COMMENTS

submitted on behalf of

URBAN AIR INITIATIVE, INC.

Concerning the U.S. Environmental Protection Agency's

Fuels Regulatory Streamlining;

Docket ID No. EPA-HQ-OAR-2018-0227

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GLOSSARY

E0	Fuel blends consisting of gasoline and no ethanol
E10	Fuel blends consisting of gasoline and 9 to 10 percent ethanol
E15	Fuel blends consisting of gasoline and 10 to 15 percent ethanol
E85	Fuel blends consisting of gasoline and 51 to 83 percent ethanol
FFV	Flex-fuel vehicle, a vehicle certified to operate on any fuel mixture consisting of gasoline and up to 83 percent ethanol
Mid-level blends	Fuel blends consisting of gasoline and more than 15 but less than 50 percent ethanol

INTRODUCTION & EXECUTIVE SUMMARY

Urban Air Initiative objects to four aspects of the proposed *Fuels Regulatory Streamlining* Rule:

1. Urban Air Initiative objects to the new definition of gasoline

The proposed rule "focuses primarily on streamlining and consolidating" the Clean Air Act's gasoline and diesel fuel quality regulations.[1] But while sailing under the flag of a deregulatory action, the proposed rule would significantly expand the reach of the gasoline regulations and impose enormous compliance burdens on an important segment of the industry.

The proposed rule would do so through an expansive new definition of gasoline.[2] Under the proposal, "gasoline" would, for the first time, include"[a]ny fuel intended or used to power a vehicle or engine designed to operate on gasoline, except for gaseous fuel."[3] On its face, that definition would include alternative flex fuels that have never been regulated as gasoline, including E85. E85 is "used to power" flex-fuel vehicles, which are "designed to operate on gasoline." Under the only reasonable interpretation of the proposed definition of gasoline, thus, E85 or other flex fuels would be "gasoline," and subject to extensive compliance burdens that are ill-suited for these fuels.

This regulatory expansion is not only costly; it is also unlawful, for at least three reasons:

First. The proposed rule would subject E85 and other alternative flex fuels that have never previously been regulated to the controls applicable to gasoline, without making any of the administrative findings or following any of the legal procedures required by the Clean Air Act. That procedural evasion is illegal.

Second. The proposed rule fails to even acknowledge the change in policy or consider the significant industry reliance interests that would be overturned by treating flex fuels as gasoline.

Third. The proposed rule violates the Regulatory Flexibility Act because EPA's certification that the proposed rule will not harm small businesses is conclusory and does not take into account the effects that EPA's expansive definition of gasoline will have on small businesses.

Apart from being unlawful, the proposed rule contravenes Executive Order 13,771. The expansive definition of gasoline would impose significant burdens on an industry that has never been regulated. That makes this action regulatory under Executive Order 13,771.

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[1] Proposed Rule, 85 Fed. Reg. 29,034, 29,035 (May 14, 2020).

[2] *See id.* Fed. Reg. at 29,040–41, 29,101.

[3] *Id.* at 29,101.

2. Urban Air Initiative objects to the current interpretation of the definition of gasoline

The proposed rule's definition of gasoline also recodifies and therefore reopens EPA's current definition of gasoline for comment. This current definition of gasoline includes any fuel "commonly or commercially known" as gasoline. EPA has asserted that this definition of gasoline would include mid-level ethanol blends like E20 or E30 as gasoline. This interpretation is arbitrary and inconsistent with commercial usage. Mid-level blends are not commonly or commercially sold as gasoline. They are instead sold as an alternative "flex fuel." The final rule must clarify that mid-level blends are not commonly or commercially sold as gasoline.

3. Urban Air Initiative objects to the new definition of "fuel additive" under the Clean Air Act's "substantially similar" law

The proposed rule would codify a new definition of "fuel additive." The proposed rule would define "fuel additive" to mean "a substance that is designated for registration under 40 CFR part 79 and is added to fuel such that it amounts to less than 1.0 volume percent of the resultant mixture, or is an oxygenate added up to a level consistent with levels that are 'substantially similar' under 42 U.S.C. 7545(f)(1) or as permitted under a waiver granted under 42 U.S.C. 7545(f)(4)." But the statute does not allow EPA to contort the meaning of fuel additive based on what concentrations of fuel additives the Agency deems "substantially similar."

4. Urban Air Initiative objects to the 15% ethanol cap under EPA's interpretation of the Clean Air Act's "substantially similar" law

The proposed rule reopens EPA's 2019 definition of "substantially similar" by proposing to codify a new rule asserting that fuel manufacturers must meet "any parameters articulated in [EPA's] definition of 'substantially similar,' " and adhering to "the parameters associated with the 2019 definition of substantially similar." That definition caps the concentration of ethanol in gasoline at 15%. That cap lacks a statutory basis under the law, because fuel blends with more than 15% ethanol are "substantially similar" to the high-level ethanol-gasoline test fuel.

BACKGROUND

A. EPA has adopted extensive fuel regulations to control the quality of "gasoline" under the Clean Air Act.

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

> (A) "if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes to, air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or

(B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated."[4]

Any person who violates EPA's controls or prohibitions under § 211(c) is subject to civil enforcement actions.[5]

Over the years, EPA has adopted extensive regulations to control the characteristics of gasoline fuels and fuel additives under § 211(c) and other related provisions of the Clean Air Act. These rules are currently codified in Part 80 of Title 40 of the Code of Federal Regulations.

