

ORAL ARGUMENT NOT YET SCHEDULED

No. 15–35834

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL.,
Plaintiffs-Appellants,

v.

JANE O'KEEFFE, ET AL.,
Defendants-Appellees,

CALIFORNIA AIR RESOURCES BOARD, ET AL.,
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon in Case
No. 15-cv-00467-AA (Hon. Ann Aiken, Chief Judge)

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

Roger R. Martella, Jr.
Paul J. Zidlicky
Paul J. Ray
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

*Attorneys for Plaintiffs-
Appellants*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants American Fuel & Petrochemical Manufacturers, American Trucking Associations, Inc., and Consumer Energy Alliance hereby state as follows:

1. American Fuel & Petrochemical Manufacturers (“AFPM”) is a national trade association of more than 400 companies. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in AFPM.
2. American Trucking Associations, Inc. (“ATA”) is a national trade association. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in ATA.
3. Consumer Energy Alliance (“CEA”) is a national trade association of more than 400,000 individual members. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in CEA.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED.....	1
STATUTORY ADDENDUM	2
INTRODUCTION AND SUMMARY.....	2
STATEMENT OF THE CASE.....	6
A. The Oregon Program.....	6
1. Life-Cycle Carbon Intensity	7
2. Compliance with Annual Average Clean Fuel Standard.....	9
3. Impact of the Program on Transportation Fuels in Oregon.....	12
B. Federal Clean Air Act.....	13
C. Proceedings Below	15
1. Plaintiffs’ Complaint.....	15
2. The District Court’s Decision	16
SUMMARY OF ARGUMENT	18
STANDARD OF REVIEW	19
ARGUMENT	20
I. The Oregon Program Violates the Commerce Clause by Discriminating Against Out-of-State Commerce	20
A. The Commerce Clause Prohibits a State from Granting a Commercial Advantage to In-State Industry at the Expense of Out-of-State Industry.....	20

B.	The Oregon Program Discriminates in Its Treatment of Gasoline and Diesel Fuel	22
1.	The Oregon Program Benefits In-State Biofuels at the Expense of Out-of-State Gasoline and Diesel Fuel	22
2.	The District Court Misapprehended Governing Case Law	25
C.	The Oregon Program Discriminates in Its Treatment of Out-of-State Ethanol.....	35
1.	The Oregon Program Benefits Oregon Ethanol at the Expense of Midwest Ethanol	35
2.	The Decision in <i>Rocky Mountain</i> Is Flawed.....	37
II.	The Oregon Program Violates the Constitution By Regulating Economic Conduct Occurring Wholly Outside Oregon.....	40
A.	States May Not Attach Restrictions to Exports or Imports to Control Economic Activity in Other States	40
B.	The Oregon Program Violates the Federal Structure of the Constitution by Regulating Activities Occurring Wholly Outside Oregon	43
C.	The Oregon Program Violates the Commerce Clause by Regulating Extraterritorially	47
III.	The Federal Clean Air Act Expressly Preempts the Oregon Program.....	50
A.	The Clean Air Act Preempts State Fuel Standards that Regulate Emissions EPA Has Found Unnecessary to Regulate	50
B.	The Oregon Program Regulates Methane, Which EPA Found Unnecessary To Regulate.....	52
	CONCLUSION	57
	STATEMENT OF RELATED CASES	57
	CETIFICATE OF COMPLIANCE.....	58
	CERTIFICATE OF SERVICE	59

TABLE OF AUTHORITIES

	Page
Cases	
<i>Amareda Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury</i> , 490 U.S. 66 (1989).....	21, 24
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975).....	42
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996).....	42
<i>Bonaparte v. Appeal Tax Ct. of Balt.</i> , 104 U.S. 592 (1881).....	41
<i>Brown v. Estate of Fletcher</i> , 210 U.S. 82 (1908).....	41
<i>Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.</i> , 476 U.S. 573 (1986).....	48, 49
<i>Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.</i> , 637 F.3d 1047 (9th Cir. 2011)	19
<i>C & A Carbone, Inc. v. Town of Clarkstown</i> , 511 U.S. 383 (1994).....	5, 20, 42, 47
<i>Chamber of Commerce of the U.S. v. Whiting</i> , 131 S. Ct. 1968 (2011).....	50
<i>Chem. Waste Mgmt. v. Hunt</i> , 504 U.S. 334 (1992).....	20
<i>City of Phila. v. New Jersey</i> , 437 U.S. 617 (1978).....	34, 38
<i>Exxon Corp. v. Governor of Md.</i> , 437 U.S. 117 (1978).....	27
<i>Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.</i> , 504 U.S. 353 (1992).....	21, 31, 32

<i>Gen. Motors Corp. v. Tracy</i> , 519 U.S. 278 (1997).....	28
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958).....	42
<i>Healy v. Beer Inst.</i> , 491 U.S. 324 (1989).....	5, 42, 43, 47, 48
<i>Hebbe v. Pliler</i> , 627 F.3d 338 (9th Cir. 2010)	19
<i>Hohn v. United States</i> , 524 U.S. 236 (1998).....	39
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979).....	33
<i>Hunt v. Wash. State Apple Advert. Comm’n</i> , 432 U.S. 333 (1977).....	5, 21, 31, 34, 35
<i>Magallanes v. Bowen</i> , 881 F.2d 747 (9th Cir. 1989)	55
<i>Magnolia Petroleum Co. v. Hunt</i> , 320 U.S. 430 (1943).....	42
<i>N.Y. Life Ins. Co. v. Head</i> , 234 U.S. 149 (1914).....	42
<i>Nat’l Ass’n of Optometrists & Opticians LensCrafters, Inc. v. Brown</i> , 567 F.3d 521 (9th Cir. 2009)	41
<i>NCAA v. Miller</i> , 10 F.3d 633 (9th Cir. 1993)	43
<i>New Energy Co. of Ind. v. Limbach</i> , 486 U.S. 269 (1988).....	<i>passim</i>
<i>Ogden v. Saunders</i> , 25 U.S. (12 Wheat.) 213 (1827)	41

<i>Or. Waste Sys. v. Dep't of Env'tl. Quality</i> , 511 U.S. 93 (1994).....	20, 21, 23, 38
<i>Oxygenated Fuels Ass'n v. Davis</i> , 331 F.3d 665 (9th Cir. 2003)	53
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	40
<i>Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.</i> , 768 F.3d 938 (9th Cir. 2014)	19, 33
<i>Rocky Mountain Farmers Union v. Corey</i> , 730 F.3d 1070 (9th Cir 2013), <i>cert. denied</i> , 134 S. Ct. 2875 (2014).....	<i>passim</i>
<i>Rocky Mountain Farmers Union v. Corey</i> , 740 F.3d 507 (9th Cir 2014), <i>cert. denied</i> , 134 S. Ct. 2875 (2014)	17, 38, 48
<i>Rowe v. Educ. Credit Mgmt. Corp.</i> , 559 F.3d 1028 (9th Cir. 2009)	6, 19
<i>Sam Francis Found. v. Christies, Inc.</i> , 784 F.3d 1320 (9th Cir 2015)	49
<i>Shelby Cty. v. Holder</i> , 133 S. Ct. 2612 (2013).....	41
<i>W. Lynn Creamery, Inc. v. Healy</i> , 512 U.S. 186 (1994).....	5, 21, 24, 25, 35
<i>Watson v. Emp'rs Liab. Assurance Corp.</i> , 348 U.S. 66 (1954).....	41, 43
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980).....	5, 40, 41, 43
<i>Wyoming v. Oklahoma</i> , 502 U.S. 437 (1992).....	20, 37
Statutes and Regulations	
42 U.S.C. § 7521 et seq.....	13

42 U.S.C. § 7545	<i>passim</i>
Or. 2009 Statutes ch. 754 § 6(2)	29
59 Fed. Reg. 7716 (Feb. 16, 1994)	<i>passim</i>
74 Fed. Reg. 66496 (Dec. 15, 2009)	56
75 Fed. Reg. 14670 (Mar. 26, 2010)	6
75 Fed. Reg. 25324 (May 7, 2010)	56
OAR § 340-253-0040	9, 13, 23, 27
OAR § 340-253-8030	22

Other Authorities

EPA, <i>Overview of Greenhouse Gases</i> , http://www3.epa.gov/climatechange/ghgemissions/gases/co2.html (last updated Dec. 11, 2015)	45
ICF Int’l, <i>Task 3—Updated Compliance Scenarios</i> (Aug. 2014), http://www.deq.state.or.us/aq/cleanFuel/docs/ComplianceScenarios_ICF.pdf	7
Joseph Story, <i>Commentaries on the Conflicts of Law</i> (1834)	41

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 because the Complaint filed by Plaintiffs American Fuel and Petrochemical Manufacturers, American Trucking Associations, and the Consumer Energy Alliance (“Plaintiffs”) alleges that the Oregon Clean Fuel Program (“Oregon Program” or “Program”) violates the United States Constitution and is preempted by the federal Clean Air Act. This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final order and judgment of the district court dismissing the Complaint and case in their entirety. The district court dismissed the Complaint on September 23, 2015, and entered judgment dismissing the case on the same day. *See* Excerpts of Record (“ER:”) 3-38 (Opinion and Order (“Order”) (Sept. 23, 2015)); ER:1-2 (Judgment). On October 22, 2015, Plaintiffs timely filed their Notice of Appeal under Federal Rule of Appellate Procedure 4(a)(1). ER:39-40 (Notice of Appeal).

ISSUES PRESENTED

I. Whether the Oregon Program violates the Commerce Clause by imposing restrictions on imported transportation fuels that discriminate against interstate and foreign commerce and are designed to promote and subsidize the development of a competing in-state transportation fuel industry?

II. Whether the Oregon Program’s restriction of imports based upon a life-cycle analysis that regulates the manner in which transportation fuels are produced and transported in interstate and foreign commerce is an impermissible extraterritorial regulation that violates the United States Constitution?

III. Whether the Oregon Program is preempted by the Clean Air Act because it is a “fuel standard” that regulates methane emissions notwithstanding the adoption by the Environmental Protection Agency (“EPA”) of a fuel standard that expressly declines to regulate methane emissions?

STATUTORY ADDENDUM

The statutory addendum to this brief contains (1) Section 211(c) of the Clean Air Act, 42 U.S.C. § 7545(c) (Addendum (“Add.”) 1-6), and (2) Oregon’s Clean Fuel Program, OAR § 340-253-000, *et seq.* (Add. 7-72).¹

INTRODUCTION AND SUMMARY

The Oregon Program is a regulation designed to restructure the market for transportation fuels produced in and imported into Oregon. The Program imposes burdens on imported transportation fuels, especially imported gasoline, diesel fuel, and Midwest ethanol, and is designed to promote and subsidize the development of

¹ The statutory addendum contains the January 2015 version of the Clean Fuel Program, which was the version in effect when Plaintiffs filed their Complaint. On December 9, 2015, an amended version of the Program was adopted. All citations to Oregon regulations herein are, unless otherwise specified, to the January 2015 version.

a competing in-state transportation fuel industry. The Program does so by applying a life-cycle analysis that regulates fuels based on factors relating to their origin, including the manner in which the fuels are produced and transported in interstate and foreign commerce. Regulated parties must satisfy an annual “clean fuel standard” cap on the average carbon intensity of the transportation fuels they market in Oregon. Importing fuels that exceed the cap requires a regulated party to purchase offsetting “credits” from competing transportation fuel providers.

This appeal challenges Oregon’s authority to discriminate against interstate and foreign commerce, to regulate interstate and foreign commerce in other states and countries, and to violate federal law. The Oregon Program is invalid because it discriminates in favor of fuels produced locally in Oregon and against imported transportation fuels such as gasoline, diesel, and Midwest ethanol, and imposes restrictions on imports in an effort to control the production and transport of fuels outside Oregon. The Oregon Program further regulates emissions of methane from transportation fuels in a manner that is expressly preempted by the federal Clean Air Act.

First, contrary to the district court’s decision, the allegations in the Complaint state a claim that the Oregon Program discriminates against interstate and foreign commerce by imposing burdens on importers of transportation fuels and requiring them to alter their mix of fuels sold in Oregon or purchase “credits”

designed to promote development of the transportation fuel industry in Oregon. *E.g.*, Compl. ¶¶ 50-60, ER:189-92. The burden is imposed through a life-cycle analysis that regulates these imports based on where and how they are produced and transported in interstate and foreign commerce. *E.g.*, *id.* ¶¶ 39-43, ER:186-87. The burden of the Oregon Program falls almost entirely on “importers of transportation fuel” because “[b]usinesses that import gasoline, ethanol, diesel fuel, bio-diesel and biomass-based diesel for use as a transportation fuel in Oregon are the largest group of regulated parties.” *Id.* ¶ 62, ER:192. In contrast, the Oregon Department of Environmental Quality (“DEQ”) has explained that the Oregon Program would not burden in-state fuel producers because “there are no producers of gasoline or diesel fuel located in Oregon,” *id.* ¶ 63, ER:192, and the biofuels produced in Oregon “already meet the ... clean fuel standards,” *id.* ¶ 64, ER:192.

According to DEQ, Oregon businesses will be able to “generate credits and benefit from the sale of those credits.” *Id.* ¶ 64, ER:192. Those credits, sold by Oregon fuel producers, must be purchased by the regulated parties that *import* transportation fuels such as gasoline and diesel fuel into Oregon.² In this way, the Oregon Program was designed, according to the governor, to “capture a portion of

² According to DEQ, Oregon credit producers would include “[1] Businesses, local governments, school districts and transit agencies that own alternative fuel fleets and dispensing infrastructure; [2] Auto manufacturers that own electric charging stations; [3] Businesses that provide chargers for their employees to charge their electric vehicles during work hours; and [4] Utilities that help businesses provide fuel and infrastructure.” Compl. ¶ 65, ER:193.

the billions of dollars that Oregonians send out of the state every year to purchase diesel and gasoline and keep those dollars circulating here in our own economy.” *Id.* ¶ 76, ER:195 (quoting Governor Kitzhaber). Under Supreme Court precedent, this massive burden imposed on imported fuels that is designed to benefit in-state competitors is impermissible discrimination, *see, e.g., W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202 (1994), and remains so even if other out-of-state competitors also might benefit from the burden imposed on these imported transportation fuels, *see Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 351-52 (1977).

Second, the Complaint’s allegations confirm that the Program impermissibly restricts imports in an effort to control economic conduct occurring outside Oregon. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). The Oregon Program assigns “carbon-intensity” scores to transportation fuels to control conduct—the production and transport of transportation fuels—occurring outside of Oregon. *E.g.*, Compl. ¶¶ 85-90, 120-130, ER:198-99, 203-04. The restriction of imports to control out-of-state economic conduct violates the prohibition on extraterritorial regulation rooted in the federal structure of the Constitution and in the Commerce Clause. *E.g., Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

Finally, the Oregon Program is expressly preempted by federal law because the Program adopts a “fuel standard” within the meaning of the Clean Air Act and that regulates methane emissions, even though EPA has determined, under Section 211(c) of the Clean Air Act, that regulation of methane is unnecessary. Compl. ¶¶ 41-42, 91-98, ER:186-87, 199-201.

STATEMENT OF THE CASE

This appeal arises from the district court’s dismissal of the Complaint under Rule 12(b)(6) and 12(c), and thus the Complaint’s well-pleaded allegations must be accepted as true and viewed in the light most favorable to Plaintiffs. *See Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029-30 (9th Cir. 2009).

A. The Oregon Program

The Oregon Program is designed to reshape the transportation fuel market in Oregon by making it more expensive to import gasoline and diesel (which Oregon does not produce), by requiring the importers of these fuels to subsidize and promote Oregon’s biofuels industry, and by discriminating against Midwest ethanol (which provides the majority of ethanol used in Oregon). *E.g.*, Compl. ¶¶ 54-59, 61-84, ER:190-91, 192-98.³

³ According to EPA, as of 2010, “over 94%” of domestic ethanol “production capacity” is from the Midwest, as compared to less than 1% (“0.8%”) from states on the West Coast. 75 Fed. Reg. 14670, 14745 (Mar. 26, 2010) (“Since the majority of ethanol is made from corn, it is no surprise that most of the plants are

The Oregon Program was authorized by Oregon’s legislature and governor and implemented by Oregon’s DEQ. *Id.* ¶¶ 34-38, ER:185-86. As explained by the governor, “[i]n 2012, Oregonians sent more than \$6 billion out of state to import gas and diesel, while homegrown, low carbon fuel producers remain locked out of a promising market.” *Id.* ¶ 74, ER:195. The governor highlighted that “[t]here are no oil refineries in Oregon, but there are biofuel producers, feedstock growers, a burgeoning electric vehicle industry, and propane, natural gas, and other innovative fuel companies ready to invest in the state.” *Id.* ¶ 75, ER:195; *see id.* ¶ 63, ER:192. The Program represents Oregon’s attempt, in the governor’s words, “to spark this home-grown industry that can capture a portion of the billions of dollars that Oregonians send out of the state every year to purchase diesel and gasoline and keep those dollars circulating here in our own economy.” *Id.* ¶ 76, ER:195.

1. Life-Cycle Carbon Intensity

The Oregon Program regulates transportation fuels based on the concept of life-cycle “carbon intensity.” Compl. ¶¶ 39-43, ER:186-87. A fuel’s “carbon intensity” is not simply a measure of the “carbon” in the fuel or the “carbon” released into the air during fuel combustion. *Id.* ¶ 43, ER:187. Rather, “carbon intensity” is “the amount of lifecycle greenhouse gas emissions per unit of energy

located in the Midwest near the Corn Belt”); *see also* ICF Int’l, *Task 3—Updated Compliance Scenarios* 10, 20, 26 (Aug. 2014), ER:136, 146, 152.

of fuel expressed in grams of carbon dioxide equivalent per megajoule (gCO₂e per MJ).” *Id.* ¶ 40, ER:186 (quoting OAR § 340-253-0040(9)).⁴

The Oregon Program’s life-cycle analysis is based on the origin of the fuel, including where and how a fuel is produced, and where and how that fuel must travel to gain entrance to the Oregon market. *Id.* ¶¶ 43, 122-27, ER:187, 203-04. That *life-cycle* analysis looks to “all stages of fuel production, from feedstock generation or extraction, production, distribution, and combustion of fuel by the consumer.” *Id.* ¶ 43, ER:187 (quoting OAR § 340-253-0040(37)). For fuel imports, the life-cycle analysis regulates the extraction and production of fuels occurring outside Oregon and the distribution of fuels in interstate and foreign commerce outside Oregon. *See id.* ¶¶ 43, 122-27, ER:187, 203-04. For instance, in setting carbon intensities for gasoline and diesel, DEQ considered “[t]he sources of crude and associated factors that affect emissions such as flaring rates, extraction technologies, capture of fugitive emissions and energy sources.” *Id.* ¶ 52, ER:190 (quoting OAR § 340-253-0400(4)(a)(A)). Because Oregon refines no petroleum, these aspects of production all occur out of state. *See id.* ¶ 63, ER:192.

For biofuels, the Oregon Program assigns individual carbon intensities to physically identical fuels based, in part, on where and how individual biofuels are

⁴ A transportation fuel’s carbon intensity includes its life-cycle methane emissions. *See Compl.* ¶¶ 41-42, ER:186-87.

produced and brought to the Oregon market. *Id.* ¶ 43, ER:187 (citing OAR § 340-253-8030 tbl.3, -8040 tbl.4). Because the Oregon Program applies to biofuels produced outside Oregon, the Oregon Program regulates the production and transport of biofuels in other states and other countries. *E.g., id.* ¶ 69, ER:193 (describing burden imposed on Midwest ethanol producers). The life-cycle analysis even regulates “significant indirect emissions . . . from changes in land use associated with the fuels” outside Oregon. *Id.* ¶ 43, ER:187.⁵

2. Compliance with Annual Average Clean Fuel Standard

The Oregon Program requires fuel providers to reduce the average carbon intensity of the transportation fuels they import or produce in Oregon to meet the annual “clean fuel standard” or purchase “credits” from competing producers. Compl. ¶¶ 50, 53-54, ER:189-90.⁶ The average carbon intensity of transportation fuels is capped at declining amounts each year through 2025. *Id.* ¶ 50, ER:189.

When the Oregon Program was adopted in 2015, the baseline carbon

⁵ DEQ adopted the Program without identifying emissions for land use changes in the lookup tables published with the regulations. *See* Compl. ¶ 43, ER:187 (citing OAR § 340-253-8030, tbl. 3; *id.* -8040, tbl. 4). But DEQ recently adopted carbon intensity values associated with land use and other indirect effects of certain biofuels, including corn ethanol. *See* OAR § 340-253-8030, tbl.3 (Dec. 9, 2015), Plaintiffs’ Mot. for Judicial Notice Ex. A tbls.3.

