ORAL ARGUMENT NOT YET SCHEDULED

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

No. 19-1124 and Consolidated Cases

AMERICAN FUEL AND PETROCHEMICAL MANUFACTURERS, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Petition for Review of Administrative Action
of the United States Environmental Protection Agency

BRIEF OF RESPONDENT ENVIRONMENTAL PROTECTION AGENCY, ET AL.

OF COUNSEL:

STACEY GARFINKLE
SUSMITA DUBEY
U.S. Environmental Protection Agency
Office of General Counsel
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Mail Code 2344A
Washington, D.C. 20460

DATE: July 31, 2020

JEFFREY BOSSERT CLARK
Assistant Attorney General

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General

PERRY M. ROSEN
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondents Environmental Protection Agency and Administrator Andrew Wheeler (collectively "EPA") acknowledge that Petitioners' Brief correctly sets out the parties, rulings and related cases. References to the Ruling(s) at issue appear in the briefs for the Petitioners.

CORPORATE DISCLOSURE STATEMENT

Respondent EPA is a governmental entity for which a corporate disclosure statement is not required.

So certified this 31st day of July, 2020 by

/s/ *Perry M. Rosen*
Perry M. Rosen
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

Statutes

Code of Federal Regulations

Federal Register

Legislative Material

Rules

GLOSSARY

Terms

AFPM	American Fuel & Petrochemical Manufacturers (and fellow Petitioners)
CAA	Clean Air Act, 42 U.S.C. §§7401-7671q
CO	Carbon Monoxide
E0	Gasoline without ethanol content, 40 C.F.R. §80.1500
E10	Gasoline blend with 9% to 10% ethanol content, 40 C.F.R. §80.1500
E15	Gasoline blend with greater than 10% to 15% ethanol content, 40 C.F.R. §80.1500
E15 Rule	Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 Fed. Reg. 26,980 (June 10, 2019)
E20	Ethanol 20
E16-E50	Gasoline blend with 16% to 50% ethanol content
E85	Gasoline blend with 51% to 83% ethanol content
EPA	Environmental Protection Agency
FFV	Flex-Fuel Vehicles
I16	Isobutanol 16
JA	Joint Appendix
MY	Model Year
NOx	Nitrous Oxides

PM	Particulate Matter
psi	pounds per square inch
RFS	Renewable Fuels Standard
RTC	Response to Comments
RVP	Reid Vapor Pressure
Sub. Sim	Substantially Similar
SRC	Small Retailers Coalition
VOCs	Volatile Organic Compounds
UAI	Urban Air Initiative (and fellow Petitioners)

INTRODUCTION

Under section 211 of the Clean Air Act ("CAA"), 42 U.S.C. §7545 (labeled "Regulation of Fuels"), the Environmental Protection Agency ("EPA") regulates and approves fuels and fuel additives for use in various classes of motor vehicles. Pursuant to its authority under §7545, EPA promulgated a regulation that merely allows E15, a fuel containing gasoline and more than 10% and up to 15% ethanol by volume, which has been sold at U.S. gas stations since 2010-11, to be more widely available during the summer. In taking this action, EPA fully studied the effects of the potential expanded use of E15. It found that the impacts of such use would be similar to those associated with the certified fuel (E10) already used in almost all light-duty gasoline-fueled vehicles in the United States. EPA's action is not only technically sound, it is fully consistent with the statute, which accords a vapor pressure allowance just for ethanol, so that it may be more widely used in gasoline blends.

Petitioners representing various industry groups challenge EPA's action, asserting from opposite perspectives primarily that EPA has exceeded its statutory authority. One Petitioner group contends that EPA went beyond supposedly unambiguous restrictions in the statute in approving greater use of E15. A second group argues that EPA did not go far enough, because it refrained from also approving the use of fuel blends with higher levels of ethanol. But as explained, EPA properly interpreted and applied the statutory directives of 42 U.S.C. §7545 and aptly exercised the discretion assigned to it by Congress under that provision.

Specifically, one subsection of the relevant statute, the "substantially similar" provision, prohibits any person from introducing into commerce a new fuel or fuel additive, or from increasing the concentration of such fuel or additive (collectively "new fuel"), unless the new fuel is substantially similar to an existing fuel used to certify model year ("MY") 1975 or newer vehicles. 42 U.S.C. §7545(f)(1). The new fuel must, therefore, be substantially similar to an existing "certification fuel."

A second subsection, 42 U.S.C. §7545(h)(1), limits the vapor pressure of gasoline (measured in Reid Vapor Pressure or "RVP") during the high ozone season, defined herein as May 1 through September 15 ("summer season").[1] This limit is necessary because, although vapor pressure is an important component of gasoline, gasoline blends with higher vapor pressure can tend to result in higher evaporative emissions of certain pollutants that can exacerbate ground-level ozone.

When ethanol is added to gasoline it tends to increase the vapor pressure somewhat. Nevertheless, in creating the vapor pressure restriction, Congress did not want to unduly limit the use of ethanol, which it explained provides various benefits when compared with the use of pure gasoline ("E0"). Accordingly, Congress granted a vapor pressure allowance of one extra pound per square inch ("psi") for fuel blends containing gasoline and 10% ethanol. This allows such blends to have a higher vapor

[1] While the high ozone season is defined as beginning on June 1, related regulatory requirements results in EPA referring to the summer season as May 1 to Sept. 15 for purposes of this Rule. *See* 84 Fed. Reg. at 26,981, n.3; 40 C.F.R. §80.27(a)(2)(ii).

pressure level (10-psi versus 9-psi RVP) during the summer season. 42 U.S.C. §7545(h)(4) ("ethanol allowance" provision).

A third subsection, 42 U.S.C. §7545(o) ("RFS provision"), establishes the Renewable Fuel Standard ("RFS") program. Although not the subject of any challenges to the rule being considered in this action, it is nevertheless relevant. The RFS provision mandates annual increasing levels of biofuels, which among other things reduce emissions of greenhouse gases by 20%-60%.

One biofuel used to satisfy the requirements of the RFS program is ethanol, which is added to gasoline to form gasoline blends such as E10 or E15, which respectively reflect levels of 10% and 15% ethanol (as later described). In 1978, E10 received a waiver permitting its use as gasoline. Today, almost all gasoline sold at U.S. gas stations is E10, not pure gasoline.

Use of E15 was approved by EPA in 2010-11 for most modern light-duty vehicles (model year 2001 and newer), but without the ethanol (vapor pressure) allowance.[2] Absent the ethanol allowance, the cost of blending practices makes the use of E15 during the summer season in much of the country effectively prohibitive. 84 Fed. Reg. at 26,988/3, 26,993/1. This, coupled with other constraints, means that the actual use of E15 has been significantly restricted, despite its conditional approval

[2] Light-duty vehicles are generally passenger cars, pick-up trucks, sport utility vehicles, vans and other vehicles capable of seating up to twelve passengers. 40 C.F.R. §86.1803-01. As used herein, the term refers to light-duty gasoline-fueled vehicles.

in 2010-11. These constraints include, for instance, the reluctance of fuel blenders and retailers to incur the costs of adding the required infrastructure to sell E15, particularly when it cannot efficiently be sold year-round.

In response to the President's directive to consider methods for helping E15 to achieve its full potential use, and pursuant to further study and analysis of E15, EPA promulgated the challenged rule, 84 Fed. Reg. 26,980 (June 10, 2019) ("E15 Rule"). EPA first concluded that the vapor pressure allowance granted solely to ethanol under §7545(h)(4) is reasonably interpreted to apply to fuel blends containing gasoline and *at least* 10% ethanol, which represented a change in EPA's application of that provision. This meant that E15 is eligible to utilize the ethanol vapor pressure allowance that previously applied only to E10 during the summer season, once EPA addressed any restrictions applicable to E15 under §7545(f).

In the second step of the E15 Rule, EPA conducted an analysis of the emissions, drivability, and materials compatibility effects of the use of E15. EPA determined under §7545(f)(1) that E15 is "substantially similar" to E10, which is the fuel now used to certify new vehicles and which has been used in most light-duty vehicles for years. Indeed, E15 has slightly lower levels of volatility (the concern relating to ozone) than the widely-available E10 certification fuel. These two actions together result in E15 now being able to be sold during the summer season at 10-psi RVP, just as E10 has been sold for decades. This action is supportive of Congress' sole intention

in enacting §7545(h)(4); creation of a vapor pressure allowance just for ethanol. 84 Fed. Reg. at 26,998/2.

The effect of these actions, i.e., of the E15 Rule, is simply to help facilitate expansion of the use of the already-available E15 by 4½ months each year. To the extent E15 replaces some use of E10, it is likely to occur with *lower* volatility. Because, however, of other market constraints, this action is projected to only modestly increase the use of E15, and therefore the consumption of ethanol. At the same time, nothing in the challenged Rule requires the use of E15. Nevertheless, the E15 Rule is being challenged here by three competing industry groups.

Petitioner American Fuel & Petrochemical Manufacturers and its fellow Petitioners (collectively "AFPM"), contend that EPA may not reinterpret 42 U.S.C. §7545(h)(4), the ethanol allowance provision. They argue that this provision cannot apply to fuel containing gasoline and *at least* 10% ethanol, which would include E15. Instead, they assert that the statute unambiguously declares that the ethanol allowance is strictly limited to gasoline containing *exactly* 10% ethanol, even though they concede that it also covers gasoline containing 9% ethanol *and* that it is virtually impossible to blend gasoline with exactly 10% ethanol. Under AFPM's interpretation, 10.0% ethanol represents an absolute cap on the application of the ethanol allowance. But the question of whether Congress's ethanol allowance applies to E15 under the wording of the statute is unquestionably ambiguous. Under such circumstances,

EPA's interpretation, which is both reasonable and fully supports Congress's intent in enacting the ethanol-specific allowance, should be upheld.

AFPM additionally challenges EPA's determination under 42 U.S.C. §7545(f)(1) that E15, which merely increases the concentration of ethanol found in E10 by 5%, is substantially similar to E10, a certification fuel. Although AFPM does not dispute that EPA has complete discretion to make this technical determination, it contends that §7545(f)(1), again unambiguously, (a) *also* requires EPA to determine that E15 is substantially similar to pure gasoline *and* (b) prohibits EPA from applying its determination to only more modern vehicles (model year 2001 and newer light-duty vehicles), even though these vehicles can operate on low-level gasoline ethanol blends such as E15. Congress, however, inserted no such constraints in the statute. Instead, understanding the technical nature of the assessment to be made, Congress accorded EPA the discretion to determine the parameters and circumstances under which a new fuel may be determined to be substantially similar to a certification fuel, such that it may be introduced into commerce.

Taking the opposite side of the question, Petitioner Urban Air Initiative and its fellow petitioners (collectively "UAI") assert that EPA has not gone near far enough in approving the use of E15 year-round. UAI contends that once EPA approved E10 as a certification fuel in 2014, it is now required by 42 U.S.C. §7545(f)(1) (the substantially similar provision) to approve all gasoline blends containing any concentration of ethanol for use in all gasoline-fueled vehicles. Accordingly, UAI asserts that EPA was

required *in the E15 Rule* to approve the use of E16-E50, or at least E20 and I16 (a gasoline blend made with 16% isobutanol).

UAI's reading of the statute (not joined by certain other ethanol producer associations, such as Intervenors) misses the mark by a wide margin. Adopting UAI's view would mean that even if a new gasoline-ethanol fuel blend would vastly increase emissions of pollutants or wreak havoc on vehicles' emission control systems, EPA has no choice but to allow *any* fuel containing *any* concentration of ethanol, all the way up to E50 or arguably E99. That is an interpretation wholly unsupported by the statute.

In any event, the Court should not reach UAI's claim. The use or approval of E16-E50 (or any mid-level fuel blend) was never proposed or considered in the promulgation of the E15 Rule. UAI is free to submit a petition for rulemaking requesting that such mid-level blends be considered substantially similar under 42 U.S.C. §7545(f)(1). UAI may not, however, use this proceeding to advocate for a regulatory change that was neither approved, rejected, proposed, nor even considered. Indeed, UAI lacks standing to raise its claim.

Finally, the Small Retailers Coalition ("SRC") alleges that EPA violated portions of the Regulatory Flexibility Act, 5 U.S.C. §§603-605 ("RFA"), and otherwise acted in an arbitrary and capricious manner, by failing to fully analyze the impacts of the E15 Rule on small fuel retailers. But the RFA has no applicability where, as here, small retailers are not subject to any new requirement created in the

E15 Rule and the alleged impacts do not emanate from the actual Rule promulgated by EPA. Instead, the effects SRC alleges, to the extent they actually exist, derive from a wholly different statutory program and are already implemented through preexisting regulations. Indeed, having failed to present any actual evidence of injury resulting from the E15 Rule itself, SRC, like UAI, lacks standing.

JURISDICTION

The court has jurisdiction in this matter pursuant to 42 U.S.C. §7607(d)(1)(E). As detailed *infra*, the claims of Petitioners UAI and SRC are jurisdictionally barred because they lack standing and have otherwise failed to challenge a final agency action.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendums to Petitioners' briefs and the Supplemental Addendum filed herewith.

STATEMENT OF THE ISSUES

The issues, as they relate to each set of Petitioners, are as follows:

Issues Related to AFPM's Claims

1. Whether EPA reasonably interpreted 42 U.S.C. §7545(h)(4), which grants a vapor pressure allowance of one extra pound per square (psi) RVP for fuel blends "containing gasoline and 10% ethanol," to apply the 1-psi allowance to fuel blends containing *at least* 10% ethanol?

2. Whether, under 42 U.S.C. §7545(f)(1), EPA's determination that E15 is substantially similar to the certification fuel E10 was within EPA's statutory authority, or whether instead the statute unambiguously *required* EPA to: (a) also determine that E15 is substantially similar to pure gasoline (E0); (b) apply its substantially similar determination to all light-duty vehicles manufactured since 1975, or to none at all; and (c) analyze whether E15 at 10-psi RVP is substantially similar to a certification fuel at 10-psi, even though all certification fuels used to certify light-duty vehicles have been deemed a certification fuel at 9-psi RVP?

3. Whether EPA's technical analysis of the emissions levels and materials compatibility of E15 as compared to E10 was based on sound data and adequately explained?

Issues Related to UAI's Claims

1. Whether UAI has standing to pursue its claims or has otherwise challenged a final agency action subject to review under 42 U.S.C. §7607(b)(1)?

2. Whether EPA's use of E10 as a certification fuel beginning in 2014 requires EPA to deem 42 U.S.C. §7545(f)(1) essentially null and void as to ethanol, thereby allowing fuel blends with *any* given concentration of ethanol to be placed into commerce, regardless of its impacts on vehicle and engine emissions and emissions control equipment?

3. Whether EPA properly addressed comments relating to fuel containing 20% ethanol (E20) or 16% isobutanol ("I16"), which was never part of EPA's proposed Rule?

Issues Related to SRC's Claims

1. Whether SRC has standing to pursue its claims or has otherwise challenged a final agency action subject to review under 42 U.S.C. §7607(b)(1)?

2. Did EPA violate the Regulatory Flexibility Act or act unreasonably when it did not assess impacts on small retailers from the regulatory requirements of the preexisting RFS program, where the E15 Rule being challenged made no changes to the RFS program as it relates to the use of E15?

STATEMENT OF THE CASE

I. THE USE AND NATURE OF ETHANOL

Ethanol is an alcohol produced extensively in the United States from corn and other feedstocks. Ethanol was introduced as a component of motor vehicle fuel in the 1970s, in part to address concerns about energy security and in part to support domestic agriculture. 84 Fed. Reg. 26,984/3. Ethanol is a type of biofuel, which, when added to gasoline, reduces emissions of greenhouse gases compared to fossil fuels. *Am. for Clean Energy v. EPA*, 864 F.3d 691, 696-98 (D.C. Cir. 2017). When added to gasoline, ethanol also increases the fuel's octane rating as compared to pure gasoline. 84 Fed. Reg. at 27,010/2. Additionally, "ethanol-blended fuel can often be sold at a lower price than conventional fuel." AFPM Br. 25.

Ethanol has been used as a gasoline additive in the United States since 1978, when a waiver was granted for E10 by operation of law under the then-applicable 42 U.S.C. §7545(f)(4). 44 Fed. Reg. 20,777 (Apr. 6, 1979). E10 was typically produced through "splash blending," where gasoline and ethanol were simply added together from different tanks, sometimes at a blender or terminal, sometimes from tanks at a gas station, and sometimes simply from two different fuel trucks. 84 Fed. Reg. at 26,985/1. As ethanol's use increased, special gasoline blendstocks were produced by refiners which could be shipped by pipeline, and into which 10% ethanol could be blended downstream at a pipeline terminal. By 2013, nearly all gasoline sold in the United States was E10, as it is today. 84 Fed. Reg. at 26,984/3-26,985/1.

II. STATUTORY BACKGROUND

In 1977, Congress established a comprehensive scheme to regulate the introduction and use of fuels. Congress created a registration requirement for designated fuels and granted EPA significant authority and discretion to regulate fuels. This included authority to issue regulations regarding the registration and testing of fuels as well as the issuance of penalties for violation of the requirements established. 42 U.S.C. §§7545(a), (b), (d), (e).

Congress further gave EPA authority to restrict the manufacture and sale of any fuel or fuel additive that causes or contributes to air or water pollution or that would impair the performance of any emission control device. 42 U.S.C. §7545(c). In order to impose such restrictions, EPA must consider medical, scientific, and technical

aspects, as well as examine economically feasible means of achieving required emissions standards. *Id.* *See also* 84 Fed. Reg. at 26,984/1. While these provisions help describe Congress's general statutory and regulatory structure for the use of transportation fuels, it is two additional subsections of 42 U.S.C. §7545 that are the focal point of this case.

A. 1977: 42 U.S.C. §7545(f) - Regulation of New Fuels and Additives

In contrast to §7545(c), which provides for the regulation of fuels already in the marketplace, 42 U.S.C. §7545(f) deals solely with "New fuels and fuel additives" [title]. *See also Am. Methyl Corp. v. EPA*, 749 F.2d 826, 836 (D.C. Cir. 1984). Specifically, §7545(f)(1)(A) makes it

> 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….

The impetus for this provision was to ensure that new fuels or fuel additives, or the increase in the concentration of a fuel or fuel additive, would not impair the emissions control performance of light-duty vehicles. *Am. Methyl Corp. v. EPA*, 749 F.2d at 829 (citing legislative history); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995). Section 7545(f)(1) was enacted to balance two equally important interests: allowing new or increased concentrations of fuels and fuel additives into the marketplace, while providing protection from new fuels and fuel additives "which may

impair emission performance of [motor] vehicles." JA__ (S. Rep. No. 95-127, at 90 (1977)). In 1990, Congress effectively supplanted subsection (f)(1)(A) when it enacted 42 U.S.C. §7545(f)(1)(B). The latter subsection applies the identical requirement that a new fuel be substantially similar to a certification fuel, but extends it from use in just light-duty vehicles to "use by any person in motor vehicles," which includes for instance heavy-duty vehicles and motorcycles. AFPM Br. 4.

Known as the "substantially similar" or "sub. sim." requirement, 42 U.S.C. §7545(f)(1) provides a more limited and directed restriction than §7545(c). It applies only to: (a) new fuels or fuel additives or existing fuels or fuel additives whose concentration is being increased; and (b) manufacturers of a fuel or fuel additive. Thus, it places no prohibition on the sale of a new fuel by downstream parties such as fuel blenders or retailers, so long as they are solely adding oxygenates in an allowable amount.[3] While §7545(f)(1) is presented as a prohibition and thus applies to fuel manufacturers without affirmative action from EPA, EPA makes express substantially similar determinations in various circumstances, as it did here.

