No. 21-

IN THE

Supreme Court of the United States

GROWTH ENERGY,

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Air Act prohibits the summertime sale of gasoline whose volatility, measured in Reid Vapor Pressure, exceeds 9 pounds per square inch. 42 U.S.C. § 7545(h)(1). Blending ethanol into gasoline increases the gasoline's volatility. So, to promote the use of ethanol in gasoline, the Act includes an "[e]thanol waiver" that increases the summertime volatility limit by 1 pound per square inch "[f]or fuel blends containing gasoline and 10 percent denatured anhydrous ethanol." 42 U.S.C. § 7545(h)(4).

The question presented is:

Whether the United States Environmental Protection Agency may interpret the ethanol-waiver provision in 42 U.S.C. § 7545(h)(4) to apply to fuel blends whose concentration of ethanol exceeds 10 percent.

PARTIES TO THE PROCEEDING

Petitioner, intervenor below, is Growth Energy.

Respondents, petitioners below, are American Fuel & Petrochemical Manufacturers; American Motorcyclist Association; American Petroleum Institute; Citizens Concerned About E15; Coalition of Fuel Marketers; the National Marine Manufacturers Association; and Small Retailers Coalition.

Respondent below was the United States Environmental Protection Agency.

Other petitioners below were Urban Air Initiative; 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.

Other intervenors below were the Renewable Fuels Association and the National Corn Growers Association.

CORPORATE DISCLOSURE STATEMENT

Growth Energy has no parent company and no publicly held company has a 10% or greater ownership interest in Growth Energy.

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Growth Energy respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTRODUCTION

Ethanol is a renewable fuel that has long been blended with gasoline to make finished transportation fuel. When ethanol is blended with gasoline, it raises the volatility of the fuel relative to pure gasoline. Volatility, measured in pounds per square inch ("psi") of Reid Vapor Pressure ("RVP"), reflects how readily a

fuel evaporates. Evaporative emissions contribute to the formation of harmful smog.

Concerned about evaporative emissions, Congress amended the Clean Air Act in 1990 to prohibit the sale of gasoline whose RVP exceeds 9 psi during the summer, when there is greater potential for evaporative emissions to form smog. 42 U.S.C. § 7545(h)(1). Because blending ethanol with gasoline raises the RVP of the fuel above 9 psi, that volatility limit would have barred ethanol-blend gasoline from the market. That was intolerable because, Congress recognized, "ethanol blending … [has] beneficial environmental, economic, agricultural, energy security and foreign policy implications." S. Rep. No. 101-228, at 110 (1989). So, to ensure that "ethanol blending … continue[s] to be a viable alternative fuel," Congress also created an "[e]thanol waiver" that raised § 7545(h)(1)'s summertime RVP limit by 1 psi "[f]or fuel blends containing gasoline and 10 percent denatured anhydrous ethanol." 42 U.S.C. § 7545(h)(4).

At that time, the only ethanol blend that met EPA's other applicable regulatory requirements to be introduced into domestic commerce was E10, which is a blend of 90% gasoline and 10% ethanol. EPA promptly adopted a regulation that ensured that E10 would remain the only commercially available ethanol blend. The regulation stated that to qualify for the 1-psi waiver, a fuel blend's "concentration of the ethanol … must be at least 9% and no more than 10%." 56 Fed. Reg. 64,704, 64,710 (Dec. 12, 1991). Thus, even after EPA later approved E15—a blend of 85% gasoline and 15% ethanol—for introduction into commerce, that regulation effectively barred the sale of E15 during the summer. Today, more than 98% of all gasoline used in the United States is E10—even though E15, with 50%

more ethanol than E10, better achieves the economic, health, environmental, and security goals Congress sought to achieve by creating the ethanol waiver for volatility.

In 2019, EPA finally acknowledged that its interpretation of the ethanol waiver in 42 U.S.C. § 7545(h)(4) made no sense and undermined Congress's objectives. There is no reason to believe that § 7545(h)(4)—whose purpose was to promote the many important benefits of ethanol blending, which is titled "[e]thanol waiver," and which expressly applies to "blends" of gasoline and ethanol—was intended to be restricted to a single ethanol blend, E10, to the exclusion of blends that contain more ethanol. Higher-ethanol blends increase the benefits of ethanol that Congress sought, without increasing fuel volatility, since they would still be subject to the same RVP limit as E10 under the ethanol waiver. In fact, as Congress understood when it created the ethanol waiver, the RVP of E15 (and other higher-ethanol blends) is actually *lower* than the RVP of E10.

EPA, therefore, adopted the rule challenged here "to create parity in the way the RVP of both E10 and E15 fuels is treated under EPA regulations." CAJA002. Reinterpreting § 7545(h)(4) to "establish[] a lower limit, or floor, on the minimum ethanol content" required for the 1-psi waiver, EPA amended its volatility regulations to make the 1-psi waiver available to ethanol blends with "at least 10 percent ethanol," including E15. CAJA013.

The court of appeals set aside the rule because it held at *Chevron* step one that Congress intended the ethanol waiver to apply only to E10. In the court's view, the ordinary meaning of the word "contain"—standing alone, without a "modifier" such as "at

least"—is "contain exactly," and therefore the statutory phrase "containing … 10 percent … ethanol" means "containing *exactly* 10% ethanol."

The court's decision flouts the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *King* v. *Burwell*, 576 U.S. 473, 492 (2015) (quotation marks omitted), and the related principle that courts "cannot interpret federal statutes to negate their own stated purposes," *id.* at 493 (quotation marks omitted), or to "lead[] to absurd … results," *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 138 (2004). The text, structure, and history of the ethanol waiver show that Congress intended it to apply to various ethanol blends to enable greater use of ethanol, and that in context, Congress intended "containing" to mean "having at least." EPA's interpretation serves that purpose while faithfully adhering to the volatility levels Congress deemed acceptable. The court of appeals' interpretation, in contrast, necessarily attributes to Congress a self-defeating and bizarre intent: facilitating increased ethanol use as long as the specified volatility limits are met, yet foreclosing blends that have more ethanol than E10 from the market even if their RVP is no higher than E10's or the specific limits.

It is imperative that this Court reject the court of appeals' interpretation—and do so in this case. The decision below effectively bars E15 from being sold during the summer. The direct harm from those lost sales is significant in its own right, but the potentially lost economic, health, environmental, and security benefits of increased ethanol use are much greater. E15 is poised to grow significantly and could begin supplanting E10 as the default transportation fuel in the United

States—and every gallon of E15 that replaces E10 increases the amount of ethanol used by 50%. But that can happen only if E15 can be sold year-round.

This petition presents the only opportunity for this Court to correct the court of appeals' error and avert its serious harmful consequences. Because the court of appeals held that the statute is unambiguous and because the D.C. Circuit has exclusive jurisdiction to review EPA regulations implementing § 7545(h)(4), there is no possibility of further percolation, a circuit split, or even a future decision from the D.C. Circuit that this Court could review.

The Court should grant the petition and reverse the decision below.

OPINIONS BELOW

The court of appeals' opinion (App.1a-19a) is published at 3 F.4th 373 (D.C. Cir. 2021).

JURISDICTION

The court of appeals issued its opinion on July 2, 2021, and denied a timely rehearing petition on September 9, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Relevant portions of 42 U.S.C. § 7545 are reprinted in the appendix to this petition. App.25a-69a.

STATEMENT

A. Factual Background

1. Ethanol is a renewable alcohol made primarily from corn. CAJA526. For more than forty years, etha-

nol has been used as a transportation fuel by being blended into gasoline. Ethanol blending benefits the economy, human health, the environment, and national security. *See infra* p.21; S. Rep. No. 101-228, at 110.

Different gasoline-ethanol blends are sold in the United States, including E10 (90% gasoline, 10% ethanol) and E15 (85% gasoline, 15% ethanol). Because E15 has 50% more ethanol than E10, E15 brings more of ethanol's many benefits than E10. CAJA031. Yet, today "more than 98% of U.S. gasoline" is E10. U.S. Dep't of Energy, Alternative Fuels Data Center, *Ethanol Fuel Basics*.[1]

The primary barrier to greater use of E15 is regulatory. As detailed below, EPA first allowed E15 to be sold in 2010, but EPA maintained volatility regulations effectively barring the sale of E15 during the four-and-a-half month summer season—the heaviest driving period of the year. The effect of that regulatory limitation was far greater than simply preventing E15 sales during the summer season; it hamstrung E15's ability to grow year-round and potentially to supplant E10 as the default fuel nationally. *See infra* pp.22-23.

2. "Measured in [psi] of [RVP], volatility reflects how readily gasoline evaporates." App.3a. The evaporative emissions of gasoline contribute to the formation of ground-level ozone smog, and "the greater the RVP, … the larger the amount of ozone formed." *Id.* (quotation marks omitted); CAJA008. The potential for evaporative emissions to form smog is higher in the summer. App.3a-4a; CAJA008.

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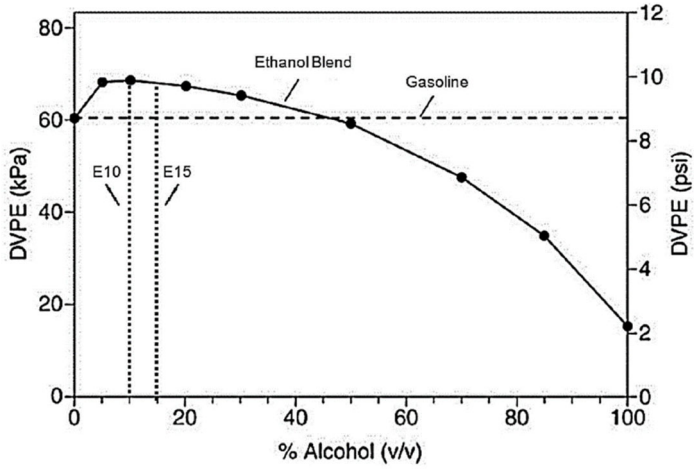
[1] https://afdc.energy.gov/fuels/ethanol_fuel_basics.html.

Ethanol affects the volatility of gasoline, but in a nonlinear way. During the summer, E10's RVP is about 10 psi, but that represents the peak RVP for ethanol-blends: adding ethanol to gasoline increases the fuel's RVP until the ethanol concentration reaches 10%—i.e., E10—at which point adding more ethanol *lowers* the fuel blend's RVP. CAJA254; CAJA051. The following graph depicts this phenomenon:



CAJA254 (vertical lines and accompanying labels added).

B. Statutory Framework and Prior EPA Volatility Regulations

The Clean Air Act establishes "a comprehensive scheme for regulating motor vehicle emission and fuel standards for the prevention and control of air pollution." App.2a (quotation marks omitted). As relevant here, 42 U.S.C. § 7545(f) declares that it "shall be unlawful for any [fuel] manufacturer … to first introduce into commerce, or to increase the concentration in use of, any fuel … for use by any person in motor vehicles … which is not substantially similar to any fuel … uti-

lized in the certification" of a "vehicle or engine." *Id.* § 7545(f)(1). But EPA may "waive" this restriction if it determines that a specified fuel or "concentration thereof[] will not cause or contribute to a failure of" any vehicle or engine to meet the emissions standards to which it was certified. *Id.* § 7545(f)(4).

E10 received a waiver under § 7545(f)(4) in 1978, allowing it to enter the transportation-fuel market in 1979. 44 Fed. Reg. 20,777 (Apr. 6, 1979); *see* App.5a. EPA later designated E10 a certification fuel for emissions testing of vehicles of model year 2017 and later. 79 Fed. Reg. 23,414, 23,419-23,420 (Apr. 28, 2014).

In 1989 and 1990, EPA promulgated regulations for gasoline volatility. 54 Fed. Reg. 11,868 (Mar. 22, 1989); 55 Fed. Reg. 23,658 (June 11, 1990). The regulations generally limited gasoline's RVP to 9 psi during "regulatory control periods," which ran from May 1 or June 1 (depending on the type of facility) to September 15. 40 C.F.R. § 80.27(a) (1990). Because the RVP of ethanol-blend gasoline is generally between 9 psi and 10 psi in the summer season, EPA's volatility regulation would have barred ethanol-blend gasoline from the market during the summer season. To avoid that, EPA included in its regulations "[s]pecial provisions for alcohol blends," which permitted such fuels to be used during the summer season if their RVP did "not exceed the [otherwise] applicable standard … by more than one" psi—i.e., if the RVP did not exceed 10 psi. *Id.* § 80.27(d)(1). To qualify for this 1-psi waiver, the regulation stated, "gasoline must contain at least 9% ethanol (by volume)," with "[t]he maximum ethanol content of gasoline … not exceed[ing] any applicable waiver conditions under" § 7545(f)(4). *Id.* § 80.27(d)(2).

At the time EPA adopted those regulations, the maximum ethanol content permitted under any applicable waiver conditions under § 7545(f)(4) was 10% (per the 1978 E10 waiver). Accordingly, in practice E10 was the highest-ethanol blend that could qualify for the 1-psi waiver. But these regulations would have allowed higher-ethanol blends, including E15, to receive the same 1-psi allowance had they also received a § 7545(f)(4) waiver.

Congress subsequently codified EPA's volatility regulations in § 7545(h). Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 216, 104 Stat. 2399, 2489. With certain exceptions not relevant here, § 7545(h) directs EPA to promulgate a regulation making it "unlawful for any person during the high ozone season to sell, offer for sale, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with [RVP] in excess of 9.0" psi. 42 U.S.C. § 7545(h)(1). Consistent with its prior regulations, EPA defined the high ozone season, or "summer season," as May 1 or June 1 (depending on the type of facility) to September 15. 40 C.F.R. §§ 80.27(a)(1) & (2), 1090.80; *see* CAJA2 n.3.

