

ORAL ARGUMENT NOT YET SCHEDULED
NO. 16-1005 AND CONSOLIDATED CASES

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

AMERICANS FOR CLEAN ENERGY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

**INITIAL OPENING BRIEF OF PETITIONER
NATIONAL BIODIESEL BOARD**

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Dated: September 8, 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners,))	
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v.))	Docket No. 16-1005 and
))	consolidated cases
ENVIRONMENTAL PROTECTION))	
AGENCY and REGINA A. MCCARTHY,))	
EPA Administrator,))	
))	
Respondents.))	
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**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW AND
RELATED CASES**

The following list of parties to this case, rulings under review, and related cases are provided pursuant to Circuit Rule 28(a)(1):

(A) **Parties and Amici**

This is a matter on petition for review of agency actions undertaken by the United States Environmental Protection Agency. There was no action in the district court, and so there were no parties in the district court. The parties are:

Petitioners:

Americans for Clean Energy; American Coalition for Ethanol; Biotechnology Innovation Organization; Growth Energy; National Corn Growers Association; National Sorghum Producers; Renewable Fuels Association (No. 16-1005)

Monroe Energy (No. 16-1044)

American Fuel and Petrochemical Manufacturers (No. 16-1047)

Alon Refining Krotz Springs, Inc.; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Lion Oil Company; Ergon-West Virginia, Inc.; Hunt Refining Company; Placid Refining Company LLC; Wyoming Refining Company; U.S. Oil & Refining Co. (No. 16-1049)

American Petroleum Institute (No. 16-1050)

National Biodiesel Board (No. 16-1053)

Valero Energy Corp. (No. 16-1054)

National Farmers Union (No. 16-1056)

Respondents:

U.S. Environmental Protection Agency

Gina McCarthy, Administrator, U.S. Environmental Protection Agency

Respondent-Intervenors:

Each of the Petitioners listed above has been granted intervention in support of EPA on other filed petitions.

(B) **Rulings Under Review**

This case involves consolidated petitions for review of a final action of the U.S. Environmental Protection Agency (“EPA”) entitled “Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017,” published at 80 Fed. Reg. 77,420 (Dec. 14, 2015).

(C) *Related Cases*

Petitioner is not aware of any pending cases involving the same underlying agency actions at issue in this case.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner National Biodiesel Board makes the following disclosures:

The National Biodiesel Board has no parent companies, and no publicly-held company has a 10% or greater ownership interest. It has not issued shares or debt securities to the public.

The National Biodiesel Board is a trade association as defined in D.C. Circuit Rule 26.1(b). It is the national trade association for the biodiesel and renewable

diesel industry, and its mission is to advance the interests of its members by creating sustainable biodiesel and renewable diesel industry growth.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

ACEI	Americans for Clean Energy, American Coalition for Ethanol, Biotechnology Innovation Organization, Growth Energy, National Corn Growers Association, National Sorghum Producers, Renewable Fuels Association
AFPM	American Fuel and Petrochemical Manufacturers (formerly NPRA)
API	American Petroleum Institute
DOE	U.S. Department of Energy
EIA	U.S. Energy Information Administration
EPA	U.S. Environmental Protection Agency
GHG	Greenhouse gas
MACT	Maximum Achievable Control Technology
NBB	National Biodiesel Board
NPRA	National Petrochemical and Refiners Association (now AFPM)
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number
USDA	U.S. Department of Agriculture

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the National Biodiesel Board's timely-filed Petition under 42 U.S.C. §7607(b)(1).

STATEMENT OF ISSUES

1) Whether EPA's interpretation of "inadequate domestic supply" and exclusion of available prior-year RINs to waive volumes under 42 U.S.C. §7545(o)(7)(A), is unlawful, arbitrary, and capricious.

2) Whether EPA's interpretation and application of Section 7545(o)(7)(D) to reduce statutory advanced-biofuel volumes is unlawful, arbitrary, and capricious.

3) Whether EPA's allowing rolling of banked-RINs rather than ensure statutory volumes is unlawful, arbitrary, and capricious.

4) Whether EPA impermissibly failed to "ensure" the statutory advanced-biofuel volumes.

5) Whether EPA's advanced-biofuel volumes are arbitrary and capricious.

6) Whether EPA followed proper procedure.

For Issue 1, NBB joins with Americans for Clean Energy, *et al.* ("ACEI"), *see* ACEI's Brief, Argument, Sections I and III. The remaining issues relate specifically to advanced biofuels.

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in the addendum.

STATEMENT OF THE CASE

Congress amended the RFS in 2007 to move toward “advanced biofuels,” including “biomass-based diesel” and “cellulosic biofuels.” 42 U.S.C. §7545(o)(2)(B). Congress’s advanced-biofuel requirements have been met because, despite lagging cellulosic biofuels, biomass-based diesel has surpassed expectations. With this Court’s approval, EPA consistently declined to deviate from the statutory advanced-biofuel volumes, even when lowering the cellulosic-biofuel volumes. *See API v. EPA*, 706 F.3d 474, 481 (D.C. Cir. 2013); 75 Fed. Reg. 76,790, 76,798 (Dec. 9, 2010); 77 Fed. Reg. 1320, 1331 (Jan. 9, 2012).

Now, for the first time, EPA reduced the statutory advanced-biofuel and renewable-fuel volumes. This unprecedented reduction sets the program back. NBB challenges several parts of EPA’s decision.

STATEMENT OF FACTS

Congress sought “to increase the production of clean renewable fuels.” Pub. L. No. 110-140, 121 Stat. 1492 (2007). The RFS volumes Congress wrote in the statute are “minimum[s].” *NPRA v. EPA*, 630 F.3d 145, 160 (D.C. Cir. 2010). And they are intentionally “aggressive[.]” S. Rep. No. 110-65 at 1 (2007). Congress chose those volumes because increasing biofuel production serves many public purposes—*e.g.*, diversifying feedstocks, improving the rural economy, and reducing GHG emissions. *Id.* at 2-3.

