ORAL ARGUMENT NOT 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,
Respondent.

PETITIONS FOR REVIEW OF FINAL ACTION
OF THE ENVIRONMENTAL PROTECTION AGENCY

OPENING BRIEF FOR OBLIGATED PARTY PETITIONERS ON CELLULOSIC BIOFUEL AND BIOMASS-BASED DIESEL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners hereby certify as follows:

A. Parties, Intervenors, and *Amici Curiae*:

These cases involve the following parties:

Petitioners:

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

No. 16-1044: Monroe Energy, LLC.

No. 16-1047: American Fuel & Petrochemical Manufacturers.

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

No. 16-1050: American Petroleum Institute.

No. 16-1053: National Biodiesel Board.

No. 16-1054: Valero Energy Corporation

No. 16-1056: National Farmers Union

Respondents:

Respondents are the United States Environmental Protection Agency ("EPA") (in Nos. 16-1044, 16-1047, 16-1049, 16-1053, and 16-1054) and EPA and Gina McCarthy, Administrator (in Nos. 16-1005, 16-1050, and 16-1056).

Intervenors and *Amici Curiae*:

E.I. du Pont de Nemours and Company is a Petitioner-Intervenor in Case No. 16-1005.

Alon Refining Krotz Springs, Inc.; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Ergon-West Virginia, Inc.; Hunt Refining Company; Lion Oil Company; Monroe Energy, LLC; Placid Refining Company; U.S. Oil & Refining Co.; Valero Energy Corporation; and Wyoming Refining Company are Respondent-Intervenors in Case Nos. 16-1005, 16-1053, and 16-1056.

American Coalition for Ethanol; Americans for Clean Energy; Biotechnology Innovation Organization; E.I. du Pont de Nemours and Company; Growth Energy; National Biodiesel Board; National Corn Growers Association; National Sorghum Producers; and Renewable Fuels Association are Respondent-Intervenors in Case Nos. 16-1044, 16-1047, 16-1049, 16-1050, and 16-1054.

B. Rulings Under Review: These consolidated cases involve final agency action of the United States Environmental Protection Agency titled "Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017; Final Rule," 80 Fed. Reg. 77,420 (Dec. 14, 2015) ("Final Rule").

C. Related Cases: These consolidated cases have not previously been before this Court or any other court. Per the Court's order of May 5, 2016, Case No. 16-1052 (*Alon Refining Krotz Springs, Inc. v. EPA*) was deconsolidated.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, Petitioners submit the following statements:

American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association of approximately 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM has no parent companies, and no publicly held company has a 10% or greater ownership interest in AFPM. AFPM is a "trade association" within the meaning of Circuit Rule 26.1. AFPM is a continuing association operating for the purpose of promoting the general commercial, professional, legislative, or other interests of its memberships.

American Petroleum Institute ("API") is a nationwide, not-for-profit association representing over 625 member companies engaged in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. API has no parent companies, and no publicly held company has a 10% or greater ownership interest in API. API is a "trade association" within the meaning of Circuit Rule 26.1. API is a continuing association operating for the purpose of promoting the general commercial, professional, legislative, or other interests of its memberships.

Monroe Energy, LLC is a Pennsylvania-based refiner of petroleum products and is wholly owned by Delta Air Lines, Inc., a publicly traded company.

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GLOSSARY

Act	Clean Air Act
AFPM	American Fuel & Petrochemical Manufacturers
API	American Petroleum Institute
EIA	Energy Information Administration
EPA	Environmental Protection Agency
Obligated Party Petitioners	American Fuel & Petrochemical Manufacturers; American Petroleum Institute; and Monroe Energy, LLC
NPRM	Notice of Proposed Rulemaking
RFS	Renewable Fuel Standards
RIN	Renewable Identification Number

INTRODUCTION

For years, EPA's rules implementing the Renewable Fuel Standard ("RFS") program have followed two consistent patterns: EPA has overestimated cellulosic biofuel production and failed to meet statutory deadlines. EPA's latest RFS rule perpetuates both patterns. This Court has already vacated EPA's 2012 cellulosic biofuel requirement, and EPA has acknowledged that its requirements for two additional years were indefensible. EPA's 2016 cellulosic requirement follows the same flawed pattern and must be vacated.

EPA's disregard of statutory deadlines is its most egregious ever. Not only is the Final Rule years late, it imposes increased requirements for biomass-based diesel that are nowhere specified in the statute and subject to an extended 14-month leadtime requirement. EPA's blatant, repeated disregard of statutory deadlines violates the Clean Air Act and requires that the biomass-based diesel requirements for 2014-2017 be vacated.

JURISDICTIONAL STATEMENT

EPA published the Final Rule in the *Federal Register* on December 14, 2015. 80 Fed. Reg. 77,420. Obligated Party Petitioners filed timely petitions for review. This Court has jurisdiction under 42 U.S.C. § 7607(b).

ISSUES PRESENTED

1. Whether EPA's 2016 cellulosic biofuel volume requirement failed to "take neutral aim at accuracy," as required by the Clean Air Act and this Court's precedent, and is inadequately explained.

2. Whether EPA violated the Act by establishing biomass-based diesel volume requirements without providing the statutorily-mandated leadtime.

STATUTES AND REGULATIONS

The Addendum contains all pertinent statutory and regulatory provisions.

STATEMENT OF THE CASE

A. The RFS Program

EPA promulgated the challenged rule under Clean Air Act Section 211, 42 U.S.C. § 7545, which Congress amended in 2005 and 2007 to establish the RFS program. *See Monroe Energy, LLC v. EPA*, 750 F.3d 909 (D.C. Cir. 2014); *API v. EPA*, 706 F.3d 474 (D.C. Cir. 2013); *Nat'l Petrochemical & Refiners Ass'n v. EPA* ("*NPRA*"), 630 F.3d 145 (D.C. Cir. 2010) (describing the RFS program).

Under the RFS program, "transportation fuel sold or introduced into commerce in the United States" must contain an "applicable volume" of renewable fuel. 42 U.S.C. § 7545(*o*)(2)(A). The statute specifies annually increasing applicable volumes for renewable fuel, advanced biofuel, and cellulosic biofuel through 2022. *See id.* § 7545(*o*)(2)(B)(i).

For biomass-based diesel, a subset of advanced biofuel, the statute sets applicable volumes only through 2012. *See id.* § 7545(*o*)(2)(B)(i)(IV). Thereafter, EPA establishes the applicable volume of biomass-based diesel based on six factors, *id.* § 7545(*o*)(2)(B)(ii), subject to a one-billion gallon floor, *id.* § 7545(*o*)(2)(B)(v). EPA must do this "no later than 14 months before the first year for which such applicable volume will apply." *Id.* § 7545(*o*)(2)(B)(ii). Thus, after 2012, EPA must promulgate the applicable volume of biomass-based diesel more than a year before any of the other renewable fuel requirements apply.

