ORAL ARGUMENT NOT YET SCHEDULED
No. 19-1124 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, et al.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petition for Review of a Final Rule
of the United States Environmental Protection Agency

JOINT BRIEF FOR INTERVENORS GROWTH ENERGY, NATIONAL CORN GROWERS ASSOCIATION, AND RENEWABLE FUELS ASSOCIATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The Petitioners in these consolidated cases are as follows:

American Fuel & Petrochemical Manufacturers ("AFPM") (No. 19-1124)

Small Retailers Coalition (No. 19-1159)

American Petroleum Institute, American Motorcycle Association, National Marine Manufacturers Association, Coalition of Fuel Marketers, Citizens Concerned About E15 (No. 19-1160)

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; South Dakota Farmers Union (No. 19-1162)

The Respondents in these consolidated cases are the U.S. Environmental Protection Agency ("EPA") and its Administrator, Andrew Wheeler.

The Intervenors in these consolidated cases are Growth Energy, National Corn Growers Association, Renewable Fuels Association, and American Fuel & Petrochemical Manufacturers.

B. Rulings Under Review

The agency action under review in these consolidated cases is the Final Rule entitled *Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*," promulgated by EPA at 84 Fed. Reg. 26,980 on June 10, 2019.

C. Related Cases

The agency action under review in these consolidated cases has not previously been before this Court or any other court. This case is related to *Urban Air Initiative v. EPA*, Nos. 19-1161 and 20-1004.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenors state as follows:

Growth Energy, the Renewable Fuels Association, and the National Corn Growers Association are nonprofit trade associations within the meaning of D.C. Circuit Rule 26.1(b). They operate for the purpose of promoting the general commercial, legislative, and other common interests of their respective members. Growth Energy's members are ethanol producers and supporters of the ethanol industry. The Renewable Fuels Association's members are ethanol producers and supporters of the ethanol industry. The National Corn Growers Association's members are corn farmers and supporters of the agriculture and ethanol industries.

Neither Growth Energy, the Renewable Fuels Association, nor the National Corn Growers Association has a parent company. No publicly held company has a 10% or greater ownership interest in Growth Energy, the Renewable Fuels Association, or the National Corn Growers Association.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Code of Federal Regulations

Federal Register

Legislative Materials

Other

GLOSSARY

A	Addendum (Declaration of Michael O'Brien)
AFPM	American Fuel & Petrochemical Manufacturers
E0	A gasoline that contains no ethanol. *See* 40 C.F.R. § 80.1500.
E10	A gasoline-ethanol blend that contains at least 9% and no more than 10% ethanol by volume. *See* 40 C.F.R. § 80.1500.
E15	A gasoline-ethanol blend that contains more than 10% and no more than 15% ethanol by volume. *See* 40 C.F.R. § 80.1500.
E85	A gasoline-ethanol blend that contains at least 50% and no more than 83% ethanol by volume. *See* 84 Fed. Reg. 10,584, 10,595 n.86 (Mar. 21, 2019).
EPA	United States Environmental Protection Agency
Intervenors	Growth Energy, the Renewable Fuels Association, and the National Corn Growers Association
JA	Joint Appendix
Petitioners	Petitioners in Nos. 19-1124 and 19-1160
psi	Pounds per square inch

RVP	Reid Vapor Pressure
Sub-sim	Substantially similar

INTRODUCTION

Ethanol has been blended in gasoline for over forty years. Today, nearly all domestic gasoline is "E10" (9-10% ethanol), which is now the standard test fuel for certifying new cars' compliance with EPA emissions standards. Ethanol has numerous benefits. It is renewable and reduces greenhouse gas emissions. It boosts octane and reduces costs for consumers. It supports rural economies and enhances U.S. energy security. Because of these benefits, Congress has created programs in the Clean Air Act and other laws to promote the use of ethanol.

In 2012, "E15"—gasoline and 10-15% ethanol—entered the market. But E15 was subject to stricter regulations than E10. Under 42 U.S.C. § 7545(h), gasoline generally must have a summertime Reid Vapor Pressure ("RVP")—a measure of volatility—not greater than 9.0 pounds per square inch ("psi"), but a fuel "containing gasoline and … 10 percent … ethanol" may have an RVP that is 1.0 psi higher. At the time, EPA interpreted that 1-psi allowance as applying to E10 but not E15. Separately, fuel "manufacturer[s]" also were barred from selling E15 at greater than 9.0 psi during the summer under § 7545(f), which restricts the sale of new fuels that are not "substantially similar" to a fuel used in vehicle emissions certification.

This disparate treatment of E10 and E15 made little sense. The volatility restrictions under § 7545(h) are intended to limit evaporative emissions, and the 1-

psi allowance promotes the sale of ethanol-blended fuels. Yet adding 5% more ethanol to E10 uses *more* ethanol and *lowers* volatility and evaporative emissions. Under § 7545(f), moreover, EPA had not considered whether E15 is "substantially similar" to certification fuel after it changed the standard certification test fuel from pure gasoline ("E0") to E10.

The Final Rule removes these unwarranted discrepancies between E10 and E15. Petitioners in Nos. 19-1124 and 19-1160 ("Petitioners") challenge the Final Rule on two main grounds, but both are meritless, and one they lack standing to assert. More broadly, Petitioners do not and cannot defend the irrational status quo ante they seek to reinstate. The Final Rule removes a volatility restriction for E15 that EPA long ago removed for E10—enhancing consumer choice while reducing volatility and evaporative emissions. This Court should not allow the petroleum industry and its allies to stymie competition in this comparatively small but important portion of the U.S. transportation fuel supply.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addenda to the other parties' briefs.

STATEMENT OF THE CASE

A. Factual Background

1. Physical and Chemical Properties of E10 and E15

Ethanol is an alcohol consisting of carbon, hydrogen, and oxygen (hence, an "oxygenate"). A renewable fuel, ethanol is produced from corn, crop residue, and other feedstocks. Ethanol blending promotes U.S. energy security, moderates the effects of volatile oil prices, and supports rural economies. Ethanol-blended fuels also typically are cheaper for consumers.

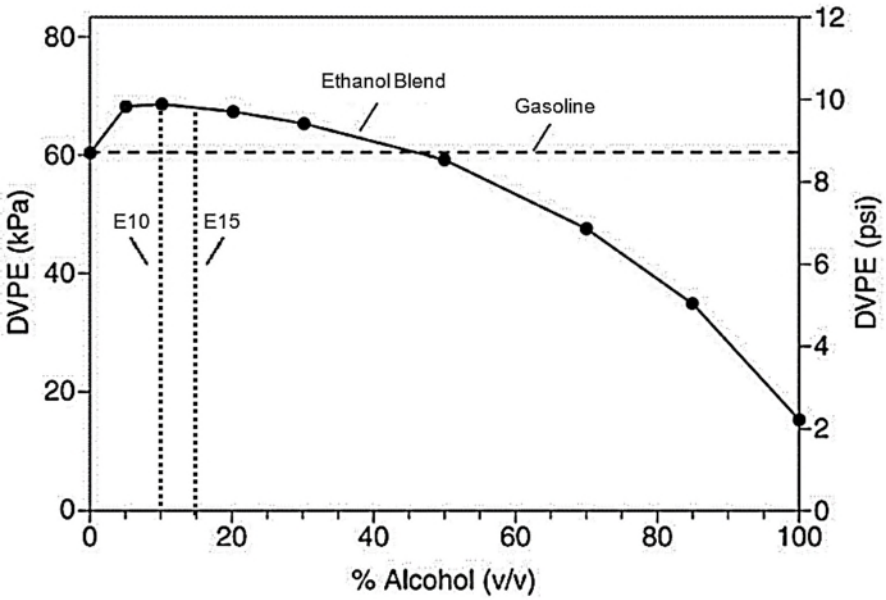
JA[Growth_Energy_Comment_Letter_at_1]; JA[RFA_Comment_Letter_at_20]; JA[NCGA_Comment_Letter_at_6-7].

Ethanol has substantial greenhouse gas benefits. Corn-starch ethanol, for example, reduces greenhouse gas emissions by approximately 40% compared to petroleum. ICF, *A Life-Cycle Analysis of the Greenhouse Gas Emissions From Corn-Based Ethanol* (2018), https://www.usda.gov/sites/default/ files/documents /LCA_of_Corn_Ethanol_2018_Report.pdf. Ethanol plays a central role in federal and state greenhouse gas reduction programs. *See, e.g.*, 42 U.S.C. § 7545(o).

When added to gasoline, ethanol can change the blend's octane rating, volatility, and emissions. Higher octane gasoline allows engine pistons to compress more before spark-ignition, enhancing fuel efficiency. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 7 (D.C. Cir. 1976). Ethanol increases octane. JA[84_Fed._Reg._at_27,010].

Volatility—how readily a liquid evaporates—is measured by RVP. "Gasoline must have volatility in the proper range to prevent driveability, performance, and emissions problems." JA[84_Fed._Reg._at_26,982] n.4. If volatility is too low, gasoline will not ignite properly; if too high, evaporative emissions can increase, and "vapor lock" can interrupt the flow of fuel to the engine. *Id.* Industry standards allow gasoline's RVP to "range from 7.0 to 15.0 psi over the course of the year." JA[84_Fed._Reg._at_26,998].

