KAMALA D. HARRIS
Attorney General of California
GAVIN G. MCCABE, CA SBN 130864*
DAVID A. ZONANA, CA SBN 196029*
Supervising Deputy Attorneys General
M. ELAINE MECKENSTOCK, CA SBN 268861*
NOAH GOLDEN-KRASNER, CA SBN 217556*
JONATHAN WIENER, CA SBN 265006*
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
Telephone: (510) 622-4450
Fax: (510) 622-2272
E-mail: Elaine.Meckenstock@doj.ca.gov
Attorneys for Defendant-Intervenor
California Air Resources Board

*Specially admitted government attorney

[additional counsel on signature page]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, et al.,

Plaintiffs,

v.

JANE O'KEEFFE, et al.,

Defendants,

and **CALIFORNIA AIR RESOURCES BOARD,** et al,

Defendant-Intervenors.

Case No. 3:15-cv-00467-AA

DEFENDANT-INTERVENORS CALIFORNIA AIR RESOURCES BOARD'S AND STATE OF WASHINGTON'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs' complaint should be dismissed for failure to state a claim upon which relief could be granted. Plaintiffs have not alleged, and cannot allege, facts supporting the basic elements of any dormant Commerce Clause discrimination claim—namely, that Oregon's Clean Fuels Program favors in-state fuels over out-of-state competitors. Indeed, Oregon's Program distinguishes among fuels based on their contributions to climate change, not based on their origins. And out-of-state fuels have obtained some of the most favorable carbon-intensity values under the Program. Plaintiffs' extraterritorial regulation claim also fails because the Ninth Circuit has concluded that programs like Oregon's regulate only the State's own market and do not, as a matter of law, regulate conduct occurring wholly outside the State.

Plaintiffs' two preemption claims fare no better. Their claim under Section 211(c)(4)(A)(i) of the Clean Air Act should be dismissed because the U.S. Environmental Protection Agency ("EPA") has not made the finding necessary to trigger preemption under this provision. In fact, EPA itself has indicated that programs like Oregon's are not preempted by federal law. That indication from EPA is equally fatal to Plaintiffs' preemption claim under the Energy Independence and Security Act of 2007 ("EISA") and the Renewable Fuel Standard ("RFS2"). That preemption claim also fails because Plaintiffs have pled no facts that could support either their standing to bring the claim or a plausible inference that Oregon's Program conflicts with EISA and the RFS2 program.

Plaintiffs' complaint should be dismissed in its entirety and with prejudice.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE ANY VIABLE DISCRIMINATION CLAIM

Plaintiffs bring two discrimination claims—that Oregon's Program discriminates against out-of-state ethanol in favor of in-state ethanol and that Oregon's Program discriminates against

petroleum fuels (which happen to be produced outside of Oregon) in favor of in-state biofuels. Plaintiffs' Memo of Ps & As in Opp. to Mots. To Dismiss (ECF #63) ("Opp.") at 7, 16, 18. Both of these claims should be dismissed.

A. Oregon's Program Does Not Discriminate Against Out-Of-State Ethanol, And Plaintiffs Cannot Plausibly Allege That It Does

Plaintiffs have failed to allege, and cannot allege, facts that could support their claim that Oregon's Program discriminates in favor of in-state ethanol at the expense of Midwest or other out-of-state ethanol. In fact, many out-of-state ethanols have obtained *more favorable* carbon-intensity values than their in-state competitor, and Midwest ethanols, specifically, have obtained some of the lowest, and most favorable, values of all. Defendant-Intervenors' Motion to Dimiss (ECF #52) ("ARB/WA Mot.") at 6. Plaintiffs' repeated assertions that "Oregon ethanol is assigned a lower carbon-intensity score than Midwest ethanol" cannot render such statements plausible, let alone true. Opp. at 18; *id.* at 13; Complaint at ¶¶ 70, 112.

In fact, the highly favorable values for out-of-state ethanols are unsurprising since Oregon's Program is modeled on California's Low Carbon Fuel Standard ("LCFS"), under which out-of-state producers (generally from the Midwest and Brazil) have also obtained the most favorable carbon-intensity values for ethanol. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1084 (9th Cir. 2013) ("The individualized pathway with the lowest carbon intensity was achieved by a Midwest producer…. The default pathway with the lowest carbon intensity is only slightly higher: 58.40 gCO_2e/MJ for Brazilian sugarcane ethanol…."); *see also* Opp. at 3 (acknowledging Oregon's Program is modeled on California's).

Because "the lowest ethanol carbon intensity values, providing the most beneficial market position, have been for pathways from the Midwest and Brazil," Oregon's Program "does not isolate [Oregon] and protect its producers from competition." *Rocky Mountain*, 730 F.3d at

1089. In other words, there is no dormant Commerce Clause concern here. *See Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (describing dormant Commerce Clause's purpose as "prevent[ing] a State from retreating into … economic isolation") (internal quotation omitted).

Contrary to Plaintiffs' argument, neither Defendant-Intervenors' brief nor the Ninth Circuit's *Rocky Mountain* decision suggest "that facial discrimination among ethanols on the basis of origin is permissible." *See* Opp. at 9. Indeed, Oregon's Program "does not base its treatment on a fuel's origin but on its carbon intensity." *See Rocky Mountain*, 730 F.3d at 1089. Notably, the 50.70 carbon-intensity value that Plaintiffs allege corresponds to Oregon's sole ethanol plant falls in the middle of the full range of ethanol values—from 12.40 (ETHS002) to 75.10 (ETHC005). OAR 340-253-8030 (Table 3); *see also* Complaint at ¶ 70. By definition, then, the carbon intensity of ethanol simply does not correlate with its origin inside or outside of Oregon. This is fatal to Plaintiffs' claim. *Pharm. Research & Mfrs. of Am. v. Cnty. of Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014) ("A statute is discriminatory if it 'impose[s] commercial barriers or discriminates against an article of commerce by reason of its origin or destination out of State.'") (quoting *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994)).

In their opposition, Plaintiffs simply continue their improper reliance on the identical, overly narrow view of the ethanol market that the Ninth Circuit rejected in *Rocky Mountain*. *See* Opp. at 18 (comparing only those ethanols purportedly "produced using the same process"); *see also Rocky Mountain*, 730 F.3d at 1088 (rejecting this very "selective comparison"); *see also* ARB/Wa Mot. at 4-9. Plaintiffs thus underscore that they have no credible response to the fact that some out-of-state ethanols have obtained more favorable values than Oregon ethanol. Indeed, these facts (evident from the face of Oregon's regulation) undermine *any* discrimination

claim. This simply is not a "'regulatory measure[] designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Davis*, 553 U.S. at 338 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–274 (1988)).