Gasoline "refiners" have extensive compliance obligations under these fuel quality rules.[6] They must demonstrate compliance with standards controlling gasoline Reid Vapor Pressure (RVP),[7] sulfur,[8] and benzene,[9] among other fuel standards. To demonstrate compliance, each gasoline refiner must sample and test each batch of gasoline produced for conformity with EPA's gasoline standards, register as a refiner with EPA, submit periodic reports, and arrange for annual audits by an independent auditor.[10] These extensive compliance requirements are designed for crude oil refiners, which produce large batches of tens or hundreds of thousands of gallons of gasoline.

But, as EPA has long recognized, this regulatory treatment is not suitable for downstream entities dealing in smaller batches of gasoline, who cannot amortize the cost of sampling and testing each batch. For that reason, not all persons who fit the literal definition of "refiner" are treated as such under EPA's gasoline regulations. Under EPA's gasoline sulfur rules, for example, "oxygenate blenders . . . are not subject to the refiner or importer [sulfur] requirements . . . , but are subject to the requirements and prohibitions applicable to

[4] 42 U.S.C. § 7545(c)(1).

[5] *Id.* § 7545(d)(1).

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

[7] 40 C.F.R. § 80.27.

[8] *Id.* § Part 80, Subparts H, O.

[9] *Id.* § Part 80, Subpart L.

[10] *See Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, 84 Fed. Reg. 10,584, 10,595 (Mar. 21, 2019) (Proposed E15 Rule); *see also* Proposed Rule, 85 Fed. Reg. at 29,106 (describing these duties), *to be codified at* 40 C.F.R. § 1090.105; *id.* at 29,140 (requiring gasoline "fuel manufacturers", formerly refiners, to "[p]erform testing for each batch of gasoline to demonstrate compliance with sulfur and benzene standards and perform testing for each batch of summer gasoline to demonstrate compliance with RVP standards."), *to be codified at* 40 C.F.R. § 1090.1310(b)(2).

downstream parties," and other specific requirements.[11] Similarly, under the RVP rules, an "ethanol blender" may demonstrate compliance "by showing receipt of certification from the facility from which the gasoline was received."[12]

B. EPA has long opted not to specifically control the quality of E85 blends.

In the mid-to-late 1990s, automakers began selling "flex-fuel" vehicles, or "FFVs."[13] Flex-fuel vehicles are vehicles certified to meet the Clean Air Act's emissions standards using both a "high-level gasoline-ethanol blend" test fuel (containing between 80% and 83% ethanol) and a gasoline test fuel.[14] This ensures that flex-fuel vehicles "are certified to meet emission standards" with gasoline and up to 83% ethanol "and any intermediate combination of gasoline and ethanol."[15]

For over two decades, retailers have sold a fuel blend commonly and commercially known as "E85," containing between 51% and 83% ethanol, for use in such flex-fuel vehicles.[16] Numerous statutes and federal programs have encouraged the production of FFVs and the sale of E85.[17]

EPA has historically taken a light-touch approach for E85. EPA has not "designated" the fuel for registration under § 211(a) of the Clean Air Act, and it has not imposed any fuel quality standards on E85 under § 211(c).[18] Controlling E85 has been unnecessary, because the "historically approved practice of blending E51–83 from only denatured fuel ethanol (DFE)

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[11] 40 C.F.R. § 80.1609.

[12] *Id.* § 80.28(g)(8).

[13] *Renewables Enhancement and Growth Support Rule*, 81 Fed. Reg. 80,828, 80,830 (Nov. 16, 2016) (REGS Rule) ("FFVs have been manufactured and introduced into commerce since 1996, and represent more than 6 percent of the current vehicle fleet and approximately 25 percent of new light-duty vehicles produced in 2014."); *see also* Dep't of Transp. et al., Report to Congress: Effects of the Alternative Motor Fuels Act CAFE Incentives Policy 13, 21–23 (2002) (reporting FFVs produced up to 2001).

[14] 40 C.F.R. § 1065.725; Proposed REGS Rule, *supra* note 13, 81 Fed. Reg. at 80,853 ("Emissions certification testing of FFVs is required using both the test fuel specified for conventional gasoline vehicles and a high ethanol content FFV test fuel (E83).").

[15] Letter from Margo Oge, Dir., Office of Transp. & Air Quality, EPA (Nov. 28, 2006) (2006 Oge Letter); Letter from Adam Kushner, Dir., Air Enforcement Div., EPA (July 31, 2008) (2008 Kushner Letter); 40 C.F.R. § 86.1803-01 (defining "flexible fuel vehicle" as a "motor vehicle engineered and designed to be operated on a petroleum fuel and on a[n] . . . ethanol fuel, or *any mixture* of the petroleum fuel and . . . ethanol") (emphasis added).

[16] *See* ASTM D5798 – 19a. The fuel contains a maximum of 85% denatured fuel ethanol when accounting for the 2% denaturant typically added to make ethanol unfit for human consumption. Proposed REGS Rule, *supra* note 13, 81 Fed. Reg. at 80,830 n.13.

[17] *See, e.g.*, 49 U.S.C. § 32905(b); 42 U.S.C. § 7583(d); *USDA Announces $100 Million for American Biofuels Infrastructure*, Press Release No. 0237.20 (May 4, 2020).

