

Flaws with Growth Energy's E15 RVP Waiver Arguments

Growth Energy's Comments

Growth Energy has made two basic arguments why EPA has authority to waive the RVP requirements for E15.¹ More recently, Growth Energy appears to have conceded that EPA does not have this authority.²

First, Growth Energy has argued that the statutory language of “fuel blends containing gasoline and 10 percent denatured anhydrous ethanol” applies to E15, because 15% ethanol blends necessarily also contain 10% ethanol. Growth Energy uses the analogy of an HOV sign that says “you must have four people in your car to use high-occupancy-vehicle lanes,” arguing it would be absurd to interpret that as preventing cars with five passengers from using the lane.

Second, Growth Energy argues that the “deemed to comply” provision is an independent, free-standing exception to the statutory RVP limits that can apply to any blend of ethanol, not just 10% blends. *See* 42 U.S.C. § 7545(h)(4).

Legal Flaws

Both of these arguments are legally flawed interpretations of the statutory text, which reads:

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

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

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

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

42 U.S.C. § 7545(h)(4).

¹ *See, e.g.*, Growth Energy Comments on RFS Standards for 2014-2016, at 50-52 (July 27, 2015), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0111-2604>; Growth Energy Comments on RFS Standards for 2014, at 65-66 (Jan. 28, 2014), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0479-5263>

² Congressional Testimony of Emily Skor, CEO (Apr. 13, 2018) (conceding that the Congressional RVP waiver “applied only to ethanol fuel blends E10 and lower and excluded ethanol blends above 10 percent”), *available at* <http://docs.house.gov/meetings/IF/IF18/20180413/108122/HHRG-115-IF18-Wstate-SkorE-20180413.pdf>

1. The “15% Includes 10%” Argument.

Growth Energy’s first argument is foreclosed by the text and history of the statute. The text expressly limits the RVP waiver to gasoline containing “10 percent” ethanol. Congress did *not* adopt the House version of this provision, which would have applied to blends containing “at least 10 percent ethanol,” but instead enacted the Senate version, which does not contain the “at least” language. *See* S. 1630 § 216 (May 23, 1990) (version that passed the House) (containing “at least 10 percent ethanol” language). Likewise, though the 1990 RVP provisions were in large part a codification of EPA’s existing RVP regulations, Congress chose not to adopt the language of EPA’s regulations that provided a higher RVP limited for blends containing “at least 9% ethanol.” 40 C.F.R. § 80.27(d)(2) (1989).³

Moreover, elsewhere in CAA provisions relating to fuels, Congress used language such as “at least” or “not less than” when it intended to set a percentage floor. For example, in the 1990 CAA amendments, Congress included a separate provision relating to reformulated gasoline, which provided that in certain areas gasoline must contain “not less than 2.7 percent oxygen by weight.” Pub. L. 100-549, § 219; *see also* 42 U.S.C. § 7554(f)(2) (“For purposes of this paragraph, the term ‘methanol’ includes any fuel which contains at least 85 percent methanol . . .”). Likewise, in a 1987 statute Congress made certain findings supporting an increase in “the quantity of motor fuels that contain at least 10 percent ethanol.” Pub. L. 100-203, § 1508(a)(6).

These other statutory provisions that expressly use the “at least” language to set a floor, and the drafting history of the 1990 CAA amendments, demonstrate that Congress limited the RVP exception to 10% blends, rather than blends containing at least 10% ethanol. Indeed, the D.C. Circuit recently rejected a similar EPA attempt to read back into the RFS statute language that Congress had intentionally omitted. *See Am. for Clean Energy v. EPA*, 864 F.3d 691, 708-09 (D.C. Cir. 2017) (comparison “with other statutory provisions related to renewable fuel” that contained the omitted language as well as “Congress’s decision to drop” that language during the drafting history “counsels against EPA’s reading . . . which in effect would add that kind of language back into the waiver provision”). Accordingly, the plain text of the statute is dispositive, as “an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.” *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

Two additional considerations reinforce this conclusion. First, EPA itself has for decades correctly interpreted this statutory language as only applying to blends that are “between 9 and 10 percent ethanol.” 56 Fed. Reg. 24,242, 24,245 (May 29, 1991). Second, the RVP waiver for 10% ethanol blends is an exception to the general 9.0 RVP limit for gasoline. Exceptions are generally “read . . . narrowly to preserve the primary operation of the provision.” *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (omission in original) (citation omitted).⁴

