

ORAL ARGUMENT NOT SCHEDULED

No. 16-1005 (and consolidated cases)

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICANS FOR CLEAN ENERGY, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY,
ADMINISTRATOR,

Respondents.

On Petition for Review of Final Rule
of the Environmental Protection Agency

**INITIAL BRIEF FOR PETITIONERS
AMERICANS FOR CLEAN ENERGY, ET AL.**

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CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to Circuit Rule 28, Petitioners Americans for Clean Energy *et al.*, through undersigned counsel, hereby certify the following as to parties, rulings, and related proceedings in this case:

Parties and Amici**A. Petitioners**

Americans for Clean Energy; the American Coalition for Ethanol; the Biotechnology Innovation Organization; Growth Energy; the National Corn Growers Association; the National Farmers Union; the National Sorghum Producers; and the Renewable Fuels Association.

The National Biodiesel Board.

Alon Refining Krotz Springs, Inc.; American Fuel & Petrochemical Manufacturers, American Petroleum Institute; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Ergon-West Virginia, Inc.; Hunt Refining Company; Lion Oil Company; Monroe Energy, LLC; Placid Refining Company LLC; U.S. Oil & Refining Co.; Valero Energy Corporation; and Wyoming Refining Company.

B. Respondents

U.S. Environmental Protection Agency, and Regina McCarthy, Administrator.

C. Intervenors in Support of Respondent

All Petitioners and E.I. du Pont de Nemours & Co.

D. Amici

There are no amici.

Rulings Under Review

Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017. 80 Fed. Reg. 77,420 (Dec. 14, 2015) (JA__).

Related Cases

This case was not previously before any court. There are no related cases.¹

¹ Another subsequent petition (Case No. 16-1052) was consolidated but later deconsolidated. Order, ECF #1611965 at 1.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioners provide the following corporate disclosure statement:

Americans for Clean Energy is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are trade groups and other supporters of renewable fuels. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It is a non-stock corporation without a parent company, and one of its six members is the Archer Daniels Midland Company, which is publicly held.

The American Coalition for Ethanol is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members include ethanol and biofuel facilities, agricultural producers, ethanol industry investors, and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The Biotechnology Innovation Organization (“BIO”) (f.k.a. the Biotechnology Industry Organization) is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are biotechnology companies, academic institutions, state biotechnology centers, and related organizations

involved in the research and development of biotechnology products, including conventional and advanced biofuels. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Growth Energy is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The National Corn Growers Association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are corn farmers and supporters of the agriculture and ethanol industries. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The Farmers Educational & Cooperative Union of America (doing business as **the National Farmers Union**) is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members include farmers who are producers

of biofuel feedstocks and consumers of large quantities of fuel. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The National Sorghum Producers is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are sorghum producers and supporters of the sorghum industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The Renewable Fuels Association (“RFA”) is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

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GLOSSARY

2013 Rule	Final Rule, <i>Regulation of Fuels and Fuel Additives: 2013 RFS</i> , 78 Fed. Reg. 49,794 (Aug. 15, 2013)
2014 NPRM	Notice of Proposed Rulemaking, <i>2014 Standards for the RFS Programs</i> , 78 Fed. Reg. 71,732 (Nov. 29, 2013)
2017 NPRM	Notice of Proposed Rulemaking, <i>RFS Programs: Standards for 2017 and Biomass-Based Diesel Volume for 2018</i> , 81 Fed. Reg. 34,778 (May 31, 2016)
ACEI	Americans for Clean Energy, Inc.
BBD	Biomass-Based Diesel
bg	billion gallons
BIO	Biotechnology Innovation Organization
EPA	Environmental Protection Agency
JA	Joint Appendix
RFA	Renewable Fuels Association
RFS	Renewable Fuel Standard
RIN	Renewable Identification Numbers
Rule	Final Rule, <i>RFS Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017</i> , 80 Fed. Reg. 77,420 (Dec. 14, 2015)
RVO	Renewable Volume Obligations

JURISDICTION

EPA published “Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017,” JA__, on December 14, 2015. The consolidated petitions were timely, and this Court has jurisdiction under 42 U.S.C. §7607(b)(1).

ISSUES

1. Whether EPA’s interpretation of “inadequate domestic supply” in the Clean Air Act’s general-waiver provision is contrary to Congress’ intent, arbitrary and capricious, or otherwise impermissible.
2. Whether EPA’s determination that its delay in issuing percentage standards for past periods authorizes a general waiver for those periods is contrary to Congress’ intent, arbitrary and capricious, or otherwise impermissible.
3. Whether EPA’s exclusion of carryover RINs from its determination of whether there is “inadequate domestic supply” for purposes of the general waiver was contrary to Congress’ intent, arbitrary and capricious, or otherwise impermissible.
4. Whether EPA’s measurement of the 2016 “supply” of renewable fuel (as EPA interprets the term) was arbitrary and capricious.

STATUTES

42 U.S.C. §7545(o) is reproduced in the Addendum.

THE CASE

A. The Renewable Fuel Standard Program

In 2007, Congress revised the Renewable Fuel Standard (“RFS”) program under the Clean Air Act with the “clear goal of ambitiously increasing the use of renewable fuel.” 80 Fed. Reg. 77,420, 77,433 (Dec. 14, 2015) (“Rule”).

Renewable fuel is “fuel that is produced from renewable biomass”—biofuel—“and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel,” 42 U.S.C. §7545(o)(1)(J), which in turn is “fuel for use in motor vehicles” and certain other engines and vehicles, §7545(o)(1)(L).²

Depending on the type of renewable fuel, it may be available for use in motor vehicles immediately upon production, or may first be blended with conventional gasoline or diesel fuel. For example, ethanol, the most common renewable fuel, may be blended with conventional gasoline to make transportation fuels such as E10 (10% ethanol) and E85 (51-83% ethanol). *See, e.g.*, Rule at 77,421, 77,438. Biomass-based diesel (“BBD”) is another category of renewable fuel.

§7545(o)(1)(D).

As established by Congress, the RFS “program requires an ‘applicable volume’ of total renewable fuel to be sold or introduced into U.S. commerce each

² Renewable fuel may also be used to displace fossil fuel “present in home heating oil or jet fuel.” §7545(o)(1)(A). For simplicity, this brief refers only to transportation fuel.

year.” *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 912 (D.C. Cir. 2014).³ Those volumes increase progressively from 4 billion gallons (“bg”) in 2006 to 36bg in 2022. §7545(o)(2)(B)(i)(I). Thus, “[t]he RFS program can be thought of as a market forcing policy,” setting a mandatory schedule of renewable-fuel volumes “well beyond any previously demonstrated ability of the industry to produce, distribute, and consume,” and at “a pace that far exceed[s] historical growth.” Rule at 77,423.

Congress’s overarching “direction” to EPA—stated repeatedly in the statute—is to “‘ensure’ the mandated fuel volumes are met.” *National Petrochemical & Refiners Ass’n v. EPA* (“*NPRA*”), 630 F.3d 145, 158 (D.C. Cir. 2010); *see* §7545(o)(2)(A)(i) & (iii), (3)(B)(i). To do so, EPA must publish by each November 30 a “renewable fuel obligation” applicable to “refineries, blenders, and importers” for the following calendar year. §7545(o)(3)(B); *see* 40 C.F.R. §80.1406 (defining these “obligated part[ies]”). These obligations are expressed as percentages reflecting the statutory volume divided by projected nationwide transportation-fuel consumption for a given year, and thus arithmetically translate the nationwide statutory volumes into individual renewable

³ The RFS program includes four nested standards for different types of renewable fuel; this brief concerns only the *total* renewable-fuel standard.

volume obligations (“RVOs”). *NPRA*, 630 F.3d at 148; §7545(o)(3)(B)(ii)(II); Rule at 77,509.

EPA tracks obligated parties’ compliance through Renewable Identification Numbers (“RINs”), unique numbers assigned to every gallon of qualifying renewable fuel produced or imported in the United States. 40 C.F.R. §§80.1425-80.1426; Rule at 77,426 n.16. The associated RIN may eventually be “separated” from the physical renewable fuel (e.g., when the renewable fuel is blended with fossil fuel to produce a transportation fuel, or is designated as transportation fuel), and may then be used to show compliance, at which point it is “retired.” 40 C.F.R. §§80.1427(a)(8), 80.1429(b), 80.1451(a); *see Monroe Energy*, 750 F.3d at 913.

