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Of Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN TRUCKING ASSOCIATIONS, INC., a trade association, and CONSUMER ENERGY ALLIANCE, a trade association,

Plaintiffs,

v.

JANE O'KEEFFE, ED ARMSTRONG, MORGAN RIDER, COLLEEN JOHNSON, and MELINDA EDEN, in their official capacities as members of the Oregon Environmental Quality Commission; DICK PEDERSEN, JONI HAMMOND, WENDY WILES, DAVID COLLIER, JEFFREY STOCUM, CORY-ANN WIND, LYDIA EMER, LEAH FELDON, GREG ALDRICH, and SUE LANGSTON, in their official capacities as officers and employees of the Oregon Department of Environmental Quality; ELLEN F. ROSENBLUM, in her official capacity as Attorney General of the State of Oregon; and KATE BROWN, in her official capacity as Governor of the State of Oregon,

Defendants,

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

STATE DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

ORAL ARGUMENT REQUESTED

and

CALIFORNIA AIR RESOURCES BOARD; STATE OF WASHINGTON; OREGON ENVIRONMENTAL COUNCIL; CLIMATE SOLUTIONS; ENVIRONMENTAL DEFENSE FUND; NATURAL RESOURCES DEFENSE COUNCIL; and SIERRA CLUB,

Intervenor Defendants.

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LOCAL RULE 7-1 CERTIFICATION

Counsel of record for Defendants Jane O'Keeffe, Ed Armstrong, Morgan Rider, Colleen Johnson, Melinda Eden, Dick Pedersen, Joni Hammond, Wendy Wiles, David Collier, Jeffrey Stocum, Cory-Ann Wind, Lydia Emer, Leah Feldon, Greg Aldrich, Sue Langston, Attorney General Ellen F. Rosenblum, and Governor Kate Brown (hereinafter "State Defendants") certifies that she made a good faith effort, through a telephone conference with Plaintiffs' counsel, to resolve the matters herein but was unable to do so.

MOTION TO DISMISS

State Defendants, by and through their counsel of record, move for an order dismissing this action for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. This motion is brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and is supported by the following Memorandum in Support.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Climate change seriously threatens Oregon's economy, environment, and public health. ORS 468A.200 (outlining legislative findings on danger of climate change). The Oregon Clean Fuels Program is designed to reduce greenhouse gas (GHG) emissions from transportation fuels. The program requires fuel importers and producers to reduce the average lifecycle GHG emissions[1] of transportation fuels that will be used in Oregon by 10 percent over 10 years.

[1] Lifecycle GHG emissions are:

> (a) The aggregated quantity of greenhouse gas emissions, including direct emissions and significant indirect emissions, such as significant emissions from changes in land use associated with the fuels;
>
> (b) Measured over the full fuel lifecycle, including all stages of fuel production, from feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer; and
>
> (c) Stated in terms of mass values for all greenhouse gases as adjusted to CO2e to account for the relative global warming potential of each gas.

OAR 340-253-0040(37).

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Plaintiffs contend the program violates the Commerce Clause and the Supremacy Clause of the U.S. Constitution. It does not, and it should be upheld.

Plaintiffs' first claim, that the Clean Fuels Program violates the dormant Commerce Clause because it discriminates against out-of-state fuel, should be dismissed. The Clean Fuels Program distinguishes among fuels based on their lifecycle GHG emissions, not their origin, and that is not discrimination. Plaintiffs' allegations do not support a reasonable inference that in-state interests are favored over their out-of-state competitors. Plaintiffs appear to object to Oregon's policy decision to move away from petroleum-based fuels toward lower-carbon fuels, but the Ninth Circuit has already rejected the claim that this policy choice is discriminatory. Moreover, a portion of Plaintiffs' discrimination claim—that the Clean Fuels Program will have discriminatory effects—is not ripe. Until some time after the program goes into effect, Plaintiffs cannot reasonably allege, much less prove, that the Clean Fuels Program has caused a shift in market share from out-of-state alternative fuel producers to in-state alternative fuel producers.

Plaintiffs' second claim, that the Clean Fuels Program violates the dormant Commerce Clause and "principles of interstate federalism" by directly regulating commerce that occurs wholly outside Oregon, should be dismissed because Plaintiffs fail to allege facts showing that the Clean Fuels Program directly regulates conduct that occurs entirely outside Oregon.

Plaintiffs' third claim, alleging that EPA has expressly preempted state regulation of methane in the emission of fuels, should be dismissed because EPA has never found that it is not necessary to regulate the carbon intensity of fuel. EPA's determination in the reformulated gasoline rule that methane is not an ozone-forming volatile organic compound (VOC) did not constitute such a finding. And, in any event, any such finding would have been reversed by EPA's later finding that methane's contribution to global warming may endanger public health or welfare.

In contrast, "carbon intensity" is "the amount of lifecycle greenhouse gas emissions per unit of energy of fuel expressed in grams of carbon dioxide equivalent per megajoule (gCO2e per MJ)." OAR 340-253-0040(9).

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Plaintiffs' fourth claim, alleging preemption by the federal Renewable Fuel Standard, should be dismissed because (1) Congress expressly preserved state authority to reduce air pollution in connection with fuels, and (2) the Clean Fuels Program does not conflict with, or pose an obstacle to, the federal Renewable Fuel Standard. Plaintiffs also lack prudential standing to maintain this claim.

II. FACTUAL BACKGROUND

In 2009, the Oregon Legislature passed House Bill 2186, authorizing the Oregon Environmental Quality Commission (EQC) to adopt rules to reduce lifecycle GHG emissions from Oregon's transportation fuels by 10 percent over a 10-year period. In 2010, the Department of Environmental Quality (DEQ) convened an advisory committee to help design a program that is consistent with HB 2186, effective in reducing GHG emissions, flexible for regulated parties, and realistic and appropriate to implement. In January 2011, DEQ published a final report outlining the advisory committee's process and recommendations. Compl. ¶ 33.

In December 2012, the EQC adopted Phase 1 rules for the Clean Fuels Program. Compl. ¶ 34. Phase 1 began on January 1, 2013, when Oregon began requiring Oregon fuel producers and importers to register for the program and to record and report the volumes and carbon intensities of the transportation fuels they produce or import into Oregon. OAR 340-253-0500 (registration); OAR 340-253-0600 (record-keeping); OAR 340-253-0620 – 0650 (reporting).

In January 2015, after DEQ convened a second advisory committee, the EQC adopted Phase 2 rules. Compl. ¶¶ 35, 37. Beginning in 2016, these rules will require transportation fuel importers and producers to reduce the average carbon intensity of fuels they provide in Oregon to meet the annual clean fuel standards. OAR 340-253-0100 – 0250; OAR 340-253-0400; OAR 340-253-8010 – 8020. The carbon intensity of a fuel is based on OR-GREET, a lifecycle emissions model developed by the Argonne National Laboratory and customized for Oregon. OAR 340-253-0040(44). The Clean Fuels Program regulations include lookup tables that list the

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carbon intensities of a variety of fuels. OAR 340-253-8030 – 8040.[2] Many rows in these tables represent default lifecycle carbon intensity values that "incorporate[] average [carbon intensity] values for producers within [a] region that use the same mechanical methods and thermal-energy source and produce the same co-product." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1093 (9th Cir. 2013); OAR 340-253-0040(9), (37). Other rows represent individualized carbon intensity values for particular fuel pathways. *See, e.g.*, OAR 340-253-8030 (Table 3, pathways ETHC014-ETHC035). For example, there are numerous fuel pathways for ethanol from California, from the Midwest, and from Brazil. OAR 340-253-8030 (Table 3). Regulations require that fuel producers use the carbon intensity value for the fuel that "best matches the description in the fuel pathway" in lookup tables 3 or 4. OAR 340-253-0400(2). The tables identify no pathways for alternative fuels produced in Oregon, but Plaintiffs allege that there is one ethanol plant operating in Oregon and that the process used in making its ethanol best matches the fuel pathway for one type of California ethanol. Compl. ¶ 70.

Beginning in 2016, regulated parties will need to hold credits equal to or greater than their deficits, on an annual aggregate basis, to demonstrate their compliance with the Clean Fuels Program. OAR 340-253-8010 – 8020. A clean fuel credit is generated when fuel is produced, imported, dispensed, or used in Oregon and the carbon intensity value of the fuel is lower than the clean fuel standard for that year. OAR 340-253-1000(5). A clean fuel deficit is generated when fuel is produced, imported, dispensed, or used in Oregon and the carbon intensity value of the fuel exceeds the clean fuel standard for that year. OAR 340-253-1000(6). Credits can be bought and sold, banked for the future, or used by a fuel importer or producer to offset a deficit created by the importation or production of other fuels. OAR 340-253-1050.

[2] The Clean Fuels Program regulations include eight tables. For the Court's convenience, State Defendants have included the first four tables in an Appendix of Authorities to this motion. The tables are also available online at http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_340/340_253.html (last visited June 3, 2015).

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On March 12, 2015, Governor Brown signed Senate Bill 324, which removed the December 31, 2015, sunset date for the Clean Fuels Program and allowed DEQ to continue implementing the program. Compl. ¶ 38.

Oregon's Clean Fuels Program is very similar to California's Low Carbon Fuel Standard (LCFS). *Compare* Cal. Code Regs tit. 17, §§ 95480-90 *with* OAR 340-253-0000 – 8080. The California LCFS has been challenged by the same plaintiffs present here (among others) on many of the same grounds asserted here. On cross-motions for summary judgment covering a subset of the claims in two consolidated cases, the Ninth Circuit held that the LCFS does not regulate extraterritorially, that it does not discriminate against out-of-state petroleum fuels, and that it does not facially discriminate against out-of-state ethanols. The Ninth Circuit then remanded the cases to the U.S. District Court for the Eastern District of California for resolution of the claims the district court had not reached. *Rocky Mountain*, 730 F.3d at 1108.