Adding small concentrations of ethanol to gasoline increases RVP. JA[ACE_Comment_Letter_at_3]. This effect peaks at approximately 10% ethanol by volume, which increases RVP by roughly 1.0 psi. JA[84_Fed._Reg._at_10,588]. Beyond that point, adding more ethanol *decreases* RVP. JA[ACE_Comment_Letter_at_3]. Adding 15% ethanol to gasoline thus results in slightly *lower* RVP than adding 10%. JA[84_Fed._Reg._at_27,011]. The graph below from the National Renewable Energy Laboratory shows the relationship between volatility and ethanol volume percentage, with the vertical lines representing E10 and E15:



JA[ACE_Comment_Letter_at_3] (vertical lines and accompanying labels added); *see* JA[API,_*Determination_of_the_Potential_Property_Ranges_of_Mid-Level_Ethanol_Blends*] (similar in report by petitioner American Petroleum Institute). Increased E15 sales thus *reduce* the volatility of a gasoline supply dominated by E10.

When EPA considers the emissions generated by a fuel, it considers both evaporative emissions that escape from the fuel system and exhaust emissions released from the tailpipe. Consistent with its effect on RVP, E15 has slightly lower evaporative emissions than E10. JA[84_Fed._Reg._at_27,011]. As to exhaust emissions, EPA modeling indicates that E15 slightly increases nitrogen oxides and particulate matter relative to E10, and considerably reduces benzene, hydrocarbons, and carbon monoxide. JA[84_Fed._Reg._at_27,012. Other studies show that nitrogen oxide emissions are unchanged with E10 and E15.

JA[NCGA_Comment_Letter_at_4]. None of these effects, however, "are []likely to affect ambient air quality beyond the margin of error in air quality monitoring." JA[84_Fed._Reg._at_27,011].

2. Production and Distribution of E10 and E15

To make E10 or E15, ethanol must be combined with petroleum-derived gasoline blendstock. Generally, such blendstock is either produced at a domestic refinery or imported, and then transported to a fuel terminal via pipeline (unless the terminal is located at the refinery). JA[84_Fed._Reg._at_10,594]. Because ethanol generally is not transported by pipeline, "oxygenate blenders" make E10 at the terminal by adding ethanol to blendstock during truck-loading for delivery to retail stations. JA[84_Fed._Reg._at_10,594, 26,986]. Much of the blending to produce E15 occurs at terminals in the same way. *See* JA[84_Fed._Reg._at_10,595]; A-6.[1]

"[E]ssentially all [U.S.] gasoline contained 10% ethanol by around 2013." JA[84_Fed._Reg._at_26,985]. As of the Final Rule's promulgation, E15 was available at approximately 1% of retail stations. JA[84_Fed._Reg._at_26,986]. Due to infrastructure and other constraints beyond the regulatory barriers lifted by the Final Rule, EPA projects "about a 0.1 percent increase" in that figure annually.

[1] Some E15 is produced at retail stations using "blender pumps," which enable E15 to be blended on-site by combining E10 with E85 (50-83% ethanol). *See* JA[84_Fed._Reg._at_10,595]; A-6.

JA[84_Fed._Reg._at_27,010]. Petroleum thus accounts for approximately 90% of U.S. gasoline, and is projected to do so for the foreseeable future, however this Court rules. Nothing in the Final Rule mandates any change in the level of ethanol in gasoline.

B. Legal Background

1. Original Statutory Framework

The Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, "established the basic framework for EPA's fuels regulations." JA[84_Fed._Reg._at_26,984]. Relevant here, 42 U.S.C. § 7545(a) and (b) authorize EPA to "designate" fuels and additives that manufacturers must "register" before introducing them into commerce. Section 7545(c) then authorizes EPA to control or prohibit fuels or additives that harm public health or welfare or impair vehicle emissions controls, subject to substantive and procedural safeguards.

2. Enactment of § 7545(f)

Congress amended the Clean Air Act in 1977 due to concerns stemming from new regulations governing the octane enhancer tetraethyl lead. In 1973, EPA determined that lead would impair the catalytic converters automakers were developing to meet 1975 emissions standards, so it mandated the sale of unleaded gasoline under § 7545(c). 38 Fed. Reg. 33,734 (Dec. 6, 1973). As refiners turned to new octane enhancers, Congress was concerned that they too would impair catalytic converters. Under the 1970 statute, however, refiners could register and

sell new octane enhancers without prior emissions testing. And without test data, EPA would lack a factual basis to regulate new octane enhancers under § 7545(c). *See* S. Rep. No. 95-127, at 90-91 (1977).

Congress accordingly mandated pre-registration testing under new § 7545(e). Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 222, 91 Stat. 685. Congress also added § 7545(f), which provides in what is now § 7545(f)(1)(A):

> [I]t shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce[] … any fuel or fuel additive for general use in light duty 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 ….

In 1990, Congress added a parallel prohibition in § 7545(f)(1)(B) that is not limited to fuels and additives sold "for general use in light duty motor vehicles," but extends to fuels and additives sold "for use by any person in motor vehicles." Clean Air Act Amendments of 1990, Pub. L. 101-549, § 214, 104 Stat. 2399.

The 1977 amendments also added § 7545(f)(4). That provision now allows EPA to "waive" the prohibition in § 7545(f)(1) if the manufacturer

> has established that [the] fuel or fuel additive … will not cause or contribute to a failure of any emission control device or system … to achieve compliance by the vehicle or engine with the emissions standards with respect to which it has been certified ….

3. E10 Waiver and EPA's "Substantially Similar" Interpretations

In 1978, EPA received a waiver application under § 7545(f)(4) for E10. Because EPA did not act on the application within 270 days, the waiver was unconditionally granted by operation of law. 44 Fed. Reg. 20,777 (Apr. 6, 1979).[2]

From 1980 to 2008, EPA also issued several interpretive rules allowing ethanol blends to enter the market under § 7545(f)(1). These interpretations specified physical and chemical characteristics for fuels to qualify as "substantially similar" or "sub-sim" to the standard certification test gasoline used during that time—an E0 formulation known as "indolene." JA[84_Fed._Reg._at_26,994]. EPA's sub-sim interpretations allowed increasing concentrations of oxygen, eventually corresponding to 7.7% ethanol by volume. 45 Fed. Reg. 67,443 (Oct. 10, 1980); 46 Fed. Reg. 38,582 (July 28, 1981); 56 Fed. Reg. 5,352 (Feb. 11, 1991); 73 Fed. Reg. 22,277 (Apr. 25, 2008). Although 7.7% ethanol increases RVP by approximately 1.0 psi, EPA's sub-sim interpretations did not address volatility except to require it to fall within the general range industry standards allowed. *See* 56 Fed. Reg. at 5,354-55.

[2] Congress later eliminated the automatic granting provision. *See* JA[84_Fed._Reg._at_26,984] n.19.

4. Enactment of § 7545(h)

In 1989 and 1990, EPA first promulgated regulations to control gasoline volatility and resulting evaporative emissions. 54 Fed. Reg. 11,868 (Mar. 22, 1989); 55 Fed. Reg. 23,658 (June 11, 1990). Issued under § 7545(c), the regulations limited gasoline's RVP during summertime "regulatory control periods" when evaporative emissions contribute to ozone formation in different areas of the country. 40 C.F.R. § 80.27(a) (1990).

EPA's volatility regulations included "[s]pecial provisions for alcohol blends," providing that a qualifying blend would be deemed compliant "if its [RVP] does not exceed the [otherwise] applicable standard … by more than one [psi]." *Id.* § 80.27(d)(1). To qualify for this "allowance," blends had to contain "at least 9% ethanol (by volume)," with "[t]he maximum ethanol content … not exceed[ing] any applicable waiver conditions under section [7545](f)(4)." *Id.* § 80.27(d)(2). At the time, that maximum ethanol content was 10% under the 1978 E10 waiver. The regulations thus effectively provided an "RVP allowance of 1.0 psi for ethanol blends of approximately 10 percent by volume." 54 Fed. Reg. at 11,869. But nothing would have prohibited higher-ethanol blends from receiving the 1-psi allowance had they received a waiver under § 7545(f)(4).

Explaining the special ethanol provisions, EPA noted that "lower RVP [base] gasoline would be necessary to produce [E10] which could meet the

gasoline RVP standards, and yet … the refining industry was not likely to make available sufficient lower-RVP product to maintain a significant [E10] market." 55 Fed. Reg. at 23,665. The allowance thus was necessary to avoid "potential economic jeopardy to the fuel ethanol industry." *Id.*

Later in 1990, Congress largely codified EPA's volatility regulations in new § 7545(h). Clean Air Act Amendments of 1990, Pub. L. 101-549, § 216, 104 Stat. 2399. Section 7545(h)(1) directs EPA to promulgate regulations generally setting an RVP limit of 9.0 psi during the summer "high ozone season."

