No. 12-___

IN THE

Supreme Court of the United States

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, INTERNATIONAL LIQUID TERMINALS ASSOCIATION, AND WESTERN STATES PETROLEUM ASSOCIATION,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Air Act regulates the Nation's transportation fuel. One provision of the Act, the Renewable Fuel Standard ("RFS"), mandates that certain escalating volumes of renewable fuel (e.g., ethanol) be blended into transportation fuel. 42 U.S.C § 7545(o). A companion provision of the Act prohibits the introduction of "any fuel * * * which is not substantially similar to any fuel or fuel additive" used to certify new vehicles. *Id.* § 7545(f). The Environmental Protection Agency ("EPA") may waive this prohibition only if the new fuel "will not cause or contribute to a failure of any emission control device or system." *Id.* § 7545(f)(4). The predominant fuel today is "E10" (10% ethanol; 90% gasoline). Acknowledging that upcoming RFS volume targets cannot be met with E10 alone, EPA granted waivers for "E15," a new gasoline blend containing 15% ethanol. EPA limited the E15 waivers to vehicle model years 2001 and later. Because of these "partial waivers," the petroleum industry must now incur substantial costs to produce and handle both E10 and E15. Nonetheless, the divided panel below found that petroleum petitioners lack standing to challenge the waivers, holding that their injuries are traceable not to the partial waivers, but rather to the RFS and competitive pressures, and, in any event, might be avoided through future technological innovation or by lobbying EPA to waive the RFS requirements.

The question presented is: Whether parties adversely affected by agency action lack Article III standing to challenge the action if the harms are also linked to related statutory requirements or competitive pressures, or might in theory be avoided through means other than litigation.

RULES 14.1 AND 29.6 STATEMENT

Petitioners here are American Fuel & Petrochemical Manufacturers ("AFPM"), International Liquid Terminals Association ("ILTA"), and Western States Petroleum Association ("WSPA"). They were petitioners in the court below.

Additional petitioners below were Grocery Manufacturers Association, American Frozen Food Institute, American Meat Institute, American Petroleum Institute, National Chicken Council, National Council of Chain Restaurants of the National Retail Federation, National Meat Association, National Pork Producers Council, National Turkey Federation, Snack Food Association, Alliance of Automobile Manufacturers, Association of Global Automakers, Inc., National Marine Manufacturers Association, and Outdoor Power Equipment Institute.

Respondent below was the U.S. Environmental Protection Agency. Intervenor-Respondent below was Growth Energy.

AFPM is a national trade association of more than 450 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. It has no parent corporation, and no publicly held company has a ten percent or greater ownership interest in AFPM.

ILTA is an international trade association that represents 81 commercial operators of bulk liquid terminals, aboveground storage tank facilities, and pipeline companies located in the United States and 47 other countries. It has no parent corporation, and no publicly held company has a ten percent or greater ownership interest in ILTA.

WSPA is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation, and marketing in the six western states of Arizona, California, Hawaii, Nevada, Oregon, and Washington. It has no parent corporation, and no publicly held company has a ten percent or greater ownership interest in WSPA.

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Petitioners American Fuel & Petrochemical Manufacturers, International Liquid Terminals Association, and Western States Petroleum Association petition for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 693 F.3d 169 and reproduced at Petition Appendix (Pet. App.) 1a-45a. The order denying panel rehearing or rehearing en banc, including the statement dissenting from that denial, is designated for publication and reproduced at Pet. App. 122a-131a. The agency

decisions at issue are published at 75 Fed. Reg. 68,094 and 76 Fed. Reg. 4,662, and reproduced at Pet. App. 46a-103a and Pet. App. 104a-121a.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2012. The petitioners timely filed a petition for panel rehearing and rehearing en banc on October 1, 2012. That petition was denied on January 15, 2013. Pet. App. 122a-131a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution provides, in pertinent part, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * * [and] to Controversies * * * between a State and Citizens of another State [or] between Citizens of different States." U.S. Const. art. III, § 2, cl. 1.

Relevant provisions of Section 211 of the Clean Air Act, 42 U.S.C. § 7545, are reproduced at Pet. App. 132a-160a.

INTRODUCTION

The decision below fundamentally alters the constitutional standards for Article III standing established by this Court. The "partial waivers" at issue—granted by the Environmental Protection Agency ("EPA"), and authorizing use of a new renewable fuel blend for only a limited set of vehicles—will require petitioners, whose members represent all segments of the petroleum industry, to incur substantial costs associated with producing, segregating, handling,

and storing that new fuel (E15) and its blendstock while continuing to produce, handle, and segregate fuels or their blendstock previously approved for use in vehicles not covered by the waivers. Nevertheless, a divided panel of the D.C. Circuit held that the petitioners lacked standing to challenge the waivers. In the majority's view, petitioners' injuries, even if the result of the waivers, were not "forced" on them by the waivers, but rather by interrelated statutory requirements and economic pressures. Given the effect of those statutory requirements and competitive pressures, and because petitioners might avoid the costs and burdens of having to produce E15 through technological innovation or by "lobbying" agency officials to lift the statutory requirements, the panel majority concluded that petitioners' injuries were not "fairly traceable" to the partial waivers that triggered them. Pet. App. 12a-17a. The result of allowing the decision below to stand is that there will be a wholesale change in our nation's fuel market, in apparent violation of law, without anyone in the fuels industry—or indeed anyone at all—allowed to challenge the agency action causing that change.

Neither of the panel's holdings is consistent with this Court's precedent, as Judge Kavanaugh noted in dissent. Pet. App. 38a-42a. It is well-settled that "traceability" for purposes of Article III is not defeated merely because other factors may have contributed to the harm resulting from the challenged agency action. *E.g.*, *Bennett v. Spear*, 520 U.S. 154, 168-70 (1997). This is particularly true when those other factors are interrelated statutory requirements and competitive pressures, which have been consistently and properly held by this Court to *confirm*—not undermine or defeat—a party's standing. *Infra* pp. 17-23. Moreover, the fact that an alleged injury

might conceivably be avoided through some speculative sequence of events has never been held, in the administrative context or elsewhere, to defeat standing. *E.g.*, *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 77-78 (1978). Here, the D.C. Circuit's ruling rejects these basic principles and deprives the industry that was the target of EPA's partial waiver decisions, whose activities are, in large measure, to be transformed by the partial waiver decisions, of the opportunity to challenge those decisions. In all its aspects, the panel's decision is simply indefensible under this Court's precedent, which is presumably why EPA itself characterized these petitioners' standing as "self-evident" in the proceedings below. Pet. App. 129a (quoting CADC Tr. of Oral Arg. at 30).

The impact of the panel's decision will be profound because it is rare indeed that any injury is caused by a single event or action, as compared to some combination of forces and causes. Indeed, the D.C. Circuit's decision, extended to its logical conclusion, would deny standing to *any* party to challenge *any* agency action because the legal force of an agency action is, after all, always ultimately "traceable" in some sense to interrelated or underlying statutory provisions. Likewise, the impacts of an agency decision, at least in the commercial context, will invariably be experienced within, and influenced by, the existing competitive and economic landscape. Yet, the panel's analysis would preclude standing in either of these circumstances, effectively barring any and all challenges to agency action.

That holding would merit review if issued by any circuit court. It raises particular concern and warrants immediate attention, however, given that it

comes from the D.C. Circuit, the court with unique and often exclusive jurisdiction to entertain challenges to administrative actions in the first instance.[1]

The practical consequences of the panel's judgment are no less significant. The "partial waivers" at issue in this case—the first of their kind—are intended to, and will, by EPA's own account, transform the Nation's fuel market. Pet. App. 115a-116a. Though EPA concluded that E15 is suitable for some of the marketplace, it also concluded that it is not suitable for all vehicle engines and should not be used in nonroad equipment. Thus, importers and refiners will now have to produce two types of fuel blends: the previously approved blend of petroleum and 10% ethanol (known as "E10")—currently the staple renewable fuel blend produced and sold in the United States—for vehicles and engines not covered by the waiver, and also the new petroleum blend of 15% ethanol for vehicles that are covered. See CADC Joint App. 227-28. Petitioners must keep the two products, E15 and E10 separate, segregated, and labeled, in their production, sale, transport and storage. Moreover, pipeline and other shipping companies will be required to modify their operations, and perhaps undertake substantial construction projects, to ensure that the two blends and blendstocks can be transported separately. See *id.* at 226-29, 575-77. Finally, storage facilities and retailers will need to maintain segregated storage and dispensing

[1] *Cf. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 535 n.14 (1978) ("Since the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals.").

units for the two blends. See *id.* The costs of all those modifications, across all those markets, will be enormous.

Agency action with such widespread impacts should not be allowed to take effect without at least the opportunity for substantive judicial review by directly impacted parties. Yet that review was denied by the panel's decision. Review by this Court is particularly warranted here, given the manifest conflicts between the decision below and this Court's precedent and its potentially radical implications for both standing jurisprudence and the nation's fuel supply. For these reasons, and as explained in greater detail below, the petition for certiorari should be granted.

STATEMENT OF THE CASE

This case concerns EPA's administration of Title II of the Clean Air Act (the "Act"), 42 U.S.C. § 7401 *et seq.*, in particular, the Renewable Fuel Standard Program ("RFS"), *id.* § 7545(o), and its authority to allow the introduction of new fuels into commerce, *id.* § 7545(f). The petitioners, a coalition of trade associations whose members represent virtually all segments of the fuel industry, challenged EPA's decision to grant a "partial waiver" of the ban on the introduction of new fuels for "E15," a blend of gasoline with 15% ethanol. The partial waivers authorize use of E15 for certain but not all vehicle types. Pet. App. 46a, 104a. The petitioners argued that EPA lacks the authority under the Act to issue partial waivers, and instead may issue waivers only if it finds that the proposed fuel "will not cause or contribute to a failure of *any* emission control device"—a finding EPA conceded it could not make with respect to E15. Pet. App. 42a-43a (quoting 42 U.S.C. § 7545(f)(4) (emphasis added)). Although

petitioners would be directly impacted by EPA's waivers—they would be effectively required by the RFS and competitive pressures to produce and handle E15 (which they could not do but for the waivers), while continuing to produce and to distribute other fuels (for vehicle types not covered by the partial waiver)—the D.C. Circuit dismissed the cases for lack of standing, without addressing the substantive validity of EPA's interpretation of the Act and its partial waivers. Pet. App. 1a-19a.

1. The RFS, enacted as part of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, and expanded by the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, established the first renewable fuel volume mandate in the United States. It requires increasing amounts of renewable fuel to be blended into the Nation's transportation fuel supply, setting out a series of annual volume requirements. 42 U.S.C. § 7545(o)(2). The renewable fuel volume mandate for 2013 is 16.55 billion gallons, increasing to 36 billion gallons by 2022. 42 U.S.C. § 7545(o)(2)(B)(i)(I).

The Act directs EPA to administer the program through regulations to ensure that transportation fuel contains "at least" the applicable volumes of renewable fuels specified in the statute. *Id.* § 7545(o)(2)(A)(i). EPA is required to establish and adjust the percentage of renewable fuel that producers and others must satisfy each year.[2] The Act

[2] Under the RFS, as implemented by EPA regulations, "obligated parties"—refiners and importers of gasoline and diesel—must show that a required volume of renewable fuel is used each year in domestic transportation fuel. 40 C.F.R. §§ 80.1406, 80.1407. In general, the required volume is determined by multiplying an obligated party's actual annual gasoline and diesel

grants EPA discretion to exempt certain sources from coverage and to modify the annual statutory volume targets if the agency determines that adherence to the target for a given year would cause severe economic or environmental harm or if there is an "inadequate domestic supply" of renewable fuel. *Id.* § 7545(o)(7)(A)-(C).

2. The Clean Air Act prohibits the introduction of any fuel that has not been previously approved by EPA or classified by the agency as "substantially similar" to an approved fuel. *Id.* § 7545(f)(1). But the Act allows EPA to waive that prohibition in certain circumstances, with appropriate findings. *Id.* § 7545(f)(4). In particular, the agency may issue a waiver for a fuel if it finds "that such fuel * * * will not cause or contribute to a failure of any emission control device or system" in a motor vehicle certified for operation by EPA. *Id.* (citing 42 U.S.C. § 7525). When that provision was first enacted in 1977, and for the next three decades, it was understood—as it plainly says—to require proof that the fuel at issue would not cause a failure in *any* vehicle in the "national automobile fleet," 42 Fed. Reg. 11,258-59 (Mar. 17, 1978), and thus to allow for only "full" waivers—those authorizing use of the fuel at issue in any vehicle or engine certified by EPA.[3] See *id.*; see

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production and importation in a given year by a percentage standard specified by EPA. 40 C.F.R. § 80.1405(c). This annual percentage standard is based on a ratio of the amount of renewable fuel the RFS requires to be used in a given year and the total amount of gasoline and diesel projected to be used in that year (subject to certain adjustments). *Id.*

[3] Until 2007, the Act provided that applications for waivers would be automatically granted—authorizing use of the fuel in all vehicles—if not acted on by the agency within 180 days of submission. See Pet. App. 65a.

also *Motor Vehicle Mfrs. Ass'n v. EPA*, 768 F.2d 385, 387-90 (D.C. Cir. 1985) (waiver depends on proof that fuel will not damage emissions systems of any "vehicles in the national fleet"); cf. Pet. App. 72a-85a (discussing waiver provision).

The most prevalent fuel authorized for use in this country is "E10," a blend of gasoline and 10% ethanol. Pet. App. 115a. E10 was approved by EPA in 1978, 44 Fed. Reg. 20,777 (Apr. 6, 1979), and it has since become the stock in trade of the commercial fuel marketplace, Pet. App. 115a. Its availability has allowed participants in the petroleum industry to satisfy the annual renewable fuel volume mandates of the RFS program, as implemented by EPA, over the last several years. See 75 Fed. Reg. 68,065 (Nov. 4, 2010).

That situation, however, is changing. Due to the combination of increasing RFS volume quotas and decreasing national gas consumption, E10 will soon no longer provide the means to satisfy the RFS requirements—something EPA refers to as the "blend wall." 75 Fed. Reg. 14,670, 14,759 (Mar. 26, 2010). EPA previously estimated that the Nation would hit this wall by 2014. *Id.* The RFS volume target for that year would, in EPA's projections, exceed the volume that could be achieved even if every drop of gasoline sold in the United States contains 10% ethanol. *Id.*[4]

[4] See also 78 Fed. Reg. 9,301 (Feb. 7, 2013) ("As the volume requirements of the RFS program increase, it becomes more likely that the volume of ethanol that must be consumed to meet those requirements will exceed the volume that can be consumed as E10. Additional volumes of ethanol must then be consumed as higher level blend levels such as E15 or E85.").

It was against this backdrop that EPA considered, and subsequently approved, the "partial waivers" for the 15% ethanol blend known as "E15." In March 2009, a group of 53 ethanol producers, led by intervenor-respondent Growth Energy ("Growth"), submitted an application under 42 U.S.C. § 7545(f)(4) seeking a waiver to allow E15 to be introduced into commerce for use in motor vehicles. Its interest, of course, was in having transportation fuel contain more ethanol at the expense of hydrocarbon-based fuels (the higher the ethanol percentage, the lower the content of fossil fuels). In response to Growth's application, which cited the need to approve a higher ethanol blend in order to overcome the upcoming "blend wall," CADC Joint App. 85, 88, EPA considered whether E15 satisfied the waiver standard set forth in the Act—that is, whether E15 would cause or contribute to a failure of any emission control device or system, Pet. App. 49a. The agency concluded the standard was not satisfied. Pet. App. 46a. Specifically, EPA found that there was a "clear basis for concern that E15 could cause [violations of] emissions standards" for certain types of motor vehicles, including light-duty vehicles from model years before 2001 and small engines, such as lawnmowers, motorcycles, boats, chainsaws, and other gasoline-powered equipment. Pet. App. 58a.

EPA nevertheless approved the waiver for a limited class of vehicles—light-duty vehicles from model years 2001 and after—whose emissions systems it found would not be detrimentally affected by E15. Pet. App. 104a. In its decisions, EPA made repeated references to the increasing volume targets of the RFS. See Pet. App. 49a-50a n.2, 65a n.12, 70a, 71a n.59, 107a n.4, 113a.

Approval of E15 will have a dramatic, direct impact on the national fuel market. As a result of the waivers, petroleum refiners and importers will have to produce E15 or appropriate blendstocks to meet the RFS requirements. CADC Joint App. 227-28. But, because the waivers are only "partial" in nature, those companies will still need to produce and maintain E10—requiring them to modify their facilities, at potentially substantial cost, to produce both types of fuels and keep them separate during transportation, storage, and delivery—or else walk away from their existing client base and thereby surrender market share.[5] *Id.*; see also CADC Joint App. 575-77.

Were a company simply to refuse to produce E15, it would be exposed to mandatory monetary assessments,[6] and would, in any event, surrender increasing portions of the fuel market, as some retailers and others adopt E15 and switch to producers offering

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[5] For retailers in particular, accommodating an additional gasoline-ethanol blend in the fuel market will require them to undertake special fuel segregation and dispensing efforts, with the attendant costs and burdens. CADC Joint App. 227-29, 576. Fuel terminals and pipelines also will need to have separate storage for E10 and E15 blendstocks.

[6] Companies that are unable to meet the RFS's requirements through the production of renewable fuel must purchase "Renewable Identification Numbers," which represents a volume of renewable fuel produced and may be held by the producing company or sold to another in order to achieve compliance with EPA's mandates. See 78 Fed. Reg. 12,158 (Feb. 21, 2013). Like other Clean Air Act requirements, companies must comply with the RFS or else face the possibility of civil penalties of up to $37,500 per day per violation. See 42 U.S.C. §§ 7545(d), 7524(b)-(c). But purchasing RINs is only an option if someone in the industry actually introduces more renewable fuel into the market. Only then can RINs be generated for others to purchase.

that product. However companies proceed, they will incur increased costs as a result of the "partial waivers."[7]

3. A number of trade groups whose members would be impacted by the partial waivers, including from the engine products industry, the food production industry, and the petroleum industry (the petitioners herein), filed petitions for review of EPA's actions in the D.C. Circuit. Pet. App. 6a. They argued that EPA lacked statutory authority to grant "partial waivers" because the Clean Air Act permits a waiver only if a new fuel "will not cause or contribute to a failure of *any* emission control device or system"—not merely some subgroup of devices or systems for certain classes of vehicles.[8] *Id.* All of the trade groups, and those representing the petroleum industry in particular, explained that they had stand-

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[7] These costs cannot be alleviated by other fuels that can be used for compliance with the RFS. For example, E85 (an alternative fuel predominantly composed of ethanol) does not provide a viable RFS compliance option for the petroleum industry as it is approved for use only in "flex-fuel" vehicles, which represent only a very small fraction of on-road vehicles in use today, and a small percentage of the country's overall transportation fuel use.

[8] Other considerations confirm that Congress did not intend to allow for "partial" waivers of the new fuel prohibition. For example, a separate "waiver" provision of the statute, allowing EPA to waive the annual renewable-fuel volume targets themselves, states explicitly that the agency may do so "in whole or in part." 42 U.S.C. § 7545(o)(7)(A). Other waiver provisions include the same language, *id.* § 7545(m)(3)(A), (o)(8)(D), but the new fuel waiver clause at issue here does not, *id.* § 7545(f)(4). That omission should be viewed, under traditional rules of statutory construction, as reflecting a deliberate decision to preclude partial waivers in this context. See*, e.g.*, *Cent. Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994).

ing in light of the costs to which their members would be exposed, as a result of the partial waivers, associated with producing and segregating two types of fuel (E10 and E15) on a prospective basis. Pet. App. 162a-165a, 167a-169a. Tellingly, while EPA disagreed with the petitioners' interpretation of the Clean Air Act, EPA did not contest their standing to bring the challenge, and indeed described it as "self-evident." Pet. App. 129a (quoting CADC Tr. of Oral Arg. at 30).[9]

a. A divided panel of the D.C. Circuit nevertheless dismissed all of the petitions on grounds that "no petitioner has standing." Pet. App. 19a. The majority acknowledged that, as a result of the partial waivers, the petitioners' members would have to produce and handle E15, but concluded that this would not be sufficient to confer standing. Rather, it emphasized the partial waivers, in and of themselves, did not "force" the petitioners' members to produce or handle E15, but rather "simply permits them to do so." Pet. App. 13a. Therefore, according to the majority, any harm to the companies was "self-inflicted" and traceable not to the partial waivers, but to the RFS program, competitive pressures, "or some combination thereof." Pet. App. 13a-17a. In addition, even if the waivers could be deemed to compel the companies to make and handle E15, the panel speculated that those costs might be avoided through some technological innovation (that presumably would allow them to meet RFS requirements by some means other than through the use of

[9] Unlike EPA, an intervenor in the case (Growth Energy, the party that had sought the waiver for E15 from EPA) did argue in its response brief that all petitioners lacked Article III and prudential standing. Pet. App. 6a.

E15, the only currently available means), or even by lobbying to have the RFS requirements modified or lifted. Pet. App. 14a-15a.

Judge Kavanaugh dissented. He explained that, although "the E15 waiver *alone* does not require the petroleum group to use E15, make changes, and incur costs," it was improper for the majority to "consider the E15 waiver in some kind of isolation chamber." Pet. App. 39a. Because the petroleum producers "likely could not meet the requirement set by [the RFS]" without producing and handling E15, "the combination of the renewable fuel mandate *and* the E15 waiver will force [them] to produce E15." Pet. App. 40a. Thus, Judge Kavanaugh concluded, "there is at least a 'substantial probability' that, gasoline producers will have to use E15 in order to meet the renewable fuel mandate[,] [a]nd that's all the petroleum group needs to show to carry its burden on the causation issue." *Id.*[10]

As to the merits of EPA's statutory authority to issue "partial waivers," Judge Kavanaugh found the question "not [even] close." Pet. App. 42a. Agreeing with the petitioners' view, he said that "EPA ran roughshod over the relevant statutory limits" in granting the waivers and that "EPA's disregard of

[10] With respect to the "food group" trade associations, a majority held that they had Article III standing, but a separate majority held that they were barred under prudential standing doctrine because concerns over food and agricultural production were not within the "zone of interests" addressed by the fuel waiver provision of the Clean Air Act. Pet. App. 24a. Judge Kavanaugh dissented on this point as well, noting a divide among the circuits over whether prudential standing is a "jurisdictional" doctrine that can be raised *sua sponte* by a court. Pet. App. 27a-32a.

the statutory text is open and notorious—and not much more needs to be said." Pet. App. 42a-43a.

b. All petitioners sought panel rehearing or rehearing en banc. The petitions were denied on January 15, 2013. Pet. App. 122a, 125a.

Judge Kavanaugh again dissented. Pet. App. 126a-131a. He emphasized that "the petroleum producers are directly regulated parties" and that this Court "has said, when a party 'is himself an object of the action' at issue, 'there is ordinarily little question that the action' has 'caused him injury, and that a judgment preventing' the action 'will redress it.'" Pet. App. 129a (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992)). The petroleum petitioners "have shown, at a minimum, the requisite 'substantial probability' that the E15 waiver will require them to refine and sell E15." Pet. App. 130a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision plainly warrants review. It adopts an approach to Article III standing that departs sharply from the principles consistently applied in this Court's cases, and it establishes effectively insurmountable barriers to regulated entities seeking judicial review of agency decisions that directly affect them. *Infra* Part I. The impact of the decision will be felt not only in this case, but—given the D.C. Circuit's position as the principal and often exclusive forum for review of agency actions—in a wide range of other challenges to agency decision-making. *Infra* Part II. For that reason, and in light of the potentially immense costs associated with the EPA actions at issue, this Court should intervene now to correct the D.C. Circuit's analysis and ensure

a consistent and reasonable approach to standing under Article III.

I. REVIEW IS WARRANTED BECAUSE THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S APPROACH TO ARTICLE III STANDING.

This Court has long described standing as a factual inquiry that asks simply whether injury to petitioner was (or will be) caused by the challenged agency action, taking into account the existing legal landscape and the practical effect of the challenged agency action on the injured parties. See, *e.g.*, *Lujan*, 504 U.S. at 560-62; *Duke*, 438 U.S. at 75-77. In particular, it has defined as "the irreducible constitutional minimum of standing" an "injury in fact" that is both "fairly traceable" to the challenged action and "redressable" by a favorable decision. *Lujan*, 504 U.S. at 560-62.

There is no doubt that under this standard the petitioners herein have standing to challenge EPA's decision to grant "partial waivers" authorizing the introduction of E15 for certain but not all classes of vehicles. Those waivers will effectively require petroleum producers and distributers to produce and maintain both E15 and the predominant blend, E10, to meet the renewable fuel standards of the Clean Air Act and to maintain their competitive position in the marketplace. *Supra* pp. 11-12. Those costs would be avoided if the agency's decision is overturned. This situation is therefore, as Judge Kavanaugh noted, precisely the one—where "the plaintiff is himself an object of the action (or forgone action) at issue" and "a judgment preventing or requiring the action will redress it"—in which this Court has said there is "ordinarily little question" that the elements of stand-

ing are satisfied. *Lujan*, 504 U.S. at 561-62; see also, *e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 93-102 (1998) (standing exists if a claimant "wins under one construction of [a statute] * * * and loses under another").

In concluding otherwise, the panel's decision adopts an approach to the elements of Article III standing that is fundamentally at odds with the analysis prescribed by this Court. That demonstrable conflict warrants this Court's review.

A. The Decision Below Permits A Finding Of "Fair Traceability" Only When The Challenged Action Is The Sole Proximate Cause Of The Alleged Injury.

The panel's opinion critically misconceives, and materially distorts, the "fairly traceable" requirement of Article III standing. It held that, even though the petitioners would be required as a result of EPA's "partial waivers" to produce and handle E15 alongside E10—which undoubtedly qualify as "injuries in fact" for these purposes—those costs cannot be "traced" to the waivers because they were more directly attributable to the interrelated statutory requirements of the RFS or competitive pressures in the marketplace. Pet. App. 13a-15a. It reasoned that the petitioners' injuries could not be traced to EPA's waivers because the waivers merely permitted the use of E15, and did not on their own "force" the petitioners to take any specific action. Pet. App. 13a. Thus, notwithstanding "but for" causation—and that the harms alleged followed factually from the partial waiver decisions—the panel majority concluded, in other words, that "traceability" could not be established because the agency's action was not the sole or proximate cause of the alleged harms.

That decision is flatly contrary to scores of cases from this Court and others (including opinions of the D.C. Circuit) that consistently characterize the traceability inquiry as requiring not that the agency action be the "sole" or "proximate" cause of the injury but, rather, only that it contribute to injury in a practical, "but-for" sense. *E.g.*, *Duke*, 438 U.S. at 75 (traceability requires only a "substantial likelihood" that challenged action contributed to harms); see also, *e.g.*, *Bennett*, 520 U.S. at 168-70 (traceability does not require that challenged action be the sole or "independent" cause of the alleged harms, or the "very last step in the chain of causation"); 15 James W. Moore et al., *Moore's Federal Practice* § 101.41[1] (3d ed. 2008) (same, citing cases). That other factors may have contributed to the injury is irrelevant, so long as that but-for chain of causation exists between the challenged agency action and the alleged harm. *E.g.*, *Duke*, 438 U.S. at 75. Put differently, in the language of this Court's opinions, the injury need be only "fairly"—not solely or proximately—traceable to the challenged action. *Lujan*, 504 U.S. at 561-62; see also *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (cautioning that courts should not "raise the standing hurdle higher than the necessary showing for success on the merits in an action").

None of the factors cited by the panel in this case—the force of interrelated statutory requirements, competitive pressures, or the permissive nature of the EPA waivers, Pet. App. 13a-15a—could in any event be deemed to undermine causation or traceability. Quite the opposite, those very factors have been expressly relied upon in prior cases of this Court as *establishing* standing.