⁶ The “clean fuel standard” is defined as “the annual average carbon intensity a regulated party must comply with, as listed in Table 1 under OAR § 340-253-8010 for gasoline and gasoline substitutes and in Table 2 under OAR § 340-253-8020 for diesel fuel and diesel substitutes.” OAR § 340-253-0040(12).

intensity assigned for gasoline was 89.31 gCO₂e/MJ, which is a single weighted average of gasoline supplied to Oregon. *Id.* ¶ 55, ER:190. Gasoline importers would be required, in 2016, to meet an average carbon intensity cap of 89.08 gCO₂e/MJ. *Id.* Likewise, the baseline carbon intensity value for diesel fuel was 87.09 gCO₂e/MJ. *Id.* ¶ 56, ER:190-91. At the time of adoption, diesel importers would be required, in 2016, to meet an average carbon intensity of 86.87 gCO₂e/MJ, which is lower than the carbon intensity for their diesel fuel. *Id.* ¶ 56.⁷

By design, the carbon intensity assigned to gasoline and diesel fuels exceeds the annual average carbon intensity fuel standard for 2016 and every year thereafter. *Id.* ¶¶ 55-56, ER:190-91. As a result, “importers of gasoline would need to replace existing sources of ethanol with ethanol that has lower calculated carbon intensities or purchase credits from other parties to meet their annual average carbon intensity requirements.” *Id.* ¶ 55, ER:190; *see also id.* ¶ 56, ER:190-91 (same for importers of diesel fuel).⁸ In contrast, the producers of

⁷ These values were amended in December 2015, but the result is the same. *See* Plaintiffs’ Mot. for Judicial Notice Ex. A, tbls.1, 3 (2016 cap for gasoline and gasoline substitutes is 97.56 gCO₂e/MJ, with the December 2015 carbon intensity baseline for blended gasoline at 97.80 gCO₂e/MJ; 2016 cap for diesel fuel and substitutes is 98.23 gCO₂e/MJ, with the December 2015 carbon intensity baseline for blended diesel fuel at 98.48 gCO₂e/MJ).

⁸ Importers may comply by altering their fuel mix by, for instance, blending lower-carbon biofuels with their gasoline. For example, under the Oregon Program’s base case for gasoline, importers of gasoline mix 90% clear gasoline with 10% ethanol, Compl. ¶ 55, ER:190, and under the base case for diesel, importers of diesel mix 95% clear biodiesel with 5% biodiesel, *id.* ¶ 56, ER:190-91.

ethanol and biodiesel in Oregon “already meet the proposed clean fuel standards” and therefore would face “no additional costs” associated with reducing carbon. *Id.* ¶ 64, ER:192. Indeed, the Oregon Program creates further opportunities for producers of Oregon biofuels to generate credits, *e.g.*, ¶¶ 53, 64, ER:190, 192, which would be sold to fuel importers to offset “deficits” and thereby achieve compliance with the Oregon Program. *Id.* ¶ 54, ER:190.

By imposing an annual average fuel standard, the Oregon Program makes fuels with lower carbon intensities (*e.g.*, those produced in Oregon) more valuable than fuels with higher carbon intensities (*e.g.*, those produced outside Oregon). *E.g.*, *id.* ¶¶ 58, 109-114, ER:191, 202-30. That is because producers whose fuels have carbon intensities higher than the annual cap—including gasoline and diesel fuel imported into Oregon, *see id.* ¶¶ 55-56, ER:190-91—must reduce their average carbon intensity, which may be accomplished by buying low-carbon fuel to blend with their conventional fuel or by buying credits from credit generators. *Id.* ¶¶ 55-57, 66-67, ER:190-91, 193. Likewise, the Oregon Program also provides an advantage to ethanol produced in Oregon over ethanol produced in the Midwest by assigning a lower carbon intensity to ethanol produced in Oregon than to Midwest ethanol made using the same production methods. *See id.* ¶¶ 70, 112, ER:193-94, 202.

3. Impact of the Program on Transportation Fuels in Oregon

Officials responsible for the Oregon Program supported it because they wanted to foster Oregon biofuels production at the expense of existing out-of-state fuel producers. *E.g.*, Compl. ¶¶ 71-84, ER:194-98. The Governor’s Office explained that the Oregon Program would counteract the net outflow of billions of dollars and promote the development of a competing in-state market. *Id.* ¶¶ 74, 76, ER:195. Oregon’s legislators agreed with the governor’s objectives: to “encourag[e] innovating investments,” “reduc[e] [Oregon’s] dependence on petroleum and channe[l] those dollars into Oregon’s economy,” and “help support the growing green energy sector [and] power [Oregon’s] economy.” *Id.* ¶ 79, ER:196-97. In turn, DEQ agreed with Oregon’s governor and legislators, explaining that the Oregon Program would “result[] in an influx of economic activity, including growth in employment, income and gross state product,” and that “[p]ositive economic impacts in Oregon stem from importing less petroleum fuel.” *Id.* ¶ 82, ER:197. Indeed, one adviser to DEQ frankly acknowledged that “the whole intent of the [Oregon Program] is to reduce the use of petroleum, which is going to have a significant impact in the petroleum industry out of state.” *Id.* ¶ 84, ER:198.

The Oregon Program has a stated goal of achieving, by 2025, a 10 percent reduction in the annual average carbon intensity for transportation fuels sold in

Oregon. *Id.* ¶ 50, ER:189. The intended design and effect of the Oregon Program is that importers of gasoline and diesel will generate deficits and therefore will be required to change the composition of the fuel they import or purchase credits from competitors that produce substitutes for gasoline and diesel fuel. *Id.* ¶¶ 57-58, ER:191.⁹ As explained by DEQ, importers of gasoline and diesel fuel whose carbon intensities are above the annual average standard “would incur the costs of purchasing credits to comply and providers of clean fuel would benefit from the sale of credits.” *Id.* ¶ 57, ER:191 (quoting DEQ, *Clean Fuels Program Phase II Rulemaking* 12 (Jan. 7-8, 2015) (DEQ recommendations to EQC)) ER:56. The discriminatory impact increases yearly as mandated reductions in average carbon intensity increase each year through 2025. Compl. ¶ 60, ER:192.

B. Federal Clean Air Act

Title II of the Clean Air Act regulates mobile sources of air pollution, including fuels. 42 U.S.C. § 7521 *et seq.* Section 211 of the Clean Air Act authorizes EPA to regulate fuels, thereby controlling vehicle emissions while ensuring a nationally uniform market for fuels. *Id.* § 7545. Section 211(c) allows EPA to “control or prohibit” a fuel or fuel additive if the “emission product” of the

⁹ Under the Oregon Program, ethanol and other biofuels are treated as “substitutes” for gasoline and diesel fuel. OAR § 340-253-0040(11) (explaining that clean fuel standard applies to gasoline and diesel fuel and their “substitutes” including ethanol and biodiesel in Tables 1 and 2); *id.* § 340-253-0040(30) (“‘Gasoline substitute’ means any fuel, other than gasoline, that may be used in an engine designed for gasoline use”); *id.* 340-253-0040(22) (defining “diesel substitute”).

fuel “may reasonably be anticipated to endanger the public health or welfare.” *Id.*

§ 7545(c)(1). Section 211(c)(4)(A) contains an express preemption provision,

which provides, in relevant part:

(A) . . . [N]o State . . . 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 [EPA] 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 [that] finding in the Federal Register, or

(ii) if [EPA] 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 [EPA].

Id. § 7545(c)(4)(A). This preemption provision is critical to achieving the statute’s goals: as EPA has explained, “[t]he national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an inefficient patchwork of potentially conflicting regulations.” EPA, *Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline*, 59 Fed. Reg. 7716, 7809 (Feb. 16, 1994) (the “RFG Rule”).

EPA has implemented Sections 211(c)(1) and (4) in, *inter alia*, a national reformulated gasoline standard. *See id.* In this rule, EPA set standards governing emissions of volatile organic compounds (“VOCs”) from vehicle fuels. EPA determined that methane, due to its low reactivity, would be excluded from

regulation based upon an exercise of EPA’s authority under Section 211(c). *Id.* at 7722-23.

C. Proceedings Below

1. Plaintiffs’ Complaint

On March 23, 2015, Plaintiffs, whose members include parties regulated by the Program, Compl. ¶¶ 7-20, ER:181-83, filed their Complaint alleging that the Oregon Program violates federal law in multiple respects and sought declaratory and injunctive relief, *id.* ¶¶ 108-45, A-D, ER:202-07.

First, the Complaint alleges that the Oregon Program violates the Commerce Clause because it discriminates against transportation fuels imported into Oregon through assignment of a carbon-intensity score for fuels that discriminates in favor of in-state fuels over imported fuels, including gasoline and diesel fuel (which are not produced in Oregon) and Midwest ethanol. *Id.* ¶¶ 50-84, ER:189-98.

Second, the Oregon Program achieves its discriminatory design by regulating activity that occurs wholly outside Oregon— the extraction, production, and transport of transportation fuels in other states and countries—through application of a “life-cycle” analysis. *Id.* ¶¶ 85-90, ER:198-99. By doing so, the Oregon Program seeks to extend Oregon’s regulatory reach beyond its borders in violation of the Commerce Clause and the interstate, federal structure of the United States Constitution. *Id.* ¶¶ 120-130, ER:203-04.

Finally, as alleged in the Complaint, the Oregon Program is expressly preempted by the Clean Air Act because it regulates methane emissions for the purpose of controlling fuel emissions even though EPA has determined that regulation of methane under Section 211(c)(1) is not necessary. *Id.* ¶¶ 91-98, 136, ER:199-201, 205.¹⁰

2. The District Court’s Decision

Defendants and the two groups of intervenors all moved for judgment under Federal Rule 12(b)(6) and 12(c). On September 23, 2015, the district court granted judgment in favor of Defendants and their intervenors. Order at 2, ER:4.

First, the district court concluded that Plaintiffs’ “discrimination claim is largely barred by” this Court’s decision in *Rocky Mountain*, but then addressed “all aspects of [the] discrimination claim.” Order at 11-12, ER:13-14.¹¹ The court

¹⁰ Plaintiffs do not challenge on appeal the district court’s dismissal of their claim that the Program conflicted with the purposes and goals of the Energy Policy Act of 2005, the Energy Independence and Security Act of 2007, and the federal Renewable Fuels Standard. *See* Compl. ¶ 138, ER:205.

¹¹ As noted by the district court, the Oregon Program was “modeled after [California’s Low Carbon Fuel Standard (“LCFS”).” Order at 6 n.6, ER:8. A panel of this Court addressed the constitutionality of the California LCFS in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir 2013), *cert. denied*, 134 S. Ct. 2875 (2014). As relevant here, the panel ruled that the California LCFS was a fuel standard within the meaning of Section 211(c) of the Clean Air Act. *Id.* at 1106. It held that the California LCFS’s treatment of imported petroleum did not discriminate against interstate commerce because, although it favored one type of in-state petroleum, it did not favor other varieties of in-state petroleum. *Id.* at 1099-1100. A majority of the panel further held that the treatment of ethanol from the Midwest did not discriminate, on its face, against interstate commerce, and

concluded that “the fact that the Oregon Program assigns lower carbon-intensity values to in-state and out-of-state biofuels than to petroleum is not indicative of discrimination.” *Id.* at 14, ER:16. The court acknowledged both “that Oregon does not produce any petroleum in-state,” *id.* at 15, ER:17, and that in assigning carbon intensities to imported fuels, the Oregon Program considered factors such as “location” in assessing “GHG emissions attributable to a default pathway,” *id.* at 16, ER:18. The court dismissed, without substantive discussion, statements by the governor, legislators, and DEQ reflecting that the Oregon Program was intended to benefit local industry at the expense of imported transportation fuels. *Id.* at 18-19, ER:20-21.

Second, notwithstanding that the Oregon Program imposes restrictions on imports based upon conduct occurring outside Oregon, the court rejected Plaintiffs’ extraterritoriality claim based on this Court’s prior conclusion that “the analogous LCFS ‘does not control conduct wholly outside the state.’” *Id.* at 23, ER:25 (quoting *Rocky Mountain*, 730 F.3d at 1103-07).

Finally, with regard to the claim of express preemption under Section 211(c)(4), the district court concluded that there was no preemption because (1)

remanded the case on the issue whether the LCFS discriminated in its purpose or effect. *Id.* at 1097. Finally, the panel ruled that the California LCFS did not violate the Commerce Clause’s prohibition on extraterritorial regulation. *Id.* at 1101-06. The Ninth Circuit denied rehearing en banc, with seven judges dissenting. *See Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 512 (9th Cir 2014). Plaintiffs address the *Rocky Mountain* decision below.

EPA “did not affirmatively find that no control or prohibition of methane was necessary,” and (2) “EPA made an Endangerment Finding in 2009” concerning methane and thus “reversed course in light of newfound scientific evidence.” *Id.* at 26, 28 n.13, ER:28, 30.

SUMMARY OF ARGUMENT

The Oregon Program violates the United States Constitution and federal law for three reasons. *First*, the Oregon Program discriminates against interstate commerce in violation of the Commerce Clause. It places both imported gasoline and diesel fuel and imported Midwest ethanol at a commercial disadvantage as compared with Oregon ethanol and other biofuels. The Program assigns gasoline and diesel—which Oregon does not produce—and Midwest ethanol a higher carbon intensity than the biofuels that Oregon does produce. The Program is designed to compel a subsidy from regulated parties that import gasoline and diesel fuel, which generate “deficits,” by requiring them to purchase “credits” from competing Oregon fuel producers.

Second, the Oregon Program violates the federal structure of the Constitution and the Commerce Clause by regulating economic activity that occurs solely outside Oregon. The Oregon Program violates both doctrines by imposing burdens on the import of fuels to control their manufacture and transport in

interstate and foreign commerce. Oregon may not extend its police power in an effort to regulate and control economic activity occurring outside of Oregon.

Finally, the Oregon Program is preempted by the federal Clean Air Act. EPA has expressly concluded it was not necessary to regulate methane from fuels—one of the greenhouse gases the Oregon Program regulates—and has published that finding in the Federal Register while expressly invoking the preemptive authority of Section 211(c) of the Clean Air Act. The Oregon Program is expressly preempted by Section 211(c) because it is a fuel standard that regulates methane emissions when EPA has concluded that methane need not be regulated.

STANDARD OF REVIEW

This appeal arises from the district court’s dismissal of the Complaint under Rule 12(b)(6) and 12(c), and therefore the Complaint’s well-pleaded allegations are accepted as true and viewed in the light most favorable to Plaintiffs. *See Rowe*, 559 F.3d at 1029-30. Thus, the Court must “draw all reasonable inferences,” *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014), and “resolve all doubts in the [Plaintiffs’] favor,” *Hebbe v. Pfliler*, 627 F.3d 338, 340 (9th Cir. 2010).¹²

¹² The NGO Intervenors’ motion under Rule 12(c) is subject to the same standards. *See Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011).

ARGUMENT

I. The Oregon Program Violates the Commerce Clause by Discriminating Against Out-of-State Commerce.

A. The Commerce Clause Prohibits a State from Granting a Commercial Advantage to In-State Industry at the Expense of Out-of-State Industry.

The Oregon Program violates the United States Constitution's Commerce Clause by requiring out-of-state fuel manufacturers to subsidize Oregon's competing biofuels industry. The Commerce Clause "directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). This limitation on state authority "presumes a national market free from local legislation," *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. at 393, and forecloses any state's "attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade," *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 339-40 (1992).

Discrimination under the Commerce Clause "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994). One example of such discriminatory treatment is placing out-of-state products at a "commercial disadvantage." *See, e.g., New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 275 (1988). As the Supreme Court has explained, "imposition of a differential burden on any part of the stream of commerce ... is invalid, because a

burden placed at any point will result in a disadvantage to the out-of-state producer.” *W. Lynn Creamery*, 512 U.S. at 202.

Under the Commerce Clause, discrimination may be reflected on the face of a state law as well as in its purpose and effect on interstate or foreign commerce. *See, e.g., Amareta Hess Corp. v. Dir., Div. of Taxation, N.J. Dep’t of Treasury*, 490 U.S. 66, 75 (1989); *Nat’l Ass’n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). A discriminatory state law need not confer advantages solely on in-state industry, *see, e.g., Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 336-38, 352-53 (1977), or impose disadvantages solely on out-of-state industry, *see, e.g., Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361-362 (1992). It is enough that a law is designed to “divert market share” to in-state industry from out-of-state businesses. *W. Lynn Creamery*, 512 U.S. at 203. Laws that discriminate against interstate and foreign commerce are “virtually *per se* invalid” and must be struck down “unless [the State] can ‘sho[w] that [they] advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’” *Or. Waste Sys.*, 511 U.S. at 99-101.

The Oregon Program discriminates against imported gasoline, diesel, and Midwest ethanol and in favor of competing fuels produced in Oregon. It does so through a life-cycle carbon intensity analysis that imposes burdens and benefits

based on where and how fuels are produced and transported in interstate and foreign commerce. As demonstrated below, the Oregon Program is invalid under these standards both in its treatment of gasoline and diesel fuel (neither of which is produced in Oregon) and in its treatment of Midwest corn ethanol (which supplies most of the ethanol used in transportation fuel in Oregon).

B. The Oregon Program Discriminates in Its Treatment of Gasoline and Diesel Fuel.

1. The Oregon Program Benefits In-State Biofuels at the Expense of Out-of-State Gasoline and Diesel Fuel.

As Oregon lawmakers emphasized when they formulated the Program, Oregon produces no gasoline or diesel, but it does produce ethanol. *See* Compl. ¶¶ 71-84, ER:194-98. The Program assigns higher carbon intensity values to imported gasoline and diesel than to ethanol and other competing fuels produced in Oregon. *Id.* ¶ 58, ER:191; *see* OAR § 340-253-8030. Specifically, the Program assigns gasoline and diesel a carbon intensity value that always is higher than the annual “clean fuel standard.” Compl. ¶¶ 55-56, 60, ER:190-92. As a consequence, a regulated party importing gasoline or diesel fuel must either alter the mix of fuels it imports into Oregon or incur “deficits” that must be offset with “credits” purchased from competing producers of biofuels. *Id.* ¶¶ 55-56, ER:190-91. As the annual standard is lowered each year, the number of credits needed to bring importers of gasoline or diesel into compliance increases. *Id.* ¶ 60, ER:192. By

contrast, ethanol from Oregon is assigned a carbon intensity well below the annual fuel standard and will remain below the standard as the standard is reduced each year. *See id.* ¶¶ 58, 68, 70, ER:191, 193-94. Thus, producing ethanol in Oregon generates “credits” that can be sold to importers of gasoline and diesel fuel that generate “deficits” that must be offset with “credits.” *Id.* ¶¶ 66-69, ER:193.

The Oregon Program discriminates against interstate commerce because the Program imposes “differential treatment o[n] in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Or. Waste Sys.*, 511 U.S. at 99. The Program burdens out-of-state gasoline refiners by requiring importers of gasoline into Oregon to alter the mix of fuels they import into Oregon or to buy credits from their competitors. Compl. ¶¶ 54-59, 67, ER:190-91, 193. Regulated parties that import gasoline or diesel thus will be forced to bear the additional expense of purchasing credits from their direct competitors. *Id.* ¶¶ 67-69, ER:193.¹³

By contrast, the Program benefits Oregon’s in-state ethanol industry by allowing the industry to sell credits to gasoline and diesel importers. *Id.* ¶¶ 54-59, 64-66, ER:190-93. The Oregon Program functions as a subsidy to in-state ethanol producers (who have credits to sell) and other Oregon credit generators paid for by

¹³ The Oregon Program defines “credit generator” as “any person eligible to generate credits by providing clean fuels for use in Oregon.” OAR § 340-253-0040(18).

out-of-state refiners of petroleum-based fuels. *Id.* DEQ predicted the Program’s commonsense effect: “Positive economic impacts in Oregon ... from importing less petroleum fuel.” *Id.* ¶ 82, ER:197.

