gallons of fuel ethanol per year. It has no parent companies. Farmers Energy Big River, LLC has a 10% or greater ownership interest in Big River Resources.

Glacial Lakes Energy, LLC is wholly owned by the Glacial Lakes Corn Processors. Glacial Lakes Corn Processors is a South Dakota cooperative with 4,100 shareholder/investors who reside primarily in eastern South Dakota. Glacial Lakes Energy, LLC is the sole owner of two large ethanol production facilities that annually produce over 240 million gallons of fuel ethanol. No publicly held company has a 10% or greater ownership interest in Glacial Lakes Energy, LLC.

Clean Fuels Development Coalition (CFDC) is a business league organization established in a manner consistent with Section 501(c)(6) of the Internal Revenue Code. Established in 1988, CFDC works with auto, agriculture, and biofuel interests in support of a broad range of energy and environmental programs. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in CFDC.

Fagen, Inc., is a Minnesota industrial construction company whose projects include biorefineries engaged in the production of fuel ethanol. It has no parent companies, and no publicly held company has a 10% or greater ownership interest

in Fagen, Inc.

Jackson Express, Inc., is a fuel retailer and convenience store organized under the laws of Nebraska. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in Jackson Express, Inc.

Jump Start Stores, Inc., is a fuel retailer and convenience store organized under the laws of Kansas. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in Jump Start Stores, Inc.

Little Sioux Corn Processors, LLC is an Iowa renewable fuel producer currently engaged in the production of fuel ethanol. Little Sioux Corn Processors, LLC has no parent companies. Little Sioux Corn Processors, LLC owns the sole general partnership interest of LSCP, LLLP d/b/a Little Sioux Corn Processors, LLLP. Archer Daniels Midland Company is a publicly held company that has a 10% or greater ownership interest in LSCP, LLLP d/b/a Little Sioux Corn Processors, LLLP.

South Dakota Farmers Union is a nonprofit organization that works to promote the interests of South Dakota farmers, ranchers, and their families, including those who grow corn for use in fuel ethanol. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in South Dakota Farmers Union.

August 9, 2019

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2019, I caused a copy of the foregoing Petition for Review and Rule 26.1 Disclosure Statement to be served by placing them in the U.S. mail, first class, return-receipt requested, upon each of the following:

U.S. Environmental Protection Agency
Correspondence Control Unit
Office of General Counsel (2311)
1200 Pennsylvania Ave., NW
Washington, DC 20460

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington DC 20530-0001

The Honorable Jeffrey Bossert Clark
Assistant Attorney General
Environmental and Natural Resources Division
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Attachment A

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 79, 80, 85, 86, 600, 1036, 1037, 1039, 1042, 1048, 1054, 1065, and 1066

[EPA–HQ–OAR–2011–0135; FRL 9906–86–OAR]

RIN 2060–AQ86

Control of Air Pollution From Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action establishes more stringent vehicle emissions standards and will reduce the sulfur content of gasoline beginning in 2017, as part of a systems approach to addressing the impacts of motor vehicles and fuels on air quality and public health. The gasoline sulfur standard will make emission control systems more effective for both existing and new vehicles, and will enable more stringent vehicle emissions standards. The vehicle standards will reduce both tailpipe and evaporative emissions from passenger cars, light-duty trucks, medium-duty passenger vehicles, and some heavy-duty vehicles. This will result in significant reductions in pollutants such as ozone, particulate matter, and air toxics across the country and help state and local agencies in their efforts to attain and maintain health-based National Ambient Air Quality Standards. Motor vehicles are an important source of exposure to air pollution both regionally and near roads. These vehicle standards are intended to harmonize with California's Low Emission Vehicle program, thus creating a federal vehicle emissions program that will allow automakers to sell the same vehicles in all 50 states. The vehicle standards will be implemented over the same timeframe as the greenhouse gas/fuel efficiency standards for light-duty vehicles (promulgated by EPA and the National Highway Safety Administration in 2012), as part of a comprehensive approach toward regulating emissions from motor vehicles.

DATES: This final rule is effective on June 27, 2014. The incorporation by reference of certain publications listed in this regulation is approved by the Director of the Federal Register as of June 27, 2014.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2011–0135. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: JoNell Iffland, Office of Transportation and Air Quality, Assessment and Standards Division (ASD), Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor MI 48105; Telephone number: (734) 214–4454; Fax number: (734) 214–4816; Email address: *iffland.jonell@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this rule include gasoline refiners and importers, ethanol producers, ethanol denaturant producers, butane and pentane producers, gasoline additive manufacturers, transmix processors, terminals and fuel distributors, light-duty vehicle manufacturers, independent commercial importers, alternative fuel converters, and manufacturers and converters of vehicles between 8,500 and 14,000 lbs gross vehicle weight rating (GVWR).

Potentially regulated categories include:

Category	NAICS[a] Code	SIC[b] Code	Examples of potentially affected entities
Industry	324110	2911	Petroleum refineries (including importers).
Industry	325110	2869	Butane and pentane manufacturers.
Industry	325193	2869	Ethyl alcohol manufacturing.
Industry	324110, 211112	2911, 1321	Ethanol denaturant manufacturers.
Industry	211112	1321	Natural gas liquids extraction and fractionation.
Industry	325199	2869	Other basic organic chemical manufacturing.
Industry	486910	4613	Natural gas liquids pipelines, refined petroleum products pipelines.
Industry	424690	5169	Chemical and allied products merchant wholesalers.
Industry	325199	2869	Manufacturers of gasoline additives.
Industry	424710	5171	Petroleum bulk stations and terminals.
Industry	493190	4226	Other warehousing and storage-bulk petroleum storage.
Industry	336111, 336112	3711	Light-duty vehicle and light-duty truck manufacturers.
Industry	811111, 811112, 811198	7538, 7533, 7534	Independent commercial importers.
Industry	335312, 336312, 336322, 336399, 811198.	3621, 3714, 3519, 3599, 7534	Alternative fuel converters.
Industry	333618, 336120, 336211, 336312.	3699, 3711, 3713, 3714	On-highway heavy-duty engine & vehicle (>8,500 lbs GVWR) manufacturers.

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your activities are regulated by this action, you should carefully examine the applicability criteria in 40 CFR parts 79,

important that our gasoline quality standards for not just sulfur, but also benzene, Reid Vapor Pressure (RVP), detergency, and compliance with the interpretive rule defining the phrase ''substantially similar'' in CAA section 211(f)(1)[462] (i.e., contain only carbon, hydrogen, oxygen, nitrogen, and sulfur) apply to any fuel used in an FFV.

Our various standards for gasoline currently apply to any fuel sold for use in motor vehicles, which is commonly or commercially known or sold as gasoline. In the fuel and fuel additive registration program, the gasoline family includes fuels composed of at least 50 percent clear gasoline by volume.[463] As a result, our gasoline standards currently apply to E16–50 ethanol blends. However, additional regulatory provisions could be useful to facilitate compliance assurance if we are to continue to treat such mid-level ethanol blends as gasoline.

The existing requirement that E51–83 must be substantially similar (sub-sim) to the vehicle certification test fuel has provided a limited measure of control over in-use E51–83 fuel quality. The finalization of specifications for FFV exhaust emission test fuel in today's action will provide improved clarity regarding what constitutes sub-sim for in-use E51–83. However, these specifications are not sufficient to provide clarity as to what is considered sub-sim for E51–83. For example, E51–83 manufactured using only gasoline, gasoline blendstocks for oxygenate blending (BOBs), a limited volume of butane that meets the standards for downstream blending into gasoline, and denatured fuel ethanol that meets the standards finalized today would clearly be sub-sim. However, use of natural gasoline may or may not result in an E51–83 blend that is sub-sim. In addition to the need for additional clarity regarding what constitutes sub-sim for E51–83, standards for sulfur, benzene, and RVP are needed to ensure fuel quality supports the attainment of our environmental goals.