Congress did not establish any specific detailed criteria for the introduction of a new fuel under §7545(f)(1). Instead, by the express terms of the statute, a new fuel or

[3] Fuel manufacturers often engage in multiple activities involving the production and distribution of fuels. These activities include not just the refining and importing of petroleum fuel, but also making fuels by blending blendstocks and oxygenates. Under EPA's regulations at 40 C.F.R. §79.2(d), only parties that are solely blending oxygenates in an allowable amount are considered not to be fuel manufacturers and, therefore, not subject to §7545(f).

increased concentration of a fuel or fuel additive cannot be introduced into commerce unless it is substantially similar "to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine…," i.e., substantially similar to a "certification fuel." 42 U.S.C. §7545(f)(1).[4]

Generally, a fuel is "substantially similar" to a certification fuel if it comports with established limits on chemical composition and physical properties. 73 Fed. Reg. 22,277, 22,281 (Apr. 25, 2008). When determining whether a fuel or fuel additive is substantially similar under 42 U.S.C. §7545(f)(1), EPA considers the impacts of the new fuel or increased concentration on emissions, drivability, and materials compatibility, in relation to the use of the certification fuel. 84 Fed. Reg. at 26,994/3.

Separately, a person may introduce a new fuel or increase its concentration by obtaining a waiver from the §7545(f)(1) substantially similar requirement. 42 U.S.C. §7545(f)(4). A waiver is available if EPA determines that the fuel or fuel additive to be introduced "will not cause or contribute to a failure of any emission control device or system ... [used] to achieve compliance by the vehicle or engine with the emission

[4] A certification fuel is a fuel used to ensure that a class of vehicles can be operated in compliance with emissions standards for designated pollutants. *See* 84 Fed. Reg. at 26,994/1-2. As used in this brief, certification fuel refers to those fuels utilized in the certification of motor vehicles in accordance with 40 C.F.R. §86.113-15. Certification fuel does not herein refer to commercial or market fuels used to accumulate mileage for purposes of aging vehicles for evaporative emissions durability in accordance with 40 C.F.R. §86.1824-08(f)(1).

standards with respect to which it has been certified." 42 U.S.C. §7545(f)(4) ("Waiver" provision).

B. 1990: 42 U.S.C. 7545(h) - Reid Vapor Pressure Requirements

Gasoline and fuel blends have a certain level of volatility, which is required to ensure that the fuel ignites properly. 84 Fed. Reg. at 26,982/1, n.4. Volatility, however, also affects the tendency of gasoline to evaporate. High volatility can cause excess evaporative emissions (in contrast to tailpipe emissions), which can contribute to the formation of ground-level ozone. *Nat'l Tank Truck Carriers, Inc. v. EPA*, 907 F.2d 177, 179 (D.C. Cir. 1990). This is of particular concern during the (high ozone) summer season.

One measure of gasoline volatility is pounds per square inch (psi) of Reid Vapor Pressure (RVP). In 1989, EPA promulgated a regulation to address gasoline volatility. EPA initially set RVP limits on gasoline to be between 9.0 and 10.5-psi during the summer season. 54 Fed. Reg. 11,868. (March 22, 1989); 84 Fed. Reg. at 26,987-88.

In the same rulemaking, EPA recognized that ethanol, an emerging oxygenate that could be added to pure gasoline to make a fuel blend that provided significant benefits, resulted in a higher RVP when added to gasoline. To avoid precluding its continued use, EPA provided E10 (then known as gasohol) with a 1-psi RVP allowance, explaining that to receive the allowance "gasoline must contain *at least* 9% ethanol." 54 Fed. Reg. at 11,885/1 (emphasis added). As EPA explained, this would ensure that the 1979 waiver granted to E10 under 42 U.S.C. §7545(f)(4) that allowed

E10 to be introduced into commerce, would not effectively be nullified by the RVP requirement it was implementing. 84 Fed. Reg. at 26,988/1.

While the ethanol allowance applied to any gasoline blend containing at least 9% ethanol, EPA clarified that an ethanol fuel blend still had to comply with the substantially similar requirements of 42 U.S.C. §7545(f)(1) to be sold. 54 Fed. Reg. at 11,872-73. Because at that time only E10 had received a waiver from that requirement under §7545(f)(4), EPA explained that the 1-psi RVP allowance would apply to gasoline containing at least 9% ethanol but only up to 10% ethanol. 84 Fed. Reg. at 26,998/2. The 9% ethanol lower limit to receive the 1-psi allowance was established to account for blending and measurement imprecision. Accordingly, in statements and regulations issued after 1990, EPA explained that the 1-psi RVP allowance applied to fuel blends containing at least 9% ethanol (from the ethanol allowance provision) but not more than 10% ethanol (from the substantially similar provision). *See* 84 Fed. Reg. at 26,989/2. *See also* 55 Fed. Reg. 23,658 (June 11, 1990) (which also adjusted the limits established in 1989).

In 1990, Congress acted to affirmatively implement EPA's summer restriction on RVP by statute. First, Congress directed the Administrator to

> promulgate regulations making it unlawful for any person during the high ozone season (as defined by the Administrator) to sell, offer for sale, dispense, supply, offer for supply, or introduce into commerce gasoline with a Reid Vapor Pressure in excess of 9.0 pounds per square inch (psi).

42 U.S.C. §7545(h)(1). Then, Congress created an exception for fuel blends containing ethanol, just as EPA had. Congress declared:

> 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).

42 U.S.C. §7545(h)(4) (the 1-psi "ethanol allowance").[5]

As Congress explained, ethanol in particular was granted this allowance because of the benefits afforded by blending ethanol with gasoline to: (a) the environment (e.g., lower tailpipe emissions); (b) the agricultural economy; and (c) foreign policy energy security. JA__ (S. Rep. No. 101-228 at 110 (1989)). Thus, Congress acted specifically to promote the use of ethanol with the enactment of §7545(h)(4). 84 Fed. Reg. at 26,998/2. This was consistent with other actions Congress took at the time to promote the use of ethanol. *See, e.g.*, 84 Fed. Reg. at 26,985/2 (describing tax credit for ethanol).

Accordingly, fuel blends "containing gasoline and 10 percent denatured anhydrous ethanol"[6] are permitted to have a 10-psi RVP during the summer season,

---

[5] EPA refers to §7545(h)(4) both as a waiver and an allowance. *See, e.g.*, 84 Fed. Reg. at 26,988/1. In order to avoid confusion with the waiver provided under 42 U.S.C. §7545(f)(4), which is discussed in all parties' briefs, EPA refers herein to 42 U.S.C. §7545(h)(4) as the "ethanol allowance."

[6] Denatured ethanol (ethyl alcohol) is undrinkable ethanol (alcohol), which allows it to avoid federal excise tax on liquor. Anhydrous ethanol means an ethyl alcohol that has had water removed to a purity of 99% ethanol. Neither of these modifiers to the word ethanol are relevant here and so in describing the operative language of 42 U.S.C.

notwithstanding the 9-psi RVP restriction set forth in §7545(h)(1).[7] EPA interpreted this provision largely as a codification of its existing regulations on the RVP limit and the 1-psi allowance at that point, which as noted applied to fuel blends containing *at least* 9% ethanol. 84 Fed. Reg. at 26,987-88; AFPM Br. 33. Consistent with the limits it applied on its own 1989 volatility regulation, which reflected the limitations of the separate substantially similar requirement, EPA initially interpreted the new §7545(h)(4) to limit the 1-psi RVP allowance to fuel blends containing gasoline and *no more than* 10 percent ethanol, even though that modifier is not in §7545(h)(4). 56 Fed. Reg. 64,704, 64,710 (Dec. 12, 1991).

C. 2005-07: Renewable Fuel Standard

In 2005, Congress enacted the Energy Policy Act ("EPAct") and in 2007 it enacted the Energy Independence and Security Act ("EISA"), creating the Renewable Fuels Standard program ("RFS program"), codifying it at 42 U.S.C. §7545(o). "Congress intended the Renewable Fuels Standards (RFS) program to 'move the United States toward greater energy independence and security' and 'increase the production of clean renewable fuels.'" *Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 634-35 (D.C. Cir. 2019) (quoting legislative preamble).

---

§7545(f)(4), EPA utilizes the phrase "containing gasoline and 10 percent ethanol" or just "containing 10% ethanol."

[7] In some areas, the RVP has been specially set at 7.8-psi RVP. In these areas the 1-psi allowance would only allow an RVP of 8.8-psi. 84 Fed. Reg. at 26,982/1, n.5.

Under the RFS program, increasingly greater amounts of biofuels need to be introduced into commerce each year, which is "used to replace or reduce the quantity of fossil fuel present in a transportation fuel." 42 U.S.C. §7545(o)(1)(J). *See also* 84 Fed. Reg. at 26,984/3 ("The RFS program places obligations on refiners and importers to expand the use of renewable fuels such as ethanol in the nation's fuel supply."). In order to qualify for the renewable fuel credits required by the statute, known as "RINs," varieties of biofuels must reduce greenhouse gas emissions as compared to pure gasoline or diesel fuel from between 20% (e.g., corn ethanol) to 60% (cellulosic biofuel). 42 U.S.C. §§7545(o)(2)(A)(i), (o)(1)(E).

D. Provisions Governing Other Fuels

The challenges in this case relate only to gasoline, which includes fuel blends that contain at least 50% gasoline. 84 Fed. Reg. at 26,981/3, n.2. There are also other types of fuels that are governed under 42 U.S.C. §7545. These include diesel and alternative fuels such as natural gas or propane, each of which is used only in engines specially designed for such fuels. Other regulated fuels include those that contain ethanol but less than 50% gasoline, such as E85, which contains up to 83% ethanol. E85 may only be used in flex-fuel vehicles ("FFVs"), which are specially designed with unique components and calibrations to operate on high levels of ethanol. UAI Br. 14; 84 Fed. Reg. at 26,993/3-26,994/1.

III. REGULATORY BACKGROUND

Over the years EPA has taken various steps to implement the statutory requirements and duties outlined above, a number of which are pertinent here.

A. Prior Administrative Actions Relevant to this Case

1. 1979: Approval of Waiver for E10

In the 1970s, corn producers began producing ethanol that could be added to gasoline to create a fuel blend. In response to a petition, E10 was granted a waiver by operation of law from the substantially similar requirement, and thus at that point it could be introduced as a fuel for light-duty vehicles. 44 Fed. Reg. 20,777 (April 6, 1979). Because there was no regulatory summer season volatility restriction at the time and the waiver contained no conditions, E10 could be used at any RVP.

2. 2010-2011: Partial Waiver for E15

Pursuant to a new petition, in 2010 EPA considered whether to grant a waiver for E15 to the substantially similar requirement under 42 U.S.C. §7545(f)(1). EPA studied the data as it relates to the requirements for a waiver under subsection 7545(f)(4): whether such fuel or a specified concentration thereof will not cause or contribute to a failure of any emission control device or system over the useful life of the vehicle, engine or emissions control system. 84 Fed. Reg. at 26,989/3. Pursuant to its analysis, EPA partially approved the waiver, initially for use in model years 2007 and newer light-duty vehicles. It then extended the waiver to certain earlier models, such that waivers are applied to all light-duty vehicles from model year 2001 onward.

75 Fed. Reg. 68,094 (Nov. 4, 2010); 76 Fed. Reg. 4662 (Jan. 26, 2011) ("2010-11 waivers"). Because EPA had determined there was a lack of data necessary to ensure that emissions controls in model year vehicles 2000 and earlier, heavy-duty vehicles, motorcycles, and non-road vehicles, engines and equipment (hereinafter "non-road products"), would not be adversely affected when E15 was used, the 2010-11 waivers were characterized as being "partial." 84 Fed. Reg. at 26,990/1.

Due to a lack of data at the time relating to evaporative emissions that might occur with E15 at RVP levels greater than 9-psi, the E15 waiver was limited to 9-psi RVP during the summer season. Thus, although manufacturers could now introduce E15 into commerce under §7545(f)(4), its use during the summer season would require a low-RVP gasoline blendstock to comply with the RVP requirements.

While EPA's E15 waiver decision permitted E15 use, it did not require that E15 be made, sold, or used. Given various market constraints, including that many fuel blenders and retailers were reluctant to invest in the infrastructure to sell E15, by 2019 only about 1% of retail gas stations offered E15. 84 Fed. Reg. at 26,986/3.

3. 2014: E10 Becomes a Certification Fuel

In 2014, EPA promulgated the Tier 3 Rule. 79 Fed. Reg. 23,414 (April 28, 2014) ("Tier 3 Rule"). "Tiers" refers here to rounds of increasingly stringent light-duty vehicle emission standards. The latest round, Tier 3 standards, are designed to reduce levels of nitrous oxides ("NOx"), volatile organic compounds ("VOCs"), and particulate matter ("PM") by 70% to 80%, and to significantly reduce levels of carbon

monoxide ("CO") and other pollutants relative to the prior Tier 2 standards. *Id*. at 23,417.

As relevant here, the Tier 3 Rule creates new emission ceilings, requiring emission control systems to meet those requirements beginning with model year 2017 light-duty vehicles. 84 Fed. Reg. 26,994/1-2. Until Tier 3, E0 had been the sole certification fuel for light-duty vehicles. Beginning with Tier 3, EPA required use of E10 to certify that new vehicles could operate in compliance with Tier 3 emissions requirements, thereby making E10 a certification fuel. 84 Fed. Reg. at 26,994/1; 40 C.F.R. §§86.113-15(a)(1), 1065.710(b). As a result, when determining if E15 is substantially similar to a certification fuel for Tier 3 vehicles (which is the determination made in the challenged E15 Rule), EPA determined whether E15 is substantially similar to E10. 84 Fed. Reg. at 26,982/1.

B. The Challenged Regulation: The E15 Rule

Pursuant to the President's Directive to consider applying the 1-psi RVP ethanol allowance to E15, EPA reexamined its treatment of E15. JA___ (EPA- HQ-OAR-2018-0775-0042). Prior to EPA's action, E15 could only be used at 9-psi RVP during the summer months. EPA noted that the "in-use gasoline supply is now almost entirely E10," which like E15 has a10-psi RVP in the summer season, and was being utilized throughout the summer season without significant impact on emissions control devices. 84 Fed. Reg. at 26,990/3.

EPA then examined whether E15, which subsequent to the 2010-11 waivers was being used at 10-psi RVP or greater outside the summer season, could also be used during the summer season without interfering with emissions control devices or otherwise increasing emissions to any significant degree. EPA noted that to the extent the use of E15 would increase under the E15 Rule, it would not cause more people to buy gasoline. Instead, it would merely replace some portion of E10 that was already being used. 84 Fed. Reg. at 27,011/2. This was critical given that fuel containing 15% ethanol generally has a slightly *lower* RVP than fuel containing 10% ethanol. Thus, EPA concluded that applying the 1-psi RVP allowance to E15 would not be anticipated to have an appreciable effect on the volatility of fuel used, and consequently would not be expected to have a material effect on in-use evaporative emissions of ozone-generating pollutants. 84 Fed. Reg. at 26,990/3-26,991/1, 26,993/1.

EPA did not merely assume that fuel containing 15% ethanol would not have an appreciable impact on emissions because it would be substituted for the slightly higher RVP E10 fuel. After reviewing studies and conducting various analyses, EPA determined that the use of E15 would not have deleterious effects on emissions from exhaust and evaporative sources, drivability or materials compatibility when used in vehicles manufactured in 2001 and thereafter. 84 Fed. Reg. at 26,999-27,005. Based on these findings, EPA took two specific actions to allow E15 to be used at 10-psi RVP during the summer season.

1. Substantially Similar Determination

As outlined, under 42 U.S.C. §7545(f)(1), a fuel or fuel additive may not be introduced or have its concentration increased without a determination that it is substantially similar to a certification fuel. As noted, EPA partially waived the substantially similar requirement for E15 in 2010-11 under §7545(f)(4). 84 Fed. Reg. at 26,997/3. EPA did not revisit that action here. *Id.* Instead, it started anew, applying the separate requirements of §7545(f)(1) to determine whether E15 is substantially similar to a certification fuel then in use. Unlike in 2010-11, when the E15 partial waivers were issued, EPA could now compare E15 to a new certification fuel, E10. This was important, given that E10 contains ethanol and had become the predominant gasoline in the marketplace.

EPA examined a variety of vehicles and available data and determined that E15 at 9-psi RVP is substantially similar to the E10 certification fuel also at 9-psi, when used in model year 2001 and newer light-duty vehicles. 84 Fed. Reg. at 26,983/2, 26,995-96. Because E15 use could result in emissions increases and materials compatibility issues in certain older light-duty vehicles and non-road products, EPA limited its substantially similar determination to 2001 and newer light-duty vehicles. *Id.* at 27,004-05.

2. EPA Reinterpreted the 1-psi RVP Ethanol Allowance as Covering E15

As outlined above, the 1-psi RVP ethanol allowance, which effectively allows ethanol-blended gasoline to be used year-round, applies to gasoline blends "containing 10% ethanol." 42 U.S.C. §7545(h)(4). In part because the separate §7545(f)(1) only allowed the use of E10 at that time, EPA had previously determined that the phrase "containing 10% ethanol" limited application of the allowance to gasoline blends containing between 9%-10% ethanol. But such an interpretation reads into §7545(h)(4) a modifier that is not there; that the allowance applies to fuel "containing *no more than* 10% ethanol."

Having previously determined that 10% as used in §7545(h)(4) does not mean exactly 10% but rather 9% to 10%, EPA reinterpreted the phrase "containing 10% ethanol." EPA found that this phrase can reasonably be interpreted to apply the 1-psi RVP allowance to any fuel containing *at least* 10% ethanol. 84 Fed. Reg. at 26,983/2. EPA explained that this interpretation was supported by the lack of modifiers in the statutory language, the contemporaneous Congressional intent to support the use of ethanol, statutory interpretation rules, and evolving circumstances and data. *Id*. at 26,990-93. Because the separate substantially similar determination only specifically addressed ethanol-blended gasoline up to E15, the effect of EPA's reinterpretation of §7545(h)(4) is to apply the 1-psi RVP ethanol allowance to gasoline blends containing between 9%-15% ethanol. *Id.* at 26,983, n.11, 26,989/2-3, 26,991/1.

Under the E15 Rule, no one would be "compelled to make or offer E15 [and each party] could choose to offer E15 as dictated by market demands and individual business decisions." 84 Fed. Reg. at 27,012/3-27,013/1. Moreover, the E15 Rule "places no new regulatory burdens on any party in the gasoline or denatured fuel ethanol distribution system." *Id*. at 27,013/1. Instead, the Rule simply acts to remove the summer season RVP hurdle, easing the expansion of the use of E15 year-round. EPA concluded that, while the Rule supports greater use of E15, growth of the use of E15 would be modest and relatively slow due to other market constraints. 84 Fed. Reg. at 27,009/3-27,010/3.

The E15 Rule also contains separate provisions that seek to address specific RIN reporting issues under the separate RFS program. None of those provisions of the E15 Rule are the subject of any Petitioners' claims in this action. All of Petitioners' claims, including those of SRC, which cites to unrelated requirements under the separate RFS program, deal solely with the issue of whether and when E15 (or other ethanol fuel blends) can be used.