But Congress recognized that the 9-psi RVP limit set by § 7545(h) "would likely result in the termination of the availability of ethanol in the marketplace" given its higher summer RVP, thereby depriving the country of the "beneficial environmental, economic, agricultural, energy security and foreign policy implications" of "ethanol blending." S. Rep. No. 101-228, at 110. Consequently, Congress also provided an "Ethanol waiver" in § 7545(h) that mirrored EPA's prior special provisions for alcohol blends. The first clause of the ethanol waiver adopts EPA's prior 1-psi allowance: "For 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 established under" § 7545(h)(1). 42 U.S.C. § 7545(h)(4). The second clause establishes a compliance defense for downstream parties, such as distributors, blenders, and retailers, which have limited ability to control the content—and thus the RVP—of the blends they distribute. Under this defense, such downstream parties are "deemed to be in full compliance" with the volatility limits set by § 7545(h)(1) so long as the blend's gasoline portion complies with the applicable RVP limits, "the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4)"—*whatever* that limit might be—and there are no additives that increase the RVP of the ethanol portion. *Id.* § 7545(h)(4)(B).[2]

In 1991, EPA revised its volatility regulations to implement § 7545(h). The amended regulations provided that, to qualify for the 1-psi waiver, a fuel blend's "concentration of ethanol … must be at least 9% *and no more than 10%*." 56 Fed. Reg. 64,704, 64,710 (Dec. 12, 1991) (emphasis added). Thus, for the first time, the summer RVP allowance was legally restricted to E10.

Two decades later, EPA granted partial waivers for E15 under § 7545(f)(4), allowing E15 to be introduced into commerce. 75 Fed. Reg. 68,094 (Nov. 4, 2010); 76 Fed. Reg. 4,662, 4,682 (Jan. 26, 2011). But because EPA still restricted the 1-psi waiver to E10, E15

[2] "Denatured" ethanol is "unfit for human consumption," and "anhydrous" ethanol is no more than 1% water. 40 C.F.R. § 1090.80.

was nearly impossible to sell during the four-and-a-half month summer season. *See* App.5a-6a.[3]

C. The Final Rule

E15's access to the market remained stunted until the rulemaking at issue here. Recognizing the "anomal[y]" of using an RVP limit to bar the sale of a fuel—E15—that has a lower RVP than the predominant fuel—E10—EPA promulgated the Final Rule in June 2019 "to create parity in the way the RVP of both E10 and E15 fuels is treated under EPA regulations." CAJA002, 012. To do so, EPA first determined that E15 is "substantially similar" to E10 under § 7545(f)(1), thus permitting E15 to be sold irrespective of the conditions imposed by the partial waivers EPA had granted E15 under § 7545(f)(4). CAJA002; CAJA014. EPA then reinterpreted the phrase "containing gasoline and 10 percent denatured anhydrous ethanol" in § 7545(h)(4) to "establish[] a lower limit, or floor, on the minimum ethanol content" required for the 1-psi waiver. CAJA013. Accordingly, EPA concluded that blends with "at least 10 percent ethanol," including E15, were eligible for the 1-psi waiver. *Id.*

The Final Rule thus removed the RVP limited set by § 7545(h)(1) as a barrier to E15 year-round sale. E15 was in fact sold in the summers of 2019, 2020, and 2021, and predictably, annual E15 use immediately increased substantially: during those three years—in which driving overall was suppressed by the Covid-19 pandemic—drivers logged as many miles on E15 as they had in the previous 10 years combined. Growth Energy, *Ameri-*

[3] Today, "it is cost-prohibitive to produce ethanol blends with volatility not exceeding 9.0 psi," App.6a, as it was when Congress enacted the ethanol waiver, S. Rep. No. 101-228, at 110.

can Drivers Reach 10 Billion Miles Driven on E15 (June 11, 2019)[4]; Growth Energy, *American Drivers Reach 20 Billion Miles on E15* (Mar. 9, 2021).[5]

D. Proceedings Below

Petroleum-industry trade associations and others petitioned for review of the Final Rule in the D.C. Circuit, arguing that EPA's interpretation of § 7545(h)(4) conflicts with the statute because (they said) "containing" could only mean "containing exactly." Intervenors representing the biofuel industry—including petitioner here—countered that § 7545(h)(4), interpreted in light of its text, structure, purpose, and history, clearly means that the 1-psi waiver is available to blends with *at least* 10% ethanol. Alternatively, they argued that, at a minimum, the ethanol waiver is ambiguous and, for the same reasons, EPA's interpretation is reasonable. EPA defended its interpretation as reasonable.

Agreeing with the challengers, the court of appeals concluded at *Chevron* step one that the statute unambiguously foreclosed EPA's interpretation of § 7545(h)(4) and vacated the relevant section of the Final Rule. App.19a. Analogizing § 7545(h)(4) to "a scientific formula," the court declared that the "ordinary meaning" of "contain" is to specify a particular amount of the identified substance (here, ethanol). App.11a-12a. The court also noted that in other places Congress had modified "contain" with phrases like "at least" or "not less than," such that the absence of a modifier here "suggests that Congress intended Subsection 7545(h)(4)

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[4] https://growthenergy.org/2019/06/11/growth-energy-american-drivers-reach-10-billion-miles-driven-on-e15/.

[5] https://growthenergy.org/2021/03/09/growth-energy-american-drivers-reach-20-billion-miles-on-e15/.

to apply [only] to E10." App.14a. Finally, the court reasoned that its interpretation comported with the statute's purpose because in "limiting the 1-psi allowance," "Congress was balancing multiple interests." App.18a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH BASIC PRINCIPLES OF STATUTORY INTERPRETATION AS ESTABLISHED BY THIS COURT'S PRECEDENT

A. The Full Context Shows That "Containing" in Section 7545(h)(4) Means "Having at Least"

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *King*, 576 U.S. at 492 (quotation marks omitted); *see id.* at 486. This canon is essential because "oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 486 (quotation marks omitted). Indeed, a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* at 492 (cleaned). For example, courts "cannot interpret federal statutes to negate their own stated purposes." *Id.* at 493 (quotation marks omitted). Applying these principles—which the court of appeals failed to do faithfully—yields the conclusion that Congress used "containing gasoline and 10 percent … ethanol" to refer to fuel blends with *at least* 10% ethanol.

Like the word "extension" in a related provision of the Clean Air Act, "[t]he key word here—'[contain]'—is

nowhere defined in the statute and it can mean different things depending on context." *HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176-2177 (2021). Although "contain" in some contexts denotes "has exactly," in other contexts it denotes "have within," i.e., "has at least." *Webster's New Collegiate Dictionary* 282 (9th ed. 1990). Accordingly, one may "use[] the phrase 'containing at least' in the same way—and essentially interchangeably—with the way [one] uses the word 'containing.'" *Waters Corp.* v. *Agilent Techs. Inc.*, 2019 WL 6255181, at *4 (D. Del. Nov. 22, 2019). For instance, § 7545 itself uses "contains the applicable volume" and "contains *at least* the applicable volume" equivalently, 42 U.S.C. § 7545(*o*)(2)(A)(i) (emphasis added), showing that, to Congress, the modifier "at least" need not always be express to be present. Likewise, a Food and Drug Administration regulation concerning statements on juice labels requires that beverages labeled as "containing 10% juice" contain *at least* 10% juice. 21 C.F.R. § 101.30(b)(1). Tellingly, again much like "extension" in *HollyFrontier*, neither the court of appeals nor the challengers have "point[ed] to a single dictionary definition of the term '[contain]' requiring" that there be *exactly* the specified amount. *HollyFrontier*, 141 S. Ct. at 2177.

The broader statutory structure and purpose make clear that, for purposes of § 7545(h)(4), Congress used "containing" to mean "having at least."

Congress titled § 7545(h)(4) "Ethanol waiver" and expressly made it available to "fuel blends containing" gasoline and 10% ethanol. Had Congress intended to restrict the waiver to a single blend (E10), Congress could have easily used much more direct language, ti-

tling the provision "E10 waiver" and making it available to "E10" or to "the blend containing" gasoline and 10% ethanol. "[T]he heading of a section [is a] tool[] available for the resolution of a doubt about the meaning of a statute." *Porter* v. *Nussle*, 534 U.S. 516, 528 (2002) (quotation marks omitted). Here, § 7545(h)(4)'s "unqualified heading scarcely aids the [court of appeals' view] that Congress meant to bi-sect the universe of" ethanol blends and restrict the waiver to E10. *Id.* And Congress's use of the plural "blend*s*" of gasoline and ethanol in the waiver provision closes the door on the lower court's interpretation, making crystal clear that Congress intended that the waiver be available not to a single ethanol blend but to any fuel blend whose ethanol concentrations is 10% or greater.

Further, Congress's aims are served only by interpreting § 7545(h)(4) to reach higher-ethanol blends. The Clean Air Act broadly facilitates the use of new fuels and concentrations thereof as long as they meet the minimum requirements to protect against harmful emissions. *See*, *e.g.*, 42 U.S.C. § 7545(f). Section 7545(h) furthers these goals in a specific context: volatility during the summer season. Section 7545(h)(4) itself embodies these twin objectives, allowing a waiver of the RVP limit for ethanol-based "fuel blends"—so that such blends can be used during the summer season—but only up to 1 psi more. *Id.* § 7545(h).

Section 7545(h)(4)'s evident purpose is also revealed in its legislative history. Congress recognized that "volatility reductions" were "necessary to protect public health and welfare," but also "recognize[d] that to require ethanol to meet a 9 pound RVP" would "likely result in the termination of the availability of ethanol in the marketplace," given the "prohibitive" "cost of producing and distributing" ethanol blends whose RVP

is 9 psi (or less) in the summer. S. Rep. No. 101-228, at 110. Consequently, Congress created the "ethanol waiver" to "allow ethanol blending to continue to be a viable alternative fuel, with its beneficial environmental, economic, agricultural, energy security and foreign policy implications." *Id.*

Congress's objectives are satisfied only by interpreting "containing" to mean "having at least"—and thus permitting the 1-psi waiver to apply to E15. This interpretation facilitates increased use of ethanol, and thus promotes the many significant benefits that Congress sought to achieve, without increasing fuel volatility above the level Congress already determined is acceptable. Under this interpretation, E15 (and other higher-ethanol blends) could be sold year-round, enabling the introduction of more ethanol into the nation's transportation-fuel supply. And those fuel blends could be sold year-round only if they satisfy the emissions requirements of § 7545(f) and only if their volatility remains within the specific limit Congress deemed acceptable in the ethanol waiver provision of § 7545(h)(4)—the very same limit that applies to E10.

In contrast, the court of appeals' contrary interpretation ascribes to Congress a bizarre intent: to promote increased ethanol use while guarding against evaporative emissions by specifying a fixed RVP limit, and yet to allow only a single blend whose concentration of ethanol is relatively low, just 10%, to be sold, even if a higher-ethanol blend meets the same fixed RVP limit. And further, the court of appeals' interpretation implies that Congress intended this outcome even though Congress understood at the time that the RVP of higher-ethanol blends would be *lower* than the RVP of E10. *See* App.18a; CAJA485 (citing CAJA424). In short, on the court of appeals' view, Congress intended to pro-

mote ethanol use while limiting volatility by foreclosing fuel blends that use *more* ethanol and have no greater—but in fact *lower*—RVP than E10 from the market for more than one-third of the year, dampening the market's incentive to invest in such blends' wider adoption.

Courts may not attribute such an absurd or bizarre intent to Congress absent clear evidence, and as discussed, there is no such evidence. *Nixon*, 541 U.S. at 138 (rejecting interpretation that implies "farfetched" congressional intent or "leads to absurd … results"); *Caron* v. *United States*, 524 U.S. 308, 315 (1998) ("Congress cannot have intended this bizarre result."); *Lindahl* v. *Office of Pers. Mgmt.*, 470 U.S. 768, 799 (1985) ("In the absence of any indication in the legislative history or persuasive functional argument to the contrary, we cannot assume that Congress intended to create such a bizarre jurisdictional patchwork.").

On the contrary, Congress consciously rejected a version of the ethanol-waiver provision that would have expressly confined the waiver to E10. The original draft of the bill provided a 1-psi allowance only for "gasoline containing at least 9 *but not more than* 10 per centum ethanol (by volume)." H.R. 3030, 101st Cong. § 214 (1989) (CAJA114-115) (emphasis added); S. 1490 101st Cong. § 214 (1989). The House and Senate both rejected that phrasing. This "drafting history showing that Congress cut out [specific] language … from the final statute … precludes any hope of a sound interpretation" that would restore the "trimmed" language, as the court of appeals' interpretation would. *Doe* v. *Chao*, 540 U.S. 614, 622-623 (2004); *see also, e.g.*, *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 579-580 (2006) ("Congress' rejection of the very language that would have achieved the result" favored by the court of appeals "weighs heavily against [that] interpretation.").

Finally, the second clause of § 7545(h)(4)—which the court of appeals ignored—confirms that Congress did not intend to restrict the 1-psi ethanol waiver to E10. As discussed above, that clause deems downstream participants compliant with the 9-psi RVP limit of § 7545(h)(1) if "the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4)." 42 U.S.C. § 7545(h)(4)(B). And § 7545(f)(4) is not limited to E10; indeed, EPA has granted a waiver to E15 under § 7545(f)(4). *Supra* p.10. Thus, Congress determined that market participants can be deemed compliant for using ethanol blends whose RVP exceeds 9 psi. Surely, Congress would not have done that had it intended the ethanol waiver's 1-psi allowance not to apply to those same blends.

B. The Court Below Incorrectly Held That Congress Intended "Containing" to Mean "Having Exactly"

The court of appeals erroneously determined that the phrase "containing … 10 percent … ethanol" in § 7545(h)(4) unambiguously means "containing *exactly* 10% ethanol" and therefore that the ethanol waiver applies only to E10.

The court brushed aside § 7545(h)(4)'s aim of promoting ethanol while capping volatility, stating vaguely that "Congress was balancing multiple interests" and giving "attention to wide-ranging economic, energy-security, and geopolitical implications." App.18a. Although Congress was indeed considering those interests, the court never explained how any of them would have led Congress to *confine* the ethanol waiver to E10. Nor could the court have done so because, as explained, Congress understood that those broader interests are served by *increased* ethanol use—such as

through E15—rather than through RVP limits, which (if set at 9 psi) hinder the availability of ethanol blends. *See supra* p.9-10. The sole purpose served by the statute's RVP limits is to limit RVP, and that purpose is served regardless of the ethanol concentration of a given blend because the statute's RVP limits, including in the ethanol waiver, are the same irrespective of the blend's ethanol concentration.

Further, the court's textual analysis begged the question. It stated that the word "contain" means "'to have within,' 'to hold,' or 'to comprise' in a manner that 'implies the actual presence of a specific substance or quantity within something.'" App.12a-13a. From that definition, the court reasoned, "Subsection 7545(h)(4) is best read to concern gasoline that 'has within it' or 'holds' a specific quantity (10%) of a specific substance (ethanol)." App.13a. But the court's preferred dictionary definition of "contains" does not support its conclusion that the statute unambiguously requires that the fuel blend have exactly 10% ethanol. E15 also "has within it" or "holds" a "specific substance"—ethanol—and in particular has, or holds, 10% of that substance within it, and then some.