[18] Proposed REGS Rule, *supra* note 13, 81 Fed. Reg. at 80,830.

and certified gasoline blendstocks for oxygenate blending (BOBs) virtually ensured the resulting blend met the gasoline fuel specifications."[19]

C. EPA has treated mid-level blends inconsistently.

1. Before 2014, EPA told fuel retailers they could sell mid-level blends using blender pumps under the Clean Air Act.

Over a decade ago, fuel retailers began using blender pumps to sell E16–E50 blends for use in flex-fuel vehicles. "The typical current practice is that a blender pump mixes gasoline (E0 or E10) and E85 parent blends at different ratios to produce various E16–50 blends."[20]

Early on, regulated parties sought to ascertain the legality of this practice under the Clean Air Act. In 2006, Dawna Leitzke, executive director of a South Dakota fuel retailers' association, asked EPA for its "position on marketers selling ethanol blends other than E10 and E85 through blender pumps for use in FFVs."[21]

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

> "[B]lends such as E20 and E30 for use in FFVs . . . are covered under the emissions certification for an E85 FFV, and thus are not prohibited under the Clean Air Act."[22]

EPA provided a similar response in 2008.[23]

2. In the preamble to the 2014 Tier 3 Rule, EPA asserted for the first time that mid-level blends were regulated gasoline.

In 2014, EPA finalized the Tier 3 Rule. In the Tier 3 Rule's preamble, EPA began to move the goalposts. It said:

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[19] *Id.* In recent years, however, abundant low-cost natural gasoline (a byproduct of natural gas) has also been used to make E85. *Id.* But according to EPA, the use of natural gasoline may violate the Clean Air Act's "substantially similar" requirement, CAA § 211(f). *Id.* at 80,842-43 ("To assure compliance with the sub-sim requirement, the EPA has required that E85 blenders can use only certified gasoline, BOBs, and DFE as E85 blendstocks, consistent with practices used in producing such blends for vehicle certification. Historically, this has not been an issue, as these were the only blendstocks used when E85 was produced at refined product terminals. However, we understand that ethanol producers may also be producing E85 by blending DFE with hydrocarbon used as an ethanol denaturant. The Alcohol Tobacco Tax and Trade Bureau (TTB) specifies a range of hydrocarbons that can be used as an ethanol denaturant, including gasoline and natural gasoline.").

[20] *Id.* at 80,842; *id.* at 80,831 n.23 ("Blender pumps make mid-level ethanol blends by mixing two parent blends stored in different storage tanks.").

[21] 2006 Oge Letter, *supra* note 15.

[22] *Id.*

[23] 2008 Kushner Letter, *supra* note 15 ("The Clean Air Act does not . . . prohibit retail gasoline stations from selling gasoline blended with up to 85% ethanol for use in flexible-fueled vehicles or engines.").

> [V]arious standards for gasoline currently apply to any fuel sold for use in motor vehicles, which is commonly or commercially known or sold as gasoline. In the fuel and fuel additive registration program, the gasoline family includes fuels composed of at least 50 percent clear gasoline by volume. As a result, our gasoline standards currently apply to E16–50 ethanol blends. However, additional regulatory provisions could be useful to facilitate compliance assurance if we are to continue to treat such mid-level ethanol blends as gasoline.[24]

The Tier 3 Rule's preamble thus announced EPA's conclusion that E16–E50 blends are regulated "gasoline."

Despite EPA's non-binding musings in the preamble, fuel retailers continued selling mid-level blends, unaware that at least some EPA staff now considered fuel retailers to be regulated "refiners." A slide deck prepared by EPA staff and submitted to the Tier 3 docket asserted, without explanation, that retail "blenders" selling E16–E50 blends "*should be* treated as refiners *but they are unaware*."[25]

3. In the proposed Renewable Enhancement and Growth Support Rule, EPA asserted that retailers who sell mid-level blends are gasoline refiners, but it also proposed rules tailored for this fuel marketplace.

In the proposed Renewables Enhancement and Growth Support (REGS) Rule, EPA moved the goalposts further by asserting that fuel retailers had to comply with the gasoline refinery rules even if they sold E16–E50 blends.[26] EPA acknowledged that "E16–50 gasoline blends are currently produced for use in FFVs using blender pumps at fuel retailer facilities."[27] But it suggested that "[b]ecause the EPA currently considers E16–50 to be gasoline[,] and blender pump operators mix E85 (a non-gasoline) with gasoline to produce E16–50, blender pump operators are gasoline refiners under our existing regulations."[28] Moreover, EPA said, retailers cannot avoid these regulations by selling fuel for use in flex-fuel vehicles: "[a]ll gasoline . . . is subject to all of the requirements applicable to gasoline because of its formulation, not because of its end use."[29] The regulations "cannot be circumvented by relabeling" gasoline for use in flex-fuel vehicles.[30] This was contradicted by prior EPA

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

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

[26] Proposed REGS Rule, *supra* note 13, 81 Fed. Reg. at 80,842.

[27] *Id.*

[28] *Id.*

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

[30] *Id.*

guidance assuring fuel retailers that the § 211 gasoline regulations apply only when gasoline is sold "for use in gasoline-only vehicles."[31]

As a practical matter, this interpretation would prohibit retailers from selling mid-level blends using blender pumps under the Clean Air Act, contradicting Director Oge's prior guidance. As EPA has recognized, "[refinery] sampling, testing, recordkeeping, and reporting requirements are not suited to fuel retail."[32] In particular, compliance "with the existing [refinery] per batch testing requirements in a retail setting is impractical because each vehicle fill-up would be considered a batch."[33] Indeed, compliance with this requirement is impossible. There is no feasible way for retailers to sample and test gasoline each time a customer attempts to refuel a vehicle with a mid-level blend.

The proposed REGS Rule would have "resolv[ed] the ambiguity of E16–50 blends" by excluding mid-level blends from its definition of gasoline and creating a new certified ethanol flex-fuel (E16–E83) that could only be sold for use in flex-fuel vehicles.[34] While ethanol flex-fuel would be subject to fuel quality standards that ensure parity with the standards for gasoline, the REGS rule proposed new streamlined compliance rules tailored to work for ethanol flex fuels and their producers.[35]

The proposed REGS rule has not been finalized.

