ORAL ARGUMENT NOT YET SCHEDULED

Nos. 16-1005 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICANS FOR CLEAN ENERGY, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Petition for Review of Action by the U.S. Environmental Protection Agency

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BRIEF FOR RESPONDENT EPA

JOHN C. CRUDEN
Assistant Attorney General

LISA M. BELL
SAMARA M. SPENCE
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
202.514.9275

Counsel for Respondents

Of Counsel:
ROLAND DUBOIS
U.S. Environmental Protection Agency
Office of General Counsel
Washington, D.C.

December 15, 2016

RESPONDENT'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondent United States Environmental Protection Agency ("EPA" or "the Agency") submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici

All petitioners, respondents, and intervenors appearing in this Court are accurately identified in the opening briefs of Petitioners.

American Soybean Association, Arvegenix, Inc., CVR Energy, Inc., Canola Council of Canada, National Renderers Association, Small Retailers Coalition, and U.S. Canola Association are amici curiae for Petitioners in all consolidated cases.

B. Rulings Under Review

The agency action under review is EPA's Rule entitled "Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017," 80 Fed. Reg. 77,420 (Dec. 14, 2015).

C. Related Cases

These consolidated cases have not previously been before this Court or any other court. Petitioners in consolidated case numbers 16-1044, 16-1049, and 16-1054 have separately filed petitions in this Court, Nos. 14-1014, 16-1032, 16-1052, and 16-1055, which challenge EPA's regulation, promulgated in 2010 and codified at 40 C.F.R. § 80.1406, that designates refiners and importers of gasoline or diesel

fuel as "obligated parties" under the Renewable Fuel Standards program. As required by this Court's precedent, these parties have also filed administrative petitions with EPA, and these cases are currently being held in abeyance pending EPA's review of the administrative petitions. See Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654, 666 (D.C. Cir. 1975).

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GLOSSARY

ACEI Petitioners	Petitioners in Nos. 16-1005 and 16-1056
AFPM	American Fuel & Petrochemical Manufacturers
API	American Petroleum Institute
B11	Fuel containing 11% biodiesel content
B15	Fuel containing 15% biodiesel content
B20	Fuel containing 20% biodiesel content
B100	Fuel containing 100% biodiesel content
CAA	Clean Air Act
CNG/LNG	Compressed or liquid natural gas produced from biogas
E10	Gasoline blend with no more than 10% ethanol content
E85	Gasoline blend containing 51% to 83% ethanol content
EIA	Energy Information Administration
EISA	Energy Independence and Security Act of 2007
EPA	Environmental Protection Agency
NBB	National Biodiesel Board
NPRA	National Petrochemical & Refiners Association
OPP	Obligated Party Petitioners
RFS	Renewable Fuel Standards
RIN	Renewable Identification Number

INTRODUCTION

Congress created the Renewable Fuel Standards ("RFS") program in the Clean Air Act ("CAA" or "the Act") to expand the domestic use of renewable fuels and reduce greenhouse gas emissions. The Act directs the United States Environmental Protection Agency ("EPA" or "the Agency") to set annual standards to achieve specified volumes of domestic renewable fuel use and gives EPA authority to adjust those volumes as part of its annual standard-setting process. 42 U.S.C. § 7545(o)(3)(B), (7)(A), (D). Petitioners challenge EPA's final action adjusting the annual volumes and setting the annual standards for the years 2014, 2015, and 2016. Petitioners representing renewable fuel groups argue that the standards are too low. Petitioners representing parties that must comply with the standards argue that they are too high, or should not apply to them at all. EPA properly exercised its authority under the Act in setting the annual standards in the face of converging challenges to renewable fuel growth under the program, and fully and rationally evaluated the concerns of multiple parties across the complex renewable fuels market. EPA's reasoned action should be upheld.

JURISDICTION

On December 14, 2015, EPA published a Final Rule establishing Renewable Fuel Standards for 2014, 2015, and 2016 and the Biomass-Based Diesel Volume

Requirements for 2017. 80 Fed. Reg. 77,420 ("the Rule"). Petitioners[1] timely filed petitions for judicial review. The Court has jurisdiction under the Clean Air Act, 42 U.S.C. § 7607(b).