To be clear, there can be no finding of facial discrimination where, as here, the regulation facially provides its most favorable carbon-intensity values for ethanol to out-of-state producers. *See* OAR 340-253-8030 (Table 3); *see also* ARB/WA Mot. at 10-11 (noting that *Rocky Mountain* found a virtually identical table of values did not facially discriminate).

There can be also no finding of purposeful discrimination where, as here, in-state ethanol producers are not actually benefited by a burden to their out-of-state competitors. Indeed, to find purposeful discrimination against out-of-state ethanol producers under such circumstances would turn the very definition of discrimination on its head. *See Davis*, 553 U.S. at 338. It would also require this court to conclude that Oregon intended to protect in-state ethanol producers even though the regulation fails to do so. Plaintiffs have identified no case in which a court has ever held that a State intended to discriminate where it failed to do so in fact. *See Rocky Mountain*, 730 F.3d at 1089 (holding that carbon-intensity values like Oregon's do not protect in-state producers); *see also* Defendants' Reply (ECF #66) at 8-12.

Lastly, there can be no finding of discriminatory effects. Whatever effects Oregon's Program may ultimately have on Oregon's ethanol market, there is absolutely no reason to speculate that out-of-state producers will lose market share when some of their ethanols are the most desirable from a carbon intensity standpoint. *See Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1231-32 (9th Cir. 2010); *see also* Defendants' Reply at 12-15.

All of Plaintiffs' discrimination claims regarding out-of-state ethanol should be dismissed with prejudice.

B. Oregon's Program Does Not Discriminate Against Out-of-State Petroleum Fuels, And Plaintiffs Cannot Plausibly Allege That It Does

Plaintiffs' claim that Oregon's Program discriminates against out-of-state petroleum fuels and in favor of in-state biofuels fails for multiple reasons, several of which overlap with the fatal flaws in Plaintiffs' ethanol claim.

1. Plaintiffs Have Not Alleged, And Cannot Allege, Facts That Could Support Their Foundational Inference That Only In-State Fuels Can Or Will Displace Out-Of-State Petroleum Fuels

Plaintiffs claim that Oregon's Program "makes Oregon biofuels more economically attractive … than petroleum [that is produced outside Oregon]." Opp. 13. This appears to be the basis for Plaintiffs' claim that Oregon intends to replace petroleum fuels with "biofuels produced in Oregon." *Id*. at 17 n.9.

Like their ethanol claim, Plaintiffs' petroleum claim is premised on a false and improperly narrow view of Oregon's market. *See* ARB/WA Mot. at 4-7. Plaintiffs ask this Court to assume that Oregon's market consists only of out-of-state petroleum and in-state biofuels, disregarding out-of-state biofuels and particularly out-of-state biofuels, such as ethanols, with favorable carbon-intensity values. *See, e.g.,* Opp. at 18 ("Oregon Program disfavors petroleum (which is not produced in Oregon) and favors biofuels (which are produced in Oregon).") Plaintiffs argue, erroneously, that the Ninth Circuit's rejection of such narrow market views was limited to ethanol. Opp. at 18 n.11. That is an odd response where Plaintiffs are omitting *out-of-state ethanols* from their analysis. Further, the Ninth Circuit rejected a similarly narrow view of California's petroleum market because it "left out several significant parts…." The court then analyzed "the full California crude-oil market." *Rocky Mountain,* 730 F.3d at 1099. In other words, the Ninth Circuit's full-market-analysis requirement applies just as much to petroleum fuels as it does to ethanols.

Considering that full market, and as discussed above, out-of-state biofuels, such as Midwestern and Brazilian ethanols, have obtained some of the most favorable carbon-intensity values. *See, supra*, Sec. I.A. The same is true of out-of-state biodiesels, the only other biofuel mentioned in Plaintiffs' complaint.[1] For example, a biodiesel described as "produced in the Midwest" has a carbon-intensity value of 13.83, among the lowest values to date for biodiesel. OAR 340-253-8040 (Table 4, pathway BIOD005). In light of such favorable values for out-of-state biofuels, Oregon's Program "creates no barriers whatsoever against interstate [low-carbon biofuel producers]."[2] *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978). Accordingly, even if biofuels may displace some petroleum fuels, there can be no plausible inference here that those biofuels must or will originate in Oregon. Because Oregon's Program leaves low-carbon ethanols and biodiesels free to compete with each other, regardless of their origins, it does not "rais[e] barriers to the free flow of interstate trade," and it does not violate the Commerce Clause. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 107 (1994) (internal quotation omitted); *see also* Defendants' Reply at 6 (noting that Oregon may recognize that petroleum fuels pose different threats and treat them accordingly).

Indeed, Plaintiffs' own description of the Court's holding in *Exxon* applies equally here and requires dismissal of this claim. Plaintiffs wrote: "The Maryland law at issue in *Exxon* forbade petroleum refiners (all of which happened to be located outside of Maryland) from

[1] Plaintiffs have failed to allege *any* facts about biodiesel produced either inside or outside of Oregon, other than a conclusory assertion that biodiesel produced in Oregon "already meet[s] the proposed" annual average carbon-intensity standard. Complaint at ¶ 58; *see also id.* at ¶ 64. Notably, *all* biodiesels that appear in Table 4 of the regulation could meet the carbon-intensity standard under the Program. *See* OAR 340-253-8040 (including biodiesel values); OAR 340-253-8020 (carbon-intensity standards). Plaintiffs have failed to state any claim that in-state biodiesel is somehow favored to the disadvantage of out-of-state fuels.

[2] The absence of barriers to interstate trade in low-carbon fuels also distinguishes this case from Plaintiffs' cases. *See also* Defendants' Reply at 6-8.

operating service stations within the state, but permitted both in-state and out-of-state independent retailers to operate in-state service stations." Opp. at 17. A meaningfully identical statement could just as easily describe Oregon's Program: The Oregon Program imposes deficits on petroleum refiners (all of which happen to be located outside of Oregon) when they sell high-carbon petroleum fuels in Oregon, but permits both in-state and out-of-state low-carbon-fuel producers and importers to obtain credits when they sell low-carbon fuels in Oregon. This is no more a violation of the Commerce Clause than the law at issue in *Exxon*. Plaintiffs' claim should be dismissed.