Congress also specified limited ways in which obligated parties would have “a degree of compliance flexibility.” 750 F.3d at 912. It allowed parties that exceed their individual obligations to generate tradable “credits” (separated RINs, under EPA’s implementation) that other obligated parties may acquire for compliance. §7545(o)(5)(A)-(B). If an obligated party “is unable to generate or purchase sufficient credits” to meet its RVO, Congress allowed it to “carry forward a renewable fuel deficit,” as long as in the next year it meets that year’s RVO *and* satisfies the carried deficit. §7545(o)(5)(D). The statute specifies that the credits are “valid to show compliance for the 12 months as of the date of generation,” §7545(o)(5)(C); EPA has interpreted that to allow for the creation of an effectively

perpetual “bank” of unused or excess RINs from prior compliance years—
“carryover” RINs—for use in subsequent compliance years. *See* 72 Fed. Reg.
23,900, 23,934 (May 1, 2007).⁴

Finally, Congress provided EPA authority to waive the statutory volume requirements under certain circumstances. Relevant here is the “general” authority to “waive the requirements ... in whole or in part ... by reducing the national quantity of renewable fuel required” if “there is an inadequate domestic supply” of renewable fuel or if “implementation of the requirement would severely harm the economy or environment.” §7545(o)(7)(A).

B. The Rule

The Rule—proposed in June 2015 and signed on November 30, 2015—defines volume requirements for 2014, 2015, and 2016. EPA declared the term “supply” to be “ambiguous” and “reasonably and best interpreted to encompass the full range of constraints that could result in an inadequate supply of renewable fuel to the ultimate consumers, including” not only “factors affecting the ability to produce or import qualifying renewable fuels,” but also “factors affecting the ability to distribute, blend, dispense, and consume those renewable fuels in vehicles.” Rule at 77,435. Accordingly, EPA set the 2016 total renewable-fuel volume requirement at 18.11bg—down from the statutory level of 22.25bg—to

⁴ EPA prohibits an obligated party from using carryover RINs to meet more than 20% of its RVOs. 40 C.F.R. §80.1427.

reflect its assessment of “the maximum supply that can reasonably be expected to be produced and consumed by a market that is responsive to the RFS standards.” *Id.* at 77,426, 77,440. EPA invoked the “inadequate domestic supply” prong of its general-waiver authority “exclusively as the basis for” 0.5bg of that reduction. *Id.* at 77,439-77,440.⁵

For 2014 and 2015, EPA took a “different approach[.]” Rule at 77,439. Because it was finalizing percentage standards when those years were largely over, EPA set the total renewable-fuel requirement equal to the number of RINs actually generated and available for compliance in those years (“net RIN generation”): 16.28bg in 2014 (down from 18.15bg) and 16.93bg in 2015 (down from 20.5bg). *Id.* at 77,426-77,427, 77,439, 77,447-77,448.⁶ EPA invoked its general-waiver authority as the “exclusive[.]” basis for 0.79bg of the 2014 reduction and 0.95bg of the 2015 reduction. *Id.* at 77,439-77,440.

In setting these volumes, EPA concluded that it could and would exclude from consideration the existing bank of approximately 1.74bg carryover RINs when determining whether there was an “inadequate domestic supply.” Rule 77,429, 77,484-77,485.

⁵ EPA invoked a separate “cellulosic waiver” provision to cover the rest of the reduction. Rule at 77,439; §7545(o)(7)(D). This brief takes no position on the validity of reductions under that provision.

⁶ EPA assumed net RIN generation in the final quarter of 2015 would be proportional to the prior quarters.

C. Judicial Proceedings

In January 2016, present petitioners petitioned for review of the Rule (Case Nos. 16-1005), except National Farmers Union petitioned in February (Case No. 16-1056).

SUMMARY OF ARGUMENT

The heart of the RFS program is the statute's mandatory schedule of annually escalating renewable-fuel volumes. The point of the schedule, and the program generally, is to force the market to increase renewable-fuel use dramatically. Congress charged EPA with ensuring the statutory volume requirements are met, except in very limited circumstances. The Rule, however, destroys Congress' creation by finding various atextual reasons for using the general waiver to reduce the total volume requirements. The aggregate effect is to discard the statutory schedule and install EPA as superintendent of the renewable-fuels market, free to promote as much or as little growth as it deems appropriate. That is not the scheme Congress established.

Specifically:

I. EPA's interpretation of "supply" in the general-waiver provision to encompass constraints on how much renewable fuel can be consumed in transportation fuel stretches "supply" to include its opposite, demand, impermissibly flouting the statutory text and history. Further, that interpretation

eviscerates the RFS program's market-forcing power and the essential market certainty the program was to provide. Once any market constraint can be counted in deciding whether to waive the statutory requirements, the requirements have nothing to force—the market will force *them*—and they serve little purpose. EPA cannot salvage its flawed interpretation by determining that it will calculate annually the “maximum” amount that could “reasonably” be consumed in a market “responsive” to the standards. Had Congress wanted to delegate to EPA general power to manage growth, it would not have buried that power in a subclause of a *waiver* provision.

II. By setting the 2014 and 2015 total volume requirements to the net RIN generation that occurred anyway during those years despite the absence of percentage standards, EPA in effect used its general-waiver power to nullify those years' statutory requirements. But as EPA previously recognized and as this Court agreed in a similar situation, delay in issuing percentage obligations does not authorize a general waiver; EPA must ensure that the statutory volumes are met regardless of that delay.

III. EPA impermissibly maintains that it can ignore carryover RINs when assessing whether there is “inadequate domestic supply.” But carryover RINs are part of the “supply,” and regardless EPA must count them when determining whether supply is “inadequate” to achieve compliance. In attempting to justify its

exclusion of carryover RINs based on its preference for maintaining a RIN “buffer,” EPA ignored its paramount statutory duty: ensuring the statutory requirements are met. Congress specified limited means for addressing unforeseen circumstances based on its policy judgments. EPA may not substitute its own judgments for Congress’.

IV. Even if EPA’s interpretation of “supply” were valid, its 2016 total renewable-fuel percentage standard would still be arbitrary and capricious. EPA assumed a limit on E85 retail prices without any explanation, adopted a demand curve that contradicts common sense and rigorous academic research (which EPA did not address), and based its analysis on data reflecting market performance during periods when volume requirements were too low to force the market to substantially increase its use of E85 (which contradicts EPA’s position that it must and did set the total volume requirement to reflect the maximum reasonably achievable volumes in a responsive market).

STANDING

The membership of ACEI et al. includes producers of renewable fuels and feedstocks used to make them. JA[EPA-HQ-OAR-2015-0111-2604.at.1]; JA[EPA-HQ-OAR-2015-0111-2540.at.1]; JA[EPA-HQ-OAR-2015-0111-2543.at.1]; JA[EPA-HQ-OAR-2015-0111-1958.at.1]; JA[EPA-HQ-OAR-2015-0111-3276.at.1]; JA[EPA-HQ-OAR-2015-0111-1657.at.1]; JA[EPA-HQ-OAR-

2015-0111-1914 at.1]. By lowering the mandatory use of those fuels, the Rule will cause members concrete and particularized injury. JA[EPA-HQ-OAR-2015-0111-2604.at.68-69]; JA[EPA-HQ-OAR-2015-0111-3276.at.1, 10-12]; JA[EPA-HQ-OAR-2015-0111-1657.at.4-5]; JA[EPA-HQ-OAR-2015-0111-1914.at.1]; *see also* Rule at 77,420 (“Entities potentially affected by this final rule are those involved with the production ... of ... renewable fuels”). As trade associations dedicated to promoting the production and use of those renewable fuels, ACEI et al. have standing. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

STANDARD OF REVIEW

This Court “may reverse” the Rule if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” §7607(d)(9).

ARGUMENT

I. EPA’S INTERPRETATION OF “SUPPLY” TO ENCOMPASS ALL POTENTIAL MARKET CONSTRAINTS IS IMPERMISSIBLE

The RFS program’s statutory volume schedule embodies Congress’ “market forcing policy” to ambitiously increase renewable-fuel use. Rule at 77,423. EPA’s role in this scheme is necessarily narrow. It “ensure[s]” the statutory requirements are met by annually “translat[ing]” the statute’s nationwide volumes into percentage standards and then enforcing compliance obligations against individual obligated parties. *NPRA*, 630 F.3d at 158; Rule at 77,422. Moreover, EPA may invoke “limited” safety valves when appropriate, 630 F.3d at 149, including

potentially waiving volume requirements if there is an “inadequate domestic supply” of renewable fuel.

Properly understood, this general-waiver power may be invoked only if enough qualifying renewable fuel, e.g., ethanol, BBD, could not be available to achieve compliance with the volume requirement. EPA, however, invoked the general waiver for the 2016 total volume standard by interpreting “supply” to account for the ability and willingness of downstream actors to distribute and consume transportation fuel, i.e., demand for renewable fuel. Rule at 77,435.