1. Contrary to the panel's decision, this Court has in numerous cases upheld standing to challenge administrative and executive action notwithstanding that the alleged harms might also be traced in whole or part to an underlying statute, interrelated statutory provision, or separate law.[11] The effect of the challenged action is judged in the context of other existing legal requirements that pressure, confine, or constrain the options open to the party challenging the agency action.

A prime example is *Clinton v. City of New York*, 524 U.S. 417 (1998), where the City of New York and others challenged the President's decision to reinstate a demand for payments that were owed to the federal government by the State of New York but would, under New York law, be ultimately assessed against the petitioners. *Id.* at 419-22, 429-32. This Court held that, although the assessments were actually imposed by New York state law, they were nevertheless "fairly traceable" to the President's decision because that decision was in fact a but-for cause of the assessments. *Id.* at 430-32 & n.19. Indeed, far from defeating or undermining standing, the Court found that the New York state law established traceability beyond any doubt, insofar as the state statute "automatically require[s] that [the petitioners] reimburse the State" for any payments made to the

[11] See, *e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (agency decision pursuant to Federal Clean Air Act); *FEC v. Akins*, 524 U.S. 11, 13-14 (1998) (agency determination pursuant to Federal Election Campaign Act); *Bennett*, 520 U.S. at 168-70 (agency determination pursuant to Federal Endangered Species Act); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970) (agency ruling pursuant to Federal Bank Service Corporation Act).

federal government. *Id.* That opinion thus held that traceability exists for purposes of Article III when the injury at issue results from the challenged executive action, regardless of whether the injury might also be linked to the force or effect of a separate action or requirement. The rule could hardly be otherwise lest injured parties be denied standing to challenge a particular agency action that actually and immediately causes them harm, simply because other laws play a role in that injury.

The D.C. Circuit's decision in this case highlights the breadth of the D.C. Circuit's contrary approach, here finding standing to challenge an agency action defeated because of requirements set forth in the very statute that the agency is applying. It is invariably the case, in any challenge to an administrative decision, that the alleged injuries resulting from the agency's action will also be traceable in some way to the requirements of the underlying statute. See *supra* note 11. Agencies can, after all, act only through and pursuant to authority conferred by Congress, *e.g.*, *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 841-46 (1984), and thus any and all action they take will be ultimately traceable to the authorizing statute. To hold that this suffices to *defeat* standing would be, in effect, to immunize all agency action from review.

Yet this was, in essence, the holding of the panel below. It held that harms alleged by the petitioners, the increased costs associated with the production and maintenance of E15, were not traceable to the partial waivers because the impetus to use E15 was ultimately attributable to the RFS. Pet. App. 14a. But this ignores that the RFS is not self-implementing and that EPA administers and can directly affect

how the RFS volume mandates are met and whether they should be waived. 42 U.S.C. § 7545(o). For instance, EPA could have determined that because the upcoming annual targets could not be satisfied through the use of E10, those targets should be lowered since they would result in severe economic harm. *Id.* § 7545(o)(7). Instead, it decided to maintain the current targets and authorize—and thereby effectively require—use of E15 to meet them. *Supra* pp. 9-11. The D.C. Circuit's decision also ignores the even more elementary fact that without the partial waivers, it would be unlawful for the petitioners to sell E15, regardless of the RFS's mandates. In other words, the petitioners' injuries are as much linked to the partial waivers as the RFS. To conclude, as the panel below did, see Pet. App. 14a, that the petitioners' injuries were solely traceable to the RFS program, to the exclusion of the partial waivers, is incompatible with the Act's interrelated fuel provisions and basic structure.

The impact of the particular agency action under review, and its effect on the party challenging that action, must be judged in conjunction with—not divorced from—other, existing statutory directives affecting that party. *Clinton*, 524 U.S. at 419-22, 429-32; see also Pet. App. 39a (Kavanaugh, J.) ("the E15 waiver [cannot be considered] in some kind of isolation chamber"). The statutory RFS requirements must, in other words, be taken into account in addressing the impact of the agency's waivers on the petitioners. Because the waivers, in conjunction with the statutory requirements, will have the effect of obliging producers and others in the petroleum industry to use E15, they clearly qualify as a but-for cause of the costs and other burdens associated with

use of E15, sufficient to satisfy the traceability element of Article III.

2. This Court has likewise repeatedly recognized, again contrary to the panel majority's analysis, that injuries resulting from competitive disadvantage are "traceable" to agency action when the agency action contributes to the relevant change in the market landscape. *E.g.*, *Clinton*, 524 U.S. at 438; *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), for example, computer serving companies had standing to challenge a regulatory ruling that would have allowed national banks to perform those services, because that ruling would have undermined their competitive position in the relevant market. *Id.* at 152. Similarly, in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), securities brokers had standing to challenge a ruling that national banks could provide brokerage services, on the ground that discounts available to the banks would disadvantage the traditional brokerage houses. *Id.* at 392; see also, *e.g.*, *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 619 (1971) (investment companies had standing to challenge ruling that banks could establish and operate collective investment funds). Indeed, as early as 1972, the Court had recognized that "[t]hese palpable economic injuries have long been recognized as sufficient to lay the basis for standing." *Morton*, 405 U.S. at 733; see also, *e.g.*, *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 93-95 (D.C. Cir. 2002) (agricultural producers had standing to challenge agency decision that altered relevant market and placed producers at competitive disadvantage).

These cases should have compelled a finding of standing in this case. The panel acknowledged that the petitioners in this case, as a result of EPA's waivers, "very well might lose business if they decline to blend or otherwise deal with E15." Pet. App. 16a. It nevertheless concluded that, because those losses would be the result of "competitive pressures" rather than "any particular administrative action," they could not support the petitioners' standing. *Id.*

That conclusion runs directly counter to the cases discussed above. It also ignores the fundamental principle that when an injury is caused by a third party, but that party's conduct is driven and authorized by a decision of a government agency, the injury remains "traceable" to the agency's decision. *Bennett*, 520 U.S. at 169. That is, without a doubt, the situation presented here: EPA's waiver decisions authorize petitioners' competitors in the transportation fuel industry to gain market share by using E15, putting the petitioners at a competitive disadvantage and causing them (as the panel stated) to "lose business." Pet. App. 16a. This is indeed exactly the circumstance—where "probable economic injury resulting from [government actions] … alter[s] competitive conditions"—in which this Court has "routinely" upheld standing. *Clinton*, 524 U.S. at 433 (quoting 3 K. Davis & R. Pierce, *Administrative Law Treatise* 13-14 (3d ed. 1994)).

3. The panel relied on, and arguably viewed as dispositive, its characterization of the waivers in this case as permissive in nature. Pet. App. 13a-17a. EPA's waivers do not, the panel said, "force, require, or even encourage fuel manufacturers * * * to introduce the new fuel[, but] simply permits them to do so." *Id.*

The panel's characterization of the waivers as permissive simply misses the point. The question for these purposes is not whether an agency ruling "simply permits" or affirmatively "forces" particular action. The question rather, is whether the ruling will as a practical matter impose costs or other burdens on the party seeking review, see *Clinton*, 524 U.S. at 433, *i.e.*, whether the injurious effect is *traceable* to the challenged action. This Court has consistently followed this approach, and in a number of cases found that parties have standing to challenge "permissive" regulatory actions, for example when the action had the effect of altering the relevant market and putting the party at a competitive disadvantage. *E.g.*, *Clinton*, 524 U.S. at 438; *Clarke*, 479 U.S. 388; *Data Processing*, 397 U.S. 150.

The reasoning of those cases, as well as their holdings, applies with full force here. Whether or not EPA's waivers are viewed as permissive in the sense that they do not "force" use of E15, they will, as a practical matter, impose costs on the petitioners. *Supra* pp. 11-12. The petitioners can either choose to use E15, and incur the costs associated with modifying their facilities to accommodate the new and old fuels, or they can choose to not use E15, and incur the costs associated with loss of market share. The petitioners are in either case exposed to increased costs. In other words, even if the waivers, in and of themselves, allow the petitioners a "choice," that choice necessarily comes at a cost—and that is all that is required to establish traceability under Article III. *E.g.*, *Clinton*, 524 U.S. at 433.[12]

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[12] The panel's characterization of the harms to which the petitioners are exposed as "self-inflicted" (Pet. App. 13a) is off-base. Actions taken on pain of punishment or significant

In all events, it is undisputed that participants in the petroleum industry will in upcoming years be unable to satisfy the increasing annual renewable fuel requirements through the use of E10. Pet. App. 38a; see also CADC Joint App. 85, 88. So long as no other renewable fuel blend was authorized for use, however, they could do nothing different and did not need to alter any of their production standards or facilities. The burden in that circumstance would have fallen on EPA to address the situation by, for example, exercising its discretion to lower the annual renewable fuel volumes, to levels achievable through use of E10. *Supra* pp. 20-21. When EPA instead granted the partial waivers, authorizing some use of E15, the burden immediately shifted to the members of the petroleum industry, which now had the opportunity—and, in light of the RFS requirements, the obligation—to introduce E15 into their systems to increase the total volume of renewable fuel. Pet. App. 38a. Though deemed a permissive "waiver," EPA's action thus had the force and effect of an affirmative mandate when considered in the context

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competitive harm if one fails to take the action are not usually regarded as "self-inflicted." They are typically regarded as coerced. Indeed, the petitioners would not voluntarily undertake the modifications necessary to incorporate E15 into their product streams or willingly forfeit their competitive position in the market, were they not forced to choose one of those options by EPA's action. In some sense, the effect of any regulatory decision that requires some business entity to take, or not take, certain actions could be deemed "voluntary." The business entity could avoid the immediate effect of the regulation simply by exiting the business or market. But this cannot plausibly be regarded as "self-imposed" and defeating of standing lest standing be defeated in virtually all cases based on the argument that a business entity could avoid the harm of the regulatory decision simply by exiting the business.

of the surrounding statutory and regulatory structure.

* * *

However the issue is framed, the petroleum petitioners in this case plainly satisfied the constitutional prerequisite of an injury "fairly traceable" to agency action. Put most simply, the injuries to which petitioners are exposed—costs associated either with modifying their facilities to handle both E10 and E15 or with the loss of market share if they decline to do so—would not have arisen if the partial waivers had not issued, and they would be abated if the waivers were overturned. Nothing more is required to establish causation under Article III. *E.g.*, *Clinton*, 524 U.S. at 438; *Lujan*, 504 U.S. at 561-62. The panel's judgment to the contrary is flatly inconsistent with this Court's precedent, and merits review.

B. The Decision Below Precludes A Finding Of "Causation" Whenever The Alleged Injury Might Speculatively Be Avoided Through Other Means.

The panel's judgment reflects another fundamental misunderstanding, and misapplication, of the "traceability" component of standing. The panel majority suggested that the petitioners' standing in this case was also defeated by the possibility that their injuries might be avoided through means other than litigation. Pet. App. 14a-15a. The panel speculated that the petitioners might avoid the need to produce and handle E15 because alternative ways to satisfy their RFS obligations might be found through "research and development," or the petitioners might secure a modification of their RFS obligations by "lobbying the Administrator [of EPA]." Pet. App. 14a-15a.

This suggestion, that an injury is not "fairly traceable" to the challenged agency action if it might be theoretically avoided through some potential, but not yet conceived, alternative means, could serve to defeat standing in almost every case. If under existing law, market conditions, and technology, the petitioners will be required to make and handle E15 (or lose market share), they will suffer injury. The panel's musings on what might possibly happen in the future that could forestall such injury ought not defeat judicial review now. Taken to its logical conclusion, the panel's decision would mean that a litigant harmed by government action could not bring a claim—indeed, would be denied any right to a federal forum whatsoever, as a matter of constitutional law—if he or she might also *try* to seek relief through other channels. That would seemingly always be the case. Under that rationale, the claims in *Massachusetts v. EPA*, 549 U.S. 497 (2007), should have been dismissed for lack of standing, since the petitioners might have sought greenhouse gas regulation through other provisions of the Clean Air Act, or perhaps by lobbying Congress to enact new legislation. See *id.* at 520-26. So too the claims in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), as the plaintiffs in that case might have petitioned EPA for reconsideration of the agency's decision denying them construction permits. See *id.* at 1369-71. It is indeed difficult to conceive of an administrative challenge that could proceed under the panel's view of traceability.

Not surprisingly, that aspect of the panel's opinion finds no support in this Court's precedent. This Court has rejected claims to standing where the petitioner has offered only some speculative and attenuated link between the challenged government

action and some possible future harm to the petitioner. For example, most recently in *Clapper v. Amnesty International USA*, 568 U.S. __ (2013) (slip op. at 15), the Court rejected the respondent's standing to challenge the constitutionality of the Foreign Intelligence Surveillance Act where the respondent based its claim to standing on the "highly speculative fear" that no less than five separate actions, involving various actors and decisions would take place as feared, and others would not, before the projected injury would result.

The D.C. Circuit's decision turns this Court's cases on "speculative" injury upside down. It *rejects* standing evident under an existing statutory framework and existing science, based on speculation that the law could, with effective lobbying, be changed, or that new technology, still unknown, might be developed. Yet this Court's decisions consistently and forcefully reject any approach that would allow mere speculation about future events or impacts to defeat standing. *E.g.*, *Clinton*, 524 U.S. at 434 n.23; *Lujan*, 504 U.S. at 561-62. As the Court stated in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), for instance: "Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief." *Id.* at 77-78.

Regardless of whether the panel intended to announce a holding so blatantly contrary to this Court's precedent, its theory on injury avoidance was an integral part of its rationale for dismissal of the claims. Pet. App. 15a. Given the manifest conflict

between the D.C. Circuit's ruling and this Court's decisions, review by this Court is warranted.

II. REVIEW IS WARRANTED IN LIGHT OF THE EXTRAORDINARY NATIONAL IMPORTANCE OF THE QUESTIONS PRESENTED.

The underlying issue that the D.C. Circuit's decision has shielded from judicial review is a matter of exceptional national importance. The "partial waivers" at issue are intended to, and will, transform the Nation's petroleum industry, from the refinery to the pump. They effectively mandate that all segments of the industry modify their facilities and operations in order to segregate and maintain both E10 and E15 for the foreseeable future. *Supra* pp. 11. The costs to the industry will be enormous. New fuel blendstocks will need to be produced and shipped to market, new pipeline and terminal storage tanks will need to be added, and additional storage tanks and modified dispensers will need to be installed at terminals and gas stations across the country. *Id.*

The costs to consumers may be no less substantial. EPA has approved the new E15 blend for use only in light-duty vehicles of model year 2001 and later; use of that fuel in other gasoline engines, including older passenger cars, boats, motorcycles, lawnmowers, and other outdoor power equipment, could according to EPA cause serious damage to those vehicles' engines. Pet. App. 58a-59a, 130a-131a. However, because E10 and E15 will be sold concurrently at many stations, and perhaps at the same pump, it is likely that many consumers may not appreciate the distinction between the two fuels, and may mistakenly use E15 in older vehicles and off-road engines, giving rise to a

correspondingly increased number of engine problems or failures. See CADC Joint App. 227, 573-74, 625. Given estimates that "[o]nly about 12 million out of the more than 240 million light-duty vehicles on the roads today are approved by manufacturers to use E15 gasoline,"[13] the impact on consumers—and the attendant costs in terms of repair expense and loss of productivity—may be huge.

Beyond the economic and practical consequences, however, the jurisprudential impact of the decision below warrants this Court's attention. That decision, as discussed above, represents a marked departure from this Court's cases on standing in the court in which the vast majority of challenges to administrative agency action are pursued. *Supra* Part I. It holds for the first time that the influence of competitive forces and other legal requirements—factors which have traditionally been relied upon to *show* standing—actually defeat it. See Pet. App. 13a-17a. The result is that parties obviously affected and injured by agency action can be denied standing, even when (as here) the agency itself deems standing to be "self-evident." Pet. App. 129a (quoting CADC Tr. of Oral Arg. at 30).

The panel's ruling denies members of the petroleum industry a day in court with respect to an EPA action that directly targets them. It would deny standing to any company in any case where the challenged agency action does not, of itself, affirmatively compel a company to take any particular action.

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[13] American Automobile Association, *New E15 Gasoline May Damage Vehicles and Cause Consumer Confusion* (Nov. 30, 2012), *available at* http://newsroom.aaa.com/2012/11/new-e15-gasoline-may-damage-vehicles-and-cause-consumer-confusion.

Denying access to judicial review to those parties that are the target of administrative action, and that are concededly and materially affected by that administrative action, fundamentally distorts the administrative process and unsettles the law of standing. The direct result of the panel's ruling here, for example, is that petroleum industry groups being targeted by a transformative EPA program, will be denied judicial review of the specific agency action at issue, and similar decisions of this type in the future. Where the industry that is the focus of an agency program lacks standing to challenge erroneous agency decisions, the voice of that industry even *within* the administrative process, in connection with the development of future rules, may be muted as well. That will be the case in connection with any further developments in this program. But it will also be true in a broader context. Under the D.C. Circuit's decision, agencies need no longer be concerned (or as concerned) with the complaints of entities objecting that they will be competitively harmed as the result of regulatory decisions that do not specifically require them to undertake any actions. The decision of the D.C. Circuit rejecting the petitioners standing thus merits review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[14]

Respectfully submitted,

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April 10, 2013

[14] The petitioners herein were joined in their challenge to the partial waivers by food industry groups, which were found by the panel to have Article III standing (because use of E15 would cause the price of grain to rise) but to lack prudential standing on grounds that they were not within the "zone of interests" of the fuel waiver provision of the Clean Air Act (which was, according to the panel, concerned with the petroleum industry). These petitioners agree with the position set forth in the separate petition filed by the food industry petitioners, in No. 12-1055, and the positions set forth in the separate petition by the engine manufacturer petitioners, in No. 12-1167.

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 17, 2012 Decided August 17, 2012

No. 10-1380

GROCERY MANUFACTURERS
ASSOCIATION, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

GROWTH ENERGY,
INTERVENOR

Consolidated with 10-1414, 11-1002, 11-1046,
11-1072, 11-1086

On Petitions for Review of Final Actions of the
Environmental Protection Agency

Catherine E. Stetson argued the cause for petitioners Grocery Manufacturers Association, et al. *Michael F. McBride* argued the cause for petitioners Alliance of Automobile Manufacturers, et al. With them on the briefs were *Mary Helen Wimberly, Richard A. Penna, Marisa Hecht, Chet M. Thompson, William L. Wehrum, and Lewis F. Powell, III.*

Kenneth T. Cuccinelli, II, Attorney General, Office of the Attorney General for the State of Virginia, *E. Duncan Getchell Jr.*, Solicitor General, *Stephen R. McCullough*, Senior Appellate Counsel, *Charles E. James Jr.*, Chief Deputy Attorney General, and *Wesley G. Russell Jr.*, Deputy Attorney General, *Luther Strange*, Attorney General, Office of the Attorney General for the State of Alabama, *E. Scott Pruitt*, Attorney General, Office of the Attorney General for the State of Oklahoma, and *John J. Burns*, Attorney General, Office of the Attorney General for the State of Alaska, were on the brief as *amici curiae* State of Alabama, et al.

Jessica O'Donnell, Attorney, Department of Justice, argued the cause and filed the brief for respondent.

Randolph D. Moss argued the cause for intervenor. With him on the brief were *Kenneth R. Meade* and *Brian M. Boynton*.

Before: SENTELLE, Chief Judge, TATEL and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* TATEL.

Dissenting opinion filed by *Circuit Judge* KAVANAUGH.

SENTELLE, *Chief Judge*: Petitioners, trade associations whose members are part of the petroleum and food industries, filed petitions for review of two EPA decisions approving the introduction of E15 – a blend of gasoline and 15 percent ethanol – for use in select motor vehicles and engines. Because we hold that no

petitioner has standing to bring this action, we dismiss all petitions for lack of jurisdiction.

I. The Waiver Proceeding

In the Energy Policy Act of 2005, Congress incorporated into the Clean Air Act (CAA) the Renewable Fuel Standard, Pub. L. 109-58, § 1501(a) (2005) (RFS). As amended, the RFS requires qualifying refiners and importers of gasoline or diesel fuel to introduce into U.S. commerce a specified, annually increasing volume of renewable fuel. 42 U.S.C. § 7545(*o*)(2)(A)(i).

In order to comply with the requirements of the RFS, refiners and importers primarily blend corn-based ethanol into the fuel supply. The national gasoline supply currently consists largely of "E10," a gasoline blended with 10 percent ethanol. Given the continual increase in required volume of renewable fuel, E10 alone will not meet the producers' obligations forever. E10 has substantially saturated the U.S. gasoline market already, yet the volume of renewable fuel required to be introduced increases annually, up to 36 billion gallons of renewable fuel in 2022. *Id.* § 7545(*o*)(2)(B)(i)(I). Moreover, an increasing percentage of the increasing RFS obligation must come from "advanced biofuels," *i.e.*, sources other than ethanol derived from corn. *Id.* § 7545(*o*)(2)(B)(i)(II) (requiring that advanced biofuel make up 21 billion of the 36 billion gallons of renewable fuel required in 2022). Fuel manufacturers must, therefore, introduce new types of renewable fuels in order to continue to meet their growing burden under the RFS.

Fuel manufacturers cannot introduce new renewable fuels into the market at will. The Clean Air Act

prohibits manufacturers from introducing into commerce "any fuel or fuel additive for use by any person in motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive" used in the federal emissions certification of those vehicles. 42 U.S.C. § 7545(f)(1)(B). To bring most new fuels (including renewable fuels) to market, a manufacturer must apply for a waiver of this prohibition pursuant to CAA Section 211(f)(4), 42 U.S.C. § 7545(f)(4). The Administrator of EPA may grant such a waiver "if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and [its] emission products . . ., will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which [the vehicle or engine] has been certified pursuant to sections 7525 and 7547(a) of this title." 42 U.S.C. § 7545(f)(4).

In March 2009, Growth Energy, a trade association representing the ethanol industry, applied for a Section 211(f)(4) waiver to introduce E15, an unleaded gasoline blend containing 15 percent ethanol. After notice and comment, EPA issued two separate waiver decisions. In its first waiver decision, Partial Grant and Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent, 75 Fed. Reg. 68,094 (Nov. 4, 2010), EPA approved the introduction of E15 for use in light-duty motor vehicles from model-year 2007 and later. At the same time, it denied the waiver for model-

year 2000 and older vehicles because it could not determine given the data available that using E15 in such vehicles would not contribute to failures of emissions controls. For the same reason, EPA denied the waiver for nonroad engines, vehicles, and equipment (*e.g.*, boats, all-terrain vehicles, and weedeaters), heavy-duty gasoline engines and vehicles, and motorcycles. Finally, EPA deferred its decision whether to approve E15 for use in model-year 2001–2006 light-duty motor vehicles and engines, stating that it needed further results from Department of Energy (DOE) tests that measured the effects of ethanol blends on the durability of engine catalysts (which "scrub" motor vehicle emissions by converting harmful exhaust gases into carbon dioxide, nitrogen, and water). After receiving those results, EPA issued a second decision. Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent, 76 Fed. Reg. 4662 (Jan. 26, 2011). That second decision extended the waiver to permit the use of E15 in light-duty motor vehicles and engines from model-years 2001–2006.

In sum, EPA granted "partial" waivers approving the introduction of E15 for use in model-year 2001 and newer light-duty motor vehicles and engines. These waivers are conditional. E15 manufacturers are required to (1) introduce only E15 that meets certain fuel quality parameters and (2) submit for approval by EPA a plan for the implementation of "misfueling mitigation conditions" set forth in the EPA decision. The term "misfueling," as used in the EPA decisions, refers to the use of E15 in pre-2001 vehicles and other non-approved vehicles, engines, and equipment. The misfueling mitigation condi-

tions and strategies which EPA set forth as necessary for such a plan included pump-labeling requirements, participation in a pump-labeling and fuel-sample compliance survey, and proper documentation of ethanol content on transfer documents.

Three sets of industry groups (collectively, "Petitioners") representing members who either (1) manufacture engines and related products (the "engine-products group" or "engine manufacturers"), (2) sell food (including livestock) that requires corn as an input (the "food group" or "food producers"), or (3) produce or handle petroleum and renewable fuels (the "petroleum group" or "petroleum suppliers") petitioned this court for review of EPA's E15 waivers. We review herein the consolidated petitions. Growth Energy, the waiver applicant, intervened in support of EPA's defense of its waiver decisions.

II. Standing

Petitioners contend that (1) EPA lacks authority under CAA Section 211(f)(4) to grant "partial" waivers approving the use of E15; (2) Growth Energy, the waiver applicant, failed to meet a required evidentiary burden under Section 211(f)(4); (3) EPA failed to provide sufficient opportunity for comment on certain aspects of its waiver decision; and (4) the record does not support EPA's decision to grant the partial waivers. While the government does not contest petitioners' standing to petition for review of EPA's waiver decisions, intervenor Growth Energy has called our attention to the potential failure of petitioners to establish standing under Article III. Even in the absence of intervenor's objection, we would be required to review petitioners' standing. Standing under Article III is jurisdictional. If no petitioner

has Article III standing, then this court has no jurisdiction to consider these petitions. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Regardless of whether the parties raised the issue, we have "an independent obligation to be sure of our jurisdiction." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Therefore, before we even consider the merits of the petitions, we must determine whether any petitioner has standing to bring them to court.

A.

As the Supreme Court has declared, "the law of Art. III standing is built on . . . the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). The application of the standing doctrine, along with other jurisdictional requirements, ensures that federal courts act only within their constitutionally prescribed role: resolving "Cases" and "Controversies," U.S. CONST. art. III, § 2, cl. 1, "those disputes which are appropriately resolved through the judicial process," *Lujan*, 504 U.S. at 560. *See also Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc). To establish Article III standing, a party must establish three constitutional minima: (1) that the party has suffered an "injury in fact," (2) that the injury is "fairly traceable" to the challenged action of the defendant, and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotation marks, alterations, and citations omitted).

The party seeking to invoke the jurisdiction of the federal court "bears the burden of establishing these elements." *Id.* at 561. To do so, it must "support each

element of its claim to standing 'by affidavit or other evidence.'" *Sierra Club*, 292 F.3d at 899 (quoting *Lujan*, 504 U.S. at 561). On direct review of agency action, it must provide that support in its opening brief. *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1289 (D.C. Cir. 2007). If the petitioner's standing is self-evident (as when the petitioner is the object of an administrative action), "no evidence outside the administrative record is necessary." *Sierra Club*, 292 F.3d at 900. But when the administrative record fails to establish a substantial probability as to any element of standing, "the petitioner must supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review." *Id.*

B.

As an initial matter, we note that each separate petitioner in this case is a trade association. Each petitions for review of EPA's waiver decisions on behalf of its members, e.g., car manufacturers, petroleum refiners, and cereal distributors. This is not in itself a problem. An association has standing to sue on its members' behalf if it can show that (1) a member "would have standing to sue in [its] own right," (2) "the interests the association seeks to protect are germane to its purpose," and (3) "neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Id.* at 898. We have no reason to believe any petitioners fail to meet the latter two requirements. We therefore need consider only whether any petitioner association has demonstrated that any of its members would have standing to sue in its own right.

We need not conclude that all petitioners have standing. As all petitioners raise the same issues, if we determine that even one of the petitioners has Article III standing, we will then have established our jurisdiction to consider the merits of the petitions. *See, e.g., Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998). Standing is not self-evident for any of the entities Petitioners represent. EPA's waiver decisions do not on their face directly impose regulatory restrictions, costs, or other burdens on any of these types of entities. This, of course, makes Petitioners' task more difficult. "The Supreme Court has stated that standing is 'substantially more difficult to establish' where, as here, the parties invoking federal jurisdiction are not 'the object of the government action or inaction' they challenge." *See Public Citizen*, 489 F.3d at 1289 (quoting *Lujan*, 504 U.S. at 562.). Petitioners have to demonstrate that EPA's actions – in particular, approving E15 via partial waivers – have caused any one of their members an injury in fact for which we can provide redress in this action. Each industry group advances a theory of standing, but none is in fact adequate to meet the burden of establishing standing under Article III.