At proposal, we sought comment on appropriate regulatory mechanisms to implement in-use quality standards for E51–83 and E16–50. We requested specific comment on possible approaches, including draft regulations, which were described in detail in a memorandum to the docket.[464] The draft regulations contained fuel quality specifications for E51–83 and two options that E51–83 manufacturers could use to demonstrate compliance. We sought comment on whether the Agency should continue to treat E16–50 as gasoline and on the need to clarify existing regulations on the meaning of gasoline as any fuel that contains 50 percent or more gasoline. Given that E16–50 can only be used in FFVs, we also sought comment on whether to amend the regulations to treat E16–50 as an alternative fuel. If EPA were to treat E16–50 as an alternative fuel rather than gasoline, we sought comment on whether we should take the same approach for E16–50 as detailed in the draft regulations for E51–83 with respect to sulfur, benzene, RVP standards, and substantially similar requirements under CAA section 211(f).

We received comments in support of and against our proposal. The vast majority of comments supported the need for EPA to promulgate in-use quality standards for these higher level ethanol blends. We also received a number of detailed productive comments on the draft regulations. A number of stakeholders also expressed their willingness to work with EPA to provide supplementary information on issues that were not addressed at proposal and not contained in their comments. At this time, we acknowledge that additional work is needed on some issues and we note that such work could not be accommodated within the timeline for this Tier 3 final rule. Therefore, we are deferring final action on these provisions at this time. We will continue to work with stakeholders in developing in-use fuel quality standards for higher level ethanol blends following the publication of this final rule. Subsequently, we may issue a supplementary proposal prior to issuing a final rule if the additional information we receive from stakeholders warrants such an action.

I. Sulfur Standards for Purity Butane and Purity Pentane Streams Blended into Gasoline

Under the Tier 2 gasoline program, ''purity'' butane blended into gasoline downstream of the refinery is subject to a 30 ppm sulfur cap and other specifications regarding its composition.[465] This is consistent with the 30 ppm refinery average sulfur standard under the Tier 2 program. Today's action finalizes the proposed 10 ppm sulfur cap for purity butane blended into gasoline effective January 1, 2017. This is consistent with the Tier 3 10 ppm refinery average sulfur specification finalized today.

As discussed in Section VI.A.4 in today's preamble, we are finalizing provisions to allow ''purity'' pentane to be blended into gasoline downstream of the refinery that are similar to the existing provisions for butane blending. This allowance will become effective June 27, 2014. Until December 31, 2016, a 30 ppm sulfur cap will apply to purity pentane blended into gasoline consistent with the existing sulfur cap for purity butane under the Tier 2 program.[466] Beginning January 1, 2017, a 10 ppm sulfur cap will apply to purity pentane blended into gasoline consistent with the butane sulfur standard finalized today.

Butane blenders commented that a significant fraction of butane and pentane might be expected to have sulfur content in excess of 10 ppm after the Tier 3 gasoline sulfur requirements become effective. To maintain a stable and adequate supply of butane and pentane for downstream RVP trimming, butane blenders requested that EPA adopt a 10 ppm sulfur average cap with a 30 ppm sulfur cap.[467]

Butane and pentane have an inherently low sulfur content that can be made to meet a 10 ppm sulfur cap with relatively mild desulfurization techniques. We anticipate that butane and pentane suppliers will desulfurize these blendstocks to well below 10 ppm sulfur as part of their response to the Tier 3 gasoline sulfur requirements. Therefore, we believe that allowing butane and pentane used for RVP trimming to exceed a 10 ppm sulfur cap would needlessly complicate compliance assurance and defer some of benefits of the Tier 3 sulfur requirements.

J. Standards for CNG and LPG

The vehicle emissions standards finalized today are fuel neutral (i.e., they are applicable regardless of the type of fuel that the vehicle is designed to use). There currently are no sulfur standards for the fuel used in compressed natural gas (CNG) and liquid propane gas (LPG) vehicles. We requested comment on whether it is necessary for EPA to establish sulfur standards for CNG and LPG to enable them meeting more stringent vehicle

[462] 73 FR 22277, 22281 (April 25, 2008).

[463] 40 CFR 79.56(e)(1)(i).

[464] Possible Approach to Fuel Quality Standards for Fuel Used in Flexible-Fuel Automotive Spark-Ignition Vehicles (FFVs), Memorandum to the docket, Jeff Herzog, April 2013.

[465] 40 CFR 80.82.

[466] Other requirements regarding the composition of purity pentane will also apply that are similar to those for purity butane.

[467] RVP trimming refers to the practice of adding a limited amount of butane/pentane to previously certified gasoline at a terminal so that the finished gasoline is closer to the maximum applicable volatility standard (summer or winter) than can be attained at the refinery level.

Attachment B

PETITION FOR RECONSIDERATION OR RULEMAKING

submitted on behalf of

URBAN AIR INITIATIVE, INC.; THE FARMERS' EDUCATIONAL & COOPERATIVE UNION OF AMERICA, D/B/A NATIONAL FARMERS UNION; FARMERS UNION ENTERPRISES, INC.; BIG RIVER RESOURCES, LLC; GLACIAL LAKES ENERGY, LLC; CLEAN FUELS DEVELOPMENT COALITION; FAGEN, INC.; JACKSON EXPRESS, INC.; JUMP START STORES, INC.; LITTLE SIOUX CORN PROCESSORS, LLC; and SOUTH DAKOTA FARMERS UNION,

Concerning the U.S. Environmental Protection Agency's

Modifications to Fuel Regulations To Provide Flexibility for E15;

Modifications to RFS RIN Market Regulations

Docket ID No. EPA-HQ-OAR-2018-0775

by C. Boyden Gray
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August 9, 2019

CONTENTS

PETITION FOR RECONSIDERATION OR RULEMAKING

INTRODUCTION & EXECUTIVE SUMMARY

Pursuant to § 307(d)(7)(B) of the Clean Air Act and § 553(d) of the Administrative Procedure Act ("APA"), Petitioners Urban Air Initiative, Inc.; The Farmers' Educational & Cooperative Union of America, d/b/a National Farmers Union; Farmers Union Enterprises, Inc.; Big River Resources, LLC; Glacial Lakes Energy, LLC; Clean Fuels Development Coalition; Fagen, Inc.; Jackson Express, Inc.; Jump Start Stores, Inc.; Little Sioux Corn Processors, LLC; and South Dakota Farmers Union, respectfully petition for reconsideration of EPA's *Modifications to Fuel Regulations To Provide Flexibility for E15* (the E15 Rule), or for rulemaking.

Petitioners are separately challenging the E15 Rule's interpretation of the Clean Air Act's sub-sim law (§ 211(f)) in the Court of Appeals D.C. Circuit. Petitioners disagree with EPA's assertion in the E15 Rule that the sub-sim law controls the concentration of ethanol in gasoline. This petition, however, does not raise that issue. It is instead focused on a narrower set of issues that are appropriate for the Agency's reconsideration or rulemaking in the first instance. Nothing in this petition should be construed as conceding or in any way endorsing EPA's authority to control the concentration of ethanol in gasoline under the sub-sim law.

I. Petitioners respectfully request that EPA allow the sale of mid-level ethanol-gasoline blends for use in flex-fuel vehicles.

For years, EPA has allowed fuel retailers to sell mid-level ethanol-gasoline blends (E16–E50) for use in flex-fuel vehicles. In 2006, Margo Oge, then Director of EPA's Office of Transportation and Air Quality (OTAQ), assured fuel retailers that E16–E50 blends "are not prohibited under the Clean Air Act" when sold through blender pumps for use in flex-fuel vehicles.[1] Director Oge's letter was later codified in a regulation providing that "[n]o person shall . . . [b]e prohibited from manufacturing, selling, introducing, or causing or allowing the sale or introduction of gasoline containing greater than 10 volume percent ethanol into any flex-fuel vehicle."[2] That rule remains in effect today. These assurances, coupled with billions of dollars in government-sponsored infrastructure investments, have allowed the creation of a significant retail market for E16–E50 blends in many parts of the country.[3]

[1] Letter from Margo Oge, Dir., Office of Transp. & Air Quality, EPA to Dawna Leitzke, Exec. Dir., S. Dakota Petroleum Marketers Ass'n (Nov. 28, 2006) (2006 Oge Letter) (Exhibit A); *see also* Letter from Adam Kushner, Dir., Air Enforcement Div., to Bob Greco, Dir., Am. Petroleum Inst. (July 31, 2008) (2006 Kushner Letter) (The Clean Air Act does not . . . prohibit retail gasoline stations from selling gasoline blended with up to 85% ethanol for use in flexible-fueled vehicles or engines.").

[2] 40 C.F.R. § 80.1504(a)(3).