Because Congress recognized that it may be impracticable to meet the escalating statutory volumes, it authorized EPA to waive them. *See Monroe Energy*, 750 F.3d at 913. Under its "general" waiver authority, EPA may waive applicable volumes when (i) their implementation "would severely harm the economy or environment of a State, region, or the United States," or (ii) "there is an inadequate domestic supply." 42 U.S.C. § 7545(*o*)(7)(A). Under its cellulosic waiver authority, EPA *must* adjust the required volume of cellulosic biofuel to "the projected volume of [actual] cellulosic biofuel production" for a particular year. *Id.* § 7545(*o*)(7)(D)(i); *see API*, 706 F.3d at 476. When EPA does so, it "may also reduce the applicable volume of renewable fuel and advanced biofuels … by the same or a lesser volume." 42 U.S.C. § 7545(*o*)(7)(D)(i).

Each year by November 30, EPA must determine and publish the volume requirements for each renewable fuel type—total renewable fuel, advanced biofuel, biomass-based diesel, and cellulosic biofuel—for the following calendar year. 42 U.S.C. § 7545(*o*)(3)(B)(i). Obligated parties—fuel refiners and importers—must demonstrate compliance with these requirements. *See Monroe Energy*, 750 F.3d at 912. To do so, a party must obtain and subsequently "retire" credits known as "Renewable Identification Numbers" ("RINs") in an amount equal to the party's volume obligations. *See* 40 C.F.R. §§ 80.1401, 80.1415, 80.1427; *Monroe Energy*, 750 F.3d at 912–13 (describing how RINs are obtained, traded, and retired). RINs are generated by producing renewable fuel, each batch of which "is assigned a set of … RINs that correspond to the volume of ethanol-equivalent fuel gallons in that batch." *Monroe Energy*, 750 F.3d at 913.

The Final Rule was issued in November 2015 and published in the *Federal Register* in December. *See* 80 Fed. Reg. 77,420 (Dec. 14, 2015). It provides annual volume requirements for 2014 through 2016 and the applicable volume of biomass-based diesel for 2014 through 2017. Because of EPA's extreme tardiness in issuing the Final Rule, the volume requirements for 2014 and the first three quarters of 2015 apply retroactively and reflect actual production. *See id.* at 77,444-48, 77,501-02. For the fourth quarter of 2015 and all of 2016 (as well as

biomass-based diesel in 2017), EPA relied on forward-looking projections. *See id.* at 77,448-82, 77,502-08.

B. The Cellulosic Biofuel Requirement

Congress established the cellulosic biofuel requirement based on the promise of liquid cellulosic biofuel—ethanol "derived from sources of lignocellulose such as switchgrass and agricultural wastes." *API*, 706 F.3d at 476. Although "there was no commercial-scale production [of liquid cellulosic biofuel] at all" when Congress established the RFS program, *id.*, Congress hoped that production would ramp up rapidly in future years, *see* 42 U.S.C. § 7545(*o*)(2)(B)(i)(III).

Congress adopted a safeguard in case the hoped-for production did not materialize: EPA must project annually the actual "volume of cellulosic biofuel production … based on" data provided by the Energy Information Administration ("EIA"). 42 U.S.C. § 7545(*o*)(7)(D)(i). If the projection "is less than" the applicable statutory volume, EPA must exercise its cellulosic waiver authority. *Id.*

EPA significantly overestimated cellulosic biofuel production every year between 2010 and 2013:

Cellulosic Biofuel Production 2010–2013 (RINs)[1]

Year	Statutory volume	EPA Projection	Actual Production	EPA Error Rate
2010	100 million	6.5 million	0	100%
2011	250 million	6.0 million	0	100%
2012	500 million	10.45 million	21,810	99.8%
2013	1 billion	6 million	810,185	86.5%

This Court vacated EPA's 2012 cellulosic biofuel requirement in *API*, holding that EPA exceeded its authority by using a forecasting methodology "in which the risk of overestimation [was] set deliberately to outweigh the risk of underestimation." 706 F.3d at 479. Rather than "tak[ing] neutral aim at accuracy," as required, EPA set the 2012 requirement to "promot[e] growth in the cellulosic biofuel industry"—a purpose with "no basis" in the statutory text. *Id.* at 476, 478-79. Following *API*, EPA acknowledged its 2011 and 2013 projections were similarly flawed. *See* 79 Fed. Reg. 25,025 (May 2, 2014); 80 Fed. Reg. at 77,508-09.

Faced with anemic liquid cellulosic biofuel production and constrained by *API*, EPA sought to increase volumes by expanding the definition of "cellulosic biofuel." In 2014, EPA approved compressed natural gas ("CNG") and liquefied

[1] For EPA projections, see 75 Fed. Reg. 14,670, 14,751 (Mar. 26, 2010); 75 Fed. Reg. 76,790, 76,792 (Dec. 9, 2010); 77 Fed. Reg. 1,320, 1,321 (Jan. 9, 2012); 78 Fed. Reg. 49,794, 49,798 (Aug. 15, 2013). For actual production, see EPA, Public Data for the Renewable Fuel Standard, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/public-data-renewable-fuel-standard.

natural gas ("LNG") derived from landfills as sources of cellulosic biofuel RINs. 79 Fed. Reg. 42,128 (July 18, 2014). CNG/LNG, which is neither ethanol nor derived solely from lignocellulose, now accounts for the "vast majority" of cellulosic biofuel production. 80 Fed. Reg. at 77,502 n.209.

The liquid cellulosic biofuel and CNG/LNG industries are separate and distinct pathways for producing renewable fuel. *See id.* at 77,505 (describing differences in "technology risk"). Accordingly, EPA assesses each pathway separately to arrive at a total cellulosic biofuel projection. *Id.* at 77,503–08. In the Final Rule, EPA nevertheless disclosed only the *aggregate* number of cellulosic biofuel RINs made available in 2014 and the first three quarters of 2015, without separately disclosing liquid cellulosic and CNG/LNG biofuel production. *See id.* at 77,502-03.[2]

Although these amounts are not disclosed in the Final Rule, they can be estimated from other EPA sources, which show that EPA's cellulosic biofuel projections for 2014 were significantly overstated:

[2] EPA disclosed *gross* production data for CNG/LNG biofuel and an "approximate" level of liquid cellulosic production in the first three quarters of 2015, *see* JA__(EPA-HQ-OAR-2015-0111-3658_at_2); 80 Fed. Reg. at 77,501, but did not provide the *net* number of CNG/LNG or liquid cellulosic biofuel RINs available for compliance in 2014 or the first three quarters 2015. It is net RINs—that is, gross RINs less RINs retired for reasons other than RFS program compliance—that matter, because only net RINs can be used to meet RFS program requirements. *See* 80 Fed. Reg. at 77,502.

2014 Cellulosic Biofuel Production (RINs)

Fuel Type	EPA Projection[3]	Actual Production[4]	EPA Error Rate
Liquid Cellulosic	17 million	0.8 million (est.)	95.2%
CNG/LNG	50 million	32.2 million (est.)	35.5%
Overall Cellulosic	67 million	33.1 million (EPA)	50.7%

EPA never made any projection for the first three quarters of 2015, so error rates cannot be computed for that period. For the final quarter of 2015, EPA estimated that liquid cellulosic biofuel production would be 2 million gallons; actual production was approximately 400,000 gallons.[5]

[3] Because EPA did not issue a final 2014 rule until after the year ended, EPA's projection comes from its original NPRM for 2014, EPA's only forward-looking projection for 2014. *See* 78 Fed. Reg. 71,732, 71,750-51 (Nov. 29, 2013).