That interpretation is impermissible. Stretching “supply” to include its opposite (demand), EPA’s interpretation disregards the statute’s plain meaning, context, and history. And treating downstream distribution and consumption constraints as a basis for waiving requirements that—as EPA recognizes—Congress intended to overcome nullifies the statutory volume requirements and subverts the market-forcing power and long-term certainty Congress designed the RFS program to provide. EPA touts its approach as “balance[d],” “reasonable,” and “adaptive,” Rule at 77,423, but even if EPA’s self-serving characterization were accurate, “EPA may not avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy,” *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006).

Congress has been clear about its policy decision, the mechanism for achieving it, and EPA's marching orders: rapid growth in the use of renewable fuel, far beyond what the market would attain on its own, accomplished through a mandatory long-term schedule of volume requirements, which EPA must ensure are met. EPA may not arrogate the power to direct the pace of growth, especially not in a way that ultimately hinders the growth Congress sought.

A. EPA's Interpretation of the "Supply" of Renewable Fuel Is Inconsistent with the Statute and Ordinary Usage

As EPA recognizes, the "common understanding" of "supply" is "an amount of a resource or product that is available for use." Rule at 77,435. Here, the relevant use is specified in the statute's definition of "renewable fuel": biofuel "that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel." §7545(o)(1)(J); *see also* §7545(o)(2)(A) (EPA must "ensure that transportation fuel sold or introduced into commerce in the United States ... contains at least the applicable volume of renewable fuel"). Thus, "supply" measures the amount of biofuel—e.g., ethanol, BBD—available through production or import to displace fossil fuel in transportation fuel. EPA, however, never determined whether those amounts were inadequate to achieve compliance

with the statutory total volume requirement, and therefore it had no authority to use the general waiver to reduce that requirement.⁷

In nonetheless invoking the general waiver, EPA instead focused on how much renewable fuel or transportation fuel could be *consumed*. That approach in effect treats “supply” as if it simultaneously means supply and its opposite—demand—and thus destroys its meaning. In particular, EPA asserts that “supply” includes:

- “[T]he attractiveness of [renewable-fuel blends] to consumers”;
- Consumer responsiveness to “reductions in [renewable-fuel blend] retail prices”;
- “Marketing Effectiveness,” including “[v]ehicle warranties,” “[r]etail fuel prices,” and “[p]roduct features and image”;
- “Consumption capacity,” including the “[e]xistence of ... vehicles/engines capable of using the fuel” and the “[t]otal transportation fuel use”;
- “Expansion of retail outlets that offer renewable fuels blends”; and
- Blenders’ “tankage” and “blending capacity.”

⁷ Ample renewable fuel was available. See JA[EPA-HQ-OAR-2015-0111-2604.at.28-29]; JA[EPA-HQ-OAR-2015-0111-1953.at.10-11]; Rule at 77,438, 77,457; see also 81 Fed. Reg. 34,778, 34,790 (May 31, 2016) (“2017 NPRM”).

Rule at 77,451-77,452; *id.* at 77,459-77,462 (finding E85 “supply” limited by retail pricing and consumer responsiveness); *id.* at 77,471-77,473 (assessing consumption capacity and consumer response to BBD); *infra* Part IV (addressing EPA’s E85 methodology). Those factors reflect not the supply of renewable fuel but the willingness and ability of downstream actors—refiners, blenders, retailers, and end consumers—to buy renewable fuel or transportation fuel, i.e., demand. This Court has recognized as much, describing the so-called E10 blendwall—a principal factor limiting EPA’s calculation of “supply,” Rule at 77,457-77,458, 77,464-77,465—as a “constraint on ethanol *demand.*” *Monroe Energy*, 750 F.3d at 913-914 (emphasis added).⁸

EPA’s interpretation is contrary not only to plain meaning but also to its prior position. EPA previously declined to apply the “inadequate domestic supply” waiver in response to concerns about factors that would have tended to reduce “likely consumption.” 75 Fed. Reg. 76,790, 76,803 (Dec. 9, 2010). EPA correctly recognized it “do[es] not have the authority to waive a portion of the standard based on projections of what *demand* would be in the absence of a mandate.” *Id.* (emphasis added). Rather, EPA said, “[d]emand ... will be a function of the RFS

⁸ The E10 blendwall “represents the volume of ethanol that can be consumed domestically if all gasoline contains 10% ethanol.” Rule at 77,423 n.10.

standard [EPA] set[s].” *Id.* EPA shows no awareness of, and provides no explanation for, its about-face.

EPA tries to justify its new position with a reading of the statute that flouts its plain meaning and ordinary usage. EPA maintains the term “used” in the definition of “renewable fuel” evinces Congress’ intent that “there is no ‘renewable fuel’ ... unless biofuels like ethanol and biodiesel *are actually used* to replace fossil-based transportation fuels.” Rule at 77,435 (emphasis added). Since *actual use* is a function of all market constraints through the ultimate consumer, EPA believes it may consider such constraints in assessing “supply.” That makes no sense. The term “used” merely defines the qualifying uses to which the biofuel may be put, as distinguished from “non-qualifying use[s].” *Id.* at 77,445; *see, e.g.*, §7545(o)(1)(L) (excluding “fuel for use in ... ocean-going vessels” from definition of “transportation fuel”). Defining something in terms of function is a common role for “used.” Paper, for example, is defined as a “material made of cellulose pulp, derived mainly from wood and rags, processed into flexible sheets ..., and *used for* writing, printing, drawing, wrapping, and covering walls.” *American Heritage College Dictionary* 1006 (4th ed. 2004) (emphasis added). EPA’s notion that biofuel magically transforms into “renewable fuel” only at the moment it is actually used makes as much sense as the notion that a flexible sheet derived from wood pulp is not “paper” until someone actually prints on it. And just as the

supply of paper is not measured by the amount of ink available for printing books, the number of bookstores or their pricing practices, or consumer preference for e-books, the distribution and consumption constraints EPA invokes are plainly irrelevant to measuring the “supply” of renewable fuel.

Other parts of the statute and its history reinforce the point. Where Congress wanted distribution constraints to be considered, it said so, repeatedly; its silence here is telling. *See Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 467 (2001) (Court has “refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted”). For example, §7545(m)(3)(C) authorizes EPA action upon finding “an inadequate domestic supply of, *or distribution capacity for*, oxygenated gasoline,” and directs EPA to consider “distribution capacity separately from the adequacy of domestic supply.” *Accord* §7545(o)(8) (directing EPA to waive statutory requirements in *first* year of RFS program based on evaluation of renewable fuel “supplies and prices” and “supply and distribution system capabilities”); §7545(c)(4)(C)(v)(IV) (permitting EPA action if it “will not cause fuel supply or distribution interruptions”).

That silence was deliberate. Before creating the RFS program, Congress considered numerous bills conditioning general waivers on inadequate “supply *or distribution* capacity.” H.R. 6, 109th Cong. §1501(a), at 710 (engrossed Apr. 21,

2005) (emphasis added); *see also, e.g.*, S. 2971, 106th Cong. §10 (2000). This “drafting history showing that Congress cut out [specific] language ... from the final statute ... precludes any hope of a sound interpretation” of the statute that would restore the “trimmed” language, as EPA’s would. *Doe v. Chao*, 540 U.S. 614, 622-623 (2004).

B. EPA’s General-Waiver Approach Arrogates the Power to Manage Growth While Undermining the Statute’s Structure and Design

Even if “supply” could “seem ambiguous in isolation,” it would be “clarified by the remainder of the statutory scheme ... because only” petitioners’ interpretation “produces a substantive effect that is compatible with the rest of the law.” *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014). The RFS is supposed to function by *creating* demand, not reacting to it, to force market growth through the certainty of a mandatory volume schedule. EPA’s approach impermissibly “overthrow[s] ... the Act’s structure and design.” *Id.* Moreover, EPA’s interpretation allows it to substitute its own policy judgments about the pace and feasibility of renewable-fuel growth for those Congress made and embedded in the statute.

1. *EPA's approach undermines the statute's market-forcing power and turns the general waiver into a general power to manage the market*

Congress created renewable-fuel standards to force the market, but EPA's interpretation of "supply" allows the market to force the standards. EPA correctly recognizes Congress intended the RFS program to "overcome constraints in the market," "including those associated with the 'E10 blendwall.'" Rule at 77,423. Congress did that through the mandatory volume schedule; "*maintaining*" the statutory volumes "create[s] 'demand pressure' to increase consumption" and overcome those constraints. *Monroe Energy*, 750 F.3d at 917 (quoting 78 Fed. Reg. 49,794, 49,821 (Aug. 15, 2013) ("2013 Rule") (emphasis added)). But in concluding that it may waive the requirements for purported "constraint[s] anywhere in [the fuel] system" affecting the consumption of renewable fuel—including the E10 blendwall—EPA allows the very barriers that the statutory volume requirements were intended to compel the industry to surmount to become grounds for reducing those requirements. That is impermissible.