The fact that the Oregon Program does not expressly state that gasoline and diesel fuel are “imported” does not insulate the Program from the requirements of the Commerce Clause. As explained by the Supreme Court, a state law that favors a “local product” does “not need to be drafted explicitly along state lines in order to demonstrate its discriminatory design.” *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep’t of Treasury*, 490 U.S. 66, 76 (1989). Here, the Program’s imposition of burdens on the sale of gasoline and diesel fuel, though not “drafted explicitly along state lines,” *id.*, reflects a discriminatory design because, according to DEQ, “there are no producers of gasoline or diesel fuel located in Oregon,” Compl. ¶ 63, ER:192; *see id.* ¶ 64, ER:192 (explaining that biofuels produced in Oregon “already meet the proposed clean fuel standards” and can “generate credits and benefit from the sale of those credits”).

Forcing an out-of-state industry to subsidize a competing in-state industry is discrimination against interstate commerce that violates the Commerce Clause. For example, in *West Lynn Creamery*, 512 U.S. 186, a Massachusetts law levied a tax on both in-state and out-of-state milk but then distributed the proceeds of this tax only to in-state milk producers. *Id.* at 190-91. The Supreme Court held that

the Massachusetts program violated the Commerce Clause, explaining that the Program “conjoin[ed] a tax” on out-of-state industry “and a subsidy” to in-state producers, thus “benefit[ing] in-state economic interests by burdening out-of-state competitors.” *Id.* at 199-200.

Here, the Oregon Program imposes a burden on regulated parties importing gasoline and diesel fuel into Oregon that is designed to promote the development of competing economic interests in Oregon by forcing burdened parties to purchase competing biofuels or credits from their direct competitors. Compl. ¶¶ 54-59, 64-66, ER:190-91, 192-93. Like the Massachusetts program in *West Lynn Creamery*, the Oregon Program, by design, imposes burdens on out-of-state industry and channels those payments to competing in-state businesses. All of the substantive burdens of the Program fall on out-of-state fuels, including imported gasoline and diesel fuel, *see id.* ¶¶ 62-64, ER:192; in contrast, in-state producers of fuels face no corresponding burdens, but can further benefit by selling “credits” at the expense of regulated parties that import competing gasoline and diesel fuel, *id.* ¶¶ 65-68, ER:193.

2. The District Court Misapprehended Governing Case Law.

The district court’s reasons for dismissing the Complaint do not withstand scrutiny.

First, the district court held that whether the Program discriminates against interstate commerce is controlled by this Court’s decision in *Rocky Mountain*, 730 F.3d 1070. *See* Order at 11, 14-16, ER:13, 16-18. But *Rocky Mountain*’s decision addressing the California LCFS with regard to gasoline and diesel fuel was based on the fact that, while the California LCFS favored an important variety of in-state petroleum, it disfavored other varieties of petroleum produced in California. *See* 730 F.3d at 1099-1100. The *Rocky Mountain* Court stated that this “burden on ‘major in-state interests ... is a powerful safeguard against legislative abuse’” and distinguished the case from one in which a state “chose to support a uniquely local industry at the expense of one in which it held no particular advantage.” *Id.*

Here, Oregon *has* chosen to benefit its own “uniquely local industry”—ethanol and other local fuels produced in Oregon—at the expense of importers of gasoline and diesel fuels which are produced outside Oregon and in which Oregon emphatically holds “no particular advantage.” *Id.*; *see also* Order at 15, ER:17 (“[I]t is undisputed that Oregon does not produce any petroleum in-state”). As a result, the “burden on major in-state interests,” which the *Rocky Mountain* Court concluded was a “powerful safeguard against legislative abuse,” 730 F.3d at 1099, is absent from the Oregon Program’s treatment of gasoline and diesel fuels.¹⁴ To

¹⁴ Furthermore, this Court’s decision in *Rocky Mountain* did not address whether California’s LCFS discriminated against out-of-state petroleum in favor of in-state ethanol, as the Oregon Program does. *See* 730 F.3d at 1097.

the contrary, Oregon's choice to single out an industry entirely absent from the state for disfavored treatment further supports Plaintiffs' claims that the Program discriminates against interstate commerce. *See id.* at 1099-1100.

For this reason, the district court likewise was mistaken in concluding that *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), supports the view that the Oregon Program does not discriminate against petroleum-based fuels because Oregon produces no petroleum. *See Order* at 15, ER:17. The Court in *Exxon* held that a statute unfavorable to out-of-state refiners was not discriminatory because no in-state refiners competed with the out-of-state refiners that challenged the statute. 437 U.S. at 125-26. The Supreme Court expressly distinguished the scenario in *Exxon* from situations in which competing "local producers and refiners" are favored. *Id.* at 125. Unlike in *Exxon*, Oregon *does* have a local biofuel industry that competes with imported gasoline and diesel fuel. The Oregon Program treats all of these competing transportation fuels as substitutes (e.g., "ethanol" as a "gasoline substitute"), and, in doing so, favors in-state biofuels over imported gasoline and diesel fuel as against the competing out-of-state industry. OAR § 340-253-0040(12) (defining "clean fuel standard"), -0040(30) (defining "gasoline substitute").

Second, the court held that Plaintiffs failed to plead that out-of-state petroleum-based fuels and in-state ethanol are "similarly situated" for purposes of

comparison under the Commerce Clause. Order at 12-13, ER:14-15. That is incorrect. The test for whether products are similarly situated is whether the “products compete against each other in a single market.” *Rocky Mountain*, 730 F.3d at 1088; *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300-01 (1997) (same). The Complaint properly alleges that petroleum-based fuels and biofuels such as ethanol compete with each other in the market for transportation fuels.

Plaintiffs expressly pled that “[t]he Oregon Program requires importers and out-of-state refiners of gasoline and diesel fuel to subsidize the development of a transportation fuel industry in Oregon and is designed to displace imported fuels from petroleum sources.” Compl. ¶ 58, ER:191; *see also id.* ¶ 109, ER:202 (“the Oregon Program discourages the use of fuels produced outside of Oregon and encourages the production of transportation fuels in Oregon”). Plaintiffs likewise explained that the Program was designed to channel “a portion of the billions of dollars that Oregonians send out of the state every year to purchase diesel and gasoline” to Oregon’s “home-grown [biofuels] industry,” *id.* ¶ 76, ER:195; *see also id.* ¶¶ 77-79, ER:196-97, and recounted DEQ’s analysis that, under the Program, “lower carbon fuels [would] replace gasoline and diesel,” *id.* ¶ 82, ER:197; *see also* ¶¶ 83-84, ER:197-98.¹⁵ These allegations plead that imported

¹⁵ *See also* Compl. ¶ 66, ER:193 (“The Oregon Program benefits in-state producers of transportation fuels, including biofuels (and the feedstock growers who supply the in-state biofuels producers) at the expense of petroleum refiners. ...”).

gasoline, diesel, and ethanol compete in the same market and are thus similarly situated for constitutional purposes.¹⁶

Indeed, the allegations of the Complaint reflect that the Oregon Program's very foundation is competition between Oregon biofuels and imported gasoline and diesel. *See id.* ¶¶ 109-111, ER:202. The Oregon statute authorizing the Program permits DEQ to set carbon intensity values for biofuels if they are "used as substitutes for gasoline or diesel." Or. 2009 Statutes ch. 754 § 6(2)(b)(C). During the rulemaking process, DEQ repeatedly referred to ethanol and other biofuels as a substitute for gasoline. Compl. ¶¶ 58, 82, 84, ER:191, 197-98, Substitution of biofuels for gasoline is one of the Program's compliance mechanisms, *id.* ¶¶ 54-59, 190-91, which DEQ predicted would lead to "[i]ncreased use of clean fuels," which will in turn "displace fuels produced from petroleum sources," *id.* ¶ 58, ER:191.

Third, the district court held that the Oregon Program is not discriminatory because it "distinguishes among fuels based on lifecycle GHG emissions, not

¹⁶ The district court mistakenly suggested, Order at 13 n.10, ER:15, that Plaintiffs misquoted the Complaint's allegations that ethanol and petroleum-based fuels compete. *Compare* Compl. ¶ 58, ER:191 ("The Oregon Program requires importers and out-of-state refiners of gasoline and diesel fuel to subsidize the development of a transportation fuel industry in Oregon and is designed to displace imported fuels produced from petroleum sources."), *with* Opposition 17 n.9, ER:157 ("Plaintiffs allege that '[t]he Oregon Program . . . is designed to displace imported fuels produced from petroleum sources' and replace them with biofuels produced in Oregon.").

origin or destination” and, in fact, confers advantages on “twelve out-of-state ethanol pathways” rather than on Oregon’s own ethanol production alone. Order at 14, ER:16; *see also id.* (“that the Oregon Program assigns lower carbon-intensity values to in-state and out-of-state biofuels than to petroleum is not indicative of discrimination”). That too is mistaken. As explained in the Complaint, the Oregon Program’s assignment of carbon intensity values to transportation fuels is itself tied to the origin of imported gasoline and diesel fuel because carbon intensity is assigned based on where and how a transportation fuel is produced and transported in interstate commerce. *See* Compl. ¶ 43, ER:187; *id.* ¶ 88, ER:198 (Oregon Program classifies fuels by their “geographic origin”); *id.* ¶ 111, ER:202 (“This discrimination against petroleum-based fuels is directed entirely at [fuels] from other states and countries”).¹⁷

The district court’s holding also misconstrues the Supreme Court’s Commerce Clause jurisprudence. Under the Commerce Clause, the issue is whether the challenged state law imposes a “commercial disadvantage” on out-of-state industry. *New Energy*, 486 U.S. at 275. That the burden imposed by the Program on imported gasoline and diesel fuel might incidentally benefit other out-of-state fuel producers in addition to Oregon’s own ethanol producers may, at

¹⁷ Further, contrary to the district court’s assertion, Order at 14, ER:16, the Oregon Program expressly discriminates based upon a fuel’s “destination” by exempting from its scope “fuels that are exported for use outside of Oregon.” Compl. ¶ 49, ER:189 (quoting OAR § 340-253-0250(2)(a)(I)).

most, “merely reduce[] the scope of the discrimination.” *Fort Gratiot*, 504 U.S. at 363. For imported gasoline and diesel, however, “the discriminatory [disadvantage] remain[s] in place.” *Id.*

The Supreme Court has recognized that benefits to industries in other states do not shield a discriminatory state law from the Commerce Clause. For instance, in *Hunt*, 432 U.S. 333, North Carolina enacted a statute forbidding containers of apples to bear any grade but the USDA grade, thus disadvantaging the Washington apple industry, which had established its own grading system. *Id.* at 336-38. The North Carolina statute conferred an advantage on apples from any state that lacked its own grading system—which included North Carolina and roughly half the states that shipped apples there. *See id.* at 349, 351. The Supreme Court struck down the statute as violating the Commerce Clause, notwithstanding the benefits to other states. *Id.* at 353. Likewise, the Ohio statute in *New Energy*, 486 U.S. 269, benefited in-state industry and also some out-of-state industry. *Id.* at 274. Ohio argued that the availability of beneficial treatment to out-of-state industry shielded its law from challenge under the Commerce Clause, but the Supreme Court disagreed and struck down the statute. *Id.* And in *Fort Gratiot*, 504 U.S. 353, the Supreme Court struck down a Michigan statute barring importation into a Michigan county of waste generated in other states (and other Michigan counties), unless the county expressly authorized importation of the waste. *See id.* at 357.

The Supreme Court explained that “the fact that the Michigan statute allows individual counties to accept solid waste from out of state [did not] qualify its discriminatory character,” because the statute still discriminated against waste that would have been imported into counties that failed to authorize importation. *Id.* at 363.

The district court was mistaken in its conclusion that the fact that the Oregon Program could benefit parties from other states immunizes it from Commerce Clause review. In *Hunt, New Energy, and Fort Gratiot*, the state laws at issue conferred benefits on industries in other states in addition to industries in the enacting states, but the Supreme Court nevertheless found them discriminatory under the Commerce Clause. So too, here: That the Oregon Program does not discriminate against all imported transportation fuels does not insulate from challenge whether the Oregon Program imposes a “commercial disadvantage” on the principal source of transportation fuels in Oregon: imported gasoline and diesel fuel.¹⁸ The Program’s potential benefits to entities from other states merely “reduce[] the scope of the discrimination,” *Fort Gratiot*, 504 U.S. at 363, but do not affect the allegations that the Program discriminates against imported gasoline and diesel fuel.¹⁹

¹⁸ See Plaintiffs’ Mot. for Judicial Notice Ex. C 43.

¹⁹ Under the Program as amended in December 2015, gasoline, which Oregon does not produce, has a carbon intensity value more than 50% higher than the value

Fourth, the district court also erred when it upheld the Oregon Program on the basis that its stated “purpose and design ... are nondiscriminatory on their face.” Order at 18, ER:20. In assessing a claim of discrimination under the Commerce Clause, a court “is not bound by the [n]ame, description or characterization given it by the legislature ... of the State.” *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (alteration in original; internal quotation marks omitted); *see Rocky Mountain*, 730 F.3d at 1098 (same). Here, the allegations of the Complaint chronicle that the Oregon Program was viewed by the governor, state legislators, and the agency responsible for its design as a means for keeping in Oregon billions of dollars that otherwise would be spent on transportation fuel imports into Oregon, thus allowing Oregon to compete in the market for transportation fuels in Oregon.²⁰ *E.g.*, Compl. ¶¶ 71-84, ER:194-98. Those well-pleaded allegations are accepted as true and cannot be rejected at the pleading

assigned to ethanol produced in Oregon. Plaintiffs’ Mot. for Judicial Notice Ex. A tbl.3. Ethanol from only one location—Brazil—was assigned a lower carbon intensity value than Oregon ethanol. *See id.* The Oregon Program’s favorable treatment of ethanol *from a single foreign country* cannot insulate an otherwise discriminatory regulation. Such a conclusion would enable any State to discriminate against its principal out-of-state competitors by allowing in-state competitors to share advantageous treatment with a single competitor from an out-of-state jurisdiction.

²⁰ The district court’s conclusion that these statements simply showed “‘predictable concern’ from state politicians for their own residents,” Order at 19, ER:21, fails to “draw all reasonable inferences” in Plaintiffs’ favor. *See Retail Prop. Trust*, 768 F.3d at 945.

stage as being “provided out of context.” Order at 18, ER:20.²¹ Nor can a discriminatory purpose be immunized by statements insisting that the Oregon Program also would serve environmental goals. *See, e.g., City of Phila. v. New Jersey*, 437 U.S. 617, 626–27 (1978).²²

Finally, the district court ignored the discrimination evident in the Oregon Program based on the assertion that the Program “applies evenhandedly.” Order 18-19, ER:20-21. That is mistaken. Courts strike down laws that purport to apply “evenhandedly” but, when viewed in the appropriate context, reflect a discriminatory design. For example, in *Hunt*, the Supreme Court struck down a North Carolina statute that applied the same labeling standard to in-state and out-of-state entities. 432 U.S. at 335. The Court ruled that this seemingly evenhanded statute was discriminatory because it burdened Washington apple growers by removing the Washington grading system from the North Carolina market. *Id.* at 348-51. Here, too, the Oregon Program imposes a discriminatory burden on

²¹ Nor can these statements be ignored based on this Court’s assessment in *Rocky Mountain* of statements made by regulators from California in connection with a separate program in resolving a motion for summary judgment. Order at 19-20, ER:21-22.

²² The district court rejected Plaintiffs’ claims on the basis that to establish a discriminatory effect, Plaintiffs must show more than “a commercial disadvantage” to out-of-state industry. Order at 20, ER:22. But, as the Supreme Court has explained, a law is discriminatory when it “place[s] at a substantial commercial disadvantage” an out-of-state product. *New Energy*, 486 U.S. at 275. In any event, the Complaint pled findings by DEQ itself that the Program would result in “importing less petroleum fuel.” Compl. ¶ 82, ER:197; *see also id.* ¶¶ 83-84, ER:197-98; ER:53.

gasoline and diesel imports based on a standard that looks to where the fuels were produced and how they were transported in interstate and foreign commerce. Compl. ¶¶ 43, 52, 85-90, 121-27, ER:187, 190, 198-99, 203-04. As with the labeling obligation that unilaterally harmed Washington apple-growers in *Hunt*, 432 U.S. at 348-51, the district court here acknowledged that the burden imposed on gasoline and diesel fuels also was unilateral because “it is undisputed that Oregon does not produce any petroleum in-state,” Order at 15, ER:17.²³

C. The Oregon Program Discriminates in Its Treatment of Out-of-State Ethanol.

1. The Oregon Program Benefits Oregon Ethanol at the Expense of Midwest Ethanol.

The Oregon Program also discriminates against out-of-state ethanol by assigning a higher carbon intensity value to Midwest ethanol than to ethanol produced in Oregon, thus placing Midwest ethanol at a “commercial disadvantage.” *New Energy*, 486 U.S. at 275; see Compl. ¶¶ 69-70, 112-14,

²³ The district court ruled that *Hunt* was distinguishable because “plaintiffs here identify no competitive and economic advantages they earned and that the Oregon program eliminates.” Order at 17, ER:19. That is wrong. The Complaint alleges that the Oregon Program is designed to “impose additional costs on out-of-state refiners,” Compl. ¶ 59, ER:191, while competing biofuel producers from Oregon face no such costs and can sell “credits” that must be purchased by importers of gasoline and diesel fuel, *id.* ¶¶ 63-64, ER:192. As the Supreme Court has explained, a discriminatory burden violates the Commerce Clause “by handicapping out-of-state competitors, thus artificially encouraging in-state production.” *W. Lynn Creamery*, 512 U.S. at 193.

ER:193-94, 202-03. Favoritism for “home-grown industry,” Compl. ¶ 76, ER:195, violates the Commerce Clause.

As originally enacted, the Oregon Program assigned higher, less favorable carbon intensity scores to ethanol produced in the Midwest and lower, more valuable scores to Oregon ethanol. *See id.* ¶¶ 69-70, 112-14, ER:193-94, 202-03.

As recently amended in 2015, the Oregon Program continues to discriminate against Midwest ethanol.

Fuel	Pathway Description	Carbon Intensity Values (gCo2e/MJ) ²⁴		
		Direct Lifecycle Emissions	Land Use or Other Indirect Effect	Total Emissions
Ethanol from Corn	Midwest average – MW corn; Dry Mill; NG; MW production	62.29	7.60	69.89
	Oregon average – MW corn; Dry Mill; NG; Oregon production	57.08	7.60	64.68

Assigning Midwest ethanol a higher carbon intensity score than Oregon ethanol confers a commercial advantage on Oregon ethanol because fuels with lower carbon intensity scores make compliance with the Oregon Program easier

²⁴ *See* Plaintiffs’ Mot. for Judicial Notice Ex. A tbl.3.

and hence are more valuable. *Id.* ¶¶ 69-70, ER:193-94. “[E]thanol from every source has ‘identical physical and chemical properties.’” *Rocky Mountain*, 730 F.3d at 1088. Furthermore, the Midwest and Oregon ethanols described in the Lookup Table are both made from corn, and both are produced using the dry mill method fired by natural gas. Compl. ¶ 70, ER:193-94. On the face of the regulation, ethanol from the Midwest that is physically identical to Oregon ethanol is nonetheless assigned a higher carbon intensity score. A statute that confers beneficial treatment on an in-state product at the expense of out-of-state products is “protectionist and discriminatory” within the meaning of the Commerce Clause. *Wyoming*, 502 U.S. at 455 (invalidating a statute that created a preference for Oklahoma coal); *see also New Energy*, 486 U.S. at 275 (striking down law that “impose[d] an economic disadvantage upon out-of-state sellers”).

2. The Decision in *Rocky Mountain* Is Flawed.

The district court ruled that *Rocky Mountain* disposed of the claim that the Program violates the Commerce Clause by discriminating against out-of-state ethanol. Order at 11, ER:13. Plaintiffs respectfully submit that *Rocky Mountain’s* holding that the California LCFS does not discriminate on its face against interstate commerce in its treatment of ethanol contradicts Supreme Court precedent. In particular, *Rocky Mountain* held that a state statute that gives unfavorable treatment to out-of-state ethanol *explicitly based on its place of origin* nevertheless

does not discriminate on its face for purposes of the Commerce Clause. *Rocky Mountain*, 730 F.3d at 1089-90. But, under Supreme Court case law, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter,” and “the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.” *Or. Waste Sys.*, 511 U.S. at 99-100.

