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The EPA at Fifty: Time to Give Bootleggers the Boot!

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THE EPA AT FIFTY: TIME TO GIVE BOOTLEGGERS THE BOOT!

Brian F. Mannix[†]

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INTRODUCTION

The Environmental Protection Agency (EPA) has an important and well-defined mission with broad public support. Too often, however, the Agency has sought to strengthen its position by aligning itself with politically powerful rent-seeking interests. There are numerous examples—most recently, the use of the renewable fuels standards to subsidize ethanol refiners and related agricultural interests. My wish for the Agency on its fiftieth birthday is that it stays focused on its own mission and remembers that old adage: “Dilution is not the solution to pollution.”

I. AGENCIES COME AND AGENCIES GO

My first full-time job was as an operations research analyst at the EPA in 1977, under President Jimmy Carter and Administrator Doug Costle. I returned to serve as the EPA’s Associate Administrator for Policy, Economics, and Innovation from 2005 to 2009, under President George W. Bush and Administrator Steve Johnson.

In between those stints, I held several other jobs that let me see the EPA from different perspectives: from 1979 to 1987 I did economic

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oversight of EPA regulations first at the Council on Wage & Price Stability and then at the newly created Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). Later, I held a position in state government, supervising the state's Department of Environmental Quality and its interactions with the EPA. For a while I worked at a manufacturing think tank, and learned the challenges of regulatory compliance from its members.

Along the way I often found reasons to question the Agency's decisions, but to this day, the EPA remains my favorite federal agency. In part that is because I have many friends and colleagues there, but it is also because, in contrast to many other federal agencies, the EPA has a persuasive reason to exist.

That may sound odd, but when I first studied public policy in the 1970s, it was common to ask whether a government program was really necessary, and sometimes the answer was "no." President Carter promoted a concept called "zero-based budgeting," which encouraged a fundamental review of each program every year.¹ (Sadly, it did not last.)

In 1974, under Chairman Ted Kennedy, the Senate Judiciary Committee held hearings questioning the need for airline regulation by the Civil Aeronautics Board (CAB).² The hearings were organized by Special Counsel (now Justice) Stephen Breyer, from whom I took an administrative law course when he returned to the academy.³ Economist Alfred Kahn was the star witness at those hearings; he went on to chair the CAB and to help phase it out of existence.⁴ This year we celebrate the thirty-fifth anniversary of the CAB's abolition.

This year we also celebrate the fortieth anniversary of the trucking and rail deregulation bills signed by President Carter, and the twenty-fifth anniversary of the complete demise of the Interstate Commerce Commission (ICC). In fact, the ICC's old hearing room still exists; it is now a conference room called Room 1123 EPA East. After a difficult day in the office, I would sometimes go to that room just to rejoice in the fact that the ICC was no longer there. We rightly celebrate the dismantling of those agencies in the era of economic deregulation,⁵

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1. Charlie B. Tyer, *Zero-Base Budgeting: A Critical Analysis*, 1 S. REV. PUB. ADMIN. 88, 88-90 (1977).
 2. Edward M. Kennedy, *Airline Regulation by the Civil Aeronautics Board*, 41 J. AIR L. & COM. 607, 607 (1975).
 3. See Stephen Breyer's Path to the Supreme Court, NAT'L CONST. CTR.: CONST. DAILY (Aug. 3, 2017), <https://constitutioncenter.org/blog/stephen-breyers-path-to-the-supreme-court> [<https://perma.cc/FB3V-MSU2>].
 4. See Robert D. Hershey, Jr., *Alfred E. Kahn Dies at 93; Prime Mover of Airline Deregulation*, N.Y. TIMES (Dec. 28, 2010), <https://nytimes.com/2010/12/29/business/29kahn.html> [<https://perma.cc/6QHK-ADKW>].
 5. See William A. Niskanen, *Economic Deregulation in the United States: Lessons for America, Lessons for China*, 8 CATO J. 657, 657 (1989)

which was a thoroughly bipartisan effort and was a spectacular success in terms of improving consumer welfare.