2. Plaintiffs' Claim Also Fails Because They Have Not Alleged Facts That Support The Threshold Conclusion That Petroleum Fuels Are "Similarly Situated" To Ethanols Or Other Biofuels

Plaintiffs' claim that Oregon's Program discriminates against out-of-state petroleum in favor of in-state ethanol or other biofuels suffers from another fundamental flaw. Petroleum and ethanol are, of course, different products, as are petroleum and biodiesel (the only other biofuel mentioned in the complaint). When plaintiffs allege a dormant Commerce Clause violation involving "entities [that] provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). If petroleum and ethanol (or other biofuels) are not "similarly situated," then differential treatment of them is not unconstitutional discrimination. *Id.* at 310. While the "similarly situated" question arises infrequently (because dormant Commerce Clause cases usually involve entities that provide the same good or service), the case law that does exist indicates that Plaintiffs have failed to allege sufficient facts to meet this threshold test.

Plaintiffs contend, in a short footnote, that their "similarly situated" allegations are sufficient, pointing to, and misquoting, a single allegation in their complaint. Opp. at 17 n.9.

Plaintiffs claim they have alleged "that '[t]he Oregon Program * * * is designed to displace imported fuels produced from petroleum sources' and replace them with biofuels produced in Oregon." *Id.* (quoting Complaint ¶ 58). The complaint does not actually allege that the fuels that displace petroleum fuels will be biofuels produced in Oregon. Complaint ¶ 58. Regardless, as the case law demonstrates, this single allegation, however stated, does not suffice to support a "similarly situated" inference here for petroleum and biofuels (such as ethanol).

In *Alaska v. Arctic Maid,* 366 U.S. 199, 204 (1961), the Court held that Alaska could treat fish processors "sell[ing] to the fresh-frozen consumer market" differently than "freezer ships [that] take their catches south [out of Alaska] for canning," without running afoul of the dormant Commerce Clause. This was so because freezer ships did not compete in the fresh-frozen consumer market; rather, freezer ships competed with Alaskan canners. *Id.* Similarly, in *General Motors,* the Court concluded that local utilities selling "a product consisting of gas bundled with [other] services" primarily to residential consumers were not "similarly situated" to independent marketers selling "unbundled gas" primarily to large businesses and, thus, that differential treatment of these two groups was not discrimination under the Commerce Clause. *General Motors,* 519 U.S. at 297, 310. As these cases demonstrate, this inquiry turns on competition between the allegedly "similarly situated" products or entities.

In the transportation fuel context, courts have traditionally considered ethanol to compete with ethanol and petroleum to compete with petroleum. Thus, *New Energy Company of Indiana* involved only the comparison of how Ohio treated ethanol produced in Ohio and elsewhere. 486 U.S.at 276. *Exxon* similarly involved only consideration of how Maryland was affecting the in-state and out-of-state entities selling petroleum in Maryland's retail market. 437 U.S. at 126. And, perhaps most notably because it involved both fuels, *Rocky Mountain* analyzed ethanol and

petroleum discrimination claims *separately*. *Rocky Mountain*, 730 F.3d. at 1088-97 (ethanol), 1097-1101 (petroleum). At a minimum, these cases indicate that Plaintiffs must allege some actual facts that could support a plausible inference that petroleum and ethanol (or other biofuels) compete and are, accordingly, "similarly situated."

Instead, Plaintiffs essentially alleged nothing on this issue, and their recent public statements belie the notion that ethanol (or other biofuels) currently compete with petroleum. Plaintiff American Fuel and Petrochemical Manufacturers ("AFPM") recently argued to EPA that ethanol can constitute no more than the ten percent it already comprises of blended gasoline:

> Given that the vast majority of cars, trucks, and other non-road vehicles and engines in the United States can only be fueled with E0 or E10 gasoline without voiding the manufacturer's warranty or potentially damaging the engine, the E10 blendwall imposes a major impediment for obligated parties to [increase their use of renewable fuels].[3]

Defendant-Intervenors' Second Request for Judicial Notice ("2nd RJN") Exh. H at 1. AFPM asserted that "[i]n the short term, there is a general inability to quickly increase the use of new biofuels due to factors like … lack of drop-in biofuels,[4] and needed infrastructure changes." *Id.* at 11 of 57. AFPM's references to market constraints that, in AFPM's view, inhibit biofuels from competing with, or displacing, petroleum do not suggest that, in AFPM's view, petroleum and ethanol (or other biofuels) are currently "similarly situated." Indeed, it is difficult to imagine

[3] Blends of ethanol and refined petroleum are often referred to by the percentage of ethanol they contain. Thus, "E0" is 100 percent petroleum and "E10" is 10 percent ethanol and 90 percent refined petroleum. *See* 80 Fed. Reg. 33,100, 33,101 (June 10, 2015). The phrase "E10 blendwall" refers to "the volume of ethanol that can be consumed domestically if all gasoline contains 10% ethanol…." *Id.* at 33,102.

[4] "'[D]rop-in' biofuels [are] those that are made from renewable sources but are otherwise essentially indistinguishable from the fossil-based fuels they displace." 80 Fed. Reg. at 33,101. Ethanol is not a drop-in fuel, as evident from AFPM's reference to the "lack of drop-in biofuels" on the market. *See also id.* at 33,102.

what facts Plaintiffs could allege to support the inference that ethanol will displace petroleum, if, as AFPM asserted to EPA, ethanol cannot readily increase beyond its current level.

It is true that Oregon intends its Program to encourage the development and production of low-carbon intensity fuels for Oregon's market. This may mean that petroleum fuels will be displaced, to some unknown extent, by lower-carbon fuels. In fact, Oregon's "compliance scenarios"—which do not predict the future but illustrate ways in which compliance could occur through 2025—suggest that paths to compliance *could* involve natural gas supplanting some petroleum diesel and electricity supplanting some petroleum gasoline and some petroleum diesel. 2nd RJN Exh. I at 16. The suggestion that natural gas and electricity might displace some petroleum does not help Plaintiffs' claim that Oregon is favoring its *biofuels* industry. With respect to biofuels, the scenarios (on which Plaintiffs rely for other purposes) also assume that the average carbon intensity of ethanol sold in Oregon will decline over time. *Id.* at 10, 12. That assumption is consistent with Plaintiffs' allegations that refiners and blenders will choose lower-carbon-intensity ethanol to blend, at current ten-percent levels, into gasoline. *See* Complaint at ¶ 55. Nothing in these scenarios, nor Plaintiffs' allegations, supports Plaintiffs' inference that ethanol will displace petroleum such that the fuels are currently "similarly situated."