1. The Engine-Products Group

The engine-products group advances a convoluted theory of standing. It begins with the assertion that its members manufacture cars, boats, and power equipment with engines not made for, certified, or warranted to use ethanol blends greater than E10. As a result of EPA's partial waivers, they assert, E15 will enter the fuel market and consumers will use it in their products. Such use, the engine manufactur-

ers claim, "may" harm their engines and emission-control devices and systems. Pet'rs Br. at 17. This will supposedly subject the engine manufacturers to liability: consumers may bring warranty and safety-related claims against the manufacturers under state or federal law, and the government may impose a recall of some engines or vehicles.

This hypothetical chain of events fails as a showing of Article III standing. An Article III injury in fact must be "(i) 'concrete and particularized' rather than abstract or generalized, and (ii) 'actual or imminent' rather than remote, speculative, conjectural or hypothetical." *In re Navy Chaplaincy*, 534 F.3d 756, 759–60 (D.C. Cir. 2008). It must also be "substantially probable" that the challenged agency action caused that injury. *See Fla. Audubon*, 94 F.3d at 663 (citing *Kurtz v. Baker*, 829 F.2d 1133, 1144 (D.C. Cir. 1987)). The engine-products group's theory of standing meets neither of these requirements.

To begin with, the engine manufacturers provide almost no support for their assertion that E15 "may" damage the engines they have sold, subjecting them to liability. They suggest that damage may occur via two avenues. First, they contend that consumers will use E15 in the model-year 2001 and newer light-duty vehicles and engines for which it has been approved, and that E15 may harm those engines (contrary to EPA's findings). They support this assertion, however, with a single reference to internal testing by Mercedes-Benz documenting a 2 percent hit to fuel economy and "potential vehicle damage" from the use of E15 in Mercedes vehicles. This is hardly evidence of a substantial probability that E15 will cause engine harm.

Second, the engine-products group maintains that consumers will "misfuel," *i.e.*, fuel non-approved vehicles and equipment with E15, and that E15 will cause damage to and emissions failures in such engines, including boat engines and power equipment motors, for which engine manufacturers may incur liability. This convoluted theory of causation will not meet Petitioners' burden. It is well established that "[c]ausation, or 'traceability,' examines whether it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d at 663 (citing *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)) (other citations omitted). As in *Florida Audubon*, *Allen v. Wright*, and numerous other cases cited in *Florida Audubon*, any injury to the engine-product petitioners – speculative at best – depends upon the acts of third parties not before the court. If the contemplated injury is to occur at all, it will require that consumers use the fuel in engines for which it is neither designed nor approved, suffer damages to those engines as a result, and bring successful warranty or other liability lawsuits against engine-products petitioners. These petitioners attempt to drag their claims across the causation threshold by simply listing federal laws that either impose liability for emission warranty claims, *see* 42 U.S.C. § 7541, or provide for recall of nonroad engines and vehicles that fail to meet emission standards, *id.* § 7547. This is not sufficient. That a theoretical possibility of lawsuits exists does not establish the required probability that the third parties will misfuel in the fashion posited by petitioners, then bring the lawsuits, then prevail. The last link is particularly problematic; the

engine-products petitioners have failed to point to any grounds for a *meritorious* suit against them. As they admit, Pet'rs' Br. at 18, their engines are not warranted for E15, nor is it clear why manufacturers would be liable for damages from consumer-induced misfueling. As for their recall theory, they have failed to establish any probability that the government would recall engines because third parties had misfueled. This leaves yet another weak link in their causative chain, especially given the limited circumstances in which manufacturers are generally subject to a recall, *see Chrysler Corp. v. EPA*, 631 F.2d 865, 896 (D.C. Cir. 1980).

To reiterate what we noted earlier in this discussion, "[T]he 'case or controversy' limitation of Article III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976). The engine-products group has not established standing to bring these petitions.

2. The Petroleum Group

The petroleum group includes associations that represent refiners and importers, which produce petroleum products, as well as "downstream" entities like fuel blenders and terminals, which handle, store, or transfer those products. The petroleum group asserts that both groups suffer an injury in fact traceable to EPA's waiver decisions. It argues that EPA's partial approval of the introduction of E15 into commerce effectively forces refiners and importers to actually introduce E15 into commerce because they are

obligated to meet the renewable fuel requirements of the RFS. They further assert that the downstream entities will have to accommodate this new fuel type. Both sets of entities will incur substantial costs as a result of taking on E15, including "special fuel production, transportation, and fuel segregation efforts." Pet'rs' Br. at 19. Further costs will come from the "new compliance surveys and fuel pump dispenser labeling" required by the E15 waiver decisions. *Id.* In addition, these entities will purportedly face the liability risks that come with producing a fuel that they contend will cause damage to misfueled vehicles.

This theory fails to establish standing. We cannot fairly trace the petroleum group's asserted injuries in fact – the new costs and liabilities of introducing and dealing with E15 – to the administrative action under review in this case. That action, 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 by waiving the CAA's prohibition on introducing a new fuel that is not substantially similar to the fuel used to certify vehicles and engines under their applicable emission standards, *see* 42 U.S.C. § 7545(f)(4). In short, the only real effect of EPA's partial waivers is to provide fuel manufacturers the option to introduce a new fuel, E15. To the extent the petroleum group's members implement that option voluntarily, any injury they incur as a result is a "self-inflicted harm" not fairly traceable to the challenged government conduct. *See, e.g., Pub. Citizen*, 489 F.3d at 1290 (citing *Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d

826, 831 (D.C. Cir. 2006)); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989).

Petitioners maintain that the new fuel choice provided by the partial waivers is no real choice at all. They stress that if EPA makes E15 an option (as it did), "refiners and importers will necessarily have to introduce E15 into commerce" to meet their volume requirements under the RFS. Even if we were to consider the refiners' and importers' decision to introduce E15 as forced rather than voluntary, it would be "forced" (under their theory) not by the availability of E15 (which is the only effect of the partial waivers) but rather by the RFS, which obliges manufacturers to introduce certain volumes of renewable fuel. In other words, if the injuries of refiners and importers are traceable to anything other than their own choice to incur them, it is to the RFS, not to the partial waivers they challenge here.

In any event, Petitioners have not established that refiners and importers will indeed have to introduce E15 to meet their volume requirements under the RFS. The partial waivers provide obligated parties with a new option for meeting those requirements, but the RFS does not mandate that obligated parties use E15 or any other particular product to meet its requirements. In fact, as noted above, refiners and importers may only use a capped amount of corn-based ethanol to meet their RFS obligations, and they are already nearing that cap. They have provided no reason why they could not instead use a different type of fuel to meet those obligations. Of course, if that reason is cost – either the costs of research and development of fuels, or the costs of introduction of such a fuel – then their choice to in-

stead use E15 would be a decision grounded in economics, not one forced on them by the RFS and most certainly not by the partial waivers. Moreover, Petitioners themselves indicated that there are still other options besides using E15: "The RFS includes mechanisms by which the EPA Administrator may waive the total volume of renewable fuel for any given year or waive requirements for certain renewable fuels." Pet'rs' Br. at 5 (citing 42 U.S.C. § 7545(*o*)(7)(A)(i)-(ii), (D), (E), (F)). While EPA may decline to waive the RFS requirements, lobbying the Administrator to do so is another option at Petitioners' disposal. In sum, Petitioners have not demonstrated that the partial E15 waivers provide refiners and importers with a Hobson's choice (introduce E15 or violate the RFS) rather than a real one, such that the costs they would sustain by introducing E15 could be considered "forced by" or traceable to the challenged agency action.

Petitioners offer a related argument centered on the downstream parties. These parties own infrastructure (*e.g.*, deepwater, barge, and pipeline terminals) that aids in the transfer, handling, and blending of petroleum products. Pet'rs' Br. at x-xi, 19. Regardless of whether the E15 waiver can be said to "cause" petroleum refiners and importers to begin introducing E15, Petitioners suggest that they will introduce it given their RFS obligations, and downstream entities will have to expend significant resources to blend and otherwise deal with the E15 the refiners and importers choose to introduce. In this way, according to Petitioners, "EPA's partial E15 waiver therefore will require these organizations to expend enormous resources to blend and introduce E15 into the market." Pet'rs' Br. at 19.

With this argument, Petitioners again wrongly identify the actual cause of downstream entities' choice to incur the costs of handling E15. Neither the RFS nor the partial E15 waivers "require" downstream entities to have anything to do with E15. If they face any pressure to handle E15, it is likely economic in nature. Downstream parties very well might lose business if they decline to blend or otherwise deal with E15, but that makes the choice to handle E15 one they make in their own self-interest, not one forced by any particular administrative action. In this way, Petitioners' argument is much like one we rejected in *Petro-Chem Processing v. EPA*, 866 F.2d at 438. In that case, the Hazardous Waste Treatment Council (HWTC) challenged EPA regulation of hazardous waste disposal in salt domes that HWTC argued was too lax. HWTC asserted that its members who provide cleanup services or waste brokering would be "forced" to use geologic repositories (salt domes) under the lax EPA standards and their use of unsafe methods would risk greater potential liability. The court rejected this theory of standing. We pointed out that this potential liability, "insofar as it is incurred voluntarily, is not an injury that fairly can be traced to the challenged action." *Id.* (internal quotation marks omitted). The members who used salt domes could avoid the potential liability by choosing safer methods than required by EPA. If they chose the unsafe methods because of "competitive pressures," they would presumably do so "in their own self-interest." *Id.* The resulting injury would thus be "self-inflicted, . . . so completely due to the [complainants'] own fault as to break the causal chain." *Id.* (internal quotation marks omitted). So too here.

All of this is to say that Petitioners' attempt to draw a causal link between the E15 waivers they challenge and the costs they would incur by introducing E15 ultimately rings hollow. If anything is "forcing" these entities to incur the costs of introducing a new fuel, it is the obligations set by the RFS, competitive pressures, or some combination thereof. EPA's partial waivers simply provide a new choice of fuel that manufacturers may produce. There is not a cause of those costs providing the petroleum group with standing.

3. The Food Group

The food group's members produce, market, and distribute food products that require corn. This petitioner group suggests that EPA's partial approval of E15 will increase the demand for corn, which is currently used to produce most ethanol on the market. This increased demand will, according to the food group, increase the prices their members have to pay for corn.

We need not decide here whether the food group has established Article III standing with this theory because the theory plainly fails to demonstrate prudential standing.[1] While we must find Article III standing before addressing the merits of a case, *see supra* p. 6, "it is entirely proper to consider whether there is prudential standing while leaving the question of constitutional standing in doubt, as there is no mandated 'sequencing of jurisdictional issues.'" *Grand Council of Crees (of Quebec) v. FERC*,

[1] Chief Judge Sentelle would hold that the food group has neither Article III nor prudential standing.

198 F.3d 950, 954 (D.C. Cir. 2000) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 575 (1999)).

To demonstrate prudential standing, the food group "must show that the interest it seeks to protect is arguably within the zone of interests to be protected or regulated by the statute . . . in question" or by any provision "integral[ly] relat[ed]" to it. *Nat'l Petrochem. Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam) (internal quotation marks omitted). The food petitioners have not made such a showing. They point out only that their interests are protected by EISA, the legislation that set forth the RFS, because EISA requires EPA to review, among other things, "the impact of the use of renewable fuels on . . . the price and supply of agricultural commodities . . . and food prices" when EPA sets renewable fuel volume requirements in the future. 42 U.S.C. § 7545(*o*)(2)(B)(ii)(VI). However, the statute Petitioners challenge here is the CAA's fuel-waiver provision, Section 211(f)(4) – not EISA. Nor is EISA "integral[ly] relat[ed] to Section 211(f)(4). Both statutes may have fuel as their subject matter, and the RFS may have even incentivized Growth Energy to apply for a waiver under Section 211(f)(4). But more is required to establish an "integral relationship" between the statute a petitioner claims is protecting its interests and the statute actually in question; otherwise, "the zone-of-interests test could be 'deprive[d] . . . of virtually all meaning." *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 903 (D.C. Cir. 1996) (quoting *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 530 (1991)). Hypothetical prudential standing to challenge action under EISA does not give the food

petitioners prudential standing to petition for review of action taken pursuant to CAA Section 211(f)(4).

The dissent relies on *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), but that decision neither changed the prudential-standing standard nor has any particular applicability to the facts here. The food group's interest in low corn prices is much further removed from a provision about cars and fuel than a neighboring land owner's interest is from a statute about land acquisition.

III. Conclusion

For the above reasons, we hold that no petitioner has standing to bring these claims. We therefore dismiss all petitions for lack of jurisdiction.

TATEL, *Circuit Judge*, concurring: I agree with the dissent that the food group has Article III standing. *See* Dissenting Op. at 4-6. I also agree with those circuits that have held that prudential standing is non-jurisdictional. *See id.* at 9-10 (collecting cases). This Circuit, however, has directly held to the contrary. *See, e.g., Steffan v. Perry*, 41 F.3d 677, 697 (D.C. Cir. 1994) ("Prudential standing is of course, like Article III standing, a jurisdictional concept."); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994) ("Standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded."). True, passing statements by subsequent panels may be in some tension with these earlier decisions, *see* Dissenting Op. at 10 n.4 (collecting cases), and in recent years the Supreme Court has certainly criticized lower courts for overusing the "jurisdictional" label, *see id.* at 7-8 (collecting cases). But taken in context these cases are "too thin a reed," *id.* at 9, to permit this panel to depart from our clear prior holdings that prudential standing is jurisdictional – no matter how much we may think those decisions are wrong or that the Supreme Court may be preparing to hold otherwise. *See Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) ("A panel of this court . . . must adhere to the law of our circuit unless that law conflicts with a decision of the Supreme Court." (citing *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (en banc))); *United States v. Williams*, 194 F.3d 100, 107 (D.C. Cir. 1999) (circuit precedent binding unless "eviscerat[ed]" by subsequent Supreme Court decisions), *abrogated on other grounds by Apprendi v. New Jersey*, 530 U.S. 466 (2000).

KAVANAUGH, *Circuit Judge*, dissenting: Federal law establishes a renewable fuel mandate that requires gasoline producers to introduce significant amounts of renewable fuel (such as ethanol) into the Nation's gasoline supply. To maintain statutory clean air standards, however, EPA is required to approve new fuels and fuel additives such as ethanol, and EPA may do so only when the new fuel would not cause any car models made after 1974 to violate federal emissions standards. EPA had previously approved use of E10, gasoline with up to 10% ethanol, for use in cars. But the requirement set by the statutory renewable fuel mandate could not be reached solely with E10. Ethanol manufacturers then petitioned EPA to exercise its statutory waiver authority to allow use of E15, gasoline with up to 15% ethanol. In order to issue the waiver under the statute, EPA had to find that E15 would not cause any car models made after 1974 to fail to meet emissions standards. EPA found that E15 could cause emissions failures in some cars made after 1974 (namely, in cars made between 1975 and 2000). Nonetheless, EPA still granted the waiver. For the first time ever, EPA granted what it termed a "partial waiver," meaning that the waiver allowed E15 use only in cars made after 2000.

In this suit, members of the food industry and the petroleum industry contend that EPA's E15 waiver is illegal. The food group is suing because, as a result of EPA's E15 waiver, ethanol production will increase and demand for corn (a necessary raw material for ethanol) will rise significantly. In turn, corn prices will rise. Therefore, food producers, which compete directly with ethanol producers in the upstream market for purchasing corn, will have to pay

more for corn. The petroleum group is suing because, as a result of EPA's E15 waiver and the statutory renewable fuel mandate, those in the petroleum industry now must refine, sell, transport, and store E15, incurring significant costs to do so.

Despite the fact that two enormous American industries will be palpably and negatively affected by EPA's allegedly illegal E15 waiver, the majority opinion tosses the case for lack of standing. Judge Tatel and I agree that the food group has Article III standing. But the majority opinion finds that the food group is not an aggrieved party (that is, does not have prudential standing) for purposes of the Administrative Procedure Act. And the majority opinion concludes that the petroleum group's injury is not caused by EPA's E15 waiver decision and that the petroleum group thus does not have Article III standing.

This suit may proceed if *either* the food group or the petroleum group has standing. In my view, both have standing.

The food group has Article III standing because the E15 waiver, particularly in conjunction with the statutory renewable fuel mandate, will increase the prices the food group must pay for corn. And the food group's prudential standing under the APA is not contested by EPA. That matters because prudential standing (unlike Article III standing) is not jurisdictional, meaning that prudential standing has been forfeited by EPA and is thus not properly before the Court. In any event, the food group easily clears the low bar for prudential standing under the APA.

The petroleum group has Article III standing because the E15 waiver, in conjunction with the statu-

tory renewable fuel mandate, will require some petroleum companies to refine, sell, transport, or store E15, imposing significant costs. And even if prudential standing were not forfeited, the petroleum group is a party regulated under the statutory waiver provision; therefore, the petroleum group's prudential standing under the APA is undisputed.[1]

On the merits, I conclude that the E15 waiver violates the statute. The waiver might be good policy; if so, Congress has the power to enact a new law permitting E15. But under the statute as currently written, EPA lacks authority for the waiver. I would therefore grant the petition for review and vacate EPA's E15 waiver decision. I respectfully dissent.

I

The Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. One aspect of the case or controversy requirement is standing. To sue in federal court, a plaintiff must demonstrate Article III standing, which consists of three requirements: (1) injury in fact – an invasion of a legally protected interest that is concrete and particularized, and actual or imminent; (2) causation – a fairly traceable connection between the injury and the challenged conduct; and (3) redressability – a likelihood that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In the regulatory context, standing has not been limited to those directly regulated by an agency. Rather, under settled standing case law, those who suf-

[1] Because I find that either of these two groups has standing, I do not address the standing of the engine products group.

fer injury as a result of an agency's allegedly illegal regulation of *someone else* can still have standing, although the analysis in such cases is tricky (and frankly rather unpredictable).[2] Article III standing is jurisdictional, meaning courts must consider the issue even if the defendant or respondent does not assert that the plaintiff or petitioner lacks Article III standing.

In addition, the Administrative Procedure Act's general cause of action for challenging agency action extends only to parties "aggrieved" by the agency action. *See* 5 U.S.C. § 702. The cause of action's limitation to "aggrieved" parties is referred to (somewhat loosely and imprecisely) as prudential standing. As explained more fully below, prudential standing is not jurisdictional, meaning that it can be forfeited and need not be considered by the court if the defendant or respondent does not assert it.

A

First, I will explain why the food group has standing. For its part, EPA has not contested the food group's Article III and prudential standing. A majority of the Court – Judge Tatel and I – conclude that the food group has Article III standing. A different majority – Chief Judge Sentelle and Judge Tatel – conclude, however, that the food group lacks prudential standing to challenge EPA's E15 waiver.

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[2] When I refer to the food group and the petroleum group throughout this opinion, I am using shorthand to refer to the many such food and petroleum trade organizations and individual businesses that have sued here. *See also* Maj. Op. at 7-8 (whether trade organization has standing turns on whether any individual member has standing).

The food group includes producers of processed food made with corn and those who raise livestock fed with corn. It is hard to overestimate the significance of corn to the American food industry. And petitioners' submissions to EPA and this Court reveal the following about the effects of EPA's E15 waiver on the food industry: In E10, up to 10% of gasoline is made up of ethanol. In E15, up to 15% of gasoline is made up of ethanol. That's a *50% increase* in the amount of ethanol used. In hard numbers, with only E10 on the market, 14 billion gallons of ethanol could be produced each year for the Nation's gasoline supply. With E15 on the market, 21 billion gallons of ethanol can be produced each year. That's *an additional 7 billion gallons* of ethanol annually produced for use in the U.S. gasoline supply. As a result of the E15 waiver, there is likely – indeed, nearly certain in the current market – to be a significant increase in demand for corn to produce ethanol. The extra demand means that corn producers can charge a higher price. Therefore, the E15 waiver will likely cause higher corn prices, and members of the food group that depend on corn will be injured. *See generally, e.g.*, Advanced Economic Solutions, Implications for US Corn Availability Under a Higher Blending Rate for Ethanol (June 2009), J.A. 604.

This is Economics 101 and requires no elaborate chain of reasoning. It is no surprise that EPA – which is typically quite aggressive in asserting standing objections in lawsuits against it – has not contested the food group's standing in this case. The food group has standing under Article III.

Even apart from that analysis, the food group has Article III standing based on our competitor standing

cases. When an agency illegally regulates an entity's competitor in a way that harms the entity – for example, by loosening regulation of the competitor – we have said that the entity has Article III standing to challenge the allegedly illegal regulation. *See, e.g., Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) ("The doctrine of competitor standing addresses the first requirement [of Article III standing] by recognizing that economic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them.") (internal quotation marks and brackets omitted); *Honeywell International Inc. v. EPA*, 374 F.3d 1363, 1369 (D.C. Cir. 2004) ("it is well established that parties suffer cognizable injury under Article III when an agency lifts regulatory restrictions on their competitors or otherwise allows increased competition") (internal quotation marks and brackets omitted); *Louisiana Energy & Power Authority v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) ("We repeatedly have held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition."). Here, EPA's E15 waiver loosens a prohibition on gasoline and ethanol producers and thereby harms entities such as the food group that directly compete with gasoline and ethanol producers in the upstream market for purchase of corn. *See Sherley*, 610 F.3d at 72-74 (similarly finding doctors have competitor standing after agency loosened restrictions and thereby allowed increased competition in upstream market for grants that fund research). Our competitor standing precedents thus independently support Article III standing for the food group.

A majority of the Court – Judge Tatel and I – agree that the food group has Article III standing. But Chief Judge Sentelle and Judge Tatel conclude that the food group lacks prudential standing.

Contrary to their majority opinion, I would conclude that prudential standing likewise poses no barrier for the food group. To begin with, EPA did not raise prudential standing as a defense to this lawsuit. That's critically important because prudential standing is not jurisdictional and thus can be forfeited when the defendant or respondent fails to assert it. Because EPA did not challenge the food group's prudential standing, any prudential standing objection is forfeited.

The majority opinion concludes that prudential standing is jurisdictional. *See* Maj. Op. at 15-17 (rejecting food group's claims solely on prudential standing grounds); Maj. Op. at 2, 17 (dismissing all claims, including those of food group, for lack of jurisdiction).

In my view, Supreme Court precedent makes clear, however, that prudential standing is not jurisdictional. Prudential standing concerns who may sue; it is an aspect of the cause of action that stems from the Administrative Procedure Act's limiting its cause of action to "aggrieved" parties. *See Bond v. United States*, 131 S. Ct. 2355, 2362-63 (2011); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 97 & n.2 (1998).[3] Prudential standing is not jurisdictional because prudential standing has not been ranked by

[3] The APA provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

Congress as jurisdictional and is not a limitation on a court's authority to hear a case, as opposed to a limitation on who may sue to challenge a particular agency action. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243-44 (2010).

In recent years, the terminology of jurisdiction has been put under a microscope at the Supreme Court. And the Court has not liked what it has observed – namely, sloppy and profligate use of the term "jurisdiction" by lower courts and, at times in the past, the Supreme Court itself. These recent Supreme Court cases have significantly tightened and focused the analysis governing when a statutory requirement is jurisdictional. In *Reed Elsevier*, for example, the Court emphasized that a statutory requirement is jurisdictional when it speaks to the power of a court to hear a case rather than to the rights of or restrictions on the parties. *Id.* at 1243; *see also Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) ("Recognizing our less than meticulous use of the term in the past, we have pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not.") (internal quotation marks omitted); *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011) ("We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important and mandatory, we have said, should not be given the jurisdictional brand.") (citations omitted); *Bowles v. Russell*, 551 U.S. 205, 213 (2007) ("the notion of subject-matter jurisdiction obviously extends to classes of cases falling within a court's adjudicatory authority")

(internal quotation marks and ellipsis omitted); *Arbaugh v. V & H Corp.*, 546 U.S. 500, 510 (2006) ("Jurisdiction, this Court has observed, is a word of many, too many, meanings.") (internal quotation marks omitted); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.").

The APA cause of action – which speaks in terms of giving "aggrieved" parties a cause of action – does not address the power of the court to hear the case. Therefore, it is quite obviously not jurisdictional under the recent Supreme Court precedents.

Indeed, although the Supreme Court has not yet directly addressed whether prudential standing is jurisdictional, the Court has suggested that it is not. In *Tenet v. Doe*, the Court noted that prudential standing is a "threshold question" that "may be resolved *before addressing jurisdiction*." 544 U.S. 1, 7 n.4 (2005) (emphasis added). While that snippet alone may be too thin a reed on which to base a definitive conclusion, it certainly is consistent with the thrust of the recent Supreme Court precedents on jurisdiction and points us further in the direction of saying that prudential standing is not jurisdictional.

Several courts of appeals have addressed the prudential standing issue in recent years – that is, since the Supreme Court's intensified focus on proper use of the term jurisdiction. And those courts likewise have determined that prudential standing is not jurisdictional. *See, e.g., Board of Mississippi Levee*

Commissioners v. EPA, 674 F.3d 409, 417 (5th Cir. 2012) ("Unlike constitutional standing, prudential standing arguments may be waived."); *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008) ("Unlike the Article III standing inquiry, whether ILC maintains prudential standing is not a jurisdictional limitation on our review. By failing to articulate any argument challenging ILC's prudential standing, the Director has waived that argument.") (citation and internal quotation marks omitted); *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008) ("Prudential-standing doctrine is not jurisdictional in the sense that Article III standing is.") (internal quotation marks omitted); *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007) ("Prudential standing is not jurisdictional in the same sense as Article III standing. . . . We could therefore decline to address this argument, as it was not raised in the court below."); *Gilda Industries, Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006) ("In the end, we do not need to reach or decide the question whether Gilda satisfies the standing requirements of the Administrative Procedure Act, because the government did not contend in its brief that Gilda's complaint should be barred by the zone of interests test. The government has thus waived that argument."); *see also, e.g., American Iron & Steel Institute v. OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999) ("We can pretermit the more difficult question regarding whether the Doctors' members' interests fall within the zone of interests protected by the OSH Act because pruden-

tial standing is flexible and not jurisdictional in nature.") (citations omitted).[4]

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[4] Some older cases from this Court said that prudential standing was jurisdictional. *See, e.g., Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994). But our more recent cases have indicated that prudential standing is not jurisdictional. *See American Chiropractic Ass'n v. Leavitt*, 431 F.3d 812, 816 (D.C. Cir. 2005) (contrasting "the less-than-demanding zone-of-interest test" with "[t]he jurisdictional question"); *Toca Producers v. FERC*, 411 F.3d 262, 265 n.* (D.C. Cir. 2005) ("the prudential standing doctrine, like the abstention doctrine, represents the sort of threshold question that may be resolved before addressing jurisdiction") (internal quotation marks and brackets omitted); *Amgen Inc. v. Smith*, 357 F.3d 103, 111 (D.C. Cir. 2004) ("That Amgen has prudential standing does not resolve this appeal, however. Another threshold issue is whether the court has jurisdiction to entertain Amgen's complaint."); *see also Oryszak v. Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009) (Ginsburg, J., concurring) (citing *Tenet*, 544 U.S. at 6 n.4).