[4] EPA's website reports *gross* actual production totals for liquid cellulosic and CNG/LNG biofuel in 2014 and 2015. *See* EPA, Public Data for the Renewable Fuel Standard, http://www.epa.gov/fuels-registration-reporting-and-compliance-help/public-data-renewable-fuel-standard (select a year and then "RIN Generation and Renewable Fuel Volume Production by Fuel Type"). The average error rate for all cellulosic biofuel volumes in 2014 (1.04%) was used to estimate net RINs by reducing gross RIN totals. *See* http://www.epa.gov/fuels-registration-reporting-and-compliance-help/2014-renewable-fuel-standard-data (select "RIN Generation Summary," then see "RIN Generation Error Corrections" column). All estimates in this Brief are rounded to the nearest hundred thousand RINs.

[5] *See* 80 Fed. Reg. at 77,506-07 (EPA fourth quarter projection); *compare id.* at 77,501 ("approximately 2 million" liquid cellulosic RINs "produced through September 2015"), *with* https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2015-renewable-fuel-standard-data (select "RIN Generation and Renewable Fuel Volume Production by Fuel Type") (showing 2.4 million liquid cellulosic RINs for 2015 as a whole).

Because EPA was so late in issuing the Final Rule, the cellulosic requirements for 2014 and the first three quarters of 2015 are based on actual production. For the remainder of 2015 and all of 2016, EPA projected cellulosic biofuel production based on a methodology (estimating facility start-up dates, production ramp-up periods and ranges, and facility outputs) that produced wildly inaccurate projections in prior years.

C. EPA's Persistent Rulemaking Delays

EPA has consistently missed the November 30 statutory deadline for publishing the annual RFS, sometimes *by over a year*:

Year	Statutory Deadline	Final Rule Publication Date[6]	Days Late
2010	11/30/2009	3/26/10	116
2011	11/30/2010	12/9/10	9
2012	11/30/2011	1/09/12	40
2013	11/30/2012	8/15/13	258
2014	11/30/2013	12/14/15	744
2015	11/30/2014	12/14/15	379
2016	11/30/2015	12/14/15	14

Notwithstanding this troubling pattern, this Court has held those delays did not justify vacatur because the statute (i) directs EPA to "ensure" that the statutory volumes of renewable fuel are used each year; and (ii) provides parties with notice of what their annual obligations might be. *See NPRA*, 630 F.3d at 156, 158; *Monroe Energy*, 750 F.3d at 919-20.

[6] *See* 75 Fed. Reg. 14,670; 75 Fed. Reg. 76,790; 77 Fed. Reg. 1,320; 78 Fed. Reg. 49,794; 80 Fed. Reg. 77,420.

This case involves EPA's failure to meet a *different* statutory deadline that applies to biomass-based diesel volume requirements after 2012—*i.e.*, when the Act itself no longer specifies biomass-based diesel volumes and obligated parties have no notice of their biomass-based diesel obligations. EPA's track record for meeting the biomass-based diesel deadline is even worse than its record for promulgating annual percentage standards:

Year	Statutory Deadline	Final Rule Publication Date[7]	Days Late
2013	10/31/11	9/27/12	332
2014	10/31/12	12/14/15	1,139
2015	10/31/13	12/14/15	774
2016	10/31/14	12/14/15	409
2017	10/31/15	12/14/15	44

This Court has not previously addressed the 14-month leadtime required for biomass-based diesel volume requirements and has not addressed circumstances where obligated parties cannot rely on the statute for guidance on their renewable fuel obligations.

SUMMARY OF THE ARGUMENT

I. In *API*, this Court held that EPA must "take neutral aim at accuracy" in setting cellulosic biofuel requirements by "reflect[ing] on the success" of its past projections and adjusting its methodology accordingly. 706 F.3d at 476-79. EPA's 2016 liquid cellulosic biofuel projection fails to meet this requirement.

[7] *See* 77 Fed. Reg. 59,458 (Sept. 27, 2012); 80 Fed. Reg. 77,420.

Virtually every aspect of EPA's predictive methodology—including its approach to estimating facility start-up dates, its use of a six-month ramp-up period, its method for computing each facility's production range, including use of a "25th and 50th percentile" methodology, and its handling of EIA production estimates—has consistently produced grossly inflated predictions. EPA did not explain why continued adherence to these failed methodologies is reasonable.

EPA's CNG/LNG projection for 2016 is also arbitrary and capricious. That projection relies on an unexplained "50th and 75th percentile" methodology, makes incorrect assumptions about CNG/LNG producers' ability to generate cellulosic RINs, relies on estimates that have proven unreliable, and projects an unreasonable one-year production increase.

EPA also erred by failing to discuss or disclose the amount of liquid cellulosic biofuel and CNG/LNG biofuel actually produced in 2014 and 2015. That information is essential to assess the accuracy of EPA's projections and make appropriate adjustments.

II. EPA violated the statutory mandate to promulgate biomass-based diesel volume requirements with 14 months leadtime *four times*, in each of the years 2014 to 2017 to which the requirements apply. This Court has long recognized the importance of statutory leadtime requirements to allow regulated entities to plan their compliance obligations. Although the Court has previously

excused EPA's failure to meet a *different* statutory deadline, with 30 days leadtime, governing the promulgation of annual percentage standards for all renewable fuel categories, those decisions arose in a different context. Above all, because the statute does not set applicable volumes for biomass-based diesel after 2012, obligated parties had no way to anticipate what new volume requirements might apply in 2014-2017, much less that EPA would raise them significantly each year without providing the requisite leadtime.

STANDING

Obligated Party Petitioners (or their member companies in the case of API and AFPM[8]) are directly regulated under the Final Rule, and must acquire and retire RINs to demonstrate compliance. "Because the financial burden of purchasing RINs is a cognizable injury-in-fact, and it is fairly traceable to the . . . fuel standards and remediable by vacatur of the Final Rule," Petitioners have "Article III standing to challenge the Final Rule." *Monroe Energy*, 750 F.3d at 915. Obligated Party Petitioners also fall within the zone of interests protected by the challenged rule. *See Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147-48 (D.C. Cir. 2002).

[8] API and AFPM filed comments in the rulemaking proceeding and have associational standing to challenge the Final Rule. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

STANDARD OF REVIEW

The Court applies the same standard when reviewing whether EPA actions were in excess of statutory authority or arbitrary and capricious under the Act as it would under the Administrative Procedure Act. *See North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "If EPA lacks authority under the [Act], then its action is plainly contrary to law and cannot stand." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). To determine whether Congress authorized EPA to take the challenged actions, this Court applies the familiar two-step inquiry from *Chevron*. *See id.* at 1081-82.

ARGUMENT

I. EPA's 2016 Cellulosic Biofuel Volume Requirement Is Unlawful.

In *API*, this Court held that the Act requires EPA to "take neutral aim at accuracy" in setting annual cellulosic biofuel requirements. 706 F.3d at 476. As the Court explained, EPA must "reflect on the success" of its past projections and recalibrate its methodology accordingly. *Id.* at 477-79.