Most advanced biofuel is biodiesel. EPA-HQ-OAR-2015-0111-1953 at 1 (JA__). As EPA knows, U.S. biodiesel responds to increased demand with increased production. *See* 76 Fed. Reg. 38,844, 38,856 (July 1, 2011); 75 Fed. Reg. at 76,802; 77 Fed. Reg. at 1334; 77 Fed. Reg. 59,458, 59,461 (Sept. 27, 2012). Thanks largely to biodiesel, 3.28 billion advanced-biofuel RINs were generated in 2013,¹ surpassing the 2.75 billion statutory requirement. EPA-HQ-OAR-2015-0111-1953 at 4 (JA__), 14-15 (JA__ - __); *Monroe Energy v. EPA*, 750 F.3d 909, 918 (D.C. Cir. 2014).

In 2013, EPA proposed reducing the statutory advanced-biofuel and renewable-fuel volumes for 2014. 78 Fed. Reg. 71,732 (Nov. 29, 2013)(JA__). EPA did not finalize those volumes, putting the program on hold for more than a year. 79 Fed. Reg. 73,007 (Dec. 9, 2014)(JA__). Finally, in June 2015, EPA issued a proposal for 2014, 2015, and 2016,² which, like the aborted 2013 proposal, still failed to enforce the statutory advanced-biofuel and renewable-fuel volumes though EPA acknowledged it must “compel[] the [oil-and-gas] industry to make dramatic changes to increase renewable fuel use.” 80 Fed. Reg. 33,100, 33,118 (June 10, 2015)(JA__). Nevertheless, EPA yielded to supposed market “constraints.” 80 Fed. Reg. 77,420, 77,420 (Dec. 14, 2015)(JA__).

¹ One biodiesel gallon generates 1.5 RINs because it contains more energy than one ethanol gallon. This brief uses the term “RINs” when referring to required “ethanol-equivalent” volumes and “gallons” when referring to physical volumes.

² EPA also proposed the 2017 biomass-based diesel volume.

The cuts are drastic. For instance, EPA required only 3.61 billion advanced-biofuel RINs for 2016, less than the 3.75 billion Congress required *for 2014*. *Id.* at 77,476-77,482 (JA__ - __).

SUMMARY OF ARGUMENT

Congress designed the RFS to change the market and “prioritized that growth as occurring principally in advanced biofuels (contrary to historical growth patterns).” 80 Fed. Reg. at 77,432 (JA__). Here, however, EPA reduced statutory *advanced-biofuels* volumes to, instead, address concerns about demand, particularly *ethanol* demand, and compliance costs. At every step, EPA exceeded its authority and failed to move the advanced-biofuel program forward as Congress envisioned.

EPA’s decision and its advanced-biofuels volumes are arbitrary. EPA failed to explain why it could not enforce the statutory volumes. EPA provided only generalized conclusions for its volumes, and the little evidence EPA cited is easily dismissed, particularly given counterevidence supporting higher volumes. EPA’s failure to follow proper procedures compounds the arbitrariness of its actions.

STANDING

NBB represents the U.S. biomass-based diesel industry. Its members own and operate biomass-based diesel facilities, are RFS participants, and are directly affected by EPA’s actions. EPA-HQ-OAR-2015-0111-1953 at 1-5 (JA__ - __). NBB has standing on their behalf and on its own behalf because it suffered a procedural

injury when EPA failed to follow proper procedures. *See id.*; 80 Fed. Reg. at 77,420 (JA__); *see also* Order [Doc. #1611965] (granting NBB intervention over standing objection).

ARGUMENT

I. STANDARD OF REVIEW

The Court must determine whether EPA's actions were arbitrary and capricious, an abuse of discretion, in excess of statutory authority, or otherwise not in accordance with law. *See Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 496-97 (2004). The Court must also ensure the agency "provide[d] a degree of public awareness, understanding, and participation commensurate with the complexity and intrusiveness of the resulting regulations." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978).

II. EPA HAS IMPERMISSIBLY EXPANDED ITS WAIVER AUTHORITY.

The RFS mandate's manifest purpose is to spur market changes: "The fact that Congress chose to mandate increasing and substantial amounts of renewable fuel clearly signals that it intended the RFS program to create incentives to increase renewable fuel supplies and overcome limitations in the market." 80 Fed. Reg. at 33,102 (JA__). Congress thus "directed" EPA "to *ensure* that transportation fuel sold or introduced into commerce in the United States" contains "*at least*" the applicable statutory volumes. *NPRA*, 630 F.3d at 147, 149 n.15 (quoting 42 U.S.C. §7545(o)(2)(A)(i)) (emphases added). The word "ensure" directs EPA to "make

certain” the statutory volumes are sold or introduced into commerce. *Id.* at 153. The phrase “at least” reveals Congress’s “intent that volumes not be reduced, at least not in the first decade” of the program. *Id.* at 156.

Because broad waiver authority would undermine Congress’s mandates, Section 7545(o)(7) grants EPA limited authority to reduce statutory volumes. It specifies when EPA *may* reduce statutory volumes—when there is “inadequate domestic supply” or to avoid “severe[]” economic or environmental harm—and provides the how, including procedural protections such as notice and comment and consultation with DOE and USDA requirements. 42 U.S.C. §7545(o)(7)(A-C). Congress identified one other context when EPA *must* reduce statutory volumes *for cellulosic biofuel*—when projected production of *cellulosic biofuel* is too low. *Id.* §7545(o)(7)(D).

EPA has essentially rewritten these provisions to give itself unfettered discretion to waive the statutory advanced-biofuel volumes. Moreover, EPA has waived these volumes for reasons that directly contradict the RFS’s fundamental goals, changing the aggressive timeline established by Congress. For these reasons, the 2014, 2015, and 2016 advanced-biofuel volumes must be reversed.

A. Open-Ended Discretion Circumvents the Limits on EPA’s Authority and Eliminates the Certainty Congress Sought.

This case presents EPA’s first-ever reduction of the statutory advanced-biofuel volume. *See* 80 Fed. Reg. at 33,110 (JA __) (seeking comment on EPA’s

authority to reduce). The “separate” authority EPA identified for reducing the advanced-biofuel volume is its claimed “cellulosic waiver authority” under Section 7545(o)(7)(D). 80 Fed. Reg. at 77,433 (JA__). EPA claims that Section 7545(o)(7)(D) lets it reduce the statutory advanced-biofuel volume *for any reason*, so long as EPA reduces that volume by no more than it reduces the cellulosic-biofuel volume. *Id.* at 77,426 (JA__).