To the extent older cases assumed prudential standing to be jurisdictional, that assumption is no longer correct after Supreme Court cases such as *Reed Elsevier*. There, the Supreme Court expressly "encouraged federal courts" to pay better attention to the distinction between jurisdictional and non-jurisdictional statutory requirements and stated that a statutory limitation generally is jurisdictional only if it speaks to the power of the courts. 130 S. Ct. at 1243-44; *see also Gonzalez*, 132 S. Ct. at 648 ("Courts, we have said, should not lightly attach those drastic consequences to limits Congress has enacted.") (internal quotation marks omitted); *Kontrick*, 540 U.S. at 455 ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.").

I certainly respect Judge Tatel's different view on the status of this Court's older precedents on this issue. But I believe our duty here is to obey the clear charge given by the Supreme Court rather than to cling to a stale slice of our precedent –

In short, respondent EPA has not raised prudential standing. EPA has thus forfeited the argument. Contrary to the weight of authority and the direction marked by the Supreme Court, the majority opinion here concludes that prudential standing is jurisdictional. *See* Maj. Op. at 2, 15-17. The majority opinion thus creates a deep and important circuit split on this important issue. In my respectful view, the Supreme Court's recent decisions on jurisdiction show that the majority opinion is incorrect on this point.[5]

Even if prudential standing were jurisdictional and we therefore had to consider the issue notwithstanding EPA's failure to raise it, I would conclude that the food group has prudential standing for either of two independent reasons.

First, members of the food group are "aggrieved" parties. To be "aggrieved" for purposes of the APA and to have prudential standing, a party must be

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precedent which not only has been undermined by subsequent Supreme Court decisions but also has not been followed by our Court in several recent cases.

[5] To be sure, intervenor Growth Energy has raised prudential standing even though EPA did not. But this Court has repeatedly held that intervenors generally may not raise arguments not raised by the parties. *See, e.g., Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). There is no reason to depart from that general rule here.

Indeed, the rule preventing expansion of the case by intervenors serves important purposes, especially in our administrative law jurisprudence. The Government as defendant or respondent may want to waive or forfeit certain non-jurisdictional, non-merits threshold defenses so as to permit or obtain a ruling on the merits. In our adversary legal system, an intervenor does not and should not have the unilateral right to thwart the Government's ability to waive non-jurisdictional, non-merits threshold defenses to suit.

"arguably within the zone of interests to be protected or regulated by the statute that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (internal quotation marks omitted). The Supreme Court has repeatedly emphasized that prudential standing is a low bar, writing just a few months ago: "The prudential standing test . . . is not meant to be especially demanding. . . . We do not require any indication of congressional purpose to benefit the would-be plaintiff. And we have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (footnote, citation, and some internal quotation marks omitted).

Importantly, in "determining whether a petitioner falls within the zone of interests to be protected by a statute, we do not look at the specific provision said to have been violated in complete isolation, but rather in combination with other provisions to which it bears an integral relationship." *National Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (internal quotation marks and brackets omitted); *see also Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 401 (1987) ("In considering whether the 'zone of interest' test provides or denies standing in these cases, we first observe that the Comptroller's argument focuses too narrowly on 12 U.S.C. § 36, and does not adequately place § 36 in the overall context of the National Bank Act. As *Data Processing* demonstrates, we are not limited to

considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act.").

Here, analysis of the overall statutory scheme shows that the food group has prudential standing. The Energy Independence and Security Act of 2007 imposes a renewable fuel mandate that requires introducing increasing amounts of renewable fuel into the market every year. *See* 42 U.S.C. § 7545(*o*)(2)(B)(i)(I). The Act's renewable fuel mandate expressly commands EPA to take account of the effect on "food prices" – that is, the price of corn. 42 U.S.C. § 7545(*o*)(2)(B)(ii)(VI). The balance Congress struck in the renewable fuel mandate thus expressly incorporates effects on food prices. At the same time, another statutory provision – in the same section of the U.S. Code – requires EPA to review and approve renewable fuel additives such as ethanol to make sure the fuel complies with clean air standards. Those statutory provisions together reflect a balance among the interests of corn farmers, the petroleum industry, the food industry, and the environment, among other interests. Because the E15 waiver is necessary – at least in the current market – to effectuate the statutory renewable fuel mandate, and because the food group is explicitly within the zone of interests for the renewable fuel mandate, the food group is in the zone of interests for purposes of this suit.[6]

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[6] One respected commentator has summarized the Supreme Court's zone of interest precedents as follows: "An injured plaintiff has standing under the APA unless Congress intended to preclude judicial review at the behest of parties in plaintiff's

That conclusion is fortified by the Supreme Court's decision just a few months ago in *Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2210-12. There, a residential property owner claimed that the Interior Department violated federal law – the Indian Reorganization Act – when it acquired a parcel of land *from someone else* for use by an Indian tribe as a casino. *See id.* at 2202-03. Perhaps needless to say, but the Indian Reorganization Act was not designed to benefit or regulate a property owner who objects when the Federal Government acquires *another* property owner's land in order to help Indians. The Supreme Court nonetheless concluded that prudential standing was satisfied. When the "Secretary obtains land for Indians" under this statute, "she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development." *Id.* at 2211. Although the statute in question "specifically addresses only land acquisition," decisions under the statute "are closely enough and often enough entwined with considerations of land use to make that difference immaterial." *Id.* at 2211-12. "And so neighbors to the use (like Patchak) are reasonable – indeed, predictable – challengers of the Secretary's decisions: Their interests, whether economic, environmental, or aesthetic, come within § 465's regulatory ambit." *Id.* at 2212.

Here, EPA's waiver decisions were similarly made with "at least one eye" toward the renewable fuel

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class." 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.9, at 1521 (5th ed. 2010). The statutes at issue here certainly do not reveal any such "intent to preclude" suits by the food group.

mandate. EPA acknowledged as much when proposing the E15 waiver. *See* Notice of Receipt of a Clean Air Act Waiver Application to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Request for Comment, 74 Fed. Reg. 18,228, 18,229 (Apr. 21, 2009) ("Growth Energy maintains that under the renewable fuel program requirements of the Energy Independence and Security Act of 2007, which is now primarily satisfied by the use of ethanol in motor vehicle gasoline, there exists a 'blend barrier' or 'blendwall' by which motor vehicle gasoline in the U.S. essentially will become saturated with ethanol at the 10 volume percent level very soon. Growth Energy maintains that a necessary first step is to increase the allowable amount of ethanol in motor vehicle gasoline up to 15 percent (E15) in order to delay the blendwall. . . . Growth Energy claims that the 'blendwall' will make those renewable fuel mandates unreachable and that there are substantial environmental benefits associated with higher ethanol blends."). Because the renewable fuel mandate in turn specifically takes account of food prices, it is reasonable and predictable to think of members of the food group as proper plaintiffs to challenge these waivers. What this Court said in the decision that was affirmed in *Match-E-Be-Nash-She-Wish Band* bears repeating: "As a practical matter it would be very strange to deny Patchak standing in this case. His stake in opposing the Band's casino is intense and obvious. The zone-of-interests test weeds out litigants who lack a sufficient interest in the controversy, litigants whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. Patchak

is surely not in that category." *Patchak v. Salazar*, 632 F.3d 702, 707 (D.C. Cir. 2011) (citation and internal quotation marks omitted). So too with the food group here.

Second, even apart from that analysis of Congress's intent in these ethanol statutes, the food group has prudential standing because it is complaining about an agency's allegedly illegal decision to loosen restrictions on a competitor of the food group – namely, the petroleum group, which competes against the food group in the upstream market for purchasing corn. Prudential standing does not prevent businesses from complaining about allegedly illegal regulation of their competitors. On the contrary, that has been the precise scenario in several Supreme Court cases where the Court found prudential standing. *See, e.g., Clarke*, 479 U.S. at 403 ("competitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings"); *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-56 (1970) (sellers of data processing service have prudential standing to challenge decision allowing bank to compete in offering those services). Our cases reveal that business competitors in upstream as well as downstream markets have prudential standing. *See, e.g., Sherley*, 610 F.3d at 75 ("We conclude the Doctors have prudential standing. The Dickey-Wicker Amendment clearly limits the funding of research involving human embryos. Because the Act can plausibly be interpreted to limit research involving ESCs, the Doctors' interest in preventing the NIH from funding such research is not inconsistent with the purposes of the Amendment. . . . [T]hat is all that matters."). Here, the

food group directly competes with gasoline and ethanol producers in the upstream market for purchasing corn as a raw material. Based on those competitor standing precedents as well, the food group has prudential standing.

B

In the alternative, even if the food group does not have standing, the petroleum group does. The petroleum group consists of companies that produce, refine, transport, and store gasoline, ethanol, and gasoline-ethanol blends. Under the statutory renewable fuel mandate, petroleum companies are forced to introduce a significant amount of renewable fuel into the Nation's gasoline supply. Using only E10 (gasoline with up to 10% ethanol), the petroleum group companies could not meet the statutory renewable fuel mandate. As a result of the E15 waiver in conjunction with the renewable fuel mandate, however, members of the petroleum group now may – and as a factual matter, *must* – use E15 (gasoline with up to 15% ethanol) in order to meet the renewable fuel mandate. Those businesses will incur considerable economic costs to modify their production, refining, transportation, and storage methods. Those costs are clearly injuries for purposes of standing. The only question here is whether those injuries are caused by EPA's E15 waiver.

EPA has not challenged the petroleum group's Article III or prudential standing. Again, I find that silence a telling indicator that the petroleum group has standing. Moreover, the majority opinion does not dispute that the petroleum group has prudential standing. But according to the majority opinion, the petroleum group has not satisfied the causation

prong of Article III standing. The majority opinion holds that the petroleum group's injury is self-imposed and not caused by EPA's E15 waiver. I disagree.

Causation requires injury that is "fairly traceable to the defendant's allegedly unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 751 (1984). It is of course true that causation can be defeated by voluntary action – purely self-inflicted injury is not fairly traceable to the actions of another. *See Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989). But causation "is not defeated merely because the plaintiff has in some sense contributed to his own injury"; causation "is defeated only if it is concluded that the injury is so completely due to the plaintiff's own fault as to break the causal chain." 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.5 (3d ed. 2008).

To show causation, the petroleum group must demonstrate a "substantial probability" that the E15 will cause at least one of its members to incur higher costs. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). To be sure, the E15 waiver *alone* does not require the petroleum group to use E15, make changes, and incur costs. But we cannot consider the E15 waiver in some kind of isolation chamber. The Energy Independence and Security Act imposes a renewable fuel mandate that requires a certain amount of renewable fuel to be introduced into the market every year. Pursuant to that law, an increasing amount of renewable fuel such as ethanol – rising to 36 billion gallons in 2022 – must be introduced into the market. 42 U.S.C. § 7545(*o*)(2)(B)(i)(I). EPA regulations identify petroleum refiners and import-

ers who produce gasoline as "obligated" parties – they are responsible for introducing a percentage of the required amount into the market each year. 40 C.F.R. § 80.1406; *see also* 40 C.F.R. §§ 80.1407, 80.1427.

Before the E15 waiver, however, petroleum producers likely could not meet the requirement set by the statutory renewable fuel mandate. Now that EPA has allowed E15 onto the market, producers likely can meet the renewable fuel mandate – but they *must* produce E15 in order to do so. So the combination of the renewable fuel mandate *and* the E15 waiver will force gasoline producers to produce E15. In tort law, when two acts combine to create an injury, both acts are considered causes of the injury. So it is here. In the current market, there is at least a "substantial probability" that, in the wake of the E15 waiver, gasoline producers will have to use E15 in order to meet the renewable fuel mandate. And that's all that the petroleum group needs to show to carry its burden on the causation issue.

Put another way, the renewable fuel mandate directly regulates gasoline producers and requires them to introduce a certain amount of ethanol. But there was an impediment preventing the producers from meeting that mandate. The E15 waiver removed the impediment, meaning that gasoline producers now will have to use E15 to meet the mandate's requirements. On those facts, the petroleum group's injury is not self-imposed, but is directly caused by the agency action under review in this case. For those reasons, the petroleum group has Article III standing to challenge the E15 waiver provision.

The majority opinion concludes otherwise. But the fundamental flaw in the majority opinion's reasoning is its belief that petroleum producers could meet the renewable fuel mandate without using E15. In the current market, the majority opinion's assumption is simply incorrect as a matter of fact.

One way to answer the causation question in this case is to ask the following: In the real world, does the petroleum industry have a realistic choice not to use E15 and still meet the statutory renewable fuel mandate? The answer is no, and intervenor Growth Energy's claim to the contrary seems rooted in fantasy.[7]

As to prudential standing for the petroleum group, EPA does not raise the issue, meaning again that it's forfeited. In any event, the majority opinion itself does not dispute that the petroleum group is in the zone of interests and has prudential standing. Petroleum producers are directly regulated parties. And parties directly regulated by a statute are within that statute's zone of interest. Thus, it is undisputed and indisputable that the petroleum group has prudential standing.

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[7] Under the majority opinion's approach, it appears that a citizen who breathes air (or at least a citizen who has breathing problems) would have standing to challenge the E15 waiver. That's because the E15 waiver will cause emissions that will negatively affect air quality. There is of course no such petitioner involved in this suit. But standing law protects economic interests as well as health interests. And the economic interests of the food and petroleum groups are palpably and significantly affected by the E15 waiver, just as are the health interests of citizens with breathing issues.

II

Having found that there is standing, I turn to the merits of this case. The merits are not close. In granting the E15 partial waiver, EPA ran roughshod over the relevant statutory limits.

Section 211(f)(1) of the Clean Air Act prohibits manufacturers of fuel or fuel additives from introducing new fuels or fuel additives into commerce for use in car models made after 1974, unless the new fuel or fuel additive is "substantially similar" to certain fuels or fuel additives already in use. 42 U.S.C. § 7545(f)(1)(B). All agree that E15 is not substantially similar to fuels already in use. But Section 211(f)(4) allows EPA to waive that prohibition if EPA "determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or fuel additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified." 42 U.S.C. § 7545(f)(4) (emphasis added). Put in plain English, in order to approve a waiver, EPA must find that the proposed new fuel will not cause any car model made after 1974 to fail emissions standards.

Here, EPA issued a waiver for E15 even though it acknowledged that E15 likely would contribute to the failure of some cars made after 1974 (namely, those made between 1975 and 2000) to achieve compliance with emissions standards. EPA maintains that E15

will not contribute to the failure of emissions control systems in cars built in 2001 and later. But EPA concedes that E15 likely *will* contribute to the failure of emissions control systems in some cars built before 2001.

EPA's E15 waiver thus plainly runs afoul of the statutory text. EPA's disregard of the statutory text is open and notorious – and not much more needs to be said.

EPA does throw out a few arguments to try to get around the text of the statute. None is persuasive.

First, EPA tries to weave ambiguity out of clarity in the statutory text. EPA contends that the statute does not expressly address partial waivers. But as petitioners aptly respond in their brief, to suggest "'that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.*, when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to the principles of administrative law, and refuted by precedent.'" Petitioners' Reply Br. 8-9 (quoting *API v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995)). There is no plausible way to read this statute as allowing partial waivers of the kind granted by EPA here.

EPA also suggests that a plain text reading of the statute would be absurd – "[c]learly Congress did not mean to require testing of every vehicle or engine." EPA Br. 23. But that argument confuses methods with standards. As to *methods*, the statute may allow EPA to test a reasonable sample of vehicles and extrapolate from those results to conclude that a new fuel will not cause any vehicles to fail their emissions tests. But the *standard* remains that a new fuel

cannot cause any vehicles to fail their emissions tests. Just because EPA can restrict its testing to a reasonable sample does not mean that EPA can restrict its waivers to a subset.

EPA then invokes the purpose and legislative history of the waiver statute. With respect to purpose, there is no single purpose to this statute. Like many statutes, this one represents a complex balancing of competing interests and a slew of compromises. Congress did not pursue one purpose at all costs. *Cf. Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012) ("No legislation pursues its purposes at all costs") (citation and brackets omitted). Courts respect the legislative process – and the myriad of interests reflected in complex legislation – by hewing to the statutory text and not trying to cherry-pick one purpose from a multitude of overlapping and sometimes conflicting congressional purposes. As to the legislative history, to the extent it's relevant, nothing in it suggests that Congress intended to allow partial waivers. In any event, as the Supreme Court has repeatedly reminded us, the text of the statute controls. *See, e.g., Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1709-11 (2012); *Milner v. Department of the Navy*, 131 S. Ct. 1259, 1266-67 (2011). And the text here is straightforward and clear.

EPA separately claims that it has traditionally interpreted the statute as allowing conditional waivers, and that this partial waiver is like a conditional waiver. Even if the statute allows conditional waivers, conditional waivers are not the same as partial waivers. Conditional waivers generally attach conditions to the *fuel*, but such waivers do not attach limi-

tations on the kind of vehicles that can use that fuel, which is the nature of the waiver at issue here and is precisely what the statute does not permit.

If Congress wanted to authorize this kind of partial waiver, it could easily have said so (and going forward, could still easily do so). After all, the statute elsewhere allows EPA to partially waive other statutory requirements. *See, e.g.*, 42 U.S.C. § 7545(k)(2)(A) (Administrator may "adjust (or waive entirely)" certain emissions requirements); 42 U.S.C. § 7545(m)(3)(A) (Administrator shall "waive, in whole or in part," oxygenated gasoline requirements that would prevent or interfere with the attainment of certain air quality standards); 42 U.S.C. § 7545(*o*)(7)(A) (Administrator may waive "in whole or in part" requirements of renewable fuel mandate). But Congress didn't authorize partial waivers in the waiver provision involved in this case.

* * *

The food group petitioners and the petroleum group petitioners each independently have standing to challenge EPA's E15 waiver. On the merits, EPA's E15 waiver is flatly contrary to the plain text of the statute. I would grant the petition for review and vacate EPA's E15 waiver decision. I respectfully dissent.

APPENDIX B

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2009–0211; FRL–9215–5]

Partial Grant and Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator

AGENCY: Environmental Protection Agency.

ACTION: Notice of partial waiver decision.

SUMMARY: The Environmental Protection Agency (EPA) is partially granting Growth Energy's waiver request application submitted under section 211(f)(4) of the Clean Air Act. This partial waiver allows fuel and fuel additive manufacturers to introduce into commerce gasoline that contains greater than 10 volume percent ethanol and no more than 15 volume percent ethanol (E15) for use in certain motor vehicles if certain conditions are fulfilled. We are partially approving the waiver for and allowing the introduction into commerce of E15 for use only in model year 2007 and newer light-duty motor vehicles, which includes passenger cars, light-duty trucks and medium-duty passenger vehicles. We are denying the waiver for introduction of E15 for use in model year 2000 and older light-duty motor vehicles, as well as all heavy-duty gasoline engines and vehicles, highway and off-highway motorcycles, and nonroad engines, vehicles, and equipment. The Agency is deferring a decision on the applicability of a waiver to model year 2001 through 2006 light-duty motor vehicles until additional test data, currently under development, is available.

[CONTENT OMITTED]

I. Executive Summary

In March 2009, Growth Energy and 54 ethanol manufacturers petitioned the Environmental Protection Agency ("EPA" or "The Agency") to allow the introduction into commerce of up to 15 volume percent (vol%) ethanol in gasoline. In April 2009, EPA sought public comment on the Growth Energy petition and subsequently received about 78,000 comments. Prior to today's action, ethanol was limited to 10 vol% in motor vehicle gasoline (E10).

In today's action, EPA is partially granting Growth Energy's waiver request based on our careful analysis of the available information, including test data and public comments. This partial grant waives the prohibition on fuel and fuel additive manufacturers on the introduction into commerce of gasoline containing greater than 10 vol% ethanol and no more than 15 vol% ethanol (E15) for use in certain motor vehicles. More specifically, today's action has two components. First, we are approving the waiver for and allowing the introduction into commerce of E15 for use in Model Year (MY) 2007 and newer light-duty motor vehicles, which includes passenger cars, light-duty trucks, and medium-duty passenger vehicles.[1] Second, we are denying the waiver for introduction into commerce of E15 for use in MY2000 and older light-duty motor vehicles, as well as heavy-duty

[1] For purposes of today's decision, "MY2007 and newer light-duty motor vehicles" include MY2007 and newer light-duty motor vehicles (LDV), light- duty trucks (LDT), and medium-duty passenger vehicles (MDPV).

gasoline highway engines and vehicles (*e.g.*, delivery trucks). Highway and off-highway motorcycles, and nonroad engines, vehicles, and equipment (nonroad products; *e.g.*, boats, snowmobiles, and lawnmowers) typically use the same gasoline as highway motor vehicles; this decision is also a denial of a waiver for introducing motor vehicle gasoline into commerce containing more than 10 vol% ethanol for use in all of those products. The Agency is deferring a decision on the applicability of a waiver with respect to MY2001–2006 light-duty motor vehicles to await additional test data. The Department of Energy (DOE) has stated that it will complete testing on these vehicles in November, after which EPA will take appropriate action.

To help ensure that E15 is only used in MY2007 and newer light-duty motor vehicles, EPA has developed a proposed rule (described below) with the express purpose of mitigating the potential for misfueling of E15 into vehicles and engines not approved for its use. EPA believes the proposed safeguards against misfueling would provide the most practical way to mitigate the potential for misfueling with E15. Moreover, the proposed rule, when adopted, would satisfy the misfueling mitigation conditions of today's partial waiver described below and would promote the successful introduction of E15 into commerce. However, if parties covered by this waiver (fuel and fuel additive manufacturers, which include renewable fuel producers and importers, petroleum refiners and importers, and ethanol blenders) desire to introduce E15 into commerce prior to a final rule being issued, they may do so provided they submit and EPA approves a plan that demonstrates that the misfueling mitigation conditions will be sat-

isfied. In addition to the misfueling mitigation conditions, E15 must also meet certain fuel quality specifications before it may be introduced into commerce.

To receive a waiver, as prescribed by the Clean Air Act, a fuel or fuel additive manufacturer must demonstrate that a new fuel or fuel additive will not cause or contribute to the failure of an engine or vehicle to achieve compliance with the emission standards to which it has been certified over its useful life. Reflecting that EPA's emission standards have continued to evolve and become more stringent over time, the in-use fleet is composed of vehicles and engines spanning not only different technologies, but also different emissions standards. Since ethanol affects different aspects of emissions, a wide range of data and information covering a wide range of highway and nonroad vehicles, engines, and equipment would be necessary for approval of an E15 waiver that would allow E15 to be introduced into commerce for use in all motor vehicles and all other engines and vehicles using motor vehicle gasoline ("full waiver"). Growth Energy did not provide the necessary information to support a full waiver in several key areas, especially long-term durability emissions data necessary to ensure that all motor vehicles, heavy-duty gasoline highway engines and vehicles, highway and off- highway motorcycles and nonroad products would continue to comply with their emission standards over their full useful life. In 2008, DOE began emissions durability testing on 19 Tier 2 motor vehicle models that would provide this data for MY2007 and newer light-duty motor vehicles ("DOE Catalyst Study").[2] Consequently, the Agency delayed a deci-

[2] DOE embarked on the study, in consultation with EPA, auto

sion until the DOE test program was completed for these motor vehicles in September 2010.

EPA reached its decision on the waiver request based on the results of the DOE Catalyst Study and other information and test data submitted by Growth Energy and in public comments. EPA also applied engineering judgment, based on the data in reaching its decision. Specifically, consistent with past waiver decisions, the Agency evaluated Growth Energy's waiver request and made its decision based on four factors: (1) Exhaust emissions impacts – long-term (known as durability) and immediate; (2) evaporative system impacts – both immediate and long-term; (3) the impact of materials compatibility on emissions; and, (4) the impact of drivability and operability on emissions. The Agency's conclusions are summarized below and additional information on each subject is provided later in this decision document.

MY2007 and Newer Light-Duty Motor Vehicles

For MY2007 and newer light-duty motor vehicles, the DOE Catalyst Study and other information before EPA adequately demonstrates that the impact of E15 on overall emissions, including both immediate[3] and durability related emissions, will not cause or

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manufacturers, fuel providers and others, after enactment of the Energy Independence and Security Act of 2007, which significantly expanded the Federal Renewable Fuel Standard Program for increasing the use of renewable fuels in transportation fuel in order to reduce imported petroleum and emissions of greenhouse gases.

[3] In past waiver decisions, we have referred to 'immediate" emissions as "instantaneous" emissions. "Immediate" and "instantaneous" are synonymous in this context.

contribute to violations of the emissions standards for these motor vehicles. Likewise, the data and information adequately show that E15 will not lead to violations of the evaporative emissions standards, so long as the fuel does not exceed a Reid Vapor Pressure (RVP) of 9.0 psi in the summertime control season.[4] The information on materials compatibility and drivability also supports this conclusion.

Durability/Long-Term Exhaust Emissions

The DOE Catalyst Study involved 19 high sales volume car and light-duty truck models (MY2005–2009 motor vehicles produced by the top U.S. sales-based automobile manufacturers) that are all designed for and subject to the Tier 2 motor vehicle emission standards. The purpose of the program was to evaluate the long term effects of E0 (gasoline that contains no ethanol and is the certification test fuel for emissions testing), E10, E15, and E20 (a gasoline-ethanol blend containing 20 vol% ethanol) on the durability of the exhaust emissions control system, especially the catalytic converter (catalyst), for Tier 2 motor vehicles. Analysis of the motor vehicles' emissions results at full useful life (120,000 miles) and emissions deterioration rates showed no significant difference between the E0 and E15 fueled groups. Three motor vehicles aged on E0 fuel had failing emissions levels and one additional motor vehicle failed one of several replicate tests. One E15-aged

[4] EPA regulates the vapor pressure of gasoline sold at retail stations during the summer ozone season (June 1 to September 15) to reduce evaporative emissions from gasoline that contribute to ground-level ozone and diminish the effects of ozone-related health problems. Gasoline needs a higher vapor pressure in the wintertime for cold start purposes.

motor vehicle had failing emissions.[5] However, none of the emissions failures appeared to be related to the fuel used. There were no emissions component or material failures during aging that were related to fueling. In addition, a review of the emission deterioration rates over the course of the test program revealed no statistically significant difference in emissions deterioration with E15 in comparison to E0. Using standard statistical tools, the test results support the conclusion that E15 does not cause or contribute to the failure of MY2007 and newer light-duty motor vehicles in achieving their emissions standards over their useful lives. These results confirm EPA's engineering assessment that the changes manufacturers made to their motor vehicles (calibration, hardware, *etc.*) to comply with the Agency's stringent Tier 2 emission standards (which began to phase in with MY2004) have resulted in the capability of Tier 2 motor vehicles to accommodate the additional enleanment caused by E15 and be compatible with ethanol concentrations up to E15.[6]. EPA's certification data show that all gasoline-fueled cars and light-duty trucks were fully phased in to the Tier 2 standards by MY2007 even though the program did not require the phase-in to be complete until MY2009. Consequently, EPA believes it appropriate to apply these test results to all MY2007 and newer light-duty motor vehicles.

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[5] It should be noted that the Dodge Caliber vehicle aged on E15 failed Tier 2 Bin 5 FUL standards on E0. However, this vehicle met Tier 2 Bin 5 FUL standards when tested on E15. The Agency could not determine the cause.

[6] *See* 65 FR 6698 (February 10, 2000).

Immediate Exhaust Emissions

Scientific information supports a conclusion that motor vehicles experience an immediate emissions impact independent of motor vehicle age (and therefore emission control technology) when operating on gasoline- ethanol blends. Nitrogen oxide (NO_X) emissions generally increase while volatile organic compound (VOC) and carbon monoxide (CO) emissions decrease. The available data supports a conclusion that the immediate emissions impacts of E15 on Tier 2 motor vehicles are likely to have the same pattern as the immediate emissions impacts of E10 on older motor vehicles (*i.e.*, NO_X emissions increase while VOC and CO emissions decrease). Although the magnitude of the immediate impact is expected to be slightly greater with E15, Tier 2 motor vehicles generally have a significant compliance margin at the time of certification and later on in-use (when they are in customer service) that should allow them to meet their emission standards even if they experience the predicted immediate NO_X increases from E15 when compared to E0. The results of the DOE Catalyst Study reflect both the immediate emissions effects as well as any durability effects as described above, and the Tier 2 motor vehicles continued to comply with their emissions standards at their full useful life. As noted above, none of the emissions failures appeared to be related to the fuel used. Based on this immediate exhaust emissions information, coupled with the durability test data and conclusions, E15 is not expected to cause Tier 2 motor vehicles to exceed their exhaust standards over their useful lives when operated on E15.