SUMMARY OF ARGUMENT

E15 already is in use for much of the year and in general exists at a lower volatility level (lower RVP) than the predominant E10. Thus, permitting further E15 use, as the E15 Rule does, is fully supportable and eminently reasonable from an historic, practical, and technical perspective. So, Petitioners rely almost exclusively on trying to constrict the statutory language to prohibit EPA from taking such a

reasonable action. But Congress imposed no such restrictions in the applicable statutory provisions. Instead it left it for EPA to exercise its discretion and technical expertise regarding the introduction and use of fuel blends in a reasonable manner. The E15 Rule does just that.

AFPM, seeking to protect its market share from the use of an additional 5% ethanol in gasoline fuel blends during the summer, contends that EPA's action contravenes Congressional intent. But the statutory provisions at issue, 42 U.S.C. §§7545(h)(4) and (f)(1), are not designed to protect the use of gasoline. Indeed, Congress enacted §7545(h)(4) specifically to support the use of ethanol, which is precisely what the E15 Rule does.

AFPM argues that 42 U.S.C. §7545(h)(4), which grants a 1-psi RVP allowance to a fuel blend "containing 10% ethanol," unambiguously grants that allowance only to a fuel that is exactly 10% ethanol. But AFPM itself concedes this is a technical impossibility. Nevertheless, AFPM clings to this argument, so that it can assert that the statute limits the ethanol allowance to a fuel that *does not exceed* 10% ethanol. This effectively injects a modifier into this supposedly unambiguous provision. But as reflected in the legislative history, the dictionary definition of the word "containing," the intent of Congress in enacting the ethanol RVP allowance, and the structure and context of the relevant CAA provisions, the operative phrase "containing 10% ethanol" is infused with ambiguity.

EPA does not contend that AFPM's interpretation is wholly unreasonable. Indeed, EPA interpreted the operative phrase similarly for a period of time. But upon further reflection and examination of the context of the §7545(h)(4), its intent, and surrounding circumstances, such as more recent and relevant data and evolving technology, EPA's revised its interpretation of the operative language. EPA determined that construing the 1-psi RVP allowance to apply to a fuel blend containing at least 10% ethanol, is at the very least a reasonable interpretation of the statute. Under such circumstances, the Court must uphold EPA's application of this provision.[8]

AFPM's separate argument that EPA's substantially similar determination is invalid, which also turns on its claim that the statutory language is unambiguous, is particularly strained. It turns on AFPM's assertion that the word "any" has only one meaning. In their view the word "any" actually means "all." But the statute calls for EPA to determine that a new fuel or increase in concentration of a fuel is "substantially similar to *any* fuel or fuel additive utilized in the certification of *any* model year 1975, *or subsequent model year*, vehicle or engine." 42 U.S.C. §7545(f)(1) (emphasis

[8] Technically, the E15 Rule allows the use of the 1-psi RVP allowance for gasoline blends containing between 9% and 15% ethanol. While EPA interprets "containing 10% ethanol" to mean containing at least 10% ethanol, *other* provisions effectively place a cap on the use of the allowance at 15% ethanol. Here, the upper limit of 15% ethanol reflects the level to which a fuel has been deemed to be substantially similar and allowed in commerce under §7545(f)(1) (as is effectuated in the E15 Rule) and the limit established in the 2010-11 E15 waivers issued under §7545(f)(4). 84 Fed. Reg. at 26,991/1-2, 26,992/3, 27,008/3.

added). This does not require EPA to find that E15 is substantially similar to *all* certification fuels or that it must apply to *all* model year vehicles. It is a statutory provision that Congress wrote to allow for the progress of technology. Having been granted full discretion to determine when a new fuel is substantially similar to a certification fuel, EPA's application of the statute is at least reasonable, and therefore should be upheld.

Nor is EPA required, as AFPM asserts, to adjudge whether E15 at 10-psi RVP is substantially similar to E10 at 9-psi RVP, an apples-to-oranges comparison. Indeed, such a comparison is inconsistent with the fact that: (a) E10 and E15 both are used at various RVP levels; (b) the volatility level of E15 is actually lower than that of E10; and (c) E10 is a certification fuel at 9-psi, so a substantially similar determination is reasonably done at 9-psi. Finally, AFPM cannot circumvent these points by arguing that a portion of EPA's findings were arbitrary and capricious or by directing the focus away from EPA's substantially similar determination under 42 U.S.C. §7545(f)(1), and instead asserting that EPA has reopened the 2010-11 waiver decisions made under 42 U.S.C. §7545(f)(4).

UAI limits its challenge specifically to EPA's substantially similar determination made under 42 U.S.C. §7545(f)(1). UAI states its central issue as follows: "Whether EPA's interpretation of the 'sub-sim' law, CAA §211(f)(1), to *prohibit* fuel and fuel additive manufacturers from selling fuel blends consisting of gasoline and more than 15% but less than 50% ethanol ('mid-level blends' [or E16-

E50]), is contrary to" law. UAI Br. 1 (emphasis added). UAI's argument is hopelessly flawed because it is based on an erroneous assumption.

The E15 Rule addresses only whether E15 should be deemed substantially similar to E10, a certification fuel for Tier 3 light-duty vehicles. The Rule neither considered nor made a determination as to whether E16-E50 is substantially similar to E10 or any other certification fuel, and certainly did not take action to *prohibit* its use. Neither the proposed nor final rules contain such a finding.

No doubt EPA could at some time, after careful analysis, determine whether a blend with a concentration of ethanol between 16% and 50% is (or is not) substantially similar to E10 or another certification fuel. But such a determination must actually be considered and then finalized by EPA. None of that occurred here. Hence, UAI's claim challenges no final agency action and is therefore barred. Nor does its claim concern an injury caused by the E15 Rule, and thus UAI lacks standing.

Notwithstanding these jurisdictional defects, UAI argues that once EPA established E10 (which has 10% ethanol) as a certification fuel, EPA *must* find *each and every* fuel blend containing any given amount of ethanol to be substantially similar to a certification fuel, because the ethanol in these blends is the same as the ethanol in E10. Under UAI's theory, EPA would be required to certify for use in all gasoline-fueled engines not only gasoline containing up to 50% ethanol, but even blends containing up to 99% ethanol, even though such blends would not be considered a gasoline blend.

UAI offers no scientific basis or technical data to support the view that E16-E50 can be utilized in light-duty vehicles designed to operate solely on gasoline and low levels of ethanol. Instead, relying on the proposition that "ethanol is ethanol is ethanol," UAI argues that EPA was required by the wording of the statute to affirmatively allow E16-E50 to be sold throughout the United States for use in all gasoline-fueled vehicles. There simply is no basis for UAI's wildly expansive interpretation of 42 U.S.C. §7545(f)(1). Indeed, it would undermine both the text and purpose of the statute, requiring the approval of high-ethanol blends without a technical analysis of their effects and *regardless* of their emissions impacts.

Finally, SRC argues that EPA violated the Regulatory Flexibility Act and otherwise acted in an arbitrary and capricious manner because it purportedly failed to fully analyze the impacts of the E15 Rule on small fuel retailers. It is quite clear, however, that SRC's concerns relate to the operation of the Renewable Fuels Standard program and the regulatory requirements under *that* program, not to any requirements imposed or even considered under the E15 Rule. Indeed, SRC's concerns relate to *statutory* requirements, and ones from a different program at that, not requirements established in any regulation being considered by the Court in this proceeding.

As outlined, the E15 Rule does not: (a) command the use of E15; (b) require any affirmative actions to be taken with regard to E15; or (c) impose new regulatory requirements on small fuel retailers. Instead, it merely supports wider potential use of E15 by removing an RVP hurdle that made E15 exceedingly difficult to use during the

summer season in the majority of the country. Since the Rule obligates no party to blend or sell E15 or take any other actions with regard to it, it places no burden on small retailers. Thus, not only are SRC's claims about impacts of the E15 Rule without merit, SRC lacks standing to assert those claims.

STANDARD OF REVIEW

EPA's action in promulgating the challenged E15 Rule can be overturned only if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or in excess of EPA's "statutory jurisdiction, authority, or limitations." 42 U.S.C. §7607(d)(9)(A), (C). In interpreting statutory terms, courts inquire whether Congress "has directly spoken to the precise question at issue," in which case the court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). If the statute is "silent or ambiguous with respect to the specific issue," the court moves to *Chevron's* second step and must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id.* at 843. The court gives particular deference to an agency's interpretation of a statute it administers when the statute is complex and within the agency's expertise. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001). The CAA is precisely this type of statute. *NRDC v. EPA*, 571 F.3d 1245, 1251 (D.C. Cir. 2009).

"The scope of review under the 'arbitrary and capricious' standard is narrow…." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Agency actions are presumed valid, *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976), and the "challenger must show the agency action is not a product of reasoned decisionmaking … [which] is 'a heavy burden,' since *State Farm* entails a 'very deferential scope of review' that forbids a court from 'substitut[ing] its judgment for that of the agency.'" *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 495 (D.C. Cir. 2016) (citations omitted).

ARGUMENT

I. EPA'S INTERPRETATION OF THE 1-psi RVP ALLOWANCE IN 42 U.S.C §7545(h) AS APPLYING TO FUEL BLENDS CONTAINING AT LEAST 10 PERCENT ETHANOL IS REASONABLE

"Under *Chevron*, we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity." *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2439 (2014). In such cases, the Agency's interpretation must be upheld so long as it falls "within the bounds of reasonable interpretation." *Arlington v. FCC*, 569 U.S. 290, 296 (2013).

AFPM does not dispute this maxim. Instead, AFPM argues that when Congress enacted 42 U.S.C. §7545(h)(4), applying a 1-psi RVP allowance for fuel "containing 10% ethanol," it unambiguously intended the term "10%" to act as an absolute ceiling. AFPM contends that the operative statutory phrase, "containing 10% ethanol," unambiguously means exactly 10.0%, which means it effectively must be interpreted to contain a qualifier ("containing *no more than* 10% ethanol"). AFPM Br. 27-39.

Contrastingly, EPA believes the operative language of the statute to be ambiguous and, based on context, legislative history and other factors, interprets it to apply the 1-psi RVP to fuel containing "*at least* 10% ethanol."

For the court to uphold EPA's interpretation so long as it falls "within the bounds of reasonable interpretation," *Arlington v. FCC*, 569 U.S. at 296, it must initially conclude that the statute is ambiguous. That clearly is the case in this instance, as EPA found. 84 Fed. Reg. at 26,990/2-26,992.

A. The Ethanol Allowance Provision is Ambiguous

In analyzing whether a statute is ambiguous, "'[t]o discern the Congress's intent, we generally examine the statutory text, structure, purpose and its legislative history.'" *Kiewit Power Constructors Co. v. Sec'y of Labor*, 959 F.3d 381, 395 (D.C. Cir. 2020) (quoting *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016)). Turning first to the statutory text, it is apparent that by including the language "containing 10% ethanol," Congress did not intend to apply the 1-psi RVP allowance to only fuels that contain *exactly* 10.0% ethanol. Congress knew full well that the vagaries of blending ethanol and gasoline made such a potential requirement virtually impossible to achieve. *See* AFPM Br. 35 (creating a blend of exactly 10% would create an impossible burden due to the "blending process itself"); *id*. at 16 (the 10% ethanol standard is subject "to the unavoidable imprecision of the blending process."); *id*. at 36 ("acknowledge[ing] the reality that blending exactly 10% ethanol is not practicable."); JA___ (AFPM Comments at 8); JA___ (RTC p. 7).

AFPM does not dispute – and cites in support of its argument – EPA's previous interpretation that "containing 10% ethanol" meant containing between 9% and 10% ethanol. AFPM Br. 35. Quite obviously, fuel that contains 9% ethanol, which is entitled to the 1-psi RVP allowance under AFPM's argument, means that the statute does not apply the allowance only to fuel containing exactly 10.0% ethanol. Yet that is AFPM's argument as to how the statute *must* be interpreted.

AFPM states that "[u]nder a plain common sense reading, 'containing' 10% means 10% -- no more or less...." AFPM Br. 27. This itself establishes that the operative provision is ambiguous, as 10%, by AFPM's own admission, does not actually mean what AFPM states is its unambiguous meaning. In their view it also means 9%. If "10% -- no more or less" can mean 9%, it can also mean 11% or 15%. It is no excuse, as AFPM contends, that the ambiguity is a result of "imprecision of the blending process." AFPM Br. 16. Whatever the cause, the statutory phrase "containing 10% ethanol" is ambiguous, as it clearly does not mean containing exactly 10.0% ethanol, as AFPM contends. This, however, is only one facet of the evidence of the ambiguity of the operative phrase.

AFPM turns to legislative history and statutory construction rules to try and glean Congress's intent in applying the 1-psi RVP allowance to the class of fuels "containing 10% ethanol." AFPM, however, tells an incomplete story. AFPM presents the following syllogism: (a) the House bill on the 1990 Clean Air Act amendments included language stating that the 1-psi allowance applies to fuel

"containing at least 10% ethanol;" (b) this provision was not adopted; and thus (c) Congress intended to define "containing 10% ethanol" as containing *no more than* 10% ethanol. AFPM Br. 33. However, "the deletion of a word or phrase in the throes of the legislative process does not ordinarily constitute, without more, evidence of a specific legislative intent," *Petit v. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012), quoting *Edison Elec. Inst. v. EPA*, 2 F.3d 438, 451 (D.C. Cir. 1993) (per curiam). That is the case here.

AFPM relies only on its supposition that Congress's failure to adopt one specific proposal containing the phrase "at least 10% ethanol" was an unambiguous rejection of that application and an intent to instead mean "no more than 10% ethanol," affirmatively applying 10% as an absolute cap. Not only did Congress fail to insert such language in the statute, AFPM offers no Congressional statements supporting such a restrictive application of the general language finally used; no committee statements, no testimony, no instances where the issue was expressly addressed. *See* 84 Fed. Reg. at 26,993.

AFPM does cite the House Report, which states that the Administrator is required to promulgate regulations which "shall permit gasoline containing at least 9 but not more than 10 percent ethanol (by volume) to exceed the volatility requirements by up to 1.0 pounds per square inch." AFPM Br. 34, citing JA __ (House Report 101-490 at p. 312). But just as the House Bill with the modifier "containing at least 10% ethanol" did not make it into the final law, so did the phrase "not more than 10 percent

ethanol" fail to make it into the statute. Thus, under AFPM's own argument, interpreting "containing 10% ethanol" as meaning "not more than 10% ethanol," cannot be the proper interpretation because it was not included in the final legislation.

In fact, the House explains in the cited report that the application of the 1-psi RVP ethanol allowance should be addressed in regulations, rather than through the statute itself. JA __ (House Report 101-490 at p. 312). This is consistent with §7545(h)(1), which commands EPA to set the 9-psi RVP standard also by regulation. These acts evidence a clear delegation to EPA of the responsibility and discretion to determine how to apply the ethanol allowance.

Additionally, other bills that contained what would eventually become the ethanol allowance, §7545(h)(4), included the operative language as applying the 1-psi RVP allowance to fuel containing "no more than" 10% ethanol. For instance, the original Administration bill (H.R. 3030) provided a 1.0 psi RVP allowance, but would have limited it to "gasoline containing at least 9 but not more than 10 per centum ethanol (by volume)." JA___ (H.R. 3030, 101st Cong., §214 (1989) at 171). That modifier *also* was not adopted. Thus, again under AFPM's own argument, this is evidence that Congress did *not* intend to limit the definition of "containing 10% ethanol" to "gasoline containing ... not more than 10 per centrum ethanol."

The lack of any real expressions of Congressional intent that the 10% figure acts as an absolute ceiling is critical here. At the time §7545(h)(4) was enacted in 1990, there were essentially no blended fuels being regularly used that contained more than

10% ethanol. 84 Fed. Reg. at 26,990-91, 26,992/2. If there had existed higher ethanol blends and Congress considered the environmental and economic impacts of applying the 1-psi RVP allowance to such higher percentage blends and *then* rejected them for application of the 1-psi RVP allowance, that would perhaps evidence support for AFPM's view. But there is no such evidence. To the contrary, Congress's use of the phrase "containing 10% ethanol" likely represented the availability only of E10 at that time. There simply is no evidence from the language and context that Congress intended the operative language to act as a cap that would deny the allowance to future-developed blends that are deemed to be safe and effective (particularly, as here, with respect to E15, a fuel blend that is generally *less* volatile than E10).

AFPM next cites other portions of the statute that include the modifier "at least." It argues that because Congress included such a modifier in some provisions of §7545 but not in §7545(h)(4), it did not intend for such modifier to apply in (h)(4). AFPM Br. 30-32. Once again, the statutory construction rule cited by AFPM works to support EPA's interpretation, as well. This only underscores the ambiguity in the statute.

Other subsections of §7545 include qualifiers such as "no more than" or "shall not exceed" in connection with numerical values and percentages. *See, e.g.*, 42 U.S.C. §7545(g)(2) ("[N]o person shall introduce ... into any motor vehicle of diesel fuel which such person knows or should know contains a concentration of sulfur *in excess* of 0.05 percent...."); *id*. at §7545(i)(1) (same); *id*. at §7545(k)(2)(B) ("The benzene content of the gasoline *shall not exceed* 1.0 percent by volume."); *id*. at

§7545(k)(3)(A)(ii) ("the aromatic hydrocarbon content of the reformulated gasoline *shall not exceed* 25 percent by volume."). (Emphasis added in each quote). All of these subsections were enacted along with §7545(h), as part of the 1990 CAA amendments.

Notwithstanding these other provisions of 42 U.S.C. §7545, Congress chose not to include a "no more than" or "not to exceed" modifier in enacting §7545(h)(4). So again, under the very statutory construction rules cited by AFPM, one must conclude that Congress specifically intended for the phrase "containing 10% ethanol" *not* to mean "containing *no more than* 10% ethanol." Thus, it is actually *AFPM's* "interpretation [that] violates [the] 'duty to refrain from reading a phrase into a statute when Congress has left it out.'" AFPM's Br. 32 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)).

AFPM moves on to cite dictionary definitions, explaining that the word "contain" means "keep within limits." AFPM Br. 29. Just as with the legislative history and statutory construction rules relied upon by AFPM, their choice of a definition tells a partial story. Even dictionaries cited by AFPM explain that the word "contain" means "to have within it," "to have as a part," to "include." Oxford English Dictionary, cited at AFPM Br. 44. *See also* 84 Fed. Reg. at 26,992/2 (citing other dictionaries defining "contain" as to "have within," to "hold"). The fuel blend known as E15 is certainly capable of "holding," "including," "having as a part," or "having within" it 10% (or more) ethanol.

AFPM argues that this latter definition should be ignored because the statute refers to a percentage, as if that changes the meaning of "containing." AFPM Br. 29. This clearly is not the case. For instance, a doctor may explain that to fight off an infection without administering an antibiotic that may cause dangerous side effects, the patient's blood must "contain 10% white blood cells," which are the human cells that fight off infection. The doctor clearly does not mean exactly 10.0% white blood cells and certainly does not mean 10% or *less*. The doctor unquestionably means that the patient must have *at least* 10% white blood cells in order to avoid being administered the dangerous antibiotic. And this is certainly common or ordinary usage of the word "containing," which AFPM asserts EPA ignores. AFPM Br. 28-29. *See also* JA__ (RTC pp. 4-6, describing ordinary and common usage).

Turning next to case law, AFPM cites *United States v. A.S.*, 939 F.3d 1063 (10th Cir. 2019), as evidence that the word "containing" in a statute means "no more than." AFPM Br. 28. Relying on any particular case to assess how Congress intended to use the word "containing" in the context of the specific provision at issue is a fool's errand. *See County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (a word may be broad in scope "but context often imposes limitations."). Indeed, a recent Supreme Court case cited by AFPM makes clear that the word "containing" can be interpreted very narrowly or quite expansively, depending on context and intent. *Kansas v. Garcia*, 140 S. Ct. 791, 802-03 (2020). As the Supreme

Court has further explained, commonly used terms simply have different meaning in different contexts. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586 (2004).

