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E15 PARTIAL WAIVERS: HOW THE EPA EXCEEDED ITS AUTHORITY AND PLACED ITS LIABILITY ON OTHERS

TYLER BREWER

I. INTRODUCTION

Imagine you own a vehicle manufactured before 2001. Now imagine having to drive around an entire city to find a gas station selling gasoline safe for your vehicle’s engine, emissions system, and fuel system. This scenario may appear more comical than plausible, but could very well illustrate the dilemma some consumers may face in the near future.

In 2012, the United States Court of Appeals for the District of Columbia Circuit refused to adjudicate a suit alleging that the Environmental Protection Agency (EPA) did not comply with federal regulations promulgated under the Clean Air Act (CAA).1 The case represented yet another example of the EPA exceeding its authorized powers.2 Specifically, Grocery Manufacturers Association v. E.P.A. was a suit arguing the legality of the EPA’s waivers to introduce a fifteen percent ethanol blend (E15) in gasoline that was dismissed for lack of standing.3 The D.C. Circuit’s dismissal permitted the EPA to grant two partial waivers that, in turn, introduced E15 into commerce for light-duty vehicles built after model-year 2000.4

The EPA’s decision to grant a waiver for specific engines marks a first in its history.5 Remarkably, this progressive decision to grant partial waivers was made despite studies showing that E15 substantially damages post-model-year 2001 engines and fuel systems.6 These partial waivers

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3 Grocery Mfrs. Ass’n, 693 F.3d at 180 (Kavanaugh, J., dissenting).
4 Id. at 172-73 (dismissing for lack of jurisdiction and failing to consider the merits).
5 See Final Opening Brief for Petitioners at 12, Grocery Mfrs. Ass’n, 693 F.3d 169 (No. 10-1380).
exceed the EPA’s authority under the CAA and will have potentially detrimental ramifications on numerous American industries.

In the United States, ethanol is fermented from grain, generally corn, in a process very similar to making moonshine. The Renewable Fuels Standard (RFS) program requires ethanol to be blended into gasoline, partly because of ethanol’s ability to reduce America’s dependence on crude oil.

The EPA’s decision to grant these partial waivers was partially due to the fact that the domestic fuel supply had reached its statutory limit for ethanol content and would fail to meet progressive demands for renewable fuel sources under current federal statutes. Still, these partial waivers were met with substantial opposition by various industries adversely affected by increasing the amount of ethanol blended with gasoline. Moreover, those in opposition presented a persuasive argument for invalidating the EPA’s grant of the partial waivers. In fact, the only opinion to discuss the merits of the case, Judge Kavanaugh’s dissent in Grocery Manufacturers Association, almost completely agrees with Petitioner’s arguments. The D.C. Circuit refused to adjudicate the validity of the EPA’s partial waiver grants despite the fact that the EPA was not in compliance with the Clean Air Act and was not authorized to grant partial waivers when it introduced E15 into the stream of commerce.

This note will focus on the EPA’s inappropriate exercise of power and the consequences for consumers. First, this note will provide general background information on ethanol, the relevant legislation targeted to implement an increased annual amount of ethanol in gasoline, and the procedures for introducing new alternative fuels to meet the increased mandated amount. Second, it will provide an analysis of how the EPA did not comply with the CAA in introducing new alternative fuels in commerce. More specifically, it will attack the validity of the arguments the EPA raised in asserting that partial waivers are within its congressionally authorized power. Third, this note will provide an overview of the adverse effects of the E15 partial waivers on the petroleum industry and consumers if no further action is taken, and also how E15 should be implemented into commerce.

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7 See generally Final Opening Brief for Petitioners, supra note 5, at 15-16.
8 See, e.g., Grocery Mfrs. Ass’n, 693 F.3d at 180-81 (Kavanaugh, J., dissenting).
10 Id.
11 Grocery Mfrs. Ass’n, 693 F.3d at 172-73, 187.
12 See generally id.
13 See generally Final Opening Brief for Petitioners, supra note 5, at 15-16.
14 Compare Final Opening Brief for Petitioners, supra note 5, at 15-16, with Grocery Mfrs. Ass’n, 693 F.3d at 180-91 (Kavanaugh, J., dissenting).
II. ETHANOL’S EVOLUTION AS AN ALTERNATIVE FUEL SOURCE & ITS REGULATION

A. General Background

Ethanol, a “biofuel”, is a clear, colorless liquid made from various plant materials.\(^{15}\) It contains the same chemical compounds regardless of whether the biomass feedstock was produced from starch, sugar, or even wood chips.\(^{16}\) Ethanol is essentially a two hundred-proof grain ethyl alcohol used as motor fuel.\(^{17}\) Due to the fact that ethanol is an alcohol, it has higher corrosive properties than regular gasoline.\(^{18}\)

