

ORAL ARGUMENT NOT YET SCHEDULED

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

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RFS POWER COALITION,)
)
Petitioner,)
)
v.)
	Case No. 20-1046)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY and ANDREW)
WHEELER, ADMINISTRATOR,)
)
Respondents.)
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**PETITIONER RFS POWER COALITION’S MOTION TO
CONSOLIDATE OR COORDINATE RELATED CASES OR,
IN THE ALTERNATIVE, HOLD IN ABEYANCE**

Pursuant to Federal Rules of Appellate Procedure 2, 3(b)(2), and 27, Circuit Rules 2 and 27, and this Court’s inherent authority to manage its docket, Petitioner RFS Power Coalition respectfully submits this motion to consolidate or coordinate the following cases:

1. *RFS Power Coalition v. EPA*, No 20-1046, filed Feb. 21, 2020 (petition for review of the “2020 Volume Rule”); and

2. *RFS Power Coalition v. EPA*, No 19-1027, filed Feb. 6, 2019 (petition for review of the “2019 Volume Rule”) (consolidated with *Growth Energy v. EPA*, No. 19-1023, with 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038 and 19-1039).

These two cases challenge successive annual rulemaking actions undertaken by the U.S. Environmental Protection Agency (“EPA”) setting renewable fuel volumes under the Renewable Fuel Standard program,¹ and raise identical issues based on substantially identical administrative records. Petitioner’s arguments in both cases involve a single, unique legal issue: the legality of EPA’s omission of electricity fuel from the annual cellulosic renewable fuel volumes and corresponding volume adjustments. Petitioner has conferred with Respondents, which have indicated that they reserve taking a position on this motion. At this time, there are no other parties in the instant case, nor any other petitions yet filed with respect to the 2020 Volume Rule. Petitioner intends to file a parallel motion in the 2019 Volume Rule proceeding.

¹ 2019 Volume Rule: *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704 (Dec. 11, 2018);

2020 Volume Rule: *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes*, 85 Fed. Reg. 7,016 (Feb. 6, 2020).

BACKGROUND

Petitioner RFS Power Coalition is a coalition of three national trade associations representing companies and biofuel facilities that produce renewable electricity used as transportation fuel. The member associations of the RFS Power Coalition are: the American Biogas Council; the Biomass Power Association; and the Energy Recovery Council.

Under the federal Renewable Fuel Standard program, EPA must promulgate rules on an annual basis determining volumes of renewable fuel production. The 2019 Volume Rule and 2020 Volume Rule are the agency's final actions with respect to this annual statutory rulemaking function with respect to annual calendar periods 2019 and 2020, respectively, during which obligated parties must purchase specified volumes of renewable fuel. *See generally* Renewable Fuel Standard, 42 U.S.C. § 7545(o)(3). For each annual period, EPA must determine annual renewable fuel volumes for renewable electricity fuel used as transportation fuel by electric vehicles. Petitioner has sought judicial review of agency action in both of these successive annual rulemakings on the grounds that EPA has undercounted available volumes of qualified electricity fuel.

The RFS Power Coalition filed a petition for review in this Court of the 2019 Volume Rule on February 6, 2019 (No. 19-1027) challenging EPA's omission of electricity fuel from the renewable fuel volumes for the 2019

compliance year. Petitioner's case was consolidated under lead case *Growth Energy v. EPA*, No. 19-1023, along with challenges by other stakeholders raising other issues in Nos. 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038 and 19-1039. Petitioner was the only party to brief this single issue relating to electricity fuel, and although included in a joint brief with other biofuel producers no other party joined in that section of the brief. *See* Biofuel Producers Opening Br. 32-42, filed Oct. 4, 2019 (ECF #1809534). Merits briefing of the 2019 Volume Rule is now completed and oral argument is scheduled for May 1, 2020.

On February 6, 2020, EPA published its 2020 Volume Rule, in which EPA again took the same position that electricity fuel would not be counted toward the annual biofuel volumes. The RFS Power Coalition filed the instant petition for review challenging the 2020 Volume Rule on February 21, 2020, raising an identical legal challenge to the agency's action with respect to the 2020 annual compliance period as it had with respect to the 2019 Volume Rule.

