



# Governors' Ethanol Coalition

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September 17, 2002

Ms. Cathy Catterson  
Clerk  
United States Court of Appeals  
for the Ninth Circuit  
95 Seventh St.  
San Francisco, CA 94103

**Re: Davis, et al. v. U.S. Environmental Protection Agency, et al., Case No. 01-71356**

Dear Ms. Catterson:

Consistent with the Court's preference as set forth in the Advisory Committee Notes to Circuit Rule 29-1, the Governors' Ethanol Coalition ("Coalition") respectfully submits this letter in lieu of a brief of amici curiae in support of Respondent, U.S. Environmental Protection Agency.

The Coalition is an association including the Governors of 26 states and Puerto Rico ("Member States"): Arkansas, Arizona, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Puerto Rico, South Carolina, South Dakota, Texas, Washington, Wisconsin, and Wyoming. Under the Clean Air Act, each of the Member States is charged with achieving or maintaining compliance with National Ambient Air Quality Standards. *See, e.g.*, 42 U.S.C. §§ 110, 161, 172. In particular, the Chicago, Houston, and Milwaukee-Racine areas, which cover portions of three of the Member States, have been designated by the Environmental Protection Agency as Severe Ozone Nonattainment Areas.

The reformulated gasoline program promulgated under section 211(k) of the *Clean Air Act*, 42 U.S.C. § 7545(k), including the minimum oxygen content requirement that is the subject of this proceeding, governs the composition of reformulated gasoline sold in the Chicago, Houston, and Milwaukee-Racine areas, as well as portions of Kentucky, and the composition of conventional gasoline sold throughout the Member States. The reformulated gasoline program is thus a part of plans by which some of the Member States comply with the requirements of the *Act*.

As described in the brief of Intervenors Renewable Fuels Association and National Corn Growers Association, Congress intended the oxygen content requirement of the Reformulated Fuels Program to increase the use of ethanol, one of the fuel additives that provide oxygen content to gasoline (“oxygenates”), and thus to increase production of corn, currently the most common feedstock for ethanol. The phaseout of another oxygenate, methyl tertiary butyl ether (“MTBE”), in California and other states will further enhance demand for corn. A waiver of the oxygen content requirement will have a considerable adverse impact on markets for corn and ethanol. The Member States produce the vast majority of corn produced in the United States. In addition, most of the nation’s ethanol production also occurs in the Member States. Whether this Court grants or denies the petition for review will thus have a significant impact on the economies of the Member States.

By this letter, the Coalition joins in the briefs of Respondent U.S. Environmental Protection Agency and Intervenors Renewable Fuels Association and National Corn Growers Association.

The Coalition agrees that the structure and legislative history of the reformulated gasoline program demonstrate that its central purpose is the reduction of ozone forming and toxic emissions from gasoline, and that Congress intended the oxygenate requirement to play a significant role in achieving that goal. The Administrator properly concluded that, in light of that purpose, a waiver of the oxygen content requirement would only be appropriate after a clear demonstration that the oxygen content would interfere with the attainment of a National Ambient Air Quality Standard and that a waiver would not interfere with attainment of another National Ambient Air Quality Standard – particularly that of ozone. The plaintiff’s argument that a waiver is appropriate despite a significant likelihood of a negative impact on ozone runs counter to the entire purpose of the program.

The plaintiff’s submittal fell far short of that demonstration. Indeed, even though the plaintiff, like the Member States, must use photochemical modeling to demonstrate that state plans will achieve attainment, it did not support its request with such modeling. Despite an extraordinarily extensive analysis, detailed in the Agency’s technical documents, the Agency could not make up for the plaintiff’s deficiency and could not independently make the necessary determination. The Court should not second-guess the Agency’s exercise of its expertise in these matters.

As others have described, the Senate has recently passed legislation, now in conference, that would substitute a broader renewable fuels requirement for the oxygen content requirement of reformulated gasoline. During its deliberations, the Senate rejected efforts to eliminate the oxygen content requirement – whether in the plaintiff’s state or elsewhere – absent such a substitute. The House of Representatives has similarly rejected a waiver of the requirement. The Coalition supports the Senate legislation. As long as the oxygenate requirement remains law, however, it should be enforced consistent with the purposes of the reformulated gasoline program.

Accordingly, the Coalition urges the Court to deny the petition for review.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bob Holden". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Bob Holden, Chair  
Governor of Missouri

Attachment: Certificate of Service  
Enclosures: Three copies.

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