Accordingly, "to assess '[t]he plainness or ambiguity of statutory language,' we must also consider 'the broader context of the statute as a whole.'" *Kiewit Power Constructors*, 959 F.3d at 395, quoting *Robinson v. Shell Oil Co*. 519 U.S. 337, 341 (1997). The broader context of 42 U.S.C. §7545(h)(4), which applies only to ethanol, is that it was designed to grant an allowance to support the use of ethanol. There is no evidence that the provision was meant to cap the use of ethanol subject to such allowance at exactly 10%, as higher ethanol blends were not even commercially available at that time. 84 Fed. Reg. at 26,990-91, 26,992/2. It is the psi-RVP levels that Congress was concerned with in enacting §7545(h). And as noted, E15 has a slightly lower RVP than blends containing 10% ethanol.

In sum, the legislative history, statutory structure, dictionary definitions, case law, and everyday usage of the operative phrase can lead to but one conclusion: that the question of whether Congress intended the phrase "containing 10% ethanol" to mean no more than 10% ethanol, exactly 10.0% ethanol, or at least 10% ethanol, is ambiguous.

B. EPA's Interpretation of the Ethanol Allowance Provision Is Reasonable and Should Therefore be Upheld

Once ambiguity is determined, "[a] court must uphold the [agency's] judgment as long as it is a permissible construction of the statute, even if it differs from how the

court would have interpreted the statute in the absence of an agency regulation." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 826–827 (2013) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)). *See also, FDA v. Brown*, 529 U.S. 120, 132-33 (2000); *NRDC v. EPA*, 749 F.3d 1055, 1060 (D.C. Cir. 2014) ("[W]e ultimately need not decide whether EPA's reading is the better or only reading of this statutory provision, but simply whether it is a permissible reading. EPA administers the Clean Air Act, and we must defer to its reasonable interpretation of any ambiguities in the statute."). EPA's view that the statute grants the 1-psi RVP allowance to fuel containing at least 10% ethanol clearly is a reasonable interpretation, based on its views as outlined above and more.

In assessing "whether the agency's answer is based on a permissible construction of the statute, *Chevron*, 467 U.S. at 843, ... [the court] must account for both the specific context in which language is used and the broader context of the statute as a whole." *Stock Market, LLC v. SEC*, 961 F.3d 421, 426 (D.C. Cir. 2020) (quotations omitted). As noted, the context of §7545(h)(4) is to make special dispensation for the use of ethanol, and at the time Congress applied the 1-psi RVP allowance to fuel "containing 10% ethanol" there were no other ethanol blends commercially available. 84 Fed. Reg. at 26,990-91, 26,992/2. Thus, Congress had no technical or market basis to set 10% as a *ceiling*, nor does AFPM cite to any such basis. Instead, it likely used the 10% figure because an ethanol blend with 10% ethanol was the only one around at the time.

Moreover, the RVP increase due to ethanol actually is slightly lower for E15 than for E10 blends. As reported in a study on different oxygenates, including ethanol, when added to pure gasoline "[t]he RVP decreased slowly when oxygenate concentration was increased from 10 percent to 50 percent...." JA___ (EPA-HQ-OAR-2018-0775-1172 at 23), *see also* Fig. 1, showing the curve of RVP specifically for ethanol reaching 10-psi before reaching the 10% level, and going down from that peak. *See also* JA___ (RTC p. 33, referencing another study concluding that ozone-forming potential decreased as the percentage of ethanol increased). Similar conclusions appear in studies published prior to the 1990 enactment of §7545(h). JA__ (RTC p. 59) (citing a 1985 study concluding that "the RVP increase resulting from blending ethanol declines above 10 percent ethanol.").

Congress's intent in limiting RVP to 9-psi RVP during the summer season was to limit volatility. Congress nevertheless created a 1-psi RVP allowance for gasoline-ethanol blends to promote the use of ethanol, due to its various benefits. It would make no sense for Congress to have intended to remove the ethanol RVP allowance it created just when volatility begins to be *reduced*, i.e., when the ethanol concentration hits 10%.

Indeed, AFPM stresses the volatility of fuel when certain levels of ethanol are added, and implies that allowing E15 is inconsistent with Congress' intent in 1990 to reduce pollution. AFPM Br. 37-38. But as noted, Congress examined the increase in volatility as compared to pure gasoline associated with the use of E10. After doing so

it enacted the 1-psi ethanol allowance, finding that it would "allow ethanol blending to continue to be a viable alternative fuel, with its beneficial environmental, economic, agricultural, energy security and foreign policy implications." JA__ (S. Rep. No. 101-228 at 110). This rationale applies to E15, which has slightly *lower* volatility than that which Congress understood was the case for E10.

EPA's interpretation of the ambiguous phrase "containing 10% ethanol" also is consistent with the overall structure of the CAA and changed circumstances. These include, but are not limited to, E15 becoming generally available after 1990, the changes in vehicle emissions systems, and increasingly greater use of renewable fuels such as ethanol, both at the behest of Congress and otherwise. 84 Fed. Reg. at 26,981/3, 26,990-91, 26,992/2, 26,995-96.

AFPM asserts that changed circumstances are irrelevant in assessing the proper interpretation of a statute, but that is not the case. The Supreme Court has recognized that agency interpretations are "not carved in stone." Rather, it is entirely appropriate for an agency to continually evaluate the wisdom of its policies, especially "*in response to changed factual circumstances*." *Brand X*, 545 U.S. at 967 (internal citation omitted, emphasis added). *See also, In re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (an agency must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances"); *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 205 (D.C. Cir. 1994). "[W]ithout regulatory flexibility,

changing circumstances and scientific developments would soon render the CAA obsolete." *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

Even if EPA's reinterpretation of §7545(h)(4) is partially grounded in policy, that too is a basis to uphold its interpretation. In considering the meaning of what "containing 10% ethanol" means in 42 U.S.C. §7545(h)(4), AFPM attempts to limit the deference accorded to EPA by citing to statutory interpretation rules described in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). AFPM Br. 30. *Kisor* actually deals with agency interpretation of its own regulations. Nevertheless, *Kisor* explains that where an action is not expressly required or prohibited, resolution of ambiguities by agencies often "'entail[s] the exercise of judgment grounded in policy concerns.'" *Id*. at 2413, quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 505, 512 (1994). Congress is well

> attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have "unique expertise," often of a scientific or technical nature, relevant to applying a regulation "to complex or changing circumstances." [Citation omitted] * * * It is because of those features that Congress, when first enacting a statute, *assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. As so too, when new issues demanding new policy calls come up within that scheme….* That preference may be strongest when the interpretive issue arises in the context of a 'complex and highly technical regulatory program.' *Thomas Jefferson*, 512 U.S. at 512.

Id. (emphasis added).

As noted *supra*, §7545(h) does not establish a prohibition and provide for an exception to that prohibition. It instead directs EPA to promulgate regulations in this

regard, i.e., it "assigns rulemaking power to [EPA] and thus authorizes it to fill out the statutory scheme." *Id*. EPA has considered the interpretive issue of "containing 10% ethanol," which most assuredly arises in the context of a "complex and highly technical regulatory program," *id.*, reviewed it in the context of congressional policy requiring increased use of biofuels and evolving circumstances, and applied an interpretation that supports and advances those policies.

C. There Exist no Other Bases to Overturn EPA's Interpretation of the Ethanol Allowance

AFPM reiterates several times that EPA was acting pursuant to a Presidential directive to consider expanding the use of E15, implying a negative connotation. AFPM Br. 11, 12, 18. There is, however, no prohibition on any person requesting that EPA reexamine a prior interpretation or otherwise expand its interpretation of a statute, and that undoubtedly includes the Administration. As *Chevron* teaches, an agency should continually assess its positions and can change an interpretation of a statute based on "a change in administrations." *Chevron*, 467 U.S. at 863. *See also*, *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1042 (D.C. Cir. 2012). In this case, the President merely sought to have EPA consider how E15 could be used to its full potential.

AFPM unsurprisingly makes much of the fact that EPA has changed its interpretation of the statutory language and avers that it was arbitrary and capricious to do so. AFPM Br. 39-41. This, however, clearly is not a basis for finding EPA's

revised interpretation to be deemed unreasonable. An agency is "free to change course" in its policies and interpretations as long as it provides "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Am. Fed'n of State, County, & Mun. Employees v. FLRA*, 395 F.3d 443, 449 (D.C. Cir. 2005) (citations omitted). As *Chevron* explains, "to engage in informed rulemaking, [an agency] must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. at 863. *See also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009). Thus, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Brand X*, 545 U.S. at 981-82.

AFPM alternatively asserts that EPA acted in an arbitrary and capricious manner in altering its interpretation because it purportedly did not adequately explain its revised interpretation. AFPM Br. 39-40. EPA's obligation to explain its change in policy or interpretation "is not particularly demanding." *Biovail Corp. v. U.S. Food & Drug Admin.*, 519 F. Supp. 2d 39, 45 (D.D.C. 2007). Nothing more than a brief statement is necessary, as long as the agency explains its actions. *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("That requirement is satisfied when the agency's explanation is clear enough that its path may reasonably be discerned."). The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the

statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. at 1811.

As outlined above, EPA detailed its various reasons for reinterpreting 42 U.S.C. §7545(h)(4). *See, e.g.*, 84 Fed. Reg. at 26,990-26,993; JA__ (RTC pp. 3-19). AFPM may not agree with those reasons, but that does not make EPA's revised interpretation unreasonable. AFPM may not circumvent the deference this Court must apply to EPA's statutory interpretation by transforming a pure statutory interpretation issue into a claim that EPA's explanation for its revised view of the statute is arbitrary and capricious. Applying the proper deference, EPA's reinterpretation of the statute is at least one reasonable construction, and therefore should be upheld.

II. EPA'S DETERMINATION UNDER 42 U.S.C. §7545(f)(1) THAT E15 IS SUBSTANTIALLY SIMILAR TO A CERTIFICATION FUEL IS WITHIN ITS STATUTORY AUTHORITY AND IS REASONABLE

Recognizing that new fuels or increased concentrations of existing fuels would become available, Congress concluded that new fuels should not be permitted to enter commerce without a determination that the fuel would not materially hinder the operation and emissions control capabilities of various classes of vehicles. Congress chose to implement this policy by prohibiting new fuels, or increases in the concentration of existing fuels or fuel additives, unless such fuel is "substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine…." 42 U.S.C. §7545(f)(1). In so doing,

Congress imposed no factors or parameters to limit EPA, relying instead on EPA to utilize its expertise to make this technical determination.

As noted above, in 2014 EPA updated the certification fuel for Tier 3 light-duty vehicles to E10, which by then was in widespread use. 84 Fed. Reg. at 26,994/1. In making its determination as to whether a new fuel or increased concentration (E15) is substantially similar to the certification fuel (E10), EPA analyzed: (a) the level and nature of emissions generated by the candidate fuel; (b) compatibility with emission control devices and other engine and vehicle materials; (c) and effects on drivability, if any. Following such analysis, EPA determined that E15 is substantially similar to E10 for use in light-duty vehicles manufactured since 2001. 84 Fed. Reg. at 26,994/2-3.

AFPM asserts that this determination contravenes the statute. It argues that EPA can only approve a new fuel if it is substantially similar to *all* certification fuels, and that it can only apply that determination to *all* vehicles manufactured since 1975, or to none at all. There are, however, no such requirements or restrictions in the statute. AFPM cannot, alternatively, conjure them through their expedient view of a single word, "any," or other tortured applications of statutory phrases.

A. The Statute Does Not Require EPA to Find that a New Fuel is Substantially Similar to Every Fuel That Has Ever Been Utilized in the Certification Process

AFPM contends that EPA's substantially similar determination must be invalidated because, although EPA found E15 to be substantially similar to E10 certification fuel, it did not make a separate determination that E15 *also* is substantially

similar to E0 (pure gasoline, an earlier certification fuel). AFPM Br. 41-47. But there is no hint in the statute that Congress intended that no blended fuel can *ever* be deemed substantially similar to a certification fuel unless it is substantially similar to pure gasoline (E0). That is a requirement Congress could easily have stated but it did not do so. AFPM cannot instead squeeze such a requirement out of a single word in §7545(f)(1).

A new fuel may be introduced into commerce so long as that fuel is "substantially similar to *any* fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine…." 42 U.S.C. §7545(f)(1) (emphasis added). AFPM asserts that the word "any" must be interpreted to mean "each and every," and thus E15 "must be substantially similar to *all* certification fuels to satisfy §7545(f)(1)." AFPM Br. 42 (emphasis in original).

AFPM is correct when it states that courts have applied an expansive meaning to the word "any." AFPM Br. 42-43. What that means is that statutory requirements can be applied to all *or* a specific item in a category. For example, in *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006), the court explained: "Read naturally, the word 'any' has an *expansive meaning*, that is, '*one or some* indiscriminately of whatever kind'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997)." *Id*. at 885 (emphasis added). *See also Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004) (quoting Webster's Third International Dictionary defining "any" as "one or some indiscriminately of whatever kind"); *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 131

(2002) (same). Thus, EPA may find E15 to be permitted to enter commerce if it finds that it is substantially similar to "one or some of whatever kind" of certification fuel, which occurred when it found that E15 is substantially similar to E10, an existing certification fuel. *See e.g., Del. Dep't of Nat. Res. and Envtl. Control v. EPA*, 895 F.3d 90, 98 (D.C. Cir. 2018) (finding context key and explaining that "[i]f 'any' can refer to 'one or some' members of a class, then it should naturally permit EPA to [take the contemplated action] when only 'one or some'" of the items apply). The fact that context is key is not surprising with a word like "any," which is concurrently listed in the dictionary as a pronoun, adverb, and adjective. Merriam Webster Dictionary at https://www.merriam-webster.com/dictionary/any.

The cases cited by AFPM do not hold otherwise. For instance, in *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) (AFPM Br. 43), the statute set forth requirements for the deletion of "any source category" from certain CAA requirements. The court found that "any" applied to a single source category and EPA was not required to address each and every source category at the same time and in the same manner. Other cases referenced by AFPM cite to the Supreme Court cases cited above, which again define "any" as "one or some indiscriminately of whatever kind." *See, e.g., NRDC v. EPA*, 755 F.3d 1010, 1019 (D.C. Cir. 2014).[9]

[9] AFPM cites several iterations of *Ethyl Corp. v. EPA* (AFPM Br. 44-45, 49) for generalized statements about the statute. That court, however, never sought to interpret what certification fuel or fuels a new fuel needs to be substantially similar to, or what vehicles are or must be covered by such a determination. For instance, AFPM

Turning back to our medical analogy, by now many know the general symptoms of COVID-19: fever or chills, cough, shortness of breath, fatigue, nausea, muscle or body aches, loss of taste or smell (and others). If you have a cough, shortness of breath, and a loss of taste and smell, and your doctor queries whether you have "any" of the symptoms of coronavirus, you do not say "no" because you do not have "each and every" symptom.

The response does not change if the word "any" is offered in a negative context, as AFPM asserts. AFPM Br. 43-44 (citing the Oxford English Dictionary, at https://www.oed.com/view/Entry/8973). If the doctor states that you are prohibited from obtaining a COVID-19 test unless you exhibit *any* of the symptoms, you would not walk out of the office without a prescription for a test because you fail to exhibit all of the symptoms. Moreover, the dictionary entry cited by AFPM for this proposition defines "any" as "referring to an unspecified quantity of a thing or things" and as "some." *Id*. "A thing," or "some," is clearly not "all" or "each and every." It further

---

believes that the court's generic reference to the plural "fuels" is evidence that a new fuel is required to be substantially similar to all certification fuels. AFPM Br. 44-45. But this cannot be, as it would require E15 to be substantially similar to certification fuel for diesel or liquid natural gas fuels, something no party asserts is required under the statute. Indeed, use of the plural "fuels" likely refers merely to the fact that there are multiple types of fuels: gasoline, diesel, propane, etc. Additionally, AFPM's citation to a single sentence in two briefs filed by EPA in other cases (*id*.) are equally innocuous and did not specifically address the statutory issues presented here.

defines "any" as used "to refer to a *member* of a particular group or class." (Emphasis added). E10 is a member of the class of vehicle certification fuels.[10]

As noted above, EPA has certification fuels for specific classes of vehicles, including diesel for diesel-powered vehicles and E85 for flex-fuel vehicles. Under AFPM's broad reading of the word "any," such that a new fuel must be substantially similar to "all" or "each and every" certification fuel, no fuel designed for light-duty vehicles could ever be deemed substantially similar. This is because a gasoline blend is not substantially similar to diesel fuel or liquid natural gas fuel, or to fuels designed specifically for vehicles that run on fuels with very high concentrations of ethanol (flex-fuel vehicles). JA__ (RTC p. 27) (finding such an application of the word "any" to be nonsensical).

AFPM seeks to avoid this absurd result of its interpretation of the word "any" by focusing on 42 U.S.C. §7545(f)(1)(A), the original version of the substantially similar requirement which applied to "light-duty motor vehicles manufactured after model year 1974." AFPM Br. 42. They contend that under this provision, the requirements do not apply to fuel for diesel or flex-fuel vehicles. First, AFPM is incorrect. As outlined at n.2, *supra* (and AFPM Br. 4), a light-duty vehicle is defined by its passenger seating capacity, not by the fuel it uses. In fact, there are many diesel, flex-

[10] EPA is quite cognizant of the fact that throughout this brief the word "any" sometimes refers to a single instance and sometimes refers to many or all. That is, again, because the meaning of the word "any" (as well as "contain") depends on context.

fuel, and natural gas vehicles that are light-duty vehicles, such as a basic Mercedes diesel sedan.

More importantly, AFPM's attempt to rely on subsection (f)(1)(A) wholly ignores Congress's 1990 amendment, where it applied the *identical* substantially similar requirement to fuels used to certify "*motor vehicles* manufactured after model year 1974." 42 U.S.C. §7545(f)(1)(B) (emphasis added). This includes diesel, flex-fuel and other types of vehicles (e.g., motorcycles). Congress clearly did not intend for the word "any" to be used differently in subsection (f)(1)(B) than it is used in subsection (f)(1)(A).

AFPM tries to further circumvent this absurd result by citing EPA's regulations that group fuels into different "fuel families." These include, for instance, diesel and ethanol blends containing more than 50% ethanol. AFPM then grants EPA "permission" to rewrite §7545(f)(1), in a manner to suit its argument, such that a fuel need only be substantially similar to a fuel used to certify "motor vehicles [*in the same fuel family*] manufactured after model year 1974." AFPM Br. 42 (EPA added words). But it is AFPM that argues that EPA is not authorized to put conditions on its substantially similar finding. AFPM does not get to now apply their own conditions when it is required to make their argument plausible.

Congress did not enact 42 U.S.C. §7545(f)(1) to secure the ever-lasting use of pure gasoline. Instead, as AFPM states, "[s]ubsection (f)(1) preemptively addresses the possibility "'that new fuel … would impair the performance of emission control

devices in cars.'" AFPM Br. 45, quoting *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 829 (D.C. Cir. 1984). The E15 Rule provides just such protection, through its finding that E15 is substantially similar to E10 certification fuel, which has long been the predominant fuel in the U.S. market.