The administrative records of the 2019 Volume Rule and 2020 Volume Rule are substantially identical (indeed, nearly verbatim identical) in terms of EPA's description of its action, response to comments, and asserted basis with respect to

electricity fuel volumes, as reflected in the final rule preamble and response-to-comments documents.²

ARGUMENT

This Court has broad inherent power to consolidate and otherwise manage related cases. Consolidation of related petitions is appropriate “[w]hen the parties have filed separate timely notices of appeal,” Fed. R. App. P. 3(b)(2), and the “cases involv[e] essentially the same parties or the same, similar, or related issues.” *Handbook of Practice and Internal Procedures* at 24 (D.C. Cir. Dec. 1, 2019). Under Fed. R. App. P. 2, the “court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs.”

A. Consolidation or Coordination of the 2019 Volume Rule and 2020 Volume Rule Briefing Is Efficient and Necessary to Preserve Remedy Availability

As noted, Petitioner has challenged EPA’s undercounting of electricity fuel in two successive annual volume periods under the Renewable Fuel Standard program. At the same time, in the context of challenges to prior annual volume rules, EPA has taken the position that no remedy for undercounting biofuel volumes can ever be retroactively or prospectively adjusted after the close of the

² Petitioner requested Respondents’ concurrence for purposes of this motion that the administrative records are substantially identical, but Respondents have reserved their response.

annual compliance period. *See* 84 Fed. Reg. 36,762, 36,787-89 (July 29, 2019) (EPA refusal to provide remedy for undercounting 500 million gallons of renewable fuel on remand of the 2016 volume rule) (addendum). Thus, if EPA's position regarding remedy were to be upheld by this Court, a decision on a challenge to EPA's annual rule would have to be decided – and remedied – within the same relevant annual period. But due to the time required for judicial review, EPA's annual volume rules are, as a practical matter, evading review under EPA's view of available remedies. Thus, it is critical to consolidate or otherwise manage these cases in a manner that provides timely decision and preserves the opportunity for an effective remedy as a practical matter.

It is difficult without judicial management to challenge and obtain judicial review in the same annual period. Since 2010, various parties have challenged EPA's annual volume rules raising a variety of legal issues. The time for judicial decision has varied, but usually taken nearly a year or more. In nearly all cases, judicial review has extended beyond the annual compliance period of that rule, making it impossible to obtain a remedy within the relevant statutory time period. In the present cases, it is unlikely that the 2019 Volume Rule challenge will be decided until late in the 2020 calendar year at the earliest, and consequently relief within the 2019 statutory compliance period would not be obtainable. Similarly, unless consolidated for purposes of briefing or otherwise expedited, it is unlikely

that Petitioner’s challenge to the 2020 Volume Rule would be decided during the 2020 statutory compliance period. The following chart illustrates the time it has taken for judicial review in previous challenges to EPA volume rules under the Renewable Fuel Standard:

Rule	Petition Filed	Decided
2019 RFS	No. 19-1027, filed Feb. 6, 2019; oral argument May 1, 2020	(at least 15 months)
2018 RFS	No. 17-1258, filed Dec. 12, 2017	Decided Sept. 6, 2019 (22 mos.)
2017 RFS	No. 16-1052, filed Feb. 12, 2016	Decided Aug. 30, 2019 (42 mos.)
2014-16 RFS	No. 16-1005, filed Jan. 8, 2016	Decided July 28, 2017 (19 mos.)
2013 RFS	No. 13-1265, filed Oct. 4, 2013	Decided May 6, 2014 (7 mos.)
2012 RFS	No. 12-1139, filed Mar. 9, 2012	Decided Jan. 25, 2013 (10 mos.)
2011 RFS	No. 10-1070, filed Mar. 29, 2010	Decided Dec. 21, 2010 (9 mos.)

There is particular urgency in managing the timing of judicial review in light of EPA’s newly announced position that it will never retroactively adjust its volume rules from prior years to provide relief, even where this Court decides that EPA has illegally undercounted renewable fuel volumes. Unless this Court directs another form of relief, fuel producers will have no effective remedy for undercounting of fuel volumes – unless judicial review is completed within the

statutory calendar period and EPA is mandated to re-adjust the applicable volumes. Even if this Court were to reject EPA's position with respect to remedy in a proper proceeding, it is nonetheless critical that Petitioner be able to obtain a decision within the same calendar year as the challenged rule, or as soon as possible thereafter, to provide an effective remedy to fuel producers as well as to minimize any disruption to the renewable fuel program.

Apart from remedy, consolidating these cases would also promote other considerations of judicial economy. Where, as here, separate petitions involve the same parties, nearly identical facts and record, and the same legal issue, the reviewing court should hear the challenges together rather than piecemeal. The issue raised by Petitioner is identical in each of the 2019 Volume Rule and 2020 Volume Rule cases. Petitioner is willing to submit its challenge to the 2020 Volume Rule on the same briefing as has been recently completed in the 2019 Volume Rule. Because the administrative records are similar if not identical, Respondents certainly would likewise rely on similar arguments. Respondent could agree, or be ordered, to submit this particular issue for the Court's consideration on the basis of the 2019 Volume Rule briefing, which has already been completed, or for good cause shown, be allowed a reasonable supplemental brief to highlight any differences in the administrative record that Respondent believes would change its arguments.