[3] *See, e.g.*, 2019 Minnesota E85 + Mid-blends Station Report, http://mn.gov/commerce-stat/pdfs/e85-fuel-use-2018.pdf.

In the E15 Rule, EPA disregards these legal assurances and states that E16–E50 blends are no longer lawful.[4] Arguing that its new position was foreordained by existing rules, EPA changed its interpretation of the law without even acknowledging any change in its legal position and without accepting public comments. That is arbitrary and capricious.

Far from being foreordained, EPA's new policy rests on a novel and convoluted reading of rules promulgated long before retailers began selling E16–E30 blends. These rules existed in 2006, when Director Oge expressly approved retailers' practice of using blender pumps to sell E16–E50 blends for use in flex-fuel vehicles. After years of industry reliance on Director Oge's guidance, EPA staff informally began to suggest that the Agency's rules forbade retailers from selling E16–E50 blends. But the informal interpretation had no legal effect, and EPA's staff acknowledged that fuel retailers were "unaware" of the staff's new view of the law.[5]

EPA has now publicly adopted the previously informal interpretation as official Agency policy. In the E15 Rule, EPA forbids the sale of E16–E50 blends, even for use in flex-fuel vehicles.[6] EPA reasons as follows:

(i) Major premise: E16–E50 blends are regulated "gasoline" for purposes of the gasoline fuel and fuel additive rules.[7]

(ii) Minor premise: Retailers blending E16–E50 are not exempt from the definition of "fuel manufacturer,"[8] because they are not blending an "allowable amount" of ethanol under the Clean Air Act's sub-sim law, § 211(f), even when they sell these fuels for use in flex-fuel vehicles.[9]

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[4] *See Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulation*s, Proposed Rule, 84 Fed. Reg. 10,584, 10,594 (March 21, 2019) (Proposed E15 Rule); *Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, 84 Fed. Reg. 26,980, 27,009 (June 10, 2019) (E15 Rule); Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations: Response to Comments, EPA-420-R-19-004 (May 2019), at 53 (E15 Response to Comments).

[5] Jeff Herzog, E51-83 and E16–E50 (June 4, 2013), at 15 (Exhibit B).

[6] E15 Response to Comments, *supra* note 4, at 53 (stating that "gasoline-ethanol blends containing up to 50 volume percent ethanol [are treated] as 'gasoline' for purposes of complying with the regulations at 40 CFR parts 79 and 80," and that that is true "regardless of whether" the fuel "is labeled for use in gasoline-fueled vehicles and engines or flexible-fueled vehicles").

[7] *Id.*

[8] 40 C.F.R. § 79.2(d) ("Fuel manufacturer means any person who, for sale or introduction into commerce, produces, manufactures, or imports a fuel or causes or directs the alteration of the chemical composition of a bulk fuel, or the mixture of chemical compounds in a bulk fuel, by adding to it an additive, *except*: . . . (2) A party (other than a fuel refiner or importer) who adds an oxygenate compound to fuel in any otherwise allowable amount is not thereby considered a fuel manufacturer." (emphasis added)).

[9] E15 Rule, *supra* note 4, 84 Fed. Reg. 27,021 (defining substantially similar to Tier 3 certification fuel); *see also* Proposed E15 Rule, *supra* note 4, 84 Fed. Reg. at 10,594 ("A party who unlawfully adds an oxygenate compound in a volume that exceeds the oxygen content limit in the interpretative definition of 'substantially

(iii) Conclusion: Retailers that sell E16–E50 blends are subject to the fuel registration rules that apply to gasoline "fuel manufacturers," even when they sell these blends for use in flex-fuel vehicles.

Under EPA's new approach, retailers that sell E16–E50 blends for use in flex-fuel vehicles are also considered "refiners" under EPA's gasoline quality rules, for essentially the same reasons.[10]

Saying that fuel retailers are gasoline fuel manufacturers and refiners is tantamount to saying they may not sell E16–E50 blends at all. As gasoline fuel manufacturers, retailers may only sell registered gasoline, and the E15 Rule makes it impossible for E16–E50 blends to be registered.[11] As gasoline fuel manufacturers, retailers are also prohibited from selling gasoline "fuel" that is not "substantially similar" to a vehicle emissions-certification test fuel ("certification fuel").[12] And under the E15 Rule's new definition of "substantially similar," gasoline-ethanol blends must contain "no more than 15 volume percent ethanol" to be "substantially similar" to a gasoline certification fuel.[13] E16–E50 blends do not comply with this ethanol concentration limit. It follows that, under the E15 Rule, fuel retailers may not sell E16–E50 blends for use in any vehicle or engine. And even if they could sell these blends, as a practical matter, retailers could never comply with fuel quality compliance requirements intended for full-fledged refiners.

EPA's new interpretation is unfair to retailers who have invested in blending infrastructure in reliance on the Agency's past assurances that E16–E50 blends legally could be sold for use in flex-fuel vehicles. EPA's new interpretation is also counterproductive. When E16–E50 blends are made using certified gasoline and denatured fuel ethanol blendstocks, the result is a clean, high-octane fuel that meets EPA's gasoline quality standards for benzene, sulfur, and volatility.[14] Flex-fuel vehicles are certified to operate on any blend between E0 and E85, so there is no reason to expect fuel-related compatibility problems in these vehicles.[15]

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similar' or the CAA sec. 211(f)(4) waiver condition . . . is a fuel manufacturer."); E15 Response to Comments, *supra* note 4, at 53 (that is true "regardless of whether" the fuel "is labeled for use in gasoline-fueled vehicles and engines or flexible-fueled vehicles").

[10] *See* E15 Response to Comments, *supra* note 4, at 53; *see also* 40 C.F.R. § 80.2(h), (i), (jj), (ll), (mm).

[11] 42 U.S.C. § 7545(a); 40 C.F.R. § 79.11.

[12] 42 U.S.C. § 7545(f)(1).

[13] E15 Rule, *supra* note 4, 84 Fed. Reg. 27,010.

[14] *See Renewables Enhancement and Growth Support Rule*, Proposed Rule, 81 Fed. Reg. 80,828, 80,853 (Nov. 16, 2016) (Proposed REGS Rule) ("E16–50 has been assured to [have no atypical elements] by the current provisions that apply the requirements applicable to gasoline to these blends and the fact that it is typically blended from E51–83 and E10.").

[15] 2008 Kushner Letter, *supra* note 1, at 1 n.2 ("A 'flexible-fueled vehicle or engine' refers to a motor vehicle or nonroad engine that has been certified by EPA to meet emissions standards using E85 . . . gasoline without ethanol, or any intermediate combination of gasoline and ethanol.").

Interpreting fuel regulations to prohibit E16–E50 blends needlessly outlaws an established market that poses no risk to public health or welfare.

Other more sensible interpretations of EPA's existing regulations are available.

First, EPA should reconsider its minor premise. Retailers that sell E16–E50 blends for use in flex-fuel vehicles are not gasoline "fuel manufacturers"; they are gasoline oxygenate blenders.[16] Consistent with Director's Oge's 2006 letter, E16–E50 blends contain an "allowable amount" of ethanol for use in flex-fuel vehicles under the Clean Air Act. It follows that retailers that make E16–E50 blends are oxygenate blenders, not gasoline "fuel manufacturers."[17]

Second, and in the alternative, EPA should reconsider its major premise. To be "gasoline," E16–E50 blends must be "commonly or commercially known or sold as" gasoline.[18] EPA has never explained why it thinks E16–E50 blends are "commonly or commercially known or sold as" gasoline, and the available evidence shows just the opposite.

Either of these readings would allow fuel retailers to continue selling E16–E50 for use in flex-fuel vehicles. EPA should reconsider its interpretation and adopt one of these readings.

II. Petitioners also request that EPA reconsider its revised definition of "substantially similar" to expressly allow the use of E15 in pre-2001 flex-fuel vehicles.

EPA's interpretative rule allows the use of E15 only "in light-duty vehicles manufactured after model year 2001."[19] It also requires plans to ensure "that the E15 is only introduced into commerce for use in model year 2001 and newer light-duty vehicles."[20] The rule makes no exception for flex-fuel vehicles produced before model year 2001, even though they were certified to operate on E15. EPA should correct this oversight and allow the use of E15 in model year 2000 or older flex-fuel vehicles.