Pure ethanol’s higher octane rating makes it a premium option to blend with gasoline.\(^{19}\) Moreover, ethanol can be blended with low-octane gasoline to meet the standard eighty-seven-octane requirement.\(^{20}\) The blending process involves producing pure fuel-grade ethanol, and then blending that fuel-grade ethanol with gasoline to create a specific percentage octane grade of fuel.\(^{21}\) Ethanol, however, does not possess the same energy content of gasoline.\(^{22}\) Pure gasoline averages thirty-three percent more energy content than ethanol and, therefore, a gallon of pure gasoline would power a vehicle thirty-three percent further compared to a gallon of pure ethanol.\(^{23}\)

As a fuel additive, ethanol represents nearly ten percent of the United States’ gasoline supply.\(^{24}\) Today, over ninety-five percent of American gasoline contains ethanol.\(^{25}\) Ethanol content varies because ethanol is blended with gasoline in varying amounts depending on the specified blend.\(^{26}\) A ten percent ethanol blend (E10) contains ten percent ethanol and ninety percent gasoline.\(^{27}\) Presently, E10 is the most common ethanol available to domestic motorists.\(^{28}\) With the recent partial waivers,
only a light-duty vehicle made after model-year 2000 is permitted to use E15, which consists of fifteen percent ethanol and eighty-five percent gasoline.29 Moreover, a “flex-fuel” vehicle is the only type of vehicle that can use gasoline with an ethanol blend greater than fifteen percent.30 Other ethanol blends are available, but are not as common.31 For example, in California, gasoline contains a 5.7% ethanol blend instead of the standard ten percent blend.32 Currently, all vehicles are capable of using gasoline with a ten percent ethanol blend.33 Automakers are cognizant of the presence of ethanol, and since the 1980s, all automakers have honored warranties for vehicles that use gasoline blended up to ten percent with ethanol.34

There are some considerable domestic benefits to using ethanol. First, ethanol production creates employment opportunities in rural communities where jobs are scarce.35 Second, ethanol use reduces greenhouse gas emissions by over fifty percent compared to gasoline production and use.36 Third, supplementing the domestic fuel supply with ethanol reduces America’s dependence on foreign petroleum, reducing the nation’s risk of trade deficits, supply distribution, and price changes.37 Fourth, ethanol arguably lowers gasoline prices.38

Nevertheless, there are both pros and cons in the ethanol debate. Growing corn for ethanol production requires substantial amounts of fertilizer and pesticides that can pollute soil and water.39 Another indirect damage ethanol causes is through its refineries. Many domestic ethanol refineries are coal-powered and possibly emit more greenhouse gases than gasoline production.40 Furthermore, forty percent of U.S. corn is used for ethanol production.41 This dependence on corn for ethanol has increased costs for livestock, dairy, poultry, eggs, and other food industries, with the cost increase carrying over to the consumer.42 This is a potential cause

30 Frequently Asked Questions: How much ethanol is in gasoline and how does it affect fuel economy?, supra note 22.
31 Ethanol FAQs, supra note 17.
32 Id.
33 Id.
34 Id.
36 Id.
37 See id.
40 Id.
42 Id.
leading to the fact that consumer food cost inflation, compared to all other goods, has doubled since 2005.43

Ethanol's use as a fuel is not a new development, and instead has been used as a fuel source since the early 19th century.44 Notably, in 1908, the first Ford Model T was designed to use ethanol.45 Although its potential was known, to prevent ethanol fuel being converted into alcoholic beverages during Prohibition, automakers were forced to design vehicles that ran on gasoline.46 In the 1940s, the first American ethanol plant was built and operated by the United States Army.47 Nearly forty years later, the federal government required the gasoline industry to remove toxic lead from fuel to reduce air pollution.48 In response to the federal ban on lead, gasoline manufacturers substituted methyl tertiary butyl ether (MTBE) for lead to boost the oxygen content of gasoline, allowing the fuel to burn more efficiently and help prevent engine knocking.49 The MTBE, however, was very corrosive and caused underground storage tanks to leak MTBE into groundwater.50 As a result, many states banned MTBE, and gasoline manufacturers began using ethanol as a MTBE substitute at the turn of the 21st century.51