Rocky Mountain avoided this case law and concluded that “a regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally.” 730 F.3d at 1089 (citing *City of Phila.*, 437 U.S. at 627). But *Philadelphia* and subsequent cases stand for the unremarkable proposition that states may not discriminate “against articles of commerce coming from outside the State unless there is some reason, *apart from their origin*, to treat them differently.” *City of Phila.*, 437 U.S. at 626-27 (emphasis added); *see also, e.g., Or. Waste Sys.*, 511 U.S. at 101 n.5. Here, the discrimination is tied to the product’s origin, and the asserted justification for a law does not bear on whether it is discriminatory. *Or. Waste Sys.*, 511 U.S. at 101 n.5. Rather, such a justification must be assessed under “strict scrutiny.” *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 516 (9th Cir.) (mem.) (M. Smith, J., joined by O’Scannlain, Callahan, Bea, Ikuta, N.R. Smith, and Murguia in relevant part, dissenting from denial of rehearing en banc), *cert. denied*, 134 S. Ct. 2875 (2014).

The *Rocky Mountain* majority characterized Supreme Court precedent on this point as “archaic formalism.” 730 F.3d at 1107. Respectfully, the Supreme Court’s “decisions remain binding precedent until [that Court] see[s] fit to reconsider them.” *Hohn v. United States*, 524 U.S. 236, 252-53 (1998). Here, the Oregon Program assigns a commercial disadvantage to Midwest ethanol as compared to Oregon ethanol based on criteria tied to the origin of a fuel. Compl. ¶¶ 69-70, 112-14, ER:193-94, 202-03. For the foregoing reasons, *Rocky Mountain*’s holding that a state law that imposes unfavorable treatment on out-of-state industry on the basis of origin nevertheless is not discriminatory should be reconsidered.²⁵

In all events, *Rocky Mountain* declined to resolve whether the California LCFS was discriminatory in its purpose or effect with respect to its treatment of Midwest ethanol. 730 F.3d at 1107. As such, *Rocky Mountain* does not support the district court’s dismissal of the totality of the discrimination claim with respect to the Oregon Program’s treatment of Midwest ethanol.

²⁵ Given the similarities between the Oregon and California LCFS programs, Plaintiffs recognize that *Rocky Mountain* controls this panel’s adjudication of whether the Oregon Program discriminates on its face against Midwest ethanol and therefore respectfully present this argument to preserve it for further review by the Ninth Circuit sitting en banc or by the Supreme Court.

II. The Oregon Program Violates the Constitution By Regulating Economic Conduct Occurring Wholly Outside Oregon.

The Oregon Program’s adoption of a life-cycle analysis to regulate fuel imports violates the Constitution in another way: It reaches beyond Oregon’s borders to control economic activity outside those borders. Indeed, the entire point of the Program’s “life-cycle” analysis, as alleged in the Complaint, is to reduce emissions from out-of-state activities associated with an imported fuel’s production and transportation—activities that have no effect on the fuel’s composition or the amount of greenhouse gases it emits in Oregon. Compl. ¶¶ 85-90, 120-30, ER:198-99, 203-04. Such extraterritorial regulation is inconsistent with the federal structure of the Constitution and violates the Commerce Clause.

A. States May Not Attach Restrictions to Exports or Imports to Control Economic Activity in Other States.

The “principles of interstate federalism embodied in the Constitution” forbid a state to regulate conduct occurring solely in its sister states. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). “Preservation of the States as independent political entities” was “the price of union,” and the states retain “residuary ... sovereignty” to regulate their affairs. *Printz v. United States*, 521 U.S. 898, 919 (1997). Because our constitutional system is based on a federal union of 50 sovereign states whose spheres of authority are defined by territorial boundaries, the sovereignty of each State places a reciprocal “limitation on the

sovereignty of all of its sister States.” *Woodson*, 444 U.S. at 293; *see also Brown v. Estate of Fletcher*, 210 U.S. 82, 89 (1908) (“The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.”). Because the States in our federal system are coequal sovereigns, “a state is without power to exercise ‘extra territorial jurisdiction,’ that is, to regulate and control activities wholly beyond its boundaries.” *Watson v. Emp’rs Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954).

As a result, “[n]o State can legislate except with reference to its own jurisdiction.” *Bonaparte v. Appeal Tax Ct. of Balt.*, 104 U.S. 592, 594 (1881).²⁶

When states “pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict ... which renders the exercise of such power incompatible with the rights of other States, and with the constitution of the United States.” *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 369 (1827). This principle derives from the “historic tradition that all the States enjoy equal sovereignty.” *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2621 (2013).

²⁶ *See* Joseph Story, *Commentaries on the Conflicts of Law* § 20 (1834) (“[N]o state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories.”).

The Supreme Court has repeatedly—and in a variety of contexts—explained that states lack authority to regulate conduct outside their borders. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court explained that “a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.” *Id.* at 572. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court ruled that Virginia’s “police powers do not reach” “information about activities outside Virginia’s borders.” *Id.* at 827-28. And, in *Hanson v. Denckla*, 357 U.S. 235 (1958), the Court highlighted the “territorial limitations on the power of the respective States.” *Id.* at 251.²⁷

Likewise, the Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). Indeed, the Supreme Court has expressly held that states “may not attach restrictions to exports or imports in order to control commerce in other States,” even if the enacting state believes the restrictions are necessary to counteract out-of-state effects that are “harmful to the environment.” *Carbone*, 511 U.S. at 393. The “critical inquiry is whether the practical effect of the

²⁷ See also *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 440 (1943) (“Texas is without power to give extraterritorial effect to its laws.”); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York [A]ll the States are restricted within the orbits of their lawful authority”).

regulation is to control conduct beyond the boundaries of the State.” *Healy*, 491 U.S. at 336 (footnote omitted). If a law regulates extraterritorial commerce, “it violates the Commerce Clause per se, and [the Court] must strike it down without further inquiry.” *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993). This ban reflects “the Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres.” *Healy*, 491 U.S. at 335-36.

B. The Oregon Program Violates the Federal Structure of the Constitution by Regulating Activities Occurring Wholly Outside Oregon.

The Oregon Program, as detailed in the Complaint, impermissibly regulates and controls conduct that occurs solely in other states. By penalizing imported fuels based solely on how they are produced and transported in other states and countries, the Program “regulate[s] and control[s] activities wholly beyond its boundaries,” *Watson*, 348 U.S. at 70, thus transgressing the “limitation on [its] sovereignty [put in place by] all of its sister States,” *Woodson*, 444 U.S. at 293.

As the Complaint explains, the Oregon Program assigns carbon-intensity values to fuels based on out-of-state activities, including “feedstock generation or extraction, production, distribution and combustion of the fuel by the consumer,” Compl. ¶ 43, ER:187, and requires them to reduce the average carbon intensity of

their fuels beginning this year. *Id.* ¶ 50, ER:189. Under that life-cycle analysis, the Oregon Program classifies fuels based on their “fuel pathway” and regulates them based on the fuel’s geographic origin, the manufacturing process used to produce the fuel, the power sources used to produce the fuel, and the transportation of the fuel to market from outside Oregon. *Id.* ¶ 88, ER:198. Thus, the Oregon Program regulates the greenhouse gas emissions associated with the extraction, production, and transportation of fuels outside Oregon. *Id.* ¶ 89, ER:198-99. Indeed, because Oregon imports all its gasoline and diesel, the Oregon Program’s regulation of the manner in which these fuels are produced and transported must, by necessity, regulate commercial activities that occur outside Oregon. *Id.* (citing DEQ, *Clean Fuels Program Phase II Rulemaking* 10 (Jan. 7-8, 2015), ER:54, and DEQ, *Oregon Low Carbon Fuel Standards: Advisory Committee Process and Program Design* (Jan. 25, 2011)); Plaintiffs’ Mot. for Judicial Notice Ex. C-1 41.²⁸

The Oregon Program is different from state consumer safety programs, which control how a product operates in a state. For example, Midwest ethanol

²⁸ Indeed, the Oregon Program’s ability to reduce global greenhouse gas emissions *depends* on controlling how fuel is produced and distributed outside Oregon. According to EPA, greenhouse gases are “globally well mixed throughout the entire atmosphere,” meaning that greenhouse gas emissions from California, Illinois, and China affect Oregon just as much as emissions from Oregon. 74 Fed. Reg. 66496, 66517 (December 15, 2009). As a result, to reduce global greenhouse gas emissions, the Oregon Program must ensure that the gasoline that otherwise would have been shipped to Oregon is not “shuffled” to some other location. *See* Plaintiffs’ Mot. for Judicial Notice Ex. C-2 52 (“Crude shuffling raises greenhouse gas emissions in some other jurisdiction and that is what DEQ is trying to avoid.”).

and Oregon ethanol are physically and chemically identical, *see* Compl. ¶ 43, ER:187, and therefore operate precisely alike. Rather than regulating in-state operation of the product, the Oregon Program regulates the production and transport of transportation fuels in interstate and foreign commerce to control economic activity occurring wholly outside of Oregon.

By doing so, the Oregon Program opens the door to unprecedented state regulation of extraterritorial activity. The life-cycle analysis reflected in the Oregon program is not limited to transportation fuels. Because “[m]any industrial processes emit CO₂,”²⁹ many imported products could be assigned a carbon-intensity score based on the emissions from their production and transportation. By applying a life-cycle analysis to interstate and foreign commerce, Oregon can condition entry to its market on the satisfaction of regulations directing the manner in which products are manufactured and transported wholly outside of Oregon.³⁰

²⁹ EPA, *Overview of Greenhouse Gases*, <http://www3.epa.gov/climatechange/ghgemissions/gases/co2.html> (last updated Dec. 11, 2015).

³⁰ Nor does the logic of the Program’s justification stop at carbon intensity. If the Program were upheld, Oregon could effectively regulate any aspect of the way in which imported goods are produced and transported, even though these out-of-state activities do not affect how the goods operate in-state, and even though the state allows commerce in identical goods that are produced and transported in a manner Oregon favors. Allowing each state such control over manufacturing in its sister states would eliminate the Constitution’s federal structure that protects the authority of each state within its own geographic sphere.

The district court reasoned that the Oregon Program did not violate principles of interstate federalism because this Court held in *Rocky Mountain* that the California LCFS did not violate the Commerce Clause. *See* Order at 22-24, ER:24-26. But in *Rocky Mountain*, this Court never addressed issues of structural federalism, *see generally* 730 F.3d 1070, and the Court’s decision interpreting the Commerce Clause does not dispose of the Complaint’s structural federalism claim.

Finally, Plaintiffs again respectfully disagree with the *Rocky Mountain* Court’s determination that “the analogous [California] LCFS ‘does not control conduct wholly outside the state,’ and is not ‘an impermissible extraterritorial regulation.’” Order at 23, ER:25 (quoting *Rocky Mountain*, 730 F.3d at 1103-07). The Oregon Program imposes a higher carbon intensity value—and thus a significant regulatory burden—based on how out-of-state gasoline and diesel fuel and Midwest ethanol are produced and transported in interstate and foreign commerce outside of Oregon. Compl. ¶ 89, ER:198. It does so in an effort to control economic activity occurring outside Oregon and thus forces entities from outside Oregon to modify the manner in which they manufacture and transport fuels to market. *Id.* ¶¶ 85-90, ER:198-99.

C. The Oregon Program Violates the Commerce Clause by Regulating Extraterritorially.

As explained in the Complaint, the Oregon Program also violates the Commerce Clause because it “appli[es] ... to commerce that takes place wholly outside of the State’s borders.” *Healy*, 491 U.S. at 336.

The Oregon Program is like the New York law which the Supreme Court struck down in *Carbone*. The ordinance in *Carbone* required that all waste be processed in a local transfer station before leaving the municipality; one potential justification was that the ordinance would “steer solid waste away from out-of-town disposal sites that ... might [be] deem[ed] harmful to the environment.” 511 U.S. at 393. The Supreme Court, reiterating that “[s]tates and localities may not attach restrictions to exports or imports in order to control commerce in other States,” held that the ordinance impermissibly “extend[ed] the town’s police power beyond its jurisdictional bounds.” *Id.* Like the ordinance in *Carbone*, the Oregon Program attaches “restrictions to exports or imports,” *id.*, to prevent out-of-state conduct it seeks to discourage. The Commerce Clause prohibits such an “exten[sion of] the [state’s] police power,” *id.*, to its sister states.

The district court relied on *Rocky Mountain* to reject Plaintiffs’ extraterritoriality claim under the Commerce Clause. Order at 22-23, ER:24-25. While Plaintiffs recognize this panel is bound by this Court’s previous decision that California’s LCFS is not a regulation of out-of-state economic activity,

Plaintiffs respectfully submit that the panel decision should be reconsidered. *See Rocky Mountain*, 740 F.3d at 517 (M. Smith, J., dissenting from denial of rehearing en banc) (asserting that panel decision “disregards controlling precedent and departs from the holdings of the Supreme Court”).

First, in *Rocky Mountain*, this Court characterized the LCFS as merely a system of “incentives” that “might encourage ethanol producers to adopt less carbon-intensive policies,” rather than a “control” or a “mandate” over out-of-state activity. *Rocky Mountain*, 730 F.3d at 1103. But, under the Commerce Clause, the “critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” *Healy*, 491 U.S. at 336. Here, the Oregon Program is designed to control interstate and foreign commerce outside of Oregon. Compl. ¶¶ 89-90, ER:198-99.

Second, this Court concluded in *Rocky Mountain* that the LCFS “regulates only the California market” because it covers only fuel ultimately sold in California and therefore applies only to firms that “wish to gain market share in California.” *Rocky Mountain*, 730 F.3d at 1101. That line of reasoning contradicts the Supreme Court’s holding that a state’s authority over in-state transactions does not give it authority over the preceding chain of commerce. Indeed, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court explained that “[t]he mere fact that the effects of [a State law] are

triggered only by sales of [a commodity] within the State ... does not validate the law if it regulates the out-of-state transactions of [producers] who sell in-state.” *Id.* at 580.

This Court, sitting en banc, recently struck down on Commerce Clause grounds a state statute similar to both the Oregon Program and the California LCFS. A California statute required royalty payments to artists after the sale of their art whenever “the seller resides in California,” even if the sales occurred outside California. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir 2015) (en banc). The Court held that the royalty requirement, as applied to out-of-state sales, violated the Commerce Clause’s prohibition on extraterritorial regulation because it “facially regulates a commercial transaction that ‘takes place wholly outside of the State’s borders.’” *Id.* at 1323.

In *Christies*, a state regulated out-of-state sales that were connected to the state by the fact that one party to the sale resided there. Likewise, the Oregon Program regulates out-of-state conduct—production of fuel feedstocks and fuel and transport of fuel—that is related to Oregon because the finished fuel’s final destination is Oregon. In neither instance should this in-state connection give the state power to regulate the entire chain of interstate or foreign commerce. The Court in *Christies* distinguished *Rocky Mountain* on the grounds that the California LCFS regulates “in-state conduct,” *id.* at 1324, but, as explained above, the

conduct the Program seeks to control—the extraction, production, and transportation of imported transportation fuels—occurs outside Oregon.³¹

III. The Federal Clean Air Act Expressly Preempts the Oregon Program.

The Oregon Program is expressly preempted by the federal Clean Air Act because EPA has concluded that regulation of methane is unnecessary under Section 211(c) of the Clean Air Act, and the Oregon Program is a fuel standard that regulates methane emissions.

A. The Clean Air Act Preempts State Fuel Standards that Regulate Emissions EPA Has Found Unnecessary to Regulate.

When presented with an express preemption clause, courts “focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.” *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1977 (2011). Section 211 of the Clean Air Act regulates motor vehicle fuels in the United States. A cornerstone of this program is EPA’s power to prescribe regulations for fuels. 42 U.S.C. § 7545(c). Congress gave EPA broad powers to “control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle . . . if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution ... that

³¹ In light of the decision in *Rocky Mountain*, Plaintiffs respectfully preserve for further review their position that the Oregon Program impermissibly regulates extraterritorially under the Commerce Clause.

may reasonably be anticipated to endanger the public health or welfare.” *Id.*

§ 7545(c)(1).

Congress enacted an express preemption provision to ensure that, whenever EPA issues a fuel standard, that standard will apply uniformly across the United States. Section 211(c)(4) provides as follows:

(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 under [Section 211(c)(1)] is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under [Section 211(c)(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.

The two subparts of Section 211(c)(4) fit together to ensure that EPA can set national fuel standards. As applied here, Section 211(c)(4)(A)(ii) provides that, if EPA sets a control for a particular characteristic of a fuel, states may not set a different control. Section 211(c)(4)(A)(i) covers the other possible scenario by ensuring that, if EPA decides that a particular fuel characteristic needs no control, EPA’s decision preempts state decisions to control that characteristic. Congress’s grant of such extensive preemptive authority to EPA makes good sense: As EPA has explained, “gasoline produced in one area is often distributed to other areas.

The national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an inefficient patchwork of potentially conflicting regulations.” 59 Fed. Reg. at 7809.

Section 211(c)(4)(A)(i)’s requirements are straightforward: Whenever EPA finds that no control or prohibition of a characteristic or component of fuel is needed and publishes that finding in the Federal Register, then any state law that is a “control or prohibition respecting [that] characteristic or component” with the purpose of “motor vehicle emission control” is preempted. *Id.* § 7545(c)(4)(A).

B. The Oregon Program Regulates Methane, Which EPA Found Unnecessary To Regulate.

The Program regulates methane emissions of motor vehicle fuels. *See* Compl. ¶¶ 30, 41-42, 53-54, 94, 133, ER:184, 186-87, 190, 199-200, 205. Specifically, the Program assigns carbon intensity values and imposes burdens on imported fuels based, in part, on methane emissions associated with these transportation fuels. *Id.* ¶¶ 30, 40-42, 57, ER:184, 186-87, 191. The Program is also a “control or prohibition” “for purposes of motor vehicle emission control” within the meaning of the preemption statute: The Ninth Circuit has held that the analogous California LCFS is “a control respecting a fuel or fuel additive and was enacted for the purpose of emissions control.” *Rocky Mountain*, 730 F.3d at

1106.³² The Oregon Program tracks the California LCFS for preemption purposes; under *Rocky Mountain*, it therefore constitutes a “control or prohibition respecting [a] characteristic or component of a fuel or fuel additive” under Section 211(c)(4)(A).³³

The Oregon Program is expressly preempted because EPA has “found that no control or prohibition of [methane] is necessary” and “published [this] finding in the Federal Register.” Compl. ¶ 92, ER:199. As set forth in the Complaint, *id.* ¶¶ 95-98, ER:200-01, EPA has issued the RFG Rule, which prescribes standards for reformulated gasoline emissions. 59 Fed. Reg. 7716. EPA issued the RFG Rule “under the authority of sections 211(k) and (c).” *Id.* at 7809. EPA adopted the RFG Rule as a fuel standard under Section 211(c) so that it could invoke Section 211(c)’s preemption provision. *See id.*

EPA explained that (1) the RFG regulation would “affect virtually all of the gasoline sold in the United States,” (2) “[t]he national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an

³² In *Rocky Mountain* this Court concluded that the California LCFS fell within the scope of Section 211(c)(4)(B), the sole purpose of which is to provide a unique exception for California to the preemptive reach of Section 211(c)(4)(A). *See* 730 F.3d at 1106. This Court has held that Sections 211(c)(4)(A) and (B) “are precisely coextensive,” *Oxygenated Fuels Ass’n v. Davis*, 331 F.3d 665, 670 (9th Cir. 2003), so the California LCFS necessarily fell within the scope of Section 211(c)(4)(A) as well.

³³ Unlike the California LCFS, the Oregon Program is ineligible for the unique California exemption from preemption contained in Section 211(c)(4)(B).

inefficient patchwork of potentially conflicting regulations,” (3) it was “issuing [the RFG] rule under the authority of sections 211 (k) and (c),” and (4) that “under section 211(c)(4) . . . dissimilar State controls [would] be preempted.” *Id.* at 7809.

In the RFG Rule, EPA specified limits on emissions from reformulated gasoline, including VOCs, which are subject to emission limitations in Section 211(k)(2)(B). *Id.* at 7720. EPA expressly excluded methane from regulation as a VOC because methane’s “low reactivity” meant that it did not present the same ozone pollution risks as other chemicals. *Id.* at 7722-23. EPA thus determined *not* to regulate methane in the RFG Rule. *See id.* at 7720, 7722-23.

The Oregon Program is preempted because it is a fuel standard that regulates methane, even though EPA decided in the RFG Rule that methane need not be regulated under Section 211(c) and published that finding in the Federal Register. *Id.* at 7722-23. EPA’s action triggers Section 211(c)(4)’s preemptive effect. In publishing the RFG Rule, EPA expressly invoked its authority under Section 211(c) and the express preemption provision of Section 211(c)(4). *Id.* at 7809.