The court also overread other provisions of the Clean Air Act. The court said, "Numerous provisions of the Clean Air Act … have percentages with modifiers," such as "at least 85 percent methanol," while § 7545(h)(4) does not. App.13-14a (quotation marks omitted). "But none of that means the bare term '[containing]' obviously and always includes a strict … requirement" that the exact amount of ethanol specified is present. *HollyFrontier*, 141 S. Ct. at 2179. Indeed, as noted, § 7545(*o*)(2)(A)(i) confirms that sometimes the Clean Air Act uses "contain [specified amount]" to mean "has at least" *without* including an express modi-

fier. *See supra* p.14. And sometimes Congress attaches an express modifier to "contain" to articulate not a floor but "exactly," as in "a mixture of alternative fuel and gasoline or diesel fuel containing exactly 50 percent gasoline or diesel fuel," 49 U.S.C. § 32901(a)(9)(C). This fuller accounting of the ways Congress uses "contain" shows that the word standing alone does not have a uniform or single meaning.

More broadly, this accounting is a reminder that the Clean Air Act "is far from a chef d'oeuvre of legislative draftsmanship," and thus that courts (and EPA) "must … bear[] in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 319-320 (2014) (quotation marks omitted). Accordingly, "the presumption of consistent usage readily yields to context." *Id.* (quotation marks omitted). And here, as explained above, the context and overall statutory scheme compel the conclusion that the ethanol waiver in § 7545(h)(4) is available for all blends with at least 10% ethanol.

C. At Most, the Statute Is Ambiguous and EPA's Interpretation Is Reasonable

Even if it were not *clear* that Congress intended "containing" 10% ethanol to mean "having at least" 10% ethanol in § 7545(h)(4), the statutory provision would at most be ambiguous, and EPA's interpretation would be a reasonable resolution of that ambiguity entitled to deference—for all the same reasons discussed above. *See King*, 576 U.S. at 486 ("oftentimes the … ambiguity … of certain words or phrases may only become evident when placed in context" (quotation marks omitted)); *City of Arlington, Tex.* v. *FCC*, 569 U.S. 290, 296

(2013) ("Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.").

II. THE DECISION BELOW WILL HAVE EXCEPTIONALLY IMPORTANT CONSEQUENCES

The decision below will have exceptionally important consequences for the nation's transportation fuel supply—and in turn for the economy, human health, the environment, and security.

Replacing some gasoline with ethanol in the nation's transportation-fuel supply brings many benefits. It promotes U.S. energy security and national security by diversifying the country's energy sources and rebalancing the country's energy trade, because it entails switching from a fuel that is, to a significant degree, imported to a fuel that is produced domestically. CAJA246; CAJA266. It spurs economic development in the rural areas that grow and convert corn to ethanol. CAJA031; CAJA328; CAJA266. It improves human health, national security, and the environment because ethanol reduces greenhouse gas emissions by more than 40% compared to the gasoline it replaces. *See* CAJA328. And it provides necessary gasoline octane. *Id.* Indeed, Congress created the Renewable Fuel Standard program "to force the market to create ways to produce and use greater and greater volumes of renewable fuel"—especially ethanol, by far the most widely used renewable fuel—in the nation's transportation-fuel supply annually. *Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 696-697, 710 (D.C. Cir. 2017); *see* 42 U.S.C. § 7545(*o*).

E15 enhances these benefits of replacing some gasoline with ethanol relative to E10 because E15 uses

50% more ethanol than E10. Moreover, because E15's RVP is lower than E10's, using E15 reduces evaporative emissions, which harm human health and the environment. *See supra* pp.6-7.

The decision below effectively bars E15 use during the summer, substantially reducing the benefits the country could receive from ethanol. But the decision's harmful consequences are much greater than that. E15 was poised to grow significantly and potentially to begin replacing E10 as the default year-round transportation fuel, supercharging the benefits of replacing some gasoline with ethanol. About 95% of the national vehicle fleet can safely use E15. Air Improvement Resource, Inc., *Analysis of Ethanol-Compatible Fleet for Calendar Year 2021*, at 2 (Nov. 9, 2020).[6] During the three years in which the Final Rule was in effect, the number of retail stations selling E15 increased from about 1,300 (according to EPA), CAJA007, to almost 2,500, Growth Energy, *E15 Rapidly Moving into the Marketplace* (July 6, 2021).[7] And in those few pandemic-affected years, drivers logged as many miles on E15 as they had in the previous 10 years combined. *Supra* p.11-12. And the availability of E15-compatible vehicles and infrastructure will rapidly approach 100% because all new vehicles, pumps, and storage tanks are E15-compatible, and retail stations naturally upgrade their pumps and tanks roughly every seven years. Stillwater Associates LLC, *Infrastructure Changes and Cost to Increase Consumption of E85 and E15 in 2017*, at 19 (July 11, 2016) (attached as Ex. 16 to Growth

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[6] https://growthenergy.org/wp-content/uploads/2020/11/Analysis-of-Ethanol-Compatible-Fleet-for-Calendar-Year-2021-Final.pdf.

[7] https://growthenergy.org/wp-content/uploads/2021/07/e15-stations-2462-2021-07-06.pdf.

Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020 (Aug. 17, 2018), EPA Dkt. # EPA-HQ-OAR-2018-0167-1292).[8]

The market, therefore, could well begin to favor E15 as the default fuel because of its higher octane rating, lower cost, and greater ability to satisfy requirements under the Renewable Fuel Standard program. The primary barrier to this switch was EPA's prior volatility regulations, which EPA tried to remedy with the Final Rule. The decision below entrenches that regulatory barrier, ensuring that E15 will not supplant E10 as the nation's default fuel, to the country's great misfortune.

III. THIS CASE PRESENTS AN IDEAL—INDEED, THE *ONLY*—VEHICLE TO RESOLVE THIS CRITICAL ISSUE

The decision below is unencumbered by alternative holdings or jurisdictional concerns. Thus, this petition presents an ideal vehicle for this Court to address the question presented and avert the enormous harmful consequences of the decision below.

More importantly, this case will be the Court's *only* opportunity to do so. Because the court of appeals held that the statute is unambiguous at *Chevron* step one, its decision forever forecloses EPA from re-adopting its interpretation. And no other court can ever address the issue because the D.C. Circuit has exclusive jurisdiction over this issue.[9] Therefore, there is no possibil-

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[8] https://www.regulations.gov/document/EPA-HQ-OAR-2018-0167-1292.

[9] The Clean Air Act grants the D.C. Circuit exclusive jurisdiction over challenges to "any control or prohibition under section

ity of further percolation, a circuit split, or even a future decision from the D.C. Circuit that this Court could review. If this Court does not hear this case, the current presidential administration and all future ones will be bound by the decision below. This Court regularly reviews decisions on EPA actions under the Clean Air Act despite the lack of a circuit split. *E.g.*, *Michigan* v. *EPA*, 576 U.S. 743 (2015); *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489 (2014); *Utility Air*, 573 U.S. 302; *see also HollyFrontier*, 141 S. Ct. 2172. The Court should do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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7545" or to "any other nationally applicable regulations promulgated, or final action taken, by [EPA] under" § 7545. 42 U.S.C. § 7607(b)(1). Section 7545(h) expressly involves a "[p]rohibition," *id.* § 7545(h)(1), and the Final Rule is a nationally applicable regulation promulgated under § 7545.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1124
Consolidated with 19-1159, 19-1160, 19-1162

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

GROWTH ENERGY, ET AL.,
Intervenors.

On Petitions for Review of an Order
of the Environmental Protection Agency

Argued April 13, 2021
Decided July 2, 2021
Filed July 2, 2021

* * *

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In October 2018, the President directed the Environmental Protection Agency "to initiate a rulemaking to consider expanding Reid

Vapor Pressure waivers for fuel blends containing gasoline and up to 15 percent ethanol," also known as E15, and to "increase transparency in the Renewable Identification Number (RIN) market," a feature of the Renewable Fuel Standard ("RFS") program. White House, Fact Sheet: President Donald J. Trump Is Expanding Waivers for E15 and Increasing Transparency in the RIN Market (Oct. 11, 2018) (emphasis omitted). EPA issued a final rule on June 10, 2019, after notice and comment, revising its regulations on fuel volatility and the RIN market. *Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, 84 Fed. Reg. 26,980 (June 10, 2019) (the "E15 Rule"). In Section II, EPA announced a new interpretation of when the limits on fuel volatility under the Clean Air Act could be waived pursuant to 42 U.S.C. § 7545(h)(4), and relatedly reinterpreted the term "substantially similar" in Subsection 7545(f)(1)(A). In these consolidated petitions for review, the petroleum and ethanol industries as well as the Small Retailers Coalition challenge EPA's decision to grant a fuel volatility waiver to E15. For the following reasons, we hold that Section II exceeds EPA's authority under Section 7545 and therefore vacate that portion of the E15 Rule.

I.

The Clean Air Act establishes, among other things, "a comprehensive scheme for regulating motor vehicle emission and fuel standards for the prevention and control of air pollution." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1054 (D.C. Cir. 1995). Section 211 of the Act, 42 U.S.C. § 7545, addresses the regulation of fuels.

To safeguard the efficacy of emission control devices in motor vehicles, Subsection 7545(f) restricts the

introduction into commerce of new fuels and fuel additives. *See Am. Methyl Corp. v. EPA*, 749 F.2d 826, 829 (D.C. Cir. 1984). It is

> unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, 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 under section 7525 of this title.

42 U.S.C. § 7545(f)(1)(A) (emphasis added). This limitation is subject to waiver, upon application and after notice and opportunity for comment, if "the applicant has established that such fuel or fuel additive ... will not cause or contribute to a failure of any emission control device or system." *Id.* § 7545(f)(4).

Subsection 7545(h) limits fuel volatility. Measured in terms of pounds per square inch ("psi") of Reid Vapor Pressure ("RVP"), volatility reflects how readily gasoline evaporates. Although fuel must be sufficiently combustible to ignite under cold start conditions, gasoline vapors contain volatile organic compounds that are a key ingredient of ground-level ozone. *Nat'l Tank Truck Carriers, Inc. v. EPA*, 907 F.2d 177, 179 (D.C. Cir. 1990). Thus, "the greater the RVP, the greater the volatility of the gasoline and the larger the amount of ozone formed." *Id.* Because ozone is created when volatile organic compounds react with nitrogen oxides in the presence of sunlight, *see S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 887 (D.C. Cir. 2006), controlling fuel volatility is particularly important dur-

ing the sunnier months of the year when ozone levels are highest, *see Nat'l Tank Truck Carriers*, 907 F.2d at 179.

Subsection 7545(h)(1) directed EPA, not later than six months after enactment of the 1990 Clean Air Act Amendments, to "promulgate regulations making it unlawful for any person during the high ozone season ... to sell, offer for sale, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with a [RVP] in excess of 9.0 [psi]." 42 U.S.C. § 7545(h)(1). The regulations were to "also establish more stringent [RVP] standards in a nonattainment area." *Id.* EPA regulations limit the RVP of gasoline to 9.0 psi in attainment areas and 7.8 psi in nonattainment areas "during the summer season," which generally runs from May 1 to September 15. 40 C.F.R. § 1090.215(a) (2020); *see id.* § 1090.80 (defining "summer season").

Congress was also aware of various benefits of ethanol as compared to gasoline, however. *See* S. Rep. No. 101-228, at 110 (1989). Because, up to a point, adding ethanol to gasoline increases the fuel's RVP, requiring E10 (fuel with 10% ethanol) to satisfy the 9-psi limit "would likely result in the termination of the availability of ethanol in the marketplace." *Id.* Subsection 7545(h)(4) provides for a waiver:

> For fuel blends containing gasoline and 10 percent denatured anhydrous ethanol, the [RVP] limitation under this subsection shall be one pound per square inch (psi) greater than the applicable [RVP] limitations established under paragraph (1) ... .

42 U.S.C. § 7545(h)(4). This 1-psi waiver allows qualifying fuels to be sold during the summer months at 10.0

psi in attainment areas and 8.8 psi in nonattainment areas. *See* 40 C.F.R. § 1090.215(b).

Both kinds of waivers—pursuant to Subsections 7545(f)(4) and (h)(4)—underlie the instant dispute. In 1979, E10 was introduced into commerce through a Subsection 7545(f)(4) waiver. *See Fuels and Fuel Additives: Gasohol; Marketability*, 44 Fed. Reg. 20,777 (Apr. 6, 1979). EPA extended the 1979 waiver in 1982 to fuel containing 0-to-10% ethanol upon finding that the "emissions effect of blends containing up to 10 percent anhydrous ethanol in unleaded gasoline would be the same or less than that for the full 10 percent ethanol blend." *Fuels*; *Blends of Ethanol in Unleaded Gasoline*, 47 Fed. Reg. 14,596, 14,596 (Apr. 5, 1982). Over the next thirty years, use of E10 increased. By 2013, E10 accounted for nearly all gasoline sold in the United States. *E15 Rule*, 84 Fed. Reg. at 26,986.

In 2010 and 2011, EPA determined that E15 would not impair certain motor vehicles' emission controls under Subsection 7545(f)(4) and by waivers approved the use of E15 in light-duty motor vehicles made after 2000. *See Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent*, 76 Fed. Reg. 4,662 (Jan. 26, 2011); *Partial Grant and Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent*, 75 Fed. Reg. 68,094 (Nov. 4, 2010); *see also Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 173 (D.C. Cir. 2012). These waivers did not include the 1-psi waiver that enabled the summer sale of E10, but instead required E15 to meet the generally applicable 9-psi limit. EPA rejected requests to apply the 1-psi waiver to E15, interpreting Subsection 7545(h)(4) as "limit[ed] ... to fuel blends containing gaso-

line and 9–10 vol% ethanol." *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, 44,433 (July 25, 2011) ("Misfueling Rule"). Because it is cost-prohibitive to produce ethanol blends with volatility not exceeding 9.0 psi, EPA's waiver condition prevented the sale of E15 during the summer. *See E15 Rule*, 84 Fed. Reg. at 26,990, 26,993.