Around the same time lead was banned from fuel, Colorado became the first state to mandate the use of ethanol fuels during winter to control carbon monoxide emissions.52 Likewise, the Clean Air Act (CAA) Amendments of 1990 mandated the use of ethanol fuels during winter in thirty-nine carbon monoxide non-attainment areas.53 Five years later, the CAA required year-round use of ethanol fuels in nine severe ozone non-attainment areas.54 Most significantly, the Energy Policy Act of 2005 required that domestic gasoline contain a minimum volume of renewable fuel.55

43 Id.
45 Id.
47 Ethanol Fuel History, supra note 44.
49 Id.
50 Id.
51 Id.
52 Ethanol Fuel History, supra note 44.
53 Id.
54 Id.
55 Id.
B. Renewable Fuel Standard

Since the early 2000’s, there has been a major push by Congress to reduce America’s dependence on foreign oil. The move toward energy independence was implemented primarily through energy and tax legislation designed to incentivize ethanol production. One of the most notable incentives is tied to satisfying the Renewable Fuel Standard (RFS). The RFS is a federal program requiring fuel sold for transportation purposes in the United States to contain a minimum volume of renewable fuels. Notably, it was the first renewable fuel volume mandate in the country. It originated in the Energy Policy Act of 2005 and was then incorporated into the CAA. During the year the RFS was enacted, the U.S. produced four billion gallons of ethanol. As amended under the Energy Independence and Security Act (EISA), the RFS requires certain U.S. fuel refiners and importers to introduce a “specified, annually increasing volume of renewable fuel.” Specifically, the 2007 amendments to the RFS now require thirty-six billion gallons of renewable fuels to be blended into the nation’s transportation fuel supply by 2022. This requirement increases the standard from the 2008 mandate, which called for nine billion gallons. Additional expansions to RFS under the EISA amendments included: (1) the insertion of diesel standards in addition to those for gasoline; (2) the establishment of new categories of renewable fuel, setting separate volume requirements for each one; and (3) an EPA obligation to apply lifecycle greenhouse gas performance threshold standards to ensure that each category of renewable fuel emits fewer greenhouse gases than the petroleum fuel it replaces. Ironically, despite Congress’s push toward energy independence, corn ethanol has displaced less than five percent of the nation’s gasoline imports.

Currently, if all gasoline sold in the United States contained an ethanol blend of ten percent (E10), approximately fourteen billion gallons...
of ethanol could be blended into the national gasoline supply.\textsuperscript{68} Even if all domestic gasoline were rated at E10, the amount of ethanol blended into the domestic gasoline supply would have to more than double over the next decade to satisfy the RFS.\textsuperscript{69} To make matters worse, ethanol sales in the U.S. have hit "the blend wall," meaning the domestic gasoline supply has absorbed the maximum limit of ethanol under the E10 blend rules.\textsuperscript{70} Thankfully, the RFS allows for the EPA Administrator, under certain provisions, to waive requirements for total renewable fuel volume for any given year or waive requirements for certain renewables.\textsuperscript{71}

\section*{C. Clean Air Act}

The CAA prevents "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."\textsuperscript{72} Thus, to introduce renewable fuels into the market, a manufacturer must apply for a waiver from the EPA pursuant to CAA Section 211(f)(4).\textsuperscript{73} To receive such a waiver, the applicant must demonstrate that the new fuel source 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."\textsuperscript{74} More specifically, the EPA Administrator may grant the waiver only:

\begin{quote}
[I]f 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
\end{quote}

\textsuperscript{68} Final Opening Brief for Petitioners, supra note 5, at 4.
\textsuperscript{70} Suzukamo, supra note 9.
\textsuperscript{71} Final Opening Brief for Petitioners, supra note 5, at 5 (citing 42 U.S.C. §§ 7547(o)(7)(A)(i-ii), (D), (E), (F)).
\textsuperscript{73} Id.
\textsuperscript{74} 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).
been certified pursuant to sections 7525 and 7547(a) of this title.\(^\text{75}\)

These procedural requirements for introducing renewable fuels into the domestic gasoline supply are examples of how strictly the CAA was intended to regulate and ensure a consistent domestic fuel supply.