The district court ruled that Section 211(c)(4) did not preempt the Program because “the EPA determined only that methane was not an ozone-forming VOC under section 211(k) and therefore not subject to regulation under section 211(c)(1).” Order at 26, ER:28. That analysis overlooks that EPA also acted under Section 211(c), and the question under Section 211(c)(4) is simply *whether*

EPA has decided “that no control or prohibition of the characteristic or component . . . is necessary” under the federal fuel standard. 42 U.S.C. § 7545(c)(4)(A)(i). Here, acting under Section 211(c), EPA determined not to regulate methane. *See* 59 Fed. Reg. at 7722 (excluding methane from regulation). That decision triggers express preemption under Section 211(c)(4) to prevent “an inefficient patchwork of potentially conflicting regulations.” *Id.* at 7809.

The district court also stated that the Program is not preempted because the RFG Rule does not constitute “an affirmative, negative determination that no control or prohibition of methane is necessary.” Order at 28, ER:30. But the RFG Rule *does* “affirmative[ly],” *id.*, conclude that control of methane is unnecessary because of “its low reactivity,” 59 Fed. Reg. at 7722, and the basis for that determination was under not only Section 211(k) but also expressly under Section 211(c). Contrary to the district court’s suggestion, Order at 27-28, ER:29-30, federal agencies need not “recite . . . magic words” for their findings to be given effect. *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989). And, in any event, EPA expressly found that regulation of methane emissions was unnecessary and expressly invoked its preemptive authority under Section 211(c) of the Clean Air Act. *See* 59 Fed. Reg. at 7722-23, 7809.

Lastly, in a footnote, the district court observed that “even if the EPA had found it unnecessary to control emissions from [methane] in 1994, it subsequently

reversed course” in its 2009 Endangerment Finding. Order at 28 n.13, ER:30. The district court admitted that “the Endangerment Finding does not amend the” RFG Rule. *Id.* The Endangerment Finding has no bearing on whether regulation of methane “under [§211(c)] is necessary,” 42 U.S.C. § 7545(c)(4)(A)(i), because it was issued under Section 202, which governs *vehicle* standards—not Section 211(c), which governs *fuel* standards. *See* 74 Fed. Reg. 66496 (Dec. 15, 2009). This distinction is important. Because “[f]uels controls might ... lead to greater government involvement in the regulation of the manufacturing process than would be expected from vehicle controls,” 59 Fed. Reg. at 7751, Congress requires EPA to “consider[] ... other technologically or economically feasible means of achieving emission standards under section [202]” before deciding to issue a fuel standard under Section 211(c). 42 U.S.C. § 7545(c)(2)(A). Since the Endangerment Finding, EPA has regulated methane emissions under Section 202, *see, e.g.*, 75 Fed. Reg. 25324, 25398, 25421 (May 7, 2010), but has not amended the federal fuel standard to regulate methane under Section 211(c).

EPA’s decision not to regulate methane emissions under Section 211(c) expressly preempts Oregon’s attempt to regulate methane emissions under the Oregon Program.

CONCLUSION

For these reasons, this Court should reverse the decision of the district court dismissing Plaintiffs' claims against the Clean Fuel Program.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs hereby state that they do not know of any related cases pending in this Court.

Dated: February 1, 2016

Respectfully submitted,

/s/ Paul J. Zidlicky

Roger R. Martella, Jr.

Paul J. Zidlicky

Paul J. Ray

Sidley Austin LLP

1501 K Street, NW

Washington, D.C. 20005

Telephone: (202) 736-8000

Facsimile: (202) 736-8711

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,577 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Paul J. Zidlicky

Paul J. Zidlicky

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 1, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Paul J. Zidlicky

Paul J. Zidlicky

STATUTORY ADDENDUM

TABLE OF CONTENTS

42 U.S.C. § 7545	ADD-01
OR. ADMIN. R. § 340-253-0000 et seq. (Jan. 2015)	ADD-07

42 U.S.C. § 7545(c)

(c) Offending fuels and fuel additives; control; prohibition

(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

(2)

(A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 7521 of this title.

(B) No fuel or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (B) of paragraph (1) except after consideration of available scientific and economic data, including a cost benefit analysis comparing emission control devices or systems which are or will be in general use and require the proposed control or prohibition with emission control devices or systems which are or will be in general use and do not require the proposed control or prohibition. On request of a manufacturer of motor vehicles, motor vehicle engines, fuels, or fuel additives submitted within 10 days of notice of proposed rulemaking, the Administrator shall hold a public hearing and publish findings with respect to any matter he is required to consider under this subparagraph. Such findings shall be published at the time of promulgation of final regulations.

(C) No fuel or fuel additive may be prohibited by the Administrator under paragraph (1) unless he finds, and publishes such finding, that in his judgment such prohibition will not cause the use of any other fuel or fuel additive which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the fuel or fuel additive proposed to be prohibited.

(3)

(A) For the purpose of obtaining evidence and data to carry out paragraph (2), the Administrator may require the manufacturer of any motor vehicle or motor vehicle engine to furnish any information which has been developed concerning the emissions from motor vehicles resulting from the use of any fuel or fuel additive, or the effect of such use on the performance of any emission control device or system.

(B) In obtaining information under subparagraph (A), section 7607(a) of this title (relating to subpoenas) shall be applicable.

(4)

(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.

(B) Any State for which application of section 7543(a) of this title has at any time been waived under section 7543(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

(C)

- (i) A State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 7410 of this title so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements. The Administrator may find that a State control or prohibition is necessary to achieve that standard if no other measures that would bring about timely attainment exist, or if other measures exist and are technically possible to implement, but are unreasonable or impracticable. The Administrator may make a finding of necessity under this subparagraph even if the plan for the area does not contain an approved demonstration of timely attainment.
- (ii) The Administrator may temporarily waive a control or prohibition respecting the use of a fuel or fuel additive required or regulated by the Administrator pursuant to subsection (c), (h), (i), (k), or (m) of this section or prescribed in an applicable implementation plan under section 7410 of this title approved by the Administrator under clause (i) of this subparagraph if, after consultation with, and concurrence by, the Secretary of Energy, the Administrator determines that--
- (I) extreme and unusual fuel or fuel additive supply circumstances exist in a State or region of the Nation which prevent the distribution of an adequate supply of the fuel or fuel additive to consumers;
- (II) such extreme and unusual fuel and fuel additive supply circumstances are the result of a natural disaster, an Act of God, a pipeline or refinery equipment failure, or another event that could not reasonably have been foreseen or prevented and not the lack of prudent planning on the part of the suppliers of the fuel or fuel additive to such State or region; and
- (III) it is in the public interest to grant the waiver (for example, when a waiver is necessary to meet projected

temporary shortfalls in the supply of the fuel or fuel additive in a State or region of the Nation which cannot otherwise be compensated for).

- (iii)** If the Administrator makes the determinations required under clause (ii), such a temporary extreme and unusual fuel and fuel additive supply circumstances waiver shall be permitted only if--
 - (I)** the waiver applies to the smallest geographic area necessary to address the extreme and unusual fuel and fuel additive supply circumstances;
 - (II)** the waiver is effective for a period of 20 calendar days or, if the Administrator determines that a shorter waiver period is adequate, for the shortest practicable time period necessary to permit the correction of the extreme and unusual fuel and fuel additive supply circumstances and to mitigate impact on air quality;
 - (III)** the waiver permits a transitional period, the exact duration of which shall be determined by the Administrator (but which shall be for the shortest practicable period), after the termination of the temporary waiver to permit wholesalers and retailers to blend down their wholesale and retail inventory;
 - (IV)** the waiver applies to all persons in the motor fuel distribution system; and
 - (V)** the Administrator has given public notice to all parties in the motor fuel distribution system, and local and State regulators, in the State or region to be covered by the waiver.

The term “motor fuel distribution system” as used in this clause shall be defined by the Administrator through rulemaking.

- (iv)** Within 180 days of August 8, 2005, the Administrator shall promulgate regulations to implement clauses (ii) and (iii).
- (v)** Nothing in this subparagraph shall--
 - (I)** limit or otherwise affect the application of any other waiver authority of the Administrator pursuant to this

section or pursuant to a regulation promulgated pursuant to this section; and

- (II) subject any State or person to an enforcement action, penalties, or liability solely arising from actions taken pursuant to the issuance of a waiver under this subparagraph.

(v)¹

- (I) The Administrator shall have no authority, when considering a State implementation plan or a State implementation plan revision, to approve under this paragraph any fuel included in such plan or revision if the effect of such approval increases the total number of fuels approved under this paragraph as of September 1, 2004, in all State implementation plans.
- (II) The Administrator, in consultation with the Secretary of Energy, shall determine the total number of fuels approved under this paragraph as of September 1, 2004, in all State implementation plans and shall publish a list of such fuels, including the States and Petroleum Administration for Defense District in which they are used, in the Federal Register for public review and comment no later than 90 days after August 8, 2005.
- (III) The Administrator shall remove a fuel from the list published under subclause (II) if a fuel ceases to be included in a State implementation plan or if a fuel in a State implementation plan is identical to a Federal fuel formulation implemented by the Administrator, but the Administrator shall not reduce the total number of fuels authorized under the list published under subclause (II).
- (IV) Subclause (I) shall not limit the Administrator's authority to approve a control or prohibition respecting any new fuel under this paragraph in a State implementation plan or revision to a State implementation plan if such new fuel--

¹ So in original.

- (aa)** completely replaces a fuel on the list published under subclause (II); or
- (bb)** does not increase the total number of fuels on the list published under subclause (II) as of September 1, 2004.

In the event that the total number of fuels on the list published under subclause (II) at the time of the Administrator's consideration of a control or prohibition respecting a new fuel is lower than the total number of fuels on such list as of September 1, 2004, the Administrator may approve a control or prohibition respecting a new fuel under this subclause if the Administrator, after consultation with the Secretary of Energy, publishes in the Federal Register after notice and comment a finding that, in the Administrator's judgment, such control or prohibition respecting a new fuel will not cause fuel supply or distribution interruptions or have a significant adverse impact on fuel producibility in the affected area or contiguous areas.

- (V)** The Administrator shall have no authority under this paragraph, when considering any particular State's implementation plan or a revision to that State's implementation plan, to approve any fuel unless that fuel was, as of the date of such consideration, approved in at least one State implementation plan in the applicable Petroleum Administration for Defense District. However, the Administrator may approve as part of a State implementation plan or State implementation plan revision a fuel with a summertime Reid Vapor Pressure of 7.0 psi. In no event shall such approval by the Administrator cause an increase in the total number of fuels on the list published under subclause (II).
- (VI)** Nothing in this clause shall be construed to have any effect regarding any available authority of States to require the use of any fuel additive registered in accordance with subsection (b) of this section, including any fuel additive registered in accordance with subsection (b) of this section after August 8, 2005.

OREGON CLEAN FUELS PROGRAM

340-253-0000

Overview

(1) Context. The Oregon Legislature found that climate change poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon. Section 1, chapter 907, Oregon Laws 2007. 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 local governments, other states and the federal government.

(2) Purpose. The purpose of the Oregon Clean Fuels Program is 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. This reduction goal applies to the average of all transportation fuels used in Oregon, not to individual fuels. A fuel user does not violate the standard by possessing fuel that has higher carbon content than the clean fuel standard allows.

(3) Background. The 2009 Oregon Legislature adopted House Bill 2186 enacted as chapter 754 of Oregon Laws 2009. The law authorizes the Environmental Quality Commission to adopt low carbon fuel standards for gasoline, diesel fuel and fuels used as substitutes for gasoline or diesel fuel. Sections 6 to 9 of chapter 754, Oregon Laws 2009 is printed as a note following ORS 468A.270 in the 2011 Edition. OAR Division 253 of Chapter 340 implements section 6 of the law.

(4) Program Review. EQC expects DEQ to periodically review and assess the Oregon Clean Fuels Program and make recommendations to EQC for improvement. DEQ will conduct two periodic reviews between 2015 and 2025. Review and assessment may include:

- (a) The program's progress towards meeting its targets;
- (b) Adjustments to the compliance schedule, if needed;
- (c) The costs and benefits that complying with Clean Fuels Program rules cause for regulated parties and credit generators;

- (d) The costs and benefits that complying with Clean Fuels Program rules cause for Oregon fuel consumers and Oregon's economy;
 - (e) The rate of climate change and the costs of environmental and economic damage due to climate change;
 - (f) The current and projected availability of clean fuels;
 - (g) The progress and adoption rates of clean fuels, clean fuel infrastructure and clean fuel vehicles;
 - (h) Identifying hurdles or barriers to implementing the Clean Fuels Program (e.g., permitting issues, infrastructure adequacy, research funds) and recommendations for addressing such hurdles or barriers;
 - (i) The mechanisms to provide exemptions and deferrals necessary to mitigate the cost of complying with the program;
 - (j) The methods to quantify lifecycle direct and indirect emissions from transportation fuels including land use change and other indirect effects;
 - (k) The latest information on low carbon fuel policies and related legal issues;
 - (l) The status of federal, state and regional programs that address the carbon content of transportation fuel; and
 - (m) Whether there are the necessary resources to implement the program.
- (5) LRAPA. Notwithstanding Lane Regional Air Pollution Agency authorization in OAR 340-200-0010(3), DEQ administers this division in all areas of the State of Oregon.

340-253-0040

Definitions

The definitions in OAR 340-200-0020 and this rule apply to this division. If this rule and 340200-0020 define the same term, the definition in this rule applies to this division.

- (1) "Actual PADD 5" means Petroleum Administration for Defense District 5, which includes Oregon, Washington, Arizona, Nevada, Hawaii, California and Alaska.

- (2) “Bill of lading” means a document issued that lists goods being shipped and specifies the terms of their transport.
- (3) “Bio-based” means produced from non-petroleum, biological renewable resources.
- (4) “Biodiesel” means a diesel substitute that consists of mono-alkyl esters of long chain fatty acids derived from plant or animal matter that complies with ASTM D6751.
- (5) “Biodiesel blend” means a blend of biodiesel with petroleum-based diesel fuel, designated BXX where XX represents the volume percentage of biodiesel fuel in the blend.
- (6) “Biogas” means gas, consisting primarily of methane and carbon dioxide, produced by the anaerobic decomposition of organic matter. Biogas cannot be directly injected into natural gas pipelines or combusted in most natural gas-fueled vehicles unless first upgraded to biomethane.
- (7) “Biomethane” means refined biogas that has been upgraded to a near-pure methane content product. Biomethane can be directly injected into natural gas pipelines or combusted in natural gas-fueled vehicles.
- (8) “Broker” means a person who is not a regulated party or a credit generator and who voluntarily registers to participate in the clean fuels program, described in OAR 340-253-0100(3), to facilitate credit generation and to trade credits with regulated parties, credit generators and other brokers.
- (9) “Carbon intensity” means 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).
- (10) “CFP Online System” means the interactive, secured, internet web-based, clean fuels program electronic data tracking, reporting and compliance system that DEQ developed, manages and operates.
- (11) “Clean fuel” means a transportation fuel whose carbon intensity value is lower than the applicable clean fuel standard for gasoline and gasoline substitutes in Table 1 under OAR 340-253-8010 or for diesel and diesel substitutes in Table 2 under OAR 340-253-8020.

- (12) “Clean fuel standard” means the annual average carbon intensity a regulated party must comply with, as listed in Table 1 under OAR 340-253-8010 for gasoline and gasoline substitutes and in Table 2 under 340-253-8020 for diesel fuel and diesel substitutes.
- (13) “Clear gasoline” means gasoline that has not been blended with a renewable fuel.
- (14) “Clear diesel” means diesel that has not been blended with a renewable fuel.
- (15) “Compliance period” means a calendar year and is the period of time within which regulated parties must demonstrate compliance under OAR 340-253-0100.
- (16) “Compressed natural gas” or “CNG” means natural gas compressed to a pressure greater than ambient pressure.
- (17) “Credit” means a unit of measure that is generated when the carbon intensity value of a fuel that is produced, imported, dispensed or used in Oregon is less than the clean fuel standard. Credits are expressed in units of metric tons of carbon dioxide equivalent and are calculated under Table 2 under OAR 340-253-1020.
- (18) “Credit generator” means any person eligible to generate credits by providing clean fuels for use in Oregon and who voluntarily registers to participate in the clean fuels program, described in OAR 340-253-0100(2), and specified by fuel type in Tables 1-4 under OAR 340-253-0310 through 340-253-0340.
- (19) “Credit transfer document” or “CTD” means an invoice, bill of lading, purchase contract or any other proof of credit ownership transfer.
- (20) “Deficit” means a unit of measure that is generated when the carbon intensity value of a fuel that is produced or imported in Oregon exceeds the clean fuel standard. Deficits are expressed in units of metric tons of carbon dioxide equivalent and are calculated under OAR 340-253-1020.
- (21) “Diesel fuel” or “diesel” means a compression ignition engine fuel conforming to the specifications of either ASTM D975 or ASTM D7467.
- (22) “Diesel substitute” means any fuel, other than diesel fuel, that may be used in an engine designed for diesel use.
- (23) “Ethanol,” or “Denatured fuel ethanol” means nominally anhydrous ethyl alcohol meeting ASTM D4806 standards that is blended with gasoline for use in a spark-ignition internal combustion engine.

- (24) “Export” means to have ownership title to transportation fuel from locations within Oregon, at the time it is delivered to locations outside Oregon by any means of transport, other than in the fuel tank of a motor vehicle for the purpose of propelling the motor vehicle.
- (25) “Feedstock” means the material from which a fuel is made.
- (26) “Fossil” means derived solely from petroleum or fossil sources such as oil fields and coal beds.
- (27) “Fuel type” means any unique fuel feedstock and production process combination.
- (28) “Fuel pathway code” means a code that represents a unique fuel type. The fuel pathway code is a field in the CFP Online System used to represent a specific type of fuel that has an assigned carbon intensity value.
- (29) “Gasoline” means a spark ignition engine fuel conforming to the specifications defined in ASTM D4814.
- (30) “Gasoline substitute” means any fuel, other than gasoline, that may be used in an engine designed for gasoline use.
- (31) “Heavy duty motor vehicle” or “HDV” means any motor vehicle rated at more than 10,000 pounds gross vehicle weight.
- (32) “Import” means to have ownership title to transportation fuel from locations outside of Oregon at the time it is brought into the State of Oregon by any means of transport other than in the fuel tank of a motor vehicle for the purpose of propelling the motor vehicle.
- (33) “Importer” means:
- (a) With respect to any liquid fuel, the person who imports the fuel; or
 - (b) With respect to any biomethane, the person who owns the biomethane when it is trucked into Oregon or injected into a pipeline located outside of Oregon and delivered for use in Oregon.
- (34) “Invoice” means the receipt or other record of a sale transaction, specifying the price and terms of sale, that describes an itemized list of goods shipped.

- (35) “Large importer” means any person who imports into Oregon more than 250,000 gallons of transportation fuels in a given calendar year.
- (36) “Light-duty motor vehicle” or “LDV” means any motor vehicle rated at 8,500 pounds gross vehicle weight or less.
- (37) “Lifecycle greenhouse gas 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.
- (38) “Liquefied natural gas” or “LNG” means natural gas that has been liquefied.
- (39) “Liquefied compressed natural gas” or “L-CNG” means natural gas that has been liquefied and transported to a dispensing station where it was then re-gasified and compressed to a pressure greater than ambient pressure.
- (40) “Liquefied petroleum gas” or “propane” or “LPG” means a petroleum product composed predominantly of any of the hydrocarbons propane, propylene, normal or iso butane, butylene, or mixtures thereof, maintained in the liquid state.
- (41) “Medium duty vehicle” or “MDV” means any motor vehicle rated between 8,501 pounds and 10,000 pounds gross vehicle weight.
- (42) “Motor vehicle” has the same meaning as defined under OAR 603-027-0410.
- (43) “Natural gas” means a mixture of gaseous hydrocarbons and other compounds with at least 80 percent methane by volume.
- (44) “OR-GREET” means the Greenhouse gases, Regulated Emissions, and Energy in Transportation (GREET) Argonne National Laboratory model that DEQ modifies and maintains for use in Oregon. DEQ will provide copies of OR-GREET upon request.