This approach serves judicial economy and reduces resource demands on the parties, which is particularly important for Petitioner, whose members are suffering economically from EPA's failure to properly implement the Renewable Fuel Program. This approach also avoids the possibility of conflicting rulings if different panels were to address the identical legal issue in separate cases involving successive annual periods. Indeed, given the length of time it has taken for decision of these annual volume rule challenges, there are now two cases pending simultaneously involving two different rules and it is possible that, without coordination, the panels would reach different conclusions, or that the second challenge could be decided by a panel before the earlier challenge that has already been briefed.

B. In The Alternative, Hold the 2020 Volume Rule Case in Abeyance Pending Decision on the 2020 Volume Rule

In the alternative, Petitioner respectfully requests that the Court hold the challenge to the 2020 Volume Rule (No. 20-1046) in abeyance pending the Court's decision in Petitioner's challenge to the 2019 Volume Rule (No. 19-1027). Given the identity of the legal issues and administrative records, a ruling in the 2019 Volume Rule challenge (if decided first) would control the electricity fuel issue raised by Petitioner in the 2020 challenge by virtue of law-of-the-circuit or other preclusion doctrines. Because the legal issues are identical and the administrative records materially indistinguishable, it would be a needless expenditure of party

David M. Williamson
Williamson Law + Policy, PLLC
1850 M Street NW, Suite 840
Washington, D.C. 20036
Tel: (202) 256-6155
Fax: (703) 519-0076
maxwilliamson@williamsonlawpolicy.com
Counsel for Petitioner RFS Power Coalition

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), counsel hereby submits this certificate as to parties and amici.

A. Petitioners

RFS Power Coalition.

B. Respondents

United States Environmental Protection Agency (“EPA”) and Andrew Wheeler, EPA Administrator.

C. Intervenors

There are no intervenors at this time.

D. Amici

There are no amici at this time.

/s/ David M. Williamson

David M. Williamson

CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 27(d)(2), I hereby certify that the foregoing filing complies with the type-volume limitations. According to the word processing system used in this office, this document, exclusive of the caption, signature block, and any certificates of counsel, contains 1,896 words.

2. Pursuant to Fed. R. App. P. 32(a)(5)-(6), I hereby certify that the foregoing filing complies with the typeface requirements and the type-style requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: March 2, 2020

/s/ David M. Williamson

David M. Williamson

CERTIFICATE OF SERVICE

I hereby certify that, on this 2d day of March 2020, I caused the foregoing RFS Power Coalition's Motion to Consolidate or Coordinate Related Cases Or, In the Alternative, Hold In Abeyance, to be served on counsel of record in this case by means of the Court's CM/ECF system.

/s/ David M. Williamson

David M. Williamson

REGULATORY ADDENDUM

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA-HQ-OAR-2019-0136; FRL-9996-53-OAR]

RIN 2060-AU42

Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Under section 211 of the Clean Air Act, the Environmental Protection Agency (EPA) is required to set renewable fuel percentage standards every year. This action proposes the annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that apply to gasoline and diesel transportation fuel produced or imported in the year 2020. Relying on statutory waiver authority that is available when the projected cellulosic biofuel production volume is less than the applicable volume specified in the statute, EPA is proposing volume requirements for cellulosic biofuel,

advanced biofuel, and total renewable fuel that are below the statutory volume targets. We are also proposing the applicable volume of biomass-based diesel for 2021. This action also proposes to address the remand of the 2016 standard-setting rulemaking, as well as several regulatory changes to the Renewable Fuel Standard (RFS) program including new pathways, flexibilities for regulated parties, and clarifications of existing regulations.

DATES:

Comments. Comments must be received on or before August 30, 2019.

Public hearing. EPA will announce the public hearing date and location for this proposal in a supplemental **Federal Register** document.

ADDRESSES: You may send your comments, identified by Docket ID No. EPA-HQ-OAR-2019-0136, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov> (our preferred method) Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Air and Radiation Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier:* EPA Docket Center, WJC West Building, Room 3334,

1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center’s hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” information in Section X.

FOR FURTHER INFORMATION CONTACT: Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: 734-214-4131; email address: macallister.julia@epa.gov.