In October 2018, the President directed EPA to initiate a rulemaking to consider modifying the volatility limits for E15 so it could "be sold year round rather than just eight months of the year." White House, Fact Sheet: President Donald J. Trump Is Expanding Waivers for E15 and Increasing Transparency in the RIN Market (Oct. 11, 2018). Section II of the E15 Rule, which EPA issued in June 2019, extended the 1-psi waiver to fuel blends with an ethanol concentration of "at least 9% and no more than 15% (by volume) of the gasoline." *E15 Rule*, 84 Fed. Reg. at 27,021 (codified at 40 C.F.R. § 80.27(d)(2), now codified in § 1090.215(b)). This change rested on two subsidiary determinations. First, EPA "adopt[ed] a new interpretation" of Subsection 7545(h)(4), *id.* at 26,991, as simply "establishing a lower limit, or floor, on the minimum ethanol content for a 1-psi waiver," *id.* at 26,992. Under its revised interpretation, the "lack[] [of] modifiers for the term 'containing'" in Subsection 7545(h)(4), "in contrast to the other statutory provisions" in Section 7545, renders the term "ambiguous and provides room for … interpretive and policy choices." *Id.* EPA concluded it was "permissible … to interpret 'containing' to mean 'containing at least'" such that "all fuels which contain at least 10 percent ethanol may receive the 1-psi waiver, including

blends that contain more than 10 percent ethanol." *Id.* This new interpretation, EPA noted, advanced the statutory purpose of promoting the use of ethanol fuel. *Id.* at 26,993. Second, EPA determined that E15 is "substantially similar" to E10, a fuel used to certify vehicle emissions control systems, when used in light-duty motor vehicles made after 2000. Because E15 thereby satisfied the requirements of Subsection 7545(f)(1)(A), as well as Subsection 7545(h)(4) as EPA reinterpreted it, E15 could be sold at 10.0 psi notwithstanding the volatility conditions in the 2010–2011 waivers. *Id.*

Three sets of petitioners challenge Section II of the E15 Rule. Petroleum Petitioners contend that Subsection 7545(h)(4)'s 1-psi waiver does not apply to blends with more than 10% ethanol and that EPA's reinterpretation contradicts the statutory text, context, and history. They further contend that EPA lacks authority to make a partial substantial-similarity determination pursuant to Subsection 7545(f)(1)(A), and that its finding that E15 is substantially similar to E10 is arbitrary and capricious. Ethanol Petitioners also challenge EPA's reinterpretation of Subsection 7545(f)(1)(A), but they maintain that the E15 Rule does not go far enough. They assert that fuel blends with more than 15% ethanol are substantially similar to E10, obligating EPA to extend the 1-psi waiver to those higher-ethanol blends. The Small Retailers Coalition challenge is directed to EPA's certification that the E15 Rule will not adversely affect small businesses. The Coalition argues that certification was inconsistent with the Regulatory Flexibility Act and irrational because small fuel retailers will be required to undertake costly infrastructure upgrades to store and sell E15.

II.

As a threshold matter, the court addresses whether at least one of the petitioners has standing under Article III of the Constitution to obtain review of the E15 Rule. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998); *Carbon Sequestration Council v. EPA*, 787 F.3d 1129, 1137 (D.C. Cir. 2015). If one of the Petroleum Petitioners has standing, and if their contention that the E15 Rule is contrary to the plain text, context, and history of the Clean Air Act is persuasive, then, absent the severability of Section II, the court must vacate the E15 Rule.

Article III standing requires that a petitioner show an "injury in fact," a "causal connection" between the injury and the challenged conduct, and a likelihood "that the injury will be redressed by a favorable decision." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted). The party invoking the court's jurisdiction bears the burden of demonstrating a "substantial probability" of standing. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (quoting *Am. Petro. Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000)). When standing is not self-evident—for example, as may be true if a petitioner is not directly regulated by the challenged rule—"the petitioner must supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review." *Id.* at 900. An association may bring suit on behalf of its members "only if (1) at least one of its members would have standing to sue in [its] own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit." *Chesapeake Climate Action Network v. EPA*, 952 F.3d 310, 318 (D.C. Cir. 2020) (quoting *Am. Truck-*

ing Ass'ns v. Fed. Motor Carrier Safety Admin., 724 F.3d 243, 247 (D.C. Cir. 2013)).

One of the Petroleum Petitioners, American Fuel & Petrochemical Manufacturers ("AFPM"), a trade association that "represents most refiners in the United States," Susan W. Grissom Decl. ¶ 2, has standing. Two of its members, Motiva Enterprises LLC and Sinclair Oil Corporation, could each assert a justiciable claim in its own right. Motiva and Sinclair assert injuries under the doctrine of competitor standing, which recognizes that "economic actors 'suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.'" *Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1015 (D.C. Cir. 2016) (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)). To demonstrate competitor injury, a petitioner must "show an actual or imminent increase in competition." *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010). With injury established, the rest of the standing inquiry ordinarily falls into place: the increased competition is caused by the agency's action and redressed by restoring the regulatory *status quo ante*. *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 341–42 (D.C. Cir. 2018); *Nat'l Biodiesel Bd.*, 843 F.3d at 1015.

Motiva and Sinclair produce petroleum products. William Spurgeon Decl. ¶ 4; Adam G. Suess Decl. ¶ 1. They compete with biofuel producers in the motor vehicle fuel market because ethanol is a substitute for the traditional petroleum-based components of gasoline. Spurgeon Decl. ¶ 25. By removing the otherwise applicable 9-psi volatility limit, the E15 Rule is substantially likely to increase demand for E15. Suess Decl. ¶¶ 10–11; *see Nat'l Biodiesel Bd.*, 843 F.3d at 1015–16; *Delta*

Const. Co. v. EPA, 783 F.3d 1291, 1299–1300 (D.C. Cir. 2015). EPA, upon extrapolating from monthly E15 retail sales data collected in Minnesota between 2015 and 2018, has estimated that "annual per-station sales of E15 would have been about 16% higher had the 1psi waiver been available for E15." Resp. to Comments at 97. Increased production of E15 is, in turn, likely to cause a significant rise in demand for ethanol and a significant reduction in demand for petroleum. Spurgeon Decl. ¶ 25; Suess Decl. ¶¶ 12–13. Because vacatur of the E15 Rule would redress these injuries, Motiva and Sinclair have competitor standing. *See Nat'l Biodiesel Bd.*, 843 F.3d at 1015.

The other two elements of associational standing are also satisfied. The interests that AFPM seeks to protect are germane to its purpose; it has an "obvious interest in challenging" a rule detrimental to the financial wellbeing of its members. *Am. Trucking Ass'ns*, 724 F.3d at 247. Neither the claims asserted regarding EPA's statutory violations, nor the relief sought by vacatur requires the participation of AFPM's members. *See Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 597 (D.C. Cir. 2015). Because AFPM has shown a substantial probability of associational standing, the court need not consider other bases offered by Petroleum Petitioners to establish Article III standing. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017).

III.

Turning to the merits, Petroleum Petitioners contend that the E15 Rule is contrary to the plain meaning of Subsection 7545(h)(4). They maintain that the statute is clear on its face: the phrase "fuel blends containing gasoline and 10 percent … ethanol" refers to E10

and E10 only. It follows, they conclude, that Subsection 7545(h)(4) does not authorize EPA to alter the volatility limits for E15. EPA responds that the term "containing" is sufficiently ambiguous to render its revised interpretation reasonable and deserving of deference by the court. Intervenors Growth Energy, National Corn Growers Association, and Renewable Fuels Association ("Biofuel Intervenors") agree with Petroleum Petitioners that the statute is unambiguous, but they contend that Subsection 7545(h)(4) unambiguously applies to all fuel blends with at least 10% ethanol.

The court's review of EPA's interpretation of the Clean Air Act proceeds under the two-step framework announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Michigan v. EPA*, 576 U.S. 743, 751 (2015); *Am. Fuel & Petro. Mfrs. v. EPA*, 937 F.3d 559, 574 (D.C. Cir. 2019). The court first asks "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In answering that question, the court exhausts the "traditional tools of statutory construction," considering the provision's text, context, legislative history, and purpose. *Id.* at 843 n.9; *see U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 605 (D.C. Cir. 2016). When Congress has written clearly, "that is the end of the matter," because the court and EPA "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. When "the statute is silent or ambiguous with respect to the specific issue," then the court will uphold EPA's interpretation so long as it "is based on a permissible construction of the statute." *Id.* at 843.

Our interpretation of Subsection 7545(h)(4) "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that lan-

guage accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). The statutory directive is straightforward. Subsection 7545(h)(4) authorizes EPA to grant a 1-psi waiver to a particular type of fuel: "blends containing gasoline and 10 percent denatured anhydrous ethanol." 42 U.S.C. § 7545(h)(4). In other words, Subsection 7545(h)(4) refers to E10. This understanding accords with the ordinary meaning of the word "contain" used as a percentage. Consider a label that a bottle of wine "contains 10% alcohol by volume." No one would understand that number to be other than a literal statement of the actual amount of alcohol in a serving. By contrast, the label would be misleading if the wine contained only 5% alcohol or 15% alcohol. Here the ordinary meaning of the phrase "containing gasoline and 10 percent … ethanol" specifies the relative amount of ethanol in a unit of fuel, not the minimum or maximum ends of an unspecified range. Confirming the ordinary meaning of "containing," the inclusion of the adjectives "denatured" (ethyl alcohol, that is, undrinkable alcohol) and "anhydrous" (alcohol that has had water removed to a purity of 99% ethanol), Resp't's Br. 17 n.6, reads like a scientific formula. A chemist or petroleum engineer would not read instructions directing the preparation of a solution containing "10 percent denatured anhydrous ethanol" to require the addition of anything other than 10 percent denatured anhydrous ethanol, and no more.

This understanding of "containing" comports with contemporaneous dictionary definitions. When Subsection 7545(h)(4) was enacted in 1990, the word "contain" was defined, as relevant, as "to have within," "to hold,"

or "to comprise" in a manner that "implies the actual presence of a specific substance or quantity within something." WEBSTER'S NEW COLLEGIATE DICTIONARY 282 (9th ed. 1990); *see also* 3 THE OXFORD ENGLISH DICTIONARY 807 (2d ed. 1989). Applying those definitions, Subsection 7545(h)(4) is best read to concern gasoline that "has within it" or "holds" a specific quantity (10%) of a specific substance (ethanol). By its plain terms, then, Subsection 7545(h)(4) applies to E10, leaving no room for EPA to exempt E15 from the 9-psi volatility limit prescribed in Subsection 7545(h)(1).

Statutory context reinforces the conclusion that Congress intended Subsection 7545(h)(4) to regulate E10. Numerous provisions of the Clean Air Act enacted contemporaneously with Subsection 7545(h) in the 1990 Amendments, Pub. L. No. 101-549, 104 Stat. 2399, have percentages with modifiers. Sometimes the modifier establishes a minimum allowable amount. For example, EPA is directed to promulgate regulations requiring certain urban buses to use "low-polluting fuels," 42 U.S.C. § 7554(c)(2)(A), including methanol, which is defined as a blend containing "*at least* 85 percent methanol," *id.* § 7554(f)(2) (emphasis added). The 1990 Amendments also require that gasoline "contain *not less* than 2.7 percent oxygen" by weight during the winter months in areas that do not meet the national ambient air quality standards for carbon monoxide. *Id.* § 7545(m)(2) (emphasis added). Other times the modifier imposes an upper limit. Addressing misfueling, Congress prohibited any person from knowingly introducing into commerce diesel fuel that "contains a concentration of sulfur *in excess of* 0.05 percent (by weight)." *Id.* § 7545(g)(2) (emphasis added). And in Subsection 7545(h)(1), Congress instructed EPA to "promulgate regulations making it unlawful for any

person during the high ozone season" to "introduce into commerce gasoline with a Reid Vapor Pressure *in excess of* 9.0 pounds per square inch." *Id.* § 7545(h)(1) (emphasis added).

In contrast, Congress did not include any modifiers in Subsection 7545(h)(4). Section 7545 itself illustrates that Congress knew how to use modifiers to set upper and lower limits. The absence of such a term in Subsection 7545(h)(4) may properly be understood as purposeful. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002); *New York v. EPA*, 413 F.3d 3, 39–40 (D.C. Cir. 2005). Had Congress intended to exempt a range of ethanol fuels from the 9-psi limit, it could have referred to fuel containing "at least" or "not more than" 10% ethanol, much as appeared in the House version of the 1-psi waiver. *See* H.R. 3030, 101st Cong. § 214 (1989). The reference to E10 without modifiers suggests that Congress intended Subsection 7545(h)(4) to apply to E10.

The statutory history points in the same direction. EPA had regulated fuel volatility before Subsection 7545(h)(4) was enacted. In particular, the year before the 1990 Amendments were enacted, EPA had imposed seasonal, state-specific volatility limits on gasoline and granted ethanol fuels a 1-psi waiver, provided the fuel "contain at least 9% ethanol" and its "maximum ethanol content … not exceed any applicable waiver conditions" granted pursuant to Subsection 7545(f)(4). *Volatility Regulations for Gasoline and Alcohol Blends Sold in Calendar Years 1989 and Beyond*, 54 Fed. Reg. 11,868, 11,885 (Mar. 22, 1989). Because only E10 had received a waiver at that time, EPA's exemption effectively applied only to fuels containing between 9 and 10 percent ethanol. *See E15 Rule*, 84 Fed. Reg. at 26,988. The following year, when Congress enacted Subsection

7545(h), it retained EPA's general framework for regulating fuel volatility, including granting ethanol fuels a 1-psi allowance. But Congress rejected EPA's open-ended approach to the 1-psi waiver, declining to codify the "at least" modifier and flexible upper limit in EPA's 1989 Rule, instead limiting Subsection 7545(h)(4) to E10.

Other legislative actions by Congress around the same time that it enacted the 1990 Amendments are to the same effect. Ten days before enacting the 1990 Amendments, Congress raised the tax imposed on motor vehicle fuels as part of the High Way Trust Fund. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11211(a)(2), 104 Stat. 1388–423 (1990). A lower tax was imposed on "any mixture *at least* 10 percent of which is alcohol … if any portion of such alcohol is ethanol." *Id.* § 11211(a)(5)(F), 104 Stat. 1388–424 (emphasis added). This legislation further underscores that Congress' omission of a modifier in Subsection 7545(h)(4) was deliberate.