Evaporative Emissions

Both diurnal and running loss evaporative emissions increase as fuel volatility increases. Diurnal evaporative emissions occur when motor vehicles are not operating and experience the change in temperature during the day, such as while parked. Running loss evaporative emissions occur while motor vehicles are being operated. Reid Vapor Pressure (RVP) is the common measure of the volatility of gasoline. E15 that meets an RVP limit of 9.0 pounds per square inch (psi) during the summer (which is equal to the RVP of E0) should not produce higher diurnal or running loss evaporative emissions than E0. We expect MY2007 and newer vehicles to meet evaporative emissions standard on 9.0 psi E15. There are concerns with E15 having an RVP greater than 9.0 psi. When ethanol is blended at 15 vol%, a 10.0 psi RVP fuel compared to 9.0 psi RVP fuel will have substantially higher evaporative emissions levels that must be captured by the emissions control system (a carbon filled canister and related system elements). This increase in evaporative emissions is beyond what manufacturers have been required to control, based on the motor vehicle certification testing for the emissions standards. Test results highlight the concern that fuel with an RVP greater than 9.0 psi during the summer will lead to motor vehicles exceeding their evaporative emission standards in-use. Additionally, as explained in the misfueling mitigation measures proposed rule, EPA interprets the 1.0 psi waiver in CAA section 211(h) as being limited to gasoline-ethanol blends that contain 10 vol% ethanol. Therefore, given the significant potential for increased evaporative emissions at higher gasoline volatility levels, and the lack of data to resolve how

this would impact compliance with the emissions standards, today's waiver is limited to E15 with a summertime RVP no higher than 9.0 psi.

Other potential issues for evaporative emissions of motor vehicles operated on E15 are increased permeation and long- term (durability) impacts.[7] Available test data indicate that for Tier 2 motor vehicles any increase in evaporative emissions as a result of permeation is limited and within the evaporative compliance margins for these motor vehicles. This is consistent with the demonstration of evaporative emissions system durability after aging on E10 that was required beginning with the Tier 2 motor vehicle standards, for the purpose of limiting permeation. With respect to durability of the evaporative emissions control systems, data from several aspects of the DOE Catalyst Study point to the expected durability of the evaporative emissions control system of Tier 2 motor vehicles on E15. First, there appears to be no evidence of an increase in evaporative emissions system onboard diagnostic system codes being triggered by E15 compared to E0. Second, teardown results of the 12 motor vehicles tested (six models with E0 and six models with E15) found no abnormalities for E15 motor vehicles compared to E0 motor vehicles.[8] Finally, evaporative testing on four of the Tier 2 motor vehicles over the course of the test program found no increased deterioration in evapo-

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[7] Permeation refers to the migration of fuel molecules through the walls of elastomers used for fuel system components.

[8] Southwest Research Institute Project 08–58845 Status Report, "Powertrain Component Inspection from Mid-Level Blends Vehicle Aging Study," September 6, 2010. See EPA–HQ–OAR–2009–0211– 14016.

rative emissions with E15 in comparison to E0.[9] Therefore, after taking into account all of these sources of evaporative emissions data, the evidence supports a conclusion that as long as E15 meets a summertime control season gasoline volatility level of no higher than 9.0 psi, E15 is not expected to cause or contribute to exceedances of the evaporative emission standards over the full useful life of Tier 2 motor vehicles.

Materials Compatibility

Materials compatibility is a key factor in considering a fuel or fuel additive waiver insofar as poor materials compatibility can lead to serious exhaust and evaporative emission compliance problems not only immediately upon use of the new fuel or fuel additive, but especially over the full useful life of vehicles and engines. As part of its E15 waiver application, Growth Energy submitted a series of studies completed by the State of Minnesota and the Renewable Fuels Association (RFA) that investigated materials compatibility of motor vehicle engines and engine components using three test fuels: E0, E10, and E20. The materials studied included what were considered to be many of the common metals, elastomers, and plastics used in motor vehicle fuel systems. Growth Energy concluded that E15 would not be problematic for current automotive or fuel dispensing equipment. While directionally illustrative, the materials compatibility information submitted by

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[9] Environmental Testing Corporation NREL Subcontract JGC–9–99141–01 Presentation, 'Vehicle Aging and Comparative Emissions testing Using E0 and E15 Fuels: Evaporative Emissions Results," August 31, 2010. See EPA–HQ–OAR–2009–0211–14015.

Growth Energy does not encompass all materials used in motor vehicle fuel systems, and the test procedures used are not representative of the dynamic real-world conditions under which the materials must perform. The information is therefore insufficient by itself to adequately assess the potential material compatibility of E15. However, the information generated through the DOE Catalyst Study demonstrates that MY2007 and newer light-duty motor vehicles will not experience materials compatibility issues that lead to exhaust or evaporative emission exceedances. The DOE Catalyst Study supports the Agency's engineering assessment that newer motor vehicles such as those subject to EPA's Tier 2 standards, were designed to encounter more regular ethanol exposure compared to earlier model year motor vehicles. Other regulatory requirements also placed an emphasis on real world motor vehicle testing, which in turn prompted manufacturers to consider different available fuels when developing and testing their emissions systems. Additionally, beginning with Tier 2, the evaporative durability demonstration procedures required the use of E10. As a result, based on the information before us, we do not expect E15 to raise emissions related materials compatibility issues for Tier 2 motor vehicles.

Drivability and Operability

There is no evidence from any of the test programs cited by Growth Energy or in the data from the DOE Catalyst Study of driveability issues for Tier 2 motor vehicles fueled with E15 that would indicate that use of E15 would lead to increased emissions or that might cause motor vehicle owners to want to tamper with the emission control system of their motor vehi-

cle. The Agency reviewed the data and reports from the different test programs, and found no specific report of driveability or operability issues across the many different motor vehicles and duty cycles, including lab testing and in-use operation.

MY2000 and Older Light-Duty Motor Vehicles

For MY2000 and older motor vehicles, the data and information before EPA fail to adequately demonstrate that the impact of E15 on exhaust emissions – both immediate and durability-related – will not cause or contribute to violations of the emissions standards for these motor vehicles. MY2000 and older motor vehicles do not have the sophisticated emissions control systems of today's Tier 2 motor vehicles, and there is an engineering basis to believe they may experience conditions affecting catalyst durability that lead to emission increases if operated on E15. This emissions impact, over time, combined with the expected immediate increase in NOX emissions from the use of E15, provides a clear basis for concern that E15 could cause these motor vehicles to exceed their emissions standards over their useful lives. Furthermore, some MY2000 and older motor vehicles were likely designed for no more than limited exposure to ethanol, since gasoline- ethanol blends were not used in most areas of the country at the time they were designed. Their fuel systems, evaporative emissions control systems, and internal engine components may not have been designed and tested for long-term durability, materials compatibility, or drivability with fuels containing ethanol. The limited exhaust emissions durability test data, evaporative emissions durability test data, and real-world materials compatibility test data either provided by

Growth Energy in their petition or available in the public domain do not address or resolve these concerns. Therefore, the information before the Agency is not adequate to make the demonstration needed to grant a waiver for the introduction into commerce of E15 for use in MY2000 and older light- duty motor vehicles.

MY2001–2006 Light-Duty Motor Vehicles

EPA is deferring a decision on MY2001–2006 light-duty motor vehicles. DOE is in the process of conducting additional catalyst durability testing that will provide data regarding MY2001–2006 motor vehicles. The DOE testing is scheduled to be completed by the end of November 2010. EPA will make the DOE test results available to the public and consider the results and other available data and information in making a determination on the introduction into commerce of E15 for use in those model year motor vehicles. EPA expects to make a determination for these motor vehicles shortly after the results of DOE testing are available.

Nonroad Engines, Vehicles, and Equipment (Nonroad Products)

The nonroad product market is extremely diverse. Nonroad products with gasoline engines include lawn mowers, chainsaws, forklifts, boats, personal watercraft, and all-terrain vehicles. Growth Energy did not provide information needed to broadly assess the potential impact of E15 on compliance of nonroad products with applicable emissions standards. Nonroad products typically have more basic engine designs, fuel systems, and controls than light-duty motor vehicles. The Agency has reasons for concern with the use of E15 in nonroad products, particularly

with respect to long-term exhaust and evaporative emissions durability and materials compatibility. The limited information provided by Growth Energy and commenters, or otherwise available in the public domain, did not alleviate these concerns. As such, the Agency cannot grant a waiver for introduction into commerce of E15 motor vehicle gasoline that is also for use in nonroad products.

Heavy-Duty Gasoline Engines and Vehicles

Given their relatively small volume compared to light-duty motor vehicles, heavy-duty gasoline engines and vehicles have not been the focus of test programs and efforts to assess the potential impacts of E15 on them. Growth Energy did not provide any data specifically addressing how heavy-duty gasoline engines' and vehicles' emissions and emissions control systems would be affected by the use of E15 over the full useful lives of these vehicles and engines. Additionally, from a historical perspective, the introduction of heavy-duty gasoline engine and vehicle technology has lagged behind the implementation of similar technology for light-duty motor vehicles. Similarly, emission standards for this sector have lagged behind those of light-duty motor vehicles, such that current heavy-duty gasoline engine standards remain comparable, from a technology standpoint to older light- duty motor vehicle standards. Consequently, we believe the concerns expressed above regarding MY2000 and older motor vehicles are also applicable to the majority of the in-use fleet of heavy-duty gasoline engines and vehicles. As such, the Agency cannot grant a waiver for the introduction into commerce of E15 for use in heavy-duty gasoline engines and motor vehicles.

Highway and Off-Highway Motorcycles

Like heavy-duty gasoline engines and vehicles, highway and off-highway motorcycles have not been the focus of E15 test programs. Growth Energy did not provide any data addressing how motorcycle emissions and emissions control systems would specifically be affected by the use of E15 over their full useful lives. While newer motorcycles incorporate some of the advanced fuel system and emission control technologies that are found in passenger cars and light-duty trucks, such as electronic fuel injection and catalysts, many do not have the specific control technology of today's motor vehicles (advanced fuel trim control) that would allow them to adjust to the higher oxygen content of E15. More importantly, older motorcycles do not have any of these technologies and are therefore more on par with nonroad products in some cases and MY2000 and older motor vehicles in others. As such, the Agency cannot grant a waiver for the introduction into commerce of E15 for use in highway and off-highway motorcycles.

Conditions on Today's Partial Waiver

There are two types of conditions being placed on the partial waiver being granted today: Those for mitigating the potential for misfueling of E15 in all vehicles, engines and equipment for which E15 is not approved, and those addressing fuel and ethanol quality. All of the conditions are discussed further below and are listed in Section XII.

EPA believes that the misfueling mitigation measures in the proposed rule accompanying today's waiver decision would provide the most practical way to ensure that E15 is only used in vehicles for which it is approved. However, if any fuel or fuel additive

manufacturer desires to introduce into commerce E15, gasoline intended for use as E15, or ethanol intended for blending with gasoline to create E15, prior to the misfueling mitigation measures rule becoming final and effective, they may do so provided they implement all of the conditions of the partial waiver, including an EPA- approved plan that demonstrates that the fuel or fuel additive manufacturer will implement the misfueling mitigation conditions discussed below.

Misfueling Mitigation Notice of Proposed Rulemaking (NPRM)

As mentioned above, EPA is proposing a regulatory program that would help mitigate the potential for misfueling with E15 and promote the successful introduction of E15 into commerce. The proposal includes several provisions that parallel the misfueling mitigation conditions on the E15 waiver. First, the proposed rule would prohibit the use of gasoline-ethanol blended fuels containing greater than 10 vol% and up to 15 vol% ethanol in vehicles and engines not covered by the partial waiver for E15. Second, the proposed rule would require all fuel dispensers to have a label if a retail station chooses to sell E15, and it seeks comment on separate labeling requirements for blender pumps and fuel pumps that dispense E85. Finally, the proposed rule would require product transfer documents (PTDs) specifying ethanol content and RVP to accompany the transfer of gasoline blended with ethanol as well as a national survey of retail stations to ensure compliance with the these requirements. In addition to proposing actions to mitigate misfueling, the proposed rule would modify the Reformulated Gasoline ("RFG") program

by updating the Complex Model to allow fuel manufacturers to certify batches of gasoline containing up to 15 vol% ethanol. Once adopted, these regulations would facilitate the introduction of E15 into commerce under this partial waiver, as certain requirements in the regulations would satisfy certain conditions in the waiver. If EPA adopts such a rule, EPA would consider any appropriate modifications to the conditions of this waiver.

II. Introduction

A. Statutory Background

Section 211(f)(1) of the Clean Air Act ("CAA" or "the Act") 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 use by any person in motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 206 of the Act. The Environmental Protection Agency ("EPA" or "the Agency") last issued an interpretive rule on the phrase "substantially similar" at 73 FR 22281 (April 25, 2008). Generally speaking, this interpretive rule describes the types of unleaded gasoline that are likely to be considered "substantially similar" to the unleaded gasoline utilized in EPA's certification program by placing limits on a gasoline's chemical composition as well as its physical properties, including the amount of alcohols and ethers (oxygenates) that may be added to gasoline. Fuels that are found to be "substantially similar" to EPA's certification fuels may be registered and introduced into commerce. The current "substantially similar" in-

terpretive rule for unleaded gasoline allows oxygen content up to 2.7% by weight for certain ethers and alcohols.[10] E10 (a gasoline- ethanol blend containing 10 vol% ethanol) contains approximately 3.5% oxygen by weight and received a waiver of this prohibition by operation of law under section 211(f)(4).[11] E15 (gasoline- ethanol blended fuels containing greater than 10 vol% ethanol and up to 15 vol% ethanol) has greater than 2.7 wt% oxygen content, and Growth Energy has applied for a waiver under section 211(f)(4) of the Act.

Section 211(f)(4) of the Act provides that upon application of any fuel or fuel additive manufacturer, the Administrator may waive the prohibitions of section 211(f)(1) if the Administrator determines that the applicant has established that such fuel or fuel additive, 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 motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards to which it has been certified pursuant to sections 206 and 213(a). In other words, the Administrator may grant a waiver for a prohibited fuel or fuel additive if the applicant can demonstrate that the new fuel or fuel additive will

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[10] *See* 56 FR 5352 (February 11, 1991).

[11] As explained at 44 FR 20777 (April 6, 1979), EPA did not grant or deny a waiver request for a fuel containing 90% unleaded gasoline and 10% ethyl alcohol within 180 days of receiving that request. By operation of a provision that was at that time included in section 211(f)(4), E10 was no longer subject to the prohibitions in CAA section 211(f)(1) of the Act. That provision has subsequently been removed.

not cause or contribute to engines, vehicles or equipment to fail to meet their emissions standards over their useful lives. The statute requires that the Administrator shall take final action to grant or deny the application, after public notice and comment, within 270 days of receipt of the application.

The current section 211(f)(4) reflects the following changes made by the Energy Independence and Security Act of 2007: (1) Requires consideration of the impact on nonroad engines and nonroad vehicles in a waiver decision; (2) extends the period allowed for consideration of the waiver request application from 180 days to 270 days; and, (3) deletes a provision that resulted in a waiver request becoming effective by operation of law if the Administrator made no decision on the application within 180 days of receipt of the application.[12]

B. Growth Energy Application and Review Process

On March 6, 2009, Growth Energy and 54 ethanol manufacturers (hereafter "Growth Energy") submitted an application to the U.S. Environmental Protection Agency (EPA) for a waiver of the substantially similar prohibition. This application seeks a waiver for gasoline containing up to 15 vol% ethanol. On April 21, 2009, EPA published notice of the receipt of the application, and EPA requested public comment on all aspects of the waiver application for assisting the Administrator in determining whether the statutory basis for granting the waiver request for E15

[12] As noted previously, the Energy Independence and Security Act of 2007 also substantially increased the mandated renewable fuel requirements of the Renewable Fuels Standard Program.

has been met.[13] EPA originally provided a 30-day period for the public to respond. The deadline for public comment was May 21, 2009.

After multiple requests for additional time to comment, EPA agreed that additional time for comments was appropriate and that an extension of the comment period would aid in providing these stakeholders and others an adequate amount of time to respond to the complex legal and technical issues that result from possibly allowing E15 to be sold commercially. Accordingly, on May 20, 2009, EPA published a **Federal Register** notice extending the public comment period for the E15 waiver application until July 20, 2009.[14] For EPA's response to more recent requests for an additional comment period, see section IX.

The Agency received approximately 78,000 comments on the waiver application. The overwhelming majority of these comments were brief comments from individuals indicating either general support for or opposition to the E15 waiver application. The Agency also received a large number of comments from a variety of organizations which substantively addressed the questions which EPA posed in the **Federal Register** notice announcing receipt of the application. These comments are summarized and addressed below.

In addition to the information submitted by Growth Energy and commenters, the Department of Energy (DOE) has been performing, and continues to perform, testing on a variety of motor vehicles focused

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[13] *See* 74 FR 18228 (April 21, 2009).

[14] *See* 74 FR 23704 (May 20, 2009).

on the effect E15 might have on motor vehicles after long-term use of E15 ("DOE Catalyst Study"). This testing is a significant source of information on the effects of E15 on the durability of motor vehicles' emissions control systems, a key technical issue to be addressed in EPA's waiver review. This kind of testing requires thousands of miles of mileage accumulation (or its equivalent using a test cell), and the collection of such data requires a significant amount of time to complete.

Coordinating with EPA and stakeholders, DOE expedited the durability testing, first focusing on newer motor vehicles. Realizing that it would take a significant amount of time (months) to finish collecting and evaluating the durability data, EPA notified Growth Energy in a letter on November 30, 2009, that it was not issuing a decision on the waiver at that time but instead planned to issue a decision at a later date based on the need to assess the critical data being generated by the DOE catalyst durability test program.

The DOE Catalyst Study is comprehensive. A total of 82 vehicles are expected to undergo full useful life testing. Motor vehicles are accumulating mileage under an accelerated protocol, which generally results in each motor vehicle being tested over 6–9 months. DOE has completed the first phase of this testing which focused on light-duty motor vehicles certified to Federal Tier 2 emissions standards. The analysis and evaluation of not only this durability data, but all of the data relevant to the Growth Energy application, as well as EPA's partial waiver decision, is discussed and explained below. DOE should complete testing on vehicles certified to Na-

tional Low Emission Vehicle (NLEV) and Tier 1 Federal emission standards by the end of November.

Various parties have also suggested allowances for the use of E12 (gasoline- ethanol blended fuel that contains 12 vol% ethanol) for all gasoline-powered vehicles and engines. The issue of E12 is also discussed separately below in Section VIII.

C. Today's Notice of Proposed Rulemaking (NPRM) on Misfueling Mitigation Measures

As noted above, today's partial waiver decision places several conditions on fuel and fuel additive manufacturers to mitigate the use of E15 in nonroad products, highway and off-highway motorcycles, heavy-duty gasoline engines and vehicles, and motor vehicles older than MY2007.

In a separate notice, we are today proposing regulatory provisions that parallel many of the conditions placed on the E15 partial waiver. Specifically, we are proposing a prohibition on the use of gasoline containing greater than 10 vol% ethanol in MY2000 and older non-flex fueled light-duty motor vehicles, heavy-duty gasoline engines and vehicles, highway and off-highway motorcycles, and all nonroad products, based on findings under both sections 211(c)(1)(A) and (B) of the CAA. The prohibition is necessary based on the potential for increased emissions resulting from the use of E15. In order to facilitate the entry of E15 into commerce for use in MY2007 and newer motor vehicles, while protecting vehicles and engines not approved for use of E15, this rulemaking proposes fuel pump labeling provisions to mitigate the misfueling of motor vehicles and other engines, vehicles and equipment prohibited from using a motor vehicle gasoline containing

ethanol in levels higher than E10. We are also proposing additional requirements for fuels that contain greater than 10 vol% ethanol and no more than 15 vol% ethanol, including the proper documentation of ethanol content on product transfer documents and requirements for a national survey to ensure the proper placement of E15 labels and the proper placement of gasoline-ethanol blends in the appropriate gasoline storage tanks; these provisions should help support the effectiveness of a labeling program.

[CONTENT OMITTED]

IV. Waiver Submissions and Analysis of Light-Duty Motor Vehicle Issues

[CONTENT OMITTED]

A. MY2007 and Newer Light-Duty Motor Vehicles

[CONTENT OMITTED]

d. Durability Studies and EPA Analysis

[CONTENT OMITTED]

i. DOE Catalyst Study Overview

The Intermediate Ethanol Blends Emissions Controls Durability Test Program ("DOE Catalyst Study") was established in 2008, following enactment of the Energy Independence and Security Act of 2007, to investigate the potential impacts of gasoline-ethanol blend levels above 10% on the durability of vehicle emissions control systems. The program was subcontracted to Southwest Research Institute (SwRI), Transportation Research Center (TRC) and Environmental Testing Corporation (ETC).

[CONTENT OMITTED]

2. Exhaust Emissions – Immediate Effects for MY2007 and Newer Light- Duty Motor Vehicles

[CONTENT OMITTED]

d. Conclusion

The Agency believes that the data above, coupled with the average compliance margins, are sufficient to show that the immediate exhaust emissions effects by themselves would not cause motor vehicles to exceed their exhaust standards over their useful lives. As discussed earlier, however, whether the fuel or fuel additive will cause motor vehicles to exceed their exhaust emission standards requires consideration of the combined impact of immediate emissions increases and the long-term exhaust emissions (durability) effects.[59]

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[59] Separately, the Agency has been performing analysis needed

[CONTENT OMITTED]

V. Nonroad Engines and Equipment (Nonroad Products)

A. Introduction

Past waiver decisions were made solely on the basis of the emission impacts of the fuel or fuel additive on motor vehicles. However, with the passage of the Energy Independence and Security Act of 2007, CAA section 211(f)(4) was expanded to require that the emissions impacts on nonroad engines and nonroad vehicles (collectively referred to as nonroad products in this section) also be taken into consideration when reviewing a waiver application. Nonroad products for the following discussion is defined as those nonroad products that contain spark-ignition engines and are used to power such nonroad vehicles and equipment as boats, snowmobiles, generators, lawnmowers, forklifts, ATVs, and many other similar products. These nonroad products are typically used only seasonally and occasionally during the season which is very different from the daily use of automobiles. Due to the seasonal and occasional use, consumers can hold onto and use their nonroad products

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to support the anti-backsliding analysis required under the Energy Independence and Security Act. We are now in the process of assessing possible control measures to offset the potential increases in ozone and particulate matter that are expected to result from the increased use of renewable fuels required by EISA and in response to the May 21, 2010 presidential memorandum directive. (NOX emissions contribute to the formation of both pollutants.) We will incorporate the results of our analysis under this assessment in a proposal on new motor vehicle and fuel control measures.

over decades with some being 30 or 40 years old. Nonroad engines are typically more basic in their engine design and control than engines and emissions control systems used in light-duty motor vehicles, and commonly have carbureted fuel systems (open loop) and air cooling (extra fuel is used in combustion to help control combustion and exhaust temperatures).

[CONTENT OMITTED]

IX. Legal Issues Arising in This Partial Waiver Decision

A. Partial Waiver and Conditions of E15 Use

As stated in EPA's notice for comment on the E15 waiver request, a possible outcome after the Agency reviewed the record of scientific and technical information may be an indication that a fuel up to E15 could meet the criteria for a waiver for some vehicles and engines but not for others. In this context, the Agency noted that one interpretation of section 211(f)(4) is that the waiver request could only be approved for that subset of vehicles or engines for which testing supports its use. We also stated that such a partial waiver for use of E15 may be appropriate if adequate measures or conditions could be implemented to ensure its proper use. EPA invited comment on the legal aspects regarding a waiver that restricted the use of E15 to a subset of vehicles or engines, and the potential ability to impose conditions on such a waiver.

We received a number of comments expressing opposition to a partial waiver based on a lack of legal

authority under section 211(f)(4). Some of those same commenters, as well as others, also stated that EPA should *first* conduct and finalize a rulemaking under section 211(c) to mitigate the potential for misfueling and limit the types of mobile sources for which E15 may be used.

Many commenters pointed to the language in section 211(f)(4) and argued that the use of the word "any" in the phrase "will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine," means that if the waiver applicant has not established that the use of E15 meets the waiver criteria for *any* type of motor vehicle or nonroad product, then the waiver must be denied. Noting the statutory provision's use of the word "any," commenters asserted that should E15 cause or contribute to a failure of *any* emission control device to achieve compliance under *any* single circumstance, then the waiver applicant has not met the waiver criteria and the waiver must be denied in its entirety. Another commenter suggested that the word "any" modifies "emission control device" and that if an emission control device for *any* of the types of vehicles in the parenthetical language in section 211(f)(4) is implicated, then the waiver must be denied. Still another commenter suggested that "In amending section 211(f)(4) in 2007 with enactment of the Energy Independence and Security Act, Congress expanded the types of devices for which an applicant must establish that a fuel or fuel additive will not cause or contribute to a failure while retaining the prohibition of causing or contributing to the failure of

'any' device. With the expansion of section 211(f)(4), EPA is directed to only approve a waiver if all nonroad and on- road vehicles and engines would not be adversely affected." Commenters asserted that the provision effectively required that there should be a "general purpose" fuel. The commenters noted that EPA would contradict this direction if it failed to address impacts on any portion of the vehicles or engines. Essentially, the implication of all of these assertions is that EPA can only grant a waiver if *all* emission control devices in *all* types of mobile sources listed in the statute will not be adversely impacted by E15.

We also received several comments suggesting that if EPA desires to grant a partial waiver, it must first proceed under section 211(c) with a separate and full rulemaking to analyze the costs, benefits, necessary lead time, and the technological feasibility of a partial waiver. The commenters stated that this rulemaking should also include an analysis of the partial prohibition and controls on the use of E15 and include detailed regulatory requirements to ensure adequate control measures and to mitigate misfueling with E15. Commenters stated that the inclusion in section 211(f)(4) of 270 days by which EPA must act does not allow enough time to address all the necessary marketing and other issues and thus Congress could not have envisioned a partial waiver.

Growth Energy and ACE stated that the Agency has the authority to grant a partial waiver or that EPA's authority for a partial waiver is a permissible interpretation of CAA authority, but that the evidence suggests a waiver for all vehicles and engines on the road today is appropriate.

We also received comment noting that the prohibition in section 211(f)(1) only applies to the use of any fuel or fuel additive in light-duty motor vehicles, indicating that the grant of the waiver of this prohibition under section 211(f)(4) is not dependent on findings with respect to nonroad products. The commenter further noted that although EPA has the authority and discretion to look at the effect of a fuel or fuel additive on nonroad products (in the context of examining impacts on motor vehicles), nothing in the statute or legislative history indicates that the amendment to section 211(f)(4) sought to limit EPA's discretion for issuing a waiver for motor vehicles. In light of Congress' decision in the Energy Independence and Security Act of 2007 to substantially increase the Renewable Fuel Standard Program's volume mandates, this commenter suggests that reading the word "any" in section 211(f)(4) as amended by the 2007 Energy Act to apply to anything more than any emission control systems on the subset of motor vehicles would be at odds with congressional intent.