As EPA previously recognized, a general waiver makes good sense, but "only in limited circumstances" lest it undermine the RFS program's market-forcing policy. *NPRA*, 630 F.3d at 149; *see* 73 Fed. Reg. 47,168, 47,171 (Aug. 13, 2008) (stating "EPA does not believe ... Congress intended" to provide a "very open-ended and wide ranging [general] waiver" authority). Renewable-fuel

producers (and importers) will act to meet the demand for their product when it is profitable and efficient to do so. Consequently, adhering to the statutory volume requirements where *producers* are unable to meet those levels of demand would penalize obligated parties without furthering the goals of the RFS program.

Moreover, the potential for a waiver in such circumstances would not diminish producers' incentives and thus the market's certainty that the requirements must be met.

In contrast, absent binding RFS requirements many downstream participants in the fuel system, e.g., many refiners, would lack incentive to use renewable fuel that might displace their own fossil fuels, stymieing renewable-fuel growth. Congress sought to create the necessary incentives for growth by mandating demand for renewable fuel. EPA's approach of waiving the statutory volumes because of inadequate demand for renewable fuel, however, allows market incentives *against* increasing renewable-fuel use to define the extent of the volume obligations and in turn the extent of renewable-fuel use. Suppressed renewable-fuel use—or as EPA calls it, “inadequate ... supply”—thus becomes a self-fulfilling prophecy—the opposite of what Congress intended.

More broadly, EPA's interpretation converts the general waiver into a general power to manage growth as EPA wishes. Under EPA's interpretation, every feature of the entire fuel system is a potential basis for waiver. Accordingly,

only EPA's assessment of "supply" in light of those features matters for setting volume requirements. That makes Congress' schedule irrelevant, as shown by EPA's actual practice in setting percentage standards for 2016 (and 2017): EPA calculates the total volume it believes could be consumed, and then applies waiver authorities as necessary to reduce the volume requirements to those amounts. *See* Rule at 77,448-77,475; 2017 NPRM at 34,785-34,796. But Congress did not create a clear, specific, mandatory volume schedule to dictate the pace of growth, only for EPA to disregard it and use its own judgment to determine annual growth rates. Rather, Congress repeatedly directed EPA to "ensure[]" that the statutory requirements "are met," §7545(o)(3)(B)(i); *accord* §7545(o)(2)(A)(i) & (iii); *Monroe Energy*, 750 F.3d at 917; *NPRA*, 630 F.3d at 158, and EPA may "not ignore the[m]," 630 F.3d at 157; *see Whitman*, 531 U.S. at 485 ("EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion."). EPA does not explain how the broad authority it now asserts is consistent with the "more limited" role it previously recognized it must play. 73 Fed. Reg. at 47,171.

EPA says its standards are "intended to fulfill [Congress'] spirit and intent," because they "reflect the *maximum* supply that can reasonably be expected to be produced and consumed by a *market that is responsive* to the RFS standards," Rule at 77,423, 77,426 (emphasis added). But EPA's assessment of "maximum"

consumption in a “responsive” market still reflects its assumption that “a constraint in any one part of the market can limit the growth in renewable fuel supply.” *Id.* at 77,449-77,450. Hence, what EPA portrays as a mechanism for pushing the market continues the improper entrenchment of those constraints.⁹

Moreover, it is unreasonable to suppose Congress would have delegated to EPA such sweeping power to manage growth through a *gloss* on a term in one *subpart* of a *waiver* provision—that EPA should predict the “maximum” “supply” (rather than “take a neutral aim” at it, as EPA had previously proposed doing, *see* 80 Fed. Reg. 33,100, 33,117-33,118 (June 10, 2015)). Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” *Whitman*, 531 U.S. at 468; *see also, e.g., MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (rejecting agency interpretation of power to “‘modify’ rate-filing requirements” that would have enabled agency to decide whether industry will be “rate-regulated” at all). Indeed, Congress explicitly delegated EPA the power to define, upon consideration of various factors, the pace of growth *after* 2022. §7545(o)(2)(B)(i)-(ii). The absence of such an explicit delegation for managing growth before 2023 precludes EPA’s notion that Congress did so anyway.

⁹ EPA did not even adhere to its own “maximum” approach when setting the 2016 total volume requirements. Part IV, *infra*.

2. *EPA's approach undermines the market certainty needed for investment in renewable fuels*

As EPA notes, the ambitious growth Congress sought requires investment, which in turn requires market certainty. Rule at 77,433, 77,456, 77,459-77,460. In the initial phase of the RFS program, Congress intended to provide that certainty through the statute's mandatory volume schedules. *Monroe Energy*, 750 F.3d at 917 (“The [statutory] volumes provide an incentive for continued investment and innovation.”). EPA's approach undermines that market certainty. Not only has EPA in effect nullified the statutory schedules, but it also has replaced them with a system in which EPA—just 30 days before the start of a given compliance year—establishes new volume requirements for that year based on its own highly unpredictable projections of consumption.

EPA suggests that its hands are tied. Setting percentage standards, EPA says, is “a very challenging task ... [that] is not given to precise measurement and necessarily involves considerable exercise of judgment” given the fuels market's “myriad complexities” and EPA's inability to “precisely predict how the market will respond to the volume-driving provisions of the RFS program.” Rule at 77,449; *id.* at 77,426-77,427. And EPA maintains that because percentage standards are not issued until each November 30, there is not “sufficient time for [them] to lead to dramatic changes in renewable fuel supply that are not already underway.” *Id.* at 77,453. Thus, in EPA's view, “the best opportunity for market

growth is likely to be for those fuels where the market is already taking action to address any relevant constraints,” *id.* at 77,453—which is to say, where the RFS program is superfluous.

These supposed defects in the RFS program are entirely EPA’s “own creation.” *Friends of Earth*, 446 F.3d at 146. Contrary to EPA’s suggestion, Congress did not direct or empower EPA to determine and require new nationwide volumes by each November 30. The statute already defines the required volumes and merely charges EPA with the ministerial task of annually “translat[ing]” the *statute’s* nationwide requirements to percentages in light of projected transportation-fuel consumption for the upcoming year. Rule at 77,422; *supra* p.3. The need for that translation does not diminish the certainty provided by the statutory schedule, since obligated parties can “readily ... estimate[] their respective obligations.” *Monroe Energy*, 750 F.3d at 920. Nor does the potential availability of a general waiver, if properly limited to circumstances in which producers cannot make available sufficient renewable fuel to achieve compliance with statutory volumes. What diminishes—destroys—that certainty is EPA’s erasure of the mandatory statutory requirements and its self-assigned role of annually establishing totally new volume requirements through a highly unpredictable analysis.

3. *EPA's concern with avoiding purportedly harmful effects overrides Congress' clear policy judgments*

EPA avers that adhering to statutory volumes that (in EPA's view) "cannot be achieved" could have "harmful effects": "a significant increase in renewable fuel and RIN prices," "RIN deficits or even non-compliance," or "the depletion of the bank of carryover RINs and instability of the RIN market," which, EPA says, "could ... erode the certainty and stability for renewable fuel volume growth that the RFS standards are intended to provide." Rule at 77,453, 77,487. EPA's concern with avoiding those supposedly harmful effects is not, however, justification for EPA's interpretation of "supply." Rather, it shows yet again that EPA's interpretation impermissibly "substitute[s] its policy judgment for that of Congress." *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994).

Those supposedly "harmful" outcomes are not harms at all: they are part and parcel of Congress' program. "[H]igh RIN prices should, in theory, incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote." *Monroe Energy*, 750 F.3d at 919. RIN-deficit carryforward is a statutory safety valve for when obligated parties are unable to meet their obligations, and using excess RINs (i.e., credits) for compliance is what they are for; EPA has relied on both to set percentage standards in the past. *Id.* at 916-917; *NPRA*, 630 F.3d at 164; Rule at

77,447; 75 Fed. Reg. at 14,670, 14,718-14,719 (Mar. 26, 2010) (“2010 Rule”); 2013 Rule at 49,821-49,823.

Moreover, by treating those “harmful effects” as cause for a general waiver due to “inadequate domestic supply,” EPA nullifies another statutory basis for a general waiver: “severe[] ... harm [to] the economy.” §7545(o)(7)(A)(i). As EPA has recognized, the severe-harm prong sets a “high threshold”: “greater than marginal, moderate or serious.” 73 Fed. Reg. at 47,172. Yet, EPA’s interpretation would allow a waiver for “inadequate domestic supply” whenever it finds that market constraints could cause enough harm to make a statutory requirement not “reasonably achievable” in a market “responsive to the RFS standards.” EPA will thus *never* need to consider the severe-harm standard. *See* Rule at 77,429 (finding it unnecessary to address oil industry’s requests for severe-harm waiver because EPA addressed those concerns in its inadequate-supply analysis). That not only violates the canon against surplusage but also overrides Congress’ determination that the only harms that can justify waiver are *severe* ones.