Even if alternative fuels compete on the margins of the petroleum market now, or might compete more fully in that market in the future (facts Plaintiffs have not alleged), that would be insufficient to support a finding of "similarly situated." In *General Motors*, the Court declined to find that local utilities and independent gas dealers were "similarly situated" based on assumptions that local utilities might compete "at the margins" of the dealers' market, which was not the utilities' "core market." 519 U.S. at 301, 308. That Court also expressly declined to base its "similarly situated" analysis on speculation about market shifts that might occur in the future

due to policy changes. *Id.* at 308 ("We are consequently ill qualified to develop Commerce Clause doctrine dependent on any such predictive judgments.").

In sum, Plaintiffs' petroleum discrimination claim should be dismissed entirely and with prejudice because Plaintiffs have failed to allege any facts that could support such a claim. The face of Oregon's regulation makes plain that out-of-state, low-carbon alternative fuels are recognized and welcome under Oregon's Program. The absence of any barriers to those out-of-state fuels assures continued interstate competition in Oregon's market, regardless of what might happen to petroleum fuels. In addition, Plaintiffs have failed to allege facts to support the necessary inference that petroleum fuels and biofuels (like ethanol) are "similarly situated."

II. OREGON'S PROGRAM DOES NOT REGULATE EXTRATERRITORIALLY, AND PLAINTIFFS CANNOT PLAUSIBLY ALLEGE THAT IT DOES

Plaintiffs' extraterritorial regulation claim fails as a matter of law, regardless of whether Plaintiffs purport to assert it under the dormant Commerce Clause or "principles of interstate federalism." The Ninth Circuit has concluded that California's LCFS "regulates only the California market." *Rocky Mountain*, 730 F.3d. at 1101. Plaintiffs acknowledge that Oregon's Program is modeled on California's LCFS. Opp. at 3. Yet, Plaintiffs do not even attempt to argue that Oregon's Program operates meaningfully differently than California's LCFS, providing this Court with no basis to hold that Oregon's Program regulates anything other than Oregon's market.

In fact, Plaintiffs' extraterritorial regulation claim, however styled, turns on whether the challenged law "regulate[s] and control[s] activities wholly beyond [the State's] boundaries." Opp. at 20 (quoting *Watson v. Emp'rs Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954)); *see also id.* at 20 (arguing that "Oregon Program purports to regulate activities that occur beyond the jurisdictional limits of Oregon"); 21 ("The Supreme Court has held that states lack authority to

regulate conduct outside their borders in a variety of contexts quite apart from the Commerce Clause.") Thus, Plaintiffs cannot state a valid claim, under any doctrine, because the Ninth Circuit has concluded, as a matter of law, that Oregon's Program only controls Oregon's market.

Notably, a California district court just dismissed this same claim from these same Plaintiffs on precisely these grounds. In that case, Plaintiffs alleged that California's LCFS, as amended in 2012, regulates extraterritorially under the dormant Commerce Clause and "principles of interstate federalism." As they do here, Plaintiffs acknowledged that the Ninth Circuit's *Rocky Mountain* decision bars their dormant Commerce Clause claim but argued that the "principles of interstate federalism" claim should survive. The court disagreed, finding that "Plaintiffs effectively allege that the Amended LCFS regulates extraterritorially in the exact same way as did the Original LCFS." 2nd RJN Exh. J at 17-18. The same is true here, as established through comparison of the allegations in the California case and this case, and as undisputed by Plaintiffs. *See* ARB/WA Mot. at 13-14. "Plaintiffs have not alleged facts demonstrating that the [Oregon Program] regulates fuels differently such that [the Ninth Circuit's] extraterritoriality analysis should not apply to bar Plaintiffs' challenge…." 2nd RJN Exh. J at 18. The extraterritorial regulation claim should be dismissed in full and with prejudice.

III. OREGON'S PROGRAM IS NOT PREEMPTED BY EPA'S REFORMULATED GASOLINE RULE, AND PLAINTIFFS CANNOT ALLEGE THAT IT IS

Plaintiffs' opposition brief fails to point to any allegations that can show (1) EPA has determined that no control of methane is necessary, (2) EPA has made such a determination about the necessity of controlling methane emissions' contribution to climate change, or (3) that any such determination would have survived EPA's more recent determinations that methane emissions' contribution to climate change endangers public health and welfare.

A. EPA Has Not Decided That Controlling Methane Is Unnecessary

Plaintiffs' opposition mischaracterizes EPA's decision that methane does not contribute to ozone formation and thus would not be covered by the Reformulated Gasoline Rule, obscuring the nature of that decision and ignoring the context of the Rule.

EPA promulgated the Reformulated Gasoline Rule pursuant to its mandatory duty to set standards for gasoline formulation to reduce emissions of ozone-forming volatile organic compounds (VOCs) and other specified pollutants below an established baseline. 59 Fed. Reg. 7,716, 7,716-17 (Feb. 16, 1994) (citing 42 U.S.C. § 7545(k)). In assigning EPA that duty, Congress left it open for EPA to determine which VOC emissions were ozone-forming. 42 U.S.C. § 7545(k)(1)(A); see also 59 Fed. Reg. at 7,722. Accordingly, EPA first determined which emissions fit that definition, and only then determined the baseline emissions and the appropriate gasoline formulation necessary to reduce emissions below that level. 59 Fed. Reg. at 7,722-23. As part of its first step, EPA concluded that methane emissions are not ozone-forming emissions. *Id*. at 7,722. Accordingly, as part of its second step, EPA opted not to include methane in calculating the baseline emissions or the reductions it was trying to achieve. *Id*. at 7,723.

In making these determinations, EPA had no reason to decide whether or not it would be necessary for States to control emissions, like methane, that are not ozone-forming. Nor did EPA make such a decision. Contrary to Plaintiffs' claim that EPA "decided that methane would be excluded from regulation" and "found that control of methane emissions was not necessary in the federal fuel standards promulgated under Section 211(c)(1)," Opp. at 23, 24, EPA found merely that methane was not ozone-forming and therefore would not be addressed by the Reformulated Gasoline Rule. That finding did not speak to the need to regulate methane emissions in any future fuel regulations at either the State or federal level. EPA's finding did not

constitute the preemptive determination, under Clean Air Act Section 211(c)(4)(A)(i) ("Clause (i)"), "that no control or prohibition of [methane emissions] is necessary."