EPA's past cellulosic biofuel projections have been dismal failures. EPA projected that millions of gallons of cellulosic biofuel would be produced in 2010 and again in 2011. Actual production in both years was exactly zero. *See* p. 6, *supra*. EPA's 2012 and 2013 projections were overstated by 99.8 percent and 86.5

percent, respectively. *Id.* In 2014, EPA's liquid cellulosic biofuel projection was off by approximately 95 percent. *See* p. 8, *supra*.

The Final Rule fails to take neutral aim at accuracy because EPA did not recalibrate its approach to avoid repeating past errors, nor did it explain how its approach is reasonable in light of prior experience. Instead, EPA doubled down on methodological approaches that have consistently produced inaccurate projections.

A. The Final Rule Fails To Take Neutral Aim At Accuracy In Projecting Liquid Cellulosic Biofuel Production.

EPA's liquid cellulosic biofuel volume projection for 2016 fails to take neutral aim at accuracy in at least five ways. At nearly every step, EPA employed methodologies that produced grossly inflated results in prior years, rather than "reflect[ing] on the success of [its] earlier" rules and applying the lessons learned. *API*, 706 F.3d at 477. "[T]he complete failure of EPA's [past] prediction[s] … colors the rationality of EPA's decision to persist" in the same methodology in 2016. *Id.* EPA's 2016 projection for liquid cellulosic biofuel is therefore unreasonable whether viewed through the lens of *API* or general administrative-law principles.[9]

[9] *See, e.g.*, *State Farm*, 463 U.S. at 43; *BellSouth Telecomm'cns, Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) (agencies have "no license to ignore the past when the past relates directly to the question at issue").

1. EPA's Approach To Estimating Facility Start-Up Dates Is Unreasonable.

EPA's projected start-up dates for new cellulosic biofuel facilities have been consistently wrong. Relying on the facilities' own forecasts, EPA projected that multiple facilities would begin production in 2010 and 2011, but none did.[10] EPA's record in subsequent years was no better:

- EPA projected that five facilities would start up in 2012; not one of those projections was accurate.[11]
- EPA projected that three facilities would begin production in the "4th Quarter 2013" or the "1st Quarter 2014"; not one of those projections held up.[12]
- EPA's original 2014 NPRM projected that four facilities would begin production in 2014, *see* 78 Fed. Reg. at 71,736, 71,740-45; all four projections were incorrect.[13]

[10] *Compare* 75 Fed. Reg. at 14,749-51 (forecasting 2010 start-up for several firms), and 75 Fed. Reg. at 76,797 (forecasting 2011 start-up for five firms), *with API*, 706 F.3d at 478 & n.1 (zero production in 2010 and 2011).

[11] *Compare* 77 Fed. Reg. at 1,322, 1,326-28 (EPA projections), *with* 78 Fed. Reg. 49,805-07 (As of August 2013, American Process not expected to begin production until 2013 at the earliest; Fiberight production not expected "until 2014"; INEOS Bio did not begin production until July 2013; KiOR did not begin production until March 2013; ZeaChem was "not expected to begin producing cellulosic biofuel until late 2014").

[12] *Compare* 78 Fed. Reg. at 49,802-08 (EPA projection), *with* JA__(EPA-HQ-OAR-2015-0111-3632) (Abengoa and Edeniq had not begun production as of November 2015; no mention of Fiberight); 78 Fed. Reg. at 71,741 ("uncertainty surrounding Fiberight's funding status" and "history of production delays").

[13] *See* JA__(EPA-HQ-OAR-2015-0111-3632) (in November 2015, Abengoa, Cool Planet, DuPont, and Poet-DSM had not begun production); JA__(AFPM/API Comments_45).

Despite this unbroken record of failure, EPA employed the same approach in the Final Rule, relying heavily on "information provided by [company] representatives" in determining "expected start-up date" for 2016. 80 Fed. Reg. at 77,500-01, 77,503-04. Often, EPA simply accepted the company's projection, despite the companies' demonstrated propensity to provide over-optimistic estimates.[14] EPA's methodology is unreasonable in light of its past experience. *See API*, 706 F.3d at 477, 479; *State Farm*, 463 U.S. at 43.

2. EPA's Six-Month Ramp-Up Period Is Unreasonable.

The Final Rule projects a "production range" for each liquid cellulosic biofuel facility. EPA computed the "high end" of this range by assuming that the facility would reach "production rates at or near the facility['s] capacity" within six months, 80 Fed. Reg. at 77,501-03, 77,508—which EPA characterized as "an optimistic ramp-up scenario."[15]

[14] *Compare, e.g.*, JA__(EPA-HQ-OAR-2015-0111-3632_1) ("Abengoa plans to begin producing salable volumes of fuel at the facility in the fourth quarter of 2015"), JA__(EPA-HQ-OAR-2015-0111-3632_4) ("INEOS Bio … expects to begin producing commercial-scale volumes of ethanol in 2016"), *with* 80 Fed. Reg. at 77,501 (adopting those start-up dates).

[15] EPA applied its ramp-up model to companies with and without prior commercial-scale production unless the facility's own projection was lower than the result generated by EPA's ramp-up model. 80 Fed. Reg. at 77,503.

The Final Rule provides no evidence that a six-month ramp-up period is reasonable, even as an "optimistic" scenario. Indeed, EPA fails to identify a single cellulosic facility that has achieved substantial production, let alone full production, within six months of start-up. Experience has shown that many cellulosic facilities take substantially longer to reach even a fraction of production capacity. *See* JA__(AFPM/API_Comments_44-45).

INEOS Bio, for example, began producing cellulosic biofuel in June 2013, but was forced to idle its plant in 2014 due to equipment problems and was "producing very little ethanol" as of September 2014. *See id.*; JA__(EPA-HQ-OAR-2015-0111-3632_4). In November 2015, EPA stated that INEOS Bio was not expected to begin commercial-scale production until 2016—a ramp-up period of at least 30 months. JA__(EPA-HQ-OAR-2015-0111-3632_4). Similarly, Poet-DSM began production in September 2014, but EPA later acknowledged that it would not begin commercial-scale production until late 2015—a ramp-up period exceeding one year.[16]

[16] JA__(EPA-HQ-OAR-2015-0111-3632_4-5). New EPA data shows that Poet-DSM likely will not reach capacity until "the end of 2016" at the earliest. *See* Memorandum to EPA Air and Radiation Docket, EPA-HQ-OAR-2016-0004-0063 (Apr. 2016), http://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0004-0063.

Other cellulosic facilities never reached full capacity because of technical failures, bankruptcies, or other problems. KiOR, for example, began production in March 2013, 78 Fed. Reg. at 71,736, but "experienced significant technical difficulties" and produced "little, if any" biofuel before going bankrupt in 2014, 80 Fed. Reg. at 77,506; *see also* JA__(AFPM/API_Comments_44) (other examples).