Section 7545(h)(4) then codifies EPA's special ethanol provisions, in two clauses. The first establishes a 1-psi allowance, similar to the 1-psi allowance in EPA's regulations, providing that, "[f]or fuel blends containing gasoline and 10 percent denatured anhydrous ethanol, the [RVP] limitation under this subsection shall be one [psi] greater than the applicable [RVP] limitations under paragraph (1)." The second clause establishes a compliance defense for downstream parties like blenders and retailers, which have limited control over the RVP of the overall blend, enabling them to avoid burdensome RVP testing. Under this defense, downstream parties are "deemed to be in full compliance" with EPA's volatility regulations as long as the blend's gasoline portion complies with the RVP limits, no other additives have been added to increase RVP, and—critically here—"the ethanol portion of the blend does not exceed its waiver condition under subsection

(f)(4).” 42 U.S.C. § 7545(h)(4). On its face, the quoted language extends this compliance defense not just to E10, but to any blend that receives a waiver under § 7545(f)(4).

In 1991, EPA revised its volatility regulations to implement new § 7545(h). EPA stated that it was “not making any change to” the regulatory RVP allowance. 56 Fed. Reg. 64,704, 64,708 (Dec. 12, 1991). But in fact, EPA amended its regulations to provide that “the concentration of the ethanol … must be at least 9% and no more than 10%.” 80 C.F.R. § 80.28(d)(2) (1991). EPA thus for the first time limited the allowance to E10.

5. EPA’s Definition of “Fuel Manufacturer”

In 1997, EPA revised its registration and testing regulations under § 7545(a), (b), and (e). Those statutory provisions—and § 7545(f) as well—impose obligations on fuel or additive “manufacturer[s].” Similarly, EPA’s implementing regulations apply to “fuel manufacturers.” EPA generally defines “fuel manufacturer” as any person that produces, manufactures, or imports fuel, alters a fuel’s chemical composition, or adds an additive. 40 C.F.R. § 79.2(d). In 1997, however, EPA clarified that “[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.” *Id.* § 79.2(d)(2); 62 Fed. Reg. 12,564, 12,571 (Mar. 17, 1997). EPA thus “exempt[ed]” from its definition “all entities

whose only 'manufacturing' activity is the blending of oxygenates" in allowable amounts. *Id.* at 12,566.

6. E15 Partial Waivers

In 2009, Growth Energy and 54 ethanol producers submitted a waiver application for E15 under § 7545(f)(4). In 2010, EPA partially granted and partially denied the application. 75 Fed. Reg. 68,094 (Nov. 4, 2010). EPA allowed manufacturers to sell E15 for use in Model Year 2007 and newer light-duty vehicles, but prohibited it for use in Model Year 2000 and older light-duty vehicles, as well as heavy-duty vehicles, motorcycles, and nonroad equipment. *Id.* at 68,149. EPA deferred decision on Model Year 2001-2006 light-duty vehicles to await additional test data. *Id.* at 68,094. In 2011, EPA granted the application for those intervening model years. 76 Fed. Reg. 4,662, 4,682 (Jan. 26, 2011).

EPA's 2010 and 2011 partial waivers contained conditions—most importantly, that "[t]he final fuel must have a[n] [RVP] not in excess of 9.0 psi during the time period from May 1 to September 15." *Id.*; 75 Fed. Reg. at 68,149. EPA reasoned that there was a "lack of data" regarding how E15 at 10.0 psi "would impact compliance with the emissions standards." *Id.* at 68,096. The E15 partial waivers and accompanying conditions, however, apply only to "fuel and fuel additive manufacturers." *Id.* at 68,150; 76 Fed. Reg. at 4,682. At the time,

EPA did not specify whether that term excludes oxygenate blenders, consistent with 40 C.F.R. § 79.2(d).

Later in 2011, EPA promulgated "misfueling mitigation" regulations under § 7545(c) to ensure that parties downstream of fuel manufacturers—including oxygenate blenders—would sell E15 in compliance with the partial waiver conditions. 76 Fed. Reg. 44,406 (July 25, 2011). In 2012, E15 was registered under § 7545(b) and first introduced into commerce. JA[84_Fed._Reg._at_27,002].

7. E10 Certification Fuel

In 2014, EPA promulgated new "Tier 3" vehicle emissions and fuel standards. 79 Fed. Reg. 23,414 (Apr. 28, 2014). In that rulemaking, EPA replaced E0 indolene with an E10 gasoline ("E10 certification fuel") as the "new emissions test fuel" for certifying gasoline vehicles. *Id.* at 23,419. Vehicle manufacturers began using E10 certification fuel for Model Year 2017, and nearly all light-duty vehicles were to be certified on this fuel starting in Model Year 2020. *Id.* at 23,476.

C. This Rulemaking

Under the E15 partial waivers and EPA's interpretation of § 7545(h)(4) limiting the 1-psi allowance to blends with 9-10% ethanol, E15 was subject to a stricter summertime volatility limit (9.0 psi) than E10 (10.0 psi). That was so even though, when blended in the same gasoline blendstock, E15 is *less* volatile than E10, with *lower* evaporative emissions. On June 10, 2019, EPA promulgated the

Final Rule "to create parity in the way the RVP of both E10 and E15 fuels is treated under EPA regulations." JA[84_Fed._Reg._at_26,981]. EPA "finaliz[ed] three steps to accomplish this change." JA[84_Fed._Reg._at_26,982].

First, EPA reconsidered its "interpretation of [§ 7545](h)(4)." *Id.* Upon further consideration of the relevant factors, EPA concluded that the statutory phrase "fuel blends containing gasoline and 10 percent denatured anhydrous ethanol" is best interpreted as "establishing a lower limit, or floor, on the minimum ethanol content" required for the 1-psi allowance. JA[84_Fed._Reg._at_26,992]. Because a blend with more than 10% ethanol still holds 10% ethanol within it, EPA concluded that any blend with "at least 10 percent ethanol may receive the 1-psi [allowance]"—including E15. *Id.*

Second, EPA "finaliz[ed] two approaches to address [§ 7545](f)." JA[84_Fed._Reg._at_26,982]. As one approach, EPA "f[ou]nd that E15 is 'substantially similar' … to … E10 certification fuel for use in MY2001 and newer light-duty vehicles." *Id.* Under this approach, because E15 satisfies the "substantially similar" requirement in § 7545(f)(1), fuel manufacturers may sell it "without the use of the E15 waivers" under § 7545(f)(4). JA[84_Fed._Reg._at_26,993]. Fuel manufacturers therefore may sell E15 without complying with the RVP condition in the 2010/2011 E15 partial waivers.

In the other approach, EPA "ma[de] clear that the conditions on the [E15 partial] waivers" do not apply to "downstream oxygenate blenders in most circumstances." JA[84_Fed._Reg._at_26,982]. EPA did so by "interpret[ing] [§ 7545](f) as applying the [E15 partial] waiver conditions [only] to fuel and additive manufacturers as defined in 40 CFR 79.2." JA[84_Fed._Reg._at_27,009]. Because oxygenate blenders are excluded from that definition, they are not subject to the prohibition in § 7545(f)(1), need not rely on the E15 partial waivers under § 7545(f)(4), and therefore need not comply with the RVP condition on those waivers. Thus, while oxygenate blenders remain subject to regulation under § 7545(c) and (h), they may sell E15 without relying on the E15 partial waivers or EPA's new sub-sim interpretation.

Third, in conformity with the foregoing changes, EPA "modif[ied] [its] regulations" under § 7545(c) to remove certain RVP-related restrictions on the sale of E15, which EPA had imposed in its 2011 misfueling regulations. JA[84_Fed._Reg._at_26,982].

SUMMARY OF ARGUMENT

Petitioners mount two main challenges to the Final Rule. Both are meritless.

First, Petitioners challenge EPA's interpretation of the 1-psi allowance in § 7545(h)(4). But EPA's reading is *compelled* by the statutory text, structure, purpose, and history. E15 "contain[s] gasoline and 10 percent … ethanol," just as

the first clause of § 7545(h)(4) requires, plus an additional 5%. The second clause of § 7545(h)(4) confirms this reading, providing a compliance defense for blends that receive a waiver under § 7545(f)(4), including higher-ethanol blends above E10, such as E15. It makes no sense that this defense would be available to higher-ethanol blends but the 1-psi allowance itself would not. Moreover, E15 has more ethanol and lower volatility than E10 and *reduces* evaporative emissions, *better* serving § 7545(h)(4)'s goals. And Congress rejected a proposal that would have capped the 1-psi allowance at 10%. At a minimum, EPA's interpretation is reasonable and merits deference.

Second, Petitioners challenge EPA's determination that E15 is "substantially similar" to E10 certification fuel under § 7545(f)(1). But because Petitioners have not challenged EPA's alternative approach to § 7545(f) clarifying that the sub-sim requirement does not apply to oxygenate blenders in the first place, Petitioners lack standing to challenge the sub-sim interpretation. Regardless, on the merits, EPA appropriately determined that E15 is substantially similar to "any" (*i.e.*, at least one) certification fuel, sensibly limited its analysis to vehicles in which E15 actually will be used, and reasonably evaluated the evidence about exhaust emissions and materials compatibility. EPA also reasonably determined that its sub-sim interpretation, combined with the 1-psi allowance in § 7545(h)(4), allows manufacturers to sell E15 at 10.0 psi in the summer. And even if Petitioners'

arguments had merit, EPA's sub-sim interpretation is severable from the remainder of the Final Rule.

ARGUMENT

I. THE COURT SHOULD UPHOLD EPA'S INTERPRETATION OF THE 1-PSI ALLOWANCE IN § 7545(h)(4)

To correct the asymmetric treatment of E10 and E15 under § 7545(h)(4), EPA revised its interpretation of that provision so that the 1-psi allowance extends not just to E10, but also to E15. That interpretation is correct; at a minimum, it is reasonable and within EPA's authority.