This is a legal error. As a whole, Section 7545(o)(7) *limits* EPA’s discretion to waive statutory volumes. Subparagraph (D)’s notation that, after reducing cellulosic-biofuels volumes, EPA “may also reduce” advanced-biofuels volumes does not mean that EPA can ignore the limitations in Subparagraph (A) and the procedural protections Congress provided. “[C]onsecutive subparagraphs must be read together to create a unified statutory scheme.” *Appalachian States Low-Level Radioactive Waste Comm’n v. O’Leary*, 93 F.3d 103, 111 (3d Cir. 1996).

The open-ended discretion EPA claims under Subparagraph (D) not only allows it to circumvent these protections; it is contrary to the RFS statute as a whole. Congress directed EPA to “ensure” the statutory volumes are met. *See Sierra Club v. EPA*, 762 F.3d 971, 979 (9th Cir. 2014) (Court “must endeavor to read the Clean Air Act ‘as a symmetrical and coherent regulatory scheme.’”) (citations omitted); *see also Sierra Club v. EPA*, 705 F.3d 458, 468-69 (D.C. Cir. 2013). Congress recognized the importance of certainty and predictability in the early years of the

program to incentivize industry to make necessary investments. *See NPRA*, 630 F.3d at 156. EPA’s broad interpretation and its approach for setting volumes does not provide certainty or predictability; EPA may not pick and choose whatever reason to reduce statutory volumes. Subparagraph (D)—a safety valve for Congress’s ambitious targets for cellulosic biofuels—would be an odd place to bury such a broad grant of waiver authority as EPA claims. *See Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.”).

EPA might respond that Congress “nested” cellulosic-biofuel volumes within the overall advanced-biofuel program. All statutory volumes are minimums, and there is no harm—indeed, there is great benefit—when the minimums are exceeded, including, but not limited to, GHG emission reductions. *See, e.g.*, EPA-HQ-OAR-2015-0111-1953 at 49-50 (biomass-based diesel, on average, provides 81% lifecycle GHG emission reductions)(JA__ - __); EPA-HQ-OAR-2015-0111-0943 (JA__ - __). Moreover, had Congress viewed the advanced-biofuel volume as contingent upon the “nested” cellulosic-biofuel volume, Congress presumably would have written “*shall* also reduce” instead of “*may* also reduce.”

Indeed, the structure of Section 7545(o)(7) refutes EPA’s interpretation of Subparagraph (D). Subparagraph (F) gave EPA authority to reset a statutory volume—from 2016 onward—if EPA waives that volume by 20% in two

consecutive years or by 50% in one year. *See* 42 U.S.C. §7545(o)(7)(F). For cellulosic biofuel, EPA triggered that duty as early as 2010. Had EPA complied with Subparagraph (F), EPA could not have used Subparagraph (D) to waive the cellulosic-biofuel volume in 2016 and, critically, would have been unable to reduce the advanced-biofuel volume in 2016.³ In the meantime, advanced biofuels overall would have continued to grow, but for EPA's actions (or inactions).

B. EPA's Approach Must Ensure Growth of Advanced Biofuels.

EPA's approach here treats advanced biofuels as secondary, deferring, instead, to its (false) concerns regarding (conventional) ethanol use. EPA first considered the appropriate overall standard by assessing the total amount of ethanol it believed could be *consumed*.⁴ 80 Fed. Reg. at 77,427 (JA__), 77,440 (JA__); *see also id.* at 77,441 n.51 (assuming all E10 consumed "is conventional")(JA__); 80 Fed. Reg. at 33,123 (JA__); 78 Fed. Reg. 49,794, 49,798 (Aug. 15, 2013). EPA determined it needed to waive the overall standard, and used Subparagraph (D) to reduce renewable fuel and advanced biofuels by the "same amount" and Subparagraph (A) to reduce renewable fuel by more. 80 Fed. Reg. at 77,443 (JA__). Only then did EPA consider "the portion of total ethanol and biodiesel, as well as

³ Again Congress circumscribed EPA's discretion by outlining factors EPA must consider. 42 U.S.C. §7545(o)(7)(F).

⁴ For "historical maximum biomass-based diesel supply," EPA ignores 2013 and additional biodiesel/renewable diesel supply in 2014. 80 Fed. Reg. at 77,440 (JA__).

other renewable fuels, that should be required as an advanced biofuel.” *Id.* at 77,476 (JA__). Aside from the unlawfulness of considering *consumption* at all, this was error.

EPA must ensure the advanced biofuel category is met *on its own*. If Subparagraph (D) is separate authority to reduce advanced biofuels as EPA contends, EPA must defend its use of *that* authority not a waiver generally. Subparagraph (D) says EPA “*may* also reduce the applicable volume of renewable fuel *and* advanced biofuel requirement.” 42 U.S.C. §7545(o)(7)(D) (emphasis added). Nothing in this provision requires EPA to reduce advanced biofuels to fit within EPA’s view of an appropriate overall standard.⁵ EPA previously recognized as much: “our authority to lower the advanced biofuel *and/or* total renewable fuel applicable volumes is discretionary.” 75 Fed. Reg. at 76,799 (emphasis added); 77 Fed. Reg. at 1331-1332 (same).

EPA will likely argue it did consider inadequate domestic supply of advanced biofuels alone. 80 Fed. Reg. at 77,439 n.41 (JA__). But, rather than consider the potential availability of each *advanced* biofuel, EPA impermissibly took a “holistic” approach. *Id.* at 77,449 (JA__); *see also* Section IV.B. For example, advanced

⁵ In a discretionary waiver context, “and” connotes EPA may reduce either or both requirements keeping within Congress’s purposes. *See In re Plaza Resort at Palmas, Inc.*, 741 F.3d 269, 276 (1st Cir. 2014) (“may” indicates “an option, not an obligation”); *Slodov v. United States*, 436 U.S. 238, 247 (1978) (rejecting reading of “and” as conjunctive “as inconsistent with [statute’s] purpose”).

ethanol can be (and has been) produced from, *e.g.*, sugarcane, separated food waste, and grain sorghum. 40 C.F.R. §80.1426(f), Table 1; 78 Fed. Reg. at 71,771 (JA__); EPA-HQ-OAR-2015-0111-3609 at 1 (JA__). EPA, instead, focused on its perceived only *readily available* advanced ethanol—reduced sugarcane ethanol imports. *See* Section IV.B.2. For biodiesel/renewable diesel, EPA considered total reasonable use (in its mind), and then inexplicably estimated only 2.1 billion gallons to be advanced. *See* Section IV.B.3. As EPA knows, its priority should be growing the advanced-biofuel program.