4. A pending administrative petition asks EPA to clarify that mid-level blends are not gasoline.

On August 9, 2019, a coalition of non-profit organizations and ethanol industry stakeholders filed an administrative petition with EPA, asking the Agency to allow the continued sale of mid-level blends for use in flex-fuel vehicles, consistent with Director Oge's guidance. Among other things, this petition argues that gasoline fuel quality controls do not apply to mid-level blends because they are not "commonly or commercially known or sold" as gasoline.[36]

EPA has not acted on this petition.

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[31] 2008 Kushner Letter, *supra* note 15.

[32] Proposed REGS Rule, *supra* note 13, 81 Fed. Reg. at 80,830.

[33] *Id.* at 80,847.

[34] *Id.* at 80,844.

[35] *Id.* at 80,843–44.

[36] Administrative Petition, https://boydengrayassociates.com/wp-content/uploads/2019/08/Petition-20190809.pdf.

COMMENTS

I. THE PROPOSED RULE'S DEFINITION OF GASOLINE IS CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS.

A. The proposed rule's definition of gasoline is unlawful because it would control E85 and other fuels as "gasoline" without complying with the statutory requirements of § 211(c).

The *Fuels Regulatory Streamlining* proposed rule "includes a new definition of gasoline."[37]

The proposed definition of gasoline includes:

> "(1) Any fuel commonly or commercially known as gasoline, including BOB.
>
> "(2) Any fuel intended or used to power a vehicle or engine designed to operate on gasoline, except for gaseous fuel.
>
> "(3) Any fuel that conforms to the specifications of ASTM D4814 (incorporated by reference in § 1090.95) and is made available for use in a vehicle or engine designed to operate on gasoline."[38]

Paragraph 1 of the new definition "is consistent with the existing parts 79 and part 80 definitions of gasoline."[39]

Paragraph 2 expands the definition of gasoline to any fuel "made available for use or used in a gasoline-fueled vehicle or engine."[40] EPA reasons that "[s]ince the ultimate purpose of our fuel standards is to ensure that compliant fuel is used in vehicles and engines, . . . if [a] product is used in a gasoline-fueled vehicle or engine, the product should be subject to EPA standards."[41]

Paragraph 3 aims to capture "fuel[s] that [are] chemically and physically similar to gasoline."[42]

The proposed definition of gasoline is overbroad. In particular, paragraph 2 of the proposed definition of gasoline would include alternative fuels like E85 or mid-level blends that have never been treated as "gasoline." Under that paragraph, "[a]ny fuel intended or used

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[37] 85 Fed. Reg. at 29,040.

[38] *Id.* at 29,101 (to be codified at 40 C.F.R. § 1090.80).

[39] *Id.* at 29,040.

[40] *Id.*

[41] *Id.*

[42] *Id.*

to power a vehicle or engine designed to operate on gasoline, except for gaseous fuel" would be considered "gasoline."[43] But ethanol flex-fuel vehicles are "designed to operate on gasoline."[44] Thus, E85 would be treated as "gasoline" under the proposed definition, even though the fuel is sold exclusively for use in flex-fuel vehicles and has never been treated as gasoline.

EPA lacks authority to make such a sweeping change in the regulatory treatment of E85 or mid-level blends without first making the findings and following the procedures required by the Clean Air Act. Under the Clean Air Act, EPA may regulate a fuel under section 211(c) only

> (A) "if, in the judgment of the Administrator, [the] fuel or . . . or any emission product of such fuel . . . causes, or contributes to, air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or
>
> (B) if emission products of such fuel . . . will impair to a significant degree the performance of any emission control device or system[.]"[45]

EPA has made no such findings for E85, mid-level blends, or other alternative fuels used in flex-fuel vehicles in the proposed rule. EPA may not avoid its obligation to make these findings by simply recategorizing these fuels as gasoline.

Moreover, EPA may not control fuels that endanger public health or welfare "except after consideration of all relevant medical and scientific evidence available to [EPA], including consideration of other technologically or economically feasible means of achieving emission standards under [section 202]."[46] Similarly, EPA may not control fuels that impair emission control systems "except after consideration of available scientific and economic data, including a cost-benefit analysis."[47] EPA has not considered any of this evidence in the proposed rule.

EPA should fix the illegal proposed rule by striking paragraph 2 from the proposed definition of gasoline. Alternatively, EPA should amend the text of the proposed rule as follows:

> "(2) Any fuel intended or used to power a vehicle or engine designed to operate *solely* on gasoline, except for gaseous fuel."

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[43] *Id.* at 29,101.

[44] 40 C.F.R. § 86.1803-01 (defining "flexible fuel vehicle" as a "motor vehicle engineered and designed to be operated on a petroleum fuel and on a[n] . . . ethanol fuel, or any mixture of the petroleum fuel and . . . ethanol").

[45] 42 U.S.C. § 7545(c)(1).

[46] *Id.* § 7545(c)(2)(A).

[47] *Id.* §7545(c)(2)(B).

This modification would exclude fuels like E85 sold for use in flex-fuel vehicles, correcting this illegal proposal.

B. The proposed rule's definition of gasoline is arbitrary and capricious because it fails to consider important reliance interests.