B. The Statute Permits EPA to Determine that a New Fuel is Substantially Similar to a Certification Fuel Only When Used in More Modern Vehicles that Have the Capability to Address Emissions that May Occur with Use of that New Fuel

AFPM argues that "the statute requires a new fuel to be substantially similar when used in *all* post-1974 light-duty vehicles and thus does not allow EPA to … limit its determination to model-year 2001 and newer vehicles." AFPM Br. 16. Once again, the statute contains no such language, as it merely requires a fuel to be substantially similar to a certification fuel "for use by any person in motor vehicles manufactured after model year 1974…." 42 U.S.C. §7545(f)(1)(B) (emphasis added).

AFPM asserts that "nothing in the statutory text authorizes EPA to make a substantial-similarity determination for only a subset of model years," in this case 2001 and newer. AFPM Br. 49. Likewise, nothing in the statutory text restricts EPA from making a substantially similar determination for a subset of model years. Quite clearly, vehicles manufactured from 2001 to the present are "vehicles manufactured after model year 1974." To the extent this provision is ambiguous, it is EPA that has discretion to fill the statutory gap, with its determination to be upheld so long as it is reasonable. *See* p. 33, *supra*.

As before, we turn to various tools to try and glean Congress's intent with regard to this provision. Reviewing legislative history, we find no evidence that Congress intended, for decades into the future, for a 1974 vehicle to present an all-or-nothing gateway to the future introduction of new fuels, particularly fuels that support Congress' intent to promote the use of alternative fuels such as ethanol.

AFPM cites an earlier action under the §7545(f)(4) waiver provision in which EPA stated that it considered whether the fuel blend at issue was substantially similar "for the broad range of vehicle model years," and that the purpose of §7545(f)(1) "is to protect the emissions control systems of motor vehicles." AFPM Br. 45-46. *See also* 84 Fed. Reg. at 26,984/1 (citing legislative history); JA__ (RTC p. 47). That is exactly right, which is precisely why EPA considered a broad range of vehicles and limited its substantially similar determination for E15 only to model year 2001 and newer light-duty vehicles. These were the vehicles for which EPA had the data to ensure that the emissions control systems could accommodate E15 without adverse effects. 84 Fed. Reg. at 27,004/2-05.[11]

In enacting §7545(f) in 1977, Congress referred to vehicles starting in 1975 because that is when catalytic converters were generally required in light-duty vehicles. *See Amoco Oil Co. v. EPA*, 501 F.2d 722, 726 (D.C. Cir. 1974). At the time

[11] AFPM asserts that this leaves out the majority of light-duty vehicles, stating that "[m]ost light-duty vehicles on the road ... are not equipped to handle gasoline with ethanol content higher than 10%," citing the E15 Rule for this proposition. AFPM Br. 3. The preamble contains no such statements about the in-use vehicle fleet, either at the cited pages or otherwise.

Congress enacted this provision, EPA would have to look back to light-duty vehicles manufactured in the two years prior to enactment and that operated essentially the same with regard to emissions. Under AFPM's view, EPA must look back to cars manufactured in the last 45 years ... and counting. There is no evidence that Congress intended EPA to ignore progress in the development of motor vehicles and their emissions control capabilities and continue into infinity to link all substantially similar determinations back to cars manufactured during the Gerald Ford Administration. Under AFPM's reasoning, if a new very-low emissions fuel is developed, EPA would be prohibited from allowing such fuel under §7545(f)(1) if vehicles manufactured between 1975-78, for example, were unable to run on it.

Congress did not define the term "substantially similar" as used in §7545(f)(1). Nor did Congress set out the criteria under which a fuel should or should not be deemed substantially similar to a certification fuel. As this Court has explained in interpreting the provisions of 42 U.S.C. §7545, when a statutory provision "places only one limitation on EPA's" authority, in this case that a new fuel be substantially similar to a certification fuel, and "does not 'prescribe any factors that EPA must consider in making its decision' ..., it is eminently reasonable to conclude that the silence is meant to convey nothing more than a refusal to tie the agency's hands." *AFPM v. EPA*, 937 F.3d 559, 577 (D.C. Cir. 2019), quoting *Am. for Clean Energy*, 864 F.3d at 733 and *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915-16 (D.C. Cir. 2014) (finding that the lack of factors allows EPA to determine "whether and in what circumstances" to apply

renewable fuel requirements). In these circumstances, "EPA enjoys broad discretion to consider 'a range of factors' in determining [how to formulate its conclusion]." *Id.*

EPA determined "whether and in what circumstances" to apply its substantially similar determination, in this case to a single certification fuel and to a subset of model year light-duty vehicles: "We believe it is reasonable to limit our sub sim finding for E15 to MY2001 and newer light-duty vehicles because we find that E15 would have similar effects on emissions, materials compatibility, and drivability when compared to Tier 3 E10 certification fuel when used in this subset of vehicles." JA__ (RTC p. 43). AFPM's effort to prohibit EPA from applying these factors is inconsistent with EPA's general authority and discretion to base its decision on any reasonable factors, which in this case was the various technical factors cited.

AFPM further argues that EPA cannot apply its finding to model year vehicles 2001 and newer because it found E15 substantially similar to E10, which is only used as a certification fuel for Tier 3 vehicles beginning with model year 2017. 84 Fed. Reg. at 26,994/1; AFPM Br. 52. The statute, however, requires EPA to determine that a fuel is "substantially similar to any fuel or fuel additive *utilized in the certification* of any model year 1975, *or subsequent model year*, vehicle or engine…." 42 U.S.C. §7545(f)(1) (emphasis added). There is no dispute that E10 is certified for use in a "subsequent model year vehicle," in this case 2017 and newer. The use of a fuel is quite a different matter than what vehicles it serves as a certification fuel for. For example, E10 is a certification fuel for 2017 and newer light-duty vehicles but is

available for use in virtually all cars on the road, dating back to 1975 model years and even earlier. The only question under the express wording of §7545(f)(1) is whether E15 is substantially similar to the certification fuel E10, not which "subsequent model year[s]" the E10 certification fuel applies to.

EPA's discretion under the substantially similar provision is further reinforced by Congress's giving EPA authority to grant a waiver from the substantially similar requirement. Under 42 U.S.C. §7545(f)(4), "the Administrator's waiver may be under such conditions, or in regard to such concentrations, as he deems appropriate consistent with the intent of this section." JA__ (S. Rep. No. 95-127 at 91 (1977)). Thus, setting conditions on the use of a new fuel is built into §7545(f).

AFPM incongruously argues that if EPA is to place conditions on the use of a new fuel, such as limiting a substantially similar determination to certain model years, it can only do so through the waiver provision, 42 U.S.C. §7545(f)(4). AFPM Br. 50-51. But AFPM does not actually believe this. Their challenge to the waivers in *Grocery Mfrs. v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012), was based on the argument that the waiver provision does not, in fact, allow EPA to permit use of a new fuel in a subset of model year vehicles or with any other conditions. That view has not changed, as their brief in *this* case relies on Judge (now Justice) Kavanaugh's dissent in *Grocery Mfrs*. AFPM Br. 51. Then-Judge Kavanaugh opined that if he had the opportunity to reach the merits, he would find that EPA may not limit a waiver under §7545(f)(4) to certain model years or place other conditions on the waiver. *Id*. at 181,

190-91. Indeed, the very reason AFPM seeks to reopen the 2010-11 waivers is to make the argument that EPA *cannot* condition a waiver under §7545(f)(4), such as by limiting it to model year 2001 and newer vehicles. AFPM Br. 57-60. As Congress explained, §7545(f)(4) allows EPA to establish conditions for the use of a new fuel "consistent with the intent of the statute." JA__ (S. Rep. No. 95-127 at 91 (1977)). The intent of the statute, including specifically 7545(f)(1), is to permit the use of new fuels that are substantially similar to a certification fuel; not to prohibit a new unless it can be used in every vehicle manufactured since 1975.

AFPM's argument is also logically unsound. The waiver provision, 42 U.S.C. §7545(f)(4) is not, as AFPM asserts, rendered superfluous by the application of a substantially similar determination to a subset of model year vehicles. AFPM Br. 50. For instance, even with the substantially similar determination for E15 in place, a waiver for E15 can still be granted to pre-2001 model year vehicles, or for a fuel with a higher ethanol concentration, as advocated by Petitioner UAI, assuming the criteria in §7545(f)(4) are met.

Additionally, there is no evidence (and AFPM points to none) that EPA applied the substantially similar determination to a subset of vehicles as a way to "avoid the emission control device effects subsection (f)(4) is designed to protect." AFPM Br. 50. To the contrary, EPA specifically analyzed the effect on emissions and materials compatibility of E15, which requires consideration of the fuel's impact on "emission control device[s] or system []," just as stated in the waiver provision, and tailored the

substantially similar determination based on that analysis. 84 Fed. Reg. at 26,984/1, 26,989/3.

Nor does EPA's action applying its determination to a subset of vehicles place older vehicles at risk, as AFPM asserts. AFPM Br. 46. EPA has promulgated a separate rule, the Misfueling Mitigation Rule, 76 Fed. Reg. 44,406 (July 25, 2011), that is designed to ensure that different classes of vehicles use only the fuel approved for those vehicles. Those provisions remained largely unchanged in the E15 Rule, with the exception of certain documentation requirements. AFPM does not challenge those changes as arbitrary or otherwise inadequate. EPA limited its substantially similar determination to only those vehicles that can safely accommodate E15. It is only under AFPM's interpretation (that a substantially similar determination must apply to all vehicles manufactured since 1975) that the risk AFPM warns of would occur.

C. The Substantially Similar Determination is Not Dependent on the Reid Vapor Pressure Permitted During the Summer

AFPM asserts that EPA's substantially similar determination is defective because, in their view, E15 at 10-psi RVP is a different fuel than E15 at 9-psi, and it is only the latter that EPA found to be substantially similar to E10. AFPM Br. 13, 53-54. AFPM's argument, however, is based on a false premise; that E10 is found in the market only at 9-psi RVP and E15 would only be available at 10-psi RVP.

The RVP can reach about 10-psi RVP whether blending *either* 10% or 15% ethanol into gasoline, depending on how the fuel is blended. The certification fuel that was designated by regulation in 2014 is E10 *at 9-psi*. 84 Fed. Reg. at 26,997/3-26,998/1. Accordingly, in order to compare apples to apples, EPA compared E15 at 9-psi to E10 at 9-psi.

With both E10 and E15, the fuel can be blended to result in a 9-psi RVP, and this is how the fuels were compared. The fact that both can also be used at 10-psi RVP under various circumstances does not call for a different or additional analysis under 42 U.S.C. §7545(f)(1). Instead, the 1-psi RVP allowance available for E15 during the summer season is applied *after* the substantially similar determination is made, and it is applied under a different statutory provision, §7545(h)(4). *See* 84 Fed. Reg. at 26,983/2, 26,998/2; RTC pp. 22-23, 37.

EPA's judgment not to compare E15 at 10-psi RVP when determining if it is substantially similar to E10, which is a certification fuel at 9-psi RVP, is consistent with the statutory regime and indeed harmonizes the key provisions. JA__ (RTC pp. 6, 19). Congress directed EPA in §7545(h) to establish volatility requirements for gasoline and further directed that certain gasoline-ethanol blends receive a 1-psi RVP allowance for those requirements. Congress did not amend §7545(f)(1) to mandate that the allowance be factored into the substantially similar determination under §7545(f)(1). Whether or not E15 qualifies to be used at 10-psi RVP during the

summer season under §7545(h)(4), is a separate inquiry from whether E15 is substantially similar to a certification fuel, in this case E10 at 9-psi RVP.

AFPM's argument might have some appeal (although without a statutory basis) if E15 maintained a higher RVP than E10. But that is not the case. As discussed *supra*, E10 and E15 generally have a similar psi-RVP, with E15's RVP actually slightly lower. The fact that different statutory provision, 42 U.S.C. §7545(h)(4), might allow E15 to be sold at 10-psi RVP in the summer season (just as E10 is sold during the summer), does not alter the analysis of whether E15 at 9-psi RVP is substantially similar to E10 certification fuel, which is certified at 9-psi RVP.

Either E15 is substantially similar to E10 certification fuel, or it is not. As EPA detailed based on their various characteristics (discussed immediately below), the fuels are substantially similar. Once that determination is made in the positive, E15 can be sold. Whether E15 can be sold at 10-psi RVP during the summer season, depends on whether the Court upholds EPA's separate determination under the separate ethanol allowance provision, §7545(h)(4). 84 Fed. Reg. at 26,998.

D. EPA's Determination that E15 is Substantially Similar to E10 Certification Fuel is Not Arbitrary and Capricious

As a final attack on the substantially similar determination, AFPM asserts that EPA's factual determination that E15 is substantially similar to E10 is arbitrary and capricious. As noted, EPA evaluated the two fuel blends based on emissions, materials compatibility, and drivability. Based on the data, EPA found that E15 at 9.0 psi

"would have effects on emissions, materials compatibility, and drivability substantially similar to Tier 3 E10 certification fuel (also at 9.0 psi RVP) in Tier 3 vehicles." 84 Fed. Reg. at 26,998/3. In other words, EPA found that the impacts of E15 would be substantially similar to the impacts of E10 certification fuel when used in similar vehicles, specifically model year 2001 and newer light-duty vehicles. *See* 84 Fed. Reg. at 26,998-27,002/2 for EPA's thorough discussion of the impacts.

Ignoring what *substantially* similar means, AFPM asserts that it was arbitrary and capricious for EPA to find that E15 is substantially similar to E10 because EPA found that emissions of certain substances, particulate matter and nitrogen oxides, would increase by 4% and 2% respectively. AFPM Br. 55-56. What AFPM does not expound on is that the data, based on large studies covering multiple model-year vehicles, also showed that E15 produced 4% *lower* carbon monoxide compared to E10. 84 Fed. Reg. at 26,999. Later studies estimated 2% higher nitrous oxide (NOx), 2% higher particular matter (PM), 4% lower carbon monoxide (CO), and 2% lower non-methane organic gases. *Id.* A 2018 study conducted by the University of California "showed no statistically significant difference in NOx, non-methane hydrocarbons (NHMC), or PM, when comparing E15 to E10 at either aromatic level." *Id.* EPA further found the results of the studies to be largely consistent over both Tier 2 and Tier 3 vehicles. *Id.* at 27,000/1. Thus, while there are likely to be some small changes in emissions with the use of E15 compared to E10, including *reduction* of some pollutants, such changes are "too small to cause or contribute to MY2001 and newer

light-duty motor vehicles to exceed the vehicle's certified exhaust emissions standards." *Id.* at 27,000/3. *See also* JA__ (RTC p.3) (explaining that "the air quality effects of giving E15 the 1-psi waiver are expected to be minimal relative to E10 today.").

EPA further described the various types of evaporative emission. EPA concluded that "E15 would have a similar effect as Tier 3 E10 certification fuel" and that "E15 at 9.0 psi RVP would be expected to have essentially identical evaporative emissions to E10 at 9.0 psi RVP." *Id.* at 27,001/1-2. As all parties explain, the higher volatility of a higher RVP fuel results in evaporative emissions changes. But as noted, E15 does not have a higher RVP than in-use E10; indeed, it is slightly lower. 84 Fed. Reg. at 26,993/2. Thus, when comparing the emissions impacts between the use of E15 and E10 in the marketplace as it relates to volatility, there is not expected to be any increase in evaporative emissions from the use of E15. 84 Fed. Reg. at 26,982/2 (emphasis added) (E15 will "maintain [ ] substantially the same level of emissions performance as E10 since E15 [is] made from the same CBOB [conventional blendstock for oxygenate blending] as is used to make E10 during the summer [and] would have *slightly lower RVP than E10*…."). *See also id.* at 26990/3-26991/1, 26993/1 ("We are confident that relative evaporative emissions effects for E15 would largely be similar or slightly less than those for E10."); JA__ (RTC p. 3).

A determination by EPA will not be deemed arbitrary and capricious so long as the agency "consider[ed] all of the relevant factors and demonstrate[d] a reasonable

connection between the facts on the record and the resulting policy choice." *Sierra Club v. Costle*, 657 F.2d 298, 323 (D.C. Cir. 1981). In making this determination, the court "give[s] an 'extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.'" *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) (citation omitted). This is especially the case as applied to "EPA's administration of the complicated provisions of the Clean Air Act." *AFPM v. EPA*, 937 F.3d at 574 (citations omitted). Here, EPA made the determination that emissions from E15, when compared to E10, were substantially similar, and AFPM has offered no basis to deem that finding to be arbitrary and capricious.

AFPM turns to EPA's findings on materials compatibility. Exercising its engineering judgment in evaluating various sets of data, EPA concluded that there would be no materials compatibility issues with E15 in model year 2001–19 light-duty vehicles. 84 Fed. Reg. at 27,004/1. AFPM does not dispute this conclusion. Instead, they argue that EPA did not, in their view, adequately discuss the engineering judgment it exercised. AFPM Br. 55-56.

First, EPA specifically referenced and relied on "our engineering judgment discussed in the E15 waiver decisions." 84 Fed. Reg. at 27,004/1. AFPM would merely need to review that decision to see how and in what circumstances EPA applied its engineering judgment to various data and findings. *See, e.g.* 75 Fed. Reg. at 68,095/1, 68,104/3, 68,124/3, 68,128/1, 68,129/2, 68,137/3, 68,145/2.

Further, as EPA described in the challenged decision, it collects data through an extensive test program designed to ensure fuel compatibility. EPA explained that since 2014, E15 has been used as an aging fuel for evaporative durability testing, so vehicles have already demonstrated materials compatibility as it might relate to evaporative emission performance under such testing. 84 Fed. Reg. at 27,001/3. E15 has also been available in the market and used in model year 2001 and newer light-duty vehicles since the 2010-11 waiver decisions, again without any identified materials compatibility issues. Reviewing the data, EPA adjudged that "model year 2001 and newer vehicles would not have materials compatibility issues with E15." 84 Fed. Reg. at 27,001/3. *See also id.* at 27,003/3-27,004/1.

EPA does not, in a rulemaking, need to provide mathematical formulas or detailed data analysis to explain its reasoned judgement based on the data reviewed. Instead, while "EPA must provide a reasoned explanation for its actions, [ ] rationality does not always imply a high degree of quantitative specificity." *Am. Petroleum Inst. v. EP*A, 706 F.3d 474, 481 (D.C. Cir. 2013). As in virtually every rulemaking the Agency promulgates, scientists and experts exercised their technical or engineering judgment to evaluate the data and formulate conclusions, and EPA does not have to further explicate its thinking. AFPM does not challenge or even identify any of these judgments, and it may not obtain a remand with a general complaint that it desires more explanation.

E. The 2010-11 Waivers Are Not Part of the E15 Rulemaking and Have not Been Reopened in the E15 Rule

Frustrated that it never got the chance to challenge the substance of the 2010-11 E15 waivers due to the court's finding in *Grocery Manufacturers* that AFPM and other petitioners lacked standing, AFPM (without its fellow Petitioners) now attempts to resurrect that challenge. AFPM Br. 17, n.7. AFPM asserts that EPA affirmatively reopened its 2010-11 waiver decisions and attempts to reargue its long-lost challenge to those 10-year old determinations. AFPM Br. 57-60. Essentially, AFPM seeks to first have this Court strike down the E15 Rule -- both EPA's reinterpretation of the ethanol allowance under 42 U.S.C. §7545(h)(4) and its substantially similar determination under 42 U.S.C. §7545(f)(1) -- and *then* reach back and strike down EPA's 2010-11 partial waiver decisions made pursuant to 42 U.S.C. §7545(f)(4). In short, they want the use of E15 banned, even in the non-summer months, where it has been sold for 10 years.