At roughly the same time, new agencies were being created to address environmental, health, and safety concerns. And new procedures were put in place to guide these social regulatory agencies. President Clinton's Executive Order No. 12,866,⁶ *Regulatory Planning and Review*, built on earlier efforts by Presidents Nixon, Ford, Carter, and Reagan, and remains in effect today.⁷ It specifies that, before regulating, agencies should state what problem they are trying to solve, explain why markets are not adequate to solve it, examine the available alternatives, and use cost-benefit analysis to evaluate the alternatives' relative merits.⁸

Applied rigorously, the well-established principles in Clinton's executive order might give some agencies considerable trouble. The Occupational Safety and Health Administration might struggle to explain why labor markets and traditional common law remedies would not adequately ensure workplace safety, for example. The Consumer Product Safety Commission would need to explain how its regulations improve the function of markets for consumer goods. Where exactly is the market failure?

But the EPA would have no such trouble explaining why it is needed. Environmental externalities are a very real problem, and markets do not exist to handle them adequately. The need for the EPA is not really in question.

This is not to say we could not find radical ways to improve the way the EPA approaches its job. There are plenty of opportunities to strengthen property rights and private remedies for environmental damage, and to design more market-like regulatory solutions. From the beginning, the EPA has done some thoughtful work on this topic, but in its regulatory actions, the impulse to command and control more often seems to prevail.

We could also do a better job of parsing the federal and state roles in environmental protection. Contrary to much of the press coverage, I think the recent rule narrowing the definition of "waters of the United States" is a step in the right direction.⁹ States have been protecting water quality for far longer than fifty years, and in many ways they are

(noting that during the 1980s, the federal government generally reduced regulation).

6. 58 Fed. Reg. 51,735 (Oct. 4, 1993).
7. See Robert J. Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71, 73, 75 (1997).
8. See *id.* at 74-75.
9. See The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22,250, 22,251 (Apr. 21, 2020) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, & 401).

better equipped to carry out this task. They have the authority to regulate land use, for example, which can be one of the most important tools for protecting water quality.

But in the final analysis, we will still need a federal agency with responsibility for environmental regulation. The EPA gets its fair share of criticism, but still enjoys strong bipartisan support and unwavering public support.¹⁰ It therefore should have the confidence to put up a vigorous resistance when rent-seeking interests seek to bend the Agency's authorities towards private aims that often conflict with the public interest.

II. OF BOOTLEGGERS AND BAPTISTS

Clemson Professor Bruce Yandle offered a positive theory of social regulation based on an analogy to the tacit alliance of bootleggers and Baptists, both of whom, for different reasons, supported alcohol prohibition¹¹:

Durable social regulation evolves when it is demanded by both of two distinctly different groups. "Baptists" point to the moral high ground and give vital and vocal endorsement of laudable public benefits . . . "Bootleggers" are much less visible but no less vital. Bootleggers, who expect to profit from the very regulatory restrictions desired by Baptists, grease the political machinery with some of their expected proceeds. They are simply in it for the money.¹²

Viewed through this lens, my argument above could be restated as follows: In contrast to the economic regulatory agencies, the EPA has a strong "Baptist" case for its existence. Agencies like the CAB and the ICC were overrun with bootleggers, typically explained by some variant of "agency capture" theories,¹³ but their Baptist stories were lacking. Their stated mission was to protect consumers from the high prices that would otherwise prevail because of natural monopolies.¹⁴ As the Kennedy–Breyer hearings vividly demonstrated, in practice those agencies were harming consumers by protecting monopolies—exactly

10. See *How the EPA Became a Victim of Its Own Success*, NPR (Feb. 17, 2017), <https://npr.org/2017/02/17/515748401/how-the-epa-became-a-victim-of-its-own-success> [<https://perma.cc/F4ER-3S7R>].