Likewise, the Reformulated Gasoline Rule's brief discussion of preemption in the preamble did not contemplate preemption of State controls of methane emissions, or of any other fuel characteristics not regulated by the Reformulated Gasoline Rule. Rather, that discussion refers only to preemption of State controls of those fuel characteristics that the Reformulated Gasoline Rule actually regulates, namely, emissions of ozone-forming VOCs and other pollutants specified by statute. 59 Fed. Reg. at 7,723. In doing so, EPA invoked preemption under Section 211(c)(4)(A)(ii) ("Clause (ii)"). That provision, which Plaintiffs do not and cannot allege applies to this case, prohibits States other than California from controlling a "characteristic or component of a fuel or fuel additive, unless the State prohibition or control is identical to the prohibition or control prescribed by [EPA]."[5] EPA's discussion of preemption echoes the language and logic of that provision:

> Whenever the federal government regulates in an area, the issue of preemption of State action in the same area is raised. The regulations proposed here will affect virtually all of the gasoline sold in the United States. As opposed to commodities that are produced and sold in the same area of the country, gasoline produced in one area is often distributed to other areas. The national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an inefficient patchwork of potentially conflicting regulations. Indeed, Congress provided in the 1977 Amendments to the Clean Air Act that federal fuels regulations preempt non-identical State controls except under certain specified circumstances (see, section 211(c)(4) of the Clean Air Act). EPA believes that the same approach to federal preemption is desirable for the reformulated gasoline and anti-dumping programs. EPA, therefore, is issuing today's final rule under the authority of sections 211 (k) and (c), and promulgate[s] under section 211(c)(4) that dissimilar State controls be preempted unless either of the

[5] *See* 42 U.S.C. § 7545(c)(4)(A)(ii); California is exempt from EPA preemption under 42 U.S.C. § 7545(c)(4)(B).

> exceptions to federal preemption specified by section 211(c)(4) applies. Those exceptions are sections 211(c)(4)[](B) and (C).

59 Fed. Reg. at 7809.

Nothing in this paragraph indicates that EPA thought it was preempting State controls under Clause (i), based on a finding that no control of a particular fuel characteristic is necessary. Clause (ii), and not Clause (i), concerns EPA's actual regulation of characteristics or components. 42 U.S.C. § 7545(c)(4)(A). Likewise, Clause (ii), and not Clause (i), inquires into whether State regulations are "non-identical" to, or "dissimilar" from, EPA regulations with respect to those characteristics or components. It is thus plain that EPA was invoking preemption under Clause (ii), not making a Clause (i) finding that State controls of unregulated characteristics or components are unnecessary.

Plaintiffs attempt to interpret this invocation of Clause (ii) preemption as a Clause (i) finding. But the Supreme Court has said on multiple occasions that decisions not to regulate differ from decisions that regulation is unnecessary. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (holding that "laundry list of reasons not to regulate" greenhouse gases did not equate to decision that statutory criteria for regulation were not satisfied); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) ("It is quite wrong to view that decision [not to establish a federal regulation] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation.").

And EPA itself has said the Reformulated Gasoline Rule does not have such a broad preemptive effect, noting that the rule's establishment of controls on fuel oxygen content in some states did not constitute a decision that similar controls in other states were unnecessary. 62 Fed. Reg. 10,690, 10,693 (March 10, 1997). EPA explained that the Reformulated Gasoline Rule merely fulfilled the agency's statutory duty to establish fuel oxygen content requirements for

certain states, which did not call for the agency to consider whether fuel oxygen requirements were necessary in other states. *Id*. Similarly, the rule also fulfilled the agency's duty to establish chemical composition standards to limit emissions of ozone-forming VOCs, and did not call for the agency to consider whether it was necessary to limit emissions of other VOCs.

Contrary to Plaintiffs' suggestion, Defendant-Intervenors have not argued that EPA could only have made a Clause (i) finding as a "stand-alone order[]." See Opp. at 27 n.18. Rather, Defendant-Intervenors merely pointed out that, at the time EPA engaged in the Reformulated Gasoline Rule, the agency's practice was to make any Clause (i) finding in a separate rulemaking. ARB/WA Mot. at 16. This is consistent with EPA's practice of being explicit when making threshold determinations required by Section 211(c)(4) and the Clean Air Act's mobile source provisions in general. ARB/WA Mot. at 15-17.[6] Accordingly, the Court should not infer that the Reformulated Gasoline Rule contains an implicit Clause (i) finding. Plaintiffs' claim should be dismissed.

B. Any Decision EPA Made Was Not About The Characteristic Regulated By Oregon's Program

Even if the Reformulated Gasoline Rule did contain a finding that it was unnecessary to regulate methane emissions, the Rule does not regulate or otherwise speak to the lifecycle carbon intensity of fuels. Accordingly, the rule cannot preempt the Clean Fuels Program, which regulates only that characteristic (assuming lifecycle carbon intensity is a fuel characteristic). That is because no state control of a fuel characteristic can be preempted unless it regulates the

[6] *See also* 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (tracking section 202(a)'s language requiring determination that greenhouse gases from vehicles endanger public health and welfare); 80 Fed. Reg. 37,758 (July 1, 2015) (tracking section 231(a)(2)(A)'s language requiring determination that greenhouse gases from aircraft endanger public health and welfare); 65 Fed. Reg. 24,268, 24,274 (April 25, 2000) (tracking section 213(a)(3)'s language requiring determination that engine technologies that can achieve emissions standards are available).

same "characteristic or component" of fuel that EPA regulates or expressly found was not necessary to control.

This narrow focus is clear from the statute's text. Clause (i) refers to "*the* characteristic or component" EPA has found unnecessary for States to control, while Clause (ii) refers to "*such* characteristic or component" that EPA has specifically regulated. 42 U.S.C. § 7454(c)(4)(A). As EPA has said, "both Congress and the Agency have clearly indicated that EPA's fuel requirements do not preempt states from regulating a specific characteristic or component that the Agency has not addressed." 62 FR 10,690, 10,692 (March 10, 1997).[7] In other words, by congressional design, States remain free to control characteristics or components that EPA has not addressed.