A. The Statutory Text, Structure, Purpose, and History Together Require Extending the 1-psi Allowance to E15

EPA concluded that § 7545(h)(4) is "ambiguous and provides room for EPA to make interpretive and policy choices," including to extend the 1-psi allowance to E15. JA[84_Fed._Reg._at_26,992]. In fact, viewed in context, § 7545(h)(4) is not ambiguous; "traditional tools of statutory construction," including the "text, structure, purpose, and history," together *compel* EPA's revised interpretation, at *Chevron* "step one." *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012) (citation omitted).

1. Statutory Text

The first clause of § 7545(h)(4) provides a 1-psi RVP allowance for "fuel blends containing gasoline and 10 percent denatured anhydrous ethanol." The statute does not define "containing," but by its ordinary meaning, "contain" means

"to have within: hold." JA[84_Fed._Reg._at_26,992] (citation omitted). By that definition, the 1-psi allowance extends to *all* blends that have within or hold 10% ethanol, even if they also have within or hold additional ethanol. That includes E15, which has 10% ethanol, plus an additional 5%. As EPA explained, "the statute sets the minimum ethanol content, such that all fuels which contain at least 10 percent ethanol may receive the 1-psi [allowance], including blends that contain more than 10 percent ethanol." JA[84_Fed._Reg._at_26,992].

Petitioners offer an alternative definition whereby "contain" means "to keep within limits," Pet'rs Br. 29 (citation omitted)—*i.e.*, to restrain or control something to prevent its escape, as in measures to "contain a virus" or a pen to "contain your puppy." That definition makes no sense in § 7545(h)(4), which is aimed at promoting ethanol use, not preventing its escape. EPA's definition is far more natural in this context.

It does not matter that Congress did not specify that the 1-psi allowance applies to blends containing "at least" 10% ethanol. *See* Pet'rs Br. 30-33. Courts recognize that the ordinary meaning of "containing" is "inclusive or open-ended and do[es] not exclude additional, unrecited elements." *Waters Corp. v. Agilent Tech. Inc.*, 2019 WL 6255181, at *4 (D. Del. Nov. 22, 2019). Ordinary parlance thus often "uses the phrase 'containing at least' in the same way—and essentially interchangeably—with the way it uses the word 'containing.'" *Id.*

Petitioners also are incorrect that "containing" in § 7545(h)(4) cannot mean "containing at least" because "the statute refers to a *percentage*, which specifically denotes parts out of 100 and thus refers to a specific proportion." Pet'rs Br. 29. The formulation "containing X%" often means "containing at least X%" where, as here, the percentage sets a prescriptive requirement, and the requirement's purpose is better served if the percentage is exceeded. For example, consider a regulation providing that to label a beverage as "juice," it "must contain 5% real fruit juice." A company selling "juice" made with 10% real fruit juice would not fear liability under that regulation. In fact, under FDA's actual regulations, a beverage labeled as "containing 10% juice" may contain *more than* 10% juice. *See* 21 C.F.R. § 101.30(b)(1); *see also* EPA Br. 40 (additional example). Even the Supreme Court has used "contain … 8.25 percent" to mean "contain not less than" that amount. *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 65 (2003); 21 C.F.R. § 131.110(a).

Similarly unavailing is Petitioners' citation to "usage of the word 'containing' by [certain] courts and EPA itself." Pet'rs Br. 28. To be sure, those examples demonstrate that, in some contexts, "containing" can refer to a specific amount or proportion. In Petitioners' examples, however, the word "containing" is used descriptively, indicating the specific proportions particular mixtures actually held. Here, the word sets a prescriptive threshold that a blend must meet to qualify for the 1-psi allowance. And critically, as in the juice example above,

§ 7545(h)(4)'s purpose is *better* served if the minimum threshold is exceeded. *Infra* pp. 22-23. In this context, "containing" is best read to mean "containing at least."

2. Statutory Structure

The second clause of § 7545(h)(4) strongly supports EPA's interpretation. That clause establishes a compliance defense whereby downstream parties are "deemed to be in full compliance" with § 7545(h) if, among other things, "the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4)." Critically, Congress did not limit this defense to blends where the ethanol portion "does not exceed 10 percent." Instead, the defense has an upper ethanol limit at the maximum content allowed by a waiver under § 7545(f)(4)—currently, 15%. The first clause of § 7545(h)(4) thus sets a *floor* (10%) for the allowance itself, and the second clause an adjustable *ceiling* for the compliance defense (the maximum ethanol content allowed under § 7545(f)(4)). This structure mirrors the preexisting volatility regulations on which Congress modeled § 7545(h)(4), which provided a 1-psi allowance for blends of "at least 9% ethanol" with "[t]he maximum ethanol content … not exceed[ing] any applicable waiver conditions under [§ 7545](f)(4)." 40 C.F.R. § 80.27(d)(2) (1990).

Petitioners never discuss § 7545(h)(4)'s second clause, which is inconsistent with their interpretation. In that clause, Congress plainly contemplated that EPA might grant § 7545(f)(4) waivers for higher-ethanol blends beyond E10. EPA did

so for E15 in 2010-2011, making E15 eligible for the compliance defense. On Petitioners' reading, however, E15 remained *ineligible* for the 1-psi allowance itself under the provision's first clause. Petitioners never explain how Congress could have intended that incongruous result, which EPA's interpretation avoids. Statutory provisions "should be interpreted in a way that renders them compatible, not contradictory. There can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." *Maracich v. Spears*, 570 U.S. 48, 68 (2013) (cleaned up; citation omitted).[3]

3. Statutory Purpose and Legislative History

Congress's purpose also strongly supports EPA's reading. Congress enacted the 1-psi allowance to "allow ethanol blending to continue to be a viable alternative fuel, with its beneficial environmental, economic, agricultural, energy security and foreign policy implications," without need for "a production and distribution network for sub-nine pound gasoline." S. Rep. No. 101-228, at 110 (1989); *see* 55 Fed. Reg. at 23,665 (similar in predecessor EPA regulations). EPA's reading serves § 7545(h)(4)'s ethanol-promoting purpose, while Petitioners'

[3] In 2014, EPA took the view that § 7545(h)(4)'s second clause, like the first clause, is limited to 9-10% ethanol. *See* 76 Fed. Reg. at 44,433-35. That is irreconcilable with the statutory text; indeed, EPA reasoned in part that § 7545(h)(4)'s second clause supposedly "cannot be read literally." *Id.* at 44,434.

reading conflicts with it. If the benefits of 10% ethanol merit a 1-psi allowance, then higher-ethanol blends merit it even more.

Petitioners repeatedly suggest that E15 has higher volatility and evaporative emissions than E10, Pet'rs Br. 6-7, 10, 37-39, but that is false, *supra* pp. 4-5. E10 lies at the peak of the ethanol-volatility curve; higher-ethanol blends are less volatile, *reducing* evaporative emissions and *better* serving the environmental objectives of § 7545(h) overall. Regardless, E15 remains subject to the same RVP cap as E10. It therefore cannot be sold at a summertime RVP above 10.0 psi—a level Congress found acceptable for ethanol blends in light of their numerous benefits. Petitioners cite a tax exemption and other provisions offering special treatment to blends with "at least" 10% ethanol, Pet'rs Br. 31-32, but they never explain why Congress would have wanted the 1-psi allowance to be limited to E10.

Furthermore, Congress rejected a proposal for § 7545(h)(4) with an explicit 10% ceiling. The original Administration bill provided a 1-psi allowance limited to "gasoline containing at least 9 but not more than 10 per centum ethanol (by volume)." H.R. 3030, 101st Cong. § 214 (1st Sess. 1989); S. 1490 101st Cong. § 214 (1st Sess. 1989). The House and Senate both rejected that proposal. *See* JA[84_Fed._Reg._at_26,992]; JA[RTC_at_10-11]. Petitioners thus would read § 7545(h)(4) to match language both chambers of Congress rebuffed.

B. Even if § 7545(h)(4) Were Ambiguous, EPA's Interpretation Is Reasonable

If Congress has not spoken clearly for purposes of *Chevron* "step one," § 7545(h)(4) is at least ambiguous, and EPA's reading is reasonable under *Chevron* "step two." *Petit*, 675 F.3d at 785. Textually, Petitioners rely on an alternative dictionary definition and the absence of a modifier like "at least." But the statute *also* lacks a modifier like "no more than." *See* EPA Br. 39. That kind of statutory "[s]ilence" at most indicates ambiguity. *Catawba Cty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009). Petitioners also ignore contrary legislative history and obscure that EPA's interpretation is more "consistent with the Congress's objective." *Wagner Seed Co., Inc. v. Bush*, 946 F.2d 918, 925 (D.C. Cir. 1991).

Petitioners assert that "EPA failed to adequately address its previous interpretation and explain its change in legal interpretation." Pet'rs Br. 41. But EPA acknowledged its prior position, noted how circumstances have changed, and explained the legal and policy basis for its revised interpretation. *See* JA[84_Fed._Reg._at_26,990-93]. That easily clears the "low bar" of demonstrating that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 377 (D.C. Cir. 2013).