Regarding EPA's authority to impose conditions on a waiver, we received comment stating that EPA has the authority to grant waivers subject to a broad range of conditions that ensure that the fuel or fuel additive will not cause or contribute to the failure of any emission control device or system. One commenter pointed to four of the eleven waivers EPA has issued since 1977 that have placed conditions on a waiver.[135] In EPA's first waiver decision in 1978, the

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[135] *See* Sun Petroleum Products Co.; Conditional Grant of Application for Fuel Waiver for 0–5.5% methanol/TBA, 44 FR 37,074 (June 25, 1979); E.I.DuPont de Nemours & Co.; Conditional Grant of Application for Fuel Waiver for 5% methanol/2% cosolvent alcohols, specified corrosion inhibitor, Decision Docu-

Agency discussed its authority to grant conditional waivers, noting that it may grant a waiver "conditioned on time or other limitations," so long as "the requirements of section 211(f)(4) are met."[136] This commenter also points to the legislative history of section 211(f)(4) which makes clear that EPA has authority to grant conditional waivers. The 1977 Senate Report regarding section 211(f)(4) states: "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." Senate Report No. 95–125, 95th Congress, 1st Session 91 (1977), pg 91.

The issue before EPA is whether it is reasonable to interpret section 211(f)(4) as authorizing EPA to grant a partial waiver under appropriate conditions, as in today's decision. If Congress spoke directly to the issue and clearly intended to not allow such a partial waiver, then EPA could not do so. However, if Congress did not indicate a precise intention on this issue, and we believe that section 211(f)(4) is

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ment, 51 FR 39,800 (Oct. 31, 1986); Texas Methanol Corp.; Conditional Grant of Application for Fuel Waiver for Octamix (5% methanol, 2.5% cosolvent alcohols, specified corrosion inhibitor), Decision Document, 53 FR 33,846 (Sept. 1, 1988); Sun Refining and Marketing Co.; Conditional Grant of Application for Fuel Waiver for 15% MTBE, Decision Document, 53 FR 33,846 (Sept. 1, 1988). These conditions have taken various forms, from restrictions on the chemical composition and additive concentration of the waiver fuel and requirements to meet ASTM and seasonal volatility standards, to specific testing protocols and mandates that a fuel manufacturer take "all reasonable precautions" to guard against unauthorized uses of the waiver fuel.

[136] *See* Ethyl Corp., Denial of Application for Fuel Waiver for MMT (1/16 and 1/32 gpg Mn), 43 FR 41,424 (Sept. 18, 1978).

ambiguous in this regard, then a partial waiver with appropriate conditions would be authorized if it is a reasonable interpretation. EPA has considered the text and structure of this provision, as well as the companion prohibition in section 211(f)(1), and believes it is a reasonable to interpret section 211(f)(4) as providing EPA with discretion to issue this partial waiver with appropriate conditions.

It is important to put section 211(f)(4) in its statutory context. The prohibition in section 211(f)(1) and the waiver provision in section 211(f)(4) should be seen as parallel and complementary provisions. Together they provide two alternative paths for entry into commerce of fuels and fuels additives. The section 211(f)(1) prohibition allows fuels or fuel additives to be introduced into commerce as long as they are substantially similar to fuel used to certify compliance with emissions standards, and the section 211(f)(4) waiver provision allows fuels or additives to be introduced into commerce if they will not cause or contribute to motor vehicles and nonroad products to fail to meet their applicable emissions standards. EPA's authority to issue a waiver is coextensive with the scope of the prohibition – whatever is prohibited can also be the subject of a waiver if the criteria for granting a waiver are met. In addition, the criteria for each provision have similar goals. They are aimed at providing flexibility to the fuel and fuel additive industry by allowing a variety of fuels and fuel additives into commerce, without limiting fuels and additives to those products that are identical to those used in the emissions certification process. This flexibility is balanced by the goal of limiting the potential reduction in emissions benefits from the emissions standards, even if some may occur because a

fuel or fuel additive is not identical to certification fuel or it leads to some emissions increase but not a violation of the standards. Together, these are indications that these provisions are intended to be parallel and complementary provisions.

The section 211(f)(1) prohibition has evolved over time. Initially it was adopted in the 1977 amendments of the Act, and was much more limited in nature. It applied only to fuels or fuel additives for general use, and was also limited to fuels or fuel additives for use in light-duty motor vehicles. EPA interpreted this as applying to bulk fuels or fuel additives for use in unleaded gasoline. The prohibition did not apply to other gasoline, or to diesel fuels or alternative fuels, or to fuel additives that were not for bulk use. It was thus relevant only to the subset of motor vehicles designed to be operated on unleaded gasoline.

In 1990 Congress amended the prohibition and broadened it. It now applies to "any fuel or fuel additive for use by any person in motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine." This extended the scope of the prohibition to apply to all gasoline, to diesel fuel, and to other fuels such as E85. However, the concept of applying this prohibition based on the relevant subset of vehicles continues. For example, a diesel fuel that is introduced into commerce for diesel vehicles does not need to be substantially similar to gasoline fuel or other fuels intended for non-diesel vehicles. This is so even though Congress used the phrase "substantially similar to *any* fuel or fuel addi-

tive utilized in the certification of *any* * * * vehicles or engine" (emphasis supplied). Clearly Congress did not intend the use of the term "any" in the prohibition to always mean all motor vehicles or 100% of the motor vehicle fleet. Diesel fuel does not need to be substantially similar to the fuel used in the certification of gasoline vehicles, and E85 does not need to be substantially similar to fuel used in the certification of diesel vehicles. For example, manufacturers who want to introduce E85 fuel or fuel additives for E85 look to the certification fuel that was used for the subset of vehicles that were certified for use on E85.

In some limited cases, EPA has approved a fuel additive as substantially similar even when it is introduced into commerce for use in just one part of a single vehicle manufacturer's product line. For example, where a fuel additive is considered part of the emissions control system for a vehicle model, and is certified that way by the vehicle manufacturer, then it is not a violation of the substantially similar prohibition for manufacturers of the fuel additive to introduce it into commerce for use in just that very small subset of vehicles as long as it is substantially similar to the fuel additive used in the certification of that vehicle model.[137] In all of these cases, broad to narrow subsets of motor vehicles can be considered when deciding whether the introduction of a fuel or fuel additive for use by that subset of motor vehicles is in compliance with the prohibition.

EPA has in fact applied this construct of this provision in all of its past waiver decisions. EPA has previously said that it is virtually impossible for an ap-

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[137] *See* 54 FR 4834 (November 22, 1989).

plicant to demonstrate that a new fuel or fuel additive does not cause or contribute to *any* vehicle or engine failing to meet its emissions standards. Instead, EPA and the courts allow applicants to satisfy this statutory provision through technical conclusions based on appropriately designed test programs and properly reasoned engineering judgment.[138] For example, the sample size in these test programs does not include *all* motor vehicles in the current fleet; the sample size is comprised of a statistically significant sample of motor vehicles that, once tested, will enable the applicant to extrapolate its findings and make its demonstration. EPA believes that this practice of focusing on a relatively small but representative subset of motor vehicles does not violate the statutory use of the word "any" in this provision.

Since the waiver and the substantially similar provisions are parallel and complementary provisions, this clearly raises the question of whether a waiver can also be based on a subset of motor vehicles meeting the criteria for a waiver. EPA believes the text and construction of section 211(f)(4) supports this interpretation.

First, the term "waive" as used in section 211(f)(4) is not modified in any way. Normally one would read this provision as a general grant of waiver authority, encompassing both partial and total waivers, as long as the waiver criteria are met. Second, the waiver criteria, like section 211(f)(1), have evolved over time. In 1977, the criteria were phrased as providing for a waiver when the fuel or fuel additive "will not cause or contribute to a failure of any emission con-

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[138] *See* 44 FR 10530 (February 21, 1979); *Motor Vehicle Mfrs. Ass'n. et. al. v. EPA*, 768 F.2d 385 (DC Cir. 1985).

trol device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards to which it has been certified." This was not modified in the 1990 amendments. In EISA 2007, Congress amended the waiver criteria, providing for a waiver when the fuel or fuel additive will not "cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards to which it has been certified." Congress uses the term "any" in section 211(f)(4), as it does in several places in section 211(f)(1). One use of the term "any" was deleted in the 2007 amendments, when the parenthetical was broadened to include consideration of nonroad engines and nonroad vehicles as well as motor vehicles. The term "any," however, has always been paired with the consistent use of the singular when referring to vehicles and emissions control systems – "the vehicle" and the emissions standards to which "it" is certified, and the "vehicle in which such device or system is used." Certainly Congress did not state that the applicant has to demonstrate that the fuel or fuel additive would not cause *any* devices or control systems, over the useful lives of the motor vehicles or nonroad products in which they are used, to fail to achieve the emissions standards to which they are certified. If Congress had stated that, then it would be clear, as one commenter suggests, that EPA should only grant a waiver if *all* emission control devices in *all* the types of mobile sources listed would

not be impacted by the fuel. But Congress did not state that.[139]

Several aspects of section 211(f) thus support the reasonableness of EPA's interpretation. The prohibition and the waiver provisions are properly seen as parallel and complementary, and the prohibition properly can be evaluated in terms of appropriate subsets of motor vehicles, notwithstanding the use of the term "any" to modify several parts of the prohibition. This clearly raises the concept of also applying the waiver criteria to appropriate subsets of motor vehicles. "Waive" is reasonably seen as a broad term that generally encompasses a total and a partial waiver, as well as the discretion to impose appropriate conditions. The criteria for a waiver also refer to "any" but the entire provision does not provide a clear indication that Congress intended to preclude consideration of subsets of motor vehicles when considering an application for a waiver. Finally, a partial waiver gives full meaning to all of the provisions at issue.

For example, in this case, granting a partial waiver means that E15 can be introduced into commerce for use in a subset of motor vehicles, MY2007 and newer

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[139] *New York v. EPA*, 443 F.3d 880[ ] (DC Cir. 2006) concerned the use of the word "any" in a different provision in the Clean Air Act and does not lead to any different conclusion here. The Court found that the statutory language, context, and legislative intent of that provision required an expansive meaning of the phrase "any physical change" in the definition of "modification" in CAA section 111(a)(4). EPA is also applying the term 'any" in an expansive manner, but in the context of a subset of motor vehicles. This takes into account the context, text, and purposes of both section 211(f)(1) and (f)(4), which, as discussed above, envisions use of such subsets of vehicles.

light-duty motor vehicles, and only for use in those motor vehicles. For those motor vehicles, EPA is not making a finding of it being substantially similar, but E15 has been demonstrated to not cause or contribute to these motor vehicles exceeding their applicable emissions standards. It will also not cause any other motor vehicles or any other on or off-road vehicles or engines to exceed their emissions standards since it may not be introduced into commerce for use in any other motor vehicles or any other vehicles or engines. Thus, under a partial waiver, as the commenter suggested, all emission control devices in all the types of mobile sources listed will not be adversely impacted by the fuel. It can only be introduced into commerce for those vehicles and engines where it has been shown not to cause emissions problems; for other types of mobile sources, it cannot be introduced into commerce for use in such vehicles and engines. In concept, therefore, the combination of this partial waiver, with appropriate conditions, and partial retention of the substantially similar prohibition, has the same effect as when the criteria for a total waiver has been met – the fuel or fuel additive will only be introduced into commerce for use in a manner that will not cause violations across the fleet of motor vehicles and nonroad products. It can only be introduced into commerce for use in vehicles and engines where it has been shown not to cause violations of the emissions standards, and may not be introduced into commerce for use in other vehicles or engines.

EPA recognizes that a partial waiver raises implementation issues regarding how to ensure that a fuel or fuel additive is only introduced into commerce for use in the specified subset of motor vehicles. The discretion to grant a partial waiver includes the au-

thority and responsibility for determining and imposing reasonable conditions that will allow for effective implementation of a partial waiver. In this case, EPA has conditioned the waiver on various actions that the fuel or fuel additive manufacturer must take. The actions are all designed to help ensure that E15 is only used by the MY2007 and later motor vehicles specified by the waiver. If a fuel or fuel additive manufacturer does not comply with the conditions, then EPA will consider their fuel or fuel additive as having been introduced into commerce for use by a broader group of vehicles and engines than is allowed under the waiver, constituting a violation of the section 211(f)(1) prohibition.

EPA recognizes, as several commenters have suggested, that EPA can impose waiver conditions only on those parties who are subject to the section 211(f)(1) prohibition and the waiver of that prohibition. These parties are the fuel and fuel additive manufacturers. Waiver conditions can apply to them, but cannot apply directly to various downstream parties, such as a retailer who is not also a fuel or fuel additive manufacturer. This is one reason EPA is also proposing specific misfueling mitigation measures in a separate rulemaking under section 211(c), to minimize any risk of misfueling. This will also facilitate compliance with certain of the waiver conditions.

Many commenters suggested that before EPA can grant a waiver of any type under section 211(f)(4), the Agency must first issue a rule under section 211(c) that addresses the proper prohibition and control of a new fuel or fuel additive to the extent necessary before such fuel or fuel additive is permitted

under section 211(f)(4). However, there is no mention of timing in these two statutory provisions and EPA believes it appropriate to consider the merits of a section 211(f)(4) waiver request on its face.

B. Notice and Comment Procedures

Section 211(f)(4) requires that EPA grant or deny an application for a waiver "after public notice and comment." As discussed in detail in Section II.B., EPA published notice of receipt of the waiver application on April 21, 2009 and provided the public with an extended public comment period of 90 days to submit comments on the waiver application. EPA received approximately 78,000 comments during the public comment period.

Commenters have asked the Agency for a second public comment period so that they may review and comment on the testing data generated by the DOE Catalyst Study. An additional comment period is neither necessary nor required by law. EPA has continued to accept comments on the waiver application even after closure of the formal comment period, and has considered comments received even as late as early October. All of these comments have been included in the public docket and thus made available to all members of the public for review and comment. Many commenters have taken the opportunity to submit additional comments in light of other comments and information included in the docket.

Data from ongoing vehicle testing programs, including DOE's data, have been included in the public docket shortly after EPA has received the information, making it available for the public's review and comment as soon as practicable. Many commenters providing substantive feedback on the waiv-

er application have been involved in one or more of the various testing programs, including DOE's, and consequently have had immediate access to the data. Comments submitted to the docket reflect that commenters have had access to and an opportunity to consider the various testing information cited by EPA in the waiver decision.

EPA has also held numerous meetings with stakeholders in which stakeholders have shared their comments, concerns and additional data regarding the waiver request. Information received at these meetings has been made available in the public docket.

In view of the access that has been made available to the relevant information in the public docket, EPA believes no need exists for a second public comment period. Moreover, EPA has already satisfied its notice and comment requirements for this Decision and has no legal obligation to provide an additional notice and comment period. EPA satisfied its procedural requirements through the public notice and comment period EPA already provided (see Section II.B) and nothing in section 211(f)(4) mandates a second comment period.[140]

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[140] This Decision is distinguishable from the outcome in *Air Transport Ass'n of America v. FAA*, 169 F.3d 1 (DC Cir. 1999). In *ATA v. FAA*, the DC Circuit found that the FAA's reliance on ex parte information submitted after closure of the public comment period violated the applicable notice and comment period requirements. The Court's holding was primarily based on the private nature of the information. *ATA*, 169 F.3d at 8 ("The important point is that because the transmission of this information * * * was never public, petitioner did not have a fair opportunity to comment on it."). In contrast, the data relied upon by the Agency in this waiver decision were included in the pubic

C. "Useful Life" Language in Section 211(f)(4)

In making any waiver decision, section 211(f)(4) indicates that EPA should ensure that any new fuel or fuel additive will not cause or contribute to a vehicle or engine failing to meet its emissions standards over its useful life. The Clean Air Act authorizes EPA to define "useful life" for the vehicles and engines EPA regulates, see CAA sections 202(d) and 213(d), and EPA includes those definitions in the same regulations that contain the emission standards for those vehicles and engines.

As discussed above, the construction of section 211(f) indicates that the meaning of section 211(f)(4) is best determined by reading it in context with the substantially similar prohibition in section 211(f)(1). Section 211(f)(1) contains the general prohibition against introducing fuels and fuel additives that are not "substantially similar" to the certification fuels used for certifying 1975 and subsequent model year motor vehicles with EPA's emissions standards. The prohibition is expansive, effectively protecting MY1975 and newer motor vehicles from using fuels or fuel additives that could detrimentally impact their ability to meet their emissions standards. In enacting this provision, Congress stated that "the intention of this new subsection [(f)] is to prevent the use of any new or recently introduced additive in those unleaded grades of gasoline required to be used in 1975 and subsequent model year automobiles which may impair emission performance of vehicles * * *." *Senate Report* (Environment and Public Works Committee) No. 95–127 (To accompany S.

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docket for the decision prior to its issuance.

252), May 10, 1977, pg 90. This general prohibition equally protects all MY1975 and newer motor vehicles from the use of new fuels and fuel additives that the motor vehicles may not have been designed to use and could degrade their emissions control systems.

The section 211(f)(1) prohibition is designed to protect the emissions control systems for the breadth of motor vehicles in the fleet, whether they are within or outside the regulatory useful life of an applicable emissions standard. This broad scope recognizes that the emissions control system of a motor vehicle continues to operate and provide important emissions benefits throughout the actual life of the motor vehicle, including the many miles or years that it may be operated past its regulatory useful life. Thus, it is important that the motor vehicle continue to use fuels that do not interfere with the continued normal operation of the emissions control system after its regulatory useful life. That normal operation may not ensure that the motor vehicle stills meets the applicable emissions standards, but it is typically such that it provides significant emissions control benefits for the country. Congress recognized this and prohibited entry into commence of fuels or fuel additives that could interfere with this result, no matter how old the motor vehicle. Congress also recognized this goal by prohibiting tampering anytime during the actual life of the motor vehicle, not just during its regulatory useful life. *See* CAA section 203(a)(3).[141]

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[141] Additionally, Congress authorized EPA to set separate in-use standards (section 202(g)) and to order recall of motor vehicles not meeting those standards (section 207(c)(1)), further il-

In promulgating CAA section 211(f)(4), Congress provided EPA with the authority to waive the prohibition for particular fuels or fuel additives, but only when the fuel or fuel additive manufacturer demonstrated that motor vehicles could still meet their emissions standards while using the particular fuel or fuel additive. *See Senate Report* (Environment and Public Works Committee) No. 95–127, May 10, 1977, pg 91 ("The waiver process * * * was established * * * so that the prohibition could be waived, or conditionally waived, rapidly if the manufacturer of the additive or the fuel establishes to the satisfaction of the Administrator that the additive, whether in certain amounts or under certain conditions, will not be harmful to the performance of emission control devices or systems."). While section 211(f)(4) refers to the "useful life" of the motor vehicle, that is part of the reference to causing or contributing to the noncompliance of the motor vehicle with its emission standards, as the emissions standards are defined in part by the useful life provision. *See House Conference Report* No. 95–564 (To accompany H.R. 6161), Aug. 3, 1977, pp 160–162 ("The conferees also intend that the words 'cause or contribute to the failure of an emission control device or system to meet emission standards over its useful life to which it has been certified pursuant to section 206' mean the non-

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lustrating its intent that emissions reductions continue at all times during the actual life of motor vehicles. Also *see General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (DC Cir. 1984) (finding that section 207(c)(1) enables EPA to order a recall of all motor vehicles in a class – even those beyond their statutory useful life – as long as EPA can demonstrate that those motor vehicles were not meeting their emissions standards while within their useful life.)

compliance of an engine or device with emission levels to which it was certified, taking into account the deterioration factors employed in certifying the engine.") This indicates that Congress was not trying to limit the scope of the waiver provision, but instead was using language normally used when referring to the emission standards. Congress wanted to ensure that new fuels or fuel additives allowed into the marketplace through a waiver would be the kinds of fuels or fuel additives that are consistent with motor vehicles meeting their applicable emissions standards.

In that context, EPA looks at whether the fuel or fuel additive would lead to an exceedance of the emissions standards if it was used during the motor vehicle's regulatory useful life. If that is the case, then the fuel should not be entered into commerce for use by that motor vehicle anytime during its actual life – just as the section 211(f)(1) prohibition ensures that motor vehicles will not use fuel or fuel additives anytime during their actual lives that are not substantially similar to the fuel or fuel additives used to certify their compliance with the emissions standards over their regulatory useful lives. This gives a reasonable meaning to the waiver provision and keeps it parallel and complementary to the section 211(f)(1) provision to which it is tied. EPA believes this reflects Congress' intention and avoids an unintended consequence that would be far at odds with the apparent purpose of sections 211(f)(1) and (4). If EPA were limited to only considering motor vehicles within their regulatory useful lives, this could require the Agency to approve waiver requests for new fuels and fuel additives even if they were clearly known to seriously degrade emission control

devices or systems and cause large emissions increases in older motor vehicles, which comprise a significant percentage of the entire fleet. Allowing such a detrimental fuel or fuel additive into the marketplace is clearly contrary to the purposes of section 211(f) which is designed as a whole to protect the benefits of the emissions control standards over the actual life of the motor vehicles.

X. Waiver Conditions

The conditions placed upon the partial waiver EPA is granting today fall into two categories. The first category concerns properties of the ethanol used to manufacture E15 and the properties of the final E15 blend. The second category of conditions concerns mitigation of potential misfueling with E15. Any party wishing to utilize this partial waiver for E15 must satisfy all of these conditions to be able to lawfully register and introduce E15, or ethanol used to make E15, into commerce.

A. Fuel Quality Conditions

As requested by Growth Energy in their waiver request application, and as is industry practice, the partial waiver for E15 contains a condition that requires use of ethanol which meets industry specifications as outlined in ASTM International D4806.[142] Additionally, as discussed above in our evaluation of the potential effect of E15 on evaporative emissions, the partial waiver for E15 contains a condition that E15 must meet a maximum RVP of 9.0 psi during

[142] ASTM International D4806–10, Standard Specification for Denatured Fuel Ethanol for Blending with Gasolines for Use as Automotive Spark-Ignition Engine Fuel.

the summertime volatility season, May 1 through September 15.

B. Misfueling Mitigation Conditions and Strategies

EPA believes that minimizing the possibility of misfueling of E15 into vehicles or engines for which it is not approved would best be achieved through implementation of misfueling mitigation requirements as proposed by EPA today in a separate action. Nevertheless, EPA is allowing the use of the partial waiver prior to the finalization of such requirements provided the fuel or fuel additive manufacturer using the partial waiver can implement the conditions described below prior to introducing E15 into commerce. Any fuel or fuel manufacturer wishing to utilize this partial waiver must submit a plan for EPA approval for implementing these misfueling mitigation conditions. EPA will determine if the plan is sufficient to address these conditions.

We believe that there are four important components to an effective misfueling mitigation strategy for reducing the potential for misfueling with E15. First, effective labeling is a key factor. Labeling is needed to inform consumers of the potential impacts of using E15 in vehicles and engines not approved for its use, to mitigate the potential for intentional and unintentional misfueling of these vehicles and engines. Labeling is also done at the point of sale where the consumer most likely will be choosing which fuel to use. Second, retail stations and wholesale purchaser-consumers need assurance regarding the ethanol content of the fuel that they purchase so they can direct the fuel to the appropriate storage tank and properly label their fuel pumps. The use of proper documentation in the form of PTDs has prov-

en to be an effective means of both ensuring that retail stations know what fuel they are purchasing and as a possible defense for retail stations in cases of liability in the event of a violation of EPA standards. Third, labeling and fuel sampling surveys are necessary to ensure that retail stations are complying with labeling requirements, ethanol blenders are not blending more than the stated amount of ethanol on PTDs, and assuring downstream compliance for fuel refiners. The Agency has used this general strategy to implement several fuel programs over the past thirty years, including the unleaded gasoline program, the RFG program, and the diesel sulfur program. These strategies are conditions of use associated with today's waiver decision and are described below.

While not a condition of today's waiver decision, the fourth component of an effective misfueling mitigation strategy is effective public outreach and consumer education. Outreach to consumers and stakeholders is critical to mitigate misfueling incidents that can result in increased emissions and vehicle damage. Consumers need to be engaged through a variety of media to ensure that accurate information is conveyed to the owners and operators of vehicles and engines.

EPA recognizes that it may be difficult to fully implement all of these misfueling mitigation strategies prior to finalization of today's proposed rule. However, any fuel or fuel additive manufacturer wishing to introduce E15 into commerce before EPA finalizes its misfueling mitigation measures rule will need to demonstrate to EPA its ability to meet the following

misfueling mitigation conditions of the partial waiver:

1. Fuel Pump Dispenser Labeling

Any fuel or fuel additive manufacturer using this partial waiver must ensure the labeling of any dispensers of this gasoline-ethanol blend. The label would have to indicate that the fuel contains up to 15 vol% ethanol – that is, the fuel is gasoline containing greater than 10 vol% ethanol and up to 15 vol% ethanol.

Based on the Agency's experience with fuel pump labeling for Ultra-Low Sulfur Diesel (ULSD) and Low Sulfur Diesel (LSD) (see 40 CFR 80.570), there are four important elements to an effective label for misfueling. The language of the E15 label must contain four components: (1) An information component; (2) a legal approval component; (3) a technical warning component; and (4) a legal warning component. Together, these four components highlight the critical information necessary to inform consumers about the impacts of using E15.

The labeling requirements EPA is proposing today in a separate proposed rule concurrent with today's partial waiver decision would place labeling requirements on retail stations that dispense E15. Compliance with these labeling requirements, when finalized, will satisfy this fuel pump dispenser labeling condition. If a fuel or fuel additive manufacturer chooses to utilize this partial waiver prior to finalization of today's proposed rule, a label designed to meet the components described in today's proposed rule and approved by EPA can satisfy this fuel pump dispenser labeling condition of this partial waiver decision.

2. Fuel Pump Labeling and Fuel Sample Survey

Any fuel or fuel additive manufacturer using this partial waiver must participate in a survey, approved by EPA, of compliance at fuel retail facilities conducted by an independent surveyor. An EPA-approved survey plan is to be in place prior to introduction of E15 into the marketplace and the results of the survey must be provided to EPA for use in its enforcement and compliance assurance activities.

One of two options may be utilized to meet this condition of this partial waiver decision:

For Survey Option 1, a fuel or fuel additive manufacturer may individually survey labels and ethanol content at retail stations wherever its gasoline, ethanol, or ethanol blend may be distributed if it may be blended as E15. EPA must approve this survey plan before it is conducted by the fuel or fuel additive manufacturer.

For Survey Option 2, a fuel or fuel additive manufacturer may choose to conduct the survey through a nationwide program of sampling and testing designed to provide oversight of all retail stations that sell gasoline. Details of the survey requirements are similar to those included in the ULSD and RFG programs. A fuel or fuel additive manufacturer may conduct this survey as part of a consortium, as discussed in the proposed rule.

EPA is proposing more formal requirements for a national E15 labeling and ethanol content survey in today's notice of proposed rulemaking. If a fuel or fuel additive manufacturer chooses to utilize this partial waiver prior to finalization of today's proposed rule, a survey designed to satisfy the components described in today's proposed rule and ap-

proved by EPA will be deemed to be sufficient to satisfy this fuel pump labeling and fuel sample survey condition of this partial waiver decision.