In addition to interpreting the term "characteristic" narrowly, EPA has interpreted the Reformulated Gasoline Rule as addressing only a limited set of fuel characteristics. 62 FR 10,690, 10,693 (finding "characteristic or component" should not be read "generally, as in 'oxygen content,' but rather, "specifically, as in 'oxygen content in RFG areas'"). Moreover, EPA has explicitly indicated that state low-carbon fuel standards like Oregon's Program are not preempted by any EPA regulation. As part of EPA's 2010 RFS2 rulemaking (16 years after promulgation of the Reformulated Gasoline Rule), one commenter urged EPA to "preempt state

[7] Rather than allege that methane emissions and carbon intensity are the same characteristic, Plaintiffs claim that distinguishing the control of ozone formation from the control of carbon intensity would lead to a slippery slope where states could pretextually regulate one characteristic in order to actually regulate a different characteristic already addressed by EPA. Opp. 26. Plaintiffs allege no facts that even remotely suggest that any such pretext is at issue here. Indeed, Plaintiffs cannot argue that Oregon is attempting to alter the characteristics or components of reformulated gasoline, because they allege that the carbon intensity controlled by Oregon's Program is not a physical attribute of fuel. *See* Complaint at ¶ 43. Plaintiffs' slippery slope argument is inapplicable here, and, in any event, courts are well-equipped to assess, in other cases, whether regulations are pretextual and whether they are applicable to a characteristic or component already addressed by EPA.

programs designed to address carbon content and lifecycle analysis of fuels" including "state low carbon fuel standards" like Oregon's Program. ARB/WA Mot. at 22. EPA rejected the suggestion that it should preempt regulations like Oregon's. *Id.* Neither EPA nor the commenter would have engaged in such a discussion if they thought such programs were already preempted by the Reformulated Gasoline Rule, as Plaintiffs claim. The Court should defer to EPA's rejection of Plaintiffs' interpretation of the Reformulated Gasoline Rule. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874-75 (2000).

C. Any Decision That State Control Of Methane Was Unnecessary Would Have Since Been Reversed

As explained in Defendant-Intervenors' motion to dismiss, EPA found in 2010 that methane and other greenhouse gases pose a threat to public health and welfare. ARB/WA Mot. at 17. Since State Intervenors filed that motion, EPA has reiterated and strengthened that finding. RJN Exh. K. In its final rule regulating greenhouse gases (which includes methane) from new power plants, EPA determined that recent scientific assessments of climate change impacts "confirm and strengthen the conclusion that GHGs endanger public health, now and in the future." *Id.* at 39-40. EPA described the unique dangers emissions of greenhouses gases like methane pose to the Pacific Northwest, including threats to water supplies, salmon runs, oyster populations and hydropower production, as well as increased risk of wildfires and coastal flooding. *Id.* at 57-58.. Thus, had the Reformulated Gasoline Rule made a finding that no control of methane was necessary because methane emissions do not endanger public health or welfare, that decision would now have been emphatically reversed.

Against this backdrop, Plaintiffs argue that EPA could decide no control is necessary for some reason other than a lack of danger, for instance, because motor vehicle emission regulations adequately control methane emissions, or because it would have been too expensive

to control methane emissions. Opp. at 27-28. But Plaintiffs do not and cannot allege that EPA made such a finding in the Reformulated Gasoline Rule. Regulations on methane emissions from motor vehicles did not exist, and the Reformulated Gasoline Rule did not address the cost of controls on methane emissions from vehicle fuels. If one were to interpret the Reformulated Gasoline Rule as a determination that no control of methane is necessary, the only semi-plausible way to do so would be to treat the statement that methane does not contribute to ozone formation as equivalent to a finding that methane does not endanger public health or welfare. As explained above, EPA did not make that finding. But, even if it had, the agency has since found precisely the opposite.

Plaintiffs' third claim, for preemption under Clause (i) of Section 211(c)(4)(A) of the Clean Air Act and EPA's Reformulated Gasoline Rule, should be dismissed with prejudice.

IV. OREGON'S PROGRAM IS NOT PREEMPTED BY THE FEDERAL RENEWABLE FUEL STANDARD ("RFS2"), AND PLAINTIFFS CANNOT PLAUSIBLY ALLEGE THAT IT IS

Plaintiffs' fourth claim—the claim that Oregon's Program conflicts with, and is therefore preempted by, the Energy Security and Independence Act of 2007 ("EISA") and the federal Renewable Fuels Standard ("RFS2") program established thereunder—should be dismissed for at least four reasons.

A. Plaintiffs Lack Standing To Bring Their Fourth Claim

First, as established in Defendant-Intervenors' opening brief, Plaintiffs lack third-party prudential standing to bring their fourth claim. *See* ARB/WA Mot. at 19-21, 23. Plaintiffs have no response.

Plaintiffs have not alleged that their members own or operate the ethanol plants allegedly protected by Congress in the statutory provision at issue—plants that were operating or under construction in 2007 and are thus exempted from demonstrating lifecycle greenhouse gas

emissions below those of gasoline ("exempted plants"). Opp. at 41. Thus, even if Plaintiffs could establish injuries to their members sufficient for Article III standing (a questionable supposition),[8] Plaintiffs do not allege, or even argue in their brief, that it is their members' rights they seek to assert here. *See* Opp. at 41; *see also* Complaint at 105-106 (alleging infringement of "rights" of exempted plants).

Nonetheless, although Plaintiffs implicitly concede that they seek to litigate the rights of others (the rights of exempted ethanol plants), Plaintiffs fail to even argue that they can satisfy the test for third-party prudential standing. Notably, Plaintiffs do not and cannot dispute that their members desire to eliminate, or at least reduce, volume mandates for renewable fuels, such as those created in the RFS2 program. *See* ARB/WA Mot. at 20-21. That desire is incompatible with the interests they purport to represent here—namely those of ethanol producers who can qualify for RFS2's renewable fuel volume mandates by virtue of a congressional exemption. In fact, since Plaintiffs filed their opposition, AFPM has publicly urged EPA to "further reduce" RFS2's volume mandates below the levels set by Congress. Second RJN, Exh. H at 3. That request followed an earlier one in which AFPM asked EPA to partially *waive* the RFS2 volume mandates for 2014. 80 Fed. Reg. 33,100, 33,107 (June 10, 2015). These are not the actions of a party whose interests are aligned with the ethanol producers whose fuels may qualify for these volume mandates by virtue of the congressional exemption at issue in this claim. AFPM lacks

[8] AFPM's recent public assertions that there is *more* ethanol qualifying as renewable fuel than can practicably be sold undermines Plaintiffs' claims of injury—that Oregon's Program would require parties regulated under RFS2 "to meet [RFS2's] volume requirements … without the benefit of ethanol from [exempted] facilities." Opp. at 32; *see also* 2nd RJN Exh. H at 7 (describing constraints, other than fuel production, as limiting ethanol use). Based on AFPM's assertions to EPA, parties regulated under RFS2 are in no danger of running out of qualifying ethanol, regardless of any effects of Oregon's Program. Notably, this purported "injury" is not alleged in AFPM's complaint and can be disregarded on that basis alone.

third-party, prudential standing to bring this claim. *See Pony v. Cnty of Los Angeles*, 433 F.3d 1138, 1147 (9th Cir. 2006).