II. THE COURT SHOULD UPHOLD EPA'S "SUBSTANTIALLY SIMILAR" INTERPRETATION UNDER § 7545(f)(1)

In addition to § 7545(h), EPA also addressed the asymmetric treatment of E10 and E15 under § 7545(f)—including by determining that E15 is "substantially similar" to E10 certification fuel. Petitioners' challenge to that determination fails. Petitioners lack standing to challenge EPA's sub-sim interpretation; the sub-sim interpretation is reasonable; and even if it were unreasonable, it is severable from the remainder of the Final Rule.

A. Petitioners Lack Standing To Challenge EPA's "Substantially Similar" Interpretation

Even assuming Petitioners have standing to challenge other aspects of the Final Rule, they lack standing to challenge EPA's sub-sim interpretation. "[S]tanding is not dispensed in gross but instead may differ claim by claim." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017) (quotation marks omitted). As explained, EPA's sub-sim interpretation is one of two approaches to § 7545(f) in the Final Rule. Because Petitioners have not challenged EPA's alternative approach clarifying that oxygenate blenders are not fuel manufacturers subject to the sub-sim requirement or the E15 partial waiver conditions, invalidating EPA's sub-sim interpretation would not redress Petitioners' alleged injuries.

At every stage, EPA made clear that its sub-sim interpretation and fuel manufacturer clarification represented two separate, independently sufficient approaches to correcting the asymmetric treatment of E10 and E15 under § 7545(f). At proposal, EPA "co-propos[ed] two potential mechanisms" to "allow the introduction into commerce of E15 at 10.0 [psi] RVP in the summer under [§ 7545](f)"—one "that would find that E15 is substantially similar" to E10 certification fuel, and another that would "clarif[y] [EPA's] interpretation of [§ 7545](f), making it clear that the conditions" on the E15 partial waivers do not apply "to downstream oxygenate blenders." JA[84_Fed._Reg._10,587]. The Final Rule "finaliz[ed]" *both* of those "two approaches to address [§ 7545](f)." JA[84_Fed._Reg._at_26,982]. EPA also repeatedly explained that the fuel manufacturer clarification "is an independent basis from the … sub sim interpretation for the regulatory amendments finalized in this rulemaking," JA[84_Fed._Reg._at_27,009]; *see* JA[84_Fed._Reg._at_26,983] n.12; JA[RTC_at_22].

EPA's two approaches are alternative solutions to the same problem. Under EPA's fuel manufacturer clarification, oxygenate blenders are not fuel "manufacturer[s]" subject to the sub-sim requirement in § 7545(f)(1) or any waiver conditions under § 7545(f)(4) if their only "manufacturing" activity consists of blending ethanol in "allowable amounts." 40 C.F.R. § 79.2(d)(2). And under EPA's

revised interpretation of the 1-psi allowance in § 7545(h)(4) and EPA's amended misfueling regulations, blending ethanol to make E15 at 10.0 psi in the summer is "allowable." Oxygenate blenders therefore need not rely on EPA's sub-sim interpretation or the E15 partial waivers, because they are not "manufacturer[s]" subject to the sub-sim requirement in the first place.

Petitioners allege competitive harm and other injuries only from increased sales of E15 by *other* parties—they seek to block those third-party sales by reinstating the regulatory barrier the sub-sim interpretation removes.[4] But Petitioners have not identified any third-party entity currently selling E15 lawfully at 10.0 psi in the summer that could not do so anyway as an oxygenate blender, regardless of the sub-sim interpretation. As noted, ethanol is typically blended into gasoline at fuel terminals by oxygenate blenders. *Supra* p. 6. Although EPA's definition of "fuel manufacturer" includes "refiner[s]," 40 C.F.R. § 79.2(d), to the extent there are third-party refiners currently selling small amounts of E15 at 10.0 psi in the summer, they can easily qualify as oxygenate blenders by simply organizing their ethanol blending operations as a separate corporate entity from their refinery operations. *See* 40 C.F.R. § 79.2(d) (defining "[f]uel manufacturer"

[4] To the extent Petroleum Petitioners' members *themselves* wish to sell E15, the Final Rule *benefits* E15 sellers, including fuel manufacturers.

as a "person," regardless of corporate affiliates); A-10.[5] And if refiners selling E15 exit the market, oxygenate blenders can readily replace the lost supply. A-10, 11.[6] In sum, the increased E15 sales that are the source of Petitioners' alleged injuries will result from EPA's interpretation of § 7545(h)(4) and the fuel manufacturer clarification alone; the sub-sim interpretation makes no difference.

The unchallenged fuel manufacturer clarification poses further standing problems for the Coalition of Fuel Marketers and Citizens Concerned About E15. Those parties rely on increased E15 sales at *particular* retail stations—those that compete with the fuel marketers' customers and those near Citizens' members. Pet'rs Br. 22-23, 25. But Petitioners have not shown that those retail stations must rely on the sub-sim interpretation, rather than the fuel manufacturer clarification, to sell E15 lawfully in the summer at 10.0 psi.[7]

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[5] EPA's "fuel manufacturer" definition also includes "importer[s]," 40 C.F.R. § 79.2(d), but neither E10 nor E15 is imported into the United States, A-5.

[6] EPA has taken the view that certain blender pump operators—those producing E15 by blending E10 with E85 made from uncertified natural gas liquids—are "refiners," not "oxygenate blenders." *See* JA[RTC_at_53]. Under that view, however, because those blender pump operators do not comply with the manufacturer registration requirements under § 7545(b), they cannot lawfully sell E15 even *with* EPA's sub-sim interpretation. *See* A-7 & n.5.

[7] The Engine Manufacturers lack standing to challenge *any* part of the Final Rule under *Grocery Manufacturers Association v. EPA*, 693 F.3d 169, 175-76 (D.C. Cir. 2012).

In light of EPA's unchallenged fuel manufacturer clarification, invalidating EPA's sub-sim interpretation would not help Petitioners at all. *Cf. Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 206 (D.C. Cir. 2011) (finding challenge to EPA regulations moot after California imposed identical requirements). They therefore lack standing to challenge it.

B. EPA Reasonably Found E15 To Be "Substantially Similar" To E10 Certification Fuel

1. EPA Reasonably Found E15 To Be Substantially Similar to a Fuel Utilized in Post-1975 Vehicle Certifications

On the merits, Petitioners first argue that E15 cannot be sold under § 7545(f)(1) unless it is "substantially similar to *all* existing certification fuels," including E10 certification fuel *and* indolene. Pet'rs Br. 41. The statutory text, structure, purpose, and history foreclose that strained reading at *Chevron* step one.

Textually, § 7545(f)(1) makes it "unlawful" for manufacturers to sell "a fuel or additive … 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." 42 U.S.C. § 7545(f)(1)(A), (B) (emphases added). By its "plain meaning," the word "any" "mean[s] 'one, some, or all indiscriminately of whatever quantity.'" JA[84_Fed._Reg._at_26,996] (quoting Webster's Third New Int'l Dictionary (1976)); *see* Pet'rs Br. 44 (quoting similar definition). So, in the context of § 7545(f)(1), if a new fuel is substantially similar to one certification fuel—or

more than one, or all certification fuels—then manufacturers may sell it. Conversely, if a new fuel is *not* substantially similar to even one certification fuel, then manufacturers may *not* sell it.

EPA's reading accords with everyday usage. If a child has a red, a blue, and a green scarf, and is told to pick a jacket the same color as "any" of her scarves, she can choose a jacket that is red, blue, *or* green. Similarly, if the child is told, "you cannot pick a jacket that is not the same color as any of your scarves," she still can choose among the three different colors. She would not think that she could only pick a jacket that is simultaneously red, blue, *and* green.

Petitioners argue that "any" means "every." *Id.* at 43. But the case they cite concerned a provision that uses "any" very differently than § 7545(f)(1). *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018) (addressing provision requiring Patent Office to "issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner"). Moreover, that case relied on a dictionary definition that applies only in certain "affirmative contexts." *Id.* (citation omitted). Here, Petitioners themselves argue that § 7545(f)(1) "is framed in the negative." Pet'rs Br. 43. Petitioners' inconsistency about whether § 7545(f)(1) involves a negative or affirmative context calls into question that distinction's usefulness here. Regardless, while Petitioners note that, in "negative context[s]," "any" can mean "even a single," Pet'rs Br. 43-44 (quotation marks omitted),

EPA's interpretation is consistent with that definition. If a new fuel is *not* substantially similar to "even a single" certification fuel—*i.e.*, it is substantially similar to *none*—then manufacturers may not sell it.

Effectively, Petitioners seek to rewrite the statute to prohibit manufacturers from selling a new fuel that "is not substantially similar to *every* [certification] fuel" or "*is substantially different from* any [certification] fuel." Congress could have enacted a statute like that. It did not.

The surrounding statutory and regulatory structure reinforces EPA's reading. Congress left the specification of certification fuels to EPA's discretion, 42 U.S.C. § 7525, and it would be far-fetched to expect manufacturers to compare new fuels with *every* certification fuel ever used since 1975. EPA's current regulations include numerous different certification fuels, and EPA has long allowed vehicle manufacturers to petition to use their own bespoke certification fuels. 40 C.F.R. §§ 1065.703-1065.735; *id.* § 86.113-04(a)(2); 46 Fed. Reg. 50,493, 50,471 (Oct. 13, 1981). Petitioners do not attempt to catalogue every relevant certification fuel.