An agency determination or conclusion reached in the past will be deemed reopened only if the agency expressly reopens it or otherwise consciously acts to "reexamin[e] … the policy at issue in the petition." *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345, 1351 (D.C. Cir. 1995) (finding that an agency's statement of "renewed adherence" to the former determination does not reopen the issue). If the agency does not affirmatively seek comment on the *specific* established policy being challenged, or otherwise affirmatively reconsider *that* policy, challenges to the policy

announced in the earlier regulation are barred. *Am. Road & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1115 (D.C. Cir. 2009), *cert. denied*, 562 U.S. 836 (2010); *NRDC v. EPA*, 571 F.3d at 1255-56; *Envtl. Def. v. EPA*, 467 F.3d 1329, 1333 (D.C. Cir. 2006).

EPA neither sought comment on the 2010-11 waivers nor did it reconsider those waivers in the E15 Rule. To the contrary, EPA expressly stated that it was "not reopening those waivers with this action [the E15 Rule]." 84 Fed. Reg. at 26,997/3. *See also* JA___ (RTC pp. 73-74) ("We explicitly stated in the NPRM that 'EPA is not proposing to revise the E15 partial waivers under CAA sec. 211(f)(4), and is therefore not soliciting comments on the waiver itself or any of its conditions.' 84 FR 10,588.").

AFPM nevertheless tries to resurrect its old, dismissed challenge to the waivers. AFPM argues that because the waivers may prove superfluous if the E15 Rule is upheld by this Court, this somehow reopens them, citing EPA's statement that the waivers will no longer be necessary. AFPM Br. 58. First, no action was taken on the waivers and any party may choose to continue to rely on them. 84 Fed. Reg. at 27,006/1, 27,007/3. That is especially true should the court reject EPA's substantially similar determination in the E15 Rule.

In any event, to the extent the waiver would be rendered superfluous, that occurs as a matter of law, not because EPA reopened the waivers. If EPA's finding under 42 U.S.C. §7545(f)(1) that E15 is substantially similar to a certification fuel is upheld, it would not be necessary for a party to utilize the waivers granted under §7545(f)(4). 84

Fed. Reg. at 27,006/1; JA__ (RTC p. 21). The E15 Rule does not reexamine the 2010-11 waivers but instead supplants the need for them. 84 Fed. Reg. 27,006/1-2, 27,007/3. The fact that an earlier administrative action (the waivers) might become superfluous, does not reopen the earlier decision, it does the opposite: it moots it.

EPA has taken no action as to the 2010-11 waivers; it has not revised them, limited them, or reconsidered them in any facet. Because of the overlapping subject matter, it was natural for EPA to review and consider data from the record of the waiver decision, so as to ensure that it was taking a comprehensive view of the factual record of the use of E15. For clarity sake, EPA also explained that nothing about the waivers was altered by the E15 Rule. *See e.g.*, 84 Fed. Reg. at 26,983/2. These statements are merely a review of facts that may be relevant to the E15 Rule it was considering, not a reopening of a waiver that no one asked to be reopened. An agency merely considering and discussing its past administrative actions and their relevance does not act to reopen those actions. *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d at 1352; *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008) (finding no reopener because, *inter alia*, the agency did not "consider [] the substance of the [earlier] rule to be in doubt….").

In a footnote, AFPM argues that if EPA did not expressly reopen the waivers, it did so constructively, implying that EPA created a different regulatory construct. AFPM Br. 58, n. 17. This Court will not consider arguments raised in a footnote, and should not do so here. *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014); *Meijer*,

Inc. v. Biovail Corp., 533 F.3d 857, 864 (D.C. Cir. 2008); *United States v. Whren*, 111 F.3d 956, 958 (D.C. Cir.1997).

In any case, the constructive reopener doctrine does not apply here. This Court has applied constructive reopener where an agency changes the underlying "regulatory construct" in an unanticipated way so as to excuse a party's failure to timely challenge the initial rulemaking. *See Envtl. Def. Fund v. EPA*, 467 F.3d 1329 (D.C. Cir. 2006). Here, EPA did not alter its earlier waiver decision or the regulatory construct of waivers. Instead, EPA applied a completely different statutory provision under wholly different circumstances, such as comparing E15 to E10, which was not a certification fuel when the waivers were issued. And AFPM *did* timely challenge the 2010-11 waiver rulemakings, it simply lacked standing to fully pursue that challenge. It may not override the Court's holding by proposing an alternative standing argument ten years later.[12]

[12] AFPM's single-paragraph argument that the 2010-11 waivers were also arbitrary and capricious, purportedly because the record (presumably in those rulemakings) failed to demonstrate that E15 will not cause or contribute to emission control device failures (AFPM Br. 60), must also be summarily rejected, as the court does not consider undeveloped arguments, whether in a footnote *or in the text*. *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013); *Allaithi v. Rumsfeld*, 753 F.3d 1327, 1334 (D.C. Cir. 2014). That is particularly true when such argument is based on a record that is not before the Court; the full administrative records in the 2010 and 2011 waiver decisions. In any event, for the technical reasons cited herein, EPA's waiver decisions were based on sound data and analysis and were not arbitrary and capricious.

III. EFFECT OF THE COURT'S POTENTIAL RULINGS ON 42 U.S.C. §§7545(h)(4) and 7545(f)(1)

EPA notes that the two determinations *actually* challenged by AFPM are both necessary in order for fuel and fuel additive manufacturers to lawfully introduce E15 at 10-psi RVP during the summer season and that these two determinations are not severable as to the specific regulated parties. 84 Fed. Reg. at 26,983/3; AFPM Br. 14. Unless both EPA's reinterpretation of the ethanol allowance at 42 U.S.C. §7545(h)(4) and its substantially similar determination under 42 U.S.C. §7545(f)(1) are upheld, manufacturers are prohibited from selling E15 at 10-psi RVP during the summer season. Thus, should the Court find that EPA's interpretation of the 1-psi RVP ethanol allowance provision must be rejected, it need not reach the substantially similar determination made under §7545(f)(1). The same is not true, however, if the Court upholds EPA's interpretation of the ethanol allowance but strikes down its substantially similar determination.

As outlined at p. 13, *supra*, the prohibition on the introduction of new fuels under 42 U.S.C. §7545(f)(1) is limited under the express wording of the statute to manufacturers of fuels and fuel additives. EPA has made clear that a fuel manufacturer is any person who "produces, manufactures, or imports a fuel," and that this does not include a party who only blends or otherwise adds ethanol or other oxygenates to gasoline in an allowable amount. JA__ (RTC pp. 22-23). Thus, the restriction on the introduction into commerce of a new fuel or increase in a fuel's

concentration absent a substantially similar determination, expressly does not apply to downstream oxygenate blenders, terminal operators or retailers, so long as they: (a) add only ethanol or other oxygenates in allowable amounts; and (b) are not otherwise fuel manufacturers, refiners or importers. *Id.*

EPA clarified this distinction several times in the E15 Rule. It explained both that the statute does not prohibit the sale of a new fuel or the increase of the concentration of an existing fuel or additive by a downstream distributor and that the 2010-11 waivers also do not include any such restriction. 84 Fed. Reg. at 26,982/1, 26,983/2; 27,009/2, 26,993/3, n.102; JA__ (RTC pp. 22-23). AFPM has not challenged this clarification in its opening brief and it may not do so in its reply brief, as any such challenge is waived. *Mobley v. CIA*, 806 F.3d 568, 588 (D.C. Cir. 2015); *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008).

IV. EPA DID NOT ACT UNLAWFULLY IN REFUSING TO EXTEND ITS SUBSTANTIALLY SIMILAR DETERMINATION TO E16-E50

While AFPM argues that EPA went too far by taking specific regulatory steps to allow the already in-use E15 to also be used during the summer season, UAI criticizes EPA for what it did not do. UAI contends that the E15 Rule must be remanded because it prohibits the use of E16-E50 and because EPA was required to approve the use of E16-E50 or other mid-level blends. But EPA took no action in the E15 Rule to prohibit the use of E16-E50 or any other fuel blend nor was any such alternative blend even the subject of the Rule. UAI neither has a substantive basis for its claims nor a

jurisdictional basis to challenge a regulatory action that did not occur and that was not part of the challenged rule.

A. The Court Lacks Jurisdiction to Consider UAI's Challenge to a Provision of the E15 Rule That Does Not Exist and Was Never Proposed

1. UAI has Failed to Challenge a Final Agency Action

As UAI announces in the opening sentence of its brief, "Petitioners challenge the E15 Rule's interpretation of the CAA's 'sub-sim' law …, to forbid the sale of mid-level fuel blends," which UAI defines as E16-E50. UAI Br. 2. UAI's claim runs head up against two undeniable jurisdictional defects: (1) the E15 Rule never proposed or considered making a substantially similar determination for E16-E50 or for any fuel blend other than for E15; and (2) nowhere does the E15 Rule forbid – or even consider – the sale or use of E16-E50.

It is a fundamental rule of administrative law that federal courts have jurisdiction to review only the final actions of a federal agency. To be deemed a final action, "the action must mark the 'consummation' of the agency's decisionmaking process ... [and it] must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

EPA promulgated the E15 Rule in response to the President's directive to consider specifically whether *E15* could be more comprehensively utilized. EPA made it abundantly clear that both its proposed action and its final action was limited to a

determination of whether only E15 was substantially similar to a certification fuel under 42 U.S.C. §7545(f)(1): "For reasons described above, we are proposing that E15 is substantially similar to Tier 3 E10 certification fuel." 84 Fed. Reg. 10,584, 10,601/2 (March 21, 2019) (Proposed Rule); 84 Fed. Reg. at 26,995 (Final Rule). *See also* JA __ (RTC pp. 31-32). The E15 Rule was not the consummation of EPA's decision-making process for E16-E50 because the Rule never even considered approving such a blend, and the E15 Rule determined no rights or obligations as to the use of E16-E50.

Apparently anxious to have the issue of the use of E16-E50 addressed by EPA, UAI attempts to coax this issue out of a rulemaking that did not address it. UAI cites to nothing in the rulemaking where EPA prohibited the use of E16-E50 or even considered making a substantially similar determination on any fuel blend other than E15, whether it be E16-E50 or otherwise. Instead, UAI cites partial quotes related to the 1-psi RVP waiver in §7545(h)(4), the substantially similar determination in §7545(f)(1), and the registration requirement in 42 U.S.C. §7545(a), UAI Br. 22-23, but none declare that E16-E50 is or is not substantially similar to anything, or that use of E16-E50 is prohibited. They simply explain what the rule did: found that gasoline blends with up to 15% ethanol are substantially similar to E10, which was all EPA was considering in this rulemaking.

Because it cannot refer to specific regulatory language actually prohibiting the use of E16-E50, UAI instead cites to general statements in the preamble. *Id*. But these statements merely clarify what the E15 Rule does *not* do, i.e., that the Rule's

substantially similar determination covers only fuel blends with "no more than 15 volume percent ethanol." *Id.*, quoting 84 Fed. Reg. at 27,021/1. Much more is required for the Court to have jurisdiction over UAI's claims. As this Court has explained:

> We have jurisdiction to review these statements [in the preamble to the regulation] only if they constitute final agency action. 42 U.S.C. §7607(b)(1) .... While preamble statements may in some unique cases constitute binding, final agency action susceptible to judicial review [citation omitted], this is not the norm. Agency statements "'having general applicability and legal effect'" are to be published in the Code of Federal Regulations.

NRDC v. EPA, 559 F.3d 561, 564-65 (D.C. Cir. 2009). *See also Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1418-20 (D.C. Cir. 1998); *Kennecott*, 88 F.3d 1191, 1223 (D.C. Cir. 1996). UAI points to no provision published in the Code of Federal Regulations (or in the preamble to the E15 Rule, for that matter), that prohibits the use of E16-E50.

Absent any regulatory action with regard to E16-E50 in the E15 Rule, it is quite evident that UAI's complaint is with the statute, not the Rule before this Court. UAI states the E15 Rule prohibits the use of E16-E50, "by imposing a 'no more than 15 volume percent ethanol' ceiling on the concentration of ethanol additive in gasoline." UAI Br. 30-31. Such a ceiling exists, however, only because as of this date EPA has not considered whether E16-E50 or any other mid-level fuel is substantially similar to a certification fuel and thus can be used in light-duty vehicles, as is required under 42

U.S.C. §7545(f)(1). That does not demonstrate a prohibition issued in the E15 Rule; it reflects a statutory requirement that EPA did not opine on in the E15 Rule.

UAI summarizes its claim as follows: "EPA's interpretation of the sub-sim law thus *amounts* to a prohibition on the sale of mid-level blends, even for use in flex-fuel vehicles." UAI Br. 24 (emphasis added). This statement is ample evidence that EPA took no actual *regulatory* action as to E16-E50. UAI is instead challenging EPA's purported explanation of the statute. While UAI may not like the statutory restrictions of 42 U.S.C. §7545(f)(1), it may not challenge a rule on a separate issue (approval of E15) merely because EPA explains the statutory requirements and limitations. Agency statements that "merely explain [ ] how the agency will enforce a statute or regulation" (for E15) are not final agency action (for E16-50 or any other fuels). *Clarian Health West, LLC v. Hargan*, 878 F.3d 346, 358 (D.C. Cir. 2017). *See also Valero Energy Corp. v. EPA*, 927 F.3d 532, 536 (D.C. Cir. 2019) (Agency does not create final challengeable action "merely by expressing its view of the law.").

That UAI may want EPA to consider E16-E50 is understandable. It may not, however, insert this issue into the proceeding before this Court by arguing that EPA *should have* addressed E16-E50. It is EPA that decides its regulatory agenda and it does not have to consider all possibilities and all potential actions in a single rulemaking. *Massachusetts v. EPA*, 549 U.S. at 527; *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated

responsibilities."); *Taylor v. FAA*, 895 F.3d 56, 68 (D.C. Cir. 2018), quoting *Mobil Oil Exploration & Producing Se, Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) ("'An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of ... priorities' and 'need not solve every problem before it in the same proceeding.'").

UAI may request that EPA proactively determine that E16-E50 is substantially similar to a certification fuel such that it can be sold for use in light-duty vehicles. For instance, UAI is free to petition EPA to consider just such action. Indeed, UAI has done essentially that.

On August 9, 2019, UAI submitted a "Petition for Reconsideration or Rulemaking." Doc. 1801959. *See* UAI Br 23, n.9. In its Petition, UAI, as it does here, declares that the E15 Rule "states that E16-E50 blends are no longer lawful" and petitions EPA "to allow the sale of E16-E50 blends for use in flex-fuel vehicles." *Id.* at 2, 14. Like its claims in its Petition before this Court, UAI's rulemaking request is misguided, since the E15 Rule: (a) nowhere states that E16-E50 blends are no longer lawful (and UAI cites to no such statements by EPA); and (b) nowhere prohibits the use of E16-E50 in flex-fuel vehicles. To the contrary, EPA's regulations make clear that no such prohibition exists. *See* 40 C.F.R. §80.1504(a)(3) ("No person shall be prohibited from manufacturing, selling, introducing, or causing or allowing the sale or introduction of gasoline containing greater than 10 volume percent ethanol in any flex-fuel vehicle…."). *See also* UAI Br. 15 (citing this provision and letters from EPA

officials assuring that there is nothing in the CAA that expressly prohibits the use of mid-level blends in flex-fuel vehicles).

Nevertheless, UAI's Petition for Rulemaking evidences that UAI knows precisely how to seek relief that is beyond the subject of the E15 Rule; it may file a petition requesting a specific agency action. Moreover, given the specific statute at issue, UAI may alternatively seek a waiver from the substantially similar requirement for E16-E50 under 42 U.S.C. §7545(f)(4), simply by submitting a waiver petition, but it has chosen not to take that path. Absent these separate alternative actions, a challenge such as UAI makes here, which is to action the agency has *not* taken, is not a challengeable agency action. *Norton v. S. Utah Wilderness Al.*, 542 U.S. 55, 64 (2004), quoting *Lujan v. Nat'l Wildlife Fed'*, 497 U.S. 871, 891 (1990) (Petitioner cannot seek "improvement of this [regulatory] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA [and CAA], respondent must direct its attack against some particular 'agency action' that causes it harm.").

An agency action is not reviewable if it "does not 'impos[e] any obligation, deny [ ] any right, or fix [ ] any legal relationship.'" *National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 16 (D.C. Cir. 2005), quoting *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003). With regard

to E16-E50, the E15 Rule itself imposed no obligation, denied no right, and fixed no legal relationship. Accordingly, the Court lacks jurisdiction over UAI's claim.

2. UAI Lacks Standing

The Court also lacks jurisdiction because UAI has failed to establish that it has standing. At an "irreducible constitutional minimum," in order to establish standing, the petitioner must prove that it has (1) "suffered an injury in fact," (2) that is "fairly … trace[able] to the challenged action of the defendant," and (3) is likely to "be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. Here, UAI has failed to establish that it has suffered any actual injury that is traceable to the E15 Rule.

UAI asserts standing on the basis that some in its Petitioner group are ethanol producers and fuel retailers "that wish to sell mid-level blends but are impeded from doing so by the E15 Rule's various restrictions on the sale of mid-level blends." UAI Br. 27.[13] UAI claims that these entities would sell greater volumes of these and other blends if "restrictions on ethanol and isobutanol were additives lifted." *Id*. While this assertion may or may not be true, the E15 Rule did not place any restrictions or impediments on the use of these fuels. The E15 Rule *removed* impediments to the sale of E15, specifically the RVP impediment of selling E15 during the summer season.

[13] The UAI petitioners also include other entities (such as UAI itself) that are not ethanol producers or fuel retailers. UAI failed to argue in its opening brief that these other entities have standing, and therefore has waived any such argument. *See* p. 93, *infra*.

Whatever impediments may apply to E16-E50 are present by virtue of the marketplace or the statute, not any action EPA took.

Petitioners must establish, with affidavits or record evidence, "that EPA's alleged failings have caused a traceable 'concrete and particularized' harm to their members that is 'actual or imminent. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002), quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000). In support of standing, UAI submits two single-paged declarations that say nothing more than that the Declarants *understand* that the E15 Rule would make it difficult or illegal to sell mid-level blends of fuel. Doc. 1842535, A-1, A-2. But as explained above, the E15 Rule does nothing of the sort.

Whatever injury UAI may allegedly suffer by virtue of not being able to market E16-E50 for sale in certain vehicles, emanates directly from the statute and not from any action taken by EPA in the challenged Rule. Thus, even if UAI's purported injury were both actual and imminent, it would still lack standing because UAI has not established that such injury is caused by the E15 Rule. Accordingly, the Court lacks jurisdiction to consider UAI's claim challenging EPA's *non-action* with regard to E16-E50, as well as its claim that EPA failed to adequately respond to comments on the use of E20 and I16, which also was not a subject of the E15 Rule (*see* discussion, *infra*).

B. E16-E50 is Not Substantially Similar to a Certification Fuel

To the extent the Court considers UAI's claim that EPA was required to determine in the E15 Rule that E16-E50 is substantially similar to E10, it should be

rejected. As UAI explains its argument, once a certification fuel contains any ethanol, all ethanol blends are, *a fortiori*, approved, regardless of the concentration of ethanol in the fuel blend. UAI Br. 24. More specifically, UAI contends that since certification gasoline was modified in the Tier 3 rulemaking in 2014 to contain 10% ethanol (E10), all ethanol-gasoline blends, regardless of the ethanol concentration, are substantially similar to E10 and thereby satisfy the requirements of §7545(f)(1). UAI's argument seriously misconstrues the statute.