III. THE EPA'S PARTIAL WAIVERS DO NOT COMPLY WITH THE CLEAN AIR ACT

A. The EPA's Partial Waivers for E15

In March 2009, Growth Energy, a trade association representing the ethanol industry, along with fifty-four ethanol manufacturers, applied for a Section 211(f)(4) waiver to increase the permissible amount of ethanol blended with gasoline from ten percent to fifteen percent.\(^\text{76}\) Despite past practices,\(^\text{77}\) the EPA issued two separate, but related, waiver decisions.\(^\text{78}\) The first decision authorized the introduction of E15 into commerce for use in "light-duty motor vehicles from model-year 2007 and later."\(^\text{79}\) Contemporaneously, the EPA partially denied the waiver by prohibiting E15 use in vehicles manufactured before model-year 2000 due to a lack of data determining the CAA's emissions compliance requirements.\(^\text{80}\) The EPA also deferred its decision to authorize E15 for model-year 2001-2006 light-duty motor vehicles until the results of engine-catalyst testing by the Department of Energy (DOE) were evaluated.\(^\text{81}\) After receiving the DOE's test results, the EPA's second waiver decision "extended the waiver to permit the use of E15 in light-duty motor vehicles and engines from model-years 2001-2006."\(^\text{82}\) Along with denying the E15 waiver for vehicles made prior to model-year 2001, the EPA denied E15 waivers for small gasoline-powered engines in boats, snowmobiles, chain saws, and leaf blowers.\(^\text{83}\)

\(^{75}\) Id.


\(^{77}\) Final Opening Brief for Petitioners, supra note 5, at 12 (declining to issue partial grants and partial denials).


\(^{79}\) Id. (citing 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)).

\(^{80}\) Id.

\(^{81}\) Id.

\(^{82}\) Id. (citing Partial Grant of Clean Air Act Waiver Application, supra note 74).

\(^{83}\) Partial Grant of Clean Air Act Waiver Application, supra note 74.
B. Misfueling Mitigation Plan

The EPA’s partial waivers for introducing E15 into the domestic fuel supply were conditional. Among the several conditions is a requirement for the “fuel and fuel additive manufacturer subject to the waivers to submit to [the] EPA a misfueling mitigation plan (MMP), for EPA’s approval, and to fully implement the EPA-approved MMP prior to introduction of the fuel or fuel additive into commerce as appropriate.” This misfueling mitigation was a condition the EPA considered necessary to “allow for effective implementation of a partial waiver.” The MMPs are required to include: (1) measures for labeling E15 fuel pump dispensers, (2) ethanol content and other information on product transfer documents, and (3) participation in a compliance survey.

The MMP requirement concerning fuel pump dispenser labeling is most important for consumers. Specifically, the condition states “reasonable measures” must be taken in labeling fuel pump dispensers to “ensur[e] that consumers do not misfuel the waivered gasoline-ethanol blend into vehicles or engines not covered by the waiver.” In May 2012, the EPA approved an orange and black E15 fuel dispenser label measuring only 3.625-by-3.5 inches. In large font, the label reads: “[Attention], E15, Up to 15% Ethanol; Use only in 2001 and newer passenger vehicles (or) flex-fuel vehicles.” At the bottom of the label, in smaller font, it reads: “[d]on’t use in other vehicles, boats, or gasoline-powered equipment. It may cause damage and is prohibited by federal law.”

C. The Chevron doctrine invalidates the EPA’s interpretation of the Clean Air Act

The Chevron doctrine is implicated the question arises of whether an administrative agency has exceeded its statutory authority. Under this doctrine, a court must decide whether Congress has passed legislation directly related to the precise question at issue, and if so, both the court and the agency must give effect to the unambiguously expressed intent of

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85 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, 68,146 (Nov. 4, 2010).
87 Partial Grant of Clean Air Act Waiver Application, supra note 74.
88 See O’DELL, supra note 6.
89 Id.
90 Id.
Congress. When this question is implicated, a court should rely on one cardinal canon above all others. Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. Thus, when the statute is unambiguous, the "judicial inquiry is complete."

Conversely, if the statutory language is ambiguous or leaves a gap in the law for the administrative agency to fill, a Chevron step two analysis is necessary. Under this analysis, a court must determine whether the agency's statutory interpretation is reasonable. If so, the agency's interpretation of the statute will receive deference from the court.

As previously mentioned but more simply put, EPA approval of a Section 211(f)(4) waiver requires a finding that the proposed new fuel will not cause any vehicle manufactured after 1974 to fail emissions standards. Yet, the EPA issued a waiver introducing E15 after acknowledging that E15 could contribute to the failure of the engines of some vehicles made before model-year 2000. In his dissent, Judge Kavanaugh stated, "[i]n granting the E15 partial waiver, [the] EPA ran roughshod over the relevant statutory limits . . . [the] EPA's disregard of the statutory text is open and notorious - and not much more needs to be said." After all, administrative law is premised on agency compliance with requirements and limits contained in the text of applicable statutes.