³ EPA’s regulations were proposed in 1987 and finalized in 1989 to address summertime VOC emissions. 54 Fed. Reg. 11,868 (Mar. 22, 1989). While they provided for a higher RVP limit for blends containing “at least” 9% ethanol, they required individual sampling of blends containing more than 10% ethanol, while allowing blends with “no more than 10% ethanol” to be deemed to comply with the standard if certain certification requirements were met. 40 C.F.R. § 80.27(b), 80.28(g)(6) (1989); 54 Fed. Reg. at 11,873-74. When EPA finalized those rules, it noted that it was “postponing its ultimate decision on how to treat ethanol” and would address it in the “second phase of RVP control.” 54 Fed. Reg. at 11,881. Rather than have EPA proceed without guidance, Congress enacted the 1990 CAA amendments to provide direction to EPA regarding its RVP rules. Congress largely codified EPA’s rules, but by omitting the “at least” language Congress made clear that both the 1 PSI waiver and the “deemed to comply” defense apply only to fuels containing 10% ethanol.

⁴ Step one of the *Chevron* inquiry involves consideration of “the language and structure of the Act, its legislative history, and any applicable canons of statutory construction,” and so consideration of this canon of construction is appropriate at *Chevron* step one, as well as step two. *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 980 (D.C. Cir. 1990).

2. The “Deemed to Comply” Argument.

Growth Energy’s second argument, focused on the “deemed to comply” portion of subsection (h)(4), is also contrary to the text and history of the statute.

The deemed to comply provision is not a separate statutory provision, but rather part of the same subsection—indeed, the same sentence—as the RVP exemption that applies only to 10% ethanol blends. Accordingly, this argument fails for the same reasons as Growth Energy’s first argument: Congress intentionally limited that entire provision to 10% ethanol blends only, and reading the “deemed to comply” provision to apply to any ethanol blend would circumvent that fundamental legislative choice. This is confirmed by the fact that the deemed to comply mechanism in EPA’s 1989 regulations was expressly limited to 10% blends, and Congress codified that portion of the regulations, as discussed above.

Other interpretive principles also demonstrate that the “deemed to comply” provision is not a free-standing exemption that could apply to any ethanol blend. The legislative history makes clear that the “provided, however” language creates an alternative way for 10% ethanol blends to demonstrate compliance. The Senate Report noted that this provision was designed to allow blenders to “demonstrate compliance with the RVP limit by providing certification that the base gasoline is in compliance with the 9.0 lbs. psi limitation and a certification that the blended fuel meets the waiver conditions of the Clean Air Act (that is, the ethanol portion does not exceed 10 percent by volume of the final fuel).” S. Rep. No. 100-231, 100th Cong. at 149 (1987). The Senate was concerned that “[r]equiring an actual test of the volatility of this blend in every case, as EPA has proposed, would not be feasible considering the very large number of batches mixed over any period, the lack of testing facilities and time to acquire testing results.” *Id.*

Interpreting the “deemed to comply” provision in such a broad fashion is also inconsistent with 42 U.S.C. § 7545(h)(5). That provision allows states to petition for an exception to “the Reid vapor pressure limitation established by paragraph (4),” and if the petition is granted, the lower RVP limit of subsection (h)(1) applies. This reference to a single RVP limit of (h)(4) is not consistent with the notion that different ethanol blends can have different RVP limits, so long as they are in compliance with their subsection (f)(4) waivers. Moreover, the (h)(5) petition only allows the lower 9 psi limit to apply to “all fuel blends containing gasoline and 10 percent” ethanol. The fact that subsection (h)(5) applies only to 10% blends is inconsistent with an interpretation of (h)(4) that would allow (h)(4) to apply to any ethanol blend for which a (f)(4) waiver has been granted.

Interpreting the “deemed to comply” provision in this fashion would also render it an extremely broad exception to the statute: EPA would have authority to waive RVP requirements entirely for the ethanol portion of any ethanol blend. As noted above, such a reading is contrary to the principle that statutory exceptions are “read . . . narrowly to preserve the primary operation of the provision.” *Maracich*, 570 U.S. at 60.

Recognizing these flaws in the Growth Energy interpretation, EPA has for decades correctly interpreted the “deemed to comply” provision as “limited to ethanol blends which meet the minimum 9 percent requirement in the regulations and the maximum 10 percent requirement” set forth in the statute. 56 Fed. Reg. 64,704, 64,708 (Dec. 12, 1991).