11. Bruce Yandle, *Bootleggers and Baptists in Retrospect*, 22 REGULATION 5, 5 (1999).

12. *Id.*

13. See *id.* at 7.

14. William A. Jordan, *Producer Protection: Prior Market Structure and the Effects of Government Regulation*, 15 J.L. & ECON. 151, 151–52 (1972).

the opposite of their stated missions. Thus exposed, the bootleggers were run out of town during the era of economic deregulation.¹⁵

With its strong Baptist mission, the EPA is in no danger of being run out of town, but it does need to be on guard against bootleggers who seek to exploit the Agency. In this, it has not always been successful.

A. “*Clean Coal, Dirty Air*”

The first example was well documented by Bruce Ackerman and William Hassler in *Clean Coal, Dirty Air*.¹⁶ In the 1970s, federal regulation of air quality threatened to put eastern high-sulfur coal at an economic disadvantage compared to western low-sulfur coal.¹⁷ To prevent this outcome, eastern coal interests fought to shape both the Clean Air Act and the EPA’s interpretation of it.¹⁸ Rather than a performance standard for sulfur emissions, the EPA required scrubbers. These worked, but they imposed on the public both higher costs for electricity and lower air quality than might otherwise have been achieved.¹⁹

It was also during this first decade that the EPA began to “grandfather in” older electric power plants, effectively creating a privileged special interest that would present the Agency with many challenges over the years.²⁰ Agency analysts knew at the time that alternatives were available: emissions trading systems, like those later adopted in the 1990 amendments to the Clean Air Act, would make it possible to adopt aggressive pollution-reduction goals without having to carve out exceptions.²¹ But the model that prevailed at the EPA was a bootlegger-and-Baptist model: command-and-control regulation with selectively granted indulgences.

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15. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1366–68 (1998).
 16. See generally BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).
 17. See *id.* at 17–19.
 18. See *id.* at 18.
 19. See *id.* at 12–34.
 20. Richard Revesz et al., *Grandfathering Coal: Power Plant Regulation Under the Clean Air Act*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10,541, 10,541 (2016).
 21. Richard E. Ayres, *The 1990 Clean Air Amendments: Performance and Prospects*, 13 NAT. RESOURCES & ENV’T 379, 381 (1998).

B. The “Land Ban” of Hazardous Waste

In 1984, Congress enacted the Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act.²² Both the legislation and the EPA’s subsequent implementing regulations were strategically shaped by the Hazardous Waste Treatment Council (HWTC), a trade association that, to an economist, looked very much like a cartel.²³ At the time, only a limited number of facilities were legally permitted to treat hazardous waste, and the HWTC worked hard to ensure that every other method of waste disposal—whether land disposal or incineration at sea—was outlawed.²⁴ They insisted on technology-based rather than risk-based standards for treatment in order to protect their captive market from any innovator who might come up with a better means of disposal.²⁵ The Council also insisted that used oil be classified as a hazardous waste, in order to prevent its beneficial recycling. The result of their efforts was severely limited capacity and very high prices for hazardous waste disposal—profitable for the members of the HWTC but harmful to consumers, and, very likely, the environment, due to all the illegal dumping of hazardous waste that the high prices encouraged.²⁶

C. Protecting the Ozone Layer, and a Manufacturer

Pursuant to the Montreal Protocol on Substances that Deplete the Ozone Layer, a treaty signed in 1987,²⁷ the EPA has phased out various halogenated hydrocarbons, especially refrigerants.²⁸ This phase-out proceeded in stages over many years as new refrigerants that were less