D. Unambiguous Language of the Clean Air Act Precludes Partial Waivers

The petitioners in Grocery Manufacturers Association provide a compelling argument indicating how the unambiguous language of CAA Section 211(f)(4) precludes any type of partial waiver. Their argument ostensibly hinges on the interpretation of the word "any" in 42 U.S.C. § 7545(f)(4). Namely, the argument is that "[r]ead naturally, the word ‘any’ has expansive meaning, that is, ‘one or some indiscriminately of whatever

94 Id.
95 Id. at 254.
97 Id.
98 Id.
100 Id. See also Partial Grant of Clean Air Act Waiver Application, supra note 74 ("Using E15 in vehicles and engines not approved for use might damage those vehicles and engines.").
101 Id. at 190.
103 See Final Opening Brief for Petitioners, supra note 5, at 23.
kind.” Petitioners also cited three recent cases where courts confirmed that “any” has an expansive meaning under the CAA. Using this analysis, Petitioners summarized their argument as follows:

Applying this expansive meaning of the word ‘any’ to Section 2111(f)(4), a waiver is permitted only in situations where the fuel or fuel additive under review will not cause or contribute to failure in any control device or system—which is to say, where the fuel or fuel additive is suitable for all vehicles and engines the Administrator has certified for use with the given fuel. The plain language of the statute allows for nothing else.

This analysis is in accord with Judge Kavanaugh’s dissent and should have been the result had the case been adjudicated on its merits.

E. EPA Contends the Clean Air Act allows Granting Waivers for Vehicles and Engines as Subsets

The EPA argued that the partial waivers should receive Chevron step two deference. Specifically, the EPA contended “[i]n the absence of any language indicating EPA must view all vehicles and engines as a single class, [the] EPA reasonably interpreted this language to allow it to evaluate vehicles and engines as subsets.” However, this argument incorrectly applies the Chevron step two analysis. As Petitioners aptly pointed out, “[t]o 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.”

More importantly, the EPA must avoid literal interpretation of the statute at Chevron step one before it can raise a Chevron step two defense. To bypass Congress’s plain statutory language, the EPA “must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it

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104 Id.
105 Id. at 23.
106 Id. at 24.
109 Id. at 23.
almost surely could not have meant it.” In response to this argument, the EPA offered various rationales to support its preferred statutory interpretation.

I. Legislative History

First, the EPA argued that legislative history supports its view. The EPA strayed from the statutory language including the word “any” and asserted that Congress did not intend to require every vehicle or engine potentially covered under Section 211(f)(4) to be tested and that the EPA had never interpreted the statute that way. Moreover, the EPA also contended that the statute permits it to evaluate a fuel’s emissions impacts by evaluating impacts in subsets of vehicles or engines.

In accordance with Petitioners’ argument, Judge Kavanaugh’s dissent correctly dismissed this argument because it “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.

This analysis still conforms to the EPA’s belief that Congress did not intend to require every vehicle or engine to be tested, but prevents the EPA from granting Section 211(f)(4) waivers without testing vehicles made prior to model-year 2001. Furthermore, the legislative history does not mention, discuss, or reference partial waivers.

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112 Id.
113 See Grocery Mfrs. Ass’n, 693 F.3d at 191 (Kavanaugh, J., dissenting).
114 See Corrected Final Brief of Respondent, supra note 108, at 23.
115 Id.
116 Id.
117 Compare Final Reply Brief for Petitioners, supra note 110, at 9 (arguing EPA conflates the standard for allowing a waiver with the burden of proof required to satisfy that standard), with Final Opening Brief for Petitioners, supra note 5, at 32-33 (explaining how the EPA’s conflates the standard for allowing a waiver with the burden of proof required to satisfy the standard). See also Grocery Mfrs. Ass’n, 693 F.3d at 191 (Kavanaugh, J., dissenting).
118 Grocery Mfrs. Ass’n, 693 F.3d at 191 (emphasis in original).
119 See id.
120 See Final Reply Brief for Petitioners, supra note 110, at 9 (“The legislative history, however, says not one word about ‘partial waivers.’”).
The EPA also asserted that its interpretation allowing partial waivers honors the Clean Air Act’s structure and purposes.\textsuperscript{121} Simply put, the EPA argued that Sections 211(f)(4) and 211(f)(1) balance two equally important interests by placing new fuels into the stream of commerce while simultaneously protecting the national mobile source fleet from new fuels that may impair emissions compliance.\textsuperscript{122} Using this summary, the EPA compared its statutory interpretation of these interdependent sections to the relevant concerns raised within the legislative history.\textsuperscript{123} Ultimately, the EPA argued that its interpretation promotes the purposes of the CAA because Congress was concerned with reducing emissions and the nation’s dependence on crude oil.\textsuperscript{124}