3. Proper Documentation of Ethanol Content on Product Transfer Documents

Today's proposed rule would require that parties that transfer blendstocks, base gasoline for oxygenate blending, and/or finished gasoline that contains ethanol content greater than 10 vol% and no more than 15 vol% include the ethanol concentration of the fuel in volume percent. Product transfer documents (PTDs) are customarily generated and used in the course of business and are familiar to parties who transfer or receive blendstocks or base gasoline for oxygenate blending and oxygenated gasoline. Since we are approving a partial waiver for the introduction into commerce of E15 for use in only MY2007 and newer motor vehicles, the PTDs that accompany the transfer of base gasoline/gasoline blendstocks used for oxygenate blending and for oxygenated gasoline must include the ethanol content of the fuel to help avoid misfueling. Downstream of the terminal where ethanol blending takes place, information on the maximum ethanol concentration in the ethanol blend is needed to help ensure that fuel shipments are delivered into the appropriate storage tanks at retail and fleet gasoline dispensing facilities.[143] A gasoline retail station and fleet dispensing facility

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[143] Evaluations are underway which may facilitate the shipment of gasoline-ethanol blends by pipeline to terminals. Hence, parties upstream of the terminal may need to include information on maximum ethanol concentration on product PTDs in the future.

must know the ethanol content of a fuel shipment so that fuel pumps may be correctly labeled.

In the event that there is a period of time when this partial waiver is utilized prior to finalization of today's proposal, a PTD program designed to satisfy the elements of today's proposed rule will be sufficient to satisfy the PTD condition of this partial waiver decision.

4. Public Outreach

While not a formal condition of this partial waiver, EPA recognizes the importance of outreach to consumers and stakeholders to misfueling mitigation. The potential for E15 misfueling incidents may exist for several reasons. For example, consumers may be inclined to misfuel when E15 costs less than E10 or E0. Additionally, in some situations, it may be more difficult to find fuels other than E15. EPA thus encourages fuel and fuel additive manufacturers to conduct a public outreach and education program prior to any introduction of E15 into commerce.

A recent example of outreach to consumers and stakeholders that may be applicable is coordinated work done in support of the ULSD program. ULSD was a new fuel with the possibility of consumer misfueling that could result in engine damage. With ULSD, the fuel industry trade association API took the lead in working with stakeholders to establish the Clean Diesel Fuel Alliance (CDFA), a collaboration of public and private organizations designed to ensure a smooth program transition by providing comprehensive information and technical coordination. The organizations represented in the CDFA include engine manufacturers, fuel retailers, trucking fleets, DOE and EPA. CDFA efforts to educate

ULSD users include developing technical guidance and educational information, including a Web site (*http://www.clean-diesel.org*), as well as serving as a central point of contact to address ULSD-related questions.

The CDFA outreach model could prove beneficial in this case. EPA anticipates that all parties involved in bringing higher gasoline-ethanol blends to market will participate in a coordinated industry-led consumer education and outreach effort. In the context of this program, potential key participants include ethanol producers, fuel and fuel additive manufacturers, automobile, engine and equipment manufacturers, States, non-governmental organizations, parties in the fuel distribution system, EPA, DOE, and USDA. Potential education and outreach activities a public/private group could undertake include serving as a central clearinghouse for technical questions about E15 and its use, promoting best practices to educate consumers or mitigate misfueling instances, and developing education materials and making them available to the public.

XI. Reid Vapor Pressure

Commenters questioned whether E15 would qualify for the 1.0 psi RVP waiver permitted for E10 under CAA section 211(h). As explained in the misfueling mitigation measures proposed rule, EPA interprets the 1.0 psi waiver in CAA section 211(h) as being limited to gasoline-ethanol blends that contain 10 vol% ethanol. Please see the preamble of that proposed rule for more discussion of this issue and for an opportunity to submit comments on this issue.

XII. Partial Waiver Decision and Conditions

Based on all the data and information described above, EPA has determined that, subject to compliance with all of the conditions below, a gasoline produced with greater than 10 vol% and no more than 15 vol% ethanol (E15) will not cause or contribute to a failure of certain motor vehicles to achieve compliance with their emission standards to which they have been certified over their useful lives.

Therefore, the waiver request application submitted by Growth Energy for its gasoline-ethanol blend with up to 15 vol% ethanol is partially and conditionally granted as follows:

(1) The partial waiver applies only to fuels or fuel additives introduced into commerce for use in MY2007 and newer light-duty motor vehicles, light-duty trucks, and medium duty passenger vehicles (hereafter "MY2007 and newer light-duty motor vehicles") as certified under Section 206 of the Act. The waiver does not apply to fuels or fuel additives introduced into commerce for use in pre-MY2007 motor vehicles, heavy-duty gasoline engines or vehicles, or motorcycles certified under section 206 of the Act, or any nonroad engines, nonroad vehicles, or motorcycles certified under section 213(a) of the Act.

(2) The waiver applies to the blending of greater than 10 vol% and no more than 15 vol% anhydrous ethanol into gasoline,[144] and the ethanol must meet

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[144] Gasoline in this case may be gasoline blendstocks that produce gasoline upon the addition of the specified amount of ethanol covered by the waiver.

the specifications for fuel ethanol found in the ASTM International specification D4806–10.[145]

(3) The final fuel must have a Reid Vapor Pressure not in excess of 9.0 psi during the time period from May 1 to September 15.

(4) Fuel and fuel additive manufacturers subject to this partial waiver must submit to EPA a plan, for EPA's approval, and must fully implement that EPA-approved plan, prior to introduction of the fuel or fuel additive into commerce as appropriate. The plan must include provisions that will implement all reasonable precautions for ensuring that the fuel or fuel additive (i.e., gasoline intended for use in E15, ethanol intended for use in E15, or final E15 blend) is only introduced into commerce for use in MY2007 and newer motor vehicles. The plan must be sent to the following address: Director, Compliance and Innovative Strategies Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW. Mail Code 6405J, Washington, DC 20460. Reasonable precautions in a plan must include, but are not limited to, the following conditions on this partial waiver:

(a)(i) Reasonable measures for ensuring that any retail fuel pump dispensers that are dispensing a gasoline produced with greater than 10 vol% ethanol and no more than 15 vol% ethanol are clearly labeled for ensuring that consumers do not misfuel the waivered gasoline-ethanol blend into vehicles or engines

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[145] ASTM D4806–10, Standard Specification for Denatured Fuel Ethanol for Blending with Gasolines for Use as Automotive Spark-Ignition Engine Fuel.

not covered by the waiver. The label shall convey the following information:

(A) The fuel being dispensed contains 15% ethanol maximum;

(B) The fuel is for use in only MY2007 and newer gasoline cars, MY2007 and newer light-duty trucks and all flex-fuel vehicles;

(C) Federal law prohibits the use of the fuel in other vehicles and engines; and

(D) Using E15 in vehicles and engines not approved for use might damage those vehicles and engines.

(ii) The fuel or fuel additive manufacturer must submit the label it intends to use for EPA approval prior to its use on any fuel pump dispenser.

(b) Reasonable measures for ensuring that product transfer documents accompanying the shipment of a gasoline produced with greater than 10 vol% ethanol and no more than 15 vol% ethanol properly document the volume of ethanol.

(c)(i) Participation in a survey of compliance at fuel retail dispensing facilities. The fuel or fuel additive manufacturer must submit a statistically sound survey plan to EPA for its approval and begin implementing the survey plan prior to the introduction of E15 into the marketplace. The results of the survey must be provided to EPA.[146] The fuel or fuel additive manufacturer conducting a survey may choose from either of the following two options:

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[146] In a Notice of Proposed Rulemaking published in today's Federal Register, EPA is proposing a more detailed labeling, product transfer documents, and survey plan.

(ii) *Individual survey option*: Conduct a survey of labels and ethanol content at retail stations wherever your gasoline, ethanol, or ethanol blend may be distributed if it may be blended as E15. The survey plan must be approved by EPA prior to conducting the survey plan.

(iii) *Nationwide survey option*: Contract with an individual survey organization to perform a nationwide survey program of sampling and testing designed to provide oversight of all retail stations that sell gasoline. The survey plan must be approved by EPA prior to conducting the survey plan.

(d) Any other reasonable measures EPA determines are appropriate.

(5) Failure to fully implement any condition of this partial waiver means the fuel or fuel additive introduced into commerce is not covered by this partial waiver.

This partial waiver decision is final agency action of national applicability for purposes of section 307(b)(1) of the Act. Pursuant to CAA section 307(b)(1), judicial review of this final agency action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by January 3, 2011. Judicial review of this final agency action may not be obtained in subsequent proceedings, pursuant to CAA section 307(b)(2). This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

Dated: October 13, 2010.

Lisa P. Jackson,

Administrator.

[FR Doc. 2010–27432 Filed 11–3–10; 8:45 am]
BILLING CODE 6560–50–P

APPENDIX C

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2009–0211; FRL–9258–6]

Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator

AGENCY: Environmental Protection Agency.

ACTION: Notice of Decision Granting a Partial Waiver.

SUMMARY: The Environmental Protection Agency (EPA) is taking additional final action on Growth Energy's application for a waiver submitted under section 211(f)(4) of the Clean Air Act. Today's partial waiver allows fuel and fuel additive manufacturers to introduce into commerce gasoline that contains greater than 10 volume percent ethanol and no more than 15 volume percent ethanol (E15) for use in model year (MY) 2001 through 2006 light-duty motor vehicles (passenger cars, light-duty trucks and medium-duty passenger vehicles), if certain conditions are fulfilled. In October 2010, we granted a partial waiver for E15 for use in MY2007 and newer light-duty motor vehicles subject to the same conditions. Taken together, the two waiver decisions allow the introduction into commerce of E15 for use in MY2001 and newer light-duty motor vehicles if those conditions are met.

[CONTENT OMITTED]

I. Executive Summary

A. Prior E15 Partial Waiver Decision

In March 2009, Growth Energy and 54 ethanol manufacturers petitioned the Environmental Protection Agency (EPA or Agency) to allow the introduction into commerce of up to 15 volume percent (vol%) ethanol in gasoline. Prior to Growth Energy's petition, ethanol was limited to 10 vol% in motor vehicle gasoline (E10). The petition requested that EPA exercise its authority under section 211(f)(4) of the Clean Air Act (CAA or Act) to waive the prohibition on the introduction of E15 into commerce under section 211(f)(1) of the Act. In April 2009, EPA invited public comment on Growth Energy's waiver request and received about 78,000 comments. On October 13, 2010, EPA took two actions on the waiver request based on the information available at that time ("October Waiver Decision").[1] First, it partially approved Growth Energy's waiver request to allow the introduction of E15 into commerce for use in MY2007 and newer light-duty motor vehicles, subject to several conditions. Second, the Agency denied the waiver request for MY2000 and older light-duty motor vehicles, heavy- duty gasoline engines and vehicles, highway and off-highway motorcycles, and other nonroad engines, vehicles, and equipment. The Agency also deferred making a decision on the waiver request for MY2001–2006 light- duty motor vehicles to await the results of additional testing being conducted by the Department of Energy (DOE).

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[1] *Partial Grant and Partial Denial of CAA Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator. See* 75 FR 68094, November 4, 2010.

B. Waiver Decision for MY2001–2006 Light-Duty Motor Vehicles

In today's action, EPA is partially granting Growth Energy's waiver request for MY2001–2006 light-duty motor vehicles based on our analysis of the available information, including DOE and other test data and public comments. This partial grant waives the prohibition on fuel and fuel additive manufacturers and allows the introduction into commerce of gasoline containing greater than 10 vol% ethanol and no more than 15 vol% ethanol for use in MY2001–2006 light-duty motor vehicles, which includes passenger cars, light-duty trucks, and medium-duty passenger vehicles (large sport utility vehicles).[2] It is subject to the same conditions that apply to the partial waiver issued in October for MY2007 and newer light-duty motor vehicles. Today's waiver decision together with the October Waiver Decision means that E15 may be introduced into commerce, subject to those conditions, for use in all MY2001 and newer light-duty motor vehicles.[3]

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[2] For purposes of today's decision, "MY2001– 2006 light-duty motor vehicles" include MY2001– 2006 light-duty vehicles (LDV), light-duty trucks (LDT), and medium-duty passenger vehicles (MDPV), the same types of motor vehicles as in the October Waiver Decision, but for the earlier model years 2001–2006.

[3] It should be noted that a number of additional steps must be completed by various parties before E15 may be distributed and sold. These steps include but are not limited to submission of a complete E15 fuels registration application by the fuel and fuel additive manufacturers who wish to introduce E15 into commerce, and EPA review and approval of the application, under the regulations at 40 CFR Part 79. Various state laws may also affect the distribution and sale of E15.

To receive a waiver under CAA section 211(f)(4), a fuel or fuel additive manufacturer must demonstrate that a new fuel or fuel additive will not cause or contribute to the failure of engines or vehicles to achieve compliance with the emission standards to which they have been certified over their useful life. The information submitted by Growth Energy was not sufficient to support a waiver covering introduction of E15 into commerce for use in MY2001–2006 light-duty motor vehicles. However, key data for responding to the waiver request for MY2001–2006 light-duty motor vehicles was provided by a DOE test program to determine the effect of long-term use of gasoline-ethanol blends, including E15, on the durability of emissions control systems, including catalysts, used in light-duty motor vehicles to control exhaust emissions (DOE Catalyst Study).[4]

In 2008, DOE began testing 19 MY2007 and newer light-duty motor vehicle models, and the resulting test data were an important part of the basis for EPA's October Waiver Decision, which granted a partial waiver for use of E15 in those model year and newer motor vehicles. In 2010, DOE began a second phase of its study with eight motor vehicle models to provide emissions-related data for MY2001– 2006 light-duty motor vehicles. Many of the models were selected for their expected sensitivity to the effects of long-term use of higher gasoline-ethanol blends, such

[4] DOE embarked on the study, in consultation with EPA, auto manufacturers, fuel providers and others, after enactment of the Energy Independence and Security Act of 2007, which significantly expanded the federal Renewable Fuel Standard program by increasing the volume of renewable fuels that must be used in transportation fuel in order to reduce imported petroleum and emissions of greenhouse gases.

as E15, so that any potential emissions problems would be more likely to become apparent. The test fleet also included several high- sales volume vehicle models. As a whole, the test fleet was appropriately composed to provide important information for assessing the potential impact of E15 on emissions of MY2001– 2006 light-duty motor vehicles.

In view of the ongoing DOE Catalyst Study, the Agency delayed making a decision on the waiver request for MY2001–2006 light-duty motor vehicles until the test program was completed and the results made available to the public. DOE testing was largely completed in November, and retesting of several models that experienced mechanical problems unrelated to fuel use was completed in December. The test results were made available to the public on a rolling basis, with EPA submitting data to the docket as soon as the data were received and checked for accuracy and completeness with DOE.

As described more fully in Section IV of this notice, EPA is making today's decision based on the results of the DOE Catalyst Study and other relevant test programs, as well as the Agency's engineering assessment that changes in regulatory requirements affecting MY2001–2006 light-duty motor vehicles generally led manufacturers to design and build vehicles able to use E15 without a significant impact on emissions. Consistent with past waiver decisions, the Agency is making its decision based on potential effects of E15 in four areas: (1) Exhaust emissions – immediate [5] and long-term (known as durability);

[5] In past waiver decisions, we have referred to "immediate" emissions as "instantaneous" emissions. "Immediate" and "instantaneous" are synonymous in this context.

(2) evaporative emissions – immediate and long-term; (3) the impact of materials compatibility on emissions; and (4) the impact of driveability and operability on emissions.

For MY2001–2006 light-duty motor vehicles, EPA concludes that the DOE Catalyst Study, other information and EPA's engineering analysis adequately demonstrate that the impact of E15 on overall exhaust emissions, including both immediate and long-term, will not cause or contribute to violations of the exhaust emissions standards for these motor vehicles. All but one of the vehicles that completed DOE testing met exhaust emission standards on average after the vehicles accumulated significant mileage, and were then tested, on E15. Although one vehicle tested on E15 slightly exceeded one emission standard, the exceedance does not appear related to fuel use since its counterpart tested on E0 (gasoline containing no ethanol) exceeded the same standard. Compliance with emission standards by the E15 test fleet as a whole is particularly compelling given that the vehicles tested were older, high mileage vehicles (reflecting their model year), and much of the testing was conducted at mileages beyond the vehicles' regulatory "full useful life" (FUL) of 100,000–120,000 miles, depending on vehicle type and model year. The test results also show that the vehicles aged and tested on E15 did not have significantly higher emissions than the vehicles aged and tested on E0, and some vehicles' emissions actually decreased on E15. Overall, the test results for MY2001– 2006 are similar to the DOE test results for MY2007 and newer light-duty motor vehicles, indicating that the earlier model year vehicles are more like later model year vehicles in their ability to maintain emission control

performance when operated on E15. The DOE test results thus strongly confirm EPA's engineering assessment that auto manufacturers responded to regulatory changes applicable to MY2001–2006 with design changes that made light-duty motor vehicles capable of maintaining exhaust emissions performance when operated on mid- level gasoline-ethanol blends, up to and including E15.

With respect to evaporative emissions, EPA concludes that analysis of test data and other available information and the Agency's engineering assessment adequately demonstrate for purposes of CAA section 211(f)(4), with the possible limited exception noted below, that the impact of E15 on overall evaporative emissions, including both immediate and durability-related, will not cause or contribute to MY2001–2006 light-duty motor vehicles exceeding their applicable evaporative emissions standards, so long as the fuel does not exceed a Reid Vapor Pressure (RVP) of 9.0 psi in the summertime volatility control season.[6] Analysis of available information suggests, but does not establish, the possibility that a limited number of vehicle models with emissions already very close to applicable evaporative emission standards might exceed the standards in-use if operated on E15. However, this possibility should be considered in light of information indicating that use of E15 by those vehicles will, overall, be better for the environment with respect to in- use evaporative

[6] EPA regulates the Reid Vapor Pressure of gasoline sold at retail stations during the summer ozone season (June 1 to September 15) to reduce evaporative emissions from gasoline that contribute to ground-level ozone. Gasoline needs a higher vapor pressure in the wintertime for cold start purposes.

emissions than would otherwise occur if a waiver were not granted. In fact, E15 may result in somewhat lower in-use evaporative emissions compared to fuel currently sold in almost all of the country (E10), as a result of differences in the allowable RVP of the two gasoline- ethanol blends. As such, the possibility of a limited number of evaporative emission exceedances, under these somewhat unique circumstances, does not warrant denial of the request for a waiver with respect to these model year vehicles. Available information on materials compatibility and driveability also supports a partial waiver for MY2001–2006 light-duty motor vehicles. Further information and explanation concerning each of these findings are provided later in this notice.

C. Conditions on Today's Partial Waiver and Proposed Rule on Misfueling Mitigation

Like the waiver for MY2007 and newer light-duty motor vehicles, today's partial waiver is subject to several conditions to ensure fuel quality, limit the fuel's summertime vapor pressure, and mitigate the potential for other vehicles, engines and products to be misfueled with E15. Specifically, EPA is placing two types of conditions on the partial waiver granted today: (1) Those for mitigating the potential for misfueling of E15 in all vehicles, engines and equipment for which E15 is not approved; and (2) those addressing fuel and ethanol quality. All of the conditions are discussed in Section X of the October Waiver Decision (*see* 75 FR 68094, 68148 (November 4, 2010)) and are listed below in Section IV. EPA is applying the same conditions on introduction of E15 into commerce for use in MY2001–2006 light-duty motor vehicles that it applied to use of E15 in MY2007

and newer such vehicles, and for the same reasons, as explained in the October Waiver Decision. To meet the misfueling-related conditions, any fuel or fuel additive manufacturer subject to this waiver must obtain EPA approval of and implement a plan that meets the conditions for ensuring that the fuel or fuel additive is only introduced into commerce for use in MY2001 and newer light-duty motor vehicles, and not for use in other on- and off-road vehicles, engines and equipment for which E15 is not approved. See Section VI below.

To help ensure that E15 is used only in motor vehicles for which it is approved, EPA issued a notice of proposed rulemaking (NPRM) published concurrently with the October Waiver Decision ("Misfueling Mitigation NPRM," 75 FR 68044, November 4, 2010). In that NPRM, EPA proposed

safeguards to provide the most practical way to mitigate the potential for misfueling of other vehicles, engines and equipment with E15. The Agency received many comments in response to the NPRM, particularly with regard to the proposed misfueling mitigation measures. EPA is now in the process of considering those comments in developing final mitigation measures so that vehicles, engines and products are appropriately fueled if E15 is introduced into commerce. As noted above, today's waiver decision authorizes, but does not require, E15 to be introduced into commerce (subject to several conditions), and a number of additional steps must be taken before that occurs. In addition, any significant shift in the marketplace from E10 to E15 will take time as producers, distributors and suppliers make the necessary adjustments. EPA is developing a program of

misfueling mitigation measures that would work in tandem with the various steps involved in distributing and marketing E15 so that needed safeguards are timely and effective.

EPA expects that the mitigation measures that are adopted would satisfy the misfueling mitigation conditions of the partial waiver decision issued in October and today, and would promote the successful introduction of E15 into commerce. In addition to the misfueling mitigation conditions, E15 and the ethanol used to make E15 must also meet certain fuel and fuel additive quality specifications before it may be introduced into commerce.

II. Introduction

Section II of the October Waiver Decision includes a comprehensive review of the relevant CAA provisions and the amendments made to those provisions by the Energy Independence and Security Act of 2007. It also describes Growth Energy's waiver application and the public review process that EPA conducted as part of its consideration of the application. Today's partial waiver decision fully incorporates by reference Section II of the October Waiver Decision and provides additional information as needed to address the potential use of E15 in MY2001–2006 light-duty motor vehicles.

[CONTENT OMITTED]

IV. Analysis For MY2001-2006 Light-Duty Motor Vehicles

[CONTENT OMITTED]

B. Evaporative Emissions

[CONTENT OMITTED]

1. Immediate Evaporative Emissions

[CONTENT OMITTED]

a. Growth Energy's Submission and Public Comment Summary

[CONTENT OMITTED]

b. EPA's Analysis and Test Programs

[CONTENT OMITTED]

i. Coordinating Research Council Test Programs—Results

[CONTENT OMITTED]

ii. Coordinating Research Council Test Programs—Analysis

[CONTENT OMITTED]

A second reason that a waiver is appropriate in this case is that the environment would likely benefit from, and in any event would not be harmed by, the impact of E15 use on evaporative emissions of MY2001-2006 light-duty motor vehicles. As explained in the Misfueling Mitigation NPRM, E10 is now the pervasive fuel in the national motor vehicle fuel market. The use of E10 already results in some permeation increases, resulting from its ethanol content, and E15 would cause no greater permeation emissions than E10. As a result, permeation emissions from the use of E15 should not lead to any actual increase in exceedances of the evaporative emissions standards in the in-use fleet of MY2001-2006 light-duty motor vehicles compared to no use of E15. In addition, as a result of the CAA's 1 psi waiver for E10, the use of E10 results in significant additional evaporative emissions from canister breakthrough, resulting from the fuel's higher volatility at 10.0 psi RVP. Since a waiver for E15 would not allow RVP greater than 9.0 psi, the lower volatility of E15 would lead to significantly lower evaporative emissions than would otherwise result from canister breakthrough with E10. To the extent it is used in the marketplace, E15 would likely replace the use of E10.[35] Therefore, its use would likely benefit, and

[35] E10 is already the predominant gasoline fuel in most of the country and it is reason nable to assume that, if and when E15

would not harm, the environment by reducing in-use vehicle evaporative emissions.[36] In these somewhat unique circumstances, EPA believes that any limited number of motor vehicles exceeding their evaporative emission standards when using E15 should not be considered significant for purposes of determining whether to grant a waiver under section 211(f)(4).[37]

[CONTENT OMITTED]

2. Long-term (Durability) Evaporative Emissions

[CONTENT OMITTED]

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is introduced into the market place, it would be in a market where fuel ethanol is already available and sold as E10.

[36] E15 use would also not affect vehicle manufacturers' compliance status since in-use testing for recall and other regulatory purposes is conducted on E0 fuel, and any effect on E15 on immediate evaporative emissions is transient and would not affect results of compliance testing on E0 fuel.

[37] It is important to note that the relevant comparison for evaluating whether a fuel or fuel additive will have an impact on failures of emission standards is a comparison between the proposed fuel or additive (here E15) and the fuel on which vehicles are tested for purposes of determining auto manufacturers' compliance with emission standards (E0). While E15 may result in limited additional exceedances of evaporative emission standards in comparison to E0, it will reduce actual in-use evaporative emissions compared to E10, the fuel it is expected to replace. We believe it is appropriate to consider both E15's limited potential for increasing exceedances of standards when compared to E0 fuel, and this real-world evaporative emissions benefit of E15 in considering the significance of any such exceedances, in deciding whether to grant a waiver for E15 use in MY2001-2006 light-duty motor vehicles.

V. Legal Issues Arising In This Partial Waiver Decision

We fully incorporate by reference Section IX of the October Waiver Decision into this decision. Section IX, entitled "Legal Issues Arising in This Partial Waiver Decision," presents discussion regarding legal issues arising from issuing these partial waiver decisions. We incorporate that discussion here as our rationale is the same for this decision.

VI. Waiver Conditions

We fully incorporate by reference Section X of the October Waiver Decision into this decision. Section X, entitled "Waiver Conditions," provides a more detailed explanation regarding the conditions placed on these partial waiver decisions. We incorporate that discussion here as our rationale is the same for this decision.

VII. Partial Waiver Decision and Conditions

Based on all the data and information described above and in the October Waiver Decision, the waiver request application submitted by Growth Energy for its gasoline-ethanol blend with up to 15 vol% ethanol is partially and conditionally granted as follows:

(1) The partial waiver applies only to fuels or fuel additives introduced into commerce for use in MY2001 and newer light-duty motor vehicles, light-duty trucks, and medium duty passenger vehicles (hereafter "MY2001 and newer light-duty motor vehicles") as certified under Section 206 of the Act. The waiver does not apply to fuels or fuel additives introduced into commerce for use in pre-MY2001 motor vehicles, heavy-duty gasoline engines or vehicles, or motorcycles certi-

fied under section 206 of the Act, or any nonroad engines, nonroad vehicles, or motorcycles certified under section 213(a) of the Act.

(2) The waiver applies to the blending of greater than 10 vol% and no more than 15 vol% anhydrous ethanol into gasoline,[40] and the ethanol must meet the specifications for fuel ethanol found in the ASTM International specification D4806–10.[41]

(3) The final fuel must have a Reid Vapor Pressure not in excess of 9.0 psi during the time period from May 1 to September 15.

(4) Fuel and fuel additive manufacturers subject to this partial waiver must submit to EPA a plan, for EPA's approval, and must fully implement that EPA-approved plan, prior to introduction of the fuel or fuel additive into commerce as appropriate. The plan must include provisions that will implement all reasonable precautions for ensuring that the fuel or fuel additive (*i.e.* gasoline intended for use in E15, ethanol intended for use in E15, or final E15 blend) is only introduced into commerce for use in MY2001 and newer light-duty motor vehicles. The plan must be sent to the following address: Director, Compliance and Innovative Strategies Division, U.S. Environmental Protection Agency, 1200 Pennsyl-

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[40] Gasoline in this case may be gasoline blendstocks that produce gasoline upon the addition of the specified amount of ethanol covered by the waiver.

[41] ASTM International D4806–10, Standard Specification for Denatured Fuel Ethanol for Blending with Gasolines for Use as Automotive Spark-Ignition Engine Fuel.

vania Ave., NW., Mail Code 6405J, Washington, DC 20460.

Reasonable precautions in a plan must include, but are not limited to, the following conditions on this partial waiver:

(a)(i) Reasonable measures for ensuring that any retail fuel pump dispensers that are dispensing a gasoline produced with greater than 10 vol% ethanol and no more than 15 vol% ethanol are clearly labeled for ensuring that consumers do not misfuel the waivered gasoline-ethanol blend into vehicles or engines not covered by the waiver. The label shall convey the following information:

(A) The fuel being dispensed contains 15% ethanol maximum;

(B) The fuel is for use in only MY2001 and newer gasoline cars, MY2001 and newer light-duty trucks and all flex-fuel vehicles;

(C) Federal law prohibits the use of the fuel in other vehicles and engines; and

(D) Using E15 in vehicles and engines not approved for use might damage those vehicles and engines.