III. ARGUMENT

A. Standards for motions to dismiss.

State Defendants move to dismiss Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). A facial challenge under Fed. R. Civ. P. 12(b)(1) asserts that the allegations in the complaint are insufficient on their face to invoke federal jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Here, State Defendants seek to dismiss certain of Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(1) because the claims are not ripe. No case or controversy exists, and courts lack subject matter jurisdiction, when a claim is not ripe for adjudication. U.S. Const. art. III, § 2; *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 1999).

To survive a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must allege sufficient facts, accepted as true, to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

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defendant is liable for the misconduct alleged." *Id*. A court must accept as true all *factual* allegations in the complaint; however, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. "'The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

B. Plaintiffs' discrimination claims should be dismissed.

Plaintiffs assert that the Clean Fuels Program discriminates on its face, in its purpose, and in effect against both out-of-state alternative fuels and out-of-state petroleum-based fuels. Plaintiffs are wrong on all counts, and their discrimination claim should be dismissed.

1. Dormant Commerce Clause standards.

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. This grant of power to Congress "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)). Courts often analyze whether laws are protectionist by examining the law on its face, in its purpose, and in its effects. *Rocky Mountain*, 730 F.3d at 1087. Discriminatory laws violate the Commerce Clause unless they serve "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.*, 486 U.S. at 278. Non-

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discriminatory laws are valid "unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits."[3] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

To state a viable discrimination claim, Plaintiffs must allege facts that, if accepted as true, support a reasonable inference that the Clean Fuels Program "benefit[s] in-state economic interests by burdening out-of-state competitors." *Davis*, 553 U.S. at 337. Accordingly, Plaintiffs must identify the in-state interests that are favored over their "similarly situated" out-of-state competitors. However, when the in-state and out-of-state entities in question sell different products, "there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). "This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." *Id.*; *see also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-26 (1978); *National Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009).

If, as a threshold matter, the Court determines that in-state and out-of-state business interests are, in fact, "similarly situated," and that those interests are treated differently, the Court must then determine whether those interests are treated differently based on origin such that the differential treatment constitutes economic protectionism. *Davis*, 553 U.S. at 338-39. That analysis requires consideration of the entire relevant market. *Rocky Mountain*, 730 F.3d at 1088 ("Because of this close competition, all sources of ethanol in the California market should be compared, and the district court erred in excluding Brazilian ethanol from its analysis."). Accordingly, "[t]he fact that the burden of a state regulation falls on *some* interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon*, 437 U.S. at 126 (emphasis added).

[3] Plaintiffs do not allege that "the burden imposed on interstate commerce is clearly excessive in relation to the local benefits." *Pike*, 397 U.S. at 142.

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2. Plaintiffs fail to plead a valid discrimination claim against petroleum-based fuels.

Plaintiffs' discrimination claims regarding petroleum-based fuels should be dismissed at the outset because Plaintiffs fail to allege that petroleum-based fuels compete against alternative fuels in the same market. *See Nat'l Ass'n of Optometrists*, 567 F.3d at 527 (holding that an out-of-state optician "is similarly situated to in-state opticians, not in-state optometrists or ophthalmologists"). Plaintiffs allege that Oregon has no producers of gasoline or diesel fuel but does have biofuel producers. Compl. ¶ 63. Plaintiffs also allege that, to comply with the Clean Fuel Program standards, "importers of gasoline would need to replace existing sources of ethanol with [lower carbon] ethanol" for mixing into their Oregon-bound gasoline. Compl. ¶ 55. In other words, ethanol producers sell their products to gasoline producers and importers, who then produce fuel for sale in Oregon's retail fuel market. Necessarily, then, ethanol producers and gasoline producers serve two different markets. Because Plaintiffs fail to plead that petroleum-based fuels compete in the same market with alternative fuels, Plaintiffs' claims alleging discrimination against out-of-state petroleum producers and importers and in favor of in-state alternative fuel producers should be dismissed. *See Gen. Motors*, 519 U.S. at 299.

Plaintiffs do allege that the Cleans Fuels Program "is designed to displace imported fuels produced from petroleum sources." Compl. ¶ 58. To the extent that this can be construed as an allegation that petroleum-based fuels compete with alternative fuels, Plaintiffs still fail to state a claim for discrimination. As long as Oregon does not favor in-state alternative fuels over out-of-state alternative fuels—which it does not—there would be no discrimination even if alternative fuels fully displaced petroleum-based fuels. In *Exxon*, Maryland prohibited refiners, all of which happened to be located outside Maryland, from operating retail gas stations. This was not discrimination because, "[w]hile the refiners [would] no longer enjoy their same status in the Maryland market, in-state independent dealers [would] have no competitive advantage over out-of-state dealers." *Exxon*, 437 U.S. at 126.

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Plaintiffs have not alleged, and cannot allege, that any "displace[ment]" of petroleum-based fuels would only benefit in-state alternative fuel producers. The Clean Fuels Program does not lead to such an inference, particularly given the low carbon-intensity values for numerous out-of-state ethanols. For example, Plaintiffs allege that the carbon intensity value that would apply to the only ethanol plant operating in Oregon is 50.70. Compl. ¶ 70. That same value also clearly applies to certain ethanol from California, as the relevant pathway is identified in DEQ regulations as "California, Dry Mill; Wet DGS; 80% NG 20% Biomass." OAR 340-253-8030 (Table 3). DEQ's lookup tables also list certain Californian and Brazilian ethanols as having lower carbon intensities than the value that Plaintiffs allege applies to the sole ethanol plant in Oregon. *See* OAR 340-253-8030 (Table 3) (listing ETHCO13 from California having a carbon intensity value of 47.44, six pathways for Brazilian ethanol having carbon intensity values under 33, and four additional ethanol pathways having carbon intensity values under 50.70).

At most, Plaintiffs' allegations suggest that petroleum producers and importers, all of whom happen to be located outside Oregon, may no longer enjoy the same status in Oregon's market. But that is not discrimination. Moreover, Plaintiffs have not alleged facts sufficient to support a reasonable inference that in-state alternative fuel producers have a competitive advantage over out-of-state alternative fuel producers. *See Exxon*, 437 U.S. at 126. As a result, their discrimination claims fail.

The fact that the Clean Fuels Program treats petroleum-based and alternative fuels somewhat differently does not support a claim of discrimination against the former. The use of mandatory statewide carbon intensity averages for petroleum-based fuels, but not for alternative fuels, is not discriminatory because petroleum-based fuels "present[] different climate challenges from ethanol and other biofuels." *Rocky Mountain*, 730 F.3d at 1084. Further, the Ninth Circuit held that it is constitutionally valid to create a "floor for assessed carbon intensity" and deny "rewards for marginal decreases in emissions from crude-oil production." *Id.* at 1098. In short,

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there are legitimate policy reasons for Oregon to treat high-carbon petroleum-based fuels differently from lower-carbon alternative fuels. And, as noted above, the regulations demonstrate that out-of-state alternative fuels may "benefit" just as much as, and in some cases more than, in-state alternative fuels, due to lower carbon intensities.

In sum, Plaintiffs' discrimination claim as to petroleum producers and importers fails because Plaintiffs have not alleged that these businesses compete with the ethanol producers Plaintiffs claim are favored. Further, Plaintiffs have not supported, and cannot support, a reasonable inference that the Clean Fuels Program benefits in-state producers such that they, and they alone, might "displace" out-of-state petroleum producers. The first claim regarding discrimination against out-of-state petroleum fuel should be dismissed for these reasons alone.

3. Plaintiffs fail to plead a valid discrimination claim against ethanol.

Plaintiffs' claim that the Clean Fuels Program discriminates against ethanol also fails. Plaintiffs allege that the carbon intensity value that would apply to the only ethanol plant operating in Oregon is nearly 10 points lower than the carbon intensity value that would apply to Midwest ethanol produced "using the same procedure."[4] Compl. ¶ 70. Thus, Plaintiffs contend, the Clean Fuels Program "treats chemically identical ethanol differently based on where it is produced. By assigning higher carbon intensities to Midwest ethanol, the Oregon Program discourages the use of ethanol produced in the Midwest." Compl. ¶ 112. But this allegation ignores the full ethanol market, making the very same error that these Plaintiffs made in the California case.

Exactly as they did in the California case, Plaintiffs disregard that Brazilian ethanols have some of the lowest and most favorable carbon intensities. *See Rocky Mountain*, 730 F.3d at

[4] Plaintiffs also allege that the "same disparity between 'California' and 'Midwest' producers would be true for other forms of ethanol." Compl. ¶ 70. To the extent Plaintiffs are suggesting that the Clean Fuels Program discriminates against Midwest ethanol and in favor of California ethanol, such discrimination does not constitute a Commerce Clause violation. *Or. Waste Sys., Inc.*, 511 U.S. at 99 (defining discrimination under dormant Commerce Clause as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter").

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1088. In *Rocky Mountain*, the district court had adopted Plaintiffs' incomplete picture of the market, "conclud[ing] that all Brazilian ethanol pathways . . . were outside the bounds of comparison." *Id.* The Ninth Circuit held that this was reversible error: "[T]his selective comparison, which excludes relevant fuel pathways and important contributors to greenhouse gas emissions, cannot support the district court's finding of discrimination." *Id.* Plaintiffs repeat their incomplete characterization of the market here and ask this Court to disregard not only the low-carbon ethanols from Brazil, but also those from California with carbon intensities equal to or less than the value allegedly applicable to ethanol from the single Oregon ethanol plant. *See supra* at 9 (describing the lower carbon intensity values that will apply to out-of-state ethanol versus the value alleged for in-state ethanol). This Court should decline Plaintiffs' invitation and consider, as the Ninth Circuit did, the full ethanol market and the full table of values on the face of the regulation.