Indeed, EPA itself has previously credited Subsection 7545(h)'s legislative history as evidence that it lacked authority to extend the 1-psi waiver to fuels other than E10. In 1991, when implementing Subsection 7545(h)(4), EPA stated that "the legislative history indicates that Congress envisioned continuation of the 9 to 10 percent requirement" set forth in EPA's 1989 Rule. *Regulation of Fuels and Fuel Additives: Standards for Gasoline Volatility; and Control of Air Pollution from New Motor Vehicles and New Motor Vehicle Engines: Standards for Particulate Emissions from Urban Buses*, 56 Fed. Reg. 24,242, 24,245 (May 29, 1991). And in adopting regulations in 2011 to prevent misfueling, EPA pointed to Subsection 7545(h)(4)'s "legislative history [as] support[ing] EPA's interpreta-

tion … that the 1 psi waiver only applies to gasoline blends containing 9–10 vol% ethanol." *Misfueling Rule*, 76 Fed. Reg. at 44,434.

The defenses of EPA's new interpretation of Subsection 7545(h)(4) in the E15 Rule are unpersuasive. EPA and Biofuel Intervenors maintain that the statute is ambiguous inasmuch as no party challenges EPA's longstanding view that the phrase "containing … 10 percent," in Subsection 7545(h)(4) "includes [blends with] as little as 9 percent" ethanol. *E15 Rule*, 84 Fed. Reg. at 26,992 n.90. But recognizing some compliance margin associated with Subsection 7545(h)(4)'s "10 percent" does not support interpreting this provision as though it applied to blends containing "at least 10 percent" ethanol. *See City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). EPA and Biofuel Intervenors also maintain that Subsection 7545(h)(4) can be read as specifying the minimum ethanol content eligible for the 1-psi waiver because the word "containing" is frequently understood to implicitly mean "containing at least." Resp't's Br. 40; Biofuel Intervenors' Br. 17–18. As an example, EPA states that a physician's diagnosis that a "patient's blood must 'contain 10% white blood cells'" to repel infections "clearly does not mean exactly 10.0% white blood cells" but rather "*at least* 10% white blood cells." Resp't's Br. 40. Yet the problem with this argument is that "the sort of ambiguity giving rise to *Chevron* deference is a creature not of definitional possibilities, but of statutory context." *New York v. EPA*, 443 F.3d 880, 884 (D.C. Cir. 2006) (internal quotation marks omitted) (quoting *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005)). Examples from other settings are unlikely to undermine contextual evidence of textual meaning in a complex regulatory regime de-

signed to reduce air pollution where the unmodified term "containing" is used with a percentage.

As to legislative history, EPA and Biofuel Intervenors point out that Congress considered but ultimately rejected the House version of Subsection 7545(h)(4), which provided that "the Administrator may permit gasoline containing *at least* 9 but *not more than* 10 per centum ethanol (by volume) to exceed the applicable Reid vapor pressure requirements by up to 1.0 psi." H.R. 3030, 101st Cong. § 214 (as introduced, July 27, 1989) (emphasis added). They maintain that Congress' decision not to adopt the House's modifier of "not more than" demonstrates there was no intention to limit the 1-psi waiver to E10. *See* Resp't's Br. 35–37; Biofuel Intervenors' Br. 22–23. This account of the legislative history is meaningfully incomplete. Congress was faced with at least three competing versions of the fuel volatility waiver. The bill introduced in the House limited the 1-psi waiver to fuel containing "not more than" 10% ethanol. H.R. 3030, § 214. The House bill reported out of Committee used different phrasing, stating that "the Administrator shall permit a 1.0 pound per square inch (psi) tolerance level for gasoline containing *at least* 10 percent ethanol." H.R. 3030, 101st Cong. § 216 (as reported by H. Comm. on Public Works and Transp., May 21, 1990) (emphasis added). Congress adopted neither of those versions, instead adopting the Senate's phrasing nearly exactly as introduced, which provided that only "fuel blends containing gasoline and 10 per centum denatured anhydrous ethanol" would receive the 1-psi waiver. S. 1360, 101st Cong. § 214 (as introduced, Sept. 14, 1989); *see also* Pub. L. No. 101-549, § 216, 104 Stat. 2399, 2490. The legislative history is silent on why Congress rejected each House formulation and instead adopted the Senate version. This am-

biguous history hardly suffices to overcome the plain text, for courts "do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994).

Lastly, EPA and Biofuel Intervenors maintain that confining Subsection 7545(h)(4) to E10 is contrary to its "ethanol-promoting purpose." Biofuel Intervenors' Br. 22; *see* Resp't's Br. 41. Perhaps so, in one respect. Yet Subsection 7545(h) need not be understood to serve one purpose at all costs. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012); *cf. Ams. for Clean Energy v. EPA*, 864 F.3d 691, 714 (D.C. Cir. 2017). A Senate Committee Report on the 1990 Amendments highlights that Congress was balancing multiple interests. As EPA and Biofuel Intervenors maintain, scientific evidence available to Congress at the time of Subsection 7545(h)'s enactment shows that increasing the ethanol content in a fuel blend beyond 10% reduces the blend's volatility. *See, e.g.*, Robert L. Furey, *Volatility Characteristics of Gasoline-Alcohol and Gasoline-Ether Fuel Blends* 23 (1985). But the record also reflects congressional attention to wide-ranging economic, energy-security, and geopolitical implications of authorizing such blends. *See* S. Rep. No. 101-228, at 110 (1989). In limiting the 1-psi allowance to blends "containing 10 percent ethanol," Congress balanced those interests. Subsection 7545(h)(4) thus reflects a compromise, not simply a desire to maximize ethanol production at all costs.

Because the text, structure, and legislative history of Subsection 7545(h)(4) foreclose EPA's application of the 1-psi waiver to E15, the court must determine whether that aspect of the E15 Rule is severable. Severability "depends on the issuing agency's intent," *North Carolina v. FERC*, 730 F.2d 790, 796 (D.C. Cir.

1984), and severance "is improper if there is substantial doubt that the agency would have adopted the severed portion on its own," *New Jersey v. EPA*, 517 F.3d 574, 584 (D.C. Cir. 2008) (internal quotation marks omitted) (quoting *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997)). The court need not reach the petitioners' challenges to the E15 Rule's interpretation of Subsection 7545(f)(1). EPA stated in the preamble that its "substantial-similarity" finding and interpretation of Subsection 7545(h)(4) in Section II "establish a single, unified program that allows the introduction into commerce of E15 at 10.0 psi RVP during the summer driving season," and that it "d[id] not intend for any of these individual actions to be severable." *E15 Rule*, 84 Fed. Reg. at 26,983. In contrast, EPA stated that Section II was "severable from" Section III, addressing the RIN market, "as these are two separate actions, each of which operates independently from the other." *Id.*

Accordingly, the court will sever and vacate Section II of the E15 Rule and dismiss the remaining petitions as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1124
September Term, 2021
Consolidated with 19-1159, 19-1160, 19-1162
EPA-84FR26980

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

GROWTH ENERGY, ET AL.,

Intervenors.

Filed On: September 9, 2021

BEFORE: Rogers, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the petition of intervenors Growth Energy, National Corn Growers Association, and Renewable Fuels Association for panel rehearing filed on August 16, 2021, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Anya Karaman
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1124
September Term, 2021
Consolidated with 19-1159, 19-1160, 19-1162
EPA-84FR26980

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

GROWTH ENERGY, ET AL.,
Intervenors.

Filed On: September 9, 2021

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao*, Walker, and Jackson, Circuit Judges

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O R D E R

Upon consideration of the petition of intervenors Growth Energy, National Corn Growers Association, and Renewable Fuels Association for rehearing en

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* Circuit Judge Rao did not participate in this matter.

banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Anya Karaman
Deputy Clerk

APPENDIX D

RELEVANT STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 7545

§ 7545. Regulation of fuels

* * *

(c) Offending fuels and fuel additives; control; prohibition

(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle 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)[2] 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.

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[2] So in original. See Codifications and 2007 Amendments notes set out under this section.

(2)(A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1)[2] except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 7521 of this title.

(B) No fuel or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (B) of paragraph (1) except after consideration of available scientific and economic data, including a cost benefit analysis comparing emission control devices or systems which are or will be in general use and require the proposed control or prohibition with emission control devices or systems which are or will be in general use and do not require the proposed control or prohibition. On request of a manufacturer of motor vehicles, motor vehicle engines, fuels, or fuel additives submitted within 10 days of notice of proposed rulemaking, the Administrator shall hold a public hearing and publish findings with respect to any matter he is required to consider under this subparagraph. Such findings shall be published at the time of promulgation of final regulations.

(C) No fuel or fuel additive may be prohibited by the Administrator under paragraph (1) unless he finds, and publishes such finding, that in his judgment such prohibition will not cause the use of any other fuel or fuel additive which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the fuel or fuel additive proposed to be prohibited.

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[2] So in original. See Codifications and 2007 Amendments notes set out under this section.

(3)(A) For the purpose of obtaining evidence and data to carry out paragraph (2), the Administrator may require the manufacturer of any motor vehicle or motor vehicle engine to furnish any information which has been developed concerning the emissions from motor vehicles resulting from the use of any fuel or fuel additive, or the effect of such use on the performance of any emission control device or system.

(B) In obtaining information under subparagraph (A), section 7607(a) of this title (relating to subpenas) shall be applicable.

(4)(A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine—

(i) if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 7543(a) of this title has at any time been waived under section 7543(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission

control, a control or prohibition respecting any fuel or fuel additive.

(C)(i) A State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 7410 of this title so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements. The Administrator may find that a State control or prohibition is necessary to achieve that standard if no other measures that would bring about timely attainment exist, or if other measures exist and are technically possible to implement, but are unreasonable or impracticable. The Administrator may make a finding of necessity under this subparagraph even if the plan for the area does not contain an approved demonstration of timely attainment.

(ii) The Administrator may temporarily waive a control or prohibition respecting the use of a fuel or fuel additive required or regulated by the Administrator pursuant to subsection (c), (h), (i), (k), or (m) of this section or prescribed in an applicable implementation plan under section 7410 of this title approved by the Administrator under clause (i) of this subparagraph if, after consultation with, and concurrence by, the Secretary of Energy, the Administrator determines that—

(I) extreme and unusual fuel or fuel additive supply circumstances exist in a State or region of the Na-

tion which prevent the distribution of an adequate supply of the fuel or fuel additive to consumers;

(II) such extreme and unusual fuel and fuel additive supply circumstances are the result of a natural disaster, an Act of God, a pipeline or refinery equipment failure, or another event that could not reasonably have been foreseen or prevented and not the lack of prudent planning on the part of the suppliers of the fuel or fuel additive to such State or region; and

(III) it is in the public interest to grant the waiver (for example, when a waiver is necessary to meet projected temporary shortfalls in the supply of the fuel or fuel additive in a State or region of the Nation which cannot otherwise be compensated for).

(iii) If the Administrator makes the determinations required under clause (ii), such a temporary extreme and unusual fuel and fuel additive supply circumstances waiver shall be permitted only if—

(I) the waiver applies to the smallest geographic area necessary to address the extreme and unusual fuel and fuel additive supply circumstances;

(II) the waiver is effective for a period of 20 calendar days or, if the Administrator determines that a shorter waiver period is adequate, for the shortest practicable time period necessary to permit the correction of the extreme and unusual fuel and fuel additive supply circumstances and to mitigate impact on air quality;

(III) the waiver permits a transitional period, the exact duration of which shall be determined by the Administrator (but which shall be for the shortest practicable period), after the termination of the

temporary waiver to permit wholesalers and retailers to blend down their wholesale and retail inventory;

(IV) the waiver applies to all persons in the motor fuel distribution system; and

(V) the Administrator has given public notice to all parties in the motor fuel distribution system, and local and State regulators, in the State or region to be covered by the waiver.

The term "motor fuel distribution system" as used in this clause shall be defined by the Administrator through rulemaking.

(iv) Within 180 days of August 8, 2005, the Administrator shall promulgate regulations to implement clauses (ii) and (iii).

(v)[3] Nothing in this subparagraph shall—

(I) limit or otherwise affect the application of any other waiver authority of the Administrator pursuant to this section or pursuant to a regulation promulgated pursuant to this section; and

(II) subject any State or person to an enforcement action, penalties, or liability solely arising from actions taken pursuant to the issuance of a waiver under this subparagraph.

(v)[3](I) The Administrator shall have no authority, when considering a State implementation plan or a State implementation plan revision, to approve under this paragraph any fuel included in such plan or revision if the effect of such approval increases the total

[3] So in original. Two cls. (v) enacted.

number of fuels approved under this paragraph as of September 1, 2004, in all State implementation plans.

(II) The Administrator, in consultation with the Secretary of Energy, shall determine the total number of fuels approved under this paragraph as of September 1, 2004, in all State implementation plans and shall publish a list of such fuels, including the States and Petroleum Administration for Defense District in which they are used, in the Federal Register for public review and comment no later than 90 days after August 8, 2005.

(III) The Administrator shall remove a fuel from the list published under subclause (II) if a fuel ceases to be included in a State implementation plan or if a fuel in a State implementation plan is identical to a Federal fuel formulation implemented by the Administrator, but the Administrator shall not reduce the total number of fuels authorized under the list published under subclause (II).

(IV) Subclause (I) shall not limit the Administrator's authority to approve a control or prohibition respecting any new fuel under this paragraph in a State implementation plan or revision to a State implementation plan if such new fuel—

(aa) completely replaces a fuel on the list published under subclause (II); or

(bb) does not increase the total number of fuels on the list published under subclause (II) as of September 1, 2004.

In the event that the total number of fuels on the list published under subclause (II) at the time of the Administrator's consideration of a control or prohibition respecting a new fuel is lower than the total number of fuels on such list as of September 1, 2004, the Adminis-

trator may approve a control or prohibition respecting a new fuel under this subclause if the Administrator, after consultation with the Secretary of Energy, publishes in the Federal Register after notice and comment a finding that, in the Administrator's judgment, such control or prohibition respecting a new fuel will not cause fuel supply or distribution interruptions or have a significant adverse impact on fuel producibility in the affected area or contiguous areas.