- (45) “Physical transport mode code” means how a fuel physically enters Oregon. Physical transport mode code is a field in the CFP Online System used to represent how a fuel was imported.
- (46) “Producer” means:
- (a) With respect to any liquid fuel, the person who makes the fuel in Oregon; or
 - (b) With respect to any biomethane, the person who refines, treats or otherwise processes biogas into biomethane in Oregon.
- (47) “Product transfer document” or “PTD” means a document that conveys information about the transfer of ownership of fuel from a regulated party to the recipient of the fuel.
- (48) “Regulated fuel” means a transportation fuel identified under OAR 340-253-0200(2).
- (49) “Regulated party” means a person responsible for compliance with the clean fuel standards identified under OAR 340-253-0310.
- (50) “Renewable diesel” means diesel fuel derived from vegetable oils, animal fats or other non-petroleum resources.
- (51) “Small importer” means any person who imports into Oregon 250,000 gallons or less of transportation fuel in a given calendar year.
- (52) “Statutory PADD 5” means the Petroleum Administration for Defense District 5 states: Oregon, Washington, Arizona and Nevada.
- (53) “Transaction type” means the nature of the fuel transaction. Transaction type is a field in the CFP Online System used to represent how a volume of fuel should be treated in terms of compliance with the clean fuel standards.
- (54) “Transportation fuel” means gasoline, diesel, any other flammable or combustible gas or liquid and electricity that can be used as a fuel for the operation of a motor vehicle. Transportation fuel does not mean unrefined petroleum products.

340-253-0060

Acronyms

The following acronyms apply to this division:

- (1) “ASTM” means ASTM International (formerly American Society for Testing and Materials).
- (2) “BTU” means British thermal unit.
- (3) “CFP” means the clean fuels program established under OAR chapter 340, division 253.
- (4) “CIE” means compression ignition engine.
- (5) “DEQ” means Oregon Department of Environmental Quality.
- (6) “EQC” means Oregon Environmental Quality Commission.
- (7) “FEIN” means federal employer identification number.
- (8) “gCO₂e per MJ” means grams of carbon dioxide equivalent per megajoule of energy.
- (9) “SIE” means spark ignition engine.

340-253-0100

Oregon Clean Fuels Program Applicability and Requirements

- (1) Regulated parties. All persons that produce in Oregon or import into Oregon any regulated fuel must comply with the rules in this division. The regulated parties for regulated fuels produced or imported in Oregon are designated under OAR 340-253-0310.
 - (a) Regulated parties must comply with sections (4) through (8) below; except that:
 - (b) Small importers are exempt from sections (5) through (8) below.
- (2) Credit generators.

(a) The following rules designate persons eligible to generate credits for each fuel type:

(A) OAR 340-253-0320 for compressed natural gas, liquefied natural gas, liquefied compressed natural gas, liquefied petroleum gas and renewable diesel;

(B) OAR 340-253-0330 for electricity; and

(C) OAR 340-253-0340 for hydrogen fuel or a hydrogen blend.

(b) Persons eligible to be credit generators are not required to participate in the program. Persons who choose voluntarily to participate in the program to generate credits must comply with sections (4), (5), (7) and (8) below.

(3) Brokers.

(a) Brokers must comply with this section and sections (4), (5), (7) and (8) below.

(b) Brokers may hold and trade credits. A broker also may generate credits and facilitate credit generation and credit trading if a regulated party, credit generator or person eligible to be a credit generator authorized the broker to act on its behalf.

(4) Registration.

(a) A regulated party must submit a complete registration application to DEQ under OAR 340-253-0500 for each fuel type on or before the date upon which that party begins producing the fuel in Oregon or importing the fuel into Oregon. The registration application must be submitted using DEQ approved forms.

(b) A credit generator must submit a complete registration to DEQ under OAR 340-253-0500 for each fuel type before it may generate credits for fuel produced, imported, dispensed or used in Oregon. DEQ will not recognize credits allegedly generated by any person that does not have an approved, accurate and current registration.

(c) A broker must submit a complete registration to DEQ under OAR 340-253-0500, or modify its existing registration each time it enters into a new contract with a regulated party or credit generator, before trading credits or facilitating credit generation or trading by a regulated party or credit generator. DEQ will not recognize the transfer of credits by a broker that does not have an approved, accurate and current registration.

(d) When DEQ approves the registration application of a regulated party, credit generator or broker under OAR 340-253-0500, the regulated party, credit generator or broker must establish an account in the CFP Online System and must use the CFP Online System to record and report credit and deficit generation, credit trading and compliance with the CFP rules in this division.

(5) Records. Beginning on July 1, 2015, regulated parties, credit generators registered under subsection (4)(b) and brokers registered under subsection (4)(c) must develop and retain all records OAR 340-253-0600 requires.

(6) Clean fuel standards. Each regulated party must comply with the following standards for all transportation fuel it produces in Oregon or imports into Oregon in each compliance period. To demonstrate compliance, regulated parties must use the calculation method OAR 340-253-1030 specifies. Regulated parties may demonstrate compliance in each compliance period either by producing or importing fuel that in the aggregate meets the standard or by obtaining sufficient credits to offset deficits for such fuel produced or imported into Oregon.

(a) Table 1 under OAR 340-253-8010 establishes the Oregon Clean Fuel Standard for Gasoline and Gasoline Substitutes; and

(b) Table 2 under OAR 340-253-8020 establishes the Oregon Clean Fuel Standard for Diesel and Diesel Substitutes.

(7) Quarterly progress report. Regulated parties, credit generators and brokers must submit quarterly progress reports under OAR 340-253-0630.

(8) Annual compliance report. Regulated parties, credit generators and brokers must submit annual compliance reports under OAR 340-253-0650.

340-253-0200

Regulated and Clean Fuels

(1) Applicability. Producers and importers of transportation fuels listed in this rule, unless exempt under OAR 340-253-0250, are subject to Division 253.

(2) Regulated fuels. Regulated fuels mean the following transportation fuels:

(a) Gasoline;

(b) Diesel fuel;

- (c) Denatured fuel ethanol;
- (d) Biodiesel; and
- (e) Any other liquid or non-liquid transportation fuel not listed in section (3) or exempted under OAR 340-253-0250.

(3) Clean fuels. Clean fuels means a transportation fuel with a carbon intensity value lower than the clean fuel standard for gasoline or diesel fuel and their substitutes in Table 1 or 2 under OAR 340-253-8010 or 340-253-8020, as applicable, for that calendar year, such as:

- (a) Bio-based compressed natural gas;
- (b) Bio-based liquefied compressed natural gas;
- (c) Bio-based liquefied natural gas;
- (d) Electricity;
- (e) Fossil compressed natural gas;
- (f) Fossil liquefied compressed natural gas;
- (g) Fossil liquefied natural gas;
- (h) Hydrogen or a hydrogen blend;
- (i) liquefied petroleum gas; and
- (j) Renewable diesel.

340-253-0250

Exemptions

(1) Exempt fuels. The following fuels are exempt from the list of regulated fuels under OAR 340-253-0200(2):

- (a) Fuels used in small volumes: A transportation fuel supplied for use in Oregon if the producer or importer documents that all providers supply an aggregate volume of less than 360,000 gasoline gallon equivalents or diesel gallon equivalents per year.

- (b) Small volume fuel producer: A transportation fuel supplied for use in Oregon if the producer documents that:
 - (A) The producer has an annual production volume of less than 10,000 gasoline gallon equivalents or diesel gallon equivalents per year; or
 - (B) The producer has an annual production volume of less than 50,000 gasoline gallon equivalents or diesel gallon equivalents and the fuel producer uses the entire volume in motor vehicles the producer uses directly; or
 - (C) The producer is a research, development or demonstration facility defined under OAR 330090-0100.
- (c) Fuels that are exported for use outside of Oregon.
 - (2) Exempt fuel uses.
 - (a) Transportation fuels supplied for use in the following motor vehicles are exempt from the definition of regulated fuels under OAR 340-253-0200:
 - (A) Aircraft;
 - (B) Racing activity vehicles defined in ORS 801.404;
 - (C) Military tactical vehicles and tactical support equipment;
 - (D) Locomotives;
 - (E) Ocean-going vessels defined under OAR 856-010-0003, except for vessel under fishery or recreational endorsement under title 46 United States Code, chapter 121;
 - (F) Motor vehicles registered as farm vehicles as provided in ORS 805.300;
 - (G) Farm tractors defined in ORS 801.265;
 - (H) Implements of husbandry defined in ORS 801.310; or
 - (I) Motor trucks defined in ORS 801.355 if used primarily to transport logs.
 - (b) To be exempt, the regulated party must document that the fuel was supplied to use in a motor vehicle listed in subsection (2)(a). The documentation must:

(A) Establish that the fuel was sold through a dedicated source to use in one of the specified motor vehicles; or

(B) Be on a fuel transaction basis if the fuel is not sold through a dedicated source.

Designation of Regulated and Opt-in Parties

340-253-0310

Regulated Parties: Gasoline, Diesel Fuel, Ethanol and Biodiesel

(1) Regulated party. The regulated party is the producer or importer of the regulated fuel.

(2) Recipient notification requirement. If a regulated party intends to transfer ownership of fuel, it is the recipient's responsibility to notify the transferor whether the recipient is a producer, a large importer, a small importer or not an importer.

(3) Recipient is a large importer. If a regulated party transfers the fuel to a large importer, the transferor and the recipient have the options and responsibilities under this section.

(a) Unless the transferor elects to remain the regulated party under (3)(b):

(A) The recipient is now the regulated party who:

(i) Must comply with the registration, recordkeeping and reporting requirements under OAR 340-253-0500, -0600, -0620, -0630 and -0650 for the fuel;

(ii) Is responsible for compliance with the clean fuel standard for the fuel under OAR 340-2530100(6); and

(iii) Is eligible to generate credits for the fuel, as applicable.

(B) The transferor must provide the recipient a product transfer document by the time of transfer. The product transfer document must prominently indicate:

(i) Transferor company name, address and contact information;

(ii) Recipient company name, address and contact information;

(iii) Date of transfer;

- (iv) Fuel pathway code and carbon intensity value;
 - (v) Volume/amount;
 - (vi) A statement that the recipient is now the regulated party; and
 - (vii) The EPA fuel production company ID and facility ID, if available.
- (C) The transferor is no longer the regulated party for such fuel, except for maintaining the product transfer documentation under OAR 340-253-0600.
- (b) The transferor may elect to remain the regulated party for the transferred fuel. If the transferor elects to remain the regulated party:
- (A) The transferor remains the regulated party who:
 - (i) Must comply with the registration, recordkeeping and reporting requirements under OAR 340-253-0500, 340-253-0600, 340-253-0620, 340-253-0630 and 340-253-0650 for the fuel;
 - (ii) Is responsible for compliance with the clean fuel standard for such fuel under OAR 340-2530100(6); and
 - (iii) Is eligible to generate credits for the fuel, as applicable.
 - (B) The transferor must provide the recipient a product transfer document by the time of transfer. The product transfer document must prominently indicate:
 - (i) Transferor company name, address and contact information;
 - (ii) Recipient company name, address and contact information;
 - (iii) Date of transfer;
 - (iv) Amount; and
 - (v) A statement that the transferor remains the regulated party.
 - (C) The recipient is not the regulated party, except for maintaining the product transfer documentation under OAR 340-253-0600.
- (4) Recipient is a producer, a small importer or is not an importer. If a regulated party transfers the fuel to a producer, a small importer or a person who is not an

importer, the transferor and the recipient have the options and responsibilities under this section.

(a) Unless the recipient and the transferor agree the recipient is the regulated party under subsection (4)(b):

(A) The transferor remains the regulated party who:

(i) Must comply with the registration, recordkeeping and reporting requirements under OAR 340-253-0500, 340-253-0600, 340-253-0620, 340-253-0630 and 340-253-0650 for the fuel;

(ii) Is responsible for compliance with the clean fuel standard for such fuel for such fuel under OAR 340-253-0100(6); and

(iii) Is eligible to generate credits for the fuel, as applicable.

(B) The transferor must provide the recipient a product transfer document by the time of transfer. The product transfer document must prominently indicate:

(i) Transferor company name, address and contact information;

(ii) Recipient company name, address and contact information;

(iii) Date of transfer;

(iv) Amount; and

(v) A statement that the transferor remains the regulated party.

(C) The recipient is not the regulated party, except for maintaining the product transfer documentation under OAR 340-253-0600.

(b) The recipient may elect to be the regulated party for the transferred fuel. If the recipient elects to be the regulated party:

(A) The recipient is the regulated party who:

(i) Must comply with the registration, recordkeeping and reporting requirements under OAR 340-253-0500, 340-253-0600, 340-253-0620, 340-253-0630 and 340-253-0650 for the fuel;

(ii) Is responsible for compliance with the clean fuel standard for such fuel for such fuel under OAR 340-253-0100(6); and

- (iii) Is eligible to generate credits for the fuel, as applicable.
- (B) The transferor must provide the recipient a product transfer document by the time of transfer. The product transfer document must prominently indicate:
 - (i) Transferor company name, address and contact information;
 - (ii) Recipient company name, address and contact information;
 - (iii) Date of transfer;
 - (iv) Fuel pathway code and carbon intensity value;
 - (v) Volume/amount;
 - (vi) A statement that the recipient is now the regulated party; and
 - (vii) The EPA fuel production company ID and facility ID, if available.
- (C) The transferor is not the regulated party, except for maintaining the product transfer documentation under OAR 340-253-0600.

340-253-0320

Credit Generators: Compressed Natural Gas, Liquefied Natural Gas, Liquefied Compressed Natural Gas, Liquefied Petroleum Gas and Renewable Diesel

- (1) Applicability. This rule applies to providers of compressed natural gas, liquefied natural gas, liquefied compressed natural gas, liquefied petroleum gas and renewable diesel for use as a transportation fuel in Oregon.
- (2) Compressed natural gas. For CNG used as a transportation fuel, subsections (a) through (c) determine the person who is eligible to generate credits.
 - (a) Fossil CNG. For fuel that is solely fossil CNG, the person that is eligible to generate credits is the owner of the compressor at the facility where the fuel is dispensed for use in a motor vehicle.
 - (b) Bio-based CNG. For fuel that is solely bio-based CNG, the person that is eligible to generate credits is the producer or importer of the fuel.
 - (c) Blend of fossil CNG and bio-based CNG. For fuel that is a blend of fossil CNG and bio-based CNG, the generated credits will be split between the persons

eligible to generate credits under subsections (a) and (b) to give each credits based on the actual amount of fossil CNG and bio-based CNG in the blend.

(3) Liquefied natural gas. For LNG used as a transportation fuel, subsections (a) through (c) determine the person who is eligible to generate credits.

(a) Fossil LNG. For fuel that is solely fossil LNG, the person that is eligible to generate credits is the owner of the fueling equipment at the facility where the fuel is dispensed for use in a motor vehicle.

(b) Bio-based LNG. For fuel that is solely bio-based LNG, the person that is eligible to generate credits is the producer or importer of the fuel.

(c) Blend of fossil LNG and bio-based LNG. For fuel that is a blend of fossil LNG and bio -based LNG, the generated credits will be split between the persons eligible to generate credits under subsections (a) and (b) to give each credits based on the actual amount of fossil LNG and bio-based LNG in the blend.

(4) Liquefied compressed natural gas. For L-CNG used as a transportation fuel, subsections (a) through (c) determine the person who is eligible to generate credits.

(a) Fossil L-CNG. For fuel that is solely fossil L-CNG, the person that is eligible to generate credits is the owner of the compressor at the facility where the fuel is dispensed for use in a motor vehicle.

(b) Bio-based L-CNG. For fuel that is solely bio-based L-CNG, the person that is eligible to generate credits is the producer or importer of the fuel.

(c) Blend of fossil L-CNG and bio-based L-CNG. For fuel that is a blend of fossil L-CNG and bio-based L-CNG, the generated credits will be split between the persons eligible to generate credits under subsections (a) and (b) to give each credits based on the actual amount of fossil L-CNG and bio-based L-CNG in the blend.

(5) Liquefied petroleum gas. For propane used as a transportation fuel, the person that is eligible to generate credits is the owner of the fueling equipment at the facility where the liquefied petroleum gas is dispensed for use in a motor vehicle.

(6) Renewable diesel. For renewable diesel used as a transportation fuel, the person that is eligible to generate credits is the producer or importer of the fuel.

(7) Responsibilities to generate credits. Any person specified in sections (2) through (5) may generate clean fuel credits by complying with the registration, recordkeeping and reporting requirements under OAR 340-253-0500, 340-253-0600, 340-253-0620, 340-253-0630 and 340-253-0650 for the fuel.

340-253-0330

Credit Generators: Electricity

(1) Applicability. This rule applies to providers of electricity used as a transportation fuel.

(2) For residential charging. For electricity used to charge a motor vehicle in a residence, subsections (a) through (c) determine the person who is eligible to generate credits.

(a) Electric Utility. By October 1 of the current year, an electric utility that is registered or has submitted a complete registration to DEQ under OAR 340-253-0500 may generate credits for the following calendar year.

(b) Broker. If an electric utility does not register as the credit generator under subsection (a), then a broker may register to generate credits.

(c) Owner of electric-charging equipment. If an electric utility or a broker does not register as the credit generator under subsection (a) or (b), then the owner of the electric-charging equipment may register to generate credits.

(3) For non-residential charging. For electricity used to charge a motor vehicle in non-residential settings, such as at publicly available charging stations, for a fleet, or at a workplace, subsections (a) through (c) determine the person who is eligible to generate credits.

(a) Owner or operator of electric-charging equipment. The owner or operator of the electric-charging equipment that is registered or has submitted a complete registration to DEQ under OAR 340-253-0500 by September 1 of the current year may generate credits for the following calendar year.

(b) Electric utility. If the owner or operator of the electric-charging equipment does not register as the credit generator under subsection (a), then an electric utility may generate credits if, by October 1, the electric utility has registered or has submitted a complete registration to DEQ under OAR 340-253-0500.

(c) Broker. If the owner or operator of the electric-charging equipment and the electric utility do not register as the credit generator under subsections (a) or (b), then a broker may generate credits if it has provided documentation to DEQ that it has an agreement with the owner or operator of the electric-charging equipment where electric vehicles are charged with transportation fuel.

(4) Responsibilities to generate credits. Any person specified under sections (2) or (3) may generate clean fuel credits by complying with the registration, recordkeeping and reporting requirements under OAR 340-253-0500, 340-253-0600, 340-253-0620, 340-253-0630 and 340-253-0650 for the fuel.

(5) Ceasing to generate credits. Any person that is registered to generate credits under OAR 340-253-0500 must notify DEQ in writing when it no longer intends to generate credits.

340-253-0340

Credit Generators: Hydrogen Fuel or a Hydrogen Blend

(1) Applicability. This rule applies to providers of hydrogen fuel and a hydrogen blend for use as a transportation fuel in Oregon.

(2) Credit generation. For a hydrogen fuel or a hydrogen blend, the person who owns the finished hydrogen fuel where the fuel is dispensed for use into a motor vehicle is eligible to generate credits.

(3) Responsibilities to generate credits. Any person specified in section (2) may generate clean fuel credits by complying with the registration, recordkeeping and reporting requirements under OAR 340-253-0500, -0600, -0620, -0630 and -0650 for the fuel.

340-253-0400

Fuel Carbon Intensity Values

(1) Statewide carbon intensity values.