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22. Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6901 (2012).
23. See Susan E. Dudley, *Bootleggers & Baptists: The Experience of Another Regulatory Economist* 5–6 (Nov. 2018) (unpublished manuscript) (on file with the George Washington University Regulatory Studies Center), *available at* <https://regulatorystudies.columbian.gwu.edu/bootleggers-baptists-experience-another-regulatory-economist> [<https://perma.cc/UV3M-25GJ>].
24. *See id.* at 6.
25. *Id.*; WILLIAM BOYES, *MANAGERIAL ECONOMICS: MARKETS AND THE FIRM* 177 (2d ed. 2011).
26. Dudley, *supra* note 23, at 6.
27. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 26,369. The 1990 Clean Air Act Amendments gave the EPA the authority to issue regulations implementing this treaty. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. § 4213 (2012)).
28. Protection on Stratospheric Ozone: Update to the Refrigerant Management Requirements Under the Clean Air Act, 81 Fed. Reg. 82,272, 82,275 (Nov. 18, 2016) (to be codified at 40 C.F.R. pt. 82).

harmful to the ozone layer were brought to market.²⁹ The phase-out was coordinated globally, but mostly the EPA seems to have coordinated with the leading manufacturer of covered halogenated hydrocarbons, DuPont (now Chemours).³⁰ Indeed, one striking feature of the phase-out is that older refrigerants seem to have been banned just when their patent protection was due to expire, and when a newly patented replacement chemical became available.³¹ The net result has been to restrict competition in the market for refrigerants, globally as well as domestically, resulting in sustained high prices. To be sure, the Montreal Protocol has been successful in halting and reversing damage to the ozone layer;³² but the manner in which it was done has been profitable for the manufacturer and very expensive for consumers.

D. Picking the Perfect Pesticide

The EPA's registration (and re-registration) of pesticides resembles in many ways the Food and Drug Administration's approval of new drugs, and in both cases the agencies feel pressure to use their health and safety authorities to erect barriers to competition. A manufacturer may argue, for example, that its proprietary formulation is superior to all competitors in a particular application, and that the agency should therefore ban the others. Even when the argument has merit, however, that approach tends to create government-protected monopolies, and can sacrifice the substantial advantages of competition and innovation.

E. CAFE Standards

The Department of Transportation has issued Corporate Average Fuel Economy standards since the 1970s but, after *Massachusetts v. EPA* was decided in 2007, the EPA has adopted a parallel program under the Clean Air Act to control greenhouse gases.³³ In doing so, the EPA has adopted many of the bootlegger pathologies that have long

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29. See OFFICE OF AIR & RADIATION, EPA, EPA-430-R-07-001, ACHIEVEMENTS IN STRATOSPHERIC OZONE PROTECTION 18–19 (2007).
30. See CHUCK BOOTEN ET AL., CLEAN ENERGY MANUFACTURING ANALYSIS CENTER, REFRIGERANTS: MARKET TRENDS AND SUPPLY CHAIN ASSESSMENT 1, 24, 33, 39, 49 (2020); Sharon Lerner, *How a Dupont Spinoff Lobbied the EPA to Stave Off the Use of Environmentally Friendly Coolants*, INTERCEPT (Aug. 25, 2018), <https://theintercept.com/2018/08/25/chemours-epa-coolant-refrigerant-dupont/> [<https://perma.cc/XQG3-P2KE>].
31. See BOOTEN ET AL., *supra* note 30, at 19.
32. See Stephen Leahy, *Without the Ozone Treaty You'd Get Sunburned in 5 Minutes*, NAT'L GEOGRAPHIC (Sept. 25, 2017), <https://www.nationalgeographic.com/news/2017/09/montreal-protocol-ozone-treaty-30-climate-change-hcfs-hfcs.html> [<https://perma.cc/X2MC-W4BJ>].
33. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499–500 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

plagued the CAFE program. Just as appliance manufacturers use the Department of Energy's (DOE) appliance efficiency standards to exclude low-priced foreign competitors from the U.S. market, domestic auto manufacturers try to shape the CAFE standards in ways that provide a competitive advantage. The standards are tiered so that light trucks—broadly defined, and popular with American consumers—get a looser standard. And the EPA adopted the “footprint method” of calculating mileage—giving extra credit to cars with a long and wide wheelbase.³⁴ There is no environmental or other public benefit associated with a large footprint; it is simply a way of creating a regulatory obstacle to imported vehicles that typically have smaller footprints. Much of the unfortunate squabbling over the CAFE standards has nothing to do with climate or any public benefit; instead it reflects the efforts of bootleggers to tilt to their own advantage the various cross-subsidies embedded in the details of the CAFE rules.

