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No Ethanol Needed: California Wins Reconsideration of its Request for an Oxygenate Waiver

In *Davis v. United States Environmental Protection Agency*¹, the Ninth Circuit reviewed the EPA's refusal to issue California a waiver of the federal oxygenate requirement for reformulated gasoline (RFG).² The court held that the EPA abused its discretion in disregarding scientific evidence relating to the effects of the requested waiver on particulate matter (PM).³ It vacated the EPA's denial of the waiver and ordered the agency to reevaluate California's request, taking particulate matter into account in measuring and balancing the benefits and harms to air quality that would likely result from a waiver.⁴ Technological advances during the years of litigation may, however, prove to have diluted the benefits of a waiver to Californians.

Congress created the RFG program under the 1990 amendments to the Clean Air Act, mandating the use of specially formulated gasoline in areas that fell short of attaining the National Ambient Air Quality Standards (NAAQS) set by the EPA for regulating key air pollutants.⁵ Los Angeles and San Diego were among the areas first targeted under the program,⁶ which stipulates that all reformulated gasoline contain at least two percent oxygen by weight.⁷ The EPA may waive this requirement if it concludes that "compliance...would prevent or interfere with the attainment...of a national primary ambient air quality standard."⁸

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1. 348 F.3d 772 (9th Cir. 2003).
2. Id. at 776.
3. Id.
4. Id.
5. Id.
6. Id. at 780 n.7.
7. Id. at 776.
The requirement for oxygen in RFG arose out of scientific findings that oxygen optimizes the burning of gasoline during combustion and thereby reducing pollution from exhaust emissions. Until recently, MTBE, a colorless, odorless, water-soluble chemical compound, has been the most common additive used to elevate fuels' oxygen content. However, MTBE readily migrates through soils and, through the inevitable leaks and spills occurring during gasoline transportation, has infiltrated the water supply in many parts of the country. MTBE is a potential carcinogen, and because it is slow to biodegrade, its presence in drinking water is a threat to public health. Seventeen states have banned MTBE thus far, and the EPA has proposed adopting a federal ban. In California, former governor Gray Davis issued an executive order in 1999 banning MTBE. Following the ban on MTBE and studies by the California Air Resources Board (CARB) suggesting that the only viable alternative, ethanol, posed environmental risks and economic hardship, California sought a waiver of the oxygenate requirement. The state's case rests on its contention that non-oxygenated gasoline developed in its own alternative fuel program would achieve greater compliance with the NAAQS than the ethanol-blended gasoline necessitated by the oxygenate requirement. The data used at trial, submitted by CARB, pointed to a nitrogen oxide (Nox) reduction where California's alternative fuel was used. Additionally, a 1998 study conducted in Los Angeles by the EPA found that a cessation of oxygenation would reduce

10. Id.
11. Id.
12. Id.
13. Pete Yost, Bush Administration Shelved MTBE Ban, ASSOC. PRESS, Feb. 16, 2004. In February, 2004, the Bush administration definitively declined to follow through with the EPA draft regulation banning MTBE that had been prepared in January 2001. Id.
15. After several extensions and an unsuccessful court challenge by ethanol manufacturers, the MTBE ban took effect on January 1, 2004. See Center for International Environmental Law, Groups Defend California’s Right to Protect Public Health (Mar. 10, 2004), available at http://www.ciel.org/Tae/Methanex_30Mar04.html (last modified Mar. 31, 2004); see also Oxygenated Fuels Assn. Inc. v. Davis, 331 F.3d 665 (9th Cir. 2003). The regulation is still under siege from a Canadian producer of methanol who argues that the ban violates NAFTA’s protections for foreign investors. See U.S Dept. of State, Methanex Corp. v. United States, available at http://www.state.gov/s/l/c5818.htm (last visited Aug. 16, 2004). The action, in which the plaintiff Methanex seeks $1 billion in damages, is currently under consideration by an international arbitration panel. Id.
17. Davis, 348 F.3d at 777.
18. Id.
the emissions of volatile organic compounds (VOCs). Both pollutants—NOx emissions and VOCs—contribute to the formation of ozone and particulate matter, two of the criteria by which the EPA judges air quality.