EPA should also take the opportunity to correct its erroneous limitation of the sub-sim interpretation to "light-duty vehicles manufactured after model year 2001."[21] EPA obviously

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[16] 40 C.F.R. § 79.2(d)(2) ("A party (other than a fuel refiner or importer) who adds an oxygenate compound to fuel in any otherwise allowable amount is not thereby considered a fuel manufacturer.").

[17] For the same reason, retailers that sell E16–E50 are "oxygenate blenders" and "ethanol blenders" under EPA's fuel quality rules, not "refiners." *See infra* p.9.; *see also* 40 C.F.R. § 80.2(h), (i), (jj), (ll), (mm).

[18] 40 C.F.R. §§ 79.32(a)(1), 80.2(c).

[19] E15 Rule, *supra* note 4, 84 Fed. Reg. at 27,021. As discussed in the following paragraph, the reference in the sub-sim interpretive rule should be to vehicles produced "after model year 2000," not 2001.

[20] *Id.*

[21] *Id.*

meant "after model year 2000," since EPA's findings about E15 apply to "MY2001 and newer light-duty vehicles."[22]

III. Petitioners request that EPA allow the use of natural gasoline in all gasoline-ethanol blends.

EPA's final rule interprets its regulations to ban the use of uncertified natural gasoline blendstocks for use in gasoline-ethanol blends.[23] By EPA's estimate, "approximately 50 percent of stations offering E15 make E15" with natural gasoline.[24] All of those retailers must now cease using natural gasoline or cease selling E15 blends. Yet EPA claims that it is not revising "any requirements applicable to blender pumps," and that "addressing this issue is beyond the scope of the rulemaking."[25]

EPA should allow the use of natural gasoline, whether in the context of the E15 rulemaking or a new rulemaking. EPA could do so by promulgating standards for the ethanol parent blends used to make gasoline-ethanol blends through blender pumps. EPA's proposed fuel standards in the Renewables Enhancement and Growth Support (REGS) Rule would have addressed this problem. Allowing the use of natural gasoline with proper regulatory safeguards would lower fuel costs while maintaining the environmental performance of the Nation's transportation fuels.

BACKGROUND

A. The Clean Air Act's Regulatory Scheme for Fuels and Fuel Additives.

Under § 211 of the Clean Air Act, EPA has authority to regulate fuels and fuel additives. EPA has promulgated regulations governing fuels and fuel additives in Title 40, Parts 79 and 80, of the Code of Federal Regulations. These regulations impose extensive requirements on gasoline "fuel manufacturers" and "refiners." EPA now claims that retailers that sell E16–E50 blends are subject to these requirements.

1. Sub-Sim Law

In 1977, Congress enacted § 211(f) of the Clean Air Act, known as the sub-sim law.[26] As amended in 1990, paragraph (1) of the sub-sim law currently provides:

> Effective upon November 15, 1990, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the

[22] *Id.* at 26,982; *cf.* 40 C.F.R. § 80.1504(a)(1).

[23] E15 Response to Comments, *supra* note 4, at 53 (arguing that the use of natural gasoline is "illegal" but contending that this interpretation "is not novel or new").

[24] E15 Rule, *supra* note 4, 84 Fed. Reg. at 27,010.

[25] E15 Response to Comments, *supra* note 4, at 53.

[26] *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 222, 91 Stat. 685, 763–64 (1977).

> concentration in use of, any fuel or fuel additive for use by any person in motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 7525 of this title.[27]

The E15 Rule promulgates a new definition of "substantially similar." This new definition limits gasoline to "no more than 15 volume percent ethanol."[28]

2. Fuel and Fuel Additive Registration

Under § 211(a) of the Clean Air Act, EPA "may by regulation designate any fuel or fuel additive" for registration.[29] Once a fuel or fuel additive is designated, EPA may prescribe a date after which "no manufacturer or processor of any such fuel or additive" may sell the fuel or fuel additive unless it was registered with EPA.[30] Under § 211(b), EPA may require manufacturers "to conduct tests to determine potential health effects" before registering a fuel or fuel additive, and it may require them to provide information to help EPA determine "the effect of [a] fuel and fuel additive on the emission control performance of any vehicle or vehicle engine."[31]

EPA promulgated its registration regulations in 1975.[32] EPA designated "motor vehicle gasoline" as a fuel and required regulated "fuel manufacturers" to register their motor vehicle gasoline.[33] EPA defined "motor vehicle gasoline" as any fuel that is "commonly or commercially known or sold as motor vehicle gasoline."[34]

In the Clean Air Act Amendments of 1977, Congress required EPA to promulgate testing protocols for the registration of fuels and fuel additives.[35] In response, EPA promulgated detailed emissions and health-effects testing protocols.[36]

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[27] 42 U.S.C. § 7545(f)(1)(B).

[28] E15 Rule, *supra* note 4, 84 Fed. Reg. at 27,021.

[29] 42 U.S.C. § 7545(a).

[30] *Id.*

[31] *Id.* § 7545(b).

[32] *Registration of Fuels and Fuel Additives*, 40 Fed. Reg. 52,009 (Nov. 7, 1975).

[33] *Id.* at 52,014.

[34] *Id.*, *codified at* 40 C.F.R. § 79.32(a).

[35] 42 U.S.C. § 7545(e).

[36] *Fuels and Fuel Additives Registration Regulations*, 59 Fed. Reg. 33,042 (June 27, 1994), *codified at* 40 C.F.R. Part 79, Subpart F.

EPA further amended its fuel registration requirements in 1997 to "ease regulatory burdens."[37] Specifically, EPA exempted from the definition of "fuel manufacturer" "*all* entities whose only 'manufacturing' activity is the blending of oxygenate," in light of the "unique market structure for ethanol blending activities."[38]

To register motor vehicle gasoline under the current rules, fuel manufacturers must file an application making certain assurances to EPA.[39] Among other things, manufacturers must name each additive "that will or may be used" in the fuel, and the fuel additive's range of possible concentrations in the fuel. Manufacturers must also show that the fuel is "substantially similar" to any certification test fuel, or show that the fuel has obtained a waiver from the "substantially similar" requirement.[40] And manufacturers must show, "or reference prior submissions" that show, that the fuel has satisfied EPA's registration testing requirements.[41]

To date, only gasoline containing up to 15% ethanol has satisfied EPA's registration testing requirements and been registered.[42] Under EPA's registration rules, motor vehicle gasoline with more than 15% ethanol would be a "new" unregistered gasoline product.[43] Such a fuel could not be registered as gasoline because it is not "substantially similar" under EPA's new interpretive rule,[44] and because it has not satisfied EPA's testing requirements. A gasoline

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[37] *Registration of Fuels and Fuel Additives: Changes in Requirements, and Applicability to Blenders of Deposit Control Gasoline Additives*, 62 Fed. Reg. 12,564, 12,565 (Mar. 17, 1997).

[38] *Id.* at 12,566 (emphasis added); 40 C.F.R. § 79.2(d)(2) ("A party (other than a fuel refiner or importer) who adds an oxygenate compound to fuel in any otherwise allowable amount is not thereby considered a fuel manufacturer.").

[39] 40 C.F.R. § 79.11.

[40] *Id.* § 79.11(i) ("The manufacturer of any fuel which will be sold, offered for sale, or introduced into commerce for use in motor vehicles manufactured after model year 1974 shall demonstrate that the fuel is substantially similar to any fuel utilized in the certification of any 1975 or subsequent model year vehicle or engine, or that the manufacturer has obtained a waiver under 42 U.S.C. 7545(f)(4).").

[41] *Id.* § 79.11(j).

[42] Proposed REGS Rule, *supra* note 14, 81 Fed. Reg. at 80,842 ("Currently, the EPA has registered gasoline that contains up to 15 volume percent ethanol.").

[43] Motor vehicle gasoline with more than 15% ethanol would be a "new" product because EPA's rules do not allow it to be enrolled into any existing gasoline test group, like the E10 or E15 test groups. *See* 40 C.F.R. § 79.51(c)(3) ("A fuel product shall be considered new if . . . under the [grouping] criteria established by § 79.56, it cannot be enrolled in the same fuel/additive group with one or more currently registered fuels."); *id.* § 79.56(e)(4)(A)(1)(iii) (requiring for each gasoline group containing ethanol and more than 1.5% oxygen, that the "representative to be used in testing" the fuel include "the highest actual or recommended concentration-in-use of the oxygenate . . . recorded in the basic registration of any member fuel or additive product"); *see also id.* § 79.51(h)(1) (requiring gasoline additives to be tested "at the maximum concentration recommended by the additive manufacturer").