SUPPLEMENTARY INFORMATION: Entities potentially affected by this proposed rule are those involved with the production, distribution, and sale of transportation fuels, including gasoline and diesel fuel or renewable fuels such as ethanol, biodiesel, renewable diesel, and biogas. Potentially affected categories include:

Category	NAICS ¹ codes	SIC ² codes	Examples of potentially affected entities
Industry	324110	2911	Petroleum refineries.
Industry	325193	2869	Ethyl alcohol manufacturing.
Industry	325199	2869	Other basic organic chemical manufacturing.
Industry	424690	5169	Chemical and allied products merchant wholesalers.
Industry	424710	5171	Petroleum bulk stations and terminals.
Industry	424720	5172	Petroleum and petroleum products merchant wholesalers.
Industry	221210	4925	Manufactured gas production and distribution.
Industry	454319	5989	Other fuel dealers.

¹ North American Industry Classification System (NAICS).

² Standard Industrial Classification (SIC).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this proposed action. This table lists the types of entities that EPA is now aware could potentially be affected by this proposed action. Other types of entities not listed in the table could also be affected. To determine whether your entity would be affected by this proposed action, you should carefully examine the applicability criteria in 40 CFR part 80. If you have any questions regarding the applicability of this proposed action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Outline of This Preamble

- I. Executive Summary
 - A. Summary of Major Provisions in This Action
 - 1. Approach To Setting Volume Requirements
 - 2. Cellulosic Biofuel
 - 3. Advanced Biofuel
 - 4. Total Renewable Fuel
 - 5. 2021 Biomass-Based Diesel
 - 6. Annual Percentage Standards
 - 7. Response to Remand of 2016 Standards Rulemaking
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 - B. Obligation To Reset Statutory Volumes
- II. Authority and Need for Waiver of Statutory Applicable Volumes

- A. Statutory Authorities for Reducing Volume Targets
 - 1. Cellulosic Waiver Authority
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- B. Severability
- C. Treatment of Carryover RINs
 - 1. Carryover RIN Bank Size
 - 2. EPA’s Proposed Decision Regarding the Treatment of Carryover RINs
- III. Cellulosic Biofuel Volume for 2020
 - A. Statutory Requirements
 - B. Cellulosic Biofuel Industry Assessment
 - 1. Review of EPA’s Projection of Cellulosic Biofuel in Previous Years
 - 2. Potential Domestic Producers
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 - 4. Summary of Volume Projections for Individual Companies
- C. Cellulosic Biofuel Volume for 2020

For 2020, the implied statutory volume target for non-cellulosic advanced biofuel is identical to that for 2019 at 4.5 billion gallons, and this is the level that would result from application of the maximum reduction permitted under the cellulosic waiver authority. Moreover, the concerns we expressed for the 2019 standards regarding impacts on costs and feedstock switching and/or diversion of foreign advanced biofuels remain valid for 2020. As in 2019, the reasonably attainable volume of advanced biofuel for 2020 falls short of the volume resulting from the maximum exercise of the cellulosic authority, although that volume is likely to be attainable. Moreover, while there is some uncertainty in the volume of advanced biofuel that may be attainable or reasonably attainable in 2020, even if greater volumes of advanced biofuel are attainable or reasonably attainable, the high cost of these fuels provides sufficient justification to reduce the advanced biofuel volume for 2020 by the maximum amount under the cellulosic waiver authority. In the 2019 final rule we presented illustrative cost projections for sugarcane ethanol and soybean biodiesel in 2019, the two advanced biofuels that would be most likely to provide the marginal increase in volumes of advanced biofuel in 2020 in comparison to 2019. Sugarcane ethanol results in a cost increase compared to gasoline that ranges from \$0.39–\$1.04 per ethanol-equivalent gallon. Soybean biodiesel results in a cost increase compared to diesel fuel that ranges from \$0.74–\$1.23 per ethanol-equivalent gallon. The cost of these renewable fuels is high as compared to the petroleum fuels they displace.

Based on the information presented above, we believe that 5.04 billion gallons of advanced biofuel is attainable in 2020. After a consideration of the projected volume of cellulosic biofuel and reasonably attainable volumes of imported sugarcane ethanol and other advanced biofuels, we determined that 2.83 billion gallons of advanced biodiesel and renewable diesel would be needed to reach 5.04 billion gallons of advanced biofuel. Based on a review of the factors relevant to the supply of advanced biodiesel and renewable diesel as discussed in Section IV.B.2, including historic production and import data, the production capacity of registered biodiesel and renewable diesel producers, and the availability of advanced feedstocks, we have determined that 2.83 billion gallons of advanced biodiesel and renewable

diesel is attainable in 2020. This is similar to the conclusions we reached for 2019, where we also determined that the same volume of non-cellulosic advanced biofuel would be attainable.