Moreover, where EPA focused on advanced biofuels, its analysis unlawfully relied on constraints “that limit the *use* of non-cellulosic advanced biofuels.” 80 Fed. Reg. at 77,434 (JA__); *see also Id.* at 77,422 (JA__); 80 Fed. Reg. at 33,104 n.12 (considering “availability of renewable fuel and the legal and practical constraints on their supply to vehicles and other qualifying uses”)(JA__). As argued in ACEI Br. at 12-14, supply and demand (“use”) are polar opposites. Limitations on supply are not limitations on demand. As this Court held, EPA got this correct before, when it considered only the potential availability of advanced biofuels. *See* 77 Fed. Reg. at 1331-1332; 78 Fed. Reg. at 71,774 (JA__); *API*, 706 F.3d at 481 (“[I]n sharp distinction with cellulosic biofuel, there appears to be no great obstacle to the *production* of advanced biofuel generally; to the extent that estimates in the

record are relatively low, that seems to be based on want of a market, which of course continued pressure will tend to solve.”) (citing 77 Fed. Reg. at 1334-1335).

III. EPA’S CONSIDERATION OF “CONSTRAINTS” ON SUPPLYING CONSUMERS IS ARBITRARY AND CAPRICIOUS.

Congress sought to diversify the country’s fuel supply. 80 Fed. Reg. at 77,421 (JA__). Congress rightfully believed the market will find ways to use biofuels consistent with mandated volumes. So, even if EPA had broad discretion to waive the statutory advanced-biofuel volumes under Subparagraph (D), it could not set volumes based on its notion of what the market can “reasonably attain[],” *i.e.*, in EPA’s terms, reasonably consume. Congress sought to create demand and stimulate investment in distribution infrastructure, not to simply follow the market, maintaining status quo. As with the “general” waiver, *see* ACEI Br. at 18-21, EPA cannot waive statutory volumes based on insufficient demand. It also undermines the incentives to expanding biofuels beyond fuel at the pump, such as heating oil that EPA recognized provides “significant additional opportunity for growth.” 80 Fed. Reg. at 77,472 (JA__). This should not be controversial: EPA previously admitted that it does “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.” 75 Fed. Reg. at 76,803.

But EPA has changed its tune. Now, EPA contends it may waive statutory volumes to avoid “noncompliance and/or additional petitions for a waiver of the

standard.” 80 Fed. Reg. at 77,442 (JA__). EPA is giving in to reluctant obligated parties who would rather distribute petroleum over advanced biofuels (their competitors) without suffering the consequences of that preference.

EPA’s waiver authority, even here, must be reconciled with Congress’s directive that EPA “ensure” the volumes Congress required in the time frame Congress required. 42 U.S.C. §7545(o)(2)(A)(i). Whether a shortfall in projected cellulosic biofuel production translates into a shortfall of “the same or a lesser volume” in the broader categories, depends solely on the availability of other fuels. Thus, even if not compelled to consider the criteria in Subparagraph (A), the availability of other advanced biofuels to make up the inadequate domestic supply of cellulosic biofuel is the only relevant criterion to reduce those volumes.

EPA followed this approach before 2014. In *API v. EPA*, this Court affirmed that EPA had “adequately grounded its determination in historical data on sugarcane ethanol imports and biodiesel production, as well as governmental and non-governmental projections for future production of those fuels.” 706 F.3d at 481 (citing 77 Fed. Reg. at 1331-1337). The Court went on: “These data plausibly suggest that some combination of the two sources of advanced biofuels will be available to make up for the shortfall in cellulosic biofuel.” *Id.* It is unreasonable to believe Congress wanted EPA, after reducing the cellulosic-biofuel volume, to

waive the advanced-biofuel volume based on its assessment of “constraints” on use of advanced biofuels that *can be* (and are) available.

Nothing in the statute evinces Congress’s intent that EPA undertake a market analysis of how, who, when, why and where the fuels actually would be used. The RFS program supports investment and innovation. *See, e.g., Monroe Energy*, 750 F.3d at 919; 77 Fed. Reg. 70,752, 70,772-70,773 (Nov. 27, 2012); 80 Fed. Reg. at 33,119 (JA__); 80 Fed. Reg. at 77,424 (JA__); EPA-HQ-OAR-2013-0479-0738 at 255 (JA__). For advanced biofuels, the statutory volumes are technology-forcing. Reducing those volumes based on demand-side considerations undermines continued investment and the innovation that has successfully diversified feedstocks, increased efficiencies, and lowered costs. EPA-HQ-OAR-2015-0111-1004 (JA__); EPA-HQ-OAR-2015-0111-1953 at 71-72 (JA__ -__); 80 Fed. Reg. at 77,473 (JA__).

EPA seems suddenly hostile to Congress’s goals *to move away from fossil fuels*. Indeed, EPA now considers “*competition*” among biofuels to be a goal of the RFS, which EPA contends would increase obligated parties’ flexibility. 80 Fed. Reg. at 77,424 (JA__). EPA has put obligated parties’ compliance costs above its duty to ensure the statutory volumes are met. But, Congress provided that economic

harm may justify waiver only when costs are severe.⁶ 42 U.S.C. §7545(o)(7)(A). Congress authorized EPA to intervene only if the costs *to society* are extreme, not just to minimize *obligated parties'* compliance costs. 73 Fed. Reg. 47,168, 47,172 (Aug. 13, 2008).

EPA rejects its earlier approach, arguing that the program is in a “period of transition” from when blending could be “readily achieved” to requiring a push “beyond current constraints on ethanol and biodiesel use.” 80 Fed. Reg. at 77,423 (JA__). But blending is not required (*e.g.*, B100 is used), and EPA can’t waive statutory volumes simply because compliance would require obligated parties to do more than they are willing, even if it is harder (which has not been shown). In any event, as shown below, EPA’s assessment of such “constraints” is not supported by the record and is wholly arbitrary.