B. EPA Has Concluded There Is No Conflict With Its RFS2 Program

Even if Plaintiffs had standing to bring their fourth claim, that claim would fail as a matter of law because, in response to a request that it preempt state programs like Oregon's, EPA indicated that such programs are "compatible" with the RFS2 program. ARB/WA Mot. at 22. Plaintiffs do not dispute that EPA has rejected the notion that state low-carbon fuel standards conflict with RFS2. Plaintiffs argue instead that conflict preemption is a "fact-intensive issue" inappropriate for resolution on a motion to dismiss. Opp. at 33. This, of course, raises more questions as to why Plaintiffs failed to allege *any* facts about *any* exempted plants. Regardless, Plaintiffs' response to EPA's statements is also entirely inconsistent with the very cases upon which Plaintiffs' rely. For example, in one such case, the Court rejected an interpretation of a statutory provision expressly because the agency implementing the statute disagreed with the proposed interpretation. *Geier*, 529 U.S. at 874-75. The relevant interpretation of the implementing agency here is not a fact-intensive question. EPA spoke during the promulgation of RFS2, just as, in *Geier*, the Department of Transportation had spoken during "the promulgation of [the regulation at issue there]." *See id.*; *see also* RJN Exh. G (ECF #53-7) at p. 13-15.

In fact, EPA has recently confirmed that its RFS2 program is compatible with, and not in conflict with, other programs that, like Oregon's, encourage the development of low-carbon alternatives to petroleum. In June of this year, EPA proposed RFS2 volumes for 2014, 2015 and 2016 and noted repeatedly that the development of renewable fuels was lagging behind Congress's goals in EISA. *E.g,* 80 Fed. Reg. 33,100 at 33,101, 33,102, 33,108 (June 10, 2015). EPA then recognized that other programs, including "myriad efforts and initiatives at the

regional and local level and within the private sector," "complement[] and support[]" the federal government's efforts to encourage renewable fuel development. *Id.* at 33,103. These statements confirm that EPA has not changed its position that efforts, outside of the federal government, to encourage the developing alternative fuel industry are compatible with RFS2.[9] Indeed, EPA's recent statements suggest that such complementary programs may well be necessary given that RFS2's incentives have not produced the level of results Congress desired.

Plaintiffs' fourth claim should be dismissed, in light of EPA's expert conclusion that programs like Oregon's are compatible with and complementary to the federal program.

C. Congress Did Not Guarantee Exempted Plants A Market For Their Ethanol

Plaintiffs' fourth claim fails for the additional reason that Oregon's Program is entirely consistent with Congress's intent for EISA and RFS2. Congress's intent, of course, is the "ultimate touchstone" of preemption analysis. AFPM Opp. at 29 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)).

Plaintiffs erroneously claim that Congress's purpose with EISA was "to ensure a continued nationwide market for ethanol from existing ethanol plants,"[10] going so far as to assert Congress deemed this purportedly permanent market guarantee to be "necessary to 'stabilize the cost and availability of energy.'" Opp. at 30. As established by Defendants, Congress neither intended to create nor actually created a perpetual market guarantee for ethanol, generally, let alone for

[9] EPA's clear recognition that efforts beyond RFS2 are needed to reach the level of alternative fuel development and production envisioned by Congress also indicates that programs like Oregon's are "more environmentally protective" such that the savings clause in EISA is triggered. *See* EISA § 204(b); *see also* Defendants' Reply at 25-26.

[10] AFPM's characterization of the exempted plants as "existing" plants is misleading. Congress did not exempt plants that exist today. Congress exempted plants that were operating or under construction when EISA was passed in December 2007. 42 U.S.C. § 7545(o)(2)(A)(i).

ethanol produced from exempted plants. Defendants' Mot. (ECF #51) at 31-34; Defendants' Reply at 27-29. In fact, as EPA noted in its recent proposal of volume mandates under RFS2 "the statute does not explicitly require the use of ethanol at all." 80 Fed. Reg. 33,100, 33,118 (June 10, 2015).

Notably, Plaintiffs' contention that Congress believed the exemption in the RFS2 program for then-existing plants was "necessary to 'stabilize the cost and availability of energy'" relies on section 806 of EISA which is codified at 42 U.S.C. § 17285, not in 42 U.S.C. § 7545(o) where the RFS2 program is codified. *See* Opp. at 30. Section 806 concerns "the use of renewable resources to generate energy," generally, and contains no reference to ethanol or to ethanol produced from exempted plants. 42 U.S.C. § 17285. Contrary to Plaintiffs' arguments, then, nothing in section 806 remotely suggests that the only "renewable energy" that could help "stabilize the cost and availability of energy" is ethanol from exempted plants. Of course, any such contention is entirely undermined by the nested volume mandates Congress actually created—volume mandates that require minimum volumes of certain specified fuels, and leave only the *remainder* of the total renewable fuel mandate available to *all* qualifying fuels (including those produced from exempted plants). *See* 80 Fed. Reg. at 33,103 ("The cellulosic biofuel and [biodiesel] categories are nested within the advanced biofuel category, which is itself nested within the total renewable fuel category.")

Finally, EPA, the expert agency implementing Congress's intentions, disagrees with Plaintiffs that Congress intended to create a guaranteed market for exempted corn ethanol plants. Describing "[t]he fundamental objective of the RFS," namely to "increase the use of renewable fuels in the U.S.," EPA noted that "Congress envisioned the majority of growth over time to come from advanced biofuels," not conventional biofuels such as corn ethanol. 80 Fed. Reg.

33,100, 33,101 (June 10, 2015). Put another way, again in EPA's words, "the purpose of the statute [is] to significantly increase the amount of renewable fuel used as transportation fuel over time, *particularly renewable fuels with the lowest lifecycle GHG emissions,* in the transportation fuel supply. " *Id.* at 33,102. Plaintiffs' view of Congress's intent cannot be reconciled with EPA's, and EPA's view prevails.[11] *See Geier*, 529 U.S. at 874-75. This claim should be dismissed.

D. Plaintiffs Have Failed To Allege, and Cannot Allege, Facts Supporting The Inference They Ask This Court To Draw—That Oregon's Program Will Foreclose Oregon's Market To Ethanol From Exempted Plants

Finally, Plaintiffs' fourth claim also fails for the additional reason that Plaintiffs have not alleged, and cannot allege, facts supporting the inference necessary to their claim. *See* ARB/WA Mot. at 23-24. Specifically, to prevail on this claim, Plaintiffs would not only have to establish that, contrary to EPA's view, Congress intended to guarantee a perpetual market to the exempted plants. Plaintiffs would also have to show that Oregon's Program conflicts with that guarantee—that, in Plaintiffs' words, Oregon's Program "would eliminate the use of [exempted] ethanol in Oregon contrary to Congress's commands under CAA Section 211(o)." Opp. at 3. But Plaintiffs' sole allegation on this point is entirely conclusory, and that is insufficient to survive a motion to dismiss. Plaintiffs have omitted *any* factual allegations that could support their conclusory inference.[12]

---

[11] Indeed, the views Plaintiffs' adopt for this litigation conflict with their own previously expressed view of the congressional intent underlying RFS2, generally, and the exemption provision for then-existing plants, specifically. *See* ARB/WA Mot. at 20; RJN Exh. F. at 22. Plaintiffs do not dispute their previous position—that RFS2 was designed to reduce greenhouse gas emissions and that the exemption for then-existing plants should be read narrowly. Nor do Plaintiffs attempt to reconcile that position with the one they adopt here.