(V) The Administrator shall have no authority under this paragraph, when considering any particular State's implementation plan or a revision to that State's implementation plan, to approve any fuel unless that fuel was, as of the date of such consideration, approved in at least one State implementation plan in the applicable Petroleum Administration for Defense District. However, the Administrator may approve as part of a State implementation plan or State implementation plan revision a fuel with a summertime Reid Vapor Pressure of 7.0 psi. In no event shall such approval by the Administrator cause an increase in the total number of fuels on the list published under subclause (II).

(VI) Nothing in this clause shall be construed to have any effect regarding any available authority of States to require the use of any fuel additive registered in accordance with subsection (b), including any fuel additive registered in accordance with subsection (b) after August 8, 2005.

* * *

(f) New fuels and fuel additives

(1)(A) Effective upon March 31, 1977, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the con-

centration in use of, 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 under section 7525 of this title.

(B) 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 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.

(2) Effective November 30, 1977, it shall be unlawful for any manufacturer of any fuel to introduce into commerce any gasoline which contains a concentration of manganese in excess of .0625 grams per gallon of fuel, except as otherwise provided pursuant to a waiver under paragraph (4).

(3) Any manufacturer of any fuel or fuel additive which prior to March 31, 1977, and after January 1, 1974, first introduced into commerce or increased the concentration in use of a fuel or fuel additive that would otherwise have been prohibited under paragraph (1)(A) if introduced on or after March 31, 1977 shall, not later than September 15, 1978, cease to distribute such fuel or fuel additive in commerce. During the period beginning 180 days after August 7, 1977, and before September 15, 1978, the Administrator shall prohibit, or restrict the concentration of any fuel additive which he determines will cause or contribute to the failure of an emission control device or system (over the useful life

of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified under section 7525 of this title.

(4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this subsection or the limitation specified in paragraph (2) of this subsection, if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or fuel additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified pursuant to sections 7525 and 7547(a) of this title. The Administrator shall take final action to grant or deny an application submitted under this paragraph, after public notice and comment, within 270 days of the receipt of such an application.

(5) No action of the Administrator under this section may be stayed by any court pending judicial review of such action.

* * *

(h) Reid Vapor Pressure requirements

(1) Prohibition

Not later than 6 months after November 15, 1990, the Administrator shall promulgate regulations making it unlawful for any person during the high ozone season (as defined by the Administra-

tor) to sell, offer for sale, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with a Reid Vapor Pressure in excess of 9.0 pounds per square inch (psi). Such regulations shall also establish more stringent Reid Vapor Pressure standards in a nonattainment area as the Administrator finds necessary to generally achieve comparable evaporative emissions (on a per-vehicle basis) in nonattainment areas, taking into consideration the enforceability of such standards, the need of an area for emission control, and economic factors.

(2) Attainment areas

The regulations under this subsection shall not make it unlawful for any person to sell, offer for supply, transport, or introduce into commerce gasoline with a Reid Vapor Pressure of 9.0 pounds per square inch (psi) or lower in any area designated under section 7407 of this title as an attainment area. Notwithstanding the preceding sentence, the Administrator may impose a Reid vapor pressure requirement lower than 9.0 pounds per square inch (psi) in any area, formerly an ozone nonattainment area, which has been redesignated as an attainment area.

(3) Effective date; enforcement

The regulations under this subsection shall provide that the requirements of this subsection shall take effect not later than the high ozone season for 1992, and shall include such provisions as the Administrator determines are necessary to implement and enforce the requirements of this subsection.

(4) Ethanol waiver

For fuel blends containing gasoline and 10 percent denatured anhydrous ethanol, the Reid vapor pressure limitation under this subsection shall be one pound per square inch (psi) greater than the applicable Reid vapor pressure limitations established under paragraph (1); Provided, however, That a distributor, blender, marketer, reseller, carrier, retailer, or wholesale purchaser-consumer shall be deemed to be in full compliance with the provisions of this subsection and the regulations promulgated thereunder if it can demonstrate (by showing receipt of a certification or other evidence acceptable to the Administrator) that—

(A) the gasoline portion of the blend complies with the Reid vapor pressure limitations promulgated pursuant to this subsection;

(B) the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4); and

(C) no additional alcohol or other additive has been added to increase the Reid Vapor Pressure of the ethanol portion of the blend.

(5) Exclusion from ethanol waiver

(A) Promulgation of regulations

Upon notification, accompanied by supporting documentation, from the Governor of a State that the Reid vapor pressure limitation established by paragraph (4) will increase emissions that contribute to air pollution in any area in the State, the Administrator shall, by regulation, apply, in lieu of the Reid vapor pressure limitation established by paragraph

(4), the Reid vapor pressure limitation established by paragraph (1) to all fuel blends containing gasoline and 10 percent denatured anhydrous ethanol that are sold, offered for sale, dispensed, supplied, offered for supply, transported, or introduced into commerce in the area during the high ozone season.

(B) Deadline for promulgation

The Administrator shall promulgate regulations under subparagraph (A) not later than 90 days after the date of receipt of a notification from a Governor under that subparagraph.

(C) Effective date

(i) In general

With respect to an area in a State for which the Governor submits a notification under subparagraph (A), the regulations under that subparagraph shall take effect on the later of—

(I) the first day of the first high ozone season for the area that begins after the date of receipt of the notification; or

(II) 1 year after the date of receipt of the notification.

(ii) Extension of effective date based on determination of insufficient supply

(I) In general

If, after receipt of a notification with respect to an area from a Governor of a State under subparagraph (A),

the Administrator determines, on the Administrator's own motion or on petition of any person and after consultation with the Secretary of Energy, that the promulgation of regulations described in subparagraph (A) would result in an insufficient supply of gasoline in the State, the Administrator, by regulation—

(aa) shall extend the effective date of the regulations under clause (i) with respect to the area for not more than 1 year; and

(bb) may renew the extension under item (aa) for two additional periods, each of which shall not exceed 1 year.

(II) Deadline for action on petitions

The Administrator shall act on any petition submitted under subclause (I) not later than 180 days after the date of receipt of the petition.

(6) Areas covered

The provisions of this subsection shall apply only to the 48 contiguous States and the District of Columbia.

* * *

(o) Renewable fuel program

(1) Definitions

In this section:

(A) Additional renewable fuel

The term "additional renewable fuel" means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.

(B) Advanced biofuel

(i) In general

The term "advanced biofuel" means renewable fuel, other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

(ii) Inclusions

The types of fuels eligible for consideration as "advanced biofuel" may include any of the following:

(I) Ethanol derived from cellulose, hemicellulose, or lignin.

(II) Ethanol derived from sugar or starch (other than corn starch).

(III) Ethanol derived from waste material, including crop residue, other vegetative waste material, animal waste, and food waste and yard waste.

(IV) Biomass-based diesel.

(V) Biogas (including landfill gas and sewage waste treatment gas) pro-

duced through the conversion of organic matter from renewable biomass.

(VI) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass.

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

The term "baseline lifecycle greenhouse gas emissions" means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

(D) Biomass-based diesel

The term "biomass-based diesel" means renewable fuel that is biodiesel as defined in section 13220(f) of this title and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwithstanding the preceding sentence, renewable fuel derived from coprocessing biomass with a petroleum feedstock shall be advanced biofuel if it meets the requirements of subparagraph (B), but is not biomass-based diesel.

(E) Cellulosic biofuel

The term "cellulosic biofuel" means renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.

(F) Conventional biofuel

The term "conventional biofuel" means renewable fuel that is ethanol derived from corn starch.

(G) Greenhouse gas

The term "greenhouse gas" means carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons,8 sulfur hexafluoride. The Administrator may include any other anthropogenically-emitted gas that is determined by the Administrator, after notice and comment, to contribute to global warming.

(H) Lifecycle greenhouse gas emissions

The term "lifecycle greenhouse gas emissions" means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the

mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

(I) Renewable biomass

The term "renewable biomass" means each of the following:

(i) Planted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to December 19, 2007, that is either actively managed or fallow, and nonforested.

(ii) Planted trees and tree residue from actively managed tree plantations on non-federal9 land cleared at any time prior to December 19, 2007, including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.

(iii) Animal waste material and animal byproducts.

(iv) Slash and pre-commercial thinnings that are from non-federal9 forestlands, including forestlands belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States, but not forests or forestlands that are ecological communities with a global or State ranking of critically imperiled, imperiled, or rare pursuant to a State Natural Heritage Pro-

gram, old growth forest, or late successional forest.

(v) Biomass obtained from the immediate vicinity of buildings and other areas regularly occupied by people, or of public infrastructure, at risk from wildfire.

(vi) Algae.

(vii) Separated yard waste or food waste, including recycled cooking and trap grease.

(J) Renewable fuel

The term "renewable fuel" means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.

(K) Small refinery

The term "small refinery" means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(L) Transportation fuel

The term "transportation fuel" means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).

(2) Renewable fuel program

(A) Regulations

(i) In general

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B). Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(ii) Noncontiguous State opt-in

(I) In general

On the petition of a noncontiguous State or territory, the Administrator

may allow the renewable fuel program established under this subsection to apply in the noncontiguous State or territory at the same time or any time after the Administrator promulgates regulations under this subparagraph.

(II) Other actions

In carrying out this clause, the Administrator may—

(aa) issue or revise regulations under this paragraph;

(bb) establish applicable percentages under paragraph (3);

(cc) provide for the generation of credits under paragraph (5); and

(dd) take such other actions as are necessary to allow for the application of the renewable fuels program in a noncontiguous State or territory.

(iii) Provisions of regulations

Regardless of the date of promulgation, the regulations promulgated under clause (i)—

(I) shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met; but

(II) shall not—

(aa) restrict geographic areas in which renewable fuel may be used; or

(bb) impose any per-gallon obligation for the use of renewable fuel.

(iv) Requirement in case of failure to promulgate regulations

If the Administrator does not promulgate regulations under clause (i), the percentage of renewable fuel in gasoline sold or dispensed to consumers in the United States, on a volume basis, shall be 2.78 percent for calendar year 2006.

(B) Applicable volumes

(i) Calendar years after 2005

(I) Renewable fuel

For the purpose of subparagraph (A), the applicable volume of renewable fuel for the calendar years 2006 through 2022 shall be determined in accordance with the following table:

Calendar year:	**Applicable volume of renewable fuel (in billions of gallons):**
2006	4.0
2007	4.7

2008	9.0
2009	11.1
2010	12.95
2011	13.95
2012	15.2
2013	16.55
2014	18.15
2015	20.5
2016	22.25
2017	24.0
2018	26.0
2019	28.0
2020	30.0
2021	33.0
2022	36.0

(II) Advanced biofuel

For the purpose of subparagraph (A), of the volume of renewable fuel required under subclause (I), the applicable volume of advanced biofuel for the calendar years 2009 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of advanced biofuel (in billions of gallons):
2009	0.6
2010	0.95
2011	1.35
2012	2.0
2013	2.75
2014	3.75
2015	5.5
2016	7.25
2017	9.0
2018	11.0
2019	13.0
2020	15.0
2021	18.0
2022	21.0

(III) Cellulosic biofuel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of cellulosic biofuel for the calendar years 2010 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of cellulosic biofuel (in billions of gallons):
2010	0.1
2011	0.25
2012	0.5
2013	1.0
2014	1.75
2015	3.0
2016	4.25
2017	5.5
2018	7.0
2019	8.5
2020	10.5
2021	13.5
2022	16.0

(IV) Biomass-based diesel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of biomass-based diesel for the calendar years 2009 through 2012 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of biomass based diesel (in billions of gallons):
2009	0.5
2010	0.65
2011	0.80
2012	1.0

(ii) Other calendar years

For the purposes of subparagraph (A), the applicable volumes of each fuel specified in the tables in clause (i) for calendar years after the calendar years specified in the tables shall be determined by the Administrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the implementation of the program during calendar years specified in the tables, and an analysis of—

(I) the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;

(II) the impact of renewable fuels on the energy security of the United States;

(III) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);

(IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;

(V) the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and

(VI) the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

The Administrator shall promulgate rules establishing the applicable volumes under this clause no later than 14 months before the first year for which such applicable volume will apply.

(iii) Applicable volume of advanced biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of advanced biofuel shall be at least the same percent-

age of the applicable volume of renewable fuel as in calendar year 2022.

(iv) Applicable volume of cellulosic biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of cellulosic biofuel established by the Administrator shall be based on the assumption that the Administrator will not need to issue a waiver for such years under paragraph (7)(D).

(v) Minimum applicable volume of biomass-based diesel

For the purpose of making the determinations in clause (ii), the applicable volume of biomass-based diesel shall not be less than the applicable volume listed in clause (i)(IV) for calendar year 2012.

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

Not later than October 31 of each of calendar years 2005 through 2021, the Administrator of the Energy Information Administration shall provide to the Administrator of the Environmental Protection Agency an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.

(B) Determination of applicable percentages

(i) In general

Not later than November 30 of each of calendar years 2005 through 2021, based on the estimate provided under subparagraph (A), the Administrator of the Environmental Protection Agency shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.

(ii) Required elements

The renewable fuel obligation determined for a calendar year under clause (i) shall—

(I) be applicable to refineries, blenders, and importers, as appropriate;

(II) be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States; and

(III) subject to subparagraph (C)(i), consist of a single applicable percentage that applies to all categories of persons specified in subclause (I).

(C) Adjustments

In determining the applicable percentage for a calendar year, the Administrator shall make adjustments—

(i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and

(ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

(4) Modification of greenhouse gas reduction percentages

(A) In general

The Administrator may, in the regulations under the last sentence of paragraph (2)(A)(i), adjust the 20 percent, 50 percent, and 60 percent reductions in lifecycle greenhouse gas emissions specified in paragraphs (2)(A)(i) (relating to renewable fuel), (1)(D) (relating to biomass-based diesel), (1)(B)(i) (relating to advanced biofuel), and (1)(E) (relating to cellulosic biofuel) to a lower percentage. For the 50 and 60 percent reductions, the Administrator may make such an adjustment only if he determines that generally such reduction is not commercially feasible for fuels made using a variety of feedstocks, technologies, and processes to meet the applicable reduction.

(B) Amount of adjustment

In promulgating regulations under this paragraph, the specified 50 percent reduction in greenhouse gas emissions from advanced biofuel and in biomass-based diesel may not be reduced below 40 percent. The specified 20 percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below

10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

(C) Adjusted reduction levels

An adjustment under this paragraph to a percent less than the specified 20 percent greenhouse gas reduction for renewable fuel shall be the minimum possible adjustment, and the adjusted greenhouse gas reduction shall be established by the Administrator at the maximum achievable level, taking cost in consideration, for natural gas fired corn-based ethanol plants, allowing for the use of a variety of technologies and processes. An adjustment in the 50 or 60 percent greenhouse gas levels shall be the minimum possible adjustment for the fuel or fuels concerned, and the adjusted greenhouse gas reduction shall be established at the maximum achievable level, taking cost in consideration, allowing for the use of a variety of feedstocks, technologies, and processes.