The proposed definition of gasoline is also arbitrary and capricious because the proposed rule fails to consider important reliance interests or acknowledge that the proposed definition of gasoline would subject E85 or mid-level blends to new, burdensome regulation. When an agency departs from its own precedent, the agency must "at least 'display awareness that it is changing position,' " provide "good reasons for the new policy," and take into account any "serious reliance interests" affected by the change in agency policy.[48] As the Supreme Court recently held, when an agency is "not writing on a blank slate, it [is] required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[49]

The proposed rule does not meet this basic standard. E85 has never been regulated under § 211(c). Nor is regulation necessary: E85 made with previously certified gasoline and denatured fuel ethanol yields a quality fuel product that ensures low vehicle emissions and does no harm to emission controls. And under EPA's interpretation of the sub-sim law, it appears that the use of uncertified natural gasoline is already unlawful.

Ethanol plants, terminal blenders, and fuel retailers have made significant investments in E85 infrastructure, relying on this light-touch regulatory treatment of E85.[50] But the proposal would now subject E85 fuel manufacturers to significant compliance burdens for crude oil refiners, without acknowledging any change in agency policy or the effect of the new policy on the longstanding and important reliance interests of E85 fuel manufacturers. It would also impose novel regulatory burdens on the approximately 5,000 fuel retailers who sell E85.[51] Failure to "consider[] those matters" is arbitrary and capricious.[52]

Similarly, despite EPA's erroneous statements to the contrary, mid-level blends have never been regulated as gasoline. Treating such blends as regulated gasoline would make it impossible for retailers to lawfully continue the practice of selling mid-level blends using blender pumps, which EPA specifically approved as legal under the Clean Air Act.[53] Thus,

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[48] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[49] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, No. 18-587, 2020 WL 3271746, at *15 (U.S. June 18, 2020) (quotation marks and citation omitted).

[50] *See, e.g.*, *supra* note 17.

[51] Ken Colombini, *Flex Fuel Spreads Its Reach, as Casey's Becomes 5,000th Station to Offer E85* (Mar. 23, 2020), https://ethanolrfa.org/2020/03/flex-fuel-spreads-its-reach-as-caseys-becomes-5000th-station-to-offer-e85//.

[52] *Regents*, 2020 WL 3271746, at *15.

[53] Proposed REGS Rule, *supra* note 13, 81 Fed. Reg. at 80,847.

the proposed rule would overturn the significant reliance interests of fuel retailers who sell these blends.[54] By subjecting hundreds or thousands of small fuel retailers who sell mid-level blends to the same compliance rules as crude oil refiners, while failing to acknowledge their "serious reliance interests" or any change in Agency policy, the proposed rule is arbitrary and capricious.[55]

To avoid finalizing an arbitrary and capricious rule, EPA must narrow its proposed definition of gasoline or publish a supplemental notice of proposed rulemaking explaining the Agency's reasons for departing from prior policy and the strong reliance interests.

C. The proposed rule violates the Regulatory Flexibility Act.

The new definition of gasoline is unlawful for another reason: EPA has not satisfied its obligations under the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA) with respect to its proposed definition of gasoline in the *Fuels Regulatory Streamlining* rule. Under the RFA, when an agency publishes a notice of proposed rulemaking as required by the Administrative Procedure Act, it must "prepare and make available for comment an initial regulatory flexibility analysis," which "shall describe the impact of the proposed rule on small entities."[56] This requirement does not apply "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities" and "publish[es] such certification in the Federal Register . . . at the time of publication of general notice of proposed rulemaking for the rule . . . , along with a succinct statement explaining the reasons for such certification."[57]

Under the SBREFA, "a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with" certain of the RFA's requirements, including the requirements of § 605(b).[58] Upon review, the agency's certification decision stands if the agency made a "reasonable, good-faith effort" to satisfy the RFA's mandate.[59] The agency must support its decision with a minimum of analysis and evidence; a "conclusory statement with no evidentiary support in the record does not prove compliance with" the RFA.[60]

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[54] While the number of fuel retailers who sell these blends nationwide is unclear, retailer data gathered by Minnesota's Commerce Department shows 284 fuel retail stations report selling significant amounts of E20, E30, E40, and E50 in Minnesota. 2019 Minnesota E85 + Mid-blends Station Report, https://mn.gov/commerce-stat/pdfs/e85-fuel-use-2019.pdf. Other states across the Midwest are likely to experience similar sales.

[55] *Encino Motorcars*, 136 S. Ct. at 2126.

[56] 5 U.S.C. § 603(a).

[57] *Id.* § 605(b).

[58] *Id.* § 611(a)(1).

[59] *Council for Urological Interests v. Burwell*, 790 F.3d 212, 227 (D.C. Cir. 2015) (quoting *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001)).

[60] *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 919 F.2d 1148, 1157 (6th Cir. 1990).

EPA has certified that its action would not have a "significant economic impact on a substantial number of small entities" under the RFA, claiming that the proposed rule merely "consolidate[s] EPA's existing fuel regulations" and that "the proposed requirements on small entities are largely the same as those already included in the existing . . . regulations."[61] While it acknowledges that its action does make changes to existing regulations, EPA describes these changes as "relatively minor corrections and modifications," and then makes the conclusory statement, unsupported by analysis or evidence, that these proposed changes, including the new, expansive definition of "gasoline," "have no net regulatory burden for all directly regulated small entities."[62] However, as stated in Section I.B above, the proposed rule's definition of gasoline will impose major new compliance burdens on ethanol plants, terminal blenders, and fuel retailers, many of which are small businesses. EPA has failed to consider these burdens, and its § 605(b) certification was therefore improper.