II. EPA’S DELAY IN ISSUING PERCENTAGE STANDARDS CANNOT AUTHORIZE A GENERAL WAIVER FOR PAST PERIODS

Because EPA failed to timely issue percentage standards for 2014 and 2015, EPA used a “different approach[]” for those years: a general waiver to reduce the total volume requirements to the amount of net RIN generation in those years (or a linear extrapolation therefrom). Rule at 77,439. But by setting the total

requirements to what the market achieved in the absence of binding RFS obligations (i.e., ones high enough to “caus[e] the market to consume renewable fuels in volumes beyond what they would otherwise choose to use,” Rule at 77,458 n.80), EPA treated its delay as license to completely ignore the statutory schedule for those years. EPA’s approach is barred by this Court’s binding precedent holding that Congress intended EPA to maintain the statutory volumes in the face of delay, and that delay is not a basis for a general waiver.

This is not the first time this situation has occurred. Like the 2014 and 2015 percentage standards, which EPA did not issue until the end of 2015, EPA did not issue the 2009 and 2010 percentage standards until well into 2010. Yet, EPA “combined” the 2009 and 2010 statutory requirements “into a single requirement” to “ensure that these two year’s worth of [BBD] will be used” (even though EPA’s estimated 2009 BBD production was below the statutory level). 2010 Rule at 14,718. The combined approach, EPA said, best fulfilled what “Congress expected and intended.” RFS2 Summary and Analysis of Comments 3-186-188 (Feb. 2010), at <https://www.epa.gov/sites/production/files/2015-08/documents/420r10003.pdf>.

On review, this Court first held that it must “determine for itself what Congress would have intended” rather than “resort to deference under *Chevron*” because Congress would not have “implicitly entrusted a laggard agency with the

authority to devise a remedy for its own untimeliness.” *NPRA*, 630 F.3d at 155. The Court sustained the rule because “EPA act[ing] after the statutory deadline[is] a situation not addressed in the [general] waiver provision” and “EPA could not ignore the 2009 mandate” due to its delay. *Id.* at 157. Further, the Court concluded that EPA’s “combined” approach fulfilled EPA’s statutory duty to “ensure” (*i.e.*, “make certain”) that the statutory volumes of renewable fuel were “sold or introduced into commerce.” *Id.* at 153, 156. *Not* maintaining the statutory requirements for both past and current years, the Court said, would be “‘flatly contrary to Congress’ intent and would turn agency delay into a windfall for the regulated entities.’” *Id.* at 156-57 (quoting EPA brief); *see also Monroe Energy*, 750 F.3d at 916, 919-921 (sustaining EPA’s belated adherence to 2013 statutory volume requirement and stressing “Congress’ focus on ensuring the annual volume requirement was met regardless of EPA delay”).

In the 2014-16 Rule, EPA ignored both its own prior position on how to proceed when it misses a November 30 deadline, *cf.* Rule at 77,430, and this Court’s binding precedent. EPA therefore may not now use delay as cause for a general waiver; EPA must ensure prior years’ requirements are met.¹⁰

¹⁰ When EPA issued the Rule, obligated parties could have achieved compliance for 2014 and 2015 entirely or almost entirely through carryover RINs, without need for a general waiver. *See* Rule at 77,482 n.146 (estimating 1.74 billion carryover RINs); *id.* at 77,439 (general waiver across 2014 and 2015 total volume requirements was 1.74bg (0.79bg + 0.95bg)).

III. EPA MAY NOT IGNORE CARRYOVER RINS WHEN DETERMINING WHETHER THERE IS “INADEQUATE DOMESTIC SUPPLY”

Even if EPA were permitted to interpret “supply” to encompass market impediments to consumption, and to waive standards for past periods simply because they are past, the Rule would still be invalid. EPA maintains it may ignore carryover RINs when determining whether it is permitted to exercise its general-waiver authority due to “inadequate domestic supply.” Even if EPA may allow for a perpetual RIN bank—though EPA itself has acknowledged that doing so renders the statutory 12-month valid life for RINs “virtually meaningless,” 72 Fed. Reg. at 23,934—EPA’s position that it may then ignore the bank in exercising the general waiver contravenes Congress’ clear intent.

A. Carryover RINs Are Part of the “Supply” of Renewable Fuel

Carryover RINs reflect the renewable-fuel “supply.” All RINs—including carryovers—represent gallons of actual renewable fuel produced or imported and available to displace fossil fuel in transportation fuel, i.e., “supply” properly interpreted. *See supra* p.12. Even under EPA’s incorrect interpretation of “supply,” carryover RINs are supply because they represent gallons of renewable fuel that were “actually used to replace fossil-based” fuels. Rule at 77,435. It is only when the RIN is used for compliance (or otherwise retired)—which, by definition, has not occurred for carryover RINs—that the RIN and its associated

gallon has been accounted for in the RFS program and are no longer part of “supply” available to meet Congress’s requirements.

EPA says the statute “can logically be read to refer only to actual renewable fuel (and not carryover RINs), since the focus of the entire RFS program is on increasing the amount of renewable fuel used in the transportation sector.” Rule at 77,484. But *all* RINs, including carryovers, represent “actual renewable fuel.” It is EPA’s approach—which allows carryover RINs to be used to offset future renewable-fuel use while excluding them from “supply” for waiver of current requirements—that decreases the overall amount of renewable fuel that will be used.

B. The Statute Requires Counting Carryover RINs to Determine Whether Supply Is “Inadequate”

Regardless of whether carryover RINs are part of the “supply” of renewable fuel, the statute requires EPA to count carryover RINs when determining whether “supply” is “inadequate.” §7545(o)(7)(A). Because carryover RINs “are a valid compliance mechanism” under EPA’s implementation of the statute, *Monroe Energy*, 750 F.3d at 916, evaluating whether “supply” is *adequate* to meet the statutory volume requirement *without* counting the bank contravenes EPA’s obligation to “‘ensure’ the mandated fuel volumes are met” and Congress’ “intent that [statutory] volumes not be reduced.” *NPRA*, 630 F.3d at 156, 158.

EPA's defense undermines the statute's structure and design. EPA asserts that maintaining a bank is a "prudent" way to "address unforeseen RIN shortfalls," Rule at 77,445, and promotes "efficient[]" program administration, *id.* at 77,484. But the statute already provides ways to deal with potential challenges resulting from adherence to the statutory volumes in the face of unforeseen shortfalls: RIN-deficit carryforwards, §7545(o)(5)(D)—which do not necessitate reducing statutory volume requirements—and a general waiver if but *only if* adherence to the statutory volume "*would severely* harm the economy or environment," §7545(o)(7)(A)(i) (emphasis added). As with EPA's interpretation of "supply," EPA's position on the bank in effect means the general waiver may be used to avoid *minor* harm that *might* occur, and thus supplants Congress' policy judgment that a waiver is appropriate only when *severe* harm *would* result. *Supra* p.25.

EPA all but admits that its maintenance of a RIN bank is an atextual effort to accommodate unforeseen circumstances because it believes the flexibility Congress provided through "[t]he RFS compliance system" is simply too "limited." Rule at 77,483-77-484. But "limited" flexibility was precisely Congress' intent and is fundamental to the RFS program's operation. *Supra* p.18; *NPRA*, 630 F.3d at 149. EPA cannot invent a different accommodation just because it does not like what Congress provided—particularly when doing so countermands its overarching statutory duty to ensure that the statutory volumes

are met. *Utility Air*, 134 S. Ct. at 2445 (“An agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”); *Friends of Earth*, 446 F.3d at 145.

Moreover, EPA has identified no basis for assuming that industry participants—many of which lack incentive to promote significant renewable-fuel growth absent RFS pressure—will save RINs for a rainy day rather than use them for compliance to avoid generating new RINs, *see* Rule at 77,486 (estimating 800 million carryover RINs would be used for 2013 compliance).¹¹

Finally, EPA’s management of the bank confirms the impermissibility of its interpretation. EPA has never explained why the bank must be any particular size. Rule at 77,485-77,486; *see also* 2017 NPRM at 34,789. In particular, EPA did not explain why the bank must have at least 1.74 billion RINs or why it could not safely set the total volume requirement so as to reduce the bank to 1.2 billion RINs, as EPA did in 2013, 2013 Rule at 49,821-49,822; *see* Rule at 77,486—an action EPA took and this Court affirmed in the face of oil-industry claims that the drawdown would impair compliance “flexibility,” *Monroe Energy*, 750 F.3d at 916-918. The inscrutability of EPA’s process for deciding, in its purportedly

¹¹ The RIN bank accumulated when the requirements were not binding and compliance was readily achieved. Rule at 77,458 n.80.

unfettered discretion, how big the bank needs to be deprives the market of the essential long-term certainty Congress intended to provide.