In its initial NPRM for 2014, EPA used "a six-month straight-line ramp-up period" to "determine the high end of the range of expected production volumes for each company." 78 Fed. Reg. at 71,739. This methodology led EPA to project 17 million RINs of liquid cellulosic biofuel production in 2014. 80 Fed. Reg. at 77,750-51. Actual production was 95 percent less than EPA's projection. *See* p. 8, *supra*.

EPA was required to consider this experience and explain why it was nevertheless reasonable to employ a six-month ramp-up period. *See API*, 706 F.3d at 477-79. Its failure to do so is arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("an agency must give adequate reasons for its decisions"); *State Farm*, 463 U.S. at 43 (rule arbitrary and capricious where it "runs counter to the evidence before the agency").

3. EPA Overstated The Low End Of Established Producers' Production Ranges.

EPA also took an unreasonable approach to computing the low end of the production range for companies that have previously produced cellulosic biofuel

RINs. *See* 80 Fed. Reg. at 77,503. EPA set that figure at the facility's actual production over "the most recent 12 months for which data is available." *Id.* This approach fails to account for past experience, which has shown that cellulosic facilities often fall substantially below prior production levels.

KiOR, for example, began shipping cellulosic biofuel in 2013, *see* 78 Fed. Reg. at 71,736, but then went bankrupt and shipped "little, if any" cellulosic biofuel in 2014, 80 Fed. Reg. at 77,506; JA__(AFPM/API_Comments_44).[17] Similarly, INEOS Bio began production in June 2013, but idled its facility in 2014 and is not expected to resume meaningful production until 2016.[18] Blue Sugars produced "approximately 20,000" RINs in 2012 but went bankrupt later that year. 78 Fed. Reg. at 49,806.

The Final Rule acknowledges the risk that companies will fall below their prior production levels, but concludes without analysis that none "of the companies projected to produce cellulosic biofuel" in 2016 is susceptible to it. 80 Fed. Reg. at 77,503, 77,507 (2016 methodology same as 2015). Considering past failures, EPA's unexplained assumption that all "established" facilities will maintain their

[17] *See also* Katie Fehrenbacher, *A Biofuel Dream Gone Bad*, Fortune (Dec. 15, 2015), http://fortune.com/kior-vinod-khosla-clean-tech/ (KiOR's factory became "a dead zone" where "[l]ong weeds ha[d] sprouted up around an empty parking lot" and no biofuel had been produced "in close to two years.").

[18] JA__(AFPM/API_Comments_44); JA__(EPA-HQ-OAR-2015-0111-3632_4).

prior production levels is unreasonable. *See API*, 706 F.3d at 477, 479; *State Farm*, 463 U.S. at 43.

4. EPA's 25th And 50th Percentile Methodology Is Inadequately Explained And Unreasonable.

The Final Rule adopts a 25th percentile methodology for projecting the output of cellulosic facilities without prior consistent commercial-scale production, and a 50th percentile methodology for projecting output by facilities that have produced commercial quantities in the past. *See* 80 Fed. Reg. at 77,506. Under this approach, EPA selects an output level at the 25th or 50th percentile of a "standardized distribution" between EPA's low-end and high-end production estimates for each facility. *Id.* at 77,504.

a. EPA provided no factual support for its 25th percentile method, which appears to have been created out of whole cloth. For 2016, the method resulted in a prediction that facilities with no prior production history will generate 19 million liquid cellulosic biofuel RINs. *Id.* at 77,508. That is over *seven times* the annual output for *all* liquid cellulosic biofuel producers in 2015[19] and nearly *five times* more liquid cellulosic fuel than EPA projects will be produced by established facilities, *see id.*, despite the many problems that consistently beset new facilities.

[19] *See* https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2015-renewable-fuel-standard-data (select "RIN Generation and Renewable Fuel Volume Production by Fuel Type") (showing 2.4 million liquid cellulosic biofuel RINs produced in 2015).

EPA failed to explain why it was reasonable to use a methodology that generates such improbable forecasts. *See Encino*, 136 S. Ct. at 2125.

b. EPA's 50th percentile model suffers from the same defect. Like the Final Rule, EPA's 2014 NPRM generated a range of possible outcomes for cellulosic biofuel production. *See* 78 Fed. Reg. at 71,750-51. EPA applied a 50th percentile model to these ranges to project 16 million liquid cellulosic biofuel RINs. *Id.* Yet actual production was only 0.8 million RINs, *see* p. 8, *supra*—an error of 95 percent.

c. The 25th and 50th percentile models are also inconsistent with past production rates. EPA's models project that liquid cellulosic facilities will produce 23 million RINs in 2016. 80 Fed. Reg. at 77,508.[20] That represents approximately 20 percent of the industry's production capacity, more than an order of magnitude greater than actual historical production. *See id.* at 77,501 (providing capacities for each facility, 114 million RINs in total). In prior years, however, the liquid cellulosic biofuel industry has never reached more than 2.1 percent of total industry capacity:[21]

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[20] EPA's projection is expressed in ethanol-equivalent gallons. *See* 80 Fed. Reg. at 77,422, 77,508. One ethanol-equivalent gallon equals one RIN.

[21] For EPA projections and production capacity data, *see* 75 Fed. Reg. 76,797; 77 Fed. Reg. at 1,330-31; 78 Fed. Reg. at 49,797, 49,808-09; 78 Fed. Reg. 71,779-80, 71,736. For actual production, see pp. 6 & 8, *supra*. Where EPA included a (continued…)

Year	Industry-Wide Capacity	EPA-Projected Production	EPA-Projected Share of Capacity	Actual Production	Actual Share of Capacity
2011	11.1 million	6.0 million	54%	0	0%
2012	32.7 million	10.45 million	32.0%	21,810	0.1%
2013	38.5 million	6 million	15.6%	810,185	2.1%
2014	113.5 million	17 million	15%	0.8 million (est.)	0.7%

EPA did not explain why it is reasonable to project that liquid cellulosic biofuel facilities will utilize nearly *ten times* as much production capacity in 2016 as in prior years. More generally, EPA adopted the 25th and 50th percentile models without "reflect[ing] on the success of earlier applications," as this Court requires. *API*, 706 F.3d at 477; *see also State Farm*, 463 U.S. at 43. EPA further erred in failing to consider whether other approaches would better predict "what will *actually* happen." *API*, 706 F.3d at 479.

5. EPA's Handling Of EIA's Estimates Was Unreasonable.

The Act requires EPA's cellulosic biofuel projections to be "based on" EIA production estimates. 42 U.S.C. § 7545(*o*)(7)(D)(i). EPA must give EIA's estimates "great respect" in computing its volume requirements. *API*, 706 F.3d at 478. EPA's 2016 estimate for liquid cellulosic biofuel (23 million RINs) is more than double EIA's estimate (10 million RINs). 80 Fed. Reg. at 77,501. This

facility in its projection table for a given year, but determined that the facility would not begin production that year, we excluded the facility from our analysis. Values expressed in gallons were converted to RINs.

continues a pattern in which EPA's projections consistently have exceeded EIA's estimates, often by substantial margins:[22]

Year	EIA Projection	EPA Projection	Actual Production
2010	5.04 million	6.5 million	0
2011	3.94 million	6 million	0
2012	6.7 million	10.45 million	21,810
2013	4–6 million	6 million	810,185

EPA has not adequately justified its continued rejection of EIA estimates that have proven to be consistently more accurate than EPA's projections (although still inflated).