[44] E15 Rule, *supra* note 4, 84 Fed. Reg. 27,021 (defining sub-sim).

fuel manufacturer that sells unregistered gasoline risks a civil enforcement action under § 211(a) and § 211(d).[45]

3. Fuel and Fuel Additive Controls and Prohibitions

Under § 211(c) of the Clean Air Act, EPA may, "from time to time . . . by regulation, control or prohibit" the "sale of any fuel or fuel additive"

> (A) "if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or
>
> (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated."[46]

Over the years, EPA has adopted extensive regulations to control the characteristics of gasoline fuels and fuel additives under § 211(c) and other provisions of the Clean Air Act.[47] Gasoline "refiners" have extensive compliance obligations under the fuel quality control rules.[48] Refiners must demonstrate compliance with standards for controlling gasoline Reid Vapor Pressure (RVP),[49] sulfur,[50] and benzene,[51] among other properties. To demonstrate compliance, each refiner must sample and test each batch of gasoline produced for conformity

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[45] 42 U.S.C. §§ 7545(a), (d)(1). Every day of violation may result in a maximum civil penalty of $47,357. *See* 40 C.F.R. § 19.4, Table 2 (adjusting civil penalties to account for inflation as of February 6, 2019). Although rarely used, criminal penalties may be available. *See* 42 U.S.C. § 7413(c)(2) (criminalizing the failure to knowingly fail to "file or maintain any . . . document" required by the Act); *see also* 18 U.S.C. § 3571 (setting forth applicable criminal penalties).

[46] 42 U.S.C. § 7545(c)(1).

[47] *See generally* 40 C.F.R. Part 80.

[48] EPA's fuel quality control rules define "refiner" as "any person who owns, leases, operates, controls, or supervises a refinery." 40 C.F.R. § 80.2(i). The rules define "refinery" to mean "any facility, including but not limited to, a plant, tanker truck, or vessel where gasoline or diesel fuel is produced, including any facility at which blendstocks are combined to produce gasoline or diesel fuel, or at which blendstock is added to gasoline or diesel fuel." *Id.* § 80.2(h). "[B]lendstock" is defined to mean "any liquid compound which is blended with other liquid compounds to produce gasoline." *Id.* § 80.2(s).

[49] 40 C.F.R. § 80.27.

[50] *Id.* § Part 80, Subparts H, O. The sulfur regulations in subpart O gradually supersede the regulations in subpart H. *See id.* § 1602.

[51] *Id.* § Part 80, Subpart L.

with EPA's gasoline standards, register as a refiner with EPA, submit periodic reports, and arrange for annual audits by an independent auditor.[52]

Not all persons who fit the definition of "refiner" are treated as such under EPA's gasoline regulations. Under EPA's gasoline sulfur rules, for example, "oxygenate blenders . . . are not subject to the refiner or importer [sulfur] requirements, but are subject to the requirements and prohibitions applicable to downstream parties," and other specific requirements.[53] Similarly, under the RVP rules, an "ethanol blender" may demonstrate compliance "by showing receipt of certification from the facility from which the gasoline was received."[54]

Any person that violates EPA's controls or prohibitions under § 211(c) is subject to civil enforcement actions.[55]

B. Until the E15 Rule, EPA Allowed the Sale of Mid-Level Ethanol Blends for Use in Flex-Fuel Vehicles.

Flex-fuel vehicles are vehicles certified to meet EPA's emissions requirements using both a "high-level" ethanol test fuel (containing between 80% and 83% ethanol) and a gasoline test fuel.[56] This dual-certification procedure ensures that flex-fuel vehicles "are certified to meet emission standards on" E85 "*and any intermediate combination of gasoline and ethanol*."[57]

A gasoline-ethanol blend commonly known as "E85," containing between 51% and 83% ethanol, has long been sold for use in flex-fuel vehicles.[58] Over a decade ago, fuel retailers also began using blender pumps to sell E16–E50 blends for use in flex-fuel vehicles. "The

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[52] *See* Proposed E15 Rule, *supra* note 4, 84 Fed. Reg. at 10,595.

[53] 40 C.F.R. § 80.1609. The subpart H sulfur regulations also exempt oxygenate blenders. *See id.* § 80.212 ("oxygenate blenders" are "not subject to the [sulfur] requirements. . . applicable to refiners").

[54] *Id.* § 80.28(g)(8). An "ethanol blender means any person who owns, leases, operates, controls, or supervises an ethanol blending plant." *Id.* § 80.2(v). "Ethanol blending plant means any refinery at which gasoline is produced solely through the addition of ethanol to gasoline, and at which the quality or quantity of gasoline is not altered in any other manner." *Id.* § 80.2(u).

[55] 42 U.S.C. § 7545(d)(1). For purposes of assessing civil penalties, violations of "a regulatory standard based upon a multiday averaging period," like the annual average benzene or sulfur standards, "shall constitute a separate day of violation for each and every day in the averaging period." *Id.* Thus, a refiner that violates the average annual sulfur standard faces potentially up to $17,285,305 in civil penalties ($47,357 × 365 violations) for that single violation.

[56] 40 C.F.R. § 1065.725; Proposed REGS Rule, *supra* note 14, 81 Fed. Reg. at 80,853 ("Emissions certification testing of FFVs is required using both the test fuel specified for conventional gasoline vehicles and a high ethanol content FFV test fuel (E83).").

[57] 2006 Oge Letter, *supra* note 1 (emphasis added).

[58] *See* ASTM D5798 – 19a.

typical current practice is that a blender pump mixes gasoline (E0 or E10) and E85 parent blends at different ratios to produce various E16–50 blends."[59]

The growth of E16–E50 sales has been encouraged by several factors. First, flex-fuel vehicle consumers want these blends. Many consumers prefer blends like E20 or E30 because unlike E85, they do not substantially lower vehicle fuel economy and vehicle range compared to gasoline.[60] Second, ethanol is a low-cost octane additive, so midlevel ethanol blends are often priced favorably compared to other high-octane gasoline blends produced with more costly fuel additives. Third, through the Biofuel Infrastructure Partnership (BIP), USDA has disbursed $100 million in grants "dedicated to support higher ethanol blend utilization," including an expansion of blender pumps.[61] When matching funds are included, the estimated public and private BIP investment amounted to $210 million, most of which funded blender pumps.[62] Finally, and as particularly relevant here, the growth of E16–E50 blends has been encouraged by EPA's repeated assurances to retailers that such blends could be sold for use in flex-fuel vehicles.

1. Director Oge's 2006 Letter

In 2006, Dawna Leitzke, Executive Director of a South Dakota fuel retailers' association, asked EPA for its "position on marketers selling ethanol blends other than E10 and E85 through blender pumps for use in FFVs."[63]

EPA's response was unequivocal. Margo Oge, then Director of EPA's Office of Transportation and Air Quality, wrote that:

> "[B]lends such as E20 and E30 for use in FFVs . . . are covered under the emissions certification for an E85 FFV, and thus are not prohibited under the Clean Air Act. I am not aware of any federal law that prohibits the sale of such blends for use in FFVs."[64]

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[59] Proposed REGS Rule, *supra* note 14, 81 Fed. Reg. at 80,842. "Blender pumps make mid-level ethanol blends by mixing two parent blends stored in different storage tanks." *Id.* at 80,831 n.23.

[60] *See, e.g.*, John F. Thomas et al., Effects of High-Octane Ethanol Blends on Four Legacy Flex-Fuel Vehicles, and a Turbocharged GDI Vehicle 20 (Mar. 2015).

[61] *Notice of Funds Availability (NOFA): Biofuel Infrastructure Partnership (BIP) Grants to States*, 80 Fed. Reg. 34,363, 34,364 (June 16, 2015); *see also* USDA, List of States Receiving BIP Grants, https://www.fsa.usda.gov/programs-and-services/energy-programs/bip/index.

[62] Proposed REGS Rule, *supra* note 14, 81 Fed. Reg. at 80,831 n.23; USDA, USDA Announces $210 Million To Be Invested in Renewable Energy Infrastructure Through the Biofuel Infrastructure Partnership (Oct. 28, 2015).

[63] 2006 Oge Letter, *supra* note 1.