IV. EVEN UNDER EPA’S INTERPRETATION OF “SUPPLY,” THE 2016 TOTAL PERCENTAGE STANDARD IS ARBITRARY AND CAPRICIOUS

Applying its interpretation of “supply,” EPA based its 2016 total renewable-fuel requirement in significant part on its determination that 200 million gallons was “the most likely maximum volume[] [of E85] that can be attained by a market responsive to the RFS standards.” Rule at 77,464. As EPA has recognized, there are no infrastructure constraints to delivering substantially greater volumes of E85 to vehicles that can use it: EPA has found that existing infrastructure could deliver over a billion gallons of E85 annually, *see* 78 Fed. Reg. 71,732, 71,760 (Nov. 29, 2013) (“2014 NPRM”), and unrebutted record evidence shows even greater volumes are feasible, *see* JA[EPA-HQ-OAR-2015-0111-2604.at.33-37].¹² Rather, EPA’s low E85 projection was driven by concerns about retail pricing and consumer responsiveness. These are plainly not “supply” factors under any reasonable interpretation, *supra* Part I, but even if they were, EPA’s analysis was arbitrary and capricious: it failed to address significant contrary record evidence,

¹² Although additional infrastructure is unnecessary for substantial E85 growth, EPA failed to apply its own standard in assessing potential infrastructure growth. EPA looked only to historical annual E85-station growth rates, but that data is irrelevant because it reflects growth under non-binding standards. Rule at 77,460; *infra* n. 14. EPA did not respond to comments explaining why substantially more station expansion would occur rapidly under a binding standard. JA[EPA-HQ-OAR-2015-0111-2604.at.37-41].

explain critical assumptions, and even apply its own standard. *See District Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) (finding APA violation when analysis “internally inconsistent and inadequately explained”).

As EPA recognizes, the market will be responsive to RFS standards and the program will succeed in spurring growth in renewable-fuel use only when the standards are “binding.” Rule at 77,458-77,459; *supra* p.26. The theory of the RFS program is that under a binding standard, the market must find an equilibrium that meets the volume requirements, and it does so through RIN prices: as EPA acknowledges, higher standards increase demand for RINs, raising RIN prices; the higher RIN prices become, the cheaper is the cost of E85 to blenders, as they can sell the RINs separated from the E85; and blenders will pass some of that value to consumers by discounting E85 relative to E10 to incentivize enough E85 consumption to meet the volume requirement. *See* Rule at 77,458-77,461; JA[EPA-HQ-OAR-2015-0111-2604.at.25-26]. The only question is what particular RIN price will be necessary to achieve that equilibrium.

EPA concluded, however, based on historical sales data, that this theory does not work well in practice for two reasons: 1) middlemen have been retaining part of the RIN value rather than passing it to consumers as a discount on E85; and 2) consumers have proved only “moderately” responsive to E85 price reductions. Rule at 77,461, 77,464. Consequently, in projecting the 2016 E85 “supply,” EPA

assumed that E85 would be priced at a 22% discount to E10 (roughly the “energy-parity” point, where \$1 of each fuel provides equivalent amounts of energy, Rule at 77,459 n.86, 77,464 n.104), and that, in economic parlance, the E85 demand curve is “linear” (i.e., a given price change will have constant effects on demand regardless of the price point). JA[EPA-HQ-OAR-2015-01111-3666.at.5].¹³ EPA’s analysis is neither rational nor consistent with the record.

EPA provides no explanation of its assumption that E85 prices could not be cheaper than a 22% discount to E10 in 2016. Rule at 77,464; *see also* JA[EPA-HQ-OAR-2015-01111-3671.at.166] (without elaboration, declaring larger discount unreasonable). “This complete lack of explanation for an important step in [EPA’s] analysis was arbitrary and capricious.” *Owner-Operator Indep. Driver’s Ass’n, Inc. v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007). Moreover, that assumption contradicts EPA’s determination that 44% of the RIN value is passed to consumers as a discount. Rule at 77,459. Even if the 44% figure were sound, it would simply confirm that any particular discount is achievable with sufficiently high RIN prices, precisely as the RFS theory contemplates. *See Monroe Energy*, 750 F.3d at 919. EPA’s 22%-discount assumption, therefore, is tantamount to an unstated RIN-price cap, which would

¹³ Given various transaction costs associated with using E85, the discount must be slightly greater than 22% to achieve true parity. 2014 NPRM at 71,760-71,761.

artificially suppress the potential discount. That is anathema to the RFS program, and certainly nothing in the phrase “inadequate domestic supply” or the broader statute permits EPA to adopt such a cap.

Moreover, EPA’s analysis of the achievable pass-through (and thus discount) is unreasonable. It was based on data from a period when the standard was not binding with respect to E85, and therefore does not indicate the equilibrium that would result in a *responsive* market.¹⁴ And EPA’s explanation for the allegedly low historical pass-through rates—lack of competition *among E85 stations*, JA[EPA-HQ-OAR-2015-0111-3631.at.10-11]—ignores the obvious fact (which EPA recognized in the abstract) that competition *between E85 and E10* will exert the necessary downward pressure on E85 prices once standards become binding, Rule at 77,459. EPA has thus “entirely failed to consider an important aspect of the problem.” *Owner-Operator*, 494 F.3d at 210.

EPA’s unreasonable treatment of E85 retail prices is compounded by its unreasonable treatment of the E85 demand curve. EPA’s view—that maintaining E85 retail prices appreciably below parity with E10 would have *no effect* on the strength of retail consumers’ response to E85 price—contradicts the common

¹⁴ The total standard has only ever been binding between August and December 2013, Rule at 77,458 n.80; 2013 Rule at 49,794, and even then it was non-binding with respect to E85 because, according to EPA, the market achieved compliance by relying almost entirely on E10, non-ethanol biofuels, and 800 million carryover RINs, Rule at 77,486.

understanding, which EPA has recognized, that price is “the most important factor” for most fuel consumers and thus E85 consumption is “likely *highly* dependent on the price relationship between E10 and E85.” 2014 NPRM at 71,760 (emphasis added). It also contradicts rigorous academic studies in the record confirming that below-parity E85 pricing will spur dramatic increases in consumption, i.e., that the demand curve is “non-linear.” JA[EPA-HQ-OAR-2015-0111-3600.at.6-7]; JA[EPA-HQ-OAR-2015-0111-3664]; *see also* JA[EPA-HQ-OAR-2015-0111-1917.at.20-22]; JA[EPA-HQ-OAR-2015-0111-2543.at.6-8].

EPA failed to address those studies’ non-linearity findings, favoring its own analysis of historical sales data that, EPA said, did not fit a non-linear demand curve better than a linear one. *See* JA[EPA-HQ-OAR-2015-01111-3666]. But that data came from periods when the total standards were *non-binding* with respect to E85, and only a trivial portion of it involved E85 prices below parity—none on a sustained basis. JA[*Id.* at.13-14, 25-35]; *see also* 2014 NPRM at 71,760 (noting E85 has consistently been priced well above parity with E10); JA[EPA-HQ-OAR-2015-0111-2604.at.34]. Perhaps EPA’s analysis illuminates the behavior of the few consumers unmotivated by price, such as government fleets required to buy E85, JA[EPA-HQ-OAR-2015-0111-3666.at.10], but it says nothing about how cost-conscious consumers, who predominate, would respond to E85 being priced below parity with E10.

In sum, the impediments EPA sees in the E85 market are merely the result of low total standards historically; the proper solution is to set higher, binding ones.

CONCLUSION

The Rule should be vacated.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 7,872 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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September 8, 2016

ADDENDUM

(o) Renewable fuel program

(1) Definitions

In this section:

(A) Additional renewable fuel

The term “additional renewable fuel” means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.

(B) Advanced biofuel

(i) In general

The term “advanced biofuel” means renewable fuel, other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

(ii) Inclusions

The types of fuels eligible for consideration as “advanced biofuel” may include any of the following:

(I) Ethanol derived from cellulose, hemicellulose, or lignin.

(II) Ethanol derived from sugar or starch (other than corn starch).

(III) Ethanol derived from waste material, including crop residue, other vegetative waste material, animal waste, and food waste and yard waste.

(IV) Biomass-based diesel.

(V) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.

(VI) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass.

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

The term “baseline lifecycle greenhouse gas emissions” means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

(D) Biomass-based diesel

The term “biomass-based diesel” means renewable fuel that is biodiesel as defined in section 13220(f) of this title and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwithstanding the preceding sentence, renewable fuel derived from co-processing biomass with a petroleum feedstock shall be advanced biofuel if it meets the requirements of subparagraph (B), but is not biomass-based diesel.