When the full ethanol market is considered, it is plain that the Clean Fuels Program does not discriminate against out-of-state ethanols. Numerous out-of-state ethanols have lower carbon intensities than the value that Plaintiffs allege applies to the single Oregon ethanol plant. The Clean Fuels Program does not, in other words, benefit Oregon fuel producers by burdening out-of-state fuel producers. *Davis*, 553 U.S. at 337-38. Plaintiffs' ethanol discrimination claim should be dismissed for this reason alone.

Plaintiffs fail to state a claim for discrimination—in any form—against either petroleum-based fuels or alternative fuels. In addition, as discussed below, Plaintiffs' allegations of facial, purpose, and effects discrimination do not assist them.

4. Plaintiffs' facial discrimination claim fails because the Clean Fuels Program distinguishes between fuels based on lifecycle GHG emissions, not origin.

Plaintiffs assert that the Clean Fuels Program discriminates on its face against both petroleum-based fuels and ethanol. But different fuels are assigned different carbon intensities because their carbon intensities are, in fact, different. Although "distinctions that benefit in-state

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producers cannot be based on state boundaries alone . . . a regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally." *Rocky Mountain*, 730 F.3d at 1089. Such regulations are permissible if there is "some reason, apart from their origin, to treat [in-state and out-of-state items] differently." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

First, the Clean Fuels Program does not facially discriminate against petroleum-based fuels. Plaintiffs allege that petroleum-based fuel producers must apply a mandatory carbon intensity value, whereas the Clean Fuels Program "distinguishes between the carbon intensities of different biofuels." Compl. ¶ 51. But this alleged differential treatment is not facially discriminatory because the two types of fuels are, in fact, different. As noted above, petroleum-based fuels present different climate change dangers than alternative fuels. The State is entitled to recognize those differences.

Second, the Clean Fuels Program does not facially discriminate against Midwest ethanol. Plaintiffs allege that, "[b]y expressly conditioning favorable or unfavorable regulatory treatment on the ethanol's point of origin, the Oregon Program discriminates against interstate commerce on its face." Compl. ¶ 114. The Ninth Circuit already rejected the identical claim that these same plaintiffs made against California's LCFS. *Rocky Mountain*, 730 F.3d at 1089-97. The Ninth Circuit held that the differences in carbon intensity values reflect real differences in carbon intensity. *Id*. at 1089-90. As a result, the court ruled that it is permissible for California to "base regulatory treatment on those [greater greenhouse gas] emissions." *Id.* at 1090. The same is true here. Moreover, it is even more apparent here than it was in *Rocky Mountain* that the regulations do not facially discriminate against out-of-state ethanols. The Clean Fuels Program identifies no benefits for any Oregon fuel producer. Rather, the regulations, to the extent that they identify ethanol's origin at all, identify the origin as Brazil, California, or the Midwest. Favoring lower-carbon fuels from California and Brazil does not advantage Oregon's economic interests. The facial discrimination claim should be dismissed.

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5. The Clean Fuels Program does not discriminate in its purpose.

Plaintiffs allege that the Clean Fuels Program discriminates against interstate commerce in its purpose or "by design," and is therefore unconstitutional. Compl. ¶ 71. But the Clean Fuels Program is not discriminatory in its purpose or by design and, in any event, a discriminatory purpose, standing alone, is not likely a violation of the dormant Commerce Clause.

The statements Plaintiffs reference do not support a conclusion that Oregon had a discriminatory purpose in establishing the Clean Fuels Program. The purpose is that stated in the Clean Fuel Program regulations: "The Oregon Clean Fuels Program will reduce Oregon's contribution to the global levels of greenhouse gas emissions and the impacts of those emissions in Oregon in concert with other greenhouse gas reduction policies and actions by [other governmental bodies]." OAR 340-253-0000(1). Plaintiffs' selective citation to a few public statements by former Governor Kitzhaber (a Governor who did not sign either the authorizing legislation or the legislation ending the sunset provision) and the public statements of a few legislators promoting local business benefits of the program cannot change the purpose stated by the public body that adopted the regulations: EQC. The Ninth Circuit reached a similar conclusion in *Rocky Mountain*, noting: "American Fuels has pulled a few quotes from an expansive record that it contends show CARB's discriminatory purpose. These do not plausibly relate to a discriminatory design and are 'easily understood, in context, as economic defense of a [regulation] genuinely proposed for environmental reasons." 730 F.3d at 1100 n. 13 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n. 7 (1981)). The Clean Fuels Program does not discriminate against interstate commerce in its purpose.

In any event, it is not clear that discriminatory purpose can, standing alone, be the basis of a claim without actual discriminatory effects or design. Courts have found a discriminatory purpose alongside discriminatory effects, especially where the discriminatory purpose was clear. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (invalidating statute because

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"it had both the purpose and effect" of favoring local products); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (invalidating state law where both its "avowed purpose and undisputed effect" were discriminatory). The Supreme Court recently explained that "[t]he Commerce Clause regulates effects, not motives, and it does not require courts to inquire into voters' or legislators' reasons for enacting a law that has a discriminatory effect." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1801 n. 4 (2015). As discussed above, the Clean Fuels Program recognizes on its face that low-carbon fuels may come from multiple locations, including many locations outside of Oregon. This program is, thus, different from the laws invalidated in *Bacchus* and *West Lynn Creamery* in which only local interests could obtain the laws' benefits. It is unclear how Plaintiffs could state a stand-alone discriminatory purpose claim concerning a regulation that, on its face, appears to give a competitive advantage to out-of-state interests. In any event, the Clean Fuels Program was not adopted for discriminatory purposes, but to reduce Oregon's contribution to climate change.

6. Plaintiffs' discriminatory effects claim should be dismissed because it is not ripe.

Plaintiffs' practical effects claim hypothesizes about the potential effects of portions of the Clean Fuels Program with which Plaintiffs have not yet had to comply. Plaintiffs fail to state a claim for discrimination in practical effect because they do not—and cannot—allege that the Clean Fuels Program has caused a shift in market share from out-of-state alternative fuel producers to in-state alternative fuel producers. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1231 (9th Cir. 2010). A plaintiff who challenges a statute or regulation as discriminatory in practical effect has the burden of offering "substantial evidence of an actual discriminatory effect." *Id.* (internal quotation and citation omitted). Here, Plaintiffs cannot allege any facts that, if true, would demonstrate a discriminatory practical effect on out-of-state alternative fuels

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because the requirement to comply with the clean fuel standards has not gone into effect.[5] Plaintiffs' claim of discriminatory effect is, therefore, not ripe.

The ripeness doctrine "prevent[s] the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *see also S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990) (if a claim is unripe, court lacks subject-matter jurisdiction over it). In analyzing ripeness, courts consider "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149. An issue that is purely legal is more likely to be fit for judicial decision than an issue that would benefit from further factual development. *Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). A claim may not be fit for judicial decision if it involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580-81 (1985).

Entergy Nuclear Vermont Yankee, LLC v. Shumlin, 733 F.3d 393, 430-31 (2nd Cir. 2013), illustrates ripeness in the dormant Commerce Clause context. In that case, the owners of the Vermont Yankee nuclear power plant alleged that, by conditioning the plant's continued operation on the execution of a new power purchase agreement, Vermont officials were effectively demanding that the plant provide more favorable rates to in-state than out-of-state utilities, in violation of the dormant Commerce Clause. The Second Circuit held that this claim was not ripe because a new power purchase agreement had not yet been completed and thus there was no evidence regarding the statute's effects on the utilities. *Id.*

Just as the *Entergy* court was unable to determine whether the Vermont statute would have the practical effect of discriminating against interstate commerce because the statute had not been fully applied to plaintiffs, here, Plaintiffs have not pleaded and cannot plead facts that

[5] As explained above, even if the Clean Fuels Program has the effect of displacing some or all of the market for petroleum-based fuels in Oregon with cleaner, alternative fuels, that effect would not constitute a violation of the Commerce Clause. *Exxon*, 437 U.S. at 136.

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would allow the Court to evaluate whether the Clean Fuels Program discriminates in practical effect. The portion of the Clean Fuels Program to which plaintiffs object—the requirement that fuel importers and producers reduce the average carbon intensity of the fuels they import or produce, or purchase credits to make up the difference—has not yet been applied to Plaintiffs, and will not be applied until 2016. OAR 340-253-8010 – 8020. And, even then, the reduction in aggregate annual carbon intensity required in the first year is one quarter of one percent (.25%). *Id*. Plaintiffs' discriminatory effects claim depends on "contingent future events"—namely, a shift in market share away from out-of-state fuel producers and to in-state fuel producers caused by the program—"that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 473 U.S. at 580-81. At the very least, the practical effects of the Clean Fuels Program are heavily fact-dependent issues that cannot be known and adjudicated until the program goes into effect. *See Ohio Forestry*, 523 U.S. at 732-33. Plaintiffs' discriminatory effects claim should be dismissed because all of Plaintiffs' discrimination claims fail and because this claim is not ripe.

C. The Clean Fuels Program does not directly regulate commerce that occurs entirely outside Oregon's boundaries.

Plaintiffs contend in their second claim that the Clean Fuels Program regulates commerce occurring entirely outside Oregon. But it does not. A statute violates the extraterritoriality doctrine when it directly controls conduct that occurs entirely outside a state's boundaries. *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989). In contrast, a statute that regulates in-state conduct, thereby affecting out-of-state conduct, does not run afoul of the doctrine. In *Healy*, the Supreme Court invalidated a beer price affirmation statute because it had the "undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Id.* at 337. *See also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986) (invalidating a New York statute that required distillers to affirm that the price of liquor sold in-state was no higher than the lowest price in other states because "[o]nce a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month. Forcing a merchant to seek regulatory approval in

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one State before undertaking a transaction in another directly regulates interstate commerce."); *Sam Francis Found. v. Christie's, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015) (explaining that laws that regulated conduct occurring entirely outside a state's boundaries violated the extraterritoriality doctrine, but that "laws that regulated *in-state conduct* with allegedly significant out-of-state practical effects" did not) (emphasis in original).