IV. EPA’S ADVANCED-BIOFUEL VOLUMES FOR 2014, 2015 AND 2016 ARE ARBITRARY AND CAPRICIOUS.

A. EPA Cannot Defend Choosing “RIN Supply” Over Ensuring the 2014 and 2015 Statutory Advanced-Biofuel Volumes.

EPA did not enforce the 2014 statutory advanced-biofuel volume. EPA believed the volume, instead, “must necessarily be determined based on historical

⁶ EPA rightfully concluded adhering to the statutory volumes here would not impose severe economic harm. *See* 80 Fed. Reg. at 77,428-77,429 (JA__ - __).

data” because the agency was late in issuing the standards. 80 Fed. Reg. at 77,427 (JA__). That was arbitrary and capricious.

EPA’s own delay is not a valid ground to reduce statutory volumes. *See Sierra Club*, 762 F.3d at 981 (rejecting claim that delay allowed EPA to “revise clear statutory terms”) (citation omitted). *See also* ACEI Br. at 25-26. In 2010, EPA was late in implementing the 2009 biomass-based diesel requirement. *NPRA*, 630 F.3d at 149-50. EPA nonetheless enforced the full 2009 volume in 2010. *Id.* at 151-52. This Court affirmed, finding “[t]he self-evident purpose of the EISA permits EPA’s action in promulgating the Final Rule in order ‘to ensure’ the volume of biomass-based diesel required for 2009 is not forgone.” *Id.* at 156. Failing to implement the statutory volume would be “flatly contrary to Congress’ intent and would turn agency delay into a windfall for the regulated entities.” *Id.* at 157 (citation omitted).

Here, by reducing statutory volumes in light of “historical data,” EPA rewarded obligated parties’ underperformance during EPA’s delay. *See, e.g.*, EPA-HQ-OAR-2013-0479-5192 at 2 (JA__). That windfall is unwarranted. EPA should have issued a notice outlining the advanced biofuel standard based on the 2014 statutory volume. *See* EPA-HQ-OAR-2015-0111-1953, Attach. 2, at 2 (JA__). Many facts, which EPA ignored, show that standards based on the 3.75 billion statutory advanced-biofuel requirement clearly and easily could have been met.

- In 2013, the industry generated 3.28 billion advanced-biofuel RINs, above the 2.75 billion requirement.⁷ EPA-HQ-OAR-2015-0111-1953 at 14-15 (JA__ - __). This was still nowhere near just the registered *biomass-based diesel* capacity of 5 billion gallons (over 7 billion RINs) poised to meet the statutory volumes. EPA-HQ-OAR-2015-0111-1953 at 116 (JA__), Attach. 1 (JA__ - __); *see also* 75 Fed. Reg. 14,670, 14,689 (Mar. 26, 2010) (recognizing debottlenecking could increase production by 20%); EPA-HQ-OAR-2013-0479-5649 at 2 (JA__); EPA-HQ-OAR-2015-0111-1953 at 10 (JA__), 113 (JA__).⁸
- In 2013, even with the so-called ethanol blendwall, over 450 million advanced-ethanol RINs were generated. EPA-HQ-OAR-2015-0111-1953 at 113 (JA__); EPA-HQ-OAR-2015-0111-3608 at 1 (JA__).
- With excess 2012 RINs, even more 2013 RINs were available for 2014. EPA-HQ-OAR-2015-0111-1953 at 31-32 (JA__ - __); 78 Fed. Reg. at 49,821; EPA-

⁷ EPA instead blames industry for not exceeding the required volumes by even more. 80 Fed. Reg. at 77,433 (JA__).

⁸ Previously recognizing up to 3.6 billion in U.S. capacity, 80 Fed. Reg. at 33,116 (JA__), EPA inexplicably states “reaching the 3.4 billion gallons suggested by NBB would likely require the addition of new production capacity,” 80 Fed. Reg. at 77,467 (JA__), using unspecified “public data” and ignoring over 600 million gallons of U.S. renewable diesel capacity. EPA-HQ-OAR-2015-0111-3579 (JA__ - __); 81 Fed. Reg. 34,778, 34,792 (May 31, 2016)(JA__). EPA also ignored foreign capacity, despite the trend in increased imports.

HQ-OAR-2015-0111-3643 at 4 (JA__) (showing almost 600 million 2013 RINs available for 2014).

Instead of moving advanced biofuels at the pace Congress sought, EPA moved advanced biofuels backwards.

Downplaying the availability of advanced biofuels, EPA improperly focuses on 2014 RINs that remain “available for compliance.” 80 Fed. Reg. at 77,447 (JA__). The difference arises because some RINs may have been retired after the biofuel was produced due to export or use for other purposes than transportation fuel, heating oil or jet fuel (*i.e.*, “qualifying” uses). But, those gallons were still produced for sale “into commerce,” and their RINs could have been available if EPA had not delayed. *See id.* at 77,445 (JA__). At a minimum, EPA erred in arbitrarily treating advanced biofuels that were exported or put to “non-qualifying” uses as not being part of the 2014 “supply.”

EPA worried that enforcing the statutory volume would “require a draw-down in the bank of carryover RINs.” 80 Fed. Reg. at 77,444 (JA__). Those concerns cannot be used to forego the statutory volumes. *See ACEI Br.* at Section III.B. Congress wanted the volumes to be met each year, and allowing RINs to remain in a “bank” rather than ensure the statutory volumes violates the statute.

Previously, EPA has considered availability of prior-year RINs to enforce the statutory volume. 78 Fed. Reg. at 49,822; *Monroe Energy*, 750 F.3d at 916; *NPRA*,

630 F.3d at 163-64. EPA recognized (but now ignores) that rolling RINs into future years violates the statutory limits on a RIN's life. 75 Fed. Reg. at 14,734; 42 U.S.C. §7545(o)(5)(C). Over-compliance in one year is no basis to permit under-compliance in following years: the statutory volumes are *minimums* that Congress wanted the market to exceed.

EPA ignored these significant concerns with its new view on banked-RINs. EPA-HQ-OAR-2015-0111-1953 at 20-21 (JA__). With 2014 over, there was no need to allow RIN banking, which was intended to address unforeseen supply disruptions in 2014. EPA's explanation (to the extent it provided one) for departing from its precedent is irrational. It can, and must, enforce the 2014 statutory volume for advanced biofuels.