[64] *Id.*; *see also* 2006 Kushner Letter, *supra* note 1 (The Clean Air Act does not . . . prohibit retail gasoline stations from selling gasoline blended with up to 85% ethanol for use in flexible-fueled vehicles or engines.").

2. The 2011 Misfueling Rule

In the 2011 Misfueling Rule, EPA codified Director Oge's 2006 policy statement by providing that "[n]o person shall . . . [b]e prohibited from manufacturing, selling, introducing, or causing or allowing the sale or introduction of gasoline containing greater than 10 volume percent ethanol into any flex-fuel vehicle, notwithstanding paragraphs (a)(1) and (a)(2) of this section."[65] This rule remains in effect.

3. The Tier 3 Rule

In 2014, EPA finalized the Tier 3 Rule. In the Tier 3 Rule's preamble, EPA said that:

> Our various standards for gasoline currently apply to any fuel sold for use in motor vehicles, which is commonly or commercially known or sold as gasoline. In the fuel and fuel additive registration program, the gasoline family includes fuels composed of at least 50 percent clear gasoline by volume. As a result, our gasoline standards currently apply to E16–50 ethanol blends. However, additional regulatory provisions could be useful to facilitate compliance assurance if we are to continue to treat such mid-level ethanol blends as gasoline.[66]

The Tier 3 Rule's preamble thus announced EPA's view that E16–E50 blends are "gasoline." But the Tier 3 Rule's preamble did not take any position on the minor premise that EPA adopted in the E15 Rule: whether retailers that sell E16–E50 are selling an "allowable amount" of ethanol when they sell E16–E50 blends for use in flex-fuel vehicles.

The only sign that some EPA staff entertained the view that retailers operating blender pumps were "fuel manufacturers" and "refiners" was contained in a slide deck prepared by EPA staff and submitted to the Tier 3 docket. The slide deck asserted, without any explanation, that retail "blenders" selling E16–E50 blends "*should be* treated as refiners *but they are unaware*."[67] This lack of awareness should not be surprising, given EPA's formal assurances that nothing in the Clean Air Act prevented retailers from selling E16–E50 blends through blender pumps for use in flex-fuel vehicles.[68]

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[65] *Regulation To Mitigate the Misfueling of Vehicles and Engines With Gasoline Containing Greater Than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs*, 76 Fed. Reg. 44,406, 44,448 (July 25, 2011), *as amended in* 79 Fed. Reg. 42,128 (July 18, 2014), *codified at* 40 C.F.R. § 80.1504.

[66] *Control of Air Pollution From Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards*, 79 Fed. Reg. 23,414, 23,558 (Apr. 28, 2014) (Tier 3 Rule).

[67] Jeff Herzog, E51-83 and E16–E50, at 15 (June 4, 2013) (emphases added).

[68] Even if this document represented the views of the Agency, as opposed to the views of individual staff members, it was not published in the Federal Register, so retailers did not even have constructive "notice" of EPA's interpretation of the law. *See* 44 U.S.C. § 1507.

As relevant to this petition, in the 2014 Tier 3 rulemaking, EPA also "updated the certification test fuel for Tier 3 certified motor vehicles and changed the certification test fuel from E0 to E10 to reflect the widespread use of E10 in the marketplace."[69] The new Tier 3 gasoline test fuel contains 9.6 to 10% ethanol.[70]

EPA did not define what range of gasoline-ethanol blends were "substantially similar" to the Tier 3 certification fuel in the Tier 3 Rule. Without an updated definition of "substantially similar," fuel retailers had no reason to suspect that, in EPA's opinion, E16–E50 blends might not contain an "allowable amount" of ethanol for use in flex-fuel vehicles or other vehicles. Hence, they had no reason to think they might be deemed gasoline "fuel manufacturers" instead of "oxygenate blenders."

C. EPA No Longer Allows the Sale of Mid-Level Ethanol Blends for Use in Flex-Fuel Vehicles.

Until 2019, fuel retailers had every reason to think that E16–E50 blends could be lawfully sold for use in flex-fuel vehicles under the Clean Air Act. That is no longer the case. Ignoring past guidance, EPA's E15 Rule adopts an interpretation of the sub-sim law and EPA's regulations that makes it illegal for retailers to sell E16–E50 blends for use in any vehicle or engine, including flex-fuel vehicles.

1. The Proposed E15 Rule

In the proposed E15 Rule, EPA advanced the view that retailers that make E16–E50 blends are gasoline "fuel manufacturers" and "refiners."[71] According to this view, retailers that make E16–E50 blends do not blend an "allowable amount" of ethanol into gasoline under the sub-sim law, § 211(f). And because these retailers do not blend an "allowable amount" of ethanol, they are "fuel manufacturers":

> [O]nly parties who 'add[] an oxygenate compound to fuel in any otherwise allowable amount' are excluded from the definition of fuel manufacturer. This provision only allows the addition of oxygenate compounds up to the amount of any CAA sec. 211(f)(4) waiver, or any allowable oxygen content under our interpretation of the meaning of 'substantially similar.' A party who unlawfully adds an oxygenate compound in a volume that exceeds the oxygen content limit in the interpretative definition of 'substantially similar' or the CAA sec. 211(f)(4) waiver condition, or who adds anything other than an oxygenate compound allowed by the substantially similar interpretative rule, is a fuel manufacturer.[72]

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[69] Proposed E15 Rule, *supra* note 4 at 10,597; *see also* Tier 3 Rule, *supra* note 66, 79 Fed. Reg. at 23,810, *codified at* 40 C.F.R. § 1065.710(b)(2).

[70] 40 C.F.R. § 1065.710(b)(2).

[71] Proposed E15 Rule, *supra* note 4, 84 Fed. Reg. at 10,594.

[72] *Id.*; *see also* 40 C.F.R. § 79.2(d), (k) (defining these regulatory terms).

2. The Final E15 Rule

The final E15 Rule goes beyond the proposal, adopting the view that retailers may not sell E16–E50 blends *even for use in flex-fuel vehicles*.

The E15 Rule defines for the first time the range of fuels that are "substantially similar" to the Tier 3 certification fuel: under the new sub-sim interpretative rule, only gasoline-ethanol blends containing "no more than 15 volume percent ethanol" are "substantially similar" to the Tier 3 gasoline certification fuel.[73] Thus, under EPA's new interpretation of its fuel and fuel additive regulations, retailers that sell E16–E50 blends are no longer adding an "allowable amount" of ethanol to gasoline, so they are gasoline "fuel manufacturers."

EPA's new position prohibiting the sale of E16–E50 blends for use in flex-fuel vehicles is confirmed by EPA's response to comments. Referencing the views it took in "the Tier 3 final rule, the proposed REGS rule, and the proposal for this action," EPA asserts that "gasoline-ethanol blends containing up to 50 volume percent ethanol [are treated] as 'gasoline' for purposes of complying with the regulations at 40 CFR parts 79 and 80."[74] EPA also says that is true "regardless of whether" the fuel "is labeled for use in gasoline-fueled vehicles and engines or flexible-fueled vehicles."[75]

EPA's citation to the proposed REGS rule is telling. In the proposed REGS Rule, EPA suggested that fuel retailers had to comply with these refinery rules even if they sold E16–E50 blends for use in flex-fuel vehicles.[76] EPA acknowledged that "E16–50 gasoline blends are currently produced for use in FFVs using blender pumps at fuel retailer facilities."[77] But it suggested that "[b]ecause the EPA currently considers E16–50 to be gasoline[,] and blender pump operators mix E85 (a non-gasoline) with gasoline to produce E16–50, blender pump operators are gasoline refiners under our existing regulations."[78] Moreover, EPA continued, retailers cannot avoid these regulations by selling fuel for use in flex-fuel vehicles: "[a]ll gasoline . . . is subject to all of the requirements applicable to gasoline because of its formulation, not because of its end use."[79] In the proposal, EPA said that the regulations

[73] E15 Rule, *supra* note 4, 84 Fed. Reg. at 27,021. The proposed rule did not include a proposed interpretive rule defining "substantially similar."

[74] Response to Comments, *supra* note 4, at 53.

[75] *Id.*

[76] Proposed REGS Rule, *supra* note 4, 81 Fed. Reg. at 80,842.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 80,863.

"cannot be circumvented by relabeling" gasoline for use in flex-fuel vehicles.[80] Commenters opposed EPA's interpretation of the law,[81] and the proposed REGS rule was never finalized.