F. Getting the Lead Out of Gasoline

Beginning in 1973, the EPA set limits on the use of tetraethyl lead, an octane booster, in gasoline.³⁵ There were two reasons for limiting lead use, and therefore two different requirements. The first reason was that the EPA was mandating catalytic converters on new cars; lead would poison those catalysts, so the EPA also mandated that gas stations carry unleaded gasoline.³⁶ The second rationale was that lead emissions from automobiles were a direct health threat, so the EPA limited the quantity of lead additives used in leaded gasoline, and lowered those limits over time.³⁷

This “lead phase-down” was in many ways an ideal candidate for a system of emissions trading. There was no need to measure the level of emissions: refiners knew exactly how much lead they were adding to the gasoline, and every gram of lead that went into the gas tank would be emitted by the tailpipe. But the EPA instead chose the command-and-control-with-exceptions approach. The Agency set a binding limit,

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34. Average Fuel Economy Standards for Light Trucks; Model Years 2008–2011, 70 Fed. Reg. 51,414, 51,416, 51,418 (proposed Aug. 30, 2005) (to be codified at 49 C.F.R. pts. 523, 533, & 537).
35. *See Fact Sheet—A Brief History of Octane in Gasoline: From Lead to Ethanol*, ENVTL. & ENERGY STUDY INST. (Mar. 30, 2016), <https://www.eesi.org/papers/view/fact-sheet-a-brief-history-of-octane> [<https://perma.cc/Y2NY-M57N>].
36. V.M. Thomas, *The Elimination of Lead in Gasoline* 20 ANN. REV. ENERGY & ENV'T 301, 312 (1995).
37. Jack Lewis, *Lead Poisoning: A Historical Perspective*, EPA J., May 1985, at 15, available at <https://archive.epa.gov/epa/aboutepa/lead-poisoning-historical-perspective.html> [<https://perma.cc/CU24-F6XF>].

measured in grams of lead per gallon of gasoline, for larger refiners.³⁸ But it made exceptions for several tiers of small refiners.³⁹ The smallest could use more than five times as much lead as large refiners.⁴⁰

At the time, small refiners were among the most powerful lobbyists in Washington. Oil and oil products were subject to price and allocation regulations administered by the DOE, which adopted a “small refiner bias” that funneled billions of dollars’ worth of oil entitlements to the small refiners.⁴¹

In one of his first acts as President, Ronald Reagan deregulated oil prices and thus ended DOE’s small refiner bias.⁴² At the same time, his Presidential Task Force on Regulatory Relief requested that the EPA re-examine the lead phase-down regulations.⁴³ It asked the Agency to evaluate the most recent health evidence to see what level of lead use could be justified;⁴⁴ and it asked the Agency to apply that level uniformly to all gasoline producers, using emissions trading, rather than exceptions, to accommodate the varying needs of different refiners.

Initially the EPA’s Air Office resisted both of these requests, but its Policy Office had long sought to adopt emissions trading, and this was a perfect opportunity to try it. In 1982, the Agency promulgated a new rule that kept the total amount of lead at the same level as the old lead phase-down rules, but with a uniform limit on all refiners, and