The 2015 standards were proposed and finalized in 2015, yet EPA followed a similar backwards-looking, consumption-driven approach as for 2014, except that it "included a projection" for the year remaining based on "historical trends." 80 Fed. Reg. at 77,427 (JA__). Relying on historical trends and discounting fuel not used as transportation fuel and fuel *projected* to be exported is even more egregious here, because the industry could have reacted to EPA's proposal and used those gallons (in the U.S.), which generated RINs in anticipation of a qualifying use. 40 C.F.R. §§80.1426(b), 80.1453(a)(12); 80 Fed. Reg. at 77,448 (JA__).

Indeed, higher volumes for 2015 were achievable, despite EPA's delay. In June 2015, EPA proposed a volume of only 2.90 billion RINs for 2015—over 300 million RINs *less than were generated in 2013*. 80 Fed. Reg. at 33,122 (JA__). EPA did so despite recognizing that this Court previously upheld standards set eight months into the compliance year. *See id.* at 33,108 (citing *Monroe Energy*, 750 F.3d at 917)(JA__). Because the market responds to EPA's notices, *see* 80 Fed. Reg. at 77,426 (JA__), EPA could have spurred the market in June 2015. *See id.* at 77,447 (JA__); *NPRA*, 630 F.3d at 163-64; *see also Monroe Energy*, 750 F.3d at 918 (noting industry responds quickly). The biomass-based diesel industry alone could increase production substantially on a month-to-month basis, producing over 300 million RINs in any month. EPA-HQ-OAR-2015-0111-1953 at 15 (JA__), 112 (JA__); *see also id.* at 78-81 (JA__ - __). EPA provided no rationale for why the industry could not have responded to higher volumes, as it has previously done.

B. EPA's 2016 Advanced-Biofuel Volume of 3.61 Billion Gallons is Unreasonable.

For 2016, EPA proposed an advanced-biofuel volume of 3.4 billion RINs with little explanation, except to say this represents an increase from 2015 and was based on "considerable judgement."⁹ 80 Fed. Reg. at 33,123 (JA__), 33,129 (JA__). As

⁹ But EPA is not the expert. *See* 42 U.S.C. §7545(o)(7) (requiring consultation with USDA and DOE before issuing waiver); EPA-HQ-OAR-2015-0111-1953 at 105-106 (JA__ - __).

explained above, the 2014 and 2015 volumes were unlawful, arbitrary, and capricious, so the 2016 volume cannot be saved simply because it is greater. And, the 3.61-billion-RIN requirement and EPA's process for setting such volume have several flaws.

1. EPA articulated no clear standard for setting advanced-biofuel volumes.—EPA proposed to identify “maximum volumes achievable.” 80 Fed. Reg. at 33,117 (JA__). Then, EPA said it didn't mean maximums for advanced biofuels, rather it chose volumes it believed were “reasonably attainable.” 80 Fed. Reg. at 77,426 (JA__). EPA's “reasonably attainable” approach is unreasonable in light of the certainty for the industry and investors Congress directed EPA to ensure—*i.e.*, the technology-forcing requirements. This Court has repeatedly rebuffed EPA's attempts to slow the pace of progress Congress sought.¹⁰ Moreover, EPA's approach provides no guidance to the industry as to how future volumes will be set, taking ability to produce out of the equation. EPA vaguely states it does not intend to “necessarily identify the most likely ‘maximum’ volumes of advanced biofuels that

¹⁰ See *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 861 (D.C. Cir. 2001) (rejecting EPA's attempt to set MACT standard at level all sources could achieve in practice); *cf. U.S. Sugar Corp. v. EPA*, __ F.3d __, 2016 WL 4056404, at *19 (D.C. Cir. 2016) (rejecting challenge to boiler MACT on grounds that standards “are difficult to achieve in practice”).

can be used in 2016.”¹¹ *Id.* at 77,476 n.129 (JA__). This cannot be reconciled with a statute seeking to “aggressively” increase advanced-biofuel production. Indeed, it allows obligated parties to sit back and do nothing.

2. EPA provides no support for its departure from its prior assessment of availability of sugarcane ethanol.—Imported sugarcane ethanol is a significant source of advanced-biofuel supply. *See* EPA-HQ-OAR-2015-0111-2495 at 9-14 (JA__ - __); EPA-HQ-OAR-2013-0479-1445 (JA__).¹² EPA consistently has looked at the potential availability of imported sugarcane ethanol to meet the advanced-biofuel volume, considering past and projected volumes. *See, e.g.*, 77 Fed. Reg. at 1332; *API*, 706 F.3d at 481. EPA admits that, over the last 10 years, about 300 million gallons per year are imported from Brazil on average. 80 Fed. Reg. at 77,478 (JA__). Despite widely anticipated increases,¹³ EPA ignored those estimates, considering only 200 million gallons for 2016 because of “the low levels of imports seen in 2014 and 2015.” *Id.* This is painfully circular: no standards were in place those years, so imported volumes could not inform how the market might react if

¹¹ We agree EPA need not be “exacting.” 80 Fed. Reg. at 77,476 n.129 (JA__); *API*, 706 F.3d at 481.

¹² In 2006, ethanol imports reached 730 million gallons, about 5% of EPA’s “maximum ethanol consumption as E10” for 2016. 80 Fed. Reg. at 77,440 (JA__); EPA-HQ-OAR-2015-0111-3599 (JA__ - __); 77 Fed. Reg. at 1332.

¹³ Higher ethanol imports are expected due to the RFS and California’s low carbon fuel standard. EPA-HQ-OAR-2015-0111-1953 at 117-119 (JA__ - __); *see also* EPA-HQ-OAR-2013-0479-0006 (EIA projection of 871 million gallons).

EPA actually set volumes on time and at statutory levels. *Cf.* EPA-HQ-OAR-2015-0111-1953 at 113 (2012 saw over 603 million advanced-biofuel ethanol RINs)(JA__); *supra* at 17. EPA failed to explain why more advanced-biofuel ethanol (including domestic) would not be available *after standards were in place*.

3. EPA provides no explanation for why volumes could not be higher.—

To limit growth in 2016, EPA raises a litany of “constraints on the availability of biodiesel to U.S. consumers.” 80 Fed. Reg. at 77,433 (JA__). EPA identifies these purported constraints (with little to no analysis) to support its decision to increase advanced-biofuel volumes incrementally and slowly (versus Congress’s aggressive approach), not to support the volume it chose. *Cf. NRDC v. EPA*, 808 F.3d 556, 570-74 (2d Cir. 2015) (finding EPA’s “turn[ing] a blind eye to significant information” arbitrary).