In substance, the interpretation first suggested in the proposed REGS rule and now endorsed by EPA in the final E15 Rule is no different from saying that E16–E50 blends are now illegal, even for use in flex-fuel vehicles. Under the final E15 Rule, every person that makes E16–E50 is a gasoline "fuel manufacturer." And gasoline fuel manufacturers must comply with the sub-sim law, § 211(f), which, under EPA's interpretation, makes it illegal to sell E16–E50 blends for use in any vehicle or engine. Also, fuel manufacturers may not sell unregistered motor vehicle gasoline, and E16–E50 blends cannot be registered as motor vehicle gasoline.[82] As a legal matter, therefore, EPA's E15 Rule makes it categorically unlawful to sell E16–E50 blends.

PETITION

I. EPA SHOULD ALLOW THE SALE OF E16–E50 BLENDS FOR USE IN FLEX-FUEL VEHICLES.

EPA's prohibition on the sale of E16–E50 blends for use in flex-fuel vehicles cannot be reconciled with EPA's past guidance and existing rules. EPA should return to its past guidance.

Reconsideration is appropriate. It was "impracticable" for Petitioners to object to EPA's prohibition of E16–E50 for use in flex-fuel vehicles during the E15 Rule's "period for public comment."[83] It did not become clear that EPA interpreted its rules to prohibit the sale of E16–E50 blends, even for use in flex-fuel vehicles, until EPA explained, in response to comments, that retailers that sell E16-E50 must follow the gasoline "fuel manufacturer" rules "regardless of whether" the fuel "is labeled for use in gasoline-fueled vehicles and engines or flexible-fueled vehicles."[84] In any event, if EPA concludes that reconsideration is not proper, EPA should begin a new rulemaking to clarify that E16–E50 may be sold for use in flex-fuel vehicles.

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[80] *Id.*

[81] *See, e.g.*, Comments of Urban Air Initiative et al., on EPA's Renewables Enhancement and Growth Support Rule 8–14 (Feb. 16, 2017).

[82] There is a certain circularity to these prohibitions, because they all depend on the sub-sim law. Motor vehicle gasoline cannot be registered unless a fuel is "substantially similar" or has obtained a waiver under § 211(f)(4). 40 C.F.R. § 79.11(i). In addition, only "fuel manufacturers" are required to register fuel products under § 211(a), and whether retailers are "fuel manufacturers" depends on whether the gasoline-ethanol blends they make are "substantially similar."

[83] 42 U.S.C. § 7607(d)(7)(B). Assuming, for the sake of argument, that EPA's prohibition of E16–E50 blends for use in flex-fuel vehicles follows automatically from the Tier 3 rule, the E15 Rule provides new "grounds" for reconsideration of the Tier 3 Rule. *Id.*

[84] Response to Comments, *supra* note 4, at 53.

A. Retailers That Use Certified Blendstocks To Make E16–E50 for Use in Flex-Fuel Vehicles Are "Oxygenate Blenders."

EPA has previously recognized that E16–E50 blends are "substantially similar" *for use in flex-fuel vehicles*. As a result, retailers that sell E16–E50 for use in flex-fuel vehicles are selling an "allowable amount" of ethanol. And because they are selling an allowable amount of ethanol, they are "oxygenate" and "ethanol" blenders, not gasoline "fuel manufacturers" or "refiners."

Selling E16–E50 blends for use in flex-fuel vehicles does not violate the sub-sim law under EPA's prior interpretation of the sub-sim law. As Director Oge said in her 2006 letter, retailers may sell E16–E50 "through blender pumps" because "blends such as E20 and E30 for use in FFVs . . . are covered under the emissions certification for an E85 FFV."[85] They are therefore "not prohibited under the Clean Air Act."[86] In other words, E16–E50 blends sold for use in flex-fuel vehicles contain an "allowable amount" of ethanol under the sub-sim law.[87] This makes sense because flex-fuel vehicles are, by definition, certified to operate on E85, gasoline, and "any intermediate combination of gasoline and ethanol."[88] It is also consistent with EPA's misfueling rule, which "allow[s] the sale or introduction of gasoline containing greater than 10 volume percent ethanol into any flex-fuel vehicle."[89]

Under EPA's rules, "[a] party . . . who adds an oxygenate compound to fuel in any otherwise allowable amount is not thereby considered a fuel manufacturer."[90] Retailers that make E16–E50 blends by adding certified denatured fuel ethanol to certified gasoline fall under this exemption: they are adding "oxygenate compound" to gasoline in an "allowable amount" for use in flex-fuel vehicles.[91] Similarly, retailers that use E85 made with certified gasoline blendstocks and denatured fuel ethanol are also adding "oxygenate compound" in an "allowable amount" for use in flex-fuel vehicles.[92] Such retailers are gasoline "oxygenate blenders" and "ethanol blenders," not refiners.[93]

EPA should return to this interpretation of its regulations. This interpretation would be consistent with Director Oge's 2006 letter and EPA's misfueling rule, and it would avoid inflicting regulatory whiplash on fuel retailers who have invested in blender pumps in reliance

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[85] 2006 Oge Letter, *supra* note 1.

[86] *Id.*

[87] 40 C.F.R. § 79.2(d)(2); Proposed E15 Rule, *supra* note 4, 84 Fed. Reg. at 10,594.

[88] 2006 Oge Letter, *supra* note 1.

[89] 40 C.F.R. § 80.1504(a)(3).

[90] *Id.* "Oxygenate compound means an oxygen-containing, ashless organic compound, such as an alcohol or ether, which may be used as a fuel or fuel additive." 40 C.F.R. § 79.2(k).

[91] *See id.* § 80.1610 (standards for denatured fuel ethanol for use in transportation fuel).

[92] Proposed E15 Rule, *supra* note 4, 84 Fed. Reg. at 10,595 (allowing E85 "so long as that E85 had itself been produced solely from denatured fuel ethanol and certified gasoline (or CBOB)").

[93] *See* 40 C.F.R. § 80.2 (u), (v), (jj), (ll), (mm).

on Dr. Oge's clear statement of EPA policy and EPA's misfueling rule. It would also remove regulatory barriers to higher ethanol blends without compromising fuel quality: fuel retailers would still be prohibited from using uncertified blendstocks to make E16–E50 for use in flex-fuel vehicles, and they would remain subject to the gasoline standards that apply downstream of refineries.

B. In the Alternative, E16–E50 Blends Are Not "Gasoline."

If EPA rejects Petitioners proposal to treat E16–E50 blends as an "allowable amount" of ethanol for use in flex-fuel vehicles, then, Petitioners request that EPA reconsider its position that E16–E50 blends are "gasoline" under its fuel and fuel additive rules.

A fuel is "gasoline" subject to EPA's gasoline registration and fuel quality control rules only if it is "commonly or commercially known or sold" as gasoline.[94] To assess whether a fuel is gasoline under this definition, courts use "objective standards."[95] ASTM's standards are "useful to the court as an aid in determining whether a particular product is 'commonly or commercially known or sold as gasoline.'"[96]

ASTM's standards for gasoline make no provision for gasoline-ethanol blends containing more than 15% ethanol.[97] ASTM instead addresses E16–E50 blends through a separate "standard practice" for "midlevel ethanol blends"—ASTM D7794.[98] ASTM D7794 provides that these fuels "are sometimes referred to at retail as 'Ethanol Flex Fuel'" and "are only suitable for use in ground flexible-fuel vehicles equipped with spark-ignition engines."[99]

This ASTM standard belies the assertion that E16–E50 blends are "commonly or commercially known or sold" as gasoline. It shows that they are instead commonly and commercially known and sold as alternative ethanol flex-fuel for use in flex-fuel vehicles.

Confirming this view, E16–E50 blends are labeled as alternative "ethanol flex fuel," not as gasoline, under the Federal Trade Commission's pump labeling rules.[100] These rules

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[94] 40 C.F.R. §§ 79.32(a), 80.2(c).

[95] *United States v. Coastal Ref. & Mktg., Inc.*, 911 F.2d 1036, 1039 (5th Cir. 1990).

[96] *Id.*

[97] *See* ASTM D4814 -16e, Table 1, n.d.

[98] ASTM D7794–18a.