The Ninth Circuit has already rejected an identical extraterritoriality challenge in the California litigation. The Ninth Circuit reversed the district court's conclusion that, because California's LCFS treated fuels differently based on lifecycle emissions, it attempted to control out-of-state conduct. *Rocky Mountain*, 730 F.3d at 1101. The Ninth Circuit explained that "California does not control [factors like transportation and farming practices]—directly or in practical effect—simply because it factors them into the lifecycle analysis." *Id*. at 1103. It explained that California has no "threshold [carbon intensity] requirement" that businesses must adopt before doing business in California. Instead, the LCFS program operates "through a market system of credits and caps." *Id.* (internal quotation and citation omitted). The Ninth Circuit's reasoning applies equally well here. Oregon's program operates the same way that California's program operates—through a system of credits and deficits that encourages the use of clean fuels in Oregon. As the Ninth Circuit concluded with respect to the California LCFS, the Clean Fuels Program "does not control the production or sale of ethanol wholly outside [Oregon.]" *Id.* at 1104.

The Ninth Circuit also rejected the argument that, if each state were to enact a regulation similar to California's LCFS, it would result in economic Balkanization. *Id.* at 1101. To demonstrate a threat of inconsistent litigation, Plaintiffs "must either present evidence that conflicting, legitimate legislation is already in place or that the threat of such legislation is both actual and imminent." *S.D. Myers v. City of San Francisco*, 253 F.3d 461, 469-70 (9th Cir. 2001). Here, Plaintiffs have failed to allege facts demonstrating that conflicting, legitimate legislation exists or is imminent. In fact, Oregon's Clean Fuels Program and California's LCFS

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are complementary, and, as the Ninth Circuit held, "so long as [each State] regulates only fuel consumed in [that State]," regulations like these do not "present the risk of conflict with similar statutes." *Rocky Mountain*, 730 F.3d at 1105. For all the reasons discussed in *Rocky Mountain*, Plaintiffs fail to state a claim for extraterritorial regulation under the dormant Commerce Clause.

Plaintiffs may argue that "principles of interstate federalism" present a different question from their extraterritoriality claim. Compl. ¶ 127. However, Plaintiffs' "principles of interstate federalism" claim fails because its premise, that Oregon's Clean Fuels Program regulates conduct wholly outside of Oregon, has already been rejected by the Ninth Circuit with respect to California's LCFS. *Rocky Mountain*, 730 F.3d at 1106 (holding that California's LCFS "does not control conduct wholly outside the state"). The Ninth Circuit's opinion in *Rocky Mountain* that California's LCFS does not regulate extraterritorially forecloses any argument that Oregon's Clean Fuels Program is an impermissible extraterritorial regulation, regardless of the basis for that claim.

D. Plaintiffs' preemption claims should be dismissed.

Plaintiffs assert two preemption claims. Their third claim for relief contends that the Clean Air Act expressly preempts the Clean Fuels Program. Their fourth claim for relief contends that the Clean Fuels Program "conflicts with and stands as an obstacle to" the objectives of Congress as expressed in the federal Renewable Fuels Standard, the Energy Policy Act of 2005 (EPAct), and the Energy Independence and Security Act of 2007 (EISA), all made a part of the Clean Air Act. Compl. ¶¶ 138-42. Plaintiffs' claims fail because the Clean Air Act expressly preserves the traditional authority of states to regulate air pollution, including air pollution caused by fuels. Nothing in the statutory provisions Plaintiffs rely upon demonstrates that Congress intended to preempt state laws like the Clean Fuels Program. Moreover, instead of conflicting with, or standing as an obstacle to, the federal Renewable Fuels Standard, the Clean Fuels Program in fact helps *achieve* the goals of the Clean Air Act.

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1. Courts recognize the presumption that states retain their historic police powers to protect the environment.

Federal law is, of course, supreme. U.S. Const. art. VI. However, "there is a general presumption against preemption in areas traditionally regulated by states. '[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress.'" *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 668 (9th Cir. 2003) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (emphasis added). Courts apply the "clear and manifest purpose of Congress" standard to conflict preemption claims, as well as express preemption claims.[6] *Id*. at 668, 673 (applying "clear and manifest" standard and requiring "clear evidence" that Congress intended to preempt); *Green v. Fund Asset Mgmt, L.P.*, 245 F.3d 214, 224 (3rd Cir. 2001) (applying "clear and manifest" standard).

Environmental regulation, including air pollution prevention, is traditionally an area of state authority and regulation. *See Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) ("Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state. Environmental regulation traditionally has been a matter of state authority."); *Oxygenated Fuels*, 331 F.3d at 673 ("Environmental regulation is an area of traditional state control."). Thus, Oregon's Clean Fuel Program falls within the states' traditional authority, and federal law cannot preempt it without proof of clear and manifest congressional intent to do so.

[6] The Supreme Court has recognized three types of preemption: express preemption, field preemption, and conflict preemption. *Oxygenated Fuels*, 331 F.3d at 667. Conflict preemption may arise in two circumstances: "where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (additional citations omitted)). Plaintiffs have alleged only the latter type of conflict preemption, termed "obstacle" preemption.

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2. The plain language of the Clean Air Act demonstrates a clear and manifest intent to preserve state authority to regulate fuels.

The plain language of the Clean Air Act explicitly preserves state authority to regulate fuels. "'Congressional purpose is the 'ultimate touchstone' of preemption analysis.'" *Oxygenated Fuels*, 331 F.3d at 668 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (additional citations omitted)). Thus, "[p]reemption analysis requires a close examination of the particular statutes and regulations at issue. '[E]ach case turns on the peculiarities and special features of the federal regulatory scheme in question.'" *Id.* (quoting *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973)). Courts must give effect to evidence "that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme." *Exxon Mobil*, 217 F.3d at 1254 (quoting *California v. FERC*, 495 U.S. 490, 497 (1990)).

This precedent is dispositive of the preemption analysis in this case because section 116 of the Clean Air Act includes a savings clause, described by the Ninth Circuit as a "sweeping and explicit provision," which preserves state authority to regulate air pollution:

> The Clean Air Act also includes a sweeping and explicit provision entitled the "Retention of State Authority." This section provides that, with [limited exceptions], "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416.

Exxon Mobil, 217 F.3d at 1255.

3. Plaintiffs' express preemption claim fails.

Plaintiffs' express preemption claim under the Clean Air Act fails because Congress intended to preserve, not preempt, state authority to regulate fuel except in narrowly prescribed circumstances that do not exist here. Section 211(c)(4)(A)(i) of the Clean Air Act, on which Plaintiffs rely for their express preemption claim, preempts state regulation only when EPA makes an express determination that regulation of a specific characteristic or component of fuel is not necessary. That provision does not apply here for several reasons. First, Plaintiffs fail to

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plead facts necessary to invoke the preemption provision. Second, EPA has not determined that no regulation of a characteristic of fuel that Oregon regulates is necessary. Third, even if EPA had made such a determination, EPA has since found that it is, in fact, necessary to regulate dangerous GHGs, including methane. As a result, Plaintiffs' third claim for relief should be dismissed.

Plaintiffs contend that one of the exceptions to the Clean Air Act section 116 savings clause applies here to preempt Oregon's Clean Fuel Program: section 211(c)(4)(A)(i) of the Clean Air Act, codified at 42 U.S.C. § 7545(c)(4)(A)(i).[7] Section 211(c)(4)(A) authorizes EPA to preempt state regulation of fuel characteristics or components, for purposes of motor vehicle emissions control, but only if EPA takes one of two specific actions. EPA must either (1) publish in the Federal Register a finding that no control or prohibition of a fuel component or characteristic is necessary under section 211(c)(1); or (2) prescribe a control or prohibition of a fuel or fuel additive. As the Clean Air Act states:

> (A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine—
>
> (i) if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register, or
>
> (ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

[7] The other exceptions to the section 116 savings clause are not relevant to this case: 42 U.S.C. §§ 1857c-10(c), (e), and (f), as in effect before August 7, 1977 (stationary source energy shortages), 7543 (tailpipe emission standards for new motor vehicles and nonroad vehicles and engines), and 7573 (aircraft emission standards).

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42 U.S.C. § 7545(c)(4)(A)(i)-(ii). So, in order to trigger preemption, EPA must *either* act to control a pollutant *or* consider and expressly determine that control over a specific characteristic or component of fuel is not necessary. EPA has done neither.

Plaintiffs contend that EPA made the necessary determination to trigger preemption of the Clean Fuels Program when it decided not to regulate methane as an ozone-forming VOC in 59 Fed. Reg. 7716, 7722-23 (Feb. 16, 1994) in the context of issuing reformulated gasoline regulations. As explained below, Plaintiffs are wrong for three reasons.

a. Plaintiffs fail to plead facts sufficient to support the application of section 211(c)(4)(A)(i) preemption.

First, Plaintiffs fail to allege facts that could support a conclusion that EPA decided not to regulate the specific characteristic or component of fuel that the Clean Fuels Program regulates. Plaintiffs allege that the Clean Fuels Program regulates "emissions of methane" and that EPA "declined to regulate emissions of methane." Compl. ¶¶ 42, 96. But Congress did not expressly preempt state controls of *emissions products* of fuels. *Compare* 42 U.S.C. § 7545(c)(1) (authorizing EPA to regulate "any fuel or fuel additive or any emission product of such fuel or fuel additive") *with* 42 U.S.C. § 7545(c)(4)(A) (preempting state controls of "any characteristic or component of a fuel or fuel additive").