The substantially similar provision expressly prohibits not only the introduction of a new fuel or additive but also the increase in concentration of a fuel or fuel additive. 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 … 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 ….

42 U.S.C. §7545(f)(1)(A) (emphasis added).

Under UAI's argument, the second *trigger* for requiring a substantially similar determination to be made – an increase in the concentration of a fuel or fuel additive already used – would simultaneously be deemed a *finding* that the fuel or fuel additive is *automatically* substantially similar, because it already is used and one is merely increasing its concentration. This renders the phrase "*increase the concentration in use of*, any fuel or fuel additive" inoperative. A statute will not be

interpreted to render its language inoperative. *Clark* v. *Rameker*, 573 U.S. 122, 131 (2014) (quoting *Corley* v. *United States*, 556 U.S. 303, 314 (2009)) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.").

UAI argues that because Congress used the phrase "or a specified concentration thereof" in the waiver provision, 42 U.S.C. §7545(f)(4), but §7545(f)(1) "lacks any similar language that would allow EPA to determine that only a 'specified concentration' of a fuel additive is 'substantially similar,'" EPA must approve the use of E16-E50. UAI Br. 42. But §7545(f)(1) includes exactly that language. Once again, this section declares it unlawful to "*increase the concentration in use* of, any fuel or fuel additive ... which is not substantially similar to any fuel or fuel additive utilized in the certification process…." *Id.* (emphasis added).

UAI's interpretation of 42 U.S.C. §7545(f)(1) subverts the very purpose for which Congress enacted it. Congress was concerned that new fuels, with various oxygenates or additives, "or increases in the concentration in use" of such fuels or additives, would interfere with emissions control devices. UAI's argument vitiates this concern by reading "increase in the concentration in use" of an additive, in this case ethanol, out of the statute. Under UAI's reading, because E10 was approved as a certification fuel in 2014, EPA is now *required* to conclude that any fuel containing any amount of ethanol -- all the way up to 99% ethanol -- to be substantially similar to E10.

Worse yet, UAI's argument would not be limited to ethanol. As EPA explains, it has made four previous substantially similar determinations and "each of our past interpretative rules provided an allowance for oxygenates within the gasoline." 84 Fed. Reg. at 26,994/2. Under UAI's theory, if any of these oxygenates – or other of the many hydrocarbons found in gasoline fuel blends – are contained in a certification fuel, each of those oxygenates and hydrocarbons would be permitted to be added up to 99%.[14]

UAI's argument would result in a whole new calculus to the application of 42 U.S.C. §7545(f)(1). In determining whether a fuel should be deemed a certification fuel, EPA would have to consider the impacts of any oxygenate found in the certification fuel, and at every level of concentration. It would have to analyze the impacts when the fuel contained 99% of each oxygenate. This is the case because under UAI's argument, once a fuel containing any level of the oxygenate is deemed substantially similar, it is *a fortiori* automatically deemed substantially similar at all concentrations. This clearly was not Congress's intent when it required a substantially similar determination to be made before allowing into commerce an increase in any fuel additive's concentration.

The concerns with allowing use of any concentration of a fuel or fuel additive once some small level of that fuel or fuel additive is permitted are obvious. UAI's

[14] Gasoline itself contains hundreds of hydrocarbons, such as butane and naphthalene. These hydrocarbons have widely varying chemical and physical properties (e.g., volatility, octane, distillation).

analogy to gin is a good one. UAI explains that gin added to tonic is still gin even if you increase the concentration of gin. UAI Br. 41. While that is true, a gin-and-tonic that is 50% or 99% gin is a very different drink, with very different impacts, than one that is 10% gin. It is the *concentration* of gin that makes the difference in assessing safety or impacts, which is precisely what §7545(f)(1) requires approval of – a new or different concentration.

UAI's argument would, in fact, wreak havoc on the very emission control assurance system Congress established in enacting 42 U.S.C. §7545(f)(1). The effects that oxygenates and other components of gasoline have on fuel blends can "vary widely depending on concentration." JA___ (RTC pp. 29-30). For instance, as outlined *supra*, different levels of ethanol result in different levels of volatility, which in turn results in different levels of pollutant emissions. But in UAI's view, the concentration is irrelevant. In their view, once ethanol (or any oxygenate) is approved for use in a fuel at its lowest level of concentration, it is automatically approved at all concentrations, i.e., it is approved regardless of the fact that at certain concentrations there may be materials incompatibility, drivability issues, and significant emission impacts that are not associated with low concentrations.

UAI attempts to support its interpretation of §7545(f)(1) by focusing on the word "additive" in the statute, asserting that: (1) ethanol is an additive; (2) the same additive, ethanol, is contained in E10; and (3) therefore no fuel containing any amount

of ethanol can be prohibited from entrance into commerce under 42 U.S.C. §7545(f)(1). UAI Br. 3, 31-37.

Ethanol can be considered an additive when assessing whether one additive is substantially similar to another additive, i.e., apples to apples. The analysis is different, however, when assessing whether the fuel E15 (which happens to include the additive ethanol) is substantially similar to another fuel, in this case E10. In this context, ethanol content is simply a fuel property of E15 and E10. JA__ (RTC p. 30). This is evident from a straightforward reading of the statute.

A new fuel may not be sold "which is not substantially similar to any fuel or fuel additive *utilized in the certification of* any model year 1975, or subsequent model year, vehicle or engine...." 42 U.S.C. §7545(f)(1) (emphasis added). It is E10 that was used in the certification process for Tier 3 vehicles and thus is a certification fuel, not ethanol or any other oxygenates or any of the hundreds of hydrocarbons that may be included in E10. Ethanol is most assuredly not substantially similar to E10 (the fuel "utilized in the certification" for Tier 3 vehicles), as ethanol is 100% ethanol and E10 is 90% gasoline.

If EPA was faced with an issue of whether ethanol as an additive was substantially similar to *another additive that serves as a certification additive*, it would be comparing one additive to the certification additive (apples to apples). As EPA

explains, "[t]he reference to 'fuel additive' and 'increasing concentration in use' are still relevant to a sub sim assessment *for a fuel additive*." JA___ (RTC p. 29).[15]

This view is reflected in EPA's regulations, which UAI itself relies upon. UAI Br. 35. 40 C.F.R. §79.21(h) reads (emphasis added):

> The manufacturer of any *fuel additive* which will be sold, offered for sale, or introduced into commerce for use *in any type of fuel* intended for use in motor vehicles manufactured after model year 1974 shall demonstrate that the fuel additive, *when used at the recommended range of concentration,* is substantially similar to any *fuel additive included in a fuel* utilized in the *certification* of any 1975 or subsequent model year vehicle or engine, or that the manufacturer has obtained a waiver under 42 U.S.C. §7545(f)(4).

---

[15] UAI argues EPA should not be given *Chevron* deference in describing what is required under §7545(f)(1), citing *Neustar, Inc. v. FCC*, 857 F.3d 886, 894 (D.C. Cir. 2017). That case merely held that where an agency's *brief* nominally references *Chevron* in its Standard of Review but does not invoke it with respect to rulemaking, the agency forfeits the right to rely on *Chevron* deference. To the extent §7545(f)(1) is ambiguous, EPA has and does invoke *Chevron* deference, both in this brief and in the rulemaking. *See, e.g.*, UAI Br. 31, 40, citing JA___ (RTC p. 30), conceding that EPA explained that it was providing its "best reading of the statute." EPA was not required to cite to the *Chevron* case. *Guedes v. Bureau of Alcohol, Tabaco and Firearms*, 920 F.3d 1, 23 (D.C. Cir. 2019) ("To be sure, an agency of course need not expressly invoke the *Chevron* framework to obtain *Chevron* deference."). And even in the absence of *Chevron* deference, a court should "pay particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need." *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020).

UAI alternatively argues that EPA's application of the statute with regard to additives is arbitrary and capricious. UAI Br. 38-40. An interpretation of a statute is either reasonable or not and it cannot be deemed arbitrary and capricious because Petitioners disagree with EPA's interpretation or claim that the present interpretation is inconsistent with other applications of the word "additive."

So, under a plain reading of EPA's regulations, fuel additives are compared to fuel additives, not to fuels, and even then at the recommended concentration, not at any concentration.

UAI cannot deny that E10, E15, and E85 are "fuels" or "fuel blends," not additives. *See, e.g.*, UAI Br. 13 ("E10 was thus indisputably a *fuel* 'utilized' in certification.") (emphasis added); *id*. (describing E85 as a "high-level ethanol-gasoline fuel blend"); *id*. at 14, 15, etc. In the E15 Rule EPA determined whether one fuel, E15, is substantially similar to the certification fuel, E10. It did not determine whether one additive (ethanol) is substantially similar to some unidentified certification additive or a certification fuel (E10).

UAI argues that EPA should ignore the wording and requirements of §7545(f)(1) because it can use 42 U.S.C. §7545(c) or (e) to control the use of E16-E50, should it deem it necessary to do so. UAI Br. 43-44. 42 U.S.C. §7545(e) merely authorizes EPA to require the testing of fuels and additives and does nothing to control their use. Section 7545(c) does allow control of already-approved fuels but includes criteria that often require lengthy studies of health effects and economic impacts that would allow a party to introduce a new (potentially harmful) fuel well before a §7545(c) examination process could be completed. 84 Fed. Reg. at 26,984/1-2. In fact, §7545(f)(1) was enacted for the express purpose of avoiding having to engage in that process for new fuels or for increases in the concentration of a fuel or additive. *Id.*

UAI further attempts to support its argument by focusing on E85. UAI appears to argue that EPA's phantom conclusion in the E15 Rule that E16-E50 is not substantially similar to a certification fuel – a conclusion that EPA never made – should be overturned because EPA should have compared E16-E50 to E85. UAI Br. 3, 25-26, 45-50. UAI argues that because E16-E50 is substantially similar to high-level ethanol test fuel, and flex-fuel vehicles run on E85, "mid-level blends [E16-E50] are thus 'substantially similar' to the high-level ethanol-gasoline test fuel … under the sub-sim law." *Id.* at 47. This "ethanol is ethanol is ethanol" argument is addressed above and the analysis does not change because ethanol has been approved in a high ethanol blend like E85 for use in flex-fuel vehicles rather than a blend like E10 for use in vehicles designed to operate solely on gasoline.

Moreover, UAI never raised this argument in its comments on the E15 Rule and it is therefore waived. 42 U.S.C. §7607(d)(7)(B). *See also United States v. L.A. Trucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952); *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (It is "black letter administrative law" that a party must raise its arguments in comments to the agency "in order for the court to consider the issue" and the "objection must be made with sufficient specificity reasonably to alert the agency.").

In any event, the notion that the use of ethanol in E85 in flex-fuel vehicles that are specially engineered to operate on high-level ethanol fuel blends, requires EPA to approve any and all use of ethanol for all other types of vehicles and engines, is even

more extreme than basing such argument on the certification of E10. UAI itself states that EPA must determine if a fuel is substantially similar when used within the same type of vehicle and to do otherwise "would make the sub-sim law unworkable." UAI Br. 46. EPA agrees, which is why the E15 Rule addresses only whether E15 is substantially similar to E10 for use in the vehicles for which E10 is a certification fuel, light-duty gasoline-fueled vehicles. UAI's view that ethanol is now allowed in any fuel, at any concentration, for any type of vehicle, has no statutory basis.

C. EPA Properly Treated Comments Relating to E20 or I16 as Beyond the Scope of the E15 Rulemaking

UAI alternatively argues not that EPA should have made a substantially similar determination as to E20 or I16 (16% isobutanol), but rather that the Agency failed to respond to comments on these fuel blends. UAI Br. 3. UAI contends that EPA specifically called for comments on the use of E20 and I16, that EPA was considering determining whether these blends are substantially similar to a certification fuel, that UAI submitted such comments, and that EPA ignored them. UAI Br. 50-53. But that is not the case.

As stated in the Proposed Rule,

> Our proposed interpretation is *limited* to gasoline that contains *only ethanol content up to 15 percen*t as this is the only oxygenate that we have sufficient data and information to support at this time. Other oxygenates (notably isobutanol) may have similar emissions effects to Tier 3 E10 certification fuel, but we lack the data and information on emissions, materials compatibility, and drivability as established for ethanol as part of the E15 partial waiver decisions and the Tier 3 rulemaking. Therefore, our

> proposed interpretation of sub sim for gasoline would interpret gasoline-ethanol blends containing up to 15 percent ethanol as sub sim….

84 Fed. Reg. at 10,601/2-3 (emphasis added).

EPA did ask for comments on "whether we should interpret sub sim to encompass other oxygenates and request any supporting data on the potential effects of other oxygenates on emissions, materials compatibility, and drivability of Tier 3 vehicles." *Id.* Nowhere, however, did EPA state or even imply that the Rule it was considering would cover anything other than a substantially similar determination "only [for fuel with an] ethanol content up to 15 percent." *Id.* Nor did EPA present, discuss, or seek comment on data that would need to be the subject of a much broader substantially similar determination. Instead, EPA merely asked for data regarding other oxygenates and never asked for data regarding fuel blends with higher levels of ethanol. In fact, the terms E20 and I16 appear nowhere in the Proposed Rule and the only place the word isobutanol appears is in the blocked quote directly above.

Petitioners in their comments decided to use a request for data regarding other oxygenates as an opportunity to argue that E20 and I16 are "substantially similar to the E10 test fuel." UAI Br. 21, citing their comments. But EPA never asked for such a proposal and certainly made clear that the proposed substantially similar determination was being proposed "only [as to blended fuel with an] ethanol content up to 15 percent." Accordingly, EPA *did* respond to UAI's comments on E20 and I16, by explaining that they are outside the scope of the Rulemaking. JA__ (RTC pp. 31-32).

UAI asserts that if EPA had heeded their comments, EPA would have been *required* to find that E20 and I16 are substantially similar to a certification fuel, and even change EPA's determination on the 1-psi RVP allowance to make it apply to E20. UAI Br. 52-53. That, however, is clearly not the case. There is no basis to conclude that EPA would have been required to expand its rulemaking beyond its proposed action simply because a commenter submits some data on an action that is not proposed. Under this reasoning, it is commenters that control an agency's actions, not the agency. That position is unsupportable. *See* pp. 77-78, *supra* (agencies control their administrative docket and actions).

A regulation can be overturned for failure to respond to comments only if the comments are significant. "The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir.1984) (internal quotation marks and citation omitted). In a rule that considered only the substantial similarity of E15 to E10, comments regarding certain mid-level fuel blends that were not under consideration or even mentioned in the proposed rule were neither central to the decision-making process nor significant.

V. THE SMALL RETAILERS' COALITION LACKS STANDING AND THEIR CLAIMS ARE OTHERWISE WITHOUT MERIT

The members of the Small Retailers Coalition (SRC) are not the subject of the E15 Rule, are not directly regulated by the E15 Rule, and are not injured by any

regulatory provision of the E15 Rule. Indeed, as SRC explains throughout its brief, to the effect its members experience any impact, it results from the operation of the Renewable Fuel Standard (RFS) program, not from any specific regulatory provision of the E15 Rule. SRC Br. 3-11. Accordingly, there is no basis to conclude that EPA failed to adequately consider the impacts of the E15 Rule on small retailers. In fact, SRC lacks standing to raise their claims.

A. The Small Retailers Coalition Lacks Standing

In addition to the requirements for standing outlined at p. 80, *supra*, a petitioner-association "must demonstrate that: (1) at least one of its *members* was injured in fact, meaning an 'actual or imminent, not conjectural or hypothetical' injury; (2) the injury was caused *by the Order [being challenged]*; and (3) the court can redress the injury. " Nat'l *Ass'n of Regulatory Utility Commissioners v. FCC*, 851 F.3d 1324, 1327 (D.C. Cir. 2017), quoting *Lujan*, 504 U.S. at 560–61 (emphasis added).

A party may not simply assert a direct injury resulting from the challenged agency action. They must establish this fact (and all elements of standing): (a) with actual evidence; (b) submitted with its opening brief. "'Bare allegations are insufficient [ ] to establish a petitioner's standing,' and where that standing is not self-evident, the petitioner in its opening brief 'must support each element of its claim to standing by affidavit or other evidence.'" *Id*., quoting *Sierra Club v. EPA*, 292 F.3d 895, 898, 899 (D.C. Cir. 2002). *See also Grocery Mfrs*, 693 F.3d at 174 (requiring evidence of standing by affidavit submitted with the party's opening brief); *Util.*

Workers Union of Am. Local 464 v. FERC, 896 F.3d 573, 578 (D.C. Cir. 2018) (quoting *Sierra Club*) (Petitioner "'must identify in the record evidence sufficient to support its standing to seek review or, if there is none ... submit additional evidence to the court of appeals'" through affidavits.... [W]e require more than representations of counsel…."). The requirement for affidavits or record evidence establishing standing is expressly required under D.C. Circuit Rule 28(a)(7).

Affidavits are critical because evidence of injury cannot be based on hearsay. *See, e.g., James v. United States*, 86 Fed. Cl. 391, 395 (2009), quoting Fed. R. Civ. P. 56(e)(1) (in establishing jurisdiction "[a] supporting or opposing affidavit must be made on *personal knowledge*, [and must] set out *facts that would be admissible in evidence*...." (Emphasis in original)).

Affidavits are also required because when an association is the petitioner, it must identify actual members who purportedly suffer actual imminent injury. *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199-200 (D.C. Cir. 2011) (for associational standing, "it is not enough to aver that unidentified members have been injured. *Summers*, [555 U.S. at 498-99]. Rather, the petitioner must specifically 'identify members who have suffered the requisite harm.' *Id.* at [499]."); *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 15 (D.C. Cir. 2011) (citation omitted) ("[W]ithout submissions of affidavits from individual members, '[w]e decline to assume missing links.'"). That is even more critical here, where judicial review is unavailable for SRC's claim under the Regulatory Flexibility Act absent the existence of "a small

entity that is adversely affected or aggrieved by a final agency action." 5 U.S.C. §611(a)(1).

SRC has submitted no affidavits or declarations in this action. Nor has it identified a single specific small entity or member that is injured. Instead, in a single paragraph of its brief, SRC simply lays out the elements of standing and then declares: "SRC meets those criteria." SRC Br. 4. SRC provides no evidence, no record cites, and no explanation of how SRC or any of its members meet the various elements of standing. Having failed to set out its case for standing in its opening brief as required, and having failed to submit any affidavits or record evidence supporting the elements of standing (imminent injury, caused by the E15 Rule, which can be redressed), SRC's claims must be dismissed for lack of jurisdiction.

SRC may not argue that establishing standing with affidavits or record evidence is unnecessary because its standing is self-evident. In *Grocery Mfrs.*, 693 F.3d at 175, the court addressed a challenge to the 2010-11 waivers for E15. While that case involved a waiver for E15 under 42 U.S.C. §7545(f)(4), and this case involves a substantially similar determination for E15 under §7545(f)(1), from a standing perspective the question is almost identical. There the court faced arguments that EPA's waiver decisions for E15 caused injuries because, *inter alia*, "downstream entities will have to accommodate this new [E15] fuel type" and will incur costs related to the introduction and use of E15. 693 F.3d at 177.