(D) 5-year review

Whenever the Administrator makes any adjustment under this paragraph, not later than 5 years thereafter he shall review and revise (based upon the same criteria and standards as required for the initial adjustment) the regulations establishing the adjusted level.

(E) Subsequent adjustments

After the Administrator has promulgated a final rule under the last sentence of paragraph (2)(A)(i) with respect to the method of determining lifecycle greenhouse gas emissions, ex-

cept as provided in subparagraph (D), the Administrator may not adjust the percent greenhouse gas reduction levels unless he determines that there has been a significant change in the analytical methodology used for determining the lifecycle greenhouse gas emissions. If he makes such determination, he may adjust the 20, 50, or 60 percent reduction levels through rulemaking using the criteria and standards set forth in this paragraph.

(F) Limit on upward adjustments

If, under subparagraph (D) or (E), the Administrator revises a percent level adjusted as provided in subparagraphs (A), (B), and (C) to a higher percent, such higher percent may not exceed the applicable percent specified in paragraph (2)(A)(i), (1)(D), (1)(B)(i), or (1)(E).

(G) Applicability of adjustments

If the Administrator adjusts, or revises, a percent level referred to in this paragraph or makes a change in the analytical methodology used for determining the lifecycle greenhouse gas emissions, such adjustment, revision, or change (or any combination thereof) shall only apply to renewable fuel from new facilities that commence construction after the effective date of such adjustment, revision, or change.

(5) Credit program

(A) In general

The regulations promulgated under paragraph (2)(A) shall provide—

(i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2);

(ii) for the generation of an appropriate amount of credits for biodiesel; and

(iii) for the generation of credits by small refineries in accordance with paragraph (9)(C).

(B) Use of credits

A person that generates credits under subparagraph (A) may use the credits, or transfer all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(C) Duration of credits

A credit generated under this paragraph shall be valid to show compliance for the 12 months as of the date of generation.

(D) Inability to generate or purchase sufficient credits

The regulations promulgated under paragraph (2)(A) shall include provisions allowing any person that is unable to generate or purchase sufficient credits to meet the requirements of paragraph (2) to carry forward a renewable fuel deficit on condition that the person, in the calendar year following the year in which the renewable fuel deficit is created—

(i) achieves compliance with the renewable fuel requirement under paragraph (2); and

(ii) generates or purchases additional renewable fuel credits to offset the renewable fuel deficit of the previous year.

(E) Credits for additional renewable fuel

The Administrator may issue regulations providing: (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports additional renewable fuels specified by the Administrator; and (ii) for the use of such credits by the generator, or the transfer of all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(6) Seasonal variations in renewable fuel use

(A) Study

For each of calendar years 2006 through 2012, the Administrator of the Energy Information Administration shall conduct a study of renewable fuel blending to determine whether there are excessive seasonal variations in the use of renewable fuel.

(B) Regulation of excessive seasonal variations

If, for any calendar year, the Administrator of the Energy Information Administration, based on the study under subparagraph (A), makes the determinations specified in subparagraph (C), the Administrator of the Environmental Protection Agency shall promulgate

regulations to ensure that 25 percent or more of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) is used during each of the 2 periods specified in subparagraph (D) of each subsequent calendar year.

(C) Determinations

The determinations referred to in subparagraph (B) are that—

(i) less than 25 percent of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) has been used during 1 of the 2 periods specified in subparagraph (D) of the calendar year;

(ii) a pattern of excessive seasonal variation described in clause (i) will continue in subsequent calendar years; and

(iii) promulgating regulations or other requirements to impose a 25 percent or more seasonal use of renewable fuels will not prevent or interfere with the attainment of national ambient air quality standards or significantly increase the price of motor fuels to the consumer.

(D) Periods

The 2 periods referred to in this paragraph are—

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

Renewable fuel blended or consumed in calendar year 2006 in a State that has received a waiver under section 7543(b) of this title shall not be included in the study under subparagraph (A).

(F) State exemption from seasonality requirements

Notwithstanding any other provision of law, the seasonality requirement relating to renewable fuel use established by this paragraph shall not apply to any State that has received a waiver under section 7543(b) of this title or any State dependent on refineries in such State for gasoline supplies.

(7) Waivers

(A) In general

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2)—

(i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or

(ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

(B) Petitions for waivers

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, shall approve or disapprove a petition for a waiver of the requirements of paragraph (2) within 90 days after the date on which the petition is received by the Administrator.

(C) Termination of waivers

A waiver granted under subparagraph (A) shall terminate after 1 year, but may be renewed by the Administrator after consultation with the Secretary of Agriculture and the Secretary of Energy.

(D) Cellulosic biofuel

(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement estab-

lished under paragraph (2)(B) by the same or a lesser volume.

(ii) Whenever the Administrator reduces the minimum cellulosic biofuel volume under this subparagraph, the Administrator shall make available for sale cellulosic biofuel credits at the higher of $0.25 per gallon or the amount by which $3.00 per gallon exceeds the average wholesale price of a gallon of gasoline in the United States. Such amounts shall be adjusted for inflation by the Administrator for years after 2008.

(iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

(E) Biomass-based diesel

(i) Market evaluation

The Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall periodically evaluate the impact of the biomass-based diesel requirements established under this paragraph on the price of diesel fuel.

(ii) Waiver

If the Administrator determines that there is a significant renewable feedstock disruption or other market circumstances that would make the price of biomass-based diesel fuel increase significantly, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall issue an order to reduce, for up to a 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomass-based diesel. For any calendar year in which the Administrator makes a reduction under this subparagraph, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(iii) Extensions

If the Administrator determines that the feedstock disruption or circumstances described in clause (ii) is continuing beyond

the 60-day period described in clause (ii) or this clause, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, may issue an order to reduce, for up to an additional 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed an additional 15 percent of the applicable annual requirement for biomass-based diesel.

(F) Modification of applicable volumes

For any of the tables in paragraph (2)(B), if the Administrator waives—

(i) at least 20 percent of the applicable volume requirement set forth in any such table for 2 consecutive years; or

(ii) at least 50 percent of such volume requirement for a single year,

the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).

(8) Study and waiver for initial year of program

(A) In general

Not later than 180 days after August 8, 2005, the Secretary of Energy shall conduct for the Administrator a study assessing whether the renewable fuel requirement under paragraph (2) will likely result in significant adverse impacts on consumers in 2006, on a national, regional, or State basis.

(B) Required evaluations

The study shall evaluate renewable fuel—

(i) supplies and prices;

(ii) blendstock supplies; and

(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

Based on the results of the study, the Secretary of Energy shall make specific recommendations to the Administrator concerning waiver of the requirements of paragraph (2), in whole or in part, to prevent any adverse impacts described in subparagraph (A).

(D) Waiver

(i) In general

Not later than 270 days after August 8, 2005, the Administrator shall, if and to the extent recommended by the Secretary of Energy under subparagraph (C), waive, in whole or in part, the renewable fuel re-

quirement under paragraph (2) by reducing the national quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

Clause (i) does not limit the authority of the Administrator to waive the requirements of paragraph (2) in whole, or in part, under paragraph (7).

(9) Small refineries

(A) Temporary exemption

(i) In general

The requirements of paragraph (2) shall not apply to small refineries until calendar year 2011.

(ii) Extension of exemption

(I) Study by Secretary of Energy

Not later than December 31, 2008, the Secretary of Energy shall conduct for the Administrator a study to determine whether compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship on small refineries.

(II) Extension of exemption

In the case of a small refinery that the Secretary of Energy determines under subclause (I) would be subject to a disproportionate economic hardship if required to comply with paragraph (2), the Administrator shall extend the ex-

emption under clause (i) for the small refinery for a period of not less than 2 additional years.

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.

(ii) Evaluation of petitions

In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.

(iii) Deadline for action on petitions

The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.

(C) Credit program

If a small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A), the regulations promulgated under paragraph (2)(A) shall provide for the generation of credits by the small refinery under paragraph (5) beginning in the calendar year following the date of notification.

(D) Opt-in for small refineries

A small refinery shall be subject to the requirements of paragraph (2) if the small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A).

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

Not later than 180 days after August 8, 2005, and annually thereafter, the Federal Trade Commission shall perform a market concentration analysis of the ethanol production industry using the Herfindahl-Hirschman Index to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior.

(ii) Scoring

For the purpose of scoring under clause (i) using the Herfindahl-Hirschman Index, all marketing arrangements among industry participants shall be considered.

(B) Report

Not later than December 1, 2005, and annually thereafter, the Federal Trade Commission shall submit to Congress and the Administrator a report on the results of the market concentration analysis performed under subparagraph (A)(i).

(11) Periodic reviews

To allow for the appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2), the Administrator shall conduct periodic reviews of—

(A) existing technologies;

(B) the feasibility of achieving compliance with the requirements; and

(C) the impacts of the requirements described in subsection (a)(2)10 on each individual and entity described in paragraph (2).

(12) Effect on other provisions

Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 7475) of this chapter. The previous sentence shall not affect implementation and enforcement of this subsection.

* * *

40 C.F.R. § 80.27

§ 80.27 Controls and prohibitions on gasoline volatility.

(a)(1) Prohibited activities in 1991. During the 1991 regulatory control periods, no refiner, importer, distributor, reseller, carrier, retailer or wholesale purchaser-consumer shall sell, offer for sale, dispense, supply, offer for supply, or transport gasoline whose Reid vapor pressure exceeds the applicable standard. As used in this section and § 80.28, "applicable standard" means the standard listed in this paragraph for the geographical area and time period in which the gasoline is intended to be dispensed to motor vehicles or, if such area and time period cannot be determined, the standard listed in this paragraph that specifies the lowest Reid vapor pressure for the year in which the gasoline is being sampled. As used in this section and § 80.28, "regulatory control periods" mean June 1 to September 15 for retail outlets and wholesale purchaser-consumers and May 1 to September 15 for all other facilities.

* * *

(2) Prohibited activities in 1992 and beyond. During the 1992 and later high ozone seasons no person, including without limitation, no retailer or wholesale purchaser-consumer, and during the 1992 and later regulatory control periods, no refiner, importer, distributor, reseller, or carrier shall sell, offer for sale, dispense, supply, offer for supply, transport or introduce into commerce gasoline whose Reid vapor pressure exceeds the applicable standard. As used in this section and § 80.28, "applicable standard" means:

(i) 9.0 psi for all designated volatility attainment areas; and

(ii) The standard listed in this paragraph for the state and time period in which the gasoline is intended to be dispensed to motor vehicles for any designated volatility nonattainment area within such State or, if such area and time period cannot be determined, the standard listed in this paragraph that specifies the lowest Reid vapor pressure for the year in which the gasoline is sampled. Designated volatility attainment and designated volatility nonattainment areas and their exact boundaries are described in 40 CFR part 81, or such part as shall later be designated for that purpose. As used in this section and § 80.27, "high ozone season" means the period from June 1 to September 15 of any calendar year and "regulatory control period" means the period from May 1 to September 15 of any calendar year.

* * *

(b) Determination of compliance. Compliance with the standards listed in paragraph (a) of this section shall be determined by the use of the sampling methodologies specified in § 80.8 and the testing methodology specified in § 80.46(c) until December 31, 2015, and § 80.47 beginning January 1, 2016.

(c) Liability. Liability for violations of paragraph (a) of this section shall be determined according to the provisions of § 80.28. Where the terms refiner, importer, distributor, reseller, carrier, ethanol blender, retailer, or wholesale purchaser-consumer are expressed in the singular in § 80.28, these terms shall include the plural.

(d) Special provisions for alcohol blends.

(1) Any gasoline which meets the requirements of paragraph (d)(2) of this section shall not be in violation of this section if its Reid vapor pressure does not exceed the applicable standard in paragraph (a) of this section by more than one pound per square inch (1.0 psi).

(2) In order to qualify for the special regulatory treatment specified in paragraph (d)(1) of this section, gasoline must contain denatured, anhydrous ethanol. The concentration of the ethanol, excluding the required denaturing agent, must be at least 9% and no more than 15% (by volume) of the gasoline. The ethanol content of the gasoline shall be determined by the use of one of the testing methodologies specified in § 80.47. The maximum ethanol content shall not exceed any applicable waiver conditions under section 211(f) of the Clean Air Act.

(3) Each invoice, loading ticket, bill of lading, delivery ticket and other document which accompanies a shipment of gasoline containing ethanol shall contain a legible and conspicuous statement that the gasoline being shipped contains ethanol and the percentage concentration of ethanol.

(e) Testing exemptions. (1)(i) Any person may request a testing exemption by submitting an application that includes all the information listed in paragraphs (e)(3) through (6) of this section to the attention of "Test Exemptions" to the address in § 80.10(a).

(ii) For purposes of this section, "testing exemption" means an exemption from the requirements of § 80.27(a) that is granted by the Administrator for the purpose of research or emissions certification.

(2)(i) In order for a testing exemption to be granted, the applicant must demonstrate the following:

(A) The proposed test program has a purpose that constitutes an appropriate basis for exemption;

(B) The proposed test program necessitates the granting of an exemption;

(C) The proposed test program exhibits reasonableness in scope; and

(D) The proposed test program exhibits a degree of control consistent with the purpose of the program and the Environmental Protection Agency's (EPA's) monitoring requirements.

(ii) Paragraphs (e)(3), (4), (5) and (6) of this section describe what constitutes a sufficient demonstration for each of the four elements in paragraphs (e)(2)(i)(A) through (D) of this section.

(3) An appropriate purpose is limited to research or emissions certification. The testing exemption application must include a concise statement of the purpose(s) of the testing program.

(4) With respect to the necessity that an exemption be granted, the applicant must demonstrate an inability to achieve the stated purpose in a practicable manner, during a period of the year in which the volatility regulations do not apply, or without performing or causing to be performed one or more of the prohibited activities under § 80.27(a). If any site of the proposed test program is located in an area that has been classified by the Administrator as a nonattainment area for purposes of the ozone national ambient air quality standard, the application must also demonstrate an inability to

perform the test program in an area that is not so classified.