Worse, certification fuels and additives are not "substantially similar" *to each other*. Indolene (E0) and E10 certification fuel, for example, are not "substantially similar" to each other—that is why E10 entered the market via the 1978 waiver under § 7545(f)(4), rather than a sub-sim interpretation under § 7545(f)(1). No new fuel can be substantially similar to both E0 and E10, just as,

in the scarf example above, a jacket cannot be the same color as both a green *and* a red scarf. Furthermore, under Petitioners' reading, a new fuel also "would need to be sub sim to diesel fuel [and] E85," which is "nonsensical." JA[RTC_at_27]. And new additives would have to be substantially similar to every additive ever used in certification. That too is nonsensical.

This problem, moreover, is not new. EPA has had multiple substantially different certification fuels since before § 7545(f)(1)(B) was enacted in 1990. *See* 40 C.F.R. § 86.113-90 (1990). So on Petitioners' reading, the sub-sim requirement in § 7545(f)(1)(B) was dead on arrival—it *never* could be met for any new fuel. Petitioners respond that "EPA could compare a new fuel only to all certification fuels within its 'fuel family.'" Pet'rs Br. 48. But that response ignores additives, which § 7545(f)(1) addresses in parallel with fuels. And even within the gasoline fuel family, indolene and E10 certification fuel are not substantially similar to each other. So even Petitioners' fallback interpretation renders the sub-sim requirement a dead letter.

More fundamentally, Petitioners' "fuel family" response abandons any pretense of textual grounding. Petitioners never explain how Congress in 1977 or 1990 could have intended "any [certification] fuel" to mean "every [certification] fuel *within the relevant fuel family*"—especially when fuel families did not appear in EPA regulations until 1994. 59 Fed. Reg. 33,042 (June 27, 1994). The

implication of multiple dissimilar certification fuels and additives is clear: "any" in § 7545(f)(1) does *not* mean "every."

Contrary to Petitioners' assertion, EPA has never stated that new fuels must be substantially similar to "all certification fuels used for the broad range of motor vehicle model years." Pet'rs Br. 45 (citation omitted). While EPA "*consider[s]* all certification fuels," 75 Fed. Reg. at 68,143 (emphasis added), it does not require new fuels to be substantially similar to all certification fuels. EPA has *never* rejected a new fuel because it was substantially similar to one certification test fuel but not a second, let alone *all* such fuels.

EPA's interpretation also accords with § 7545(f)(1)'s purpose and history. The provision is not designed "to ensure backwards compatibility for new fuels in previously-manufactured vehicles." Pet'rs Br. 41. It was enacted with an eye toward novel octane enhancers, which Congress feared would damage catalytic converters in *new*, post-1975 vehicles. *Supra* pp. 7-8. But Congress did not want to ban new fuels and additives altogether, or to require all new fuels and additives to obtain waivers under § 7545(f)(4). So the sub-sim requirement strikes a balance—new fuels and additives may be "first introduced into commerce" without a waiver if they are "substantially similar" to at least one fuel or additive used in certification. 42 U.S.C. § 7545(f)(1)(A), (B). New fuels and additives that meet

that requirement are unlikely to impair emissions control systems. And if increased emissions do result, EPA retains regulatory authority under § 7545(c).

2. EPA Reasonably Found E15 To Be Substantially Similar When Used in a Particular Category of Vehicles

Petitioners next argue that § 7545(f)(1) bars EPA from "mak[ing] a substantial-similarity determination for only a subset of model years"—here, Model Year 2001 and newer light-duty vehicles. Pet'rs Br. 49. Again, Petitioners are mistaken.

The phrase "substantially similar" is the kind of "broad and open-ended term[]"—"like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable'"—that "afford[s] agencies broad policy discretion." *Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 655 (D.C. Cir. 2019) (citation omitted). Consistent with § 7545(f)(1)'s purpose, EPA has given "substantially similar" a functional reading, requiring new fuels to have "general physical and chemical characteristics" that sufficiently resemble certification fuel such that they will not "impair … emission controls." JA[84_Fed._Reg._at_26,994, 26,997].

Of course, a new fuel's emissions effects depend on the vehicles and engines in which the fuel actually will be used. EPA therefore sensibly "look[s] only to [a new fuel's] use in the engines and vehicles within which it can be used, and not its use in vehicles and engines which are fueled by other types of fuel." JA[84_Fed._Reg._at_26,996]. This, moreover, was "a unique circumstance"

where, due to EPA's analysis in the E15 partial waivers, EPA already "ha[d] knowledge of the use of E15 in particular vehicles and engines." *Id.* And while Congress enacted § 7545(f)(1) to prevent new fuels and additives from harming emissions control systems before EPA could regulate them under § 7545(c), EPA here had *already* regulated E15 under § 7545(c). *See* JA[84_Fed._Reg._at_26,994]; [RTC_at_26]. It would have been passing strange for EPA to consider E15's effects on *all* vehicles when EPA already knew about E15's effects on particular vehicles, and had already prohibited its use in inappropriate vehicles. Always considering all vehicles, moreover, would mean banning a new fuel in 2020 if, theoretically, it could cause emissions exceedances in vehicles from 1978, in which the fuel is prohibited. That is absurd.

Petitioners' contrary arguments fail. Petitioners cite snippets from two EPA briefs and one decision of this Court, Pet'rs Br. 49, but no prior case has addressed whether sub-sim interpretations may be limited to a subset of vehicles. EPA's sub-sim interpretation does not create an "exception" to the sub-sim requirement for pre-2001 vehicles, *id.* at 50, because E15 cannot be sold for use in those vehicles anyway. And EPA's approach does not render § 7545(f)(4) "superfluous." *Id.* Even when the sub-sim analysis is limited to particular vehicles, § 7545(f)(1) allows manufacturers to sell new fuels or additives only if they are physically and chemically "similar" to one used in certification. Section 7545(f)(4) goes further,

allowing sales of new fuels and additives that are *not* physically and chemically "similar." And EPA did not need to identify specific "statutory language authorizing it[] … to consider only a subset of vehicles." *Id.* The sub-sim interpretation is an "interpretive rule[]," JA[84_Fed._Reg._at_26,980], and thus rests on EPA's general authority to interpret the statutes it administers.

Finally, it was not "unreasonable" for EPA not to limit its sub-sim interpretation to vehicles that were actually certified on E10 certification fuel. Pet'rs Br. 52. Nothing in § 7545(f)(1) requires EPA to do that, and EPA reasonably determined that the relevant universe comprises *all* vehicles in which E15 can be used. As explained, it would make little sense to consider vehicles in which, under the E15 partial waivers, E15 *cannot* be used. It would make equally little sense to *exclude* vehicles in which E15 *can* be used. *See* JA[84_Fed._Reg._at_26,996]. At a minimum, EPA's reading falls within its interpretive discretion.

3. EPA's Conclusion that E15 Is Substantially Similar Is Supported by the Record

Petitioners also contend that EPA misevaluated the effects that E15 at 9.0 psi would have on exhaust emissions and materials compatibility. Pet'rs Br. 55-57. But EPA's technical analysis was sound and within its broad discretion.

As to exhaust emissions, EPA concluded that any changes would be "relatively small" and that any increases would fall well within vehicles' compliance margins, ensuring that vehicles would still comply with emissions

standards. JA[84_Fed._Reg._at_27,000, 27,012]. EPA also concluded that any emissions changes would fall within the "margin of error in air quality modeling," making it "inappropriate to attribute any meaningful environmental impacts (positive or negative) to increased E15 use as a result of this rulemaking." JA[84_Fed._Reg._at_27,011-12]; *see* JA[RTC_at_35].

Petitioners emphasize EPA studies indicating that "E15 … *will* increase certain emissions." Pet'rs Br. 55. But other studies say otherwise, *see supra* pp. 5-6, and E15 indisputably reduces other emissions. JA[84_Fed._Reg._at_27,012]. And while EPA described some projected increases as "meaningful"—*i.e.*, methodologically robust—they are "small." JA[84_Fed._Reg._at_26,999] n.139. Petitioners also cherry-pick one EPA statement about a possible 10% increase in particulate matter emissions. Pet'rs Br. 56. But even that high-end estimate falls well within vehicles' compliance margins. JA[84_Fed._Reg._at_27,000]. And Petitioners ignore other studies showing that E15 would "not … produce a significant increase in tailpipe [particulate matter] emissions." *Id.*[8]

As to materials compatibility, EPA reasoned that "[a]uto manufacturers have used E15 for … evaporative durability testing since at least MY2014," and thus have designed their vehicles "with materials capable of handling E15."

[8] EPA has long recognized that a fuel may be substantially similar to certification fuel even though some emissions may increase. *See, e.g.*, 56 Fed. Reg. at 5354.

JA[84_Fed._Reg._at_27,001]. For older vehicles, EPA relied on its analysis from the E15 partial waivers, noting that manufacturers have used E10 for durability testing since 2004 and have installed leak detection monitors and undergone rigorous durability testing since 2000. JA[84_Fed._Reg._at_27,003-04].

Petitioners contend that EPA's findings are "inadequately explained" because EPA gave "no new analysis or even an explanation of why its previous analysis remained valid." Pet'rs Br. 56. But absent some reason to question its prior analysis—and Petitioners offer none—EPA was entitled to stand by the "engineering judgment discussed in the E15 waiver decisions." JA[84_Fed._Reg._at_27,004].