The record shows more biomass-based diesel is available. EPA admits higher volumes are possible. 80 Fed. Reg. at 33,128 (JA__). EPA estimates only 2.1 billion gallons of biomass-based diesel (3.15 billion RINs), ignoring (1) available renewable-diesel capacity, (2) additional registered and unregistered U.S. biodiesel capacity, and (3) additional registered foreign capacity. 80 Fed. Reg. at 77,478 (JA__). EPA also used *only* biodiesel’s 1.5 equivalence value, but renewable diesel has higher equivalence values, providing at least another 100 million RINs. *Id.* at 77,479 (JA__).

EPA ignores the recent substantial increases in imports as “difficult to predict.” 80 Fed. Reg. at 77,468 (JA__). This is counter to all the *actual* evidence. Notably, Argentina is built for export with the U.S. being its only significant export market. EPA-HQ-OAR-2015-0111-1953 at 78 (JA__); EPA-HQ-OAR-2013-0479-5618 at 80-81 (JA__); EPA-HQ-OAR-2013-0479-3185 (JA__-__). Instead, EPA responded that Argentina could ship fuel to Brazil, 80 Fed. Reg. at 77,470 (JA__), but Brazil, which is promoting *domestic* biodiesel, has zero imports since 2012. USDA, *Brazil: Biofuels Annual*, at 19-21 (2014), available at http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Biofuels%20Annual_Sao%20Paulo%20ATO_Brazil_7-25-2014.pdf.

Even if consumption were an appropriate consideration, EPA’s volumes still fail. First, EPA does not explain why its 2.5 billion gallons of biodiesel/renewable diesel estimate could not all be advanced biofuels, rather than only 2.1 billion. In other words, EPA limits advanced biofuels by counting approximately 400 million gallons of *imported* product from grandfathered facilities that do *not* meet any GHG emission reduction requirements against the industry. 80 Fed. Reg. at 77,468 (JA__). This is particularly troubling given EPA’s claims above that biomass-based diesel imports were too uncertain. EPA should have sought to ensure these volumes were all advanced.

Second, EPA ignores analyses finding the industry can meet the distribution demands of the program, including its own previous assessments. 75 Fed. Reg. at 14,757-14,759; EPA-HQ-OAR-2015-0111-0042 at 227 (JA__); 77 Fed. Reg. at 59,483; *see also* EPA-HQ-OAR-2015-0111-1953 at 69-72 (JA__ - __), 121-128 (JA__ - __). Not including other advanced biofuels, the 2016 requirement would require biodiesel making up only about 4% of 55 billion gallons of diesel fuel EPA estimates will be used. EPA-HQ-OAR-2015-0111-3622 at 1 (JA__). But, there are no limitations to using biodiesel, including B100. 77 Fed. Reg. at 59,466; S. Rep. No. 110-65 at 2. And, the record is replete with data showing blends of B11, B15, B20 and higher being used throughout the country by high volume users.¹⁴ 80 Fed. Reg. at 77,470-77,471, n.115,118-120 (JA__ - __); EPA-HQ-OAR-2015-0111-1953 at 70-71 (JA__ - __). EPA also ignores state incentives that EPA admits promote biofuel use. *See* EPA-HQ-OAR-2015-0111-1953 at 116-117 (JA__ - __); EPA-HQ-OAR-2015-0111-0054 at 2-3 (JA__ - __). Merely stating that something could be a constraint does not make it so. *See, e.g.*, 80 Fed. Reg. at 77,470 (comparing biodiesel distribution facilities to petroleum product terminals generally)(JA__). Indeed, the

¹⁴ Recognizing hundreds of stations sell \geq B20, EPA's response is that a regional company representing 0.15% of the refining industry may sell B2 during winter months. 80 Fed. Reg. at 77,470-77,471 (JA__ - __); EPA-HQ-OAR-2015-0111-2264 at 1 (JA__); *cf.* EPA-HQ-OAR-2015-0111-3617 at 10 (JA__).

market consistently has been able to meet demand. *See, e.g.*, EPA-HQ-OAR-2015-0111-1953 at 10 (JA__); EPA-HQ-OAR-2015-0111-1035 (JA__ -__).

That's not even considering the opportunity in the billions of gallons of distillate fuel used for heating oil, EPA-HQ-OAR-2015-0111-1953 at 128-129 (JA__ -__), and investments made waiting on the statutory volumes. *See, e.g.*, EPA-HQ-OAR-2015-0111-1004 (JA__); EPA-HQ-OAR-2013-0479-5649 at 2-3 (JA__ -__); EPA-HQ-OAR-2015-0111-0997 (JA__ -__). Instead, EPA blames the public for not providing more data to counter its view that higher volumes are more “than the current infrastructure is prepared to manage.” 80 Fed. Reg. at 77,442 n.45 (JA__), n.56 (JA__); *but see* EPA-HQ-OAR-2013-0479-8653 at 14 (JA__); EPA-HQ-OAR-2015-0111-1048 (JA__ -__). But, the record shows EPA's conclusory finding is irrational.¹⁵ Then, even under EPA's own flawed interpretation, it has not provided “a substantial justification” for reducing the 2016 advanced-biofuel statutory volume to 3.61 billion RINs. 80 Fed. Reg. at 77,434 (JA__). It should have required more.

¹⁵ Ignoring the majority of medium- and heavy-duty vehicles (the largest users of diesel) approve use of B20 (as they don't warranty fuel) and numerous users of B20 (including owners of Detroit Diesel engines), EPA references *sales* data from Detroit Diesel and an unsupported statement in comments of an *ethanol* group. 80 Fed. Reg. at 77,472 (citing EPA-HQ-OAR-2015-0111-2604, Ex. 2 at 12)(JA__).