Plaintiffs allege that the program "assigned different carbon intensity values to biofuels that are physically and chemically identical." Compl. ¶ 43; *see also* ¶ 112. If by a "characteristic or component" of fuel, Congress meant a physically or chemically detectable property of fuel, then Plaintiffs' allegations make clear that this is not what Oregon regulates, because the program distinguishes among physically and chemically identical fuels. And in that case, Plaintiffs' claim fails because, under the facts pleaded by Plaintiffs, section 211(c)(4)(A)(i) does not apply.[8]

[8] Plaintiffs may argue this issue was decided by the Ninth Circuit in *Rocky Mountain*, 730 F.3d at 1106, but it was not. Rather, the court there held only that Congress did not decide in section 211(c)(4)(B) to exempt California from dormant Commerce Clause requirements.

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If, on the other hand, "characteristic or component" means something other than a physical or chemical property of a fuel, and effectively includes any particular, specific purpose for regulating fuel, then the characteristic or component must be identified. Plaintiffs allege that the Clean Fuels Program "regulates the average 'carbon intensity' of transportation fuels sold in Oregon." Compl. ¶ 39. Oregon regulations provide that the Clean Fuels Program is designed to "reduce the amount of lifecycle greenhouse gas emissions per unit of energy by a minimum of 10 percent below 2010 levels over a 10-year period." OAR 340-253-0000(2). The regulated characteristic must be lifecycle GHG emissions. The California district court came to a similar conclusion about California's LCFS when it concluded that it "controls fuel carbon." *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1042, 1061 (E.D. Cal. 2011). Assuming the carbon intensity of fuel qualifies as a characteristic of fuel, then the question is whether EPA decided it is not necessary to control the carbon intensity of fuel.

b. EPA has not found that it is unnecessary to regulate the carbon intensity of fuel.

EPA did not decide that it is not necessary to control the carbon intensity of fuel. Plaintiffs' express preemption claim fails for this reason, as well. Plaintiffs rely on the reformulated gasoline rule, which EPA adopted under Clean Air Act sections 211(c) and 211(k). Section 211(c)(1) has a broader reach than section 211(k). Section 211(c)(1) authorizes EPA to regulate fuels or fuel additives if fuels, fuel additives, or their emissions contribute to air pollution "that may reasonably be anticipated to endanger the public health or welfare." 42 U.S.C. § 7545(c)(1). Section 211(c) is the statutory section containing the preemption provision. Section 211(k), in contrast, is very specific: It requires EPA to adopt rules for reformulated gasoline that would require "the greatest reduction in emissions of ozone forming volatile organic compounds . . . achievable through the reformulation of conventional gasoline[.]" 42 U.S.C. § 7545(k)(1)(A).

Notably, Congress did not define "ozone forming volatile organic compounds" in the context of section 211(k). Defining the term thus falls to EPA. In its reformulated gasoline rule,

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EPA found that methane is not an ozone-forming VOC because its contribution to ozone formation is far less than that of other VOCs. EPA explained:

> The Act requires reductions in emissions of ozone-forming VOCs. This interpretation is consistent with the focus of Section 211(k) on the areas with the most extreme ozone pollution problem. EPA proposed in April 16, 1992 that methane would be excluded from the definition of VOC on the basis of its low reactivity in keeping with past EPA actions, but included all other VOCs including ethane. EPA further proposed, however, that should the Agency modify the definition of VOC, we might do so for the reformulated gasoline rulemaking as well. As discussed in the February 26, 1993 proposal, EPA has also modified the definition of VOC to exclude ethane in a separate Agency rulemaking (57 FR 3941). As a result, the performance of fuels meeting the VOC emission requirements under the simple model are expressed on a non-methane, non-ethane basis. This change resulted in slight changes to the simple model equations previously proposed, but the overall results of the simple model are essentially unaffected.

59 Fed. Reg. 7722-23. Plaintiffs appear to contend that this paragraph constitutes the finding that "no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary." But there are several problems with their argument.

First, the reformulated gasoline rule controls ozone-forming VOCs, not fuel carbon. If carbon intensity is a characteristic or component of fuel within the meaning of section 211(c)(4)(A), it is not a characteristic or component addressed by the reformulated gasoline rule. In order to invoke preemption under section 211(c)(4)(A)(i), the characteristic or component of fuel regulated by the state must be the same characteristic or component for which EPA determined regulation is not necessary.

Second, the paragraph Plaintiffs rely upon in the reformulated gasoline rule makes no mention of preemption under section 211(c)(4)(A)(i). It only discusses the requirements of Rule 211(k). EPA defined ozone-forming VOCs to exclude methane under section 211(k), but it did not make any finding that "no control . . . is necessary" under section 211(c), a finding that is required to trigger preemption under section 211(c)(4)(A)(i).

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Moreover, although the reformulated gasoline rule does discuss preemption under section 211(c)(4)(A), it does so without referencing 211(c)(4)(A)(i), or using any of the language of that provision. Rather, it uses the language of section 211(c)(4)(A)(ii). Under that provision, EPA automatically preempts state controls of a characteristic or component of a fuel that are not identical to controls EPA adopts for the same characteristic or component. EPA found:

> 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 under section 211(c)(4) that dissimilar State controls be preempted unless either of the exceptions to federal preemption specified by section 211(c)(4) applies. Those exceptions are sections 211(c)(4)(B) and (C).

59 Fed. Reg. 7809. Significantly, EPA invokes the language and thrust of section 211(c)(4)(A)(ii). EPA's references to "non-identical State controls" and "dissimilar State controls" are clear references to preemption of state regulation where EPA does, in fact, act with respect to a fuel characteristic or component, meaning section 211(c)(4)(A)(ii). Moreover, EPA's invocation of section 211(c) assumes the regulation will automatically trigger preemption, which is consistent with section 211(c)(4)(A)(ii) preemption but not section 211(c)(4)(A)(i) preemption. Notably absent from EPA's discussion of preemption is a finding that no control or prohibition of any component or characteristic of fuel is necessary under section 211(c) by either EPA or by any state. Therefore, EPA's reformulated gasoline regulation does not make the required finding to trigger section 211(c)(4)(A)(i) preemption, and Oregon's Clean Fuels Program is not preempted.

c. EPA's 2009 Endangerment Finding reinforces the states' ability to regulate the carbon intensity of fuel.

There is a third reason why Oregon's Clean Fuels Program is not expressly preempted by section 211(c)(4)(A)(i). In 2009, EPA determined that methane and five other GHGs "may reasonably be anticipated both to endanger public health and to endanger the public welfare."

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74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). This Endangerment Finding is the necessary predicate to EPA regulation of GHGs, specifically including methane, under the Clean Air Act. As a result, even if EPA *had* found that it is unnecessary to control methane emissions under section 211(c) in the reformulated gasoline rule it adopted in 1994 under section 211(k), and methane emissions were properly alleged and considered to be a characteristic or component of fuel, EPA subsequently reversed course. Specifically, EPA defined "air pollution which may reasonably be anticipated to endanger public health or welfare" under Clean Air Act section 202(a)(1) to include methane. 74 Fed. Reg. 66,496. This is the same standard that triggers EPA's authority to regulate under section 211(c). And EPA has found that its section 202(a) Endangerment Finding supports regulatory actions under other Clean Air Act provisions. *See* 79 Fed. Reg. 1430 (Jan. 8, 2014).

In light of the 2009 Endangerment Finding, any decision EPA made in 1994 under section 211(k) about whether methane "causes or contributes to air pollution . . . that may reasonably be anticipated to endanger the public health or welfare" has been superseded in the context of the regulation of methane as a GHG. EPA has definitively decided that methane is a dangerous GHG that does endanger public health and welfare.

For all these reasons, Clean Air Act section 211(c)(4)(A)(i) does not preempt the Clean Fuels Program, and Plaintiffs' third claim for relief should be dismissed.

4. The Clean Fuels Program is not preempted by the federal Renewable Fuels Standard, the Energy Policy Act of 2005, or the Energy Independence and Security Act of 2007.

Plaintiffs' fourth claim for relief alleges that Oregon's Clean Fuels Program is preempted by the following federal laws: (1) the federal Renewable Fuels Standard, 42 U.S.C. § 7545(o); (2) the Energy Policy Act of 2005 (EPAct); and (3) the Energy Independence and Security Act of 2007 (EISA). Compl. ¶¶ 138-42. Plaintiffs contend that the Clean Fuels Program "conflicts with and stands as an obstacle to the accomplishment and execution of the full purposes and

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objectives of the federal laws and regulations," and is therefore preempted by the Supremacy Clause of the U.S. Constitution. Compl. ¶ 142.

Specifically, Plaintiffs allege that the Clean Fuels Program "conflicts with the EISA by penalizing the continued production of renewable fuels in existing biorefineries." Compl. ¶ 105. Plaintiffs similarly allege the program is "designed to close Oregon as a market for certain renewable fuels produced in existing biorefineries and thus frustrates and stands as an obstacle to the congressional purpose of ensuring a continued market nationwide for these renewable fuels and meeting the applicable volume requirements for these renewable fuels." Compl. ¶ 106. These allegations are insufficient to state a claim that the Clean Fuels program is preempted by the federal Renewable Fuel Standard as amended by the EPAct and the EISA.

These allegations fail to state a preemption claim because they are mere conclusory statements that need not be accepted as true and because they require unreasonable inferences. This Court need not accept as true Plaintiffs' assertion that the Clean Fuels Program "penalize[es] the continued production of renewable fuels in existing biorefineries," as the Complaint fails to identify any such plant or penalty. Indeed, Plaintiffs lack prudential standing to bring this claim as they do not allege that they in fact produce or sell the type of biofuel they claim that Oregon's Clean Fuels Program penalizes. Plaintiffs appear to assert the rights of others—namely, the rights of others who produce the unidentified type of biofuel Plaintiffs claim the Clean Fuel Program somehow penalizes. Plaintiffs' assertion of this claim is improper under prudential standing principles. *See, e.g., The Wilderness Society v. Kane County*, 632 F.3d 1162, 1169-71 (10th Cir. 2011) (holding that the plaintiffs lacked prudential standing to maintain a preemption claim because they sought to protect interests of a third party, and not their own rights).