As the court first explained, standing is not self-evident where the regulation at issue does not on its face "directly impose regulatory restrictions, costs or other burdens" on the party asserting standing. *Id.* at 175 The court found an insufficient basis for standing, explaining that "EPA's approval of the introduction of E15 for use in certain vehicles and engines, does not force, require, or even encourage fuel manufacturers or any related entity to introduce the new fuel; it simply permits them to do so...."). *Id.* at 177. Particularly pertinent to SRC's claims, the court found no exception based on an allegation that downstream entities must deal with requirements or obligations under the Renewable Fuel Standard Program: "Neither the RFS nor the partial E15 waivers 'require' downstream entities to have anything to do with E15." *Id*. at 178. Just as downstream parties in *Grocery Manufacturers* had no standing to challenge a rule that allowed for the sale of E15 at 9-psi RVP, downstream parties here (SRC) have no standing to challenge a rule that does nothing more than allow for the sale of E15 at 10-psi RVP during the summer season.

Finally, even considering SRC's allegations absent affidavits or record evidence, their bare assertions of injury fail to establish standing. To satisfy the causation element when challenging an agency action, the petitioner must establish that the claimed injury results from "the regulatory changes made in the Order" being challenged. *Nat'l Ass'n of Regulatory Util. Comm v. FCC*, 851 F.3d 1324, 1328 (D.C. Cir. 2017) (explaining that the challenged agency action must be the source of the harm). *See also Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S.

Ct. 2652, 2663 (2015) (the injury must be fairly traceable to the agency action being challenged). As outlined below, SRC's brief, which does not challenge actual elements of the E15 Rule but rather challenges obligations under the RFS program, fails to fulfill that requirement.

Even if one were to consider obligations under the RFS program, SRC still lacks standing. The economic effects that SRC alleges could occur are based on speculative future actions and economic decisions of large retailers or suppliers responding to the E15 Rule. SRC Br. 8-10. An allegation that a regulatory action will indirectly lead to injury is insufficient to establish standing where it "hinge[s] on the actions of third parties." *Swanson Group Mfg., LLC v. Jewell*, 790 F.3d 235, 242 (D.C. Cir. 2015). *See also Grocery Mfrs.*, 693 F.3d at 175; *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009). SRC's claims of injury are based on pure speculation regarding how the marketplace may react, which also is insufficient to establish standing. *Young America's Found. v. Gates*, 573 F.3d 797, 799-800 (D.C. Cir. 2009) (quoting *Lujan*, 504 U.S. at 561) (Petitioners must "allege facts showing it is 'likely, as opposed to merely speculative, that [its] injury will be redressed by a favorable decision.'"). "[U]nsubstantiated and speculative fear is not a basis for standing." *Blum v. Holder*, 744 F.3d 790, 803 (1st Cir. 2014), citing *Clapper*, 568 U.S. at 420.

Because SRC's claims of injury are: (1) speculative; (2) depend on the actions of third parties; (3) do not derive from the Rule being challenged; (4) do not identify

association members who are injured; and (5) are unsupported by affidavits or record evidence, it lacks standing and hence the Court lacks jurisdiction over SRC's claims.

B. EPA Did Not Fail to Consider Impacts to Small Retailers as Required Under the Regulatory Flexibility Act

SRC asserts that it was arbitrary and capricious for EPA not to address supposed impacts to small retailers it claims were caused by EPA's promulgation of the E15 Rule. SRC contends that EPA further violated the Regulatory Flexibility Act (RFA) by failing to fully explore this harm. Referring to its comments, SRC succinctly states its claims as follows: "SRC squarely raised: (1) the harm to small fuel retailers from the point of obligation rule; and (2) the magnification of that harm from a rule that requires retailers to sell fuel blends that results in significant additional economic investment." SRC Br. 2. Each of these claims is fatally flawed: (1) the "point of obligation rule" is a different rule than the E15 Rule, it is issued under the RFS program, 42 U.S.C. §7545(o), not the statutory provisions at issue, and it was not revised, altered or considered in the E15 Rule; and (2) nothing in the E15 Rule requires retailers to sell any specific fuel blend.[16]

1. EPA Did Not Violate the Regulatory Flexibility Act

As SRC explains, "there almost certainly is" "a meaningful difference between an 'affected' party and 'regulated' party under the RFA." SRC Br. 6. That

[16] As previously noted, while the E15 Rule contains a separate section relating to RIN reporting requirements under the RFS, none of SRC's claims have anything to do with those provisions. SRC's claims relate solely to EPA's actions that result in expanded use of E15 as a fuel blend.

meaningful difference is that the analysis required by the Regulatory Flexibility Act (RFA) does not apply when small business entities are not directly regulated but rather indirectly affected by a newly promulgated regulation. Agencies need to conduct Regulatory Flexibility Act analyses and certifications only with regard to small entities that are directly "subject to the proposed regulation -- that is, those small entities to which the proposed rule will apply." *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 867-69 (D.C. Cir. 2001); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998). "This court has consistently rejected the contention that the RFA applies to small businesses indirectly affected by the regulation of other entities." *Cement Kiln*, 255 F.3d at 860 (multiple citations omitted). *See also Mid-Tex Elec. Coop v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985) (Congress "did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses....").

Under its Regulatory Impact Analysis, EPA found that the E15 Rule "will not have a significant economic impact on a substantial number of small entities, [finding that the Rule will] not substantively alter the regulatory requirements of parties that make and distribute gasoline." 84 Fed. Reg. at 27,020/1-2. Indeed, it determined that the Rule "will allow parties that make and distribute E15, including small entities, more flexibility in the summer to satisfy market demands." *Id*.

SRC disputes that its constituency is merely affected by the E15 Rule. They claim: "Because fuel retailers are regulated by the E15 Rule, EPA is required to

consider its impacts [to] fuel retailers." SRC Br. 7. But SRC fails to cite to a single provision of the E15 Rule that regulates its members. Instead, they cite regulations issued to implement the RFS program under 42 U.S.C. §7545(o) and statutory requirements of the RFS program, which were unchanged in the E15 Rule. SRC Br. 3, 5, 6, 7, 8, 9, 10 and 11 of their 11-page brief. In contrast, SRC *never* cites a regulatory provision issued under 42 U.S.C. §§7545(f) or (h), and certainly no provision promulgated as part of the E15 Rule.

For instance, SRC explains: "Although the preamble takes care to state that "[g]asoline service stations" are merely "'affected'" by the rule, for over a decade, EPA defined fuel retailers as 'entities likely to be *regulated* by' its RFS Program rules." SRC Br. 6 (emphasis in original). But the Rule before this Court, the E15 Rule, as it relates to actions under 42 U.S.C. § 7545(f) and (h), was not issued under the RFS program, which is set out at 42 U.S.C. §7545(o).

Similarly, SRC declares: "The E15 Rule will disproportionately harm small fuel retailers due to a misalignment in the point of obligation in the RFS Program." SRC Br. 7. The point of obligation refers to refiners and importers who are "obligated parties" responsible for establishing compliance with renewable fuel quotas under the RFS program under 42 U.S.C. §7545(o). These obligations are set out at 40 C.F.R. §80.1406, and have nothing to do with any determination about the ethanol allowance or the substantially similar determination made in the E15 Rule.

Even if point of obligation requirements *were* part of the E15 Rule (which they are not), the Regulatory Flexibility Act would still not be implicated, as SRC contends. The retailers and downstream entities that are members of SRC are not directly regulated by the Renewable Ruel Standard program or its point of obligation requirements. *See* 42 U.S.C. § 7545(o)(3)(B)(ii)(I) (excluding "distributors" from the list of entities to whom "[t]he renewable fuel obligation determined for a calendar year ... shall be applicable"); *Ams. for Clean Energy*, 864 F.3d at 704 ("Congress chose not to place any compliance burdens on the fueling stations or consumers of transportation fuel.").

In any case, the E15 Rule did not alter, revise or make any changes to the point of obligation under the RFS program – or make any regulatory changes whatsoever to the RFS program as it relates to SRC or other entities' use of E15. SRC does not identify any regulatory requirement announced in the E15 Rule as impacting its members. Further, all of the alleged impacts it references, to the extent they exist, emanate from a completely different regulatory program and statutory provision. Thus, EPA did not violate the Regulatory Flexibility Act by refraining from addressing purported impacts to small retailers of the Rule it actually promulgated.

2. EPA Did Not Act in an Arbitrary and Capricious Manner with Regard to Small Retail Entities

Attempting to repackage its Regulatory Flexibility Act claim in different terms, SRC asserts that EPA acted in an arbitrary and capricious manner because it

purportedly failed to adequately address the impacts of the E15 Rule on small fuel retailers. The impacts, according to SRC, include the costs associated with infrastructure for the users of fuel blends containing ethanol, most particularly gas stations or blenders needing underground storage tanks sufficient to house such blends. SRC Br. 8-9. But none of those costs need be incurred.

Nothing in the E15 Rule requires any retailer to sell or distribute E15. As EPA explained, "[t]his rule is not a mandate for E15. Rather it simply removes one of several hurdles to increased E15 use that is within EPA's authority to address." JA__ (RTC p. 58). *See also* JA___ (RTC pp. 122-23) ("We are not mandating that small businesses install equipment to sell E15, nor do we believe that those that choose not to will be at a competitive disadvantage to those that do."). There simply is nothing in the E15 Rule that requires retailers to incur any costs as a result of the Rule or, for that matter, to take any action related to the use of E15.

Engaging in pure conjecture, SRC asserts that because large retailers are more financially able than small retailers to afford the infrastructure required to accommodate E15, EPA should have considered this fact in the E15 Rule. SRC Br. 8-10. SRC's assertion is wholly speculative. They refer to no data or other evidence in the record to support such supposition. Available since 2010, E15 is already sold at retail gas stations and SRC presents no data supporting a conclusion that removing the summer season RVP hurdle will: (a) cause large companies to construct new infrastructure to sell E15; (b) that small retailers will not follow suit; and (c) that small

retailers will then be economically harmed because they are selling E10 and not also E15. As discussed *supra*, there are other barriers to the sale of E15. Quite simply, the choice of a small or large retailer not to offer E15 for sale, should that actually occur, may have nothing to do with a competitive disadvantage engendered by the fuel being available year-round. 84 Fed. Reg. at 26,987/1, 26,990; 27,009/3-10, JA___ (RTC pp. 61-62).

SRC further asserts that obligated parties under the RFS program, such as manufacturers and refiners, often purchase more RINs from large fuel retailers, to the detriment of the small retailers they represent. SRC Br. 7-8. While that may or may not be true, that has nothing to do with the E15 Rule before this Court. Although the E15 Rule contains revisions to certain RIN provisions of the RFS program, they deal solely with reporting requirements designed to increase transparency and address potentially manipulative behaviors in the RIN trading market, 84 Fed. Reg. 26,981-82. None are the subject of SRC's (or any other Petitioner's) claims in this case.

SRC summarizes its economic argument by stating: "To meet the goals of the RFS program, EPA must devise a regulatory system that allows them to bring more renewable fuel to market. The E15 Rule does the exact opposite." SRC Br. 10. First, this summary of SRC's position once again refers to the RFS program and calls for a different regulatory system to aid *that* program; it does not challenge specific actions taken in the E15 Rule. Second, the one thing the E15 Rule does do is establish a process to "bring more renewable fuel to market," even though that may take some

time. SRC presents no data or evidence to support an opposing view. JA__ (RTC p. 122).

In its Conclusion, SRC suggests that changes be made to the point of obligation requirements under the RFS program. SRC can seek to effectuate such a change by petitioning EPA for a rulemaking relating to that program. Other entities have done exactly that. *See, e.g.*, 82 Fed. Reg. 56,779 (Nov. 30, 2017). Just like UAI, however, it may not use the present Rule as a conduit to address separate issues that arise under separate regulatory programs.

C. SRC Has Failed to Challenge a Final Agency Action

As outlined at p. 74, *supra*, the Court lacks jurisdiction where Petitioners fail to challenge a final agency action. Because SRC challenges the effects of statutory requirements and not any action taken in the E15 Rule, they fail to challenge a final agency action and SRC's claims should be dismissed.

CONCLUSION

For the foregoing reasons, the Petitions for Review of UAI and SRC should be dismissed for lack of jurisdiction and all Petitions for Review should otherwise be denied.

Respectfully submitted,

OF COUNSEL:

STACEY GARFINKLE
SUSMITA DUBEY
U.S. Environmental Protection Agency

JEFFREY BOSSERT CLARK
Assistant Attorney General

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General

Office of General Counsel
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Mail Code 2344A
Washington, D.C. 20460

DATE: July 31, 2020

/s/ *Perry M. Rosen*
PERRY M. ROSEN
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 37(A)(7)(b)

This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) and the Court's Order of March 27, 2020 (Doc. 1835704) because this brief contains 27,477words, excluding the parts of the brief exempt under Fed. R. App. P. 32 (a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in proportionally spaced typeface using Microsoft Word 14-point Times New Roman type.

So certified this 31st day of July, 2020 by

/s/ *Perry M. Rosen*
Perry M. Rosen
Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Respondent Environmental Protection Agency, et al., was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties, who have registered with the Court's CM/ECF system.

So certified this 31st day of July, 2020 by

/s/ *Perry M. Rosen*
Perry M. Rosen
Counsel for Respondents

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 86. Control of Emissions from New and in–Use Highway Vehicles and Engines (Refs & Annos)
Subpart B. Emission Regulations for 1977 and Later Model Year New Light–Duty Vehicles and New Light–Duty Trucks and New Otto–Cycle Complete Heavy–Duty Vehicles; Test Procedures (Refs & Annos)

40 C.F.R. § 86.113–15

§ 86.113–15 Fuel specifications.

Effective: June 27, 2014
Currentness

Section 86.113–15 includes text that specifies requirements that differ from § 86.113–94. Where a paragraph in § 86.113–94 is identical and applicable to § 86.113–15, this may be indicated by specifying the corresponding paragraph and the statement "[Reserved]. For guidance see § 86.113–94."

(a) Gasoline fuel. This paragraph (a) describes how to transition to an ethanol-blend test fuel for vehicles certified under subpart S of this part. You may use the test fuels specified in § 86.113–04(a) for vehicles that are not yet subject to testing with the new fuel. You may use the specified ethanol-blend test fuel anytime earlier than we specify as long as you use the corresponding procedures for measuring and calculating emission results. See 40 CFR 600.117 for special provisions that apply for emission measurements related to fuel economy and greenhouse gases. Manufacturers must certify using E10 test fuel as specified in 40 CFR part 1065, subpart H, and service accumulation fuel meeting applicable specifications as follows:

(1) Except as allowed under paragraph (a)(2) of this section, Use E10 test fuel to demonstrate compliance with the Tier 3 exhaust emission standards as specified in § 86.1811 and 86.1816, and to demonstrate compliance with the Tier 3 evaporative emission standards as specified in § 86.1813.

(2) You may use California test fuels to demonstrate compliance with Tier 3 emission standards as follows:

(i) For vehicles certified for 50–state sale, you may instead use California Phase 3 gasoline (E10) as adopted in California's LEV III program for exhaust emission testing. Through model year 2019, we will also use this E10 fuel for any low-altitude exhaust emission testing with such vehicles. Starting in model year 2020, we may use test fuel meeting either California Phase 3 gasoline (E10) or the gasoline (E10) test fuel specified in this paragraph (a). For cold temperature testing and for exhaust emission tests at high-altitude conditions, you may certify vehicles through model year 2019 based on testing with the gasoline (E0) test fuel specified in § 86.113–04(a); for such vehicles, we may use test fuel meeting either the gasoline (E0) test fuel specified in § 86.113–04(a) or the gasoline (E10) test fuel specified in this paragraph (a).

(ii) For vehicles that were certified to SULEV exhaust emission standards with a 150,000 mile useful life under California's LEV II program and that are eligible to use that carryover data for continued certification, you may use that carryover data to demonstrate compliance with the exhaust emission standards that apply for Bin 30 vehicles under § 86.1811–17

for model years 2015 through 2019. The test fuel specifications that applied for the original emission measurements under the LEV II program also apply for any additional exhaust testing under the Tier 3 program, including confirmatory testing, selective enforcement auditing, and in-use testing. For vehicles certified under this paragraph (a)(2)(ii), use the E10 test fuel specified in 40 CFR 1065.710 for cold temperature testing and high-altitude testing.

(iii) For vehicles certified for 50–state sale, you may instead use California test fuel for evaporative emission testing as follows:

(A) If you originally certified vehicles in California in model year 2015 or 2016 to PZEV standards with California Phase 2 gasoline, you may use that data with carryover vehicles to certify to the Tier 3 evaporative emission standards through model year 2019. We will use this same fuel to measure diurnal, hot soak, running loss, and SHED rig emissions at low-altitude conditions for such vehicles. For refueling, spitback, and high-altitude testing, you may use test fuel meeting either the gasoline (E0) test fuel specified in § 86.113–04(a) or the gasoline (E10) test fuel specified in this paragraph (a); we may use either of the specified fuels for our testing. For leak testing, you must use the gasoline (E10) test fuel specified in this paragraph (a).

(B) If you certify vehicles to LEV III standards with California Phase 3 gasoline (E10), you may use that collection of data to certify to the Tier 3 evaporative emission standards. Through model year 2019, we will use this same fuel to measure diurnal, hot soak, running loss, SHED rig, and canister bleed emissions (as appropriate) at low-altitude conditions; starting in model year 2020, we may use either California Phase 3 gasoline (E10) or the gasoline (E10) test fuel specified in this paragraph (a) for our testing with such vehicles. For refueling, spitback, high-altitude, and leak testing, you must use the gasoline (E10) test fuel specified in this paragraph (a), except that you may instead use the gasoline (E0) test fuel specified in § 86.113–04(a) for model year 2015 and 2016; we will use your selected fuel for our testing. Note that you may no longer certify vehicles to the Tier 3 standards based on California's rig-testing procedures after model year 2021, as described in § 86.1813–17(g).

(C) For evaporative emission testing with California test fuels, perform tests based on the test temperatures specified by the California Air Resources Board.

(3) Except as specified in paragraph (a)(2)(iii) of this section and in this paragraph (a)(3), use E10 test fuel to demonstrate compliance with the refueling and spitback emission standards for any vehicles that must be certified to meet the diurnal plus hot soak standards with E10 test fuel under paragraphs (a)(1) and (2) of this section. You may delay using E10 test fuel until model year 2022 for incomplete heavy-duty vehicles not certified to refueling emission standards.

(4) If a vehicle uses E10 test fuel for evaporative emission testing and E0 is the applicable test fuel for exhaust emission testing, exhaust measurement and reporting requirements apply over the course of the evaporative emission test, but the vehicle need not meet the exhaust emission standards during the evaporative emission test run.

(5) For service accumulation, use a commercially available fuel, subject to the additional specification in § 86.1824–08(f) for evaporative emissions.

(b) through (g) [Reserved]. For guidance see § 86.113–94.

Credits
[79 FR 23694, April 28, 2014]

SOURCE: 42 FR 32954, June 28, 1977; 50 FR 35386, Aug. 30, 1985; 53 FR 19134, May 26, 1988; 53 FR 43875, Oct. 31, 1988; 54 FR 14455, April 11, 1989; 56 FR 64711, Dec. 12, 1991; 57 FR 30055, July 7, 1992; 58 FR 4002, Jan. 12, 1993; 58 FR 16019, March 24, 1993; 62 FR 31232, June 6, 1997; 62 FR 44875, Aug. 22, 1997; 62 FR 47119, Sept. 5, 1997; 63 FR 7719, Feb. 17, 1998; 65 FR 59955, Oct. 6, 2000; 66 FR 17273, March 29, 2001; 67 FR 72825, Dec. 6, 2002, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401–7671q.

Current through July 23, 2020, 85 FR 44649.

End of Document