EPA also erred by failing to provide an opportunity for comment on EIA's estimate. "An agency commits serious procedural error when it fails to reveal … the technical basis for a proposed rule in time to allow for meaningful commentary." *Conn. Power & Light Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). EPA committed such an error by failing to disclose EIA's estimate until after it issued the Final Rule.

B. EPA's 2016 CNG/LNG Projection Is Arbitrary And Capricious.

The CNG/LNG component of the Final Rule's 2016 cellulosic biofuel requirement is also unreasonable.

[22] For 2010, *see* 75 Fed. Reg. at 14,749 (EIA), 14,751 (EPA). For 2011, *see* 75 Fed. Reg. 76,796 (EIA), 76,797 (EPA). For 2012, *see* 77 Fed Reg. at 1,328–29 (EIA), 1,322 (EPA). For 2013, *see* 78 Fed. Reg. at 49,805 (EIA), 49,797 (EPA) (discussing conversion of EIA estimate to ethanol-equivalent gallons).

First, EPA's CNG/LNG methodology is inadequately explained. The Final Rule uses a 50th percentile model to select production values for new CNG/LNG producers and a 75th percentile model for established CNG/LNG facilities. 80 Fed. Reg. at 77,505-08. Yet the Final Rule does not show that these models accurately explain CNG/LNG production in prior years. *See* JA__(AFPM/API_Comments_46).

Second, EPA's model relies on incorrect assumptions about CNG/LNG producers' ability to generate cellulosic RINs. Only fuel used for motor-vehicle transportation generates RINs. *See* 42 U.S.C. §§ 7545(*o*)(1)(L), 7545(*o*)(2)(A)(i). Yet many facilities are incapable of producing transportation-grade CNG/LNG; indeed, fewer than eight percent of U.S. landfills produce biogas capable of transportation use. *See* JA__(AFPM/API_Comments_46). Even when a facility generates biogas of sufficient quality, it must be located near a pipeline to enable shipment to areas where CNG/LNG will be utilized for transportation purposes. *Id.* EPA has not shown that such pipeline infrastructure exists. *Id.* EPA's forecasts also fail to account for competing demands for CNG/LNG, such as renewable electricity required by state renewable portfolio standards. *Id.*

Third, EPA's CNG/LNG estimate for 2016 is contrary to the record. The Final Rule relies on data from the Coalition for Renewable Natural Gas, whose 2014 estimate was more than double actual production.

JA__(AFPM/API_Comments_47). Moreover, EPA has not shown that the technological and supply-chain conditions exist for a 67 million RIN increase in CNG/LNG production from 2015 (140 million RINs generated) to 2016 (207 million RINs projected).

C. EPA Failed To Disclose Or Discuss Essential Data.

The Final Rule does not disclose or discuss actual production data for liquid cellulosic and CNG/LNG biofuel in 2014 and the first part of 2015. *See* pp. 7-8, *supra*. EPA cannot "take neutral aim at accuracy," *API*, 706 F.3d at 476, without anchoring its analysis in past production levels. Because the Final Rule analyzes liquid cellulosic and CNG/LNG biofuels separately, *see* 80 Fed. Reg. at 77,503-08, past production data for both fuel types must be considered in evaluating the reasonableness of EPA's predictions. EPA's failure even to disclose this information prevents interested parties and this Court from assessing EPA's 2016 projection, requiring a remand. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–21 (1971) (court must have access to information "necessary … to determine if the [agency] acted within the scope of [its] authority").

* * *

This Court vacated EPA's 2012 cellulosic biofuel requirement because it was set to "promot[e] growth in the cellulosic biofuel industry"—a purpose with "no basis in the relevant text of the Act"—rather than projecting "what will

actually happen," as required. *API*, 706 F.3d at 478-79. In 2016, EPA repeated this error, stating that the Final Rule is "intended … to incentiviz[e] cellulosic biofuel production," JA__(Response_to_Comments_537), and to "drive growth in . . . advanced biofuels," 80 Fed. Reg. at 77,423. Although EPA asserted that it was taking a more cautious approach, *see id.*at 77,504, in reality it employed methods that have failed year after year. The 2016 cellulosic biofuel requirement, like the 2012 requirement, must be vacated.

II. EPA Lacked Authority To Promulgate Biomass-Based Diesel Volumes Exceeding 1.28 Billion Gallons.

The Act imposes two deadlines for EPA's issuance of annual RFS program rules. First, EPA must publish the annual percentage standards for all four categories of renewable fuel in the *Federal Register* by November 30 in the year before the standards apply. 42 U.S.C. § 7545(*o*)(3)(B)(i). EPA has repeatedly missed this deadline, sometimes by *a year or more*.

This case concerns EPA's violation of the second, distinct statutory deadline: the requirement to promulgate the applicable volume of biomass-based diesel "no later than 14 months before the first year for which such applicable volume will apply." 42 U.S.C. § 7545(*o*)(2)(B). Unlike the other renewable fuel categories for which Congress specified volumes through 2022, the statute provides biomass-based diesel volumes only through 2012. *Id.* § 7545(*o*)(2)(B)(i)(IV). After 2012, EPA may require no fewer than 1 billion

gallons of biomass-based diesel, *id.* § 7545(*o*)(2)(B)(v), but may require more upon considering the past implementation of the RFS program and six discretionary factors. *Id.* § 7545(*o*)(2)(B)(ii)(I)-(VI). If EPA departs from the 1 billion gallon statutory floor or seeks to increase the amount of biomass-based diesel beyond the prior year's mandate, it must promulgate that volume by October 31 fourteen months before it will apply. *See id.* § 7545(*o*)(2)(B).

EPA proposed biomass-based diesel volumes for 2014-2015 on November 29, 2013—over a year after the statutory deadline (October 31, 2012) for the 2014 volume. *See* 78 Fed. Reg. at 71,732. On December 9, 2014, EPA exacerbated the delay by announcing it would not finalize that proposal. *See* 79 Fed. Reg. 73,007 (Dec. 9, 2014). EPA issued a new proposed rule on June 10, 2015 to govern the years 2014-2017, *see* 80 Fed. Reg. 33,100, and it finalized the volumes for those years on December 14, 2015, thereby missing the statutory deadlines for all four years. *See* p. 10, *supra*.

This Court has recognized the importance of adhering to statutory deadlines and of giving regulated entities adequate leadtime to plan for compliance. *See, e.g.*, *Natural Res. Def. Council v. Thomas*, 805 F.2d 410, 435-36 (D.C. Cir. 1986) (holding that when Congress enacted a four-year leadtime requirement "for the benefit of the manufacturers, to allow time for them to design and develop engines in compliance with newly promulgated standards" and "refused to give the agency

any leeway in adjusting deadlines," there is "no precedent or basis for excusing the agency from the statutory command"); *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353-54 (D.C. Cir. 1986) (finding that when "Congress create[s] a specific deadline in order to provide the industry with … leadtime," the agency's failure to meet that deadline can be "detrimental " because industry "cannot plan ahead and ensure compliance with the standard until it is issued").