4. EPA Reasonably Evaluated E15 at 9.0 psi

Petitioners finally contend that EPA's sub-sim interpretation is unlawful because EPA analyzed E15 at 9.0 psi, not 10.0 psi, which Petitioners claim is necessary to allow fuel manufacturers to sell E15 in the summer at 10.0 psi. Pet'rs Br. 53-54. Petitioners thus challenge EPA's explanation that its sub-sim analysis at 9.0 psi, together with the 1-psi allowance in § 7545(h)(4), allows manufacturers to sell E15 in the summer at 10.0 psi. JA[84_Fed._Reg._at_26,998]. That challenge fails.

EPA's explanation reasonably harmonizes § 7545(f)(1) and (h)(4). Congress enacted § 7545(f)(1) to prevent novel fuels and additives from impairing vehicle

emissions control systems before EPA had a chance to go through rulemaking under § 7545(c). But here, EPA *already* had regulated gasoline volatility extensively under § 7545(c) and (h). Section 7545(h)(4), moreover, reflects a congressional judgment that to the extent certain gasoline-ethanol blends increase volatility, any increase up to 1.0 psi should not prevent those blends from being sold. EPA therefore reasonably determined that it would be "inappropriate to limit under sub sim the volatility of a fuel that Congress allowed a 1-psi [allowance] from the volatility standard, under [§ 7545](h)(4)." JA[84_Fed._Reg._at_26,998]. That approach respects the congressional policy judgments underlying § 7545(f)(1) and (h)(4), "giv[ing] meaning to both" and ensuring that "E15 will be treated similarly to E10 under [§ 7545](f)(1) and [](h)(4)." *Id.*

All of this is consistent with EPA's longstanding approach to volatility under § 7545(f)(1). In past sub-sim interpretations, EPA has allowed new fuels to fall within just "a single volatility class defined in [industry standards], which range from 7.0 psi to 15.0 psi over the course of the year." *Id.* EPA took a more focused approach here by evaluating E15 at 9.0 psi, but the end result is the same—volatility concerns will not prevent manufacturers from selling a new fuel that complies with the volatility requirements under § 7545(h).

Again, "substantially similar" is a "broad and open-ended term[]" that "afford[s] [EPA] broad policy discretion." *Alon Ref.*, 936 F.3d at 655 (citation

omitted). At a minimum, EPA's explanation of the combined effect of § 7545(f)(1) and (h)(4) is reasonable and entitled to deference.[9]

C. EPA's Sub-Sim Interpretation Is Severable

Even if this Court were to invalidate EPA's sub-sim interpretation, it should uphold the remainder of the Final Rule. This Court will "sever[] and affirm[]" a portion of an agency rule where the valid and invalid portions "operate[] entirely independently of one another" and the Court "can say without any substantial doubt that the agency would have adopted the severed portion on its own." *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 71 (D.C. Cir. 2017) (quotation marks omitted). Both requirements are met here.

First, as explained, EPA's sub-sim interpretation was one of two alternative approaches EPA adopted to correct the asymmetric treatment of E10 and E15 under § 7545(f). EPA's unchallenged alternative approach—clarifying that oxygenate blenders are not fuel manufacturers subject to the sub-sim requirement or E15 partial waiver conditions—operates entirely independently of the sub-sim

[9] Intervenors endorse EPA's responses to Petitioners' arguments challenging the E15 partial waivers. *See* Pet'rs Br. 57-58. EPA did not reopen the partial waivers and lacks authority to "reconsider waivers [once] granted." *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 836 (D.C. Cir. 1984). Intervenors also endorse EPA's responses to the Small Retailers' Coalition. As to the arguments by Urban Air Initiative and fellow petitioners, Intervenors take no position except to underscore that, if the Court accepts those arguments, it should remand without vacatur.

interpretation. Petitioners have not identified any party that desires to sell E15 at 10.0 psi in the summer yet could not, as a practical matter, do so anyway without EPA's sub-sim determination.

Second, EPA unquestionably would have adopted the Final Rule without the sub-sim interpretation. *Id.* EPA has so indicated. EPA Br. 72-73. To be sure, the preamble states that, "[i]n the event … [EPA] lack[s] authority to adopt any element of this program, … the other elements of the program cannot be justified in isolation." JA[84_Fed._Reg._at _26,983]. But the sub-sim interpretation and fuel manufacturer clarification constitute two alternative versions of the same "element," each removing the barriers E15 faced under § 7545(f)(1). With the fuel manufacturer clarification intact, the Final Rule will accomplish EPA's objectives even without the sub-sim determination.[10]

CONCLUSION

The petitions in Nos. 19-1124 and 19-1160 should be dismissed in part and denied in part, or, alternatively, denied in full. The petition in No. 19-1159 should be dismissed or denied. If the petition in No. 19-1162 is granted, the Court should remand without vacatur.

[10] Severing and upholding the remainder of the Final Rule is all the more warranted if the Court rejects only an aspect of the sub-sim analysis that EPA potentially could remedy on remand.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a)(2)(C), the undersigned hereby certifies that this brief complies with the word-count limitation set forth in this Court's order in these consolidated cases dated March 27, 2020. That order provides that the "Joint Brief for Intervenors Growth Energy, National Corn Growers[] Association, and Renewable Fuels Association" is "not to exceed 8,750 words."

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains exactly 8,744 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Ethan G. Shenkman

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that I have this 21st day of August, 2020, caused the foregoing to be served upon parties on the Court's official service list via email through the Court's CM/ECF system.

/s/ Ethan G. Shenkman

Addendum

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

American Fuel & Petrochemical Manufacturers, et al., *Petitioners*, v. U.S. Environmental Protection Agency, et al., *Respondents*, Growth Energy, et al., *Intervenors*.	No. 19-1124 and consolidated cases

DECLARATION OF MICHAEL O'BRIEN IN SUPPORT OF JOINT INTERVENORS GROWTH ENERGY, NATIONAL CORN GROWERS ASSOCIATION, AND RENEWABLE FUELS ASSOCIATION'S INTERVENOR BRIEF

I, Michael O'Brien, declare as follows:

1. This declaration is based on my personal knowledge, experience, and training, and I would and could testify competently thereto under oath if called as a witness in this matter. I offer this declaration in support of Growth Energy, National Corn Growers Association, and Renewable Fuel Association's intervenor brief.

2. I have worked in the energy industry for more than fifteen years, and in the ethanol industry specifically for nine years. I am currently the Vice President of Market Development at Growth Energy. Growth Energy is the leading association of ethanol producers in the country, with 100 producer members as well as fuel retailers and associate members whose businesses support the ethanol industry.

3. I have extensive experience related to gasoline markets, ethanol-blending, and, in particular, E15 blending, distribution, and sales practices. There are approximately 2,200 retail locations selling E15 today. I have been personally involved in assisting retailers with equipment, installation, marketing, and regulatory issues related to sale of E15 at more than 1,500 of those locations. I am also responsible for conducting branding and marketing initiatives, including consumer research, field trials, and sales analytics, in collaboration with all of the country's major E15 retailers.

4. This declaration addresses (1) how and why ethanol is blended into gasoline to make E10 and E15; (2) the impact of the Final Rule allowing E15 at 10 psi to be sold in the summer ozone season[1] on the parties that blend E15; and (3) the likely outcome for the E15 market if only downstream oxygenate blenders

[1] *Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, 84 Fed. Reg. 26,980 (Jun. 10, 2019) (the "Final Rule").

could blend E15 at 10 psi in the summer, but fuel manufacturers as defined at 40 C.F.R. § 79.2 could not do so.

(1) How and Why Ethanol is Blended into Gasoline to Make E10 and E15.

5. Ethanol has been blended into gasoline as an additive for over 40 years. In the last 15 years, the gasoline market in the United States has transitioned from substantial E0 sales to nearly all E10 sales. In comparison, E15 sales are a small portion of the gasoline market, with only approximately 1.5 percent of retail stations offering the fuel in 2020.

6. The two primary drivers of the transition to widespread blending of 10 percent ethanol into gasoline were (1) ethanol's octane-enhancing properties; and (2) ethanol's lower cost as compared to gasoline blendstocks (including conventional blendstock for oxygenate blending (CBOB) and reformulated blendstock for oxygenate blending (RBOB)). Thus, both E10 and E15 are generally higher-octane and lower cost than E0 if produced using the same gasoline blendstock, and E15 is less expensive than E10. Specifically, a gallon of E15 is usually approximately $.03 to $.10 less expensive for consumers than E10.[2]

[2] *See* E15 Progress Report, Growth Energy, https://growthenergy.org/wp-content/uploads/2020/07/ptp-stationcount-2192-2020-07-08.pdf.

7. Major integrated oil companies such as Shell and Exxon refine crude oil to produce gasoline blendstocks ready for the addition of ethanol.[3] A smaller segment of the petroleum refining market blends already-refined petroleum components into gasoline blendstocks ready for the addition of ethanol. EPA rules consider both types of gasoline blendstock producers to be a "fuel manufacturer" under 40 C.F.R. Part 79 regulations and a "refiner" under 40 C.F.R. Part 80 regulations.