(E) Cellulosic biofuel

The term “cellulosic biofuel” means renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.

(F) Conventional biofuel

The term “conventional biofuel” means renewable fuel that is ethanol derived from corn starch.

(G) Greenhouse gas

The term “greenhouse gas” means carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons,⁹ sulfur hexafluoride. The Administrator may include any other anthropogenically-emitted gas that is determined by the Administrator, after notice and comment, to contribute to global warming.

(H) Lifecycle greenhouse gas emissions

The term “lifecycle greenhouse gas emissions” means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

(I) Renewable biomass

The term “renewable biomass” means each of the following:

(i) Planted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to December 19, 2007, that is either actively managed or fallow, and nonforested.

(ii) Planted trees and tree residue from actively managed tree plantations on non-federal¹⁰ land cleared at any time prior to December 19, 2007, including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.

(iii) Animal waste material and animal byproducts.

(iv) Slash and pre-commercial thinnings that are from non-federal¹⁰ forestlands, including forestlands belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States, but not forests or forestlands that are ecological communities with a global or State ranking of critically imperiled, imperiled, or rare pursuant to a State Natural Heritage Program, old growth forest, or late successional forest.

(v) Biomass obtained from the immediate vicinity of buildings and other areas regularly occupied by people, or of public infrastructure, at risk from wildfire.

(vi) Algae.

(vii) Separated yard waste or food waste, including recycled cooking and trap grease.

(J) Renewable fuel

The term “renewable fuel” means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.

(K) Small refinery

The term “small refinery” means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(L) Transportation fuel

The term “transportation fuel” means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).

(2) Renewable fuel program

(A) Regulations

(i) In general

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United

⁹So in original. The word “and” probably should appear.

¹⁰So in original. Probably should be “non-Federal”.

States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B). Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(ii) Noncontiguous State opt-in

(I) In general

On the petition of a noncontiguous State or territory, the Administrator may allow the renewable fuel program established under this subsection to apply in the noncontiguous State or territory at the same time or any time after the Administrator promulgates regulations under this subparagraph.

(II) Other actions

In carrying out this clause, the Administrator may—

- (aa) issue or revise regulations under this paragraph;
- (bb) establish applicable percentages under paragraph (3);
- (cc) provide for the generation of credits under paragraph (5); and
- (dd) take such other actions as are necessary to allow for the application of the renewable fuels program in a noncontiguous State or territory.

(iii) Provisions of regulations

Regardless of the date of promulgation, the regulations promulgated under clause (i)—

- (I) shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met; but
- (II) shall not—
 - (aa) restrict geographic areas in which renewable fuel may be used; or
 - (bb) impose any per-gallon obligation for the use of renewable fuel.

(iv) Requirement in case of failure to promulgate regulations

If the Administrator does not promulgate regulations under clause (i), the percentage of renewable fuel in gasoline sold or dispensed to consumers in the United States, on a volume basis, shall be 2.78 percent for calendar year 2006.

(B) Applicable volumes

(i) Calendar years after 2005

(I) Renewable fuel

For the purpose of subparagraph (A), the applicable volume of renewable fuel for the calendar years 2006 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of renewable fuel (in billions of gallons):
2006	4.0
2007	4.7
2008	9.0
2009	11.1
2010	12.95
2011	13.95
2012	15.2
2013	16.55
2014	18.15
2015	20.5
2016	22.25
2017	24.0
2018	26.0
2019	28.0
2020	30.0
2021	33.0
2022	36.0

(II) Advanced biofuel

For the purpose of subparagraph (A), of the volume of renewable fuel required under subclause (I), the applicable volume of advanced biofuel for the calendar years 2009 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of advanced biofuel (in billions of gallons):
2009	0.6
2010	0.95
2011	1.35
2012	2.0
2013	2.75
2014	3.75
2015	5.5
2016	7.25
2017	9.0
2018	11.0
2019	13.0
2020	15.0
2021	18.0
2022	21.0

(III) Cellulosic biofuel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of cellulosic biofuel for the calendar years 2010 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of cellulosic biofuel (in billions of gallons):
2010	0.1
2011	0.25
2012	0.5
2013	1.0
2014	1.75
2015	3.0
2016	4.25
2017	5.5
2018	7.0
2019	8.5
2020	10.5
2021	13.5
2022	16.0

(IV) Biomass-based diesel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of biomass-based diesel for the calendar years 2009 through 2012 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of biomass-based diesel (in billions of gallons):
2009	0.5
2010	0.65
2011	0.80
2012	1.0

(ii) Other calendar years

For the purposes of subparagraph (A), the applicable volumes of each fuel specified in the tables in clause (i) for calendar years after the calendar years specified in the tables shall be determined by the Administrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the implementation of the program during calendar years specified in the tables, and an analysis of—

(I) the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;

(II) the impact of renewable fuels on the energy security of the United States;

(III) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);

(IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;

(V) the impact of the use of renewable fuels on the cost to consumers of trans-

portation fuel and on the cost to transport goods; and

(VI) the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

The Administrator shall promulgate rules establishing the applicable volumes under this clause no later than 14 months before the first year for which such applicable volume will apply.

(iii) Applicable volume of advanced biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of advanced biofuel shall be at least the same percentage of the applicable volume of renewable fuel as in calendar year 2022.

(iv) Applicable volume of cellulosic biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of cellulosic biofuel established by the Administrator shall be based on the assumption that the Administrator will not need to issue a waiver for such years under paragraph (7)(D).

(v) Minimum applicable volume of biomass-based diesel

For the purpose of making the determinations in clause (ii), the applicable volume of biomass-based diesel shall not be less than the applicable volume listed in clause (i)(IV) for calendar year 2012.

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

Not later than October 31 of each of calendar years 2005 through 2021, the Administrator of the Energy Information Administration shall provide to the Administrator of the Environmental Protection Agency an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.

(B) Determination of applicable percentages

(i) In general

Not later than November 30 of each of calendar years 2005 through 2021, based on the estimate provided under subparagraph (A), the Administrator of the Environmental Protection Agency shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.

(ii) Required elements

The renewable fuel obligation determined for a calendar year under clause (i) shall—

(I) be applicable to refineries, blenders, and importers, as appropriate;

(II) be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States; and

(III) subject to subparagraph (C)(i), consist of a single applicable percentage that applies to all categories of persons specified in subclause (I).

(C) Adjustments

In determining the applicable percentage for a calendar year, the Administrator shall make adjustments—

(i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and

(ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

(4) Modification of greenhouse gas reduction percentages

(A) In general

The Administrator may, in the regulations under the last sentence of paragraph (2)(A)(i), adjust the 20 percent, 50 percent, and 60 percent reductions in lifecycle greenhouse gas emissions specified in paragraphs (2)(A)(i) (relating to renewable fuel), (1)(D) (relating to biomass-based diesel), (1)(B)(i) (relating to advanced biofuel), and (1)(E) (relating to cellulosic biofuel) to a lower percentage. For the 50 and 60 percent reductions, the Administrator may make such an adjustment only if he determines that generally such reduction is not commercially feasible for fuels made using a variety of feedstocks, technologies, and processes to meet the applicable reduction.

(B) Amount of adjustment

In promulgating regulations under this paragraph, the specified 50 percent reduction in greenhouse gas emissions from advanced biofuel and in biomass-based diesel may not be reduced below 40 percent. The specified 20 percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below 10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

(C) Adjusted reduction levels

An adjustment under this paragraph to a percent less than the specified 20 percent greenhouse gas reduction for renewable fuel shall be the minimum possible adjustment, and the adjusted greenhouse gas reduction shall be established by the Administrator at the maximum achievable level, taking cost in consideration, for natural gas fired corn-based ethanol plants, allowing for the use of a variety of technologies and processes. An adjustment in the 50 or 60 percent greenhouse gas levels shall be the minimum possible adjustment for the fuel or fuels concerned, and the adjusted greenhouse gas reduction shall be established at the maximum achievable level, taking cost in consideration, allowing for the use of a variety of feedstocks, technologies, and processes.

(D) 5-year review

Whenever the Administrator makes any adjustment under this paragraph, not later than 5 years thereafter he shall review and revise (based upon the same criteria and standards as required for the initial adjustment) the regulations establishing the adjusted level.

(E) Subsequent adjustments

After the Administrator has promulgated a final rule under the last sentence of paragraph (2)(A)(i) with respect to the method of determining lifecycle greenhouse gas emissions, except as provided in subparagraph (D), the Administrator may not adjust the percent greenhouse gas reduction levels unless he determines that there has been a significant change in the analytical methodology used for determining the lifecycle greenhouse gas emissions. If he makes such determination, he may adjust the 20, 50, or 60 percent reduction levels through rulemaking using the criteria and standards set forth in this paragraph.