Plaintiffs' conclusory assertion that Congress intended to ensure "a continued market nationwide" for certain renewable fuels is equally vague and implausible. Compl. ¶ 106. Indeed, as explained below on pages 31-34, this assertion is directly contradicted by the Renewable Fuel Standard itself, which is intended to drive development of the *very same*

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next-generation fuels (specifically very low-carbon fuels) as Oregon's program and does not guarantee a market for corn ethanol.

Plaintiffs misconstrue the federal laws cited in their fourth claim for relief. Congress expressly intended to preserve states' traditional authority to regulate fuels, such as with regulations like the Clean Fuels Program, and so this Court need not reach the question of whether the Oregon Clean Fuels Program conflicts with federal law. If this Court reaches that issue, Oregon's Clean Fuels Program does not conflict with or stand as an obstacle to the purposes and objectives of the Clean Air Act Renewable Fuel Standard Program. To the contrary, Oregon's Clean Fuels Program will help achieve the purposes and objectives of the federal Renewable Fuels Standard, as amended by the EPAct and EISA.

a. Plaintiffs cannot overcome the presumption against preemption because the Clean Air Act demonstrates express intent to preserve state authority to regulate fuels via low carbon fuel standards.

As explained above, courts presume that states retain their historic powers to protect the environment, unless there is a *clear and manifest congressional intent to preempt those powers*. The Renewable Fuel Standard does not contain any such clear and manifest intent. To the contrary, the Clean Air Act section 116 includes a savings clause, quoted above, that expressly preserves state authority to regulate air pollution. As noted above on pages 20-21, section 211(c)(4)(A) of the Clean Air Act provides for only two *limited* circumstances in which states will be preempted from regulating fuels to abate air pollution. 42 U.S.C. § 7545(c)(4)(A)(i)-(ii). Neither of those circumstances are present here.

Moreover, as explained below, the EISA amended section 211(o) to include a savings clause that *prevents* preemption of any more environmentally protective state law or regulation, further demonstrating congressional intent to preserve states' authority to adopt low carbon fuel standards.

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b. The EISA further preserves state authority to regulate fuels.

Nothing in the EISA, which amended Clean Air Act section 211(o) in 2007, alters the Clean Air Act section 116 savings clause or the narrow scope of potential federal preemption of state fuel regulation allowed by sections 116 and 211(c)(4). Rather, the EISA also demonstrates congressional intent to preserve state fuel regulation authority. The EISA contains its own savings clause that prevents the EISA from preempting any more environmentally protective state law or regulation:

> Except as provided in section 211(o)(12) of the Clean Air Act, nothing in the amendments made by this title to section 211(o) of the Clean Air Act shall be construed as superseding, or limiting, any more environmentally protective requirement under the Clean Air Act, or under any other provision of State or Federal law or regulation, including any environmental law or regulation.

Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 204(b), 121 Stat. 1492 (2007). *See* 153 Cong. Rec. H14430 (Dec. 6, 2007) (Rep. Waxman remarks that the EISA "won't seize authority from the States to act on global warming.").

Section 211(o)(12), exempted from the savings clause above, does not affect federal preemption of state fuel regulation, either. Rather, it states that the regulation of GHGs pursuant to section 211(o), by itself, does not affect or expand the regulation of GHGs under other provisions of the Clean Air Act:

> Effect on other provisions.-- Nothing in [section 211(o)], or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 165) of this Act. The previous sentence shall not affect implementation and enforcement of this subsection.

EISA, Pub. L. No. 110-140, § 210(b), 121 Stat. 1492 (2007). Accordingly, the EISA does not support Plaintiffs' fourth claim for relief. Like the Clean Air Act section 116 savings clause, the EISA savings clause demonstrates congressional intent to preserve the states' role in fuel

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regulation, and cannot support a finding of "clear and manifest" congressional purpose to preempt the states.

c. This Court need not reach the issue whether the Clean Fuels Program actually conflicts with the Renewable Fuel Standard.

Because the plain language of the Clean Air Act demonstrates that Congress did not intend to preempt state fuel regulation, this Court should not reach the issue of whether the Oregon Clean Fuels Program actually conflicts with the Renewable Fuel Standard enacted under Clean Air Act section 211(o). Courts must give full effect to these provisions, which demonstrate that Congress decided to preserve state authority to regulate fuels. *Exxon Mobil*, 217 F.3d at 1254 (explaining that courts must "'give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme.'" (internal citation omitted)).

"Where Congress has included an express provision granting states the power to enact laws . . . it cannot frustrate the intent of Congress when the state acts within the terms of the grant." *State of North Dakota ex rel. Stenehjem v. Freeeats.com, Inc.*, 712 N.W.2d 828, 841 (N.D. 2006) (rejecting conflict preemption where plain language reflected clear congressional intent not to preempt); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (the plain wording of the statute "'necessarily contains the best evidence of Congress's pre-emptive intent'" (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993))). Courts sometimes reach conflict preemption analysis where the scope of the preemption provision alone does not foreclose, through negative implication, any possibility of implied conflict preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). Nor does a savings clause necessarily bar the ordinary working of conflict preemption principles, so long as the savings clause is not rendered ineffectual. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). Here, however, the Clean Air Act provisions expressly preserve state authority to regulate fuels, foreclosing implied conflict preemption.

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The court in *Stenehjem* explained that in *Geier* and other obstacle preemption cases, the statutory preemption provisions and savings clauses were "inconsistent and conflicting," and in the absence of clear congressional intent found in the plain language of the statute, courts considered actual conflicts. But when Congress has pronounced its intent not to preempt through explicit statutory language, the court's task is an easy one: There is no federal preemption. *See Stenehjem*, 712 N.W.2d. at 841 (citing *English*, 496 U.S. at 78-79). Moreover, the Clean Air Act section 116 savings clause and the section 211(c)(4)(A) preemption provision are precisely fitted together, reflecting a clear and harmonious congressional design, as opposed to the inconsistent and conflicting statutory provisions examined in *Geier*. State fuel regulation authority is preserved by the savings clause, and may be preempted only pursuant to the requirements of section 211(c)(4)(A), which is specifically carved out from the savings clause. The Court must give effect to such evidence of intent to preserve state authority. *Exxon Mobil*, 217 F.3d at 1254.

d. Oregon's Clean Fuels Program does not conflict with the purposes or objectives of the Renewable Fuel Standard.

Should this Court reach the issue, there is no actual conflict between the federal Renewable Fuel Standard program and Oregon's Clean Fuels Program. There is an actual conflict when state regulation "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oxygenated Fuels*, 331 F.3d at 667 (citing *English*, 496 U.S. at 78-79) (additional citations omitted)). The historic police powers of the states are not to be superseded unless that was the clear and manifest purpose of Congress. *Green*, 245 F.3d at 224 (applying "clear and manifest" standard to actual conflict analysis) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

In 2005, Congress amended the Clean Air Act to create the Renewable Fuel Standard program, which required that gasoline sold or introduced into commerce in the United States contain a certain amount of renewable fuel by volume. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501(a)(2), 119 Stat. 594, 1069-71 (2005). Congress defined "renewable fuel" broadly to include motor vehicle fuels derived from grain, such as corn ethanol, *as well as* fuels

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derived from sugar or potatoes or other biomass; natural gas produced from a biogas source; and cellulosic biomass ethanol. *Id.* The volume requirement could be met with *any* type of renewable fuel; it did not require nor guarantee the use of corn ethanol to meet the volume requirement. *Id.*

Congress's overall purpose in adopting the Renewable Fuel Standard program in 2005, as section 211(o) of the Clean Air Act, was to reduce U.S. dependency on foreign oil and increase production of domestic renewable fuels by requiring a certain amount of renewable fuel by volume. The specific objective of the EISA amendments to the Renewable Fuel Standard program was to increase the required volume of renewable fuel and to increase the production of "advanced biofuels"—defined as those renewable fuels that have lower lifecycle GHG emissions—which would result in reducing GHG emissions that contribute to climate change. Congress did not require, or guarantee, the use of corn ethanol to meet the volume requirement in any market. Therefore, as a matter of law, Oregon's Clean Fuels Program does not actually conflict with Congress' objectives, even if it would impact the ability of corn ethanol producers to sell in the Oregon market. In fact, Oregon's Clean Fuels Program will *help achieve* the congressional objective to increase production of advanced biofuels by regulating the carbon intensity of fuels sold in Oregon.

In 2007, Congress enacted the EISA and amended the Renewable Fuel Standard program to increase the total minimum volume requirement for renewable fuels, and, specifically, to require a certain amount of that volume requirement be met by advanced biofuels to reduce GHG emissions. EISA, Pub. L. No. 110–40, 121 Stat. 1492 (2007). Again, Congress did not require or guarantee the use of corn ethanol to meet the increased volume requirement. *See id.* In fact, Congress defined ethanol derived from corn starch as "conventional biofuel." 42 U.S.C. § 7545(o)(1)(F). Congress defined "advanced biofuel" as "renewable fuel, other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions . . . that are at least 50 percent less than baseline lifecycle greenhouse gas emissions." 42 U.S.C. § 7545(o)(1)(B).

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"Renewable fuel" is defined generally as "fuel produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel." 42 U.S.C. § 7545(o)(1)(J).

