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REPLY TO DC. UNLESS CHECKED.

William Orr, Chairman
FOR HAND-DELIVERY National Alternative Fuels Association

Section 211(k) of the Clean Air Act regulations concerning reformulated gasoline (MTBE)

Dear Bill,

The question you posed was whether Sect. 211(k) of the Clean Air Act and certain of the regulations issued thereunder, illegally restrain the use and sale of reformulated gasoline containing low molecular weight alcohol. The question of illegality centers on either violation of standards of equal protection and due process under administrative law, or unconstitutionality of the regulations because of such defects.

My background to answer this question is: 13 Supreme Court cases, several of which involved either due process or equal protection claims, and several turning on the legitimacy of regulations issued by federal agencies under their enabling laws.

My answer is that the proposed regulations are probably illegal. This is based on the fact that the regulations are contrary to well-established scientific evidence on volatility of materials, and ozone consequences of that volatility (Re. reactivity in the atmosphere).

Three leading cases support this: the Black Lung Case, the Benzene Case, and the Seat Belt Cases. All are discussed in the attached memo. In summary, neither laws nor regulations will withstand judicial challenge if they ignore, or fly in the face of, "the best available scientific evidence." Sect. 211(k) regulations do that, with respect to reformulated gasolines that contain methanol or ethanol. There is, of course, a long line of cases holding that courts should defer to any agency's interpretation of its own law and area of expertise. These three cases deal with decisions that went beyond that area of deference.

This is a very important issue. Reducing smog-production of gasoline -- by reducing generation of low-altitude ozone evaporative emissions -- is a critical goal of the Clean Air Act. Reformulated gasolines are essential for that goal. However, if alcohol blends are excluded under the regs, the regs will probably be struck down. On the other hand, if the regs are amended to reflect best available scientific evidence and therefore include alcohol blends, the regs will remain in place and the purposes of the Act will be better served.

Litigation should always be the last resort. But if it comes to that, we can discuss the necessary steps, and parties, and how the scientific evidence should be marshaled for an appeal in the US Circuit Court for the D.C. Circuit, at your convenience.

Sincerely,



John C. Armor

JCA/ja

MEMORANDUM

To: William Orr, Chairman, National Alternative Fuels Association From: John C. Armor, Esq.

Re: Sect. 211(k) of the Clean Air Act and proposed regulations thereunder concerning reformulated gasoline

Question Presented:

1. Are the proposed regulations dealing with reformulated gasoline illegal, because they effectively exclude the use of methanol and ethanol blends, by the EPA's definition of "mass emissions"?

The first leading case, *Usury v. Turner Elkhorn Mining Co.*, 428 US 1 (1976), concerns the legitimacy of scientific presumptions which Congress on occasion will place in the text of laws. In the Black Lung Benefits Act of 1972, Congress provided that employees who had worked in mines for at least 10 years, and who ultimately suffered from any of a list of pulmonary diseases directly or indirectly related to Black Lung Disease, would be presumed to have gotten their disease from mine work, and companies would, beyond certain dates, be liable in proportion to the number of years they had employed them.

In *Usury*, the Supreme Court upheld this presumption on practical grounds. The only absolute diagnosis for Black Lung is an autopsy, and since its manifestations occur long after exposure, the only way to be certain that a given mine owner was responsible would be if the employee worked only in that mine his entire career. So, under ordinary tort law, only miners who had a single employer could recover, and only through their survivors after their deaths. On the other hand, the causality of Black Lung Disease was fairly clear from thousands of cases, and the apportionment among multiple employers was a "reasonable" conclusion based on "best available scientific evidence," in the opinion of the Supreme Court.

By contrast with this situation, Sect. 211(k) of the Clean Air Act contains an assumption that ozone formation, and therefore smog production, is driven by the total mass of volatile emissions from reformulated gasolines. That assumption is not "reasonable" and it is squarely contradicted by the "best available scientific evidence." Dr. Carter, a nationally-recognized expert on the subject, has researched the ozone-producing capacity (reactivity) of compounds found in evaporative emissions of various fuels including gasolines. A chart of his findings shows variances as large as 700 times the ozone formation from the worst compounds to the best. For example, his work shows a variance of 700 times between methane (a principal evaporative compound from methanol-gasoline mixtures) and 1, 3-butadiene (a principal evaporative compound from ordinary gasoline). His research also shows a variance of 12 times between methanol and 2-methylene-2-butene (which evaporates from ordinary gasoline).