[99] *Id.*

[100] 16 C.F.R. § 306.0(o) ("Ethanol flex fuels means a mixture of gasoline and ethanol containing more than 10 percent but not greater than 83 percent ethanol by volume."). E15's labeling requirements are governed by EPA rules, not FTC rules, *see* FTC, Complying with the FTC Fuel Rating Rule (Oct. 2016) ("You do not need to post a label for ethanol flex fuels containing no more than 15% ethanol if you have labeled the dispenser in accordance with the EPA's E15 labeling requirements at 40 CFR 80.1501.").

require retailers to include a prominent label displaying the fuel's ethanol content and warning consumers: "Use *Only* In Flex-Fuel Vehicles. May Harm Other Engines":[101]

EPA has never explained how it could believe, contrary to these objective standards and rules, that E16–E50 blends are "commonly or commercially known or sold" as gasoline.[102] In the past, EPA has simply pointed to its registration testing protocols, which define the gasoline "fuel family" to include fuels containing "more than 50 percent gasoline."[103] EPA's reliance on this definition is misplaced. EPA's rules provide that this fuel family definition applies only to "subpart F of this part"—the group testing protocols in part 79, subpart F.[104] The "fuel family" definition, therefore, does not in any way govern what fuels are "commonly or commercially known or sold" as gasoline for purposes of the general gasoline registration (subparts A, B, and D of part 79) or fuel quality (part 80) requirements. Nor are these "fuel family" definitions responsive to the relevant question under EPA's controlling regulations: whether E16–E50 blends are "commonly or commercially known or sold" as gasoline.

EPA should reconsider its assertion that E16–E50 blends are regulated as "gasoline." In the proposed REGS Rule, EPA would have "resolv[ed] the ambiguity of E16–50 blends" by excluding E16–E50 blends from its definition of gasoline and creating a new certified ethanol flex-fuel (E16–E83) that could only be sold for use in flex-fuel vehicles.[105] That approach would be preferable to prohibiting the sale of E16–E50 blends for use in flex-fuel vehicles.

II. EPA SHOULD ALLOW THE USE OF E15 IN MODEL YEAR 2000 AND EARLIER FLEX-FUEL VEHICLES.

EPA should take the opportunity to correct erroneous language in its new definition of "substantially similar," which mistakenly says that its interpretation applies only to "light-duty vehicles manufactured after model year 2001." EPA obviously meant after "model year 2000," since EPA's findings about E15 apply to "MY2001 and newer light-duty vehicles."[106]

More importantly, EPA should also amend its new sub-sim definition to clarify that flex-fuel vehicles produced before model year 2001 may use E15. Under EPA's new definition of "substantially similar," E15 may be used only "in light-duty vehicles manufactured after model year 2001."[107] EPA's new rule also requires misfueling mitigation plans to ensure "that

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[101] 16 C.F.R. § 306.12(a)(4)(ii), (f).

[102] Tier 3 Rule, *supra* note 66, 79 Fed. Reg. at 23,558.

[103] Proposed REGS Rule, *supra* note 14, 81 Fed. Reg. at 80,842; 40 C.F.R. §§ 79.50, 79.56(e)(1)(i).

[104] 40 C.F.R. § 79.50.

[105] Proposed REGS Rule, *supra* note 14, 81 Fed. Reg. at 80,843.

[106] *Id.* at 26,982; *cf.* 40 C.F.R. § 80.1504(a)(1).

[107] E15 Rule, *supra* note 4, 84 Fed. Reg. at 27,021. As explained above, the reference should be to model year 2000, not 2001.

the E15 is only introduced into commerce for use in model year 2001 and newer light-duty vehicles."[108] Unlike the 2011 Misfueling Rule,[109] this definition of "substantially similar" contains no express exemption for flex-fuel vehicles produced before model year 2001.

Many model year 2000 or older flex-fuel vehicles remain on the road. According to EPA and other federal agencies, more than 600,000 ethanol flex-fuel vehicles were sold in model year 2000 alone, and a similar number were sold in model years 1998 and 1999 combined.[110] By 2002, there were about "1.2 million" flex-fuel vehicles on the road.[111] There is no good reason to prevent the sale of E15 for use in these flex-fuel vehicles, which, by definition, can use any combination of gasoline and E85, including E15.

Reconsideration is proper. The proposed rule did not include these errors, so it would have been impracticable to raise these objections during the period for comment on the E15 Rule.[112] EPA should correct this oversight in its definition of "substantially similar" and include an exemption allowing the use of E15 in model year 2000 or older flex-fuel vehicles.

III. EPA SHOULD PROMULGATE REGULATIONS ALLOWING NATURAL GASOLINE BLENDSTOCKS FOR USE IN GASOLINE-ETHANOL BLENDS.

Retailers have commonly used E85 produced with uncertified natural gasoline (a mix of pentanes and some heavier hydrocarbons typically produced by natural gas processing facilities) to make E15 and E16–E50 blends using blender pumps. In the E15 Rule, EPA bans natural gasoline blendstocks for use in all gasoline-ethanol blends except E85.[113] By EPA's estimate, "approximately 50 percent of stations offering E15 make E15" with natural gasoline.[114] All of those retailers must now cease using natural gasoline or cease selling E15 blends.

Instead of banning natural gasoline, EPA should "allow the use of natural gasoline as a blendstock to produce [gasoline-ethanol blends]," as it proposed in the REGS rule.[115]

Natural gasoline is a useful product. Natural gasoline could decrease the cost of producing E85, and the higher volatility of natural gasoline could allow the sale of E85 in the upper range of its allowable ethanol content (83% ethanol) by facilitating "compliance with

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[108] *Id.*

[109] *See* 40 C.F.R. § 80.1504(a)(3).

[110] Report to Congress: Effects of the Alternative Motor Fuels Act CAFE Incentives Policy 13 (2002). Manufacturers produced approximately 575,000 flex-fuel vehicles in model years 1999 and 1998. *Id.* at 21–23.

[111] *Id.* at 26.

[112] The Proposed Rule did not contain any definition of "substantially similar."

[113] E15 Response to Comments, *supra* note 4, at 53 (arguing that the use of natural gasoline is "illegal" but contending that this interpretation "is not novel or new").

[114] E15 Rule, *supra* note 4, 84 Fed. Reg. at 27,010.

[115] Proposed REGS Rule, *supra* note 14, 81 Fed. Reg. at 80,844.

ASTM minimum volatility specifications."[116] This could, in turn, reduce the cost of producing E15, E16–E50, and E85 blends.

To be sure, the use of natural gasoline also poses environmental risks. Natural gasoline can be high in sulfur content; it can contain atypical elements (*i.e.*, chemical elements other than "CHONS"—carbon, hydrogen, oxygen, nitrogen and sulfur) that can poison vehicle catalysts; and the high volatility of natural gasoline can also cause excess evaporative emissions even when mixed with substantial amounts of ethanol.[117] Although ASTM has published consensus-based standards governing natural gasoline used to make E85,[118] EPA believes these voluntary standards alone "are not adequate to ensure the emissions control performance of" flex-fuel vehicles.[119]

Natural gasoline's environmental risks can be managed by setting fuel standards for E85 blends used in blender pumps, similar to those that already apply to gasoline. EPA should promulgate a rule finalizing fuel standards for E85 blends used in blender pumps as they have for gasoline. Retailers that use these certified E85 parent fuels to make E15 and E16–E50 for use in flex-fuel vehicles would then be adding certified oxygenate, and they should therefore qualify as oxygenate blenders exempt from the gasoline manufacturer and refiner requirements.

CONCLUSION

EPA should reconsider or amend its rules as requested by Petitioners.

[116] *Id.* at 80,844 ("Natural gasoline is an inexpensive and increasingly plentiful by product of the ongoing expansion in domestic natural gas and crude oil and its use would decrease EFF production costs . . . . Due to the relative high volatility of natural gasoline [typically ranging from 12 to 15 psi] and the low volatility of ethanol, the use of natural gasoline could also facilitate the manufacture of E85 in the upper range of its allowable ethanol content (i.e. 70 to 83 volume percent ethanol) while maintaining compliance with ASTM minimum volatility specifications.").

[117] *Id.*

[118] In 2016, ASTM finalized standards governing natural gasoline for use in ethanol fuel blends. *See* ASTM D8011-16.

[119] Proposed REGS Rule, *supra* note 14, 81 Fed. Reg. at 80,844.