The total renewable fuel volume requirements include a "nested" requirement that a certain amount of the total renewable fuel volume include a certain volume of advanced biofuel. 42 U.S.C. § 7545(o)(2)(B); 75 Fed. Reg. 14,670, 14,674 (Table I.A.1-1 showing volume requirements), 14,675 (discussing "nested requirements"). Any fuel that is advanced biofuel qualifies to meet the total renewable fuel requirement, but corn ethanol (conventional biofuel) does not qualify to meet the advanced biofuel volume requirement. 75 Fed. Reg. 14,674-75. For example, in 2012, the total renewable fuel requirement is 15.2 billion gallons, of which 2 billion gallons must be advanced biofuel, but none of which is required or guaranteed to be corn ethanol. *Id.* Moreover, the total renewable fuel requirement increases each year, and by 2016, the required annual incremental increase must be comprised totally of advanced biofuel, further demonstrating that Congress intended to increase production of advanced biofuel with the objective to reduce GHG emissions, *not* to maintain support for the corn ethanol industry.

Therefore, Congress did not intend to guarantee fuel providers an unconstrained choice of renewable fuels, and did not intend to guarantee a market for ethanol. *See, e.g., Oxygenated Fuels*, 331 F.3d at 672 (Congress did not intend to give gasoline producers unconstrained choice of fuel oxygenates under Clean Air Act section 211 program); *Oxygenated Fuels Ass'n, Inc. v. Pataki*, 158 F. Supp. 2d 248, 260, n. 6 (N.D.N.Y. 2001) (use of one particular fuel oxygenate not essential to congressional purpose of Clean Air Act section 211 program requiring oxygenates to be added to fuels).

An additional requirement imposed by the EISA is that new facilities must achieve "at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions." 42 U.S.C. § 7545(o)(2)(A)(i). Again, the congressional purpose is to reduce the amount of GHG emissions, which Oregon's Clean Fuels Program will

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help achieve. Congress did not require existing facilities to retrofit to meet the 20 percent reduction, nor does Oregon's Clean Fuels Program impose such a requirement.

Congress did not manifest any intent to maintain the existing market for the corn ethanol industry. In fact, the opposite appears to be true. Congress intended to *increase* the market for advanced biofuel, which does not include corn ethanol, by imposing annual renewable fuel volume requirements that are increasingly composed of advanced biofuel, with the ultimate objective to reduce the amount of GHG emissions. Any potential incidental impact on corn ethanol producers from Oregon's Clean Fuels Program, therefore, does not actually conflict with congressional purposes and objectives for the Renewable Fuel Standard program.

There is also no conflict for another reason: The federal Renewable Fuel Standard program creates a *minimum* requirement that was intended to provide a floor. *See Geier*, 529 U.S. at 870 (savings provision preserved those state tort actions "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor"); *O'Hara v. General Motors Corp.*, 508 F.3d 753, 763 (5th Cir. 2007) (action not preempted where court found federal glazing standard to be a minimum safety standard).

The federal Renewable Fuel Standard program creates a floor, both in its minimum fuel volume requirements as well as the provision that requires, at a minimum, that new facilities reduce GHG emissions by 20 percent. 75 Fed. Reg. 14,673 ("program intended to require minimum volume"), 14,869 ("volume of renewable fuel from grandfathered facilities exempt from the 20% greenhouse gas threshold" limited to baseline volume because allowing the exemption to apply to volume resulting from increased production "would likely lead to a substantial increase in production of fuel that is not subject to any greenhouse gas limitations, which EPA does not believe would be consistent with the objectives of the Act.").

The savings provision in the EISA makes it clear that the federal program does not limit "any more environmentally protective requirement under the Clean Air Act, or under any other provision of State or Federal law or regulation, including any environmental law or regulation."

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EISA, Pub. L. No. 110-140, § 204(b), 121 Stat. 1492 (2007). Oregon is not directly regulating the volume of renewable fuels or the facilities that produce renewable fuels. To the extent that Oregon's Clean Fuels Program may provide incentives that result in increased production of advanced biofuels or encourage changes in production that will reduce GHG emissions beyond the requirements of the federal Renewable Fuel Standard program, the standard is a "more environmentally protective requirement" that is allowed by the EISA, and one that will help achieve congressional objectives.

IV. CONCLUSION

For the reasons stated above, this Court should grant State Defendants' motion and dismiss all of the claims in Plaintiffs' Complaint.[9]

DATED June 5, 2015.

Respectfully submitted,

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[9] If any of Plaintiffs' claims survive this motion, State Defendants will request that the deadlines currently in place in this case be extended.

340-253-8010

Table 1 - Oregon Clean Fuel Standard for Gasoline and Gasoline Substitutes

Stat. Auth.: ORS 468.020 Sec. 6, ch. 754, OL 2009, (2011 Edition)
Stats. Implemented: Sec. 6, ch. 754, OL 2009, (2011 Edition)

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Table 1 – 340-253-8010
Oregon Clean Fuel Standard for Gasoline and Gasoline Substitutes

Calendar Year	Oregon Clean Fuel Standard (gCO2e per MJ)	Percent Reduction
2015	None (Gasoline Baseline is 89.31)	
2016	89.08	0.25 percent
2017	88.86	0.50 percent
2018	88.41	1.00 percent
2019	87.97	1.50 percent
2020	87.08	2.50 percent
2021	86.18	3.50 percent
2022	84.84	5.00 percent
2023	83.50	6.50 percent
2024	82.16	8.00 percent
2025 and beyond	80.36	10.00 percent

340-253-8020

Table 2 - Oregon Clean Fuel Standard for Diesel Fuel and Diesel Substitutes

Stat. Auth.: ORS 468.020 Sec. 6, ch. 754, OL 2009, (2011 Edition)
Stats. Implemented: Sec. 6, ch. 754, OL 2009, (2011 Edition)

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Table 2 – 340-253-8020
Oregon Clean Fuel Standard for Diesel Fuel and Diesel Substitutes

Calendar Year	Oregon Clean Fuel Standard (gCO2e per MJ)	Percent Reduction
2015	None (Diesel Baseline is 87.09)	
2016	86.87	0.25 percent
2017	86.65	0.50 percent
2018	86.22	1.00 percent
2019	85.78	1.50 percent
2020	84.91	2.50 percent
2021	84.04	3.50 percent
2022	82.73	5.00 percent
2023	81.43	6.50 percent
2024	80.12	8.00 percent
2025 and beyond	78.38	10.00 percent

340-253-8030 (Former 340-253-3010)

Table 3 – Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

NOTE: DEQ recognizes that indirect effects, including indirect land use change, are real. However the methodologies to quantify these effects are still in development. DEQ intends to monitor the science of indirect effect and will adjust carbon intensity values through future rulemaking as methodologies improve.

Stat. Auth.: ORS 468.020 Sec. 6, ch. 754, OL 2009, (2011 Edition)
Stats. Implemented: Sec. 6, ch. 754, OL 2009, (2011 Edition)

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Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

Fuel	Pathway Identifier	Pathway Description	Carbon Intensity Values (gCO2e/MJ)		
			Direct Emissions	Land Use or Other Indirect Effect	Total
Gasoline	ORGAS001	Clear gasoline, based on a weighted average of gasoline supplied to Oregon	89.40	-	89.40
	ORGAS002	Blended gasoline, 10% ethanol, based on assuming 90% clear gasoline and 10% GREET default corn ethanol	89.31	-	89.31
Ethanol from Corn	ETHC001	Midwest average; 80% Dry Mill; 20% Wet Mill; Dry DGS; NG	69.40	-	69.40
	ETHC002	California average; 80% Midwest Average; 20% California; Dry Mill; Wet DGS; NG	65.66	-	65.66
	ETHC003	California; Dry Mill; Wet DGS; NG	50.70	-	50.70
	ETHC004	Midwest; Dry Mill; Dry DGS, NG	68.40	-	68.40
	ETHC005	Midwest; Wet Mill, 60% NG, 40% coal	75.10	-	75.10
	ETHC006	Midwest; Wet Mill, 100% NG	64.52	-	64.52
	ETHC007	Midwest; Wet Mill, 100% coal	90.99	-	90.99
	ETHC008	Midwest; Dry Mill; Wet, DGS; NG	60.10	-	60.10

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Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

	ETHC009	California; Dry Mill; Dry DGS, NG	58.90	-	58.90
	ETHC010	Midwest; Dry Mill; Dry DGS; 80% NG; 20% Biomass	63.60	-	63.60
	ETHC011	Midwest; Dry Mill; Wet DGS; 80% NG; 20% Biomass	56.80	-	56.80
	ETHC012	California; Dry Mill; Dry DGS; 80% NG; 20% Biomass	54.20	-	54.20
	ETHC013	California; Dry Mill; Wet DGS; 80% NG; 20% Biomass	47.44	-	47.44
	ETHC014	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Coal use not to exceed 71% of fuel use (by energy); Coal carbon content not to exceed 48%	60.99	-	60.99
	ETHC015	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 5% of the fuel use (by energy); Coal use not to exceed 66% of fuel use (by energy); Coal carbon content not to exceed 48%	59.08	-	59.08
	ETHC016	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 10% of the fuel use (by energy); Coal use not to exceed 60% of fuel use (by energy); Coal carbon content not to exceed 48%	57.16	-	57.16

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Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

	ETHC017	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 15% of the fuel use (by energy); Coal use not to exceed 54% of fuel use (by energy); Coal carbon content not to exceed 48%	55.24	-	55.24
	ETHC018	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Coal use not to exceed 71% of fuel use (by energy); Coal carbon content not to exceed 48%	59.80	-	59.80
	ETHC019	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 5% of the fuel use (by energy); Coal use not to exceed 65% of fuel use (by energy); Coal carbon content not to exceed 48%	57.86	-	57.86
	ETHC020	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 10% of the fuel use (by energy); Coal use not to exceed 59% of fuel use (by energy); Coal carbon content not to exceed 48%.	55.91	-	55.91

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Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