V. EPA DID NOT FOLLOW PROPER PROCEDURES.

The arbitrariness of EPA's actions is magnified by its procedural violations, particularly given this annual process EPA has chosen to undertake.¹⁶ Rather than provide the public with any real analysis,¹⁷ EPA waited until the final preamble to pick and choose what might possibly support the conclusory statements made in the proposal,¹⁸ ignoring anything else, to impermissibly “skew the record in its favor.” *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005); *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (agency should not be allowed “to play hunt the peanut with technical information, hiding or disguising the information that it employs”). There are many examples of EPA ignoring anything contrary to its predetermined goal—reduce the statutory volumes to avoid increases in compliance costs.¹⁹ Indeed, EPA admonished Texas for the very thing it has done here. 73 Fed. Reg. at 47,183-47,184; 80 Fed. Reg. at

¹⁶ 74 Fed. Reg. 24,904, 24,914 (May 26, 2009); 81 Fed. Reg. at 34,780.

¹⁷ See EPA-HQ-OAR-2015-0111-1953 at 107-10 (JA__ - __).

¹⁸ Compare 80 Fed. Reg. at 33,116-33,117 (JA__ - __), with 80 Fed. Reg. at 77,465-77,475 (JA__ - __).

¹⁹ See, e.g., *supra* 22-26, n.14, 15. Compare EPA-HQ-OAR-2015-0111-3617 (JA__), cited in 80 Fed. Reg. at 77,470 n.114, with EPA-HQ-OAR-2015-0111-1953 at 127-128 (JA__ - __); EPA-HQ-OAR-2015-0111-0054 (JA__ - __); EPA-HQ-OAR-2015-0111-1957 at 9-10 (JA__ - __); Minnesota Dep't of Agriculture, *Report to the Legislature: Annual Report on Biodiesel*, at 3 (2015), available at <http://www.mda.state.mn.us/news/government/~media/Files/news/govrelations/biodieselreport2015.pdf>.

77,441 (agreeing EPA should “elaborate on the limitations in the supply of advanced biofuel”)(JA__). This does not meet any procedural requirements.

CONCLUSION

For the foregoing reasons, as well as in ACEI Brief, Argument, Sections I and III, this Court must vacate the overall advanced biofuel and renewable fuel 2014-2016 volumes.

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CERTIFICATION PURSUANT TO FRAP 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned hereby certifies that the foregoing Initial Brief of Petitioner National Biodiesel Board is 5,989 words in compliance with this Court's order dated June 24, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2016, I caused to be electronically filed the foregoing Initial Brief of Petitioner National Biodiesel Board with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

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ORAL ARGUMENT NOT YET SCHEDULED
NO. 16-1005 AND CONSOLIDATED CASES

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

AMERICANS FOR CLEAN ENERGY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

**ADDENDUM TO
INITIAL OPENING BRIEF OF PETITIONER
NATIONAL BIODIESEL BOARD**

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Dated: September 8, 2016

STATUTORY ADDENDUM

42 U.S.C. § 7545(o)

fere with the attainment by the area of a national primary ambient air quality standard (or a State or local ambient air quality standard) for any air pollutant other than carbon monoxide.

(B) The Administrator shall, upon demonstration by the State satisfactory to the Administrator, waive the requirement of paragraph (2) where the Administrator determines that mobile sources of carbon monoxide do not contribute significantly to carbon monoxide levels in an area.

(C)(i) Any person may petition the Administrator to make a finding that there is, or is likely to be, for any area, an inadequate domestic supply of, or distribution capacity for, oxygenated gasoline meeting the requirements of paragraph (2) or fuel additives (oxygenates) necessary to meet such requirements. The Administrator shall act on such petition within 6 months after receipt of the petition.

(ii) If the Administrator determines, in response to a petition under clause (i), that there is an inadequate supply or capacity described in clause (i), the Administrator shall delay the effective date of paragraph (2) for 1 year. Upon petition, the Administrator may extend such effective date for one additional year. No partial delay or lesser waiver may be granted under this clause.

(iii) In granting waivers under this subparagraph the Administrator shall consider distribution capacity separately from the adequacy of domestic supply and shall grant such waivers in such manner as will assure that, if supplies of oxygenated gasoline are limited, areas having the highest design value for carbon monoxide will have a priority in obtaining oxygenated gasoline which meets the requirements of paragraph (2).

(iv) As used in this subparagraph, the term distribution capacity includes capacity for transportation, storage, and blending.

(4) Fuel dispensing systems

Any person selling oxygenated gasoline at retail pursuant to this subsection shall be required under regulations promulgated by the Administrator to label the fuel dispensing system with a notice that the gasoline is oxygenated and will reduce the carbon monoxide emissions from the motor vehicle.

(5) Guidelines for credit

The Administrator shall promulgate guidelines, within 9 months after November 15, 1990, allowing the use of marketable oxygen credits from gasolines during that portion of the year specified in paragraph (2) with higher oxygen content than required to offset the sale or use of gasoline with a lower oxygen content than required. No credits may be transferred between nonattainment areas.

(6) Attainment areas

Nothing in this subsection shall be interpreted as requiring an oxygenated gasoline program in an area which is in attainment for carbon monoxide, except that in a carbon monoxide nonattainment area which is redesignated as attainment for carbon monoxide, the requirements of this subsection shall re-

main in effect to the extent such program is necessary to maintain such standard thereafter in the area.

(7) Failure to attain CO standard

If the Administrator determines under section 7512(b)(2) of this title that the national primary ambient air quality standard for carbon monoxide has not been attained in a Serious Area by the applicable attainment date, the State shall submit a plan revision for the area within 9 months after the date of such determination. The plan revision shall provide that the minimum oxygen content of gasoline referred to in paragraph (2) shall be 3.1 percent by weight unless such requirement is waived in accordance with the provisions of this subsection.

(n) Prohibition on leaded gasoline for highway use

After December 31, 1995, it shall be unlawful for any person to sell, offer for sale, supply, offer for supply, dispense, transport, or introduce into commerce, for use as fuel in any motor vehicle (as defined in section 7554(2)⁸ of this title) any gasoline which contains lead or lead additives.

(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.

⁸So in original. Probably should be section "7550(2)".

(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)(i) 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.

(q)¹² Analyses of motor vehicle fuel changes and emissions model

(1) Anti-backsliding analysis

(A) Draft analysis

Not later than 4 years after August 8, 2005, the Administrator shall publish for public comment a draft analysis of the changes in emissions of air pollutants and air quality due to the use of motor vehicle fuel and fuel additives resulting from implementation of

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

¹² So in original. No subsec. (p) has been enacted.