We acknowledge that there is some uncertainty regarding whether the market will actually supply 5.04 billion gallons of advanced biofuel in 2020. In the event that the market does not supply this volume, the carryover RIN bank represents a source of RINs that could help obligated parties meet an advanced biofuel volume requirement of 5.04 billion gallons in 2020 if the market fails to supply sufficient advanced biofuels. As discussed in greater detail in Section II.C.1, carryover RINs provide obligated parties compliance flexibility in the face of substantial uncertainties in the transportation fuel marketplace and provide a liquid and well-functioning RIN market upon which success of the entire program depends. We currently estimate that there are approximately 390 million advanced carryover RINs available.

D. Volume Requirement for Total Renewable Fuel

As discussed in Section II.A.1, we believe that the cellulosic waiver provision is best interpreted as requiring that the advanced biofuel and total renewable fuel volumes be reduced by equal amounts. For the reasons we have previously articulated, we believe this interpretation is consistent with the statutory language and best effectuates the objectives of the statute, including the environmental objectives that generally favor the use of advanced biofuels over non-advanced biofuels and the legislative intent reflected in the statutory volume tables.¹¹¹ If we were to reduce the total renewable fuel volume requirement by a lesser amount than the advanced biofuel volume requirement, we would effectively increase the opportunity for conventional biofuels to participate in the RFS program beyond the implied statutory volume of 15 billion gallons. Applying an equal reduction of 9.96 billion gallons to both the statutory target for advanced biofuel and the statutory target for total renewable fuel results in a total renewable fuel volume of 20.04 billion gallons as shown in Table IV.A–1.¹¹² This volume of total renewable fuel results in an implied volume of 15

¹¹¹ See 81 FR 89752–89753 (December 12, 2016). See also 78 FR 49809–49810 (August 15, 2013); 80 FR 77434 (December 14, 2015).

¹¹² EPA also considered the availability of carryover RINs in determining whether reduced use of the cellulosic waiver authority would be warranted. For the reasons described in Section II.B, we do not believe this to be the case.

billion gallons of conventional fuel, which is the same as in the 2019 final rule.

We note that because we are proposing to use the maximum reduction possible under the cellulosic waiver authority, no additional reductions are possible under that authority. While the general waiver authority does provide a means for further reductions in the applicable volume requirement for total renewable fuel, the record before us does not indicate that such a waiver is justified. In particular, in a separate memorandum we provide a description of the ways in which the market could make 20.04 billion gallons of total renewable fuel available in 2020.¹¹³ In light of the total volume of ethanol that could be used in 2020,¹¹⁴ along with the potential for conventional biodiesel and renewable diesel, we find that there would be sufficient volumes of conventional renewable fuel to reach 15 billion gallons and of total renewable fuel to reach 20.04 billion gallons.

V. Response to Remand of 2016 Rulemaking

In addition to proposing the applicable volume requirements and percentage standards for 2020, in this

¹¹³ “Market impacts of biofuels in 2020,” memorandum from David Korotney to docket EPA–HQ–OAR–2019–0136. In prior actions, similar analyses indicated that the market was capable of both producing and consuming the required volume of renewable fuels, and that as a result there was no basis for finding an inadequate domestic supply of total renewable fuel. See 82 FR 34229 & n.82 (July 21, 2017). Given the D.C. Circuit’s decision in *ACE*, however, assessment of demand-side constraints is no longer relevant for determining inadequate domestic supply. However, we believe consideration of the ways that the market could make this volume available may still be generally relevant to whether and how EPA exercises its waiver authorities, such as our consideration of whether the volumes will cause severe economic harm.

¹¹⁴ We note that the previously cited memorandum discusses the potential for total ethanol consumption in 2020, but does not make specific projections for E0, E15 and E85. Volumes of these ethanol blends are highly dependent upon consumer demand. In prior annual rules, we assessed volumes of these blends in determining whether and to what extent to exercise the inadequate domestic supply waiver authority. The D.C. Circuit’s decision *ACE* precludes assessment of demand-side constraints in determining inadequate domestic supply, and consistent with that decision, we no longer assess such blend volumes. While we could still assess such blend volumes in deciding whether and to what extent to exercise our discretionary waiver authorities, and in evaluating the market’s ability to meet the total renewable fuel requirement, doing so is not necessary. In terms of the market’s ability to satisfy the total renewable fuel requirement, the more relevant consideration is whether the pool-wide ethanol volume, together with volumes of other biofuels, suffices. We note that EPA does not establish standards for E0, E15, or E85. Moreover, there has historically been a lack of reliable data on volumes of these blends.