	ETHC021	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 15% of the fuel use (by energy); Coal use not to exceed 53% of fuel use (by energy); Coal carbon content not to exceed 48%	53.96	-	53.96
	ETHC022	2A Application*: Midwest; Dry Mill; 15% Dry DGS, 85% Partially Dry DGS; NG; Plant energy use not to exceed a value the applicant classifies as confidential	57.16	-	57.16
	ETHC023	2A Application*: Midwest; Dry Mill; Partially Dry DGS; NG; Plant energy use not to exceed a value the applicant classifies as confidential	54.29	-	54.29
	ETHC024	2A Application*: Midwest; Dry Mill; 75% Dry DGS, 25% Wet DGS; NG; Plant energy use not to exceed a value the applicant classifies as confidential	61.60	-	61.60
	ETHC025	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	62.44	-	62.44
	ETHC026	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/ combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	58.49	-	58.49

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Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

	ETHC027	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/biomass & landfill gas fuels; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	58.50	-	58.50
	ETHC028	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/corn fractionation; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	61.66	-	61.66
	ETHC029	2A Application*: Dry Mill; Dry DGS; Conventional cook/combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	60.52	-	60.52
	ETHC030	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/biogas process fuel; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	44.70	-	44.70
	ETHC031	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	53.69	-	53.69

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Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

	ETHC032	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis/ combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	50.01	-	50.01
	ETHC033	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis/corn fractionation; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	50.26	-	50.26
	ETHC034	2A Application*: Dry Mill; Wet DGS; Conventional cook/combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	50.47	-	50.47
	ETHC035	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis/biogas process fuel; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	43.21	-	43.21

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Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

Ethanol from Sugarcane	ETHS001	Brazilian sugarcane using average production processes	27.40	-	27.40
	ETHS002	Brazilian sugarcane with average production process, mechanized harvesting and electricity co-product credit	12.40	-	12.40
	ETHS003	Brazilian sugarcane with average production process and electricity co-product credit	20.40	-	20.40
	ETHS004	2B Application*: Brazilian sugarcane processed in the CBI with average production process; Thermal process power supplied with NG	32.94	-	32.94
	ETHS005	2B Application*: Brazilian sugarcane processed in the CBI with average production process, mechanized harvesting and electricity co-product credit; Thermal process power supplied with NG	17.94	-	17.94
	ETHS006	2B Application*: Brazilian sugarcane processed in the CBI with average production process and electricity co-product credit; Thermal process power supplied with NG	25.94	-	25.94
Compressed Natural Gas	CNG002	North American NG delivered via pipeline; compressed in OR	68.00	-	68.00
	CNG003	Landfill gas (biomethane) cleaned up to pipeline quality NG; compressed in OR	11.26	-	11.26
	CNG004	Dairy Digester Biogas to CNG	13.45	-	13.45
	CNG005	Biomethane produced from the high-solids (greater than 15 percent total solids) anaerobic digestion of food and green wastes; compressed in OR	-15.29	-	-15.29

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Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

	CNG006	North American landfill gas to pipeline-quality biomethane; delivered via pipeline; compressed in OR	33.02	-	33.02
Liquefied Natural Gas	LNG001	North American NG delivered via pipeline; liquefied in OR using liquefaction with 80% efficiency	83.13	-	83.13
	LNG002	North American NG delivered via pipeline; liquefied in OR using liquefaction with 90% efficiency	72.38	-	72.38
	LNG003	Overseas-sourced LNG delivered as LNG to OR; re-gasified then re-liquefied in OR using liquefaction with 80% efficiency	93.37	-	93.37
	LNG004	Overseas-sourced LNG delivered as LNG to OR; re-gasified then re-liquefied in OR using liquefaction with 90% efficiency	82.62	-	82.62
	LNG005	Overseas-sourced LNG delivered as LNG to OR; no re-gasification or re-liquefaction in OR	77.50	-	77.50
	LNG006	Landfill Gas (biomethane) to LNG liquefied in OR using liquefaction with 80% efficiency	26.31	-	26.31
	LNG007	Landfill Gas (biomethane) to LNG liquefied in OR using liquefaction with 90% efficiency	15.56	-	15.56
	LNG008	Dairy Digester Biogas to LNG liquefied in OR using liquefaction with 80% efficiency	28.53	-	28.53
	LNG009	Dairy Digester Biogas to LNG liquefied in OR using liquefaction with 90% efficiency	17.78	-	17.78
Liquefied Petroleum Gas	LPG001	Liquefied petroleum gas, crude and natural gas mix	83.05	-	83.05
Electricity	ELC001	Oregon average electricity mix	108.29	-	108.29

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Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

Hydrogen	HYGN001	Compressed H2 from central reforming of NG (includes liquefaction and re-gasification steps)	142.20	-	142.20
	HYGN002	Liquid H2 from central reforming of NG	133.00	-	133.00
	HYGN003	Compressed H2 from central reforming of NG (no liquefaction and re-gasification steps)	98.80	-	98.80
	HYGN004	Compressed H2 from on-site reforming of NG	98.30	-	98.30
	HYGN005	Compressed H2 from on-site reforming with renewable feedstocks	76.10	-	76.10

340-253-8040 (Former 340-253-3020)

Table 4 – Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes

NOTE: DEQ recognizes that indirect effects, including indirect land use change, are real. However the methodologies to quantify these effects are still in development. DEQ intends to monitor the science of indirect effect and will adjust carbon intensity values through future rulemaking as methodologies improve.

Stat. Auth.: ORS 468.020 Sec. 6, ch. 754, OL 2009, (2011 Edition)
Stats. Implemented: Sec. 6, ch. 754, OL 2009, (2011 Edition)

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Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes

Fuel	Pathway Identifier	Pathway Description	Carbon Intensity Values (gCO2e/MJ)		
			Direct Emissions	Land Use or Other Indirect Effect	Total
Diesel	ORULSD001	Clear diesel, based on a weighted average of diesel fuel supplied to Oregon	89.00	-	89.00
	ORULSD002	Blended diesel, 5% biodiesel, based on assuming 95% clear diesel and 5% GREET default soybean biodiesel	87.09	-	87.09
Biodiesel	BIOD001	Conversion of Midwest soybeans to biodiesel (fatty acid methyl esters -FAME)	21.25	-	21.25
	BIOD002	Conversion of waste oils (Used Cooking Oil) to biodiesel (fatty acid methyl esters -FAME) where "cooking" is required	15.84	-	15.84
	BIOD003	Conversion of waste oils (Used Cooking Oil) to biodiesel (fatty acid methyl esters -FAME) where "cooking" is not required	11.76	-	11.76

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Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes

	BIOD004	Conversion of waste oils (Used Cooking Oil) to biodiesel (fatty acid methyl esters -FAME) where "cooking" is required. Fuel produced in the Midwest	18.72	-	18.72
	BIOD005	Conversion of waste oils (Used Cooking Oil) to biodiesel (fatty acid methyl esters -FAME) where "cooking" is not required. Fuel produced in the Midwest	13.83	-	13.83
	BIOD007	Conversion of corn oil, extracted from distillers grains prior to the drying process, to biodiesel	4.00	-	4.00
Renewable Diesel	RNWD001	Conversion of Midwest soybeans to renewable diesel	20.16	-	20.16
	RNWD002	Conversion of tallow to renewable diesel using higher energy use for rendering	39.33	-	39.33
	RNWD003	Conversion of tallow to renewable diesel using lower energy use for rendering	19.65	-	19.65
Compressed Natural Gas	CNG002	North American NG delivered via pipeline; compressed in OR	68.00	-	68.00
	CNG003	Landfill gas (biomethane) cleaned up to pipeline quality NG; compressed in OR	11.26	-	11.26
	CNG004	Dairy Digester Biogas to CNG	13.45	-	13.45
	CNG005	Biomethane produced from the high-solids (greater than 15 percent total solids) anaerobic digestion of food and green wastes; compressed in OR	-15.29	-	-15.29

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Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes

	CNG006	North American landfill gas to pipeline-quality biomethane; delivered via pipeline; compressed in OR	33.02	-	33.02
Liquefied Natural Gas	LNG001	North American NG delivered via pipeline; liquefied in OR using liquefaction with 80% efficiency	83.13	-	83.13
	LNG002	North American NG delivered via pipeline; liquefied in OR using liquefaction with 90% efficiency	72.38	-	72.38
	LNG003	Overseas-sourced LNG delivered as LNG to OR; re-gasified then re-liquefied in OR using liquefaction with 80% efficiency	93.37	-	93.37
	LNG004	Overseas-sourced LNG delivered as LNG to OR; re-gasified then re-liquefied in OR using liquefaction with 90% efficiency	82.62	-	82.62
	LNG005	Overseas-sourced LNG delivered as LNG to OR; no re-gasification or re-liquefaction in OR	77.50	-	77.50
	LNG006	Landfill Gas (bio-methane) to LNG liquefied in OR using liquefaction with 80% efficiency	26.31	-	26.31
	LNG007	Landfill Gas (bio-methane) to LNG liquefied in OR using liquefaction with 90% efficiency	15.56	-	15.56
	LNG008	Dairy Digester Biogas to LNG liquefied in OR using liquefaction with 80% efficiency	28.53	-	28.53
	LNG009	Dairy Digester Biogas to LNG liquefied in OR using liquefaction with 90% efficiency	17.78	-	17.78

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Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes

Liquefied Petroleum Gas	LPG001	Liquefied petroleum gas, crude and natural gas mix	83.05	-	83.05
Electricity	ELC001	Oregon average electricity mix	108.29	-	108.29
Hydrogen	HYGN001	Compressed H2 from central reforming of NG (includes liquefaction and re-gasification steps)	142.20	-	142.20
	HYGN002	Liquid H2 from central reforming of NG	133.00	-	133.00
	HYGN003	Compressed H2 from central reforming of NG (no liquefaction and re-gasification steps)	98.80	-	98.80
	HYGN004	Compressed H2 from on-site reforming of NG	98.30	-	98.30
	HYGN005	Compressed H2 from on-site reforming with renewable feedstocks	76.10	-	76.10