In June 2001, the EPA denied California's request, citing its new technical conclusions that granting the waiver would increase carbon monoxide emissions and have an uncertain effect on VOC emissions. Because of this uncertainty over whether VOC emissions would decrease (as a result of lessened evaporative VOC generated by gasoline commingling) or increase (as a result of more exhaust VOC) under a waiver, the EPA could not conclude decisively that issuing a waiver would lead to a drop in ozone levels. Hence it saw no basis for approving the waiver. Since the standard for issuing a waiver is that it "aid in attaining at least one NAAQS and not hinder attainment for any other NAAQS," the EPA deemed it unnecessary to consider the effect of the NOx reduction on particulate matter levels.

In Davis, California successfully challenged the EPA for failing to fully consider NOx reductions in analyzing the propriety of a waiver. The Ninth Circuit noted that § 7545(k)(2)(B) of the Clean Air Act was silent on how to "resolve situations involving multiple NAAQS when a waiver could aid in attaining one NAAQS but could also impede compliance with another." The court asserted, however, that it was unlikely Congress would have wanted the EPA to overlook demonstrated impacts on other air quality components solely on the finding that the waiver was liable to produce negative effects on one NAAQS. According to the court, the EPA ought to examine all available evidence.

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19. Petitioners' Opening Brief at 21, Davis (No. 01-71356).
23. Id.
24. 348 F.3d at 777-78, 782.
25. Id. at 779. California also charged the EPA with abusing its discretion by imposing on the state a strict evidentiary standard to "clearly demonstrate" the effects a waiver would have on NAAQS. The court held that the EPA's interpretation of the standard was permissible. Id. at 779-80. Likewise, the court declined to disagree with the EPA's technical analysis where the agency's findings (such as the effect on VOCs) contradicted California's own research. Id. at 781-83.
26. Id. at 783; see also 42 U.S.C. § 745(k)(2)(B).
27. Davis, 348 F.3d at 783-84.
to determine whether the net effect on air quality of a proposed waiver is positive.\textsuperscript{38}

Notably, the court ruled against California on two other points raised by the state. First, California argued that the EPA acted wrongly by failing to follow a formal rulemaking process, which includes the opportunity for public comment. The court rejected this argument, holding that agencies are not bound to formal procedures unless the relevant statute explicitly requires them.\textsuperscript{29} Second, California claimed that the Clean Air Act’s special authorization for the state to “prescribe and enforce...a control or prohibition respecting any fuel or fuel additive”\textsuperscript{30} exempted it from federal fuel requirements.\textsuperscript{31} The court rejected this claim, and instead maintained that the provision enables California only to supplement, not supplant, federal fuel regulations.\textsuperscript{32}

As of September 2004, the EPA has yet to review the data as the court ordered and decide whether to grant California the oxygenate waiver.\textsuperscript{33} However, it has halted legal appeals.\textsuperscript{34} Governor Schwarzenegger has reiterated the state’s call for the waiver,\textsuperscript{35} and California Senators Boxer and Feinstein have written to the EPA, chastising the agency for its continuing delay in issuing the waiver.\textsuperscript{36}

Yet, just as the environmental and economic consequences of requiring ethanol-containing gasoline are contested, the actual effect of a present waiver on the formulation of California’s gasoline also remains disputed. Proponents of a waiver assert that conversion to non-oxygenated gasoline would save California consumers $450 million per year in fuel costs.\textsuperscript{37} However, the Renewable Fuels Association says that 70% of gasoline used in California today is already blended with

\begin{itemize}
  \item 28. Id. at 784.
  \item 29. Id. at 785-86.
  \item 30. 42 U.S.C. § 7545(c)(4)(B).
  \item 31. \textit{Davis}, 348 F.3d at 786-87.
  \item 32. Id.
  \item 33. Interview with Jerry Martin, Spokesman, California Air Resources Board, in Sacramento, Cal. (September 15, 2004). The court’s order did not set a deadline by which the EPA must reconsider denial of the waiver, leaving the agency free to delay if it chooses. Id.
  \item 34. Bustillo, \textit{supra} note 10, at B6.
  \item 35. Id. In January, 2004, the EPA agreed to a proposal for waiving the oxygenate requirement in New Hampshire.
\end{itemize}
ethanol. As the phase-out date for MTBE approaches and the EPA waiver hangs in limbo, refiners are under pressure to complete plant modifications that will facilitate ethanol blending and enable the production of legally acceptable RFG. Should the waiver be granted, refitting plants to produce non-oxygenated RFG would be expensive for manufacturers and consumers. The delay in the waiver may thus have diminished its ultimate value to the state’s gasoline consumers.

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