(a) Regulated parties, credit generators and brokers must use the statewide average carbon intensity values in Table 3 or 4 under OAR 340-253-8030 or 8040, as applicable, for the following fuels:

(A) Gasoline;

- (B) Diesel fuel;
 - (C) Fossil compressed natural gas;
 - (D) Fossil liquefied natural gas;
 - (E) Liquefied petroleum gas; and
 - (F) Electricity, unless an electricity provider meets the conditions under subsection (1)(b) and chooses to obtain a different carbon intensity value.
 - (b) For electricity, credit generators and brokers may obtain a carbon intensity value different from the statewide average carbon intensity value by following the procedures under section (3), if the electricity provider:
 - (A) Is exempt from the definition of public utility under ORS 757.005 (1)(b)(G), and is not regulated by the Oregon Public Utility Commission; or
 - (B) Generates lower carbon electricity at the same location as it is dispensed into a vehicle.
- (2) Carbon intensity values for established pathways. Except as provided in section (3), regulated parties, credit generators and brokers must use the carbon intensity value for each transportation fuel that best matches the description in the fuel pathway in Table 3 or 4 under OAR 340-2538030 or 340-253-8040, as applicable, and as approved through the registration process under OAR 340-253-0500.
- (3) Individual carbon intensity values.
- (a) Directed by DEQ. A regulated party, credit generator or broker must obtain and use an individual carbon intensity value for a fuel if DEQ:
 - (A) Determines the fuel's carbon intensity is not adequately represented by any of the carbon intensity values for established pathways in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable; and
 - (B) Directs the regulated party, credit generator or broker to obtain an individual carbon intensity value under OAR 340-253-0450.
 - (b) Election of the party. A regulated party, credit generator or broker may obtain and use an individual carbon intensity value for a fuel if:

- (A) It applies for and obtains DEQ approval under OAR 340-253-0450; and
- (B) The fuel's carbon intensity value differs from the carbon intensity value for the most similar fuel pathway in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable, by at least 5.0 gCO₂e per MJ or 10 percent, whichever is less.
- (c) New fuel or feedstock. A regulated party, credit generator or broker must obtain approval for an individual carbon intensity value under OAR 340-253-0450 for any fuel not included in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable, and for any fuel made from a feedstock not represented in a carbon intensity value in Table 3 or Table 4 under OAR 340-253-8030 or 340-253-8040, as applicable. A regulated party, credit generator or broker must notify DEQ by submitting a modification to the original registration within 30 days of providing a new transportation fuel for use in Oregon.
- (d) Process change notification. If a fuel's carbon intensity value changes due to a change in refining process in a way that increases the fuel's carbon intensity value by more than either 5.0 gCO₂e per MJ or 10 percent, whichever is less, the regulated party, credit generator or broker must notify DEQ and obtain an individual carbon intensity value under OAR 340-253-0450 by submitting a modification to the original registration under OAR 340-253-0500 within 30 days after the refining process changes.
- (e) OR-GREET. Regulated parties, credit generators and brokers must calculate all carbon intensity values using the approved version of OR-GREET, or a DEQ-approved comparable model for any fuel that cannot be modeled with OR-GREET. Any variations from the approved version of OR-GREET must be documented as described under OAR 340-253-0450(1) and submitted to DEQ for approval.
- (4) DEQ review of carbon intensity values. Every three years, or sooner if DEQ determines that new information becomes available that warrants an earlier review, DEQ will review the carbon intensity values in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040 and:
 - (a) Must consider, at a minimum:
 - (A) The sources of crude and associated factors that affect emissions such as flaring rates, extraction technologies, capture of fugitive emissions and energy sources;

- (B) The sources of natural gas and associated factors that affect emissions such as extraction technologies, capture of fugitive emissions and energy sources;
 - (C) The statewide mix of electricity used in Oregon;
 - (D) Individual carbon intensity values that have been approved under OAR 340-253-0450;
 - (E) Changes to OR-GREET;
 - (F) New methods to calculate lifecycle greenhouse gas emissions;
 - (G) Changes in quantifying indirect land use change; and
 - (H) Changes in quantifying indirect effects.
- (b) Report to EQC regarding whether statewide average carbon intensity values in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040 should be revised. Changes to Table 3 or 4 under OAR 340-253-8030 or 340-253-8040 may only be revised through a rulemaking.

340-253-0450

Approval for Individual Carbon Intensity Values

- (1) Individual carbon intensity value approval. A regulated party, credit generator or broker may not use an individual carbon intensity value without written DEQ approval under this rule. Individual carbon intensity values are not available for the fuels listed under OAR 340-2530400(1)(a).
- (a) OR-GREET modifications. To obtain an individual carbon intensity value, a regulated party, credit generator or broker may propose a modification to inputs into OR-GREET that more accurately reflect the specific characteristics of the fuel or changes to OR-GREET itself that will result in a more accurate calculation of the carbon intensity value for a fuel. The proposal for an individual carbon intensity value must include:
- (A) Inputs used to generate the carbon intensity values under OAR 340-253-0400; and
 - (B) All modified parameters used to generate the new fuel carbon intensity value.

(b) Other modifications. To obtain an individual carbon intensity value, a regulated party, credit generator or broker may propose modifications based on any new information to calculate lifecycle greenhouse gas emissions. The proposal for an individual carbon intensity value must include:

(A) Inputs used to generate the carbon intensity values under OAR 340-253-0400; and

(B) All parameters used to generate the new fuel carbon intensity value.

(2) Reliability. The regulated party, credit generator or broker must supply documentation necessary for DEQ to determine that the method used to calculate the individual carbon intensity value is reliable and comparable to OR-GREET.

(3) Modification submittal. The regulated party, credit generator or broker must submit proposed modifications under this rule electronically and must include:

(a) Documentation that the proposed pathway has been approved by the California Air Resources Board, if available;

(b) A description of all modifications required by Section (1);

(c) Supporting data and calculations; and

(d) Any other information the party would like to submit or DEQ requests to verify the method for calculating the proposed, individual carbon intensity value.

(4) Review process. Within 15 workdays after receiving any modification proposal submitted under section (3), DEQ will determine whether the proposal is complete.

(a) If DEQ determines the proposal is incomplete, DEQ will notify the regulated party, credit generator or broker and identify the deficiencies. If the party submits supplemental information, DEQ has 15 workdays to determine if the supplemental submittal is complete, or to notify the party and identify the continued deficiencies.

(b) If DEQ determines the proposal is complete, DEQ will:

(A) Publish the application on the Oregon Clean Fuels Program website; and

(B) Approve or deny an individual carbon intensity value.

(5) DEQ approval. A regulated party, credit generator or broker may use an individual carbon intensity value upon receiving written approval from DEQ. DEQ will propose to incorporate all associated parameters and fuel-related information of a DEQ-approved individual carbon intensity value into Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable, in a future rulemaking.

(6) DEQ denial. If DEQ determines the proposal for an individual carbon intensity value is not adequately documented, DEQ will deny the modification proposal, identify the basis for the denial, and notify the party which carbon intensity value it is authorized to use for the fuel.

340-253-0500

Registration

(1) Registration information. To register, regulated parties, credit generators and brokers must submit the following to DEQ using DEQ-approved forms:

(a) Company identification, including physical and mailing addresses, phone numbers, e-mail addresses, and contact names;

(b) The CFP status of the registrant as a producer, small importer, large importer, credit generator or broker;

(c) For each transportation fuel that will be produced, imported, dispensed or used in Oregon, as applicable:

(A) The proposed carbon intensity value for each fuel. The proposed carbon intensity value must be:

(i) A statewide carbon intensity value for any fuel listed under OAR 340-253-0400(1);

(ii) An individual carbon intensity value listed under Table 3 or 4 under OAR 340-253-8030 or 340-253-8040; or

(iii) An individual carbon intensity approved by DEQ, or a proposal to obtain a new individual carbon intensity value, under OAR 340-253-0400(3).

(B) For a biofuel, its EPA production company ID and facility ID;

(C) The physical transport mode that represents how the fuel will enter Oregon.

- (d) Other information requested by DEQ related to registration.
- (2) Completeness of submittal. DEQ will review the information submitted under section (1) to determine if the submission is complete.
- (a) If DEQ determines the submission is incomplete, DEQ will notify the registrant of the information needed to complete the submission. The registrant must provide the requested information within 30 calendar days from the date on the request.
 - (b) If DEQ determines the submission is complete, DEQ will notify the party in writing of the completeness determination.
 - (c) If DEQ does not notify the party in writing of the completeness determination within 30 calendar days of receipt of the registration application, the application is deemed complete.
- (3) Approval of carbon intensity values. DEQ will review proposed carbon intensity values to determine if they are accurate.
- (a) DEQ will review proposed carbon intensity values as follows:
 - (A) For a proposed carbon intensity value listed under Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable, DEQ will review whether the fuel type accurately matches the fuel pathway description of the proposed carbon intensity value listed.
 - (B) For a proposed individual carbon intensity value, DEQ will review the proposal as provided under OAR 340-253-0450.
 - (b) If DEQ determines that the proposed carbon intensity values accurately reflect the carbon intensity of the fuel types, DEQ will approve the proposed values. Approval of carbon intensity values is confirmed in the registration approval under section (4).
 - (c) If DEQ determines that a different carbon intensity value more accurately reflects the information submitted, DEQ will notify the regulated party, credit generator or broker of its determination including DEQ's proposed carbon intensity value and the reason(s) for selecting it within 45 days of DEQ's completeness determination.
- (A) The registrant must accept or appeal DEQ's determination in writing within 15 days of receiving DEQ's carbon intensity value determination.

(B) If the registrant accepts DEQ's determination, then confirmation will be through the registration approval under section (4) of this rule.

(C) If the registrant appeals DEQ's determination, then it must submit additional supporting information to DEQ within 30 days of its appeal notification. DEQ will review the additional information as provided in this section for review of initial submissions of carbon intensity values. If DEQ already reviewed one appeal of its carbon intensity determination under this section, DEQ may inform the regulated party, credit generator or broker that DEQ's decision is final and it will not undertake further review.

(4) Registration approval. Once DEQ approves the carbon intensity values, DEQ will notify the registrant in writing of its registration approval. The notification will include confirmation of the carbon intensity value for each fuel to be used in calculating credits and deficits under OAR 340-253-1000.

(5) Modifications to registration.

(a) The registrant must submit an amended registration to DEQ within 30 days of any change occurring to information described in section (1).

(b) DEQ may require a registrant to submit an amended registration based on new information DEQ receives.

(c) If a registrant amends its registration under this section, the registrant must also update the registrant's account in the CFP Online System to accurately reflect the amended information, as appropriate.

(6) Opting out. To opt-out of the CFP, a credit generator or broker must notify DEQ in writing. A credit generator or broker that opts out cannot generate, trade, or facilitate the generation or trading of credits unless the credit generator or broker re-registers under OAR 340-253-0100(3) or (4). Regulated parties may not opt-out of the CFP.

(7) Registering as a user in the CFP Online System. After DEQ provides initial written approval of the registration application of a regulated party, credit generator or broker, the regulated party, credit generator or broker must establish an account in the CFP Online System and must use the CFP Online System to record and report credit and deficit generation, credit trading and compliance with the rules in this division.

340-253-0600

Records

(1) Records. Regulated parties, credit generators and brokers must retain the following records for at least 5 years:

- (a) Product transfer documents;
- (b) Credit transfer documents;
- (c) Copies of all data and reports submitted to DEQ;
- (d) Records related to each fuel transaction; and
- (e) Records used for compliance or credit calculations.

(2) Review. All data, records, and calculations used by a regulated party, a credit generator or a broker to comply with the Oregon Clean Fuels Program are subject to verification by DEQ. Regulated parties, credit generators and brokers must provide records retained under section (1) within 60 calendar days after the date DEQ requests a review of the records, unless DEQ specifies otherwise.

340-253-0620

CFP Online System Reporting

(1) Online reporting. Regulated parties, credit generators and brokers must use the CFP Online System to submit quarterly progress reports under OAR 340-253-0630 and annual compliance reports under OAR 340-253-0650.

(2) Establishing an account. Following DEQ's approval of the regulated party's, credit generator's or broker's registration under OAR 340-253-0500, such person must establish an account in the CFP Online System. Such person must include the following information to register as a user in the CFP Online System:

- (a) User's name, address, state and county, date and place of incorporation, and federal employer identification number (FEIN);
- (b) User's primary contact name, business and mobile phone numbers, email address, username and password;
- (c) Name and title of an Administrator;

- (d) Name and title of Contributors, optional;
 - (e) Name and title of Reviewers, optional; and
 - (f) Any other information DEQ may require in the CFP Online System.
- (3) Account management roles.
- (a) Administrator:
 - (A) Authorized to sign for the user;
 - (B) Responsible for submitting quarterly progress and annual compliance reports;
 - (C) Makes changes to the company profile; and
 - (D) May designate users within the company who can review and upload data, but not submit reports.
 - (b) Contributor:
 - (A) Authorized to submit quarterly progress and annual compliance reports, if given signature authority; but
 - (B) Cannot make changes to the company profile.
 - (c) Reviewer:
 - (A) Provided read-only access; but
 - (B) Cannot submit quarterly progress and annual compliance reports.
- (4) Signature. Reports must include an electronic signature that certifies that the submitted information is true, accurate and complete.
- (5) Correcting a previously submitted report. A regulated party, credit generator or broker may request to have a previously submitted quarterly progress or annual compliance report reopened for corrective edits and re-submittal. The requestor must submit an “Unlock Report Request Form” using the CFP Online System. The requestor is required to provide justification for the report corrections and indicate the specific corrections to be made to the report. Each submitted request is subject to DEQ approval. DEQ approval of a corrected a report does not preclude DEQ enforcement based on misreporting.

(6) Information exempt from disclosure. Pursuant to the provisions of ORS 192.410 to 192.505, all information submitted to the Department is subject to inspection upon request by any person unless such information is determined to be exempt from disclosure under the Oregon public records law, ORS 192.410 through 192.505 or other applicable Oregon law.

340-253-0630

Quarterly Progress Reports

(1) Quarterly progress reports. Each quarter, regulated parties, credit generators and brokers must submit a progress report using the CFP Online System by no later than:

- (a) May 31 – for January through March of each year;
- (b) August 31 – for April through June of each year;
- (c) November 30 – for July through September of each year; and
- (d) February 28 – for October through December of each previous year.

(2) General reporting requirements for quarterly progress reports. Regulated parties, credit generators and brokers must submit quarterly progress reports that contain the information specified in Table 5 under OAR 340-253-8050 for each transportation fuel subject to the CFP.

(3) Specific reporting parameters for biomethane (including bio-based CNG, bio-based LNG and bio-based L-CNG) used as a transportation fuel. The credit generator must report:

- (a) The information specified for CNG and LNG in Table 5 under OAR 340-253-8050;
- (b) The carbon intensity value of the bio-based CNG, bio-based LNG or bio-based L-CNG as approved under OAR 340-253-0500(4); and
- (c) The EPA production company ID and facility ID.

(4) Specific reporting parameters for electricity used as a transportation fuel. For electricity used as a transportation fuel, a credit generator must report the following:

- (a) The information specified for electricity in Table 5 under OAR 340-253-8050;
- (b) The carbon intensity value of the electricity as approved under OAR 340-253-0500(4); and
- (c) For residential charging stations, the total electricity dispensed (in kilowatt hours) to all vehicles at each residence, measured by:
 - (A) The use of direct metering (either sub-metering or separate metering) to measure the electricity directly dispensed to all vehicles at each household or residence; or
 - (B) For households and residences where direct metering is not available and with prior DEQ approval, the credit generator may report the total electricity dispensed as a transportation fuel using an alternative method that the credit generator demonstrates is substantially similar to the use of direct metering.
- (d) For each public access, fleet and workplace private access charging facility, the amount of electricity dispensed (in kilowatt hours).

340-253-0650

Annual Compliance Reports

- (1) Annual compliance reports. Using the CFP Online System, regulated parties, credit generators and brokers must submit an annual compliance report to DEQ not later than April 30 for the compliance period running from January 1 through December 31 of the previous year.
- (2) General reporting requirements for annual compliance reports. Regulated parties, credit generators and brokers must submit annual compliance reports that meet, at minimum, the general and specific requirements for quarterly progress reports and include the following information:
 - (a) The total credits and deficits generated by the regulated party, credit generator or broker in the current compliance period, calculated in the CFP Online System;
 - (b) Any credits carried over from the previous compliance period;
 - (c) Any deficits carried over by a regulated party from the previous compliance period;

- (d) The total credits acquired from other regulated parties, credit generators and brokers;
- (e) The total credits transferred to other regulated parties, credit generators and brokers; and
- (f) The total credits retired by a regulated party to meet the regulated party's compliance obligation.

340-253-1000

Credit and Deficit Basics

- (1) Carbon intensity values.
 - (a) Except as provided in subsection (b), when calculating carbon intensity values, regulated parties, credit generators and brokers must:
 - (A) Use a DEQ carbon intensity value approved under OAR 340-253-0500(4); and
 - (B) Express the carbon intensity value to the same number of significant figures as shown in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable.
 - (b) If a regulated party, credit generator or broker has submitted a complete registration under OAR 340-253-0500 and DEQ has not approved the proposed carbon intensity value or has not determined that a different carbon intensity value more accurately reflects the fuel type, the regulated party, credit generator or broker must use the carbon intensity value proposed in its registration.
- (2) Fuel quantities. Regulated parties, credit generators and brokers must express fuel quantities to the nearest whole unit applicable for each fuel such as gallons, standard cubic feet, kilowatt-hours or pounds.
- (3) Conversion of energy. To convert other energy units to megajoules, the regulated party, credit generator or broker must multiply the unit by the corresponding energy density factor based on the lower heating values of fuels in OR-GREET using BTU to megajoules conversion of 1,055 J per BTU. Table 6 under OAR 340-253-8060 includes energy density conversions for Oregon.

(4) Metric tons of CO₂ equivalent. Regulated parties, credit generators and brokers must express credits and deficits to the nearest whole metric ton of carbon dioxide equivalent.

(5) Credit generation. A clean fuel credit is generated when fuel is produced, imported, dispensed or used in Oregon, as applicable, and the carbon intensity value of the fuel approved under OAR 340-253-0500(4) is less than the clean fuel standard for gasoline or diesel fuel and their substitutes in Table 1 or 2 under OAR 340-253-8010 or 340-253-8020, as applicable.

(6) Deficit generation. A clean fuel deficit is generated when fuel is produced, imported, dispensed or used in Oregon, as applicable, and the carbon intensity value of the fuel approved under OAR 340-253-0500(4) is more than the clean fuel standard for gasoline or diesel fuel and their substitutes in Table 1 or 2 under OAR 340-253-8010 or 340-253-8020, as applicable.

340-253-1010

Fuels to Include in Credit and Deficit Calculation

(1) Fuels included. Regulated parties, credit generators and brokers must calculate credits or deficits for all regulated fuels and clean fuels.

(2) Fuels exempted. Except as provided in section (3), regulated parties, credit generators and brokers may not calculate credits and deficits for fuels:

- (a) Exported outside Oregon; or
- (b) Exempt under OAR 340-253-0250.

(3) Voluntary inclusion. A regulated party, credit generator or broker may choose to include in its credits and deficits calculations fuel that is exempt under OAR 340-253-0250(1) or sold to an exempt user under OAR 340-253-0250(2) provided that all fuel listed on the same delivery invoice is included.

340-253-1020

Calculating Credits and Deficits

Regulated parties, credit generators and brokers must calculate credits or deficits for each fuel included under 340-253-1010 by:

- (1) Using credit and deficit basics as OAR 340-253-1000 specifies;

- (2) Calculating *energy in megajoules* by multiplying the amount of fuel by the energy density of the fuel in Table 6 under OAR 340-253-8060;
- (3) Calculating the *adjusted energy in megajoules* by multiplying the *energy in megajoules* from section (2) by the energy economy ratio of the fuel using Table 7 or 8 under OAR 340-253-8070 or 340-253-8080, as applicable;
- (4) Calculating the *carbon intensity difference* by subtracting the fuel's carbon intensity value as approved under OAR 340-253-0500(4) from the clean fuel standard for gasoline or diesel fuel and their substitutes in Table 1 or 2 under OAR 340-253-8010 or 340-253-8020, as applicable;
- (5) Calculating the *grams of carbon dioxide equivalent* by multiplying the *adjusted energy in megajoules* in section (3) by the *carbon intensity difference* in section (4);
- (6) Calculating the *metric tons of carbon dioxide equivalent* by dividing the *grams of carbon dioxide equivalent* in section (5) by 1,000,000; and
- (7) Determining under OAR 340-253-1000(5) and (6) whether credits or deficits are generated.

340-253-1030

Net Balance Calculation Deficits

- (1) Small deficits. At the end of a compliance period, a regulated party that has a net deficit balance may carry forward a small deficit to the next compliance period without penalty if the regulated party does not have any credits to offset its deficits. A small deficit exists if the amount of credits the regulated party needs to meet the standard is 10 percent or less than the total amount of deficits the regulated party generated for the compliance period.
- (2) Large deficits. At the end of a compliance period, a regulated party that has a net deficit balance may not carry forward a large deficit to the next compliance period. A large deficit exists if the amount of credits the regulated party needs to meet the standard is greater than 10 percent of the total amount of deficits the regulated party generated for the compliance period. A regulated party violates this rule if that party has a large deficit at the end of a compliance period.
- (3) Deficit reconciliation. If a regulated party carries a small deficit forward from the previous compliance period, the regulated party must eliminate the small

deficit by the end of the current compliance period. This provision does not preclude the regulated party from carrying forward a small deficit in the subsequent compliance period based on the total amount of deficits the regulated party generated in the subsequent compliance period.

340-253-1050

Credit Basics

(1) General.

(a) Clean fuel credits are a regulatory instrument and do not constitute personal property, instruments, securities or any other form of property.

(b) Regulated parties, credit generators and brokers may:

(A) Retain clean fuel credits without expiration for use within the CFP, subject to this rule and OAR 340-253-1030; and

(B) Acquire or transfer clean fuel credits from or to other regulated parties, credit generators and brokers that are approved program users under OAR 340-253-0500(4) and have account access to the CFP Online System.