rulemaking we are also proposing to address the remand of the 2016 annual rule by the D.C. Circuit Court of Appeals, in *ACE*. In light of the fact that we can no longer incent additional renewable fuel generation in 2016, and the significant burden on obligated parties of imposing an additional standard, we are proposing to retain the original 2016 total renewable fuel standard. This section describes the relevant aspects of the 2016 annual rule, the court's decision, EPA's responsibilities following the court's remand, and our proposed approach.

A. Reevaluating the 2016 Annual Rule

1. The 2016 Renewable Fuel Standard

On December 14, 2015, we promulgated a rulemaking establishing the volume requirements and percentage standards for 2014, 2015, and 2016.¹¹⁵ In establishing those standards, we utilized the cellulosic waiver authority under CAA 211(o)(7)(D) to lower the cellulosic biofuel, advanced biofuel, and total renewable fuel volume requirements for 2016, and the general waiver authority under CAA 211(o)(7)(A) to lower total renewable fuel by an additional increment.

As an initial step, under CAA 211(o)(7)(D), we lowered the cellulosic biofuel volume requirement by 4.02 billion gallons, to the projected production of cellulosic biofuel for 2016, as required by the statute.¹¹⁶ Using that same authority, we then elected to reduce the advanced biofuel and total renewable fuel volumes. We did not reduce the advanced biofuel volume requirement by the full 4.02 billion gallons that was permitted under this authority, but rather by a lesser 3.64 billion gallons that resulted in an advanced biofuel volume requirement that was "reasonably attainable."¹¹⁷ This allowed some advanced biofuel to "backfill" for the shortfall in cellulosic biofuel. We then reduced the total renewable fuel volume by an amount equivalent to the reduction in advanced biofuel in accordance with our longstanding interpretation that when making reductions to advanced biofuel and total renewable fuel under CAA 211(o)(7)(D), the best reading of the statute is to reduce them both by the same amount.¹¹⁸

As a second step, under CAA 211(o)(7)(A), under a finding of inadequate domestic supply, we further lowered the total renewable fuel

standard by 500 million gallons for 2016.¹¹⁹ In assessing "inadequate domestic supply," we considered the availability of renewable fuel to consumers. Based on such demand-side considerations, we made the additional 500 million gallon reduction in the total renewable fuel requirement.

The 2016 total renewable fuel standard was challenged in court. In an opinion issued on July 28, 2017, the D.C. Circuit vacated our use of the general waiver authority under a finding of inadequate domestic supply to reduce the 2016 total renewable fuel standard, the second step of setting the 2016 total renewable fuel standard.¹²⁰ The court in *ACE* held that we had improperly focused on supply of renewable fuel to consumers, and that the statute instead requires a "supply-side" assessment of the volumes of renewable fuel that can be supplied to refiners, blenders, and importers.¹²¹ Other components of our interpretation of "inadequate domestic supply" were either upheld by the court in *ACE* (e.g., our interpretation that carryover RINs are not part of the "supply" for purposes of this waiver authority) or were not challenged (e.g., our consideration of biofuel imports as part of the domestic supply). Our use of the cellulosic waiver authority to provide the initial reduction in total renewable fuel was also upheld by the court.

2. Agency Responsibility

The court in *ACE* upheld our volume requirements for advanced biofuel and cellulosic biofuel, so there is therefore no need for the agency to adjust those 2016 final volume requirements. The court also upheld EPA's use of the cellulosic waiver authority to reduce the 2016 total renewable fuel volume requirement. The court only vacated our decision to further reduce that requirement under the "inadequate domestic supply" waiver authority, remanding this issue to the Agency for further consideration consistent with the court's opinion.¹²² Our obligation is thus to reevaluate the 2016 total renewable fuel volume requirement in accordance with the court's decision.

B. Consideration of the Burdens of a Retroactive Standard

We propose to find that imposing an additional burden on obligated parties for the 2016 volume requirements through a higher standard at this time would be unduly burdensome and

inappropriate. In the *ACE* decision, and two previous decisions,¹²³ the court stated that in imposing a retroactive standard, we must balance the burden on obligated parties of a retroactive standard with the broader goal of the RFS program to increase renewable fuel use.¹²⁴ We believe that in the case of the 2016 renewable fuel volumes, any approach that requires additional volumes of renewable fuel use would impose a significant burden on obligated parties, without any corresponding benefit as any additional standard cannot result in additional renewable fuel use in 2016. Thus, we are proposing to retain the original 2016 total renewable fuel standard.