Many statutes, including the CAA, represent “a complex balancing of competing interests and a slew of compromises.”\textsuperscript{125} The presence of such compromises illustrates that Congress does not pursue a unitary purpose without regard for its costs.\textsuperscript{126} Moreover, deference should be given to the legislative process “by hewing to the statutory text and not trying to cherry-pick” one purpose from many to ostensibly serve as the authority required to grant Section 211(f)(4) waivers.\textsuperscript{127}

2. Partial Waivers are Analogous to Conditional Waivers

In addition to its other claims, the EPA claimed it has traditionally interpreted the CAA to allow conditional waivers and that partial waivers are analogous to conditional waivers.\textsuperscript{128} Specifically, the EPA argued that legislative history designates Congress’ intent for the EPA to grant waivers as it deems appropriate.\textsuperscript{129}

Yet, as Petitioners’ argument indicates, this claim defies the CAA’s logic.\textsuperscript{130} “Section 211 concerns the regulation of fuels, not vehicles or engines, and 211(f)(4) provides a standard that non-similar new fuels must meet in order to qualify for a waiver – not vehicles or engines.”\textsuperscript{131} Petitioners argue, “any conditions imposed on the waiver involve standards the fuel must meet before qualifying, not the vehicle.”\textsuperscript{132} Judge Kavanaugh

\textsuperscript{121} Corrected Final Brief of Respondent, supra note 108, at 24.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 24-25.
\textsuperscript{124} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} See id. ("EPA separately claims that it has traditionally interpreted the statute as allowing conditional waivers, and that this partial waiver is like a conditional waiver.").
\textsuperscript{129} Corrected Final Brief of Respondent, supra note 108, at 27-28.
\textsuperscript{130} See Final Reply Brief for Petitioners, supra note 110, at 11.
\textsuperscript{131} Id. (emphasis in original).
\textsuperscript{132} Id. (emphasis in original).
agreed with this argument and discussed his rationale in a more simplified manner: "[c]onditional waivers generally attach to the fuel, but such waivers do not attach limitations on the kind of vehicles that can use that fuel, which is the nature of the [partial] waiver at issue here and is precisely what the statute does not permit."

3. Growth Energy Never Met Its Burden of Proof Under the Clean Air Act

As previously mentioned, Section 211(f)(4) permits the EPA Administrator to grant a waiver if the applicant establishes that such fuel or fuel additive will not cause or contribute to a failure of any emission control device or system to achieve compliance with the emission standards with respect to which the vehicle or engine has been certified. In previous waiver decisions, the EPA had habitually denied waiver requests when the applicant had failed to meet this burden. Moreover, the EPA has stated, "Section 211(f)(4) clearly places upon the waiver applicant the burden of establishing that its fuel or fuel additive will not cause or contribute to the failure of vehicles or engines to meet their assigned emission standards over their useful lives." Not only has this been the EPA’s longstanding interpretation of the statute, but this has also been the judicially approved interpretation.

In evaluating Growth Energy’s waiver application, the EPA concluded that Growth Energy failed to adequately demonstrate E15’s compliance with the CAA and thus failed to satisfy its burden of proof. Under the EPA’s longstanding interpretation of Section 211(f)(4), the waiver should have been denied in full.

Nevertheless, the EPA unilaterally chose to satisfy Growth Energy’s statutory burden from information contained in the Department of Energy’s (DOE) Catalyst Study. Most troubling from the EPA’s rebuttal is its reliance on a non-thorough study that found E15 to be detrimental to some vehicles. The Petitioners reveal this "smoking gun" in their opening brief: "despite testing fewer than 20 vehicles models in support of the first waiver decision, testing only eight in support of its second waiver decision, testing only eight in support of its second waiver decision,

135 Final Opening Brief for Petitioners, supra note 5, at 6.
136 Id. at 39 (quoting 75 Fed. Reg. at 68,100).
137 Id. (citing Am. Methyl Corp. v. Envtl. Prot. Agency 749 F.2d 826, 830 (D.C. Cir. 1984) ("[T]he burden of establishing that [a new fuel] meets the criteria for a valid waiver specified in Section 211(f)(4), taking into account all available information, should be borne by [the applicant].").
139 See id. at 40 (quoting 75 Fed. Reg. at 68,099).
140 Id.
and not testing all vehicle models known to have a propensity to fail when using ethanol-containing fuels, DOE’s tests still produced failures using E15.\(^{141}\)

Once again, the EPA failed to abide by the plain language of the statute in requiring the applicant to establish the fuel’s compliance with the CAA. This is another clear violation of the *Chevron* step one analysis. As a result, no deference should be given to the EPA’s decision. To add insult to injury, the DOE Catalyst Study on which the EPA relied so critically for rationalizing its grant of partial waivers possessed severely relaxed standards compared to the EPA’s in-house testing protocol.\(^{142}\)

### IV. THE ADVERSE EFFECTS OF E15 AND ITS FUTURE

The effects of E15’s introduction are far-reaching and will have repercussions throughout the economy, as evidenced by the various industries represented in *Grocery Manufacturers Association*.\(^{143}\) In order for the nation to benefit from E15, Congress, in conjunction with the EPA, must do more to ensure that current legislation promotes the purposes of the CAA and the RFS.