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38. RICHARD G. NEWELL & KRISTIAN ROGERS, RES. FOR THE FUTURE, *THE U.S. EXPERIENCE WITH THE PHASEDOWN OF LEAD IN GASOLINE 3* (2003) (“Large refiners . . . were to produce a quarterly average of no more than 0.8 grams per gallon (gpg) for the first year and 0.5 gpg the next two years.”).
39. *Id.* (“small refiners . . . faced a scale of five different standards”).
40. *See id.* (“the smallest refiners being permitted 2.65 gpg, and the largest of the small refiners being permitted 0.8 gpg”).
41. Notices of January 1981 and Entitlements Adjustments, 49 Fed. Reg. 27,410, 27,411 (July 3, 1984).
42. Robert D. Hershey, Jr., *President Abolishes Last Price Controls on U.S.-Produced Oil*, N.Y. TIMES (Jan. 29, 1981), <https://www.nytimes.com/1981/01/29/us/president-abolishes-last-price-controls-on-us-produced-oil.html> [<https://perma.cc/7XFX-JSCZ>].
43. Herbert L. Needleman, *The Removal of Lead from Gasoline: Historical and Personal Reflections*, in 2 PUBLIC HEALTH: THE DEVELOPMENT OF A DISCIPLINE 181, 200–01 (Dona Schneider & David E. Lilienfeld eds., 2011).
44. *See* William Greider, *When Big Business Needs a Favor, George Bush Gets the Call*, ROLLING STONE (Apr. 12, 1984, 12:00 PM), <https://www.rollingstone.com/politics/politics-news/when-big-business-needs-a-favor-george-bush-gets-the-call-240823/> [<https://perma.cc/3P9G-CPK4>]. Some refiners, most notably Arco, had argued that no limits were needed. Arco changed its position when it realized that a subsidiary, Arco Chemical, was the leading producer of feedstocks for octane boosters that would substitute for lead.

trading to give flexibility.⁴⁵ The small refiners sued, arguing that emissions trading would never work.⁴⁶ By the time they got to court, however, it was already working smoothly. Refiners could buy as many lead rights as they needed, at a price of about one cent per gram.⁴⁷

The result of this reform was striking. In the next three years, more than half of all refiners in the United States closed. The small refiners had served no real economic purpose, they existed *only* to collect the subsidies provided by the DOE and the EPA.

There is another chapter to this story. On his own initiative, Joel Schwartz (then in the EPA's Policy Office; now at Harvard's School of Public Health) completed the study of the health effects of lead in gasoline that the OMB had requested. Following a briefing on the study, the OMB asked the EPA to propose the complete removal of lead from gasoline, which it did in 1984.⁴⁸ At this point there was almost no resistance to the proposal because lead was no longer being used to subsidize small refiners. The lesson is that regulation to protect the environment is much easier to accomplish when it is not entangled with the private interests of bootleggers.

The rest of the world followed the U.S. initiative; the Persian Gulf oil producers deserve special credit for facilitating the removal of leaded gasoline from the continents of Africa and Asia.⁴⁹ The United Nations Environment Program has estimated the global health benefits of lead removal at nearly \$2.4 trillion per year.⁵⁰

G. The Ethanol Bootleggers

The EPA's Renewable Fuels Standard (RFS) mandates certain ratios of renewable fuels to fossil fuels used in motor vehicles.⁵¹ This

45. *EPA Sets New Limits on Lead in Gasoline*, EPA, <https://archive.epa.gov/epa/aboutepa/epa-sets-new-limits-lead-gasoline.html> [<https://perma.cc/XWU3-KSDX>] (last updated Sept. 16, 2016).

46. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 511, 534 (D.C. Cir. 1983).

47. *Id.* at 536 & n.85.

48. Kenneth Bridbord & David Hanson, *A Personal Perspective on the Initial Federal Health-Based Regulation to Remove Lead from Gasoline*, 117 ENVTL. HEALTH PERSP. 1195, 1199–2000 (2009).

49. See Marc Lacey, *Belatedly, Africa Is Converting to Lead-Free Gasoline*, N.Y. TIMES (Oct. 31, 2004), <https://www.nytimes.com/2004/10/31/world/africa/belatedly-africa-is-converting-to-leadfree-gasoline.html> [<https://perma.cc/VT7W-CQDZ>].