We believe the burdens associated with altering the 2016 standard are high. In order to revise the 2016 standard EPA would need to rescind the 2016 standard and return the RINs used for compliance returned to the original owners. Once those RINs were unretired, a process that could take several months, trading of those RINs could resume for a designated amount of time before retirements would again be required to demonstrate compliance. Obligated parties could then comply with a new, higher standard that includes an adjustment to the required total renewable fuel volume to address the *ACE* decision.

Under our current regulations, only 2015 and 2016 RINs can be used to demonstrate compliance with the 2016 standard.¹²⁵ However, there are far fewer 2015 and 2016 RINs available today (i.e., RINs that are valid but have not already been retired to comply with the 2015, 2016, or 2017 standards) than would be needed to comply with a supplemental standard commensurate with our exercise of the general waiver authority, that is, 500 million gallons. Additionally, the few 2015 and 2016 RINs available are unevenly held between obligated parties; because of the small number of RINs, any parties who held excess 2015 and 2016 RINs could attempt to sell them at a high price, creating dysfunction within the RIN market. These high prices would create a burden on obligated parties, without providing any incentive for additional renewable fuel use.

We also considered and rejected two alternative approaches for addressing the remand. First, we considered an

¹²³ *Monroe Energy, LLC v. EPA*, 750 F.3d 909 (D.C. Cir. 2014); *NPRA v. EPA*, 630 F.3d 145 (D.C. Cir. 2010).

¹²⁴ E.g., in *Monroe*, the court held that EPA's action was reasonable because it "considered various ways to minimize the hardship caused to obligated parties." *Monroe* at 920.

¹²⁵ 40 CFR 80.1427(a).

¹¹⁵ 80 FR 77420.

¹¹⁶ See *Id.* at 77499.

¹¹⁷ *Id.* at 77442–43.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 77444.

¹²⁰ *ACE*, 864 F.3d 691.

¹²¹ *Id.* at 696.

¹²² *Id.* at 703.

approach where 2016 RINs used for compliance with the 2017 standards could be unretired and used for compliance with the increased 2016 standard, but this would essentially also reopen 2017 compliance, and likely 2018 compliance for the same reason.¹²⁶ Reopening compliance would impose a significant burden on both obligated parties and EPA as described above. Moreover, stakeholders have expressed strong desires for consistent compliance requirements on an annual basis,¹²⁷ and having compliance for the prior year complete before requiring compliance with the subsequent year is essential to properly account for the status of RINs, due to the 2-year RIN lifespan. Reopening compliance for 2016–2018 could have cascading effects on compliance for 2019 and subsequent years. Compliance with an additional standard would also necessarily result in a drawdown of the carryover RIN bank. It is no longer possible to generate 2016, 2017, or 2018 RINs; an additional standard would require the use of carryover RINs and drawdown of the carryover RIN bank, which as explained in Section II, we do not believe to be appropriate. Therefore, we do not find that it would be appropriate or reasonable to reopen compliance with the entire 2016 total renewable fuel standard.

Second, we also considered imposing an additional obligation as a supplement to the 2020 standards and allowing compliance with 2019 and 2020 RINs. Under this approach, there would likely be sufficient RINs to comply with an additional 500 million gallon standard. However, as we believe there are very limited opportunities to use biofuels beyond the volumes we are proposing for 2020,¹²⁸ we believe that this is unlikely to incent significant new biofuel generation in 2020. Instead, it would likely lead to a significant drawdown of the carryover RIN bank, which as explained in section II, we do not believe to be appropriate.

For the forgoing reasons, we are proposing to retain the 2016 total

¹²⁶ If 2017 compliance is reopened, 2018 compliance would then also need to be reopened due to the 2-year lifespan of RINs.

¹²⁷ See, e.g., Comments from API/AFPM on the 2014–2016 annual rule suggesting that delayed compliance can make it difficult to assess the size of the RIN bank, Docket ID: EPA–HQ–OAR–2015–0111–1948.