#### A. Separate E15 Fueling Dispensers and Storage Tanks are Needed

One of the most drastic effects E15 will have on the petroleum industry is the introduction of separate fueling dispensers at American gas stations.\(^{144}\) In 2012, the American Petroleum Institute (API) released a study revealing that seventy percent of the equipment at domestic gas stations was incompatible with E15.\(^{145}\) Even more troubling is that, at the time of the study’s release, only forty percent of available new equipment was compatible with E15.\(^{146}\)

Currently, gasoline with a ten percent ethanol blend is dispensed at a majority of the nation’s 160,000 gas stations.\(^{147}\) In the gas station industry,

\(^{141}\) Id. at 50 (referencing 76 Fed. Reg. at 4,671).

\(^{142}\) See id. at 45-46.


\(^{146}\) Id.

most underground storage tanks are not certified to store fuel with an ethanol blend greater than ten percent. E15 is so corrosive that its underground storage tanks must be composed of stainless steel. Retrofitting just one gas station to sell E15 would cost tens of thousands of dollars. This type of investment is impractical because only a small portion of the nation’s automotive fleet is capable of using E15. Ultimately, the introduction of E15 will cause many gas station owners to discontinue selling certain grades of fuel they currently sell to generate the capacity to offer E15, or to take the more expensive route by purchasing additional pumps and underground storage tanks. While E15 poses fewer problems for gas stations currently being built, existing gas stations will definitely feel the economic effects of retrofitting to sell E15. In describing these effects, Kirk McCauley, a representative of the Service Station Dealers of America stated, “[i]t wouldn’t be economically feasible for many [service-station owners] to have to tear up an existing place to put in new pumps and tanks.”

B. E15 Damages Engines

E15 is more corrosive than traditional fuel sources and can accelerate an engine’s degradation. Many automakers have allocated the risks of E15 on the consumer by offering warranties that do not cover damages associated with using E15. Of all vehicles on the road today, only five percent have been approved by the manufacturer to use E15. Put into numbers, approximately twelve million of the two hundred and forty million light-duty vehicles currently on the road have manufacturer


151 O’DELL, supra note 6.

152 id.

153 id.


155 id.

approval to use E15. \(^{157}\) In fact, the only automaker to approve E15 in its regular fleet of vehicles is Porsche, and that approval only pertains to models built since 2001. \(^{158}\) Both Toyota and Lexus have gone one step further by placing labels on their vehicles’ gas caps indicating E15 is not designed for their vehicles. \(^{159}\)

Congressman Jim Sensenbrenner (5th WI) is a staunch opponent of E15. In a public statement addressing the issue, Sensenbrenner stated that, “Americans need a fuel that will give them more miles out of a gallon of gas and extend the lives of their cars – not one that will permanently send their vehicles to the junkyard.” \(^{160}\)

Automakers have echoed Sensenbrenner’s distaste for E15. \(^{161}\) Mercedes-Benz warns that using E15 in its vehicles will harm the engine’s emission control system, leading to more significant problems. \(^{162}\) Honda indicated its engines were not designed nor built to use E15, noting a potential for engine failure. \(^{163}\) Volkswagen believes the EPA does not possess sufficient test results to permit E15’s use and will not cover complications deriving from E15 use under its warranties. \(^{164}\) BMW asserted that E15 damages its vehicles’ fuel pumps, oil pans, filters, and various other engine and supply systems. \(^{165}\) Additionally, Mazda, Hyundai, and Kia believe the EPA has failed to adequately show E15 will not subject their vehicles to damage or increased wear. \(^{166}\)

Contrary to EPA claims, findings by the Coordinating Research Council (CRC) concluded that approximately five million cars, manufactured within the permissible time frame of the EPA’s partial waivers, could have damaged engines due to hotter-burning fuels. \(^{167}\) In the CRC’s final report on its findings, it stated, “[t]he study has shown two popular gasoline engines used in light-duty automotive applications of vehicles from model years 2001 through 2009 failed with mechanical damage when operated on intermediate-level ethanol blends (E15 and

\(^{157}\) Mark Green, AAA: Not So Fast on E15, ENERGY TOMORROW (Nov. 30, 2012), http://energytomorrow.org/blog/aaa-not-so-fast-on-e15/#/type/all.