D. The proposed rule does not comply with Executive Order 13,771.

Apart from failing to comply with the law, EPA may have also improperly labeled the proposed rule "deregulatory" under Executive Order 13,771.[63] According to guidance from the Office of Information and Regulatory Affairs (OIRA), an agency action is only "deregulatory" if it "has total costs less than zero."[64] While the rule has an estimated annual cost savings of $32.9 million,[65] nothing in the proposed rule accounts for the significant costs of the new expansive ambit of "gasoline." If EPA finalizes the proposed rule, it must quantify these costs if feasible, and if total costs exceed zero, it must recognize that the rule is regulatory.

II. THE PROPOSED RULE'S DEFINITION OF GASOLINE REOPENS EPA'S ERRONEOUS ASSERTION THAT MID-LEVEL BLENDS ARE "COMMONLY OR COMMERCIALLY KNOWN OR SOLD AS GASOLINE."

Where an agency "has opened [an] issue up anew, even though not explicitly, its renewed adherence is substantively reviewable."[66] The proposed rule reopens EPA's interpretation of the current definition of "gasoline," because it promulgates a new definition of gasoline that "is consistent with the existing parts 79 and part 80 definitions of gasoline," and that would

[61] Proposed Rule, 85 Fed. Reg. at 29,088.

[62] *Id.*

[63] 85 Fed. Reg. 29,087 ("This action is expected to be an Executive Order 13771 deregulatory action."). The rule has an estimated annual cost savings of $32.9 million. *Id.* at 29,086, at Table XIV.C-1; EPA, Economic Analysis: Fuels Regulatory Streamlining Proposed Rule 2, EPA-HQ-OAR-2018-0227-0016.

[64] *See* Dominic J. Mancini, Acting Administrator, Office of Info. & Regulatory Affairs, M-17-21, Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs" 4, M-17-21 (April 5, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda /2017/M-17-21.pdf.

[65] 85 Fed. Reg. at 29,086, at Table XIV.C-1; EPA, Economic Analysis: Fuels Regulatory Streamlining Proposed Rule 2, EPA-HQ-OAR-2018-0227-0016.

[66] *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (citation omitted).

carry forward EPA's interpretive gloss on those terms to the new streamlined fuel quality rules for gasoline.

EPA has previously asserted that mid-level blends are "commonly or commercially known or sold" as gasoline because "[i]n the fuel and fuel additive registration program, the gasoline family includes fuels composed of at least 50 percent clear gasoline by volume."[67] This legal conclusion was based on a non sequitur, and the conclusion has always been wrong.

First, EPA's legal conclusion was based on a non sequitur. In particular, EPA's reliance on this "fuel family" definition is badly misplaced. EPA's rules unambiguously provide that the fuel family definitions apply only to "subpart F of this part"—the registration group testing protocols of part 79, subpart F of Title 40.[68] The "fuel family" definition, therefore, does not in any way govern what fuels are "commonly or commercially known or sold" as gasoline for purposes of the fuel quality (part 80) requirements of Title 40. Nor are these "fuel family" definitions responsive to the relevant question under EPA's regulations: whether mid-level blends are "commonly or commercially known or sold" as gasoline. EPA's illogical leap from the "fuel family" definition of gasoline to the assertion that mid-level blends are regulated as gasoline was thus a non sequitur.

Second, the legal conclusion was wrong. To assess whether a fuel is "commonly or commercially known or sold as gasoline," courts use "objective standards."[69] For example, consensus-based industry standards like ASTM's gasoline standards are "useful to the court as an aid in determining whether a particular product is 'commonly or commercially known or sold as gasoline.' "[70]

ASTM's D4814 standards for gasoline make no provision for gasoline-ethanol blends with more than 15% ethanol.[71] ASTM instead addresses mid-level blends through a separate "standard practice" for "midlevel ethanol blends"—ASTM D7794.[72] ASTM D7794 provides that these fuels "are sometimes referred to at retail as 'Ethanol Flex Fuel'" and "are only suitable for use in ground flexible-fuel vehicles equipped with spark-ignition engines."[73] ASTM standards, therefore, contradict EPA's assertion that mid-level blends are "commonly or commercially known or sold" as gasoline. It shows instead that they are commonly and commercially known and sold as an alternative ethanol "flex-fuel" for use in flex-fuel vehicles only.

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[67] Tier 3 Rule, *supra* note 24, 79 Fed. Reg. at 23,558.

[68] 40 C.F.R. § 79.50.

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

[70] *Id.*

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

[72] ASTM D7794–18a.

[73] *Id.*

Confirming this view, mid-level blends are labeled as alternative "ethanol flex fuel" by retailers under the Federal Trade Commission's pump labeling rules, not as gasoline.[74] These rules require fuel retailers who sell mid-level blends to include a prominent label displaying the fuel's ethanol content and warning consumers: "Use *Only* In Flex-Fuel Vehicles. May Harm Other Engines."[75]

The objective evidence thus demonstrates that mid-level blends are not known or sold as gasoline, and EPA's assertion to the contrary is both unlawful and arbitrary and capricious. In the final rule, EPA should clarify that mid-level blends are not "commonly or commercially known or sold" as gasoline. Even if there is some ambiguity, as EPA acknowledged in the REGS rule,[76] at a minimum, EPA must disavow its prior, illogical interpretation of that phrase, which is completely untethered to actual commercial usage.