¹²⁸ See section IV (finding that the advanced biofuel volume resulting from the full reduction under the cellulosic waiver authority is not reasonably attainable, and further noting uncertainties relating to the attainable volume) and “Market impacts of biofuels in 2020,” available in the docket (describing limitations on the ability of the market to use biofuels).

renewable fuel in response to the court’s remand in *ACE*.¹²⁹

VI. Impacts of 2020 Volumes on Costs

In this section, EPA presents its assessment of the illustrative costs of this proposed rulemaking. It is important to note that these illustrative costs do not attempt to capture the full impacts of this proposed rule. We frame the analyses we have performed for this rule as “illustrative” so as not to give the impression of comprehensive estimates. These estimates are provided for the purpose of showing how the cost to produce a gallon of a “representative” renewable fuel compares to the cost of petroleum fuel. There are a significant number of caveats that must be considered when interpreting these illustrative cost estimates. For example, there are many different feedstocks that could be used to produce biofuels, and there is a significant amount of heterogeneity in the costs associated with these different feedstocks and fuels. Some renewable fuels may be cost competitive with the petroleum fuel they replace; however, we do not have cost data on every type of feedstock and every type of fuel. Therefore, we do not attempt to capture this range of potential costs in our illustrative estimates.

The volumes for which we have provided cost estimates are described in Sections III and IV. In this section, we examine the illustrative costs of two different cases. In the first case, we provide illustrative cost estimates by comparing the proposed 2020 renewable fuel volumes to 2020 statutory volumes. In the second case, we examine the proposed 2020 renewable fuel volumes to the final 2019 renewable fuel volumes to estimate changes in the annual costs of the proposed 2020 volumes in comparison to the 2019 volumes.¹³⁰

¹²⁹ In addition to today’s response to the remand, we note that the precedential effect of the *ACE* decision has governed subsequent RFS annual rules. Compare, e.g., 82 FR 34229 & n.82 (July 21, 2017) (2018 annual rule proposal, issued prior to *ACE*) (soliciting comment on whether it would be appropriate to exercise the inadequate domestic supply waiver authority based on the “maximum reasonably achievable volume” of renewable fuel, which incorporates demand-side considerations), with 82 FR 46177 (Oct. 4, 2017) (2018 annual rule availability of supplemental information and request for comment, issued after *ACE*) (recognizing, under *ACE*, that EPA may not consider demand-side constraints in determining inadequate domestic supply).

¹³⁰ This action imposes renewable fuel standards only for 2020. However, solely for E.O. 13771 purposes in this section, we estimate the costs of the relevant volumes as though they applied in future years as well. Therefore, we use the term “annual costs” in this section.

A. Illustrative Costs Analysis of 2020 Proposed Volumes Compared to the 2020 Statutory Volumes Baseline

In this section, EPA provides illustrative cost estimates that compare the proposed 2020 cellulosic biofuel volume requirements to the 2020 cellulosic statutory volume that would be required absent the exercise of our cellulosic waiver authority under CAA section 211(o)(7)(D)(i). As described in Section III, we are proposing a cellulosic volume of 540 million gallons for 2020, using our cellulosic waiver authority to waive the statutory cellulosic volume of 10.5 billion gallons by 9.96 billion gallons. Estimating the cost savings from renewable fuel volumes that are not projected to be produced is inherently challenging. EPA has taken the relatively straightforward methodology of multiplying this waived cellulosic volume by the wholesale per-gallon costs of cellulosic biofuel production relative to the petroleum fuels they displace. Since the implied non-cellulosic advanced biofuel and implied conventional renewable fuel volumes are unchanged from the statutory implied volumes, there is no need to estimate cost impacts for these volumes.

While there may be growth in other cellulosic renewable fuel sources, we believe it is appropriate to use cellulosic ethanol produced from corn kernel fiber at an existing corn starch ethanol production facility as representative of all liquid cellulosic renewable fuel. Even though there is no increase in liquid cellulosic biofuels in this proposed annual 2020 RFS rule, we believe it is appropriate to use these costs to estimate the cost savings from the statutory volumes. The majority of liquid cellulosic biofuel in 2020 is expected to be produced using this technology. In addition, as explained in Section III, we believe that production of the major alternative cellulosic biofuel—CNG/LNG derived from biogas—is limited in 2020 due to a limitation in the number of vehicles capable of using this form of fuel.¹³¹

EPA uses a “bottom-up” engineering cost analysis to quantify the costs of producing a gallon of cellulosic ethanol derived from corn kernel fiber. There are multiple processes that could yield cellulosic ethanol from corn kernel fiber. EPA assumes a cellulosic ethanol production process that generates biofuel using distiller’s grains, a co-product of generating corn starch ethanol that is commonly dried and sold into the feed market as distillers dried

¹³¹ See Section III.C.2 for a further discussion of the quantity of CNG/LNG projected to be used as transportation fuel in 2020.