(ii) The fuel or fuel additive manufacturer must submit the label it intends to use for EPA approval prior to its use on any fuel pump dispenser.

(b) Reasonable measures for ensuring that product transfer documents accompanying the shipment of a gasoline produced with greater than 10 vol% ethanol and no more than 15 vol% ethanol properly document the volume of ethanol.

(c)(i) Participation in a survey of compliance at fuel retail dispensing facilities. The fuel or fuel additive manufacturer must submit a statistically sound survey plan to EPA for its approval and begin implementing the survey plan prior to the introduction of E15 into the marketplace. The results of the survey must be provided to EPA.[42] The fuel or fuel additive manufacturer conducting a survey may choose from either of the following two options:

(ii) *Individual survey option:* Conduct a survey of labels and ethanol content at retail stations wherever your gasoline, ethanol, or ethanol blend may be distributed if it may be blended as E15. The survey plan must be approved by EPA prior to conducting the survey plan.

(iii) *Nationwide survey option:* Contract with an individual survey organization to perform a nationwide survey program of sampling and testing designed to provide oversight of all retail stations that sell gasoline. The survey plan must be approved by EPA prior to conducting the survey plan.

(d) Any other reasonable measures EPA determines are appropriate.

(5) Failure to fully implement any condition of this partial waiver means the fuel or fuel additive introduced into commerce is not covered by this partial wavier.

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[42] In a Notice of Proposed Rulemaking published on November 4, 2010 in the **Federal Register** (*see* 75 FR 68044), EPA proposed a more detailed labeling, product transfer documents, and survey plan.

These conditions are the same as those provided in the October partial waiver for MY2007 and newer light- duty motor vehicles. They have been modified here only to reflect the combined model years covering MY2001 and newer.

This partial waiver decision is final agency action of national applicability for purposes of section 307(b)(1) of the Act. Pursuant to CAA section 307(b)(1), judicial review of this final agency action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by March 28, 2011. Judicial review of this final agency action may not be obtained in subsequent proceedings, pursuant to CAA section 307(b)(2). This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

Dated: January 21, 2011.

Lisa P. Jackson,

Administrator.

[FR Doc. 2011–1646 Filed 1–25–11; 8:45 am]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 10-1380

SEPTEMBER TERM, 2012

EPA-75FR68094

FILED On: January 15, 2013

GROCERY MANUFACTURERS ASSOCIATION, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

GROWTH ENERGY,
INTERVENOR

Consolidated with 10-1414, 11-1002, 11-1046, 11-1072, 11-1086

Before: SENTELLE, *Chief Judge*, and TATEL and KAVANAUGH*, *Circuit Judges*

* Circuit Judge Kavanaugh would grant the petitions for panel rehearing

ORDER

Upon consideration of the petition of American Petroleum Institute, et. al. for panel rehearing filed on September 28, 2012; the petition of the Engine Products Group for panel rehearing filed on September 28, 2012; and the petition of American Fuel & Petrochemical Manufacturers and International Liquid Terminals Association for panel rehearing filed October 1, 2012, and the responses thereto, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

FILED On: January 15, 2013
NO. 10-1380

GROCERY MANUFACTURERS ASSOCIATION, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

GROWTH ENERGY,
INTERVENOR

Consolidated with 10-1414, 11-1002, 11-1046, 11-1072, 11-1086

On Petitions for Rehearing En Banc

Before: SENTELLE, *Chief Judge*, and HENDERSON, ROGERS, TATEL, GARLAND*, BROWN, GRIFFITH, and KAVANAUGH*, *Circuit Judges*

ORDER

The petition of the American Petroleum Institute and the Food Petitioners for rehearing en banc; the petition of the Engine Products Group for rehearing en banc; and the petition of American Fuel & Petrochemical Manufacturers and International Liquid Terminals Association for rehearing en banc, and the responses to the petitions were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petitions. Upon consideration of the foregoing, it is

ORDERED that the petitions be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

* Circuit Judge Garland did not participate in this matter.

** Circuit Judge Kavanaugh would grant the petitions.

** A statement by Circuit Judge Kavanaugh dissenting from the denial of the petition for rehearing en banc is attached.

KAVANAUGH, *Circuit Judge*, dissenting from the denial of rehearing en banc:

This case concerns a challenge to EPA's E15 waiver decision. The E15 waiver, in conjunction with the statutory renewable fuel mandate, will require petroleum producers to refine and sell E15, a blend of gasoline that contains 15 percent ethanol. The E15 waiver also will increase the demand for corn and thus increase corn prices for food producers. Two industry groups separately challenged the E15 waivers – the food producers who will pay higher prices for corn and the petroleum producers who will be forced to refine and sell E15. They contended that the E15 waiver will palpably and negatively affect the American food and petroleum industries, with corresponding impacts on American consumers. And they argued that the E15 waiver is unlawful because it exceeds EPA's statutory authority.

Even though EPA did not raise a challenge to the standing of the food producers or the petroleum producers, the panel dismissed the case on standing grounds. The panel determined that the *food producers* have Article III standing but lack prudential standing because, according to the panel, the food producers are not within the zone of interests under the relevant ethanol-related statute. The panel separately held that the *petroleum producers* lack Article III standing. We must reach the merits if *either* the food producers or the petroleum producers have standing. In my view, both groups plainly have standing.

I

To begin with, the panel ruled that the *food producers* lack prudential standing. That holding is incorrect for either of two alternative reasons.

First, the Administrative Procedure Act's prudential standing "zone of interests" requirement is not jurisdictional, and the issue was not raised in this case by respondent EPA. Therefore, the issue is forfeited. Based on older circuit precedent, however, the panel held that the zone of interests requirement is jurisdictional and that the court therefore had to consider it on its own motion. The circuits are split on whether the zone of interests requirement is jurisdictional; some other circuits disagree with the conclusion of the panel here. Applying recent Supreme Court precedents, I would conclude that the zone of interests requirement is not jurisdictional. The recent Supreme Court decisions have repeatedly emphasized more careful attention to the jurisdiction label. Those cases have stressed that a rule is not jurisdictional unless it is labeled by Congress as such or unless it speaks to the power of the courts to hear the case. *See, e.g., Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243-44 (2010).

Here, the APA gives a cause of action to "aggrieved" parties; the zone of interests requirement is simply a way to help determine whether a particular party is "aggrieved." The zone of interests requirement does not pertain to the power of the court to hear a case. Under the Supreme Court's recent decisions, therefore, the zone of interests requirement is not jurisdictional – a reading of the recent Supreme Court prec-

edents with which Judge Tatel appears to agree, as he indicated in his panel concurrence. As a result, because EPA chose not to challenge the food producers' prudential standing – in other words, because EPA accepted that the food producers were within the zone of interests and therefore an aggrieved party – that issue has been forfeited and is no longer part of the case.

Second, even if the prudential standing zone of interests issue were properly presented in this case, the food producers easily meet the requirements set forth in the Supreme Court's important recent decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*. 132 S. Ct. 2199 (2012). Justice Kagan's opinion for the Supreme Court in *Match-E* – the Supreme Court's first comprehensive analysis of the prudential standing zone of interests requirement in 25 years – made clear that the zone of interests test poses a very low additional bar to an otherwise permissible APA suit by a party with Article III standing.

The Supreme Court's *Match-E* decision was issued after oral argument in our case, and the panel majority opinion appeared to treat it as a bit of an afterthought, devoting a scant two sentences to it. Under *Match-E*, as I read it, the food producers are well within the zone of interests of Section 7545, which sets forth the ethanol mandate. *See* 42 U.S.C. § 7545. The food producers' case for being within the zone of interests is especially strong here because Congress *expressly* took account of the interests of food producers, among others, in this ethanol-related statute. Moreover, the food producers' economic interests are directly affected by the increased demand

for corn caused by EPA's E15 waiver. The prudential standing zone of interests issue is thus not a close call here, in my view, even assuming that it is properly part of the case.

With the panel majority opinion left intact, this Court's prudential standing law will unfortunately linger in a state of uncertainty and error. I hope that it can be clarified at some point in a manner that comports with the Supreme Court's recent decisions on jurisdiction and prudential standing.

II

Of course, even if the food producers could not bring suit, the *petroleum producers* have separately challenged the E15 waiver. The panel ruled that the petroleum producers lack Article III standing to challenge the E15 waiver. But the petroleum producers are directly regulated parties; and as the Supreme Court has said, when a party "is himself an object of the action" at issue, "there is ordinarily little question that the action" has "caused him injury, and that a judgment preventing" the action "will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Indeed, EPA did not even challenge the petroleum producers' Article III standing, recognizing at oral argument that the petroleum producers' standing was "self-evident." Tr. of Oral Arg. at 30.

Although we of course still have to consider Article III standing because Article III standing is jurisdictional, EPA's view on this point is quite telling. EPA did not raise Article III standing no doubt because it fully understands how this program actually works, and EPA appreciates that the combination of the statutory renewable fuel mandate and EPA's E15 waiver will obviously force petroleum producers to

refine and sell E15. The panel majority opinion speculated, however, that the petroleum producers can meet the renewable fuel mandate without refining and selling E15, and that EPA's E15 waiver therefore would not cause the injury to the petroleum producers. The evidence overwhelmingly indicates the contrary – namely, that petroleum producers will have to use E15 to meet the renewable fuel mandate. In fact, the ethanol producers who sought the E15 waiver specifically argued to EPA that the E15 waiver was "necessary" for petroleum producers to meet the renewable fuel mandate. What better evidence do we need? The petroleum producers have shown, at a minimum, the requisite "substantial probability" that the E15 waiver will require them to refine and sell E15. The petroleum producers thus have Article III standing to challenge the E15 waiver.

* * *

The panel's decision to throw out the suit on standing grounds is mistaken in multiple independent ways, in my respectful view. And the panel's standing holding is problematic not only because of the erroneous standing law that it creates, but also because it is outcome-determinative in a case with significant economic ramifications for the American food and petroleum industries, as well as for American consumers who will ultimately bear some of the costs.[1] The

[1] Although not my focus here, I also note that the E15 waiver apparently will harm some cars' engines, a point made by a third set of petitioners in this case (the engine manufacturers). Indeed, just a few weeks ago, the American Automobile Association warned of the damage E15 will cause to car engines and took the extraordinary step of publicly asking EPA to block the sale of E15. *See* Gary Strauss, *AAA Warns E15 Gasoline Could Cause Car Damage*, USA TODAY, November

panel's standing holding is outcome determinative because EPA will lose if we reach the merits. The E15 waiver plainly violates the statutory text. The statute does not allow a waiver for a new fuel if the waiver would cause failure of emissions standards in cars manufactured after 1974. The evidence is undisputed that this E15 waiver would cause failure of emissions standards in cars manufactured through 2000. Yet EPA still granted the waiver. EPA's action simply cannot be squared with the statutory text.

I respectfully dissent from the denial of rehearing en banc.

30, 2012.

APPENDIX F

Effective: January 1, 2009

United States Code Annotated Currentness
Title 42. The Public Health and Welfare

Chapter 85. Air Pollution Prevention and Control
(Refs & Annos)

Subchapter II. Emission Standards for
Moving Sources

Part A. Motor Vehicle Emission and Fuel Standards
(Refs & Annos)

§ 7545. Regulation of fuels

(a) Authority of Administrator to regulate

The Administrator may by regulation designate any fuel or fuel additive (including any fuel or fuel additive used exclusively in nonroad engines or nonroad vehicles) and, after such date or dates as may be prescribed by him, no manufacturer or processor of any such fuel or additive may sell, offer for sale, or introduce into commerce such fuel or additive unless the Administrator has registered such fuel or additive in accordance with subsection (b) of this section.

[CONTENT OMITTED]

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

(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or

sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or (B) [FN2] if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

[CONTENT OMITTED]

(f) New fuels and fuel additives

(**1)(A)** Effective upon March 31, 1977, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for general use in light duty motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 7525 of this title.

(B) Effective upon November 15, 1990, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive

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

[CONTENT OMITTED]

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

[CONTENT OMITTED]

(*o*) Renewable fuel program

(1) Definitions

In this section:

(A) Additional renewable fuel

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

(B) Advanced biofuel

(i) In general

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

(ii) Inclusions

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

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

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

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

(IV) Biomass-based diesel.

(V) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.

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

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

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

(D) Biomass-based diesel

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

(E) Cellulosic biofuel

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

(F) Conventional biofuel

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

(G) Greenhouse gas

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

(H) Lifecycle greenhouse gas emissions

The term "lifecycle greenhouse gas emissions" means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

(I) Renewable biomass

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

(i) Planted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to the enactment of this sentence that is either actively managed or fallow, and nonforested.

(ii) Planted trees and tree residue from actively managed tree plantations on non-federal land cleared at any time prior to enactment of this sen-

tence, including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.

(iii) Animal waste material and animal byproducts.

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

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

(vi) Algae.

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

(J) Renewable fuel

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

(K) Small refinery

The term "small refinery" means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing

the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(L) Transportation fuel

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

(2) Renewable fuel program

(A) Regulations

(i) In general

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

(ii) Noncontiguous State opt-in

(I) In general

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

(II) Other actions

In carrying out this clause, the Administrator may--

(aa) issue or revise regulations under this paragraph;

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

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

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

(iii) Provisions of regulations

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

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

(II) shall not--

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

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

(iv) Requirement in case of failure to promulgate regulations

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

(B) Applicable volumes

(i) Calendar years after 2005

(I) Renewable fuel

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

Calendar year	**fuel (in billions of gallons)**
2006	4.0
2007	4.7
2008	9.0
2009	11.1
2010	12.95
2011	13.95
2012	15.2
2013	16.55
2014	18.15
2015	20.5
2016	22.25
2017	24.0
2018	6.0
2019	28.0
2020	30.0
2021	33.0
2022	36.0

(II) Advanced biofuel

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

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

(III) Cellulosic biofuel

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

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

(IV) Biomass-based diesel

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

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

(i) Other calendar years

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

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

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

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

(IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than

renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;

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

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

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

(iii) Applicable volume of advanced biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of advanced biofuel shall be at least the same percentage of the applicable volume of renewable fuel as in calendar year 2022.

(iv) Applicable volume of cellulosic biofuel

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

(v) Minimum applicable volume of biomass-based diesel

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

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

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

(B) Determination of applicable percentages

(i) In general

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

(ii) Required elements

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

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

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

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

(C) Adjustments

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

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

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

(4) Modification of greenhouse gas reduction percentages

(A) In general

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

(B) Amount of adjustment

In promulgating regulations under this paragraph, the specified 50 percent reduction in greenhouse gas

emissions from advanced biofuel and in biomass-based diesel may not be reduced below 40 percent. The specified 20 percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below 10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

(C) Adjusted reduction levels

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

(D) 5-year review

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

(E) Subsequent adjustments

After the Administrator has promulgated a final rule under the last sentence of paragraph (2)(A)(i)

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

(F) Limit on upward adjustments

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

(G) Applicability of adjustments

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

(5) Credit program

(A) In general

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

(i) for the generation of an appropriate amount of credits by any person that refines, blends,

or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2);

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

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

(B) Use of credits

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

(C) Duration of credits

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

(D) Inability to generate or purchase sufficient credits

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

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

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

(E) Credits for additional renewable fuel

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

(6) Seasonal variations in renewable fuel use

(A) Study

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

(B) Regulation of excessive seasonal variations

If, for any calendar year, the Administrator of the Energy Information Administration, based on the study under subparagraph (A), makes the determinations specified in subparagraph (C), the Administrator of the Environmental Protection Agency shall promulgate regulations to ensure that 25 percent or more of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) is used during each of the 2 periods specified in subparagraph (D) of each subsequent calendar year.

(C) Determinations

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

(i) less than 25 percent of the quantity of renewable fuel necessary to meet the requirements of

paragraph (2) has been used during 1 of the 2 periods specified in subparagraph (D) of the calendar year;

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

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

(D) Periods

The 2 periods referred to in this paragraph are--

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

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

(F) State exemption from seasonality requirements

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

(7) Waivers

(A) In general

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

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

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

(B) Petitions for waivers

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

(C) Termination of waivers

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

(D) Cellulosic biofuel

(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume estab-

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

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

(iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of

cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

(E) Biomass-based diesel

(i) Market evaluation

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

(ii) Waiver

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

(iii) Extensions

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

(F) Modification of applicable volumes

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

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

(ii) at least 50 percent of such volume requirement for a single year, the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).

(8) Study and waiver for initial year of program

(A) In general

Not later than 180 days after August 8, 2005, the Secretary of Energy shall conduct for the Adminis-

trator a study assessing whether the renewable fuel requirement under paragraph (2) will likely result in significant adverse impacts on consumers in 2006, on a national, regional, or State basis.

(B) Required evaluations

The study shall evaluate renewable fuel--

(i) supplies and prices;

(ii) blendstock supplies; and

(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

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

(D) Waiver

(i) In general

Not later than 270 days after August 8, 2005, the Administrator shall, if and to the extent recommended by the Secretary of Energy under subparagraph (C), waive, in whole or in part, the renewable fuel requirement under paragraph (2) by reducing the national quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

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

(9) Small refineries

(A) Temporary exemption

(i) In general

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

(ii) Extension of exemption

(I) Study by Secretary of Energy

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

(II) Extension of exemption

In the case of a small refinery that the Secretary of Energy determines under subclause (I) would be subject to a disproportionate economic hardship if required to comply with paragraph (2), the Administrator shall extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

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

(ii) Evaluation of petitions

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

(iii) Deadline for action on petitions

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

(C) Credit program

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

(D) Opt-in for small refineries

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

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

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

(ii) Scoring

For the purpose of scoring under clause (i) using the Herfindahl-Hirschman Index, all marketing ar-

rangements among industry participants shall be considered.

(B) Report

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

(11) Periodic reviews

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

(A) existing technologies;

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

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

(12) Effect on other provisions

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

[CONTENT OMITTED]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1380

FILED On: October 25, 2011

GROCERY MANUFACTURERS
ASSOCIATION, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

Consolidated with 10-1414, 11-1002, 11-1046,
11-1072, 11-1086

On Petitions for Review of Final Actions of the
Environmental Protection Agency

FINAL OPENING BRIEF FOR PETITIONERS

[CONTENT OMITTED]

STANDING

Petitioners in these six consolidated cases fall into three categories – engine products, petroleum, and food. The engines products group – the Alliance, Global Automakers, NMMA, and OPEI – is made up of trade associations whose members manufacture light-duty motor vehicles, engines and related equipment, marine vessels, and outdoor power equipment, and whose emission-control devices, systems and engines may be harmed by the use of E15. They are directly affected by the partial E15 waiver. The Alliance and Global Automakers will be retroactively required to permit E15 to be used in all MY2001 and newer motor vehicles currently on the road, as well as all future vehicles. None of the current vehicles (other than a small number of flex-fuel vehicles) were manufactured, certified, or warranted to use ethanol blends greater than E10. They therefore face serious risks of liability imposed by numerous state and federal laws, as well as operational performance and consumer satisfaction exposure. *See, e.g.*, CAA, 42 U.S.C. §§ 7541 and 7547 (imposing liability for in-use emission warranty claims and providing for recall of vehicles and engines due to non-conformity with applicable standards); National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, et seq. (requiring recalls under 49 C.F.R. Part 577 due to safety-related problems that potentially may be caused by the use of E15); Consumer Product Safety Act, 15 U.S.C. § 2051, *et seq.* (same). Vessel owners are potentially liable for safety-related problems that may be caused by the use of E15 under the Federal Boat Safety Act, 46 U.S.C. 4301, *et seq*. These Petitioners as well as individual members of the associations provided information de-

tailing their harms to EPA in their comments opposing the E15 waiver. *See, e.g.*, JA387-433 [R2,559.1] (ALLSAFE and OPEI); JA532-567 [R2,679.1] (NMMA); JA132-141 [R1,026.1] (Mercury Marine); JA159-170 [R2,515] (Mercedes-Benz USA).

Three petroleum groups – API, NPRA, and WSPA – have members that that produce gasoline from crude oil. ILTA has members that handle, store, and transfer bulk quantities of gasoline and renewable fuels. Accommodating an additional gasoline-ethanol blend in the fuel market – the direct result of EPA's approval of E15 – will require petroleum group members to undertake special fuel production, transportation, and fuel segregation efforts. In addition, members that produce E15 blends will be required to comply with new compliance surveys and fuel pump dispenser labeling requirements. These actions will impose substantial economic costs.

Members of the petroleum group who are refiners and importers are also obligated parties under EISA, *see* 75 FR at 14,867-68 (to be codified at 40 C.F.R. § 80.1406). This means that refiners and importers will necessarily have to introduce E15 into commerce, which will affect other petroleum group members engaged in downstream operations. *See id.* at 14,772 (describing "essentially all downstream [fuel] blenders and terminals," as well as the traditional "refiners and importers" as "regulated parties under RFS[] since essentially all gasoline will be blended with ethanol"). EPA's partial E15 waiver therefore will require these organizations to expend enormous resources to blend and introduce E15 into the market.

In addition, petroleum group members could potentially face significant liability risks due to the harms

that could result from using E15 in some waivered vehicles or in misfueling pre-MY2001 vehicles and other engines, including power tools, generators, and vessels, for which E15 is manifestly unsuitable. These Petitioners, as well as individual members of their organizations, therefore submitted numerous comments explaining such harms. *See, e.g.*, JA206-235 [R2,550] (NPRA); JA568-592 [R2,680] (API); JA623-625 [R2,824] (BP America); JA626-627 [R2,883] (Chevron). *See also* U.S. Gov't Accountability Office, GAO-11-513, *BIOFUELS: Challenges to the Transportation, Sale, and Use of Intermediate Ethanol Blends* 27-30 (June 2011), *available at* http://www.gao.gov/new.items/d11513.pdf (hereinafter GAO, *Biofuels*) (explaining the various costs and risks that retailers are likely to face in selling intermediate ethanol blends).

The food group petitioners – GMA, AFFI, AMI, NCC, NCCR, NMA, NPPC, NTF, and SFA – represent entities that either produce, market, and distribute food items made from the grains (mostly corn) that will be diverted to produce more ethanol, or raise livestock that eat feed predominantly made up of such grains. The increased demand for grains that produce ethanol will result in a corresponding increase in grain prices. See 75 FR at 14,683 (Table I.B-1) (predicting at least an 8.2% increase in corn prices and a soybean price increase of 10.3%). Petitioners raised this very point in their comments to EPA opposing the E15 waiver request, as did their individual member organizations. *See, e.g.*, JA146-156 [R2,347.1] (NCC); JA599-615 [R2,717] (AFFI, GMA, NCCR, SFA, among others); JA616- 622 [R2,768.1] (AMI and NTF); JA129 [R523.1] (Tyson); JA144-145 [R1,321] (Simmons); JA526-531

[R2,678.1] (Smithfield); JA628-629 [R13,898] (Farbest).

It is the settled law of this Circuit that where any one petitioner has standing, the Court need not address the standing of other petitioners. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998). Here, however, *all* Petitioners are directly affected by EPA's "partial waiver" decisions. The specific members of these organizations, identified in the Certificate of Parties, *supra*, will be harmed as here identified. Standing is therefore established.

ARGUMENT

[CONTENT OMITTED]

CONCLUSION

[CONTENT OMITTED]

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1380

FILED On: October 25, 2011

GROCERY MANUFACTURERS
ASSOCIATION, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

Consolidated with 10-1414, 11-1002, 11-1046,
11-1072, 11-1086

On Petitions for Review of Final Actions of the
Environmental Protection Agency

FINAL REPLY BRIEF FOR PETITIONERS

[CONTENT OMITTED]

STANDING

EPA concedes that the Court has jurisdiction over this case, and therefore that Petitioners have standing. *See* EPA Br. 1. This is consistent with its longstanding treatment of many of the individual petitioners as "stakeholders" in Section 211(f)(4) waiver decisions. *See id.* at 6-7, 10, 35, n.8, 42-43, 49; JA44-45 [75 FR 68,094, 68,133-34 & n.109 (Nov. 4, 2010)]. But Growth contends that Petitioners have demonstrated neither Article III nor prudential standing. *See* Growth Br. 3. Growth is wrong on both counts.[1]

I. PETITIONERS HAVE ARTICLE III STANDING.

The bulk of Growth's Article III argument "is nothing more than an effort to bootstrap standing analysis to issues that are controverted on the merits." *Southern Cal. Edison Co. v. FERC*, 502 F.3d 176, 180 (D.C. Cir. 2007) (citation omitted). Growth dismisses as "speculative" that E15 will cause engine failures and emissions standards violations, and that consumers will misfuel with E15. Growth Br. 4-6. But as this Court has held, "in reviewing the standing question, the court must be careful not to decide the questions on the merits * * * and must * * * assume that * * * the petitioner would be successful in its claims." *Southern Cal. Edison Co.*, 502 F.3d at 180 (brackets and citation omitted).

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[1] Growth argues in a footnote (at 19 n.2) that this Court should consider the standing of each of the petitioner groups separately. But Petitioners have filed on joint brief, and where one petitioner has standing, all have standing. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998).

In any event, the record is replete with studies demonstrating the harmful effects of E15 on vehicles and engines. Indeed, EPA summarized some of these studies in its first waiver decision. *See, e.g.*, JA34 [75 FR at 68,123] (describing studies provided by Honda and the CRC). Commenters referenced the common occurrence, during the transition from leaded to unleaded fuel, of *intentional* misfueling by customers, even where physical barriers were in place to prevent misfueling (which are not required for E15). *See* JA393 [R2,559.1, ALLSAFE cmt., at 2] (citing 49 FR 31,032, 31,034 (Aug. 2, 1984)).

Misfueling and engine failures are hardly "speculative." The injury Petitioners will suffer as a result is being subjected to potential penalties and liabilities under facially applicable CAA provisions and having to defend against them. *See, e.g.*, 42 U.S.C. § 7541(c)(1). Whether there are meritorious defenses available to them is beside the point.

Growth's argument concerning the petroleum group is, at best, disingenuous. While Growth seeks to characterize selling E15 as completely "voluntary," its past statements indicate a different view. In submitting its application, Growth labeled the waiver as "Necessary to Meet Federal Law and Important Governmental Objectives" and stated that "[f]ailure to remove the blend barrier will result in an insufficient supply of ethanol to meet the renewable fuel mandates of EISA 2007." *See* JA84-85 [R2, Cover Letter, at 1-2].

EPA's partial waiver will effectively require petroleum group members to expend enormous resources to introduce E15 into commerce. See Pet. Br. 4-5, 19. EPA has concluded that "[t]o the extent it is used in

the marketplace, E15 would likely replace the use of E10." JA80 [76 FR 4,662, 4,680 (Jan. 26, 2011)]. Specialized transportation, handling, and fuel segregation efforts will be necessary. See, e.g., JA226, 227-229 [R2,550, NPRA cmt., at 19, 20-22]; JA575-577 [R2,680.3, API cmt., at 6-8]. Additional costs imposed by the introduction of E15 and the increased likelihood of liability are thus anything but speculative.

The food petitioners also plainly have standing. EPA has predicted that corn prices will increase as a result of the new RFS standards, despite the limit on the amount of corn starch ethanol that may be counted toward the requirement. See 75 FR 14,670, 14,683 (Mar. 26, 2010) (Table I.B-1). The so-called "blend wall" limits the amount of corn that is now being diverted to ethanol for production of E10. The E15 waiver eliminates the E10 blend wall, which will increase diversion – and increase corn prices.

II. PETITIONERS HAVE ARTICLE III STANDING.

[CONTENT OMITTED]

III. EPA'S WAIVER DECISIONS WERE NEITHER RATIONALLY SUPPORTED BY THE RECORD NOR ADEQUATELY EXPLAINED.

[CONTENT OMITTED]

CONCLUSION

[CONTENT OMITTED]