8. Ethanol blending to produce E10 most often occurs at a fuel terminal downstream of a refinery. Parties that blend ethanol at downstream terminals (and who do not themselves produce the gasoline blendstock) are considered "oxygenate blenders" under EPA's regulations. Specifically, gasoline blendstock ready for ethanol blending is shipped to the fuel terminal via pipeline. At such a fuel terminal, ethanol and gasoline blendstock are pumped in precise proportions (or "metered") from separate tanks (using so-called "in-line blending equipment") into transport trucks. Thus, oxygenate blenders produce ethanol-gasoline blends by combining gasoline blendstock with the ethanol as they are both pumped into the trucks. The trucks then carry the final ethanol-gasoline blend to retail stations. Oxygenate blenders register with EPA, but are not themselves required to test the

[3] "Integrated" refers to oil and gas companies that have petroleum exploration, production, and refining businesses as well as retail arms.

gasoline blendstock and ethanol to ensure those components each comply with EPA regulations -- upstream parties do that.

9. In some very limited circumstances, ethanol blending to produce E10 occurs at either (1) a terminal co-located with a refinery, or (2) a facility where gasoline components are combined to produce gasoline blendstock ready for ethanol blending. In either of these two scenarios, the party that blends the ethanol could be but is not necessarily the same entity that is defined and registered with EPA as a "fuel manufacturer" under 40 C.F.R. Part 79 regulations and a "refiner" under 40 C.F.R. Part 80 regulations. In these cases, the ethanol blending operation is in a physically separate location from operations to produce the gasoline blendstock.

10. Retail stations do not manufacture or blend E10 on-site; these downstream parties simply receive E10 blended, generally at terminals, and offer it to consumers.

11. Additionally, neither E10 nor E15 are imported into the United States as blended products.

12. As I explain next, parties that EPA considers "oxygenate blenders" account for the production of the vast majority of lawful sales of E15 in the United States.

13. E15 is lawfully produced and distributed in two distinct ways. First, and predominantly, downstream oxygenate blenders produce E15 at a fuel terminal through in-line blending of gasoline blendstock and ethanol into trucks in the same manner that oxygenate blenders produce E10 (as I described above).[4] As with E10, the trucks then deliver the blended E15 to retail stations for sale to consumers. Roughly two-thirds of E15 lawfully sold at retail stations nationwide is produced by blending at terminals by parties who qualify as oxygenate blenders.

14. Second, and to a lesser extent, certain retail stations are equipped with a specific type of gasoline pump, called a "blender-pump," that allows E15 to be blended on-site by combining E10 and E85 (a blend of petroleum products and between 51 and 83 percent ethanol) that are stored in separate underground tanks. EPA considers a retail station with such a blender-pump to be lawfully producing E15 as an "oxygenate blender," so long as the E85 used to make E15 is comprised of gasoline blendstock that is already certified for addition of ethanol. 84 Fed. Reg. 10,584, 10,596 (Mar. 21, 2019) (explaining that such retailers are "analogous to downstream oxygenate blenders" and therefore not "fuel manufacturers"). This is because the retail station is simply offering two already-regulated fuel products—gasoline blendstocks and ethanol—for combination into E15. Blender-

[4] The fuel is currently offered at more than 190 terminals across the United States. *See* "Retailer Hub," Growth Energy, https://growthenergy.org/resources/retailer-hub/.

pump retailers that are considered downstream "oxygenated blenders" constitute roughly one-third of lawful E15 sales.[5]

15. A very small remaining portion of lawfully-produced E15 is blended by upstream parties that EPA considers "fuel manufacturers" for regulatory purposes. These parties are refiners and gasoline blenders that *both* (1) refine or blend gasoline blendstocks, *and* (2) blend 15 percent ethanol into the blendstock to produce E15. Specifically, through information publicly available on EPA's website, I reviewed the six parties that are considered "fuel manufacturers" and are registered to produce E15.[6] Of these six parties, several of them may already use separate corporate entities for their refining and ethanol blending operations; and, as explained below, the others could easily begin doing so if that were necessary to continue selling E15 lawfully. Even if none of these six parties currently use separate corporate entities for their blending operations, I am aware, based on my

[5] In contrast, where the E85 used to make E15 is made from petroleum components that are *not* certified as gasoline blendstock, such as natural gas liquids (which are byproducts of natural gas production), EPA deems the retail station to be a "fuel manufacturer." *See Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations: Response to Comment* at 53 (May 2019). EPA considers such use of "uncertified components" with blender pumps "illegal" because, among other things, the retail stations that operate blender pumps do not follow the extensive regulatory requirements that apply to fuel manufacturers under 40 C.F.R. Part 80. *Id.* Given their treatment by EPA as unlawful, such operations are not considered further in this analysis.

[6] "List of Registered Motor Vehicle Gasolines and Motor Vehicle Diesel Fuels," https://www3.epa.gov/otaq/fuels1/ffars/web-fuel.htm (list accurate as of July 7, 2020).

knowledge of the E15 market, that these parties contribute a very small (less than approximately five percent) portion of the E15 available for sale today.

(2) Impact of Final Rule

16. The Final Rule confirms that the prohibition in Section 211(f)(1) against sale of fuels that are not "substantially similar" to certification fuel applies only to "fuel manufacturers" and not to oxygenate blenders. Similarly, the Final Rule confirms that EPA's Section 211(f)(4) waiver decisions, which restricted sale of E15 to 9.0 psi RVP in the summer ozone season, apply only to "fuel manufacturers" and not to oxygenate blenders. As I described above, oxygenate blenders make up the vast majority of the parties that lawfully blend E15. Under the Final Rule, such parties who wish to lawfully blend and sell E15 at 10.0 psi in the summer can do so by taking advantage of the 1.0 psi allowance under Section 211(h)(4). 84 Fed. Reg. at 26,982.

17. The Final Rule also makes sale of E15 at 10.0 psi in the summer legal for "fuel manufacturers" based on the combined effect of the Section 211(h)(4) allowance and EPA's determination that E15 is "substantially similar" ("sub sim") to E10 under Section 211(f)(1). *Id.* As I explain next, this part of EPA's Final Rule -- addressing "fuel manufacturers" -- is unnecessary, except for the rare parties that are "fuel manufacturers" who blend E15. As a practical matter, EPA's confirmation that oxygenate blenders may lawfully blend and sell summertime E15

at 10.0 psi suffices for those parties to meet demand for E15 in the summer when volatility regulations apply.

(3) Impact of Restriction of 10 psi Waiver to Oxygenate Blenders

18. EPA's objective in the Final Rule is to provide regulatory relief for E15 -- specifically, to make E15 at 10.0 psi lawful to blend and sell during the summer. EPA's confirmation in the Final Rule that downstream oxygenate blenders are not "fuel manufacturers" subject to Section 211(f), and may therefore lawfully produce and sell summertime E15 at 10.0 psi, is sufficient to meet that objective. In other words, as a practical matter, EPA's objective would be achieved even without its sub sim determination. This is so for two primary reasons:

19. First, as explained above, parties registered as "fuel manufacturers" that blend E15 are both small in number and small contributors to the overall E15 market. Were they to exit the market, retail demand for summertime E15 could readily be filled by the vast majority of E15 blenders who are oxygenate blenders and not "fuel manufacturers."

20. Second, EPA has made clear that any party currently registered as a "fuel manufacturer" could simply establish a separate corporate entity, registered as an "oxygenate blender," if it wants to engage in lawful blending of ethanol with gasoline blendstock to make E15. Through this simple corporate adjustment, any

such party could lawfully blend summertime E15 at 10.0 psi. *See* 84 Fed. Reg. at 10,594 n. 79 (Mar. 21, 2019) ("If a separate party operated a terminal co-located with a refinery and the party was excluded from the definition of fuel manufacturers under 40 CFR 79.2(d)(2), the party that operated the co-located terminal would not be subject to the E15 waiver conditions."). Based on my experience in the industry and what I know about companies registered as "fuel manufacturers," I am confident that creating a new corporate entity to conduct what are already separate E15 blending operations would be a straightforward, low-cost way to continue to lawfully blend E15 at 10 psi for sale in the summertime. Indeed, I am aware of many integrated companies that, for a variety of reasons including regulatory compliance, have separate corporate entities for (1) production of gasoline blendstocks; (2) blending of ethanol to create finished gasoline; and (3) downstream retail operations.

21. If, for some reason, such a modest corporate reorganization were infeasible for a particular company, it is highly unlikely that the national market for summertime E15 would be affected. In my experience, based on working in and observing the market for ethanol blends, other parties that qualify as oxygenate blenders would easily make up any small volumes of lost supply to satisfy E15 demand. Specifically, additional E15 could readily be blended at terminals operated by oxygenate blenders such that retail stations would not be supply

constrained if a "fuel manufacturer" were to exit the E15 market. In fact, today, close to 200 terminals blend E15, whereas in 2017, only five did.[7]

22. Accordingly, as a practical matter, EPA's confirmation that "oxygenate blenders" may lawfully blend and sell summertime E15 at 10 psi is all that is needed to provide "relief" for E15. Based on my experience, I would expect this part of EPA's Final Rule, on its own, to allow for sufficient blending and sales of E15 at 10 psi to meet summertime demand.

[7] *See supra* note 4.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: 8/20/2020

Michael O'Brien
Vice President of Market Development
Growth Energy