EPA has similarly acknowledged that the Act requires providing 14 months' leadtime for annual biomass-based diesel volume requirements. *See, e.g.*, 80 Fed. Reg. at 33,132; JA__(API/AFPM_Comments_Appendix_C). Moreover, just one month before the start of the 2014 compliance year, or 13 months *after* the statutory deadline for a final rule, EPA seemingly recognized the impropriety of increasing biomass-based diesel volumes without giving the requisite leadtime when it proposed to establish the 2014 volume at a level identical to the final 2013 volume (1.28 billion gallons). *See* 78 Fed. Reg. at 71,737.

In the Final Rule, however, EPA ignored the statute's clear command and dismissed the importance of leadtime. EPA sought to excuse its grossly tardy biomass-based diesel requirements by relying on this Court's decisions in *NPRA* and *Monroe Energy*. *See* 80 Fed. Reg. at 77,430. That reliance is improper.

Both cases addressed a *separate* statutory deadline with a substantially different context. That difference compels a different result here. *NPRA* involved

the statutory deadlines for promulgating programmatic rules, in 42 U.S.C. § 7545(*o*)(2)(A)(i), and the annual volume requirements, which require only 30 days leadtime, *id.* § 7545(*o*)(3)(B)(i). *See NPRA*, 630 F.3d at 148, 152, 157-58. *Monroe Energy* involved only the 30-day leadtime provision for annual volume requirements. *See* 750 F.3d at 919-21. By contrast, the deadline at issue here requires 14 months' leadtime. *See* 42 U.S.C. § 7545(*o*)(2)(B)(ii). The much lengthier leadtime requirement demonstrates Congress's view of the importance of giving obligated parties adequate notice.

The distinction between these deadlines is critical because the Court upheld EPA's untimely rulemakings in prior cases in part because it found that obligated parties long had notice of the statutory volumes and thus did not require the statutory 30-day leadtime. *See NPRA*, 630 F.3d at 156, 158; *see also Monroe Energy*, 750 F.3d at 919-20. But no such notice exists here because there are no statutory volumes to "ensure" for biomass-based diesel after 2012. Obligated parties could not have anticipated how EPA might apply the statutory criteria for establishing biomass-based diesel volumes post-2012. The last notice they had of the biomass-based diesel volume requirement was the 2013 requirement of 1.28 billion gallons—far less than the volumes in the Final Rule. Thus, the only biomass-based diesel volume that obligated parties could reasonably anticipate

might apply in 2014 (and beyond) is either the 1 billion gallons specified by statute or, at most, the 1.28 billion gallon requirement that EPA promulgated for 2013.

Equally important, the past cases challenged EPA's authority to issue annual RFS rules *at all* when it missed the statutory deadline, not whether EPA can *increase* applicable volume requirements without providing obligated parties the requisite leadtime. In analyzing "what Congress would have intended when EPA missed [this] statutory deadline," *NPRA*, 630 F.3d at 156, this Court concluded that Congress did not intend to divest EPA of rulemaking authority. *See id.* at 154, 158; *Monroe Energy*, 750 F.3d at 919-20. Here, by contrast, Obligated Party Petitioners are not asking the Court to hold that EPA forfeited rulemaking authority by failing to provide 14 months leadtime of biomass-based diesel applicable volumes. EPA may issue those requirements late, but it cannot *increase* the mandate without providing the requisite leadtime. Thus, this Court should hold that EPA cannot exceed the 1.28 billion gallon requirement from the 2013 final rule because EPA failed to provide the requisite leadtime and because obligated parties lacked notice, from the statute or otherwise, of what the potential applicable volumes might be.[23]

[23] *NPRA* nor *Monroe Energy* are further distinguishable because neither case involved a situation in which EPA missed a statutory deadline for four straight years. *Cf. In re Ctr. for Auto Safety*, 793 F.2d at 1352-54 (finding that "there is no (continued…)

In addition to its unwarranted reliance on *NPRA* and *Monroe Energy* as a free pass, EPA defends its long-overdue action by claiming that the November 2013 and June 2015 proposed rules provided notice that EPA could set biomass-based diesel volumes higher than 1.28 billion gallons in 2014 and 2015. *See* 80 Fed. Reg. at 77,491. But the statute requires EPA to "*promulgate* rules," not *propose* rules, "establishing the applicable volumes under this clause no later than 14 months before the first year for which such applicable volume will apply." 42 U.S.C. § 7545(*o*)(2)(B) (emphasis added). EPA cannot evade that clear requirement by relying on non-binding statements in proposed rules.

EPA's other notice argument—that obligated parties could anticipate biomass-based diesel volumes higher than 1.28 billion gallons because compliance with the statutory volumes for advanced biofuel and total renewable fuel would mean that compliance with the biomass-based diesel volumes will either be satisfied or easily satisfied—likewise fails. *See* 80 Fed. Reg. at 77,491. As explained in *Monroe Energy*, it was a "major point of uncertainty" whether EPA would exercise its waiver authority to reduce the increasing statutory volumes of advanced biofuel and total renewable fuel. 750 F.3d at 920-21. Thus, the statutory

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doubt that the agency's delays in issuing the standards [for compliance years 1986-1988] have been unreasonable").

volumes of advanced biofuel and total renewable fuel did not provide sufficient notice for what biomass-based diesel volumes might apply in 2014-2017.

CONCLUSION

The Court should grant the petitions for review and vacate the cellulosic biofuel volume requirement for 2016 and the biomass-based diesel volume requirements for 2014-2017.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,875 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

/s/ Thomas A. Lorenzen
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September 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2016, I caused copies of the Opening Brief for Obligated Party Petitioners on Cellulosic Biofuel and Biomass-Based Diesel to be served by the Court's CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

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September 8, 2016

ADDENDUM A: STATUTORY AND REGULATORY SUPPLEMENT

TABLE OF CONTENTS

42 U.S.C. § 7545(o)

(o) Renewable fuel program.

(1) Definitions

In this section:

(A) Additional renewable fuel

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

(B) Advanced biofuel

(i) In general

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

(ii) Inclusions

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

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

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

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

(IV) Biomass-based diesel.

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

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

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

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

(D) Biomass-based diesel

The term "biomass-based diesel" means renewable fuel that is biodiesel as defined in section 312(f) of the Energy Policy Act of 1992 (42 U.S.C. 13220(f)) 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, 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 the enactment of this sentence that is either actively managed or fallow, and nonforested.

(ii) Planted trees and tree residue from actively managed tree plantations on non-federal land cleared at any time prior to enactment of this sentence, 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-federal 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 the date of enactment of this paragraph [enacted Aug. 8, 2005], the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United 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 the date of enactment of this sentence [enacted Dec. 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 the date of enactment of this sentence, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

* * *

(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 renewable fuel (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 renewable fuel (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:

	Applicable volume of renewable fuel (in

	billions of gallons):
Calendar year:	
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 transportation 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).

* * *

(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).

* * *

(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 the date of enactment of this subparagraph, 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 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.