50. *Phase-Out of Leaded Petrol Brings Huge Health and Cost Benefits—UN-Backed Study*, U.N.: NEWS (Oct. 27, 2011), <https://news.un.org/en/story/2011/10/393292-phase-out-leaded-petrol-brings-huge-health-and-cost-benefits-un-backed-study> [<https://perma.cc/H8AV-48QZ>].

51. *Overview for Renewable Fuel Standard*, EPA, <https://www.epa.gov/>

type of ratio constraint can be thought of as having two shadow prices: it creates a cross-subsidy by taxing the denominator and subsidizing the numerator. Thus the RFS effectively taxes gasoline and diesel fuel, and subsidizes ethanol and biodiesel. This mechanism is not itself objectionable; the lead-trading program described above also functioned through a ratio constraint; and, like the lead program, the RFS program allows for trading. The problem is that the case for renewable fuels, especially ethanol, is largely a bootlegger case. The promotion of ethanol fuel has been expensive, harmful to air and water quality, and of no discernable benefit to the climate. In recent years, it has been the Agriculture Department, more than the EPA, that has been advocating for aggressive RFS standards.

The cost of the RFS is passed through to consumers in the price of fuels, but that has not stopped some oil refiners from requesting relief.⁵² The EPA began granting exemptions from the RFS to refiners who argued that they could not afford to buy allowances (known as RINs) in the market.⁵³ Given the history of the lead phase-down program above, it is dismaying to see how the RFS program has evolved. The EPA soon learned that the refiners who were granted exemptions then turned around and *shorted* the RIN market, based on the insider information that their own exemption was going to drive future RIN prices lower.

The Agency has started to make the granting of RFS exemptions public in order to avoid this insider trading in the RIN market. Even so, the effect of the exemptions is to create yet another class of bootleggers. Consumers are still paying needlessly high prices for fuel, while ethanol refiners and select oil refiners are squabbling over how the spoils should be divided. Any environmental benefit in all this is difficult to find.

CONCLUSION: IS THE EPA A VICTIM OR A PERPETRATOR?

The examples above are necessarily very abbreviated accounts of what are much more complicated stories.⁵⁴ I chose them just to illustrate the frequency with which bootleggers attempt to commandeer

renewable-fuel-standard-program/overview-renewable-fuel-standard [https://perma.cc/QZP9-P6BF] (last updated June 7, 2017).

52. See Scott Irwin, *Clearing the Logjam on the RFS and SREs: A Simple Proposal*, FARMDOC DAILY, Sept. 19, 2019, at 4, available at <https://farmdocdaily.illinois.edu/2019/09/clearing-the-logjam-on-the-rfs-and-sres-a-simple-proposal.html> [https://perma.cc/2RN2-TTEL].

53. *Id.* at 1–2, 4.

54. For more detail on some examples, see Jonathan H. Adler, *Rent Seeking Behind the Green Curtain*, 4 REGULATION 26 (1996), <https://www.cato.org/sites/cato.org/files/serials/files/regulation/1996/10/v19n4-4.pdf> [https://perma.cc/CJM4-UKKZ].

the EPA's regulatory authorities, and bend the rules towards private gains.

But is it fair to blame the EPA for this phenomenon? Not entirely. Often the Agency is acting in response to pressure from Congress or the White House, or even in response to mandates that result from litigation. In many cases, the bootlegger stories above played out more in the legislative arena than in the process of administrative rule-making. And external political forces always will—indeed, they always must—play a role in shaping policy.

Even so, the EPA must take some responsibility for letting its attention wander from its core mission. The program offices within the EPA are themselves interested parties, and actively engage in the rough-and-tumble of the politics that preoccupy the denizens of D.C. In my observation, the EPA's offices will sometimes actively collaborate with bootleggers in an attempt to build political support for the expansion of one program or another. In the long run, I think the EPA will be more successful by resisting entanglement with bootleggers, and by keeping its environmental mission, and the public interest, paramount.