In other words, despite these vast differences, with the exception of two compounds the regulations treat all these compounds as if they were equally harmful, measuring them on a single, "mass basis."

EPA makes only two exceptions to the false equality of the "mass basis" treatment. They appear in the proposed regulations (not in the Act) and exclude methane and ethane **due to** their low reactivity. In short, the principle of reactivity is recognized by the EPA, but only for two compounds.

On the standards of the Black Lung case, the regulations under the Clean Air Act are illegal on this point. I gather that Dr. Carter's research results are not unusual, and that many other sources agree with the chemical reactivity differences he finds.

In the Benzene Case, *Industrial Union Dept., AFL CIO v. American Petroleum Inst.*, 448 US 607 (1980), the Supreme Court looked at the other end of the spectrum. Congress listed benzene as a carcinogen in the law, but left the determination of the minimum amount to OSHA. The Agency set a standard of 1 part per million in the ambient air in plants using benzene. However, the scientific evidence was that benzene appeared in the ambient *outdoor* air in amounts up to 0.5 ppm in many parts of the country. And, there was no evidence in the record of specific health risks in levels as low as 1 ppm. The Supreme Court struck down that portion of the regulations for violation of the first principle of administrative law, namely that delegation is only valid within limits. Congress cannot say to any agency: "Here's a problem. Go solve it any way you see fit." It also stands for the proposition that neither law nor regulations can be valid when written without regard to the "best available scientific evidence."

In the Seat Belt Cases, *Motor Vehicle Manufacturers Assn v. State Farm Mutual*, 463 US 29 (1983), the Supreme Court threw back to the National Highway Transportation Safety Administration the question of whether air bags should be mandated in new cars, on the grounds that it had rewritten its regulations without considering the efficacy of air bags. This case is actually part of a series of cases which had reached the Supreme Court once before, and which included more than 60 rule-making procedures by the NHTSA. But the 1983 case was the most important, since the Court found that NHTSA was "arbitrary and capricious" in seeking to revise its Rule 208 concerning automobile passenger safety and eliminate the prior requirement of "passive restraints" in all new cars after September, 1982. Air bags were a known alternative with the possibility of greater benefits in preventing death or serious injury, and therefore the process of rewriting the regulations was fundamentally defective for this omission.

All three of these leading cases potentially apply to the situation of lower molecular weight alcohols as gasoline additives; however, the Seat Belt Cases probably have the greatest application. The Supreme Court was not concerned with politics or economics, but only with legitimacy of administrative law-making. So, it ordered the regulators to do their job correctly. Ultimately they did, and air bags are now becoming prevalent. The precise parallels with using methanol as a gasoline additive are these: methanol blends are known, effective alternatives, but powerful political forces and economic interests do not even want it considered, just as powerful interests did not want air bags to be considered, regardless of the scientific evidence.

The only clear way to solve the problem is for the EPA to consider properly the intent of the Act, especially its express language on reducing ozone *formation* potential, and to incorporate the best available scientific evidence on this point, in the regulation.

Litigation could leave the United States with no regulations on reformulated gasolines for years to come.

Answer to the Question: The proposed regulations at issue here, even though they were produced under the "regulatory negotiation" provisions of 1 C.F.R. Sect. 305.82-4, are illegal because they are not compatible with the well-known, scientific evidence. Also, the E.P.A. is not required to accept a "reg-neg" as its final rule. See, *NRDC v. United States . EPA*, 859 F2d 156 (D.C.Cir.1988).

[Note: if judicial review proves necessary, it should take place in the D.C.Circuit, or other Circuit. Court of convenience to the parties. See, *Florida Power & Light Co. v. Lorion*, 470 US 729 (1985). or it might be sought under the Mandamus and Venue Act, 28 U.S.C.A. Sect. 99 (1977).]

In my judgment. the urgency of this problem can be met by a regulatory method of adjusting "mass emissions" for their actual, atmospheric effects by accounting for reactivity. A proper scientific basis would allow those who use alcohol additives to make a simple election according to a formula. The EPA has already moved in this direction on two compounds. In addition to being more tenable legally, it makes common sense for the EPA to do this with respect to alcohol additives.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John C. Armor", followed by a long horizontal line extending to the right.

John C. Armor

JCA/ja