[12] Plaintiffs' inability to allege *any* facts concerning exempted plants underscores that litigating Plaintiffs' claim would almost certainly require substantial third-party discovery.

(continued…)

Notably, Plaintiffs have not alleged what range of carbon-intensity values are associated with exempted plants producing ethanol that might even arguably be sold in Oregon. Without that information, Plaintiffs' inference that these plants will be excluded from Oregon's market is entirely implausible and Plaintiffs' claim should be dismissed. That dismissal should be with prejudice because five of the twelve lowest carbon-intensity values under Oregon's Program correspond to ethanol producers located in the Midwest, the region in which Plaintiffs claim the exempted plants are located. *See* ARB/Mot. at 6, 6 n.4; *see also Rocky Mountain*, 730 F.3d at 1084 ("The individualized pathway with the lowest carbon intensity was achieved by a Midwest producer through Method 2A.")

In an attempt to augment their complaint on this issue, Plaintiffs repeatedly assert, in their brief, that Oregon has "predict[ed]" the end of "importation of fuels from existing Midwestern ethanol plants." Opp. at 30; *see also id.* at 31 ("In each of the compliance scenarios projected by the Oregon Program, the volume of Midwestern ethanol sold in Oregon drops from over 130 million gallons to 0 after 2019."); 33 ("Defendants have predicted that, however importers attempt to comply, by 2019 they will no longer be able to sell Midwestern ethanol in the Oregon market."). In fact, Oregon's "compliance scenarios" contradict Plaintiffs' claims.

The compliance scenarios assume that in the Program's early years (2016-2018), Oregon's ethanol needs will be met predominantly by ethanol labeled as "Corn, MW." 2nd RJN Exh. I at 20, 26. Beginning in 2019, that ethanol is assumed to be replaced by increased volumes from ethanol categories labeled "Low CI corn," "Sugar cane," and "Sorghum." *Id.* Plaintiffs appear

---

(…continued)
There is little reason for the parties here to engage in that activity, for the Court to expend its resources overseeing that activity, or for exempted plants to be forced to object to or comply with discovery requests all supposedly to further interests they have declined to assert. *See* ARB/WA Mot. at 23.

to assume that only the ethanol labeled "Corn, MW" could originate in the Midwest, but that is not borne out by the scenarios themselves.

The category "Low CI corn" ethanol reflects the ongoing "shift towards more efficient corn ethanol production as a result of the California LCFS," and specifically the "many new lower carbon pathways [for corn ethanol] submitted to and approved by CARB." *Id.* at 10. A brief review of those lower-carbon pathways under California's LCFS reveals that almost all of them are from Midwestern producers. *See* LCFS § 95486(b)(1)(T) (identifying low-carbon corn ethanol pathways (ETCH030 and ETHC032-35) as obtained by Midwest producer POET); *see also* 2nd RJN Exh. L at 7 (pathway ETHC096 from Great Plains Ethanol), 12 (pathway ETHC073 from Western Plains).

The same is true for "Sorghum" ethanols. This category recognizes the "shift occurring towards lower carbon intensity feedstocks for ethanol production including grain and sweet sorghum as a result of the California LCFS." 2nd RJN Exh. I at 10. And the sorghum ethanols recognized under California's LCFS also come predominantly from the Midwest, including some from US Energy Partners in Russell, Kansas. Exh. L at 11 (pathways ETHGW013, ETHGW015).

Essentially, then, these "compliance scenarios" assume that *conventional* corn ethanol will, over time, be replaced by lower-carbon ethanols exactly as the Program's declining carbon-intensity standard would suggest. Based on carbon-intensity values under California's LCFS, the scenarios assume most of that lower-carbon ethanol will come from the Midwest ("Low CI corn" and "Sorghum") with some "Sugar cane" also coming from Brazil. Of course, since the market will ultimately decide which fuels are used to comply with Oregon's carbon-intensity standard, it could be the case that *all* of the replacement, low-carbon ethanol comes from the Midwest.

Regardless, and contrary to Plaintiffs' assertions, these "compliance scenarios" do not indicate that "importers … will no longer be able to sell Midwestern ethanol in the Oregon market" after 2018. Opp. at 33; *see also id.* at 30, 31. Indeed, given the low carbon-intensity values obtained by Midwestern ethanol plants, some of which appear to be exempted plants,[13] Plaintiffs' inference that Oregon's Program will close the State's market to Midwestern plants, generally, or exempted plants, specifically, is wholly implausible.

Thus, even if Plaintiffs' were correct that Congress created a market guarantee for exempted ethanol plants, no facts that can be assumed to be true here would support even the inference of a conflict with that intent. This claim should be dismissed with prejudice.

CONCLUSION

The complaint should be dismissed for the reasons described above and in the other briefs filed by Defendant and both sets of Defendant-Intervenors in this matter.

[13] *See* 2nd RJN at ¶¶ 6, 7 (noting that the websites for both Western Plains and U.S. Energy Partners/White Energy claim that their plants began operating before 2007).

Dated: August 17, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
ROBERT W. BYRNE
Senior Assistant Attorney General
GAVIN G. MCCABE
Supervising Deputy Attorney General

/s/ M. Elaine Meckenstock
M. ELAINE MECKENSTOCK
Deputy Attorney General
Attorneys for Defendant-Intervenor California Air Resources Board

ROBERT W. FERGUSON
Attorney General of Washington

/s/ Leslie R. Seffern
LESLIE R. SEFFERN*
Assistant Attorney General
Attorneys for Defendant-Intervenor State of Washington

*Specially admitted government attorney

LR 11 CERTIFICATION

The undersigned counsel certifies that counsel for the State of Washington consented to inclusion of her signature, for Washington, on this document.

/s/ M. Elaine Meckenstock
M. ELAINE MECKENSTOCK
Deputy Attorney General
Attorney for Defendant-Intervenor
California Air Resources Board

OK2015900236
90545717.docx