(5) With respect to reasonableness, a test program must exhibit a duration of reasonable length, effect a reasonable number of vehicles or engines, and utilize a reasonable amount of high volatility fuel. In this regard, the testing exemption application must include:

(i) An estimate of the program's duration;

(ii) An estimate of the maximum number of vehicles or engines involved in the test program;

(iii) The time or mileage duration of the test program;

(iv) The range of volatility of the fuel (expressed in Reid Vapor Pressure (RVP)) expected to be used in the test program; and

(v) The quantity of fuel which exceeds the applicable standard that is expected to be used in the test program.

(6) With respect to control, a test program must be capable of affording EPA a monitoring capability. At a minimum, the testing exemption application must also include:

(i) The technical nature of the test program;

(ii) The site(s) of the test program (including the street address, city, county, State, and zip code);

(iii) The manner in which information on vehicles and engines used in the test program will be recorded and made available to the Administrator;

(iv) The manner in which results of the test program will be recorded and made available to the Administrator;

(v) The manner in which information on the fuel used in the test program (including RVP level(s), name, address, telephone number, and contact person of supplier, quantity, date received from the supplier) will be recorded and made available to the Administrator;

(vi) The manner in which the distribution pumps will be labeled to insure proper use of the test fuel;

(vii) The name, address, telephone number and title of the person(s) in the organization requesting a testing exemption from whom further information on the request may be obtained; and

(viii) The name, address, telephone number and title of the person(s) in the organization requesting a testing exemption who will be responsible for recording and making available to the Administrator the information specified in paragraphs (e)(6)(iii), (iv), and (v) of this section, and the location in which such information will be maintained.

(7) A testing exemption will be granted by the Administrator upon a demonstration that the requirements of paragraphs (e)(2), (3), (4), (5) and (6) of this section have been met. The testing exemption will be granted in the form of a memorandum of exemption signed by the applicant and the Administrator (or his delegate), which shall include such terms and conditions as the Administrator determines necessary to monitor the exemption and to carry out the purposes of this section. Any violation of such a term or condition shall cause the exemption to be void.

40 C.F.R. § 80.28

§ 80.28 Liability for violations of gasoline volatility controls and prohibitions.

(a) Violations at refineries or importer facilities. Where a violation of the applicable standard set forth in § 80.27 is detected at a refinery that is not an ethanol blending plant or at an importer's facility, the refiner or importer shall be deemed in violation.

(b) Violations at carrier facilities. Where a violation of the applicable standard set forth in § 80.27 is detected at a carrier's facility, whether in a transport vehicle, in a storage facility, or elsewhere at the facility, the following parties shall be deemed in violation:

(1) The carrier, except as provided in paragraph (g)(1) of this section;

(2) The refiner (if he is not an ethanol blender) at whose refinery the gasoline was produced or the importer at whose import facility the gasoline was imported, except as provided in paragraph (g)(2) of this section;

(3) The ethanol blender (if any) at whose ethanol blending plant the gasoline was produced, except as provided in paragraph (g)(6) of this section; and

(4) The distributor and/or reseller, except as provided in paragraph (g)(3) of this section.

(c) Violations at branded distributor facilities, reseller facilities, or ethanol blending plants. Where a violation of the applicable standard set forth in § 80.27 is detected at a distributor facility, a reseller facility, or an ethanol blending plant which is operating under the corporate, trade, or brand name of a gasoline refiner or

any of its marketing subsidiaries, the following parties shall be deemed in violation:

(1) The distributor or reseller, except as provided in paragraph (g)(3) or (g)(8) of this section;

(2) The carrier (if any), if the carrier caused the gasoline to violate the applicable standard;

(3) The refiner under whose corporate, trade, or brand name (or that of any of its marketing subsidiaries) the distributor, reseller, or ethanol blender is operating, except as provided in paragraph (g)(4) of this section; and

(4) The ethanol blender (if any) at whose ethanol blending plant the gasoline was produced, except as provided in paragraph (g)(6) or (g)(8) of this section.

(d) Violations at unbranded distributor facilities or ethanol blending plants. Where a violation of the applicable standard set forth in § 80.27 is detected at a distributor facility or an ethanol blending plant not operating under a refiner's corporate, trade, or brand name, or that of any of its marketing subsidiaries, the following parties shall be deemed in violation:

(1) The distributor, except as provided in paragraph (g)(3) or (g)(8) of this section;

(2) The carrier (if any), if the carrier caused the gasoline to violate the applicable standard;

(3) The refiner (if he is not an ethanol blender) at whose refinery the gasoline was produced or the importer at whose import facility the gasoline was imported, except as provided in paragraph (g)(2) of this section; and

(4) The ethanol blender (if any) at whose ethanol blending plant the gasoline was produced, except as provided in paragraph (g)(6) or (g)(8) of this section.

(e) Violations at branded retail outlets or wholesale purchaser-consumer facilities. Where a violation of the applicable standard set forth in § 80.27 is detected at a retail outlet or at a wholesale purchaser-consumer facility displaying the corporate, trade, or brand name of a gasoline refiner or any of its marketing subsidiaries, the following parties shall be deemed in violation:

(1) The retailer or wholesale purchaser-consumer, except as provided in paragraph (g)(5) or (g)(8) of this section;

(2) The distributor and/or reseller (if any), except as provided in paragraph (g)(3) or (g)(8) of this section;

(3) The carrier (if any), if the carrier caused the gasoline to violate the applicable standard;

(4) The refiner whose corporate, trade, or brand name (or that of any of its marketing subsidiaries) is displayed at the retail outlet or wholesale purchaser-consumer facility, except as provided in paragraph (g)(4) of this section; and

(5) The ethanol blender (if any) at whose ethanol blending plant the gasoline was produced, except as provided in paragraph (g)(6) or (g)(8) of this section.

(f) Violations at unbranded retail outlets or wholesale purchaser-consumer facilities. Where a violation of the applicable standard set forth in § 80.27 is detected at a retail outlet or at a wholesale purchaser-consumer facility not displaying the corporate, trade, or brand name of a refiner or any of its marketing subsidiaries, the following parties shall be deemed in violation:

(1) The retailer or wholesale purchaser-consumer, except as provided in paragraph (g)(5) or (g)(8) of this section;

(2) The distributor (if any), except as provided in paragraph (g)(3) or (g)(8) of this section;

(3) The carrier (if any), if the carrier caused the gasoline to violate the applicable standard;

(4) The ethanol blender (if any) at whose ethanol blending plant the gasoline was produced, except as provided in paragraph (g)(6) of this section; and

(5) The refiner (if he is not an ethanol blender) at whose refinery the gasoline was produced and/or the importer at whose import facility the gasoline was imported, except as provided in paragraph (g)(2) of this section.

(g) Defenses.(1) In any case in which a carrier would be in violation under paragraph (b)(1) of this section, the carrier shall not be deemed in violation if he can demonstrate:

(i) That the violation was not caused by him or his employee or agent; and

(ii) Evidence of an oversight program conducted by the carrier, such as periodic sampling and testing of incoming gasoline, for monitoring the volatility of gasoline stored or transported by that carrier.

(iii) An oversight program under paragraph (g)(1)(ii) of this section need not include periodic sampling and testing of gasoline in a tank truck operated by a common carrier, but in lieu of such tank truck sampling and testing, the common carrier shall demonstrate evidence of an oversight program for monitoring compliance with the volatility requirements of § 80.27

relating to the transport or storage of gasoline by tank truck, such as appropriate guidance to drivers on compliance with applicable requirements and the periodic review of records normally received in the ordinary course of business concerning gasoline quality and delivery.

(2) In any case in which a refiner or importer would be in violation under paragraphs (b)(2), (d)(3), or (f)(5) of this section, the refiner or importer shall not be deemed in violation if he can demonstrate:

(i) That the violation was not caused by him or his employee or agent; and

(ii) Test results using the sampling methodology set forth in § 80.8 and the testing methodology set forth in § 80.46(c), or any other test method where adequate correlation to § 80.46(c) is demonstrated, which show evidence that the gasoline determined to be in violation was in compliance with the applicable standard when it was delivered to the next party in the distribution system.

(3) In any case in which a distributor or reseller would be in violation under paragraph (b)(4), (c)(1), (d)(1), (e)(2), or (f)(2) of this section, the distributor or reseller shall not be deemed in violation if he can demonstrate:

(i) That the violation was not caused by him or his employee or agent; and

(ii) Evidence of an oversight program conducted by the distributor or reseller, such as periodic sampling and testing of gasoline, for monitoring the volatility of gasoline that the distributor or reseller sells, supplies, offers for sale or supply, or transports.

(4) In any case in which a refiner would be in violation under paragraphs (c)(3) or (e)(4) of this section, the refiner shall not be deemed in violation if he can demonstrate all of the following:

(i) Test results using the sampling methodology set forth in § 80.8 and the testing methodology set forth in § 80.46(c), or any other test method where adequate correlation to § 80.46(c) is demonstrated, which show evidence that the gasoline determined to be in violation was in compliance with the applicable standard when transported from the refinery.

(ii) That the violation was not caused by him or his employee or agent; and

(iii) That the violation:

(A) Was caused by an act in violation of law (other than the Act or this part), or an act of sabotage or vandalism, whether or not such acts are violations of law in the jurisdiction where the violation of the requirements of this part occurred, or

(B) Was caused by the action of a reseller, an ethanol blender, or a retailer supplied by such reseller or ethanol blender, in violation of a contractual undertaking imposed by the refiner on such reseller or ethanol blender designed to prevent such action, and despite reasonable efforts by the refiner (such as periodic sampling and testing) to insure compliance with such contractual obligation, or

(C) Was caused by the action of a retailer who is supplied directly by the refiner (and not by a reseller), in violation of a contractual undertaking imposed by the refiner on such retailer designed to prevent such action, and despite reasonable efforts by the refiner (such as

periodic sampling and testing) to insure compliance with such contractual obligation, or

(D) Was caused by the action of a distributor or an ethanol blender subject to a contract with the refiner for transportation of gasoline from a terminal to a distributor, ethanol blender, retailer or wholesale purchaser-consumer, in violation of a contractual undertaking imposed by the refiner on such distributor or ethanol blender designed to prevent such action, and despite reasonable efforts by the refiner (such as periodic sampling and testing) to insure compliance with such contractual obligation, or

(E) Was caused by a carrier or other distributor not subject to a contract with the refiner but engaged by him for transportation of gasoline from a terminal to a distributor, ethanol blender, retailer or wholesale purchaser-consumer, despite reasonable efforts by the refiner (such as specification or inspection of equipment) to prevent such action, or

(F) Occurred at a wholesale purchaser-consumer facility: Provided, however, That if such wholesale purchaser-consumer was supplied by a reseller or ethanol blender, the refiner must demonstrate that the violation could not have been prevented by such reseller's or ethanol blender's compliance with a contractual undertaking imposed by the refiner on such reseller or ethanol blender as provided in paragraph (g)(4)(iii)(B) of this section.

(iv) In paragraphs (g)(4)(iii)(A) through (E) of this section, the term "was caused" means that the refiner must demonstrate by reasonably specific showings, by direct or circumstantial evidence, that the violation was caused or must have been caused by another.

(5) In any case in which a retailer or wholesale purchaser-consumer would be in violation under paragraphs (e)(1) or (f)(1) of this section, the retailer or wholesale purchaser-consumer shall not be deemed in violation if he can demonstrate that the violation was not caused by him or his employee or agent.

(6) In any case in which an ethanol blender would be in violation under paragraphs (b)(3), (c)(4), (d)(4), (e)(5) or (f)(4) of this section, the ethanol blender shall not be deemed in violation if he can demonstrate:

(i) That the violation was not caused by him or his employee or agent; and

(ii) Evidence of an oversight program conducted by the ethanol blender, such as periodic sampling and testing of gasoline, for monitoring the volatility of gasoline that the ethanol blender sells, supplies, offers for sale or supply or transports; and

(iii) That the gasoline determined to be in violation contained no more than 15% ethanol (by volume) when it was delivered to the next party in the distribution system.

(7) In paragraphs (g)(1)(i), (g)(2)(i), (g)(3)(i), (g)(4)(ii), (g)(5), and (g)(6)(i) of this section, the respective party must demonstrate by reasonably specific showings, by direct or circumstantial evidence, that it or its employee or agent did not cause the violation.

(8) In addition to the defenses provided in paragraphs (g)(1) through (6) of this section, in any case in which an ethanol blender, distributor, reseller, carrier, retailer, or wholesale purchaser-consumer would be in violation under paragraph (b), (c), (d), (e), or (f) of this section, as a result of gasoline which contains between 9 and 15 percent ethanol (by volume) but exceeds the ap-

plicable standard by more than one pound per square inch (1.0 psi), the ethanol blender, distributor, reseller, carrier, retailer or wholesale purchaser-consumer shall not be deemed in violation if such person can demonstrate, by showing receipt of a certification from the facility from which the gasoline was received or other evidence acceptable to the Administrator, that:

(i) The gasoline portion of the blend complies with the Reid vapor pressure limitations of § 80.27(a); and

(ii) The ethanol portion of the blend does not exceed 15 percent (by volume); and

(iii) No additional alcohol or other additive has been added to increase the Reid vapor pressure of the ethanol portion of the blend.

In the case of a violation alleged against an ethanol blender, distributor, reseller, or carrier, if the demonstration required by paragraphs (g)(8)(i), (ii), and (iii) of this section is made by a certification, it must be supported by evidence that the criteria in paragraphs (g)(8)(i), (ii), and (iii) of this section have been met, such as an oversight program conducted by or on behalf of the ethanol blender, distributor, reseller or carrier alleged to be in violation, which includes periodic sampling and testing of the gasoline or monitoring the volatility and ethanol content of the gasoline. Such certification shall be deemed sufficient evidence of compliance provided it is not contradicted by specific evidence, such as testing results, and provided that the party has no other reasonable basis to believe that the facts stated in the certification are inaccurate. In the case of a violation alleged against a retail outlet or wholesale purchaser-consumer facility, such certification shall be deemed an adequate defense for the retailer or wholesale purchaser-consumer, provided that the retailer or

wholesale purchaser-consumer is able to show certificates for all of the gasoline contained in the storage tank found in violation, and, provided that the retailer or wholesale purchaser-consumer has no reasonable basis to believe that the facts stated in the certifications are inaccurate.