(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 the date of enactment of this paragraph [enacted Aug. 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 the date of enactment of this paragraph [enacted Aug. 8, 2005], the Administrator shall, if and to the extent recommended by the Secretary of Energy under subparagraph (C), waive,

in whole or in part, the renewable fuel requirement under paragraph (2) by reducing the national quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

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

(9) Small refineries

(A) Temporary exemption

(i) In general

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

(ii) Extension of exemption

(I) Study by Secretary of Energy

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

(II) Extension of exemption

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

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

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

(ii) Evaluation of petitions

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

(iii) Deadline for action on petitions

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

(C) Credit program

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

(D) Opt-in for small refineries

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

* * *

(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) on each individual and entity described in paragraph (2).

* * *

42 U.S.C. § 7607(d)

* * *

(d) Rulemaking

(1) This subsection applies to—

* * *

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

* * *

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553 (b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4) (A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B) (i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying

such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6) (A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7) (A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section).

Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

40 C.F.R. § 80.1401

* * *

Renewable Identification Number (RIN), is a unique number generated to represent a volume of renewable fuel pursuant to §§80.1425 and 80.1426.

* * *

40 C.F.R. § 80.1415

§ 80.1415 How are equivalence values assigned to renewable fuel?

(a)(1) Each gallon of a renewable fuel, or gallon equivalent pursuant to paragraph (b)(5) or (b)(6) of this section, shall be assigned an equivalence value by the producer or importer pursuant to paragraph (b) or (c) of this section.

(2) The equivalence value is a number that is used to determine how many gallon-RINs can be generated for a gallon of renewable fuel according to § 80.1426.

(b) Equivalence values shall be assigned for certain renewable fuels as follows:

(1) Ethanol which is denatured shall have an equivalence value of 1.0.

(2) Biodiesel (mono-alkyl ester) shall have an equivalence value of 1.5.

(3) Butanol shall have an equivalence value of 1.3.

(4) Non-ester renewable diesel with a lower heating value of at least 123,500 Btu/gal shall have an equivalence value of 1.7.

(5) 77,000 Btu (lower heating value) of biogas shall represent one gallon of renewable fuel with an equivalence value of 1.0.

(6) 22.6 kW-hr of electricity shall represent one gallon of renewable fuel with an equivalence value of 1.0.

(7) For all other renewable fuels, a producer or importer shall submit an application to the Agency for an equivalence value following the provisions of paragraph (c) of this section. A producer or importer may also submit an application for an alternative equivalence value pursuant to paragraph (c) if the renewable fuel is listed in this paragraph (b), but the producer or importer has

reason to believe that a different equivalence value than that listed in this paragraph (b) is warranted.

(c) *Calculation of new equivalence values.*

(1) The equivalence value for renewable fuels described in paragraph (b)(7) of this section shall be calculated using the following formula:

EV = (R/0.972) * (EC/77,000)

Where:

EV = Equivalence Value for the renewable fuel, rounded to the nearest tenth.

R = Renewable content of the renewable fuel. This is a measure of the portion of a renewable fuel that came from renewable biomass, expressed as a fraction, on an energy basis.

EC = Energy content of the renewable fuel, in Btu per gallon (lower heating value).

(2) The application for an equivalence value shall include a technical justification that includes a description of the renewable fuel, feedstock(s) used to make it, and the production process.

(i) A calculation for the requested equivalence value according to the equation in paragraph (c)(1) of this section, including supporting documentation for the value of EC used in the calculation such as a certificate of analysis from a laboratory that verifies the lower heating value in Btu per gallon of the renewable fuel produced.

(ii) For each feedstock, component, or additive that is used to make the renewable fuel, provide a description, the percent input, and identify whether or not it is renewable biomass or is derived from renewable biomass.

(iii) For each feedstock that also qualifies as a renewable fuel, state whether or not RINs have been previously generated for such feedstock.

(iv) A description of the renewable fuel and the production process, including a block diagram that shows all inputs and outputs at each step of the production

process with a sample quantity of all inputs and outputs for one batch of renewable fuel produced.

(3) The Agency will review the technical justification and assign an appropriate equivalence value to the renewable fuel based on the procedure in this paragraph (c).

(4) Applications for equivalence values must be sent to one of the following addresses:

(i) For U.S. Mail: U.S. EPA, Attn: RFS2 Program Equivalence Value Application, 6406J, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

(ii) For overnight or courier services: U.S. EPA, Attn: RFS2 Program Equivalence Value Application, 6406J, 1310 L Street, NW., 6th floor, Washington, DC 20005. (202) 343-9038.

(5) All applications required under this section shall be submitted on forms and following procedures prescribed by the Administrator.

40 C.F.R. § 80.1427

§ 80.1427 How are RINs used to demonstrate compliance?

(a) *Renewable Volume Obligations.* (1) Except as specified in paragraph (b) of this section or § 80.1456, each party that is an obligated party under § 80.1406 and is obligated to meet the Renewable Volume Obligations under § 80.1407, or is an exporter of renewable fuels that is obligated to meet Renewable Volume Obligations under § 80.1430, must demonstrate pursuant to § 80.1451(a)(1) that it is retiring for compliance purposes a sufficient number of RINs to satisfy the following equations:

* * *

(2) Except as described in paragraph (a)(4) of this section, RINs that are valid for use in complying with each Renewable Volume Obligation are determined by their D codes.

(i) RINs with a D code of 3 or 7 are valid for compliance with the cellulosic biofuel RVO.

(ii) RINs with a D code of 4 or 7 are valid for compliance with the biomass-based diesel RVO.

(iii) RINs with a D code of 3, 4, 5, or 7 are valid for compliance with the advanced biofuel RVO.

(iv) RINs with a D code of 3, 4, 5, 6, or 7 are valid for compliance with the renewable fuel RVO.

(3)(i) Except as provided in paragraph (a)(3)(ii) of this section, a party may use the same RIN to demonstrate compliance with more than one RVO so long as it is valid for compliance with all RVOs to which it is applied.

(ii) A cellulosic diesel RIN with a D code of 7 cannot be used to demonstrate compliance with both a cellulosic biofuel RVO and a biomass-based diesel RVO.

* * *

(6) Except as provided in paragraph (a)(7) of this section:

(i) RINs may only be used to demonstrate compliance with the RVOs for the calendar year in which they were generated or the following calendar year.

(ii) RINs used to demonstrate compliance in one year cannot be used to demonstrate compliance in any other year.

* * *

(b) *Deficit carryovers.* (1) An obligated party or an exporter of renewable fuel that fails to meet the requirements of paragraph (a)(1) or (a)(7) of this section for calendar year i is permitted to carry a deficit into year i+1 under the following conditions:

(i) The party did not carry a deficit into calendar year i from calendar year i-1 for the same RVO.

(ii) The party subsequently meets the requirements of paragraph (a)(1) of this section for calendar year i+1 and carries no deficit into year i+2 for the same RVO.

(iii) For compliance with the biomass-based diesel RVO in calendar year 2011, the deficit which is carried over from 2010 is no larger than 57% of the party's

2010 biomass-based diesel RVO as determined prior to any adjustment applied pursuant to paragraph (a)(7)(i) of this section.

(iv) The party uses the same compliance approach in year i+1 as it did in year i, as provided in § 80.1406(c)(2).

* * *