(F) Limit on upward adjustments

If, under subparagraph (D) or (E), the Administrator revises a percent level adjusted as provided in subparagraphs (A), (B), and (C) to a higher percent, such higher percent may not exceed the applicable percent specified in paragraph (2)(A)(i), (1)(D), (1)(B)(i), or (1)(E).

(G) Applicability of adjustments

If the Administrator adjusts, or revises, a percent level referred to in this paragraph or makes a change in the analytical methodology used for determining the lifecycle greenhouse gas emissions, such adjustment, revision, or change (or any combination thereof) shall only apply to renewable fuel from new facilities that commence construction after the effective date of such adjustment, revision, or change.

(5) Credit program

(A) In general

The regulations promulgated under paragraph (2)(A) shall provide—

(i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2);

(ii) for the generation of an appropriate amount of credits for biodiesel; and

(iii) for the generation of credits by small refineries in accordance with paragraph (9)(C).

(B) Use of credits

A person that generates credits under subparagraph (A) may use the credits, or transfer all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(C) Duration of credits

A credit generated under this paragraph shall be valid to show compliance for the 12 months as of the date of generation.

(D) Inability to generate or purchase sufficient credits

The regulations promulgated under paragraph (2)(A) shall include provisions allowing any person that is unable to generate or purchase sufficient credits to meet the requirements of paragraph (2) to carry forward a renewable fuel deficit on condition that the person, in the calendar year following the year in which the renewable fuel deficit is created—

- (i) achieves compliance with the renewable fuel requirement under paragraph (2); and
- (ii) generates or purchases additional renewable fuel credits to offset the renewable fuel deficit of the previous year.

(E) Credits for additional renewable fuel

The Administrator may issue regulations providing: (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports additional renewable fuels specified by the Administrator; and (ii) for the use of such credits by the generator, or the transfer of all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(6) Seasonal variations in renewable fuel use**(A) Study**

For each of calendar years 2006 through 2012, the Administrator of the Energy Information Administration shall conduct a study of renewable fuel blending to determine whether there are excessive seasonal variations in the use of renewable fuel.

(B) Regulation of excessive seasonal variations

If, for any calendar year, the Administrator of the Energy Information Administration, based on the study under subparagraph (A), makes the determinations specified in subparagraph (C), the Administrator of the Environmental Protection Agency shall promulgate regulations to ensure that 25 percent or more of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) is used during each of the 2 periods specified in subparagraph (D) of each subsequent calendar year.

(C) Determinations

The determinations referred to in subparagraph (B) are that—

- (i) less than 25 percent of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) has been used during 1 of the 2 periods specified in subparagraph (D) of the calendar year;
- (ii) a pattern of excessive seasonal variation described in clause (i) will continue in subsequent calendar years; and
- (iii) promulgating regulations or other requirements to impose a 25 percent or more seasonal use of renewable fuels will not prevent or interfere with the attainment of national ambient air quality standards or significantly increase the price of motor fuels to the consumer.

(D) Periods

The 2 periods referred to in this paragraph are—

- (i) April through September; and
- (ii) January through March and October through December.

(E) Exclusion

Renewable fuel blended or consumed in calendar year 2006 in a State that has received a waiver under section 7543(b) of this title shall not be included in the study under subparagraph (A).

(F) State exemption from seasonality requirements

Notwithstanding any other provision of law, the seasonality requirement relating to renewable fuel use established by this paragraph shall not apply to any State that has received a waiver under section 7543(b) of this title or any State dependent on refineries in such State for gasoline supplies.

(7) Waivers**(A) In general**

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2)—

- (i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or
- (ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

(B) Petitions for waivers

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, shall approve or disapprove a petition for a waiver of the requirements of paragraph (2) within 90 days after the date on which the petition is received by the Administrator.

(C) Termination of waivers

A waiver granted under subparagraph (A) shall terminate after 1 year, but may be renewed by the Administrator after consultation with the Secretary of Agriculture and the Secretary of Energy.

(D) Cellulosic biofuel

(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator

shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(ii) Whenever the Administrator reduces the minimum cellulosic biofuel volume under this subparagraph, the Administrator shall make available for sale cellulosic biofuel credits at the higher of \$0.25 per gallon or the amount by which \$3.00 per gallon exceeds the average wholesale price of a gallon of gasoline in the United States. Such amounts shall be adjusted for inflation by the Administrator for years after 2008.

(iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

(E) Biomass-based diesel

(i) Market evaluation

The Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall periodically evaluate the impact of the biomass-based diesel requirements established under this paragraph on the price of diesel fuel.

(ii) Waiver

If the Administrator determines that there is a significant renewable feedstock disruption or other market circumstances that would make the price of biomass-based diesel fuel increase significantly, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall issue an order to reduce, for up to a 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomass-based diesel. For any calendar year in which the Administrator makes a reduction under this subparagraph, the Admin-

istrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(iii) Extensions

If the Administrator determines that the feedstock disruption or circumstances described in clause (ii) is continuing beyond the 60-day period described in clause (ii) or this clause, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, may issue an order to reduce, for up to an additional 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed an additional 15 percent of the applicable annual requirement for biomass-based diesel.

(F) Modification of applicable volumes

For any of the tables in paragraph (2)(B), if the Administrator waives—

(i) at least 20 percent of the applicable volume requirement set forth in any such table for 2 consecutive years; or

(ii) at least 50 percent of such volume requirement for a single year,

the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).

(8) Study and waiver for initial year of program

(A) In general

Not later than 180 days after August 8, 2005, the Secretary of Energy shall conduct for the Administrator a study assessing whether the renewable fuel requirement under paragraph (2) will likely result in significant adverse impacts on consumers in 2006, on a national, regional, or State basis.

(B) Required evaluations

The study shall evaluate renewable fuel—

(i) supplies and prices;

(ii) blendstock supplies; and

(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

Based on the results of the study, the Secretary of Energy shall make specific recommendations to the Administrator concerning waiver of the requirements of paragraph (2), in whole or in part, to prevent any adverse impacts described in subparagraph (A).

(D) Waiver

(i) In general

Not later than 270 days after August 8, 2005, the Administrator shall, if and to the

extent recommended by the Secretary of Energy under subparagraph (C), waive, in whole or in part, the renewable fuel requirement under paragraph (2) by reducing the national quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

Clause (i) does not limit the authority of the Administrator to waive the requirements of paragraph (2) in whole, or in part, under paragraph (7).

(9) Small refineries

(A) Temporary exemption

(i) In general

The requirements of paragraph (2) shall not apply to small refineries until calendar year 2011.

(ii) Extension of exemption

(I) Study by Secretary of Energy

Not later than December 31, 2008, the Secretary of Energy shall conduct for the Administrator a study to determine whether compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship on small refineries.

(II) Extension of exemption

In the case of a small refinery that the Secretary of Energy determines under subclause (I) would be subject to a disproportionate economic hardship if required to comply with paragraph (2), the Administrator shall extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.

(ii) Evaluation of petitions

In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.

(iii) Deadline for action on petitions

The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.

(C) Credit program

If a small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A), the regulations promulgated under paragraph (2)(A) shall provide for the generation of credits by the small refinery under paragraph (5) beginning in the calendar year following the date of notification.

(D) Opt-in for small refineries

A small refinery shall be subject to the requirements of paragraph (2) if the small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A).

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

Not later than 180 days after August 8, 2005, and annually thereafter, the Federal Trade Commission shall perform a market concentration analysis of the ethanol production industry using the Herfindahl-Hirschman Index to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior.

(ii) Scoring

For the purpose of scoring under clause (i) using the Herfindahl-Hirschman Index, all marketing arrangements among industry participants shall be considered.

(B) Report

Not later than December 1, 2005, and annually thereafter, the Federal Trade Commission shall submit to Congress and the Administrator a report on the results of the market concentration analysis performed under subparagraph (A)(i).

(11) Periodic reviews

To allow for the appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2), the Administrator shall conduct periodic reviews of—

(A) existing technologies;

(B) the feasibility of achieving compliance with the requirements; and

(C) the impacts of the requirements described in subsection (a)(2)¹¹ on each individual and entity described in paragraph (2).

(12) Effect on other provisions

Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 7475) of this chapter. The previous sentence shall not affect implementation and enforcement of this subsection.

¹¹ So in original. Subsection (a) does not contain a par. (2).

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2016, I caused copies of the foregoing document to be served by the Court's CM/ECF System, which will send a notice of the filing to all registered CM/ECF users.

/s/ Seth P. Waxman

SETH P. WAXMAN

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September 8, 2016