\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Id.

\(^{165}\) Id.

\(^{166}\) Id.

\(^{167}\) BELL, supra note 159.
E20).” 168 E15’s corrosive properties have also led to destroyed gaskets and rotted-out fuel systems in late-model vehicles.169 The risk of consumers damaging their vehicles by using an “EPA approved” gasoline outweighs the potential benefits of ethanol. This is especially true when considering the fact that only forty percent of Americans have enough money saved to afford a major automobile repair.170

C. Misfueling with E15 Misplaces Liability for Engine Damage

Compliance with the EPA’s Misfueling Mitigation Plan (MMP), which is mandatory for all parties subject to the partial waiver, requires the placement of relatively small labels on fuel dispensers that indicate whether the dispenser contains E15.171 Believing that a small sticker will prevent misfueling is wishful thinking by the EPA because of the low likelihood that many consumers will notice the sticker, let alone read it. The testimony of Gregory Scott, executive vice president and general counsel of the National Petrochemical & Refiners Association, best summarized the issue during an EPA opening hearing stating “misfueling may occur intentionally, due to price differential or a quality perception, or unintentionally, due to consumer confusion or inattention. Such misfueling cannot be avoided merely with a dispenser label.”172

Furthermore, the strong opposition to E15 by automakers has created a potential ‘perfect storm’ of consumer confusion. Consumers may read the MMP label, use E15 thinking it is safe in their vehicle, and contemporaneously void their vehicles’ warranties.173 Again, this assumes consumers will not only notice the MMP label, but also read it.

To further complicate matters, in August 2012, the EPA started requiring consumers to purchase a minimum of four gallons at gas stations selling E15 under certain situations.174 According to the EPA:

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169 E15 Gas Approved by EPA Slammed by AAA – Carmakers Will Not Honor Warranties, supra note 149.
171 O’DELL, supra note 6.
174 Tracy, supra note 148.
[R]etail stores that own or operate blender pumps [that] either dispense E15 from a dedicated hose and nozzle if able, or in the case of E15 and E10 being dispensed from the same hose, [the EPA] require[s] that at least four gallons of fuel be purchased to prevent vehicles and engines with smaller fuel tanks from being exposed to gasoline-ethanol blended fuels containing greater than 10 vol% ethanol. This can create a situation where consumers unknowingly buy E15, which, ironically, is a federal crime. To put this dilemma into perspective, "[w]ithout the [four-gallon] rule, a motorcyclist who followed an E15 customer at the pump, but who only purchased two gallons of E10, could receive enough residual E15 from the hose and nozzle to violate an engine warranty and possibly cause engine problems." Furthermore, this four-gallon rule is impractical because some motorcycle and other vehicle fuel tanks hold less than four gallons. This scenario implicates the very problem posed in the beginning of this note regarding the lack of access to a safe fuel source.

D. What the Future Should Hold for E15 in America

Until these partial waivers are invalidated, more must be done to mitigate the adverse effects of E15. The need for further testing and public dissemination of the pros and cons of ethanol, specifically E15, can be deduced from the analysis above. Members of Congress are beginning to realize the need to address the concerns surrounding E15 and have proposed legislation requiring the EPA to authorize an unbiased study of E15. Beyond further testing, Congress or the EPA must get creative to ensure all reasonable actions are taken to inform the public about E15. One suggestion would be treating E15 like diesel fuel at gas stations. Most gas stations' diesel fuel dispensers have a uniquely colored nozzle to signal consumers that the nozzle dispenses diesel fuel. Gas stations could offer E15 with uniquely colored nozzles specific to gasoline with an ethanol blend greater than ten percent.

176 Id.
177 See Partial Grant of Clean Air Act Waiver Application, supra note 74.
179 Id.
180 Strauss, supra note 158.
V. CONCLUSION

The D.C. Circuit failed consumers and industries throughout the country by not adjudicating the issues raised in Grocery Manufacturers Association, especially after considering the persuasive dissent written by Judge Kavanaugh agreeing with the Petitioners’ arguments that the EPA’s decision to grant partial waivers to allow E15 to be widely introduced exceeded its authority. The EPA should have adhered to the plain language of the CAA and refused to grant Growth Energy’s Section 211(f)(4) waiver. Until the EPA’s power can be reined in, the adverse effects of E15 must be mitigated. Whether that mitigation entails further research to better assess the harm E15 can cause to engines and other vehicle component systems, uniquely colored fuel dispenser nozzles, or some other initiative – something must be done.