III. THE PROPOSED RULE'S INTERPRETATION OF THE SUB-SIM LAW IS UNLAWFUL.

The Clean Air Act's sub-sim law forbids fuel and fuel additive manufacturers from increasing the concentration in use of fuels or fuel additives that are not "substantially similar" to the fuels or fuel additives used in the motor vehicle certification test fuels.[77]

The proposed rule would codify this "substantially similar" requirement for gasoline fuel and fuel additives, based on the Clean Air Act's sub-sim law.[78] In addition to parroting the text of the statute, the proposal adds a new rule that "[n]o fuel or fuel additive manufacturers may introduce into commerce gasoline or gasoline additives (including oxygenates) that violate any parameters articulated in the definition of 'substantially similar.' "[79] That includes "the parameters associated with the 2019 definition of substantially similar."[80] These parameters limit the concentration of ethanol in gasoline to blends "no more than 15% ethanol."[81]

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[74] 16 C.F.R. § 306.0(o) ("Ethanol flex fuels means a mixture of gasoline and ethanol containing more than 10 percent but not greater than 83 percent ethanol by volume."). E15's labeling requirements are governed by EPA rules, not FTC rules. *See Complying with the FTC Fuel Rating Rule*, Fed. Trade Comm'n (Oct. 2016), https://www.ftc.gov/tips-advice/business-center/guidance/complying-ftc-fuel-rating-rule ("You do not need to post a label for ethanol flex fuels containing no more than 15% ethanol if you have labeled the dispenser in accordance with the EPA's E15 labeling requirements at 40 CFR 80.1501.").

[75] 16 C.F.R. § 306.12(a)(4)(ii), (f).

[76] Proposed REGS Rule, *supra* note 13, 81 Fed. Reg. at 80,844.

[77] 42 U.S.C. § 7545(f)(1).

[78] 85 Fed. Reg. at 29,111–12, *to be codified at* 40 C.F.R. § 1090.260.

[79] *Id.* at 29,112.

[80] *Id.* at 29,053.

[81] *Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, 84 Fed. Reg. 26,980, 27,021 (June 10, 2019) (E15 Rule).

The proposed rule would then also simultaneously codify a new definition of "fuel additive." It would define "fuel additive" to mean "a substance that is designated for registration under 40 CFR part 79 and is added to fuel such that it amounts to less than 1.0 volume percent of the resultant mixture, or is an oxygenate added up to a level consistent with levels that are 'substantially similar' under 42 U.S.C. 7545(f)(1) or as permitted under a waiver granted under 42 U.S.C. 7545(f)(4)."[82] Thus, denatured fuel ethanol would be considered a "fuel additive" only if the finished fuel is E15, but not if the finished fuel is E20.

A. The proposed rule's definition of "fuel additive" under the Clean Air Act's "substantially similar" law is unlawful.

The proposal's novel definition of fuel additive cannot be reconciled with the text and structure of CAA § 211.

First, this definition of fuel additive is contrary to the ordinary meaning of the term. "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself."[83] As relevant here, a gasoline "additive" is defined by a contemporary dictionary as "a chemical (as an antiknock agent or an agent for counteracting deposits on spark plugs) added to gasoline."[84] This dictionary gives the example of "tetraethyl lead."[85] This ordinary meaning includes any chemical agent intentionally added to gasoline, regardless of concentration.

Second, the "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning."[86] Courts should particularly strive to avoid interpretations that give the same word "two different meanings in the same section of the statute."[87] That canon is relevant here, because under the Part 79 regulations of CAA § 211(a), (b), and (e), the term fuel additive is not limited to any particular concentration. EPA's rules define "additive" in these provisions to mean "any substance, other than one composed solely of carbon and/or hydrogen, that is intentionally added to a fuel named in the designation . . . and that is not intentionally removed prior to sale or use."[88] That definition includes any fuel additive added to gasoline regardless of its concentration in the fuel. While the canon of consistent usage may yield to context, context reinforces its application here. CAA §§ 211(a), (b), (c)(1), (e), and (f) are interrelated parts of a comprehensive "scheme" to control fuels and fuel additives.[89] Such a scheme "should not be

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[82] Proposed Rule, 85 Fed. Reg. at 29,101.

[83] *Food Mkt'g Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

[84] Webster's (Third) Int'l Dictionary 24 (1966).

[85] *Id.*

[86] *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quotation marks omitted).

[87] *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

[88] 40 C.F.R. § 79.2(e).

[89] *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995) (*Ethyl II*).

read as a series of unrelated and isolated provisions."[90] The provisions should instead "be interpreted together, as though they were one law."[91] That requires interpreting the term "fuel additive" consistently.

Third, the prior-construction canon also supports interpreting "fuel additive" to include any fuel additive, even those that are not "substantially similar." Language that is "obviously transplanted from another legal source . . . brings the old soil with it."[92] Thus, "[w]hen administrative . . . interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative . . . interpretations as well."[93] EPA promulgated its administrative definition of "fuel additive" in 1975.[94] Two years later, Congress enacted the sub-sim law, borrowing the term "fuel additive." Under the prior-construction canon, then, the sub-sim law "is presumed to carry forward" EPA's prior administrative definition of "fuel additive."[95] That definition of fuel additive includes any fuel additive added to gasoline, regardless of concentration.[96]

Fourth, this definition of fuel additive would create needless surplusage. It is a fundamental rule of statutory interpretation that "[a] court should give effect, if possible, to every clause and word of a statute."[97] But under EPA's interpretation of the sub-sim law, the law's prohibition on "increas[ing] the concentration in use of[] any . . . fuel additive" that is not "substantially similar" to a fuel additive used in certification would do no work, because fuel additives that EPA believes are not substantially similar would not be considered fuel additives.[98] That is illogical.

In conclusion, EPA's novel definition of fuel additive is unlawful. It should be withdrawn in the final rule.

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[90] *Gustafson*, 513 U.S. at 570.