(c) Regulated parties, credit generators and brokers may not:

(A) Use alleged credits that have not been generated in compliance with the rules in this division; or

(B) Borrow or use anticipated credits from future projected or planned carbon intensity reductions.

(2) Mandatory retirement of credits.

(a) At the end of a compliance period, a regulated party that possesses credits must retire a sufficient number of credits to satisfy the regulated party's compliance obligation for that compliance period. A regulated party may not carry over credits to the next compliance period if the regulated party has any remaining deficits.

(b) At the end of a compliance period, if the total number of credits is less than the total number of deficits, the regulated party is subject to OAR 340-253-1030.

(3) Credit transfers between parties.

(a) “Credit seller,” as used in this rule, means a regulated party, credit generator or broker who wishes to sell or transfer credits.

(b) “Credit buyer,” as used in this rule, means a regulated party, credit generator or broker who wishes to acquire credits.

(c) A credit seller and a credit buyer may enter into an agreement to transfer credits.

(d) A credit seller may only transfer credits up to the number of total credits in the credit seller’s CFP Online System account.

(4) Credit transfer form.

(a) When parties intend to enter in to a credit transfer agreement, the credit seller must use the “Credit Transfer Form” provided in the CFP Online System and must include the following:

(A) Date of the proposed credit transfer agreement;

(B) Name and FEIN of the credit seller and credit buyer;

(C) Name and contact information of the person who performed the transaction on the credit seller’s and credit buyer’s behalf;

(D) The number of credits proposed to be transferred; and

(E) The price or equivalent value of the consideration (in US dollars) to be paid per metric ton of credit proposed for transfer, excluding any fees.

(b) After receiving the credit transfer form from the credit seller, the credit buyer must confirm the accuracy of the information contained in the credit transfer form using the CFP Online System.

(5) Broker. A credit seller or a credit buyer may elect to use a broker to facilitate the transfer of credits but may only use a broker who complies with this rule. A broker may only facilitate the transfer of credits if that broker:

(a) Has an approved and active registration under OAR 340-253-0500(4);

(b) Has an account on the CFP Online System; and

(c) Complies with OAR 340-253-0100(4).

(6) Illegitimate credits.

(a) A credit generator violates these rules if it submits information into the CFP Online System indicating that one or more credits have been generated when such an assertion is inconsistent with the requirements of OAR 340-253-1000 through 340-253-1020. If DEQ determines that one or more clean fuel credits a credit generator claims to have generated was not generated in compliance with these rules, then the credit generator:

(A) Must provide an approved clean fuel credit to replace each credit that was not properly generated, if available; and

(B) Is also subject to enforcement for the violation.

(b) A regulated party, credit generator or broker that has acquired one or more illegitimate credits is subject to enforcement unless DEQ determines:

(A) The credits were acquired from a registered regulated party, credit generator or broker with a CFP Online System account; and

(B) The carbon intensity value of the fuel for which the credits were generated matches the carbon intensity value approved by DEQ for that fuel pathway.

(7) Public disclosure.

(a) List of DEQ-approved registered parties. DEQ will maintain a current list of regulated parties, credit generators and brokers that have had their registrations approved by DEQ under OAR 340-253-0500(4) and will make that list available on-line. The list will include, at a minimum, the name of the regulated party, credit generator or broker and whether the regulated party is a large importer, a small importer or a producer.

(b) Clean Fuels Program status report. DEQ will publish a quarterly report that summarizes the aggregate CFP credit and deficit generation for the:

(A) Most recent quarter;

(B) Past quarters of the current compliance period; and

(C) Past annual compliance periods.

(c) Clean Fuels Program credit report. DEQ will publish a monthly report that summarizes the aggregate CFP credit transfer information for:

- (A) Most recent month;
- (B) Past months of the current compliance period; and
- (C) Past annual compliance periods.
- (d) DEQ reports will be based on information submitted into the CFP Online System.
- (e) DEQ reports will represent information aggregated for all fuel transacted within the state; not by individual parties.

Deferrals

340-253-2000

Emergency Deferral Due to Clean Fuel Supply

- (1) Determining whether to issue an emergency deferral. DEQ will issue an order declaring an emergency deferral from the clean fuel standard, if DEQ determines:
 - (a) There is a shortage of fuel that is needed for regulated parties to comply with the clean fuel standard, due to:
 - (A) A natural disaster; or
 - (B) An unanticipated disruption in production or transportation of clean fuels used for compliance, except disruptions for routine maintenance of a fuel production facility or fuel transmission system; and
 - (b) The magnitude of the shortage is greater than the equivalent of five percent of the total credits generated by all regulated parties and providers of clean fuels under OAR 340-253-1020 in the previous compliance period. To determine the magnitude of the shortage, DEQ will consider the following:
 - (A) The volume and carbon intensity of the fuel determined to be not available under subsection (1)(a);
 - (B) The estimated duration of the shortage;
 - (C) Whether one of the following options could mitigate compliance with the clean fuel standard:

- (i) The same fuel from other sources is available;
 - (ii) Substitutes for the affected fuel and the carbon intensity values of those substitutes are available; or
 - (iii) Banked clean fuel credits are available; and
- (D) Any other information DEQ may need to determine the magnitude of the shortage.
- (2) Content of an emergency deferral. If DEQ determines under section (1) that it must issue a deferral, then DEQ will determine:
- (a) The start date and end date of the emergency deferral period, which may not exceed one year (but which may be renewed if DEQ makes a subsequent determination under section (1));
 - (b) The fuel deferred from complying with the clean fuel standard; and
 - (c) Which of the following methods DEQ selects to defer compliance with the clean fuel standard during the temporary deferral period:
 - (A) Allowing deficits to be carried over into future compliance periods, notwithstanding OAR 340-253-1030(2) and 340-253-1030(3); or
 - (B) Suspending deficit accrual during the emergency deferral period.
 - (d) Credits will accrue during the emergency deferral period.
- (3) Issuing an emergency deferral. An emergency deferral order DEQ issues under this rule must notify the affected parties and must contain at least the following information:
- (a) DEQ's determination under section (1);
 - (b) The deferral period as established under section (2);
 - (c) The fuel deferred as established under section (2); and
 - (d) The method selected by DEQ to comply as established under section (2).

340-253-2100

Forecasted Deferral Due to Clean Fuel Supply

- (1) DEQ forecast. DEQ will use available data under section (2) to develop a fuel supply forecast for the next calendar year that includes:
 - (a) The potential volumes of gasoline substitutes and diesel fuel substitutes available in Oregon;
 - (b) The estimated total aggregate credits available;
 - (c) The estimated credits needed to meet the clean fuel standard; and
 - (d) A comparison of the estimates under subsections (1)(a) and (b) with (1)(c) to indicate the availability of fuel needed for compliance.
- (2) Available data. DEQ will consider available data to develop the forecast including:
 - (a) Past Oregon fuel consumption volumes and trends;
 - (b) Oregon and nationwide trends in alternative fuel use;
 - (c) Information on numbers of alternative-fueled vehicles in Oregon;
 - (d) Banked clean fuel credits;
 - (e) Projected total transportation fuel consumption volumes in Oregon, including gasoline and diesel fuel;
 - (f) Planned projects in or near Oregon such as electric vehicle charging or natural gas fueling stations;
 - (g) The status of existing and planned clean fuel production facilities nationwide;
 - (h) Applicable updates to the carbon intensity values of fuels;
 - (i) Nationwide volumes for fuels required under the federal renewable fuel standard; and
 - (j) Any other information DEQ may need to develop the forecast.

(3) Determining whether to issue a forecasted deferral. If DEQ forecasts a shortfall in clean fuel credits under subsection (1)(d), and the shortfall is greater than the equivalent of five percent of the credits needed under (1)(c) to comply with the clean fuel standard, then DEQ will determine whether a forecasted deferral is needed by considering the following:

- (a) Timing of fuel availability;
- (b) Timing, duration and magnitude of the estimated clean fuel shortfall;
- (c) Information in addition to material considered under section (2), on potential and current gasoline substitutes and diesel fuel substitutes, including:
 - (A) Production nationwide;
 - (B) Use in Oregon; and
 - (C) Clean fuel infrastructure development in Oregon; and
 - (d) Any other information DEQ may need in the analysis.
- (4) Content of a forecasted deferral. If DEQ determines under section (3) that it must issue a forecasted deferral, DEQ will determine:
 - (a) The start date and end date of the forecasted deferral period, which may not exceed one year except that DEQ may renew that period if DEQ makes a subsequent determination under section (3));
 - (b) The fuel deferred from complying with the clean fuel standard; and
 - (c) Which of the following methods DEQ will use to defer compliance with the clean fuel standard during the forecasted deferral period:
 - (A) Defer the requirement to comply with the clean fuel standard for up to one year, and allow credits to accrue during the deferral period; or
 - (B) Propose that EQC revise the CFP through a rulemaking to:
 - (i) Amend the clean fuel standard;
 - (ii) Amend the clean fuel standard to extend beyond 2025, the year when Oregon must meet the lowest average carbon intensity values to allow for less stringent annual reductions while still reaching the same average carbon intensity value at the end of the period; or

(iii) Otherwise amend the CFP to address the forecasted fuel supply shortage, such as by adopting a multi-year deferral.

(5) Issuing a forecasted deferral. DEQ will issue a forecasted deferral order to the affected parties with the following information:

- (a) DEQ's determination under section (3);
- (b) The deferral period as established under section (4);
- (c) The fuel deferred as established under section (4); and
- (d) The method selected by DEQ to comply as established under section (4).

340-253-2200

Monthly Fuel Price Deferral

(1) Definitions. As used in this rule:

(a) "Diesel Blends" means diesel fuel and diesel fuel blended with biodiesel.

(b) "Gasoline Blends" means gasoline and gasoline blended with ethanol.

(c) "Price evaluation threshold" means that the 12-month rolling weighted average price of gasoline blends or diesel blends in Oregon is more than five percent higher than the 12-month rolling weighted average price in the:

(A) Statutory PADD 5 for gasoline; or

(B) Statutory PADD 5 or, if unavailable, Actual PADD 5, for diesel fuel.

(2) Average price. Each month, DEQ will calculate the 12-month rolling average price for gasoline blends and diesel blends using data available from the U.S. Energy Information Administration or a comparable source, as follows:

(a) Oregon's 12-month rolling average price. Each month, DEQ will calculate the Oregon 12-month rolling average price for gasoline blends and diesel blends.

(b) Gasoline 12-month rolling weighted-average price for PADD 5. Each month, DEQ will calculate the PADD 5 12-month rolling volume-weighted average price for gasoline blends using the statutory PADD 5 data.

(c) Diesel 12-month rolling weighted-average price for PADD 5. Each month, DEQ will calculate the PADD 5 12-month rolling volume-weighted average price for diesel blends using the actual PADD 5 or, if available, the statutory PADD 5 data.

(3) Determining need for cost mitigation. If the price of gasoline blends or diesel blends in Oregon exceeds the price evaluation threshold:

(a) DEQ will provide fuel data and analysis to EQC that includes the applicable information under sections (4) and (5);

(b) EQC will determine the need to mitigate the costs of complying with the clean fuel standard after considering the DEQ fuel data and analysis. EQC will direct DEQ to implement one or more cost mitigation strategies if EQC determines that:

(A) The price of Oregon gasoline blends or diesel blends exceeds the price evaluation threshold due to the costs of complying with the clean fuel standard; and

(B) Implementing one of the strategies under section (6) is necessary to mitigate the costs of compliance with the clean fuel standard.

(4) Determining whether the clean fuel standard caused the price evaluation threshold exceedance. EQC will determine whether the price of Oregon gasoline blends or diesel blends exceeds the price evaluation threshold due to the costs of complying with the clean fuel standard. DEQ will analyze and provide the following information to EQC:

(a) Whether fuel volume and price data is faulty or incomplete;

(b) Price of gasoline substitutes and diesel substitutes;

(c) Changes in demand for gasoline blends and diesel blends such as changes caused by:

(A) An increase in population; or

(B) An increase in fuel usage.

(d) A decrease in retail outlets for gasoline blends and diesel blends in Oregon;

(e) Natural or manmade disasters affecting Oregon but not the statutory PADD 5 as a whole;

(f) Regulatory change that affects Oregon but not the statutory PADD 5 as a whole;

(g) Change in the usage of reformulated gasoline or other special fuel in any state in the statutory PADD 5; and

(h) Any other information DEQ or EQC may need to determine whether the clean fuel standard caused the price of Oregon gasoline blends or diesel blends to exceed the price evaluation threshold.

(5) Factors in determining whether a price mitigation strategy is necessary. EQC will consider the following factors to determine whether it is necessary to mitigate the costs of compliance with the clean fuel standard, or whether the price of gasoline blends or diesel blends will fall below the price evaluation threshold within six months without implementing a cost mitigation strategy:

(a) Fuel price trends;

(b) Price of gasoline substitutes and diesel substitutes;

(c) Availability and use of gasoline substitutes and diesel substitutes in Oregon;

(d) Compliance schedule for the fuel;

(e) Future supply of gasoline substitutes and diesel substitutes; and

(f) Any other information DEQ or EQC may need to determine whether implementing standard cost mitigation strategy is necessary.

(6) Cost mitigation strategies. If EQC determines under subsection (3)(b) that mitigating the cost of compliance is necessary, it will order, and DEQ will implement, one of the following cost mitigation strategies with EQC-approved start and end dates:

(a) Suspending deficit accrual during a cost mitigation period and allowing credits to accrue during that period;

(b) Allowing credits to accrue and allowing deficits to be carried over into future compliance periods, notwithstanding OAR 340-253-1030(2) and 340-253-1030(3), during a cost mitigation period. EQC may allow deficits to be carried

over for one, two, or three future compliance periods before the deficits must be reconciled;

- (c) Suspending deficit accrual for a percentage of the fuel during the cost mitigation period and allowing credits to accrue during the period;
 - (d) Eliminating the requirement to comply with the clean fuel standard for up to one year; or
 - (e) Adopting any other price mitigation strategy that EQC determines to be necessary to effectively mitigate the cost of compliance.
- (7) EQC reconsideration. EQC may reconsider and revise its determinations under sections (4) and (5) if the information it considered under those sections has changed. Based on that reconsideration, EQC may reconsider and revise or withdraw any cost mitigation strategies ordered under section (6).
- (8) DEQ implementation. In implementing a cost mitigation strategy as EQC directs, DEQ will notify the affected parties with the following information:
- (a) EQC's determinations under sections (4) through (6);
 - (b) The start date and end date for the cost mitigation strategy period;
 - (c) The fuel(s) affected by the price mitigation strategy; and
 - (d) The cost mitigation strategy that EQC adopted under section (6).

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

Oregon Department of Environmental Quality 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

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

State of Oregon Department of Environmental Quality 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

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

Oregon Department of Environmental Quality Table 3 – 340-253-8030 Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes					
Fuel	Pathway Identifier	Pathway Description	Carbon Intensity Values (gCO ₂ e/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
	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

Oregon Department of Environmental Quality

Table 3 – 340-253-8030

Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

	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
	ETHC017	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed	55.24	-	55.24

Oregon Department of Environmental Quality

Table 3 – 340-253-8030

Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

		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%			
	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
	ETHC021	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed	53.96	-	53.96

Oregon Department of Environmental Quality

Table 3 – 340-253-8030

Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

		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%			
	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

Oregon Department of Environmental Quality

Table 3 – 340-253-8030

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

Oregon Department of Environmental Quality

Table 3 – 340-253-8030

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 the 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	43.21	-	43.21

Oregon Department of Environmental Quality

Table 3 – 340-253-8030

Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

Fuel	Pathway Identifier	Pathway Description	Carbon Intensity Values (gCO ₂ e/MJ)		
			Direct Emissions	Land Use or Other Indirect Effect	Total
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

Oregon Department of Environmental Quality

Table 3 – 340-253-8030

Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

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
	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

Oregon Department of Environmental Quality

Table 3 – 340-253-8030

Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

	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
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

Oregon Department of Environmental Quality

Table 3 – 340-253-8030

Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

	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

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

Oregon Department of Environmental Quality Table 4 – 340-253-8040 Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes					
Fuel	Pathway Identifier	Pathway Description	Carbon Intensity Values (gCO ₂ e/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

Oregon Department of Environmental Quality

Table 4 – 340-253-8040

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

Oregon Department of Environmental Quality

Table 4 – 340-253-8040

Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes

	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
	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

Oregon Department of Environmental Quality

Table 4 – 340-253-8040

Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes

	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
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

Oregon Department of Environmental Quality

Table 4 – 340-253-8040

Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes

	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

Table 5 – Summary Checklist of Quarterly Progress and Annual Compliance Reporting Requirements

Oregon Department of Environmental Quality Table 5 – 340-253-8050 Summary Checklist of Quarterly Progress and Annual Compliance Reporting Requirements					
Parameters to Report	Gasoline & Diesel Fuel	Ethanol & Biodiesel	CNG, LNG, LPG & Renewable Diesel	Electricity	Hydrogen & Hydrogen Blends
Company or organization name	x	x	x	x	x
Reporting period	x	x	x	x	x
Fuel pathway code	x	x	x	x	x
Transaction type	x	x	x	x	x
Transaction date	x	x	x	x	x
Business Partner	x	x	x	x	x
Production Company ID and Facility ID	n/a	x	n/a	n/a	x
Physical transport mode code	x	x	x	x	x
Aggregation	x	x	x	x	x
Application / EER	x	x	x	x	x
Amount of each fuel used as gasoline replacement	x	x	x	x	x
Amount of each fuel used as diesel fuel replacement	x	x	x	x	x
*Credits/deficits generated per quarter (MT)	x	x	x	x	x
For Annual Compliance Reporting (in addition to the items above)					
*Credits and Deficits	x	x	x	x	x

Oregon Department of Environmental Quality

Table 5 – 340-253-8050

Summary Checklist of Quarterly Progress and Annual Compliance Reporting Requirements

generated per year (MT)					
*Credits/deficits carried over from the previous year (MT), if any	X	X	X	X	X
*Credits acquired from another party (MT), if any	X	X	X	X	X
*Credits sold to another party (MT), if any	X	X	X	X	X
*Credits retired within LCFS (MT) to meet compliance obligation, if any	X	X	X	X	X

*Value will be calculated and stored in the CFP Online System.

Table 6 – Oregon Energy Densities of Fuels

Oregon Department of Environmental Quality Table 6 – 340-253-8060 Oregon Energy Densities of Fuels	
Fuel (units)	MJ/unit
Gasoline (gallon)	116.09 (MJ/gallon)
Diesel fuel (gallon)	129.49 (MJ/gallon)
Compressed natural gas (standard cubic feet)	0.98 (MJ/standard cubic feet)
Electricity (kilowatt hour)	3.60 (MJ/kilowatt hour)
Denatured ethanol (gallon)	81.51 (MJ/gallon)
Clear biodiesel (gallon)	119.55 (MJ/gallon)
Liquefied natural gas (gallons)	76.84 (MJ/gallon)
Hydrogen (kilograms)	123.00 (MJ/kilogram)
Liquefied petroleum gas (gallons)	96.5 (MJ/gallon)

Table 7 – Oregon Energy Economy Ratio Values for Fuels Used as Gasoline Substitutes

Oregon Department of Environmental Quality Table 7 – 340-253-8070 Oregon Energy Economy Ratio Values for Fuels Used as Gasoline Substitutes	
Fuel/Vehicle Combination	EER Value Relative to Gasoline
Gasoline or any ethanol blend	1.0
Compressed Natural Gas (CNG) or Internal Combustion Engine Vehicle (ICEV)	1.0
Electricity, Battery Electric Vehicle or Plug-In Electric Vehicle	3.4
Hydrogen or Fuel Cell Vehicle	2.5

Table 8 – Oregon Energy Economy Ratio Values for Fuels Used as Diesel Substitutes

Oregon Department of Environmental Quality Table 8 – 340-253-8080 Oregon Energy Economy Ratio Values for Fuels Used as Diesel Substitutes	
Fuel/Vehicle Combination	EER Value Relative to Diesel
Diesel fuel or biodiesel blends	1.0
Compressed Natural Gas (CNG) or Liquefied Natural Gas (LNG) (Spark-Ignition Engines)	0.9
Compressed Natural Gas (CNG) or Liquefied Natural Gas (LNG) (Compression-Ignition Engines)	1.0
Electricity, Battery Electric Vehicle or Plug-In Electric Vehicle	2.7
Hydrogen or Fuel Cell Vehicle	1.9