[91] Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 252 (2012).

[92] *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019) (citation omitted) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

[93] *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

[94] 40 Fed. Reg. at 52,011.

[95] Scalia & Garner, *supra* note 91, at 322.

[96] 40 C.F.R. § 79.2(e) ("Additive means any substance, other than one composed solely of carbon and/or hydrogen, that is intentionally added to a fuel named in the designation (including any added to a motor vehicle's fuel system) and that is not intentionally removed prior to sale or use.")

[97] *See Moskal v. United States*, 498 U.S. 103, 109 (1990) (quotation marks omitted).

[98] 42 U.S.C. § 7545.

B. The proposed rule must acknowledge that mid-level blends are "substantially similar" to the high-level ethanol-gasoline test fuel.

By proposing to codify a requirement that manufacturers must meet "any parameters articulated in [EPA's] definition of 'substantially similar,' " and by adhering to "the parameters associated with the 2019 definition of substantially similar," the proposed rule has reopened those parameters.[99]

Those parameters include a limit on the concentration of ethanol in gasoline to "no more than 15 volume percent ethanol ('E15')."[100] This limitation is unlawful, because mid-level blends are "substantially similar" to the high-level ethanol-gasoline blend test fuel used to certify flex-fuel vehicles.[101]

To determine whether a fuel is "substantially similar," EPA considers whether—compared to "*any* fuel . . . utilized in the certification of *any* . . . vehicle," CAA § 211(f)(1)(B)—the candidate fuel has similar effects on (1) emissions; (2) the durability of vehicle emission controls; and (3) a vehicle's performance or "driveability."[102] These criteria are "linked" because "they are intended to answer the same question: Whether a fuel[] . . . will harm emission controls on vehicles and engines or result in increases in regulated emissions."[103] When determining whether a fuel is "substantially similar," EPA does not consider the fuel's compatibility with *every* type of motor vehicle, as that would make the sub-sim law unworkable. (Indeed, no fuel is compatible with all motor vehicles.) Instead, as the E15 Rule explains, "[i]n assessing whether a fuel is substantially similar to a certification fuel, [EPA] must look only to its use in the engines and vehicles within which it can be used, and not its use in vehicles and engines which are fueled by other types of fuel."[104]

Mid-level blends are "substantially similar" to high-level ethanol-gasoline test fuel under these criteria. Flex-fuel vehicles are the only vehicles certified to operate on high-level ethanol-gasoline test fuel, so only such vehicles could be the relevant unit of analysis for purposes of the "substantially similar" criteria. When used in flex-fuel vehicles, mid-level ethanol blends do not pose any risk to compliance with emission standards, because flex-fuel vehicles are designed to maintain "emissions performance across the full range of potential in-use fuel formulations," meaning any mixture of "gasoline and . . . up to 83 volume percent ethanol."[105] Nor do they pose any risk to vehicle emission controls or driveability: as the Department of Energy has explained, "FFVs can run on E85, gasoline, or any blend of the two, without adverse effects on fuel system and engine materials, onboard diagnostics

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[99] *CTIA-Wireless Ass'n* , 466 F.3d at 110.

[100] E15 Rule, *supra* note 81, 84 Fed. Reg. at 27,021.

[101] 40 C.F.R. § 1065.725.

[102] E15 Rule, *supra* note 81, 84 Fed. Reg. at 26,997.

[103] *Id.*

[104] *Id.*

[105] Tier 3 Rule, *supra* note 24, 81 Fed. Reg. at 23,529, 23,557.

systems, or driveability."[106] Mid-level blends are thus "substantially similar" to the high-level ethanol-gasoline test fuel under all of the criteria that EPA considers, so they are not "unlawful" under the sub-sim law.

The conclusion that mid-level blends are substantially similar to the high-level ethanol-gasoline test fuel is consistent with prior EPA guidance on mid-level blends. EPA stated in 2006 that "blends such as E20 and E30 for use in FFVs . . . are covered under the emissions certification for an E85 FFV, and thus are not prohibited under the Clean Air Act."[107] This statement would make no sense unless mid-level blends are "substantially similar" to the high-level ethanol-gasoline test fuel used to certify flex-fuel vehicles; fuels that are *not* sub-sim *are* by definition prohibited under the Clean Air Act, unless granted a waiver under § 211(f)(4). The E15 rule's limit on the concentration of ethanol is thus arbitrary and capricious because it upsets reasonable expectations without acknowledging this past guidance or the "serious reliance interests" it has induced.[108]

EPA's interpretation is arbitrary and capricious for an additional reason: it treats E85 and mid-level blends differently for purposes of the sub-sim law for no identifiable policy reason. E85 would still be allowed into commerce because the Agency says it is not regulated "gasoline." Mid-level blends, by contrast, would be shut out, even though flex-fuel vehicles are designed to meet EPA's standards on both fuels. The Court "must reverse an agency policy when [it] cannot discern a reason for it."[109] No reason anchored in the sub-sim law's text, history, or purpose supports EPA's disparate treatment of E85 and mid-level blends for use in flex-fuel vehicles.

EPA must acknowledge that mid-level blends are substantially similar to the high-level ethanol-gasoline blend test fuel.

[106] E85 is subject to ASTM standard D5798. *See* Dep't of Energy, Handbook for Handling, Storing, and Dispensing E85 and Other Ethanol-Gasoline Blends 16 (2016) (DOE Ethanol Handbook).

[107] 2006 Oge Letter, *supra* note 15.

[108] *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1114 (D.C. Cir. 2019).

[109] *Judulang v. Holder*, 565 U.S. 42, 64 (2011).