PERTINENT STATUTES AND REGULATIONS

Petitioners' opening briefs and the addendum to this brief contain pertinent statutes and regulations.

STATEMENT OF ISSUES

1. This Court has held that EPA has broad discretion to determine whether and under what circumstances to use its cellulosic waiver authority to lower the statutory volume targets for advanced and total renewable fuels when it lowers the volume of cellulosic biofuel. Did EPA reasonably exercise this broad discretion when it lowered the statutory volumes of advanced biofuel using the cellulosic waiver provision?

[1] Petitioners in this consolidated action are: (1) in case Nos. 16-1005 and 16-1056, Americans for Clean Energy, Inc., Renewable Fuels Association, Growth Energy, American Coalition for Ethanol, Biotechnology Innovation Organization, National Sorghum Producers, National Corn Growers Association, National Farmers Union (collectively, "ACEI Petitioners"); (2) in case No. 16-1053, National Biodiesel Board ("NBB"); and (3) in case Nos. 16-1044, 16-1047, 16-1049, 16-1050, 16-1054, American Fuel & Petrochemical Manufacturers ("AFPM"), American Petroleum Institute ("API"), Monroe Energy, LLC, Valero Energy Corp., 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 Company, and Wyoming Refining Company (collectively, "Obligated Party Petitioners").

2. The Act authorizes EPA to use its general waiver authority to lower the statutory volumes of renewable fuel when there is an "inadequate domestic supply." Where the statute does not define "supply," and the term could apply at many different points in the transportation fuel supply chain, should the Court defer to EPA's interpretation and use of its general waiver authority to further lower the volume of total renewable fuel based on a finding of inadequate supply of renewable fuel to the ultimate consumer?

3. Were the methodology and technical analyses EPA used to assess the 2016 volumes of total renewable fuel and advanced biofuel reasonable and supported by evidence in the record?

4. Under this Court's precedent, EPA must take a "neutral aim at accuracy" when projecting cellulosic biofuel production. Was EPA's outcome-neutral methodology used to project cellulosic biofuel production in 2016 reasonable and supported by the record?

5. Under this Court's well-settled precedent, EPA is authorized to impose renewable fuel obligations as required by the Act even when EPA has missed statutory deadlines. Did EPA act reasonably in setting biomass-based diesel volumes after the statutory deadlines when it followed this Court's precedent for setting volumes in such circumstances?

6. EPA issued a regulation in 2007 designating the parties that must comply with the renewable fuel standards, and reaffirmed that decision in a 2010 rulemaking. Where EPA did not propose to reconsider the matter and the Act unambiguously confers broad discretion on EPA to determine when and on what grounds to identify obligated parties, was it arbitrary or capricious for EPA to treat comments on a change in the longstanding point of obligation as "outside the scope of this rulemaking"?

STATEMENT OF THE CASE

I. Statutory Background

In 2005, and again in 2007, Congress amended the CAA to establish a Renewable Fuel Standards ("RFS") program, now codified at 42 U.S.C. § 7545(o). See Energy Policy Act of 2005 ("EPAct"), Pub. L. No. 109-58, 119 Stat. 594 (2005); Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121 Stat. 1492 (2007). To "move the United States toward greater energy independence and security," 121 Stat. 1492, the Act requires increasing use over time of "renewable fuel," which is fuel made from biomass sources "used to replace or reduce the quantity of fossil fuel present in transportation fuel." 42 U.S.C. § 7545(o)(1)(J). The Act establishes increasing annual "applicable volume" targets for four categories of renewable fuels—total renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel—to be used in the

U.S. transportation fuel system.[2] 42 U.S.C. § 7545(o)(2)(B)(i). Advanced biofuels are a subset of renewable fuels that produce lower lifecycle greenhouse gas emissions than conventional renewable fuels such as corn-based ethanol. 42 U.S.C. § 7545(o)(1)(B). Biomass-based diesel is a subset of advanced biofuels and is a diesel fuel substitute made from feedstocks such as oils and animal fats. Id. § 7545(o)(1)(D); 40 C.F.R. § 80.1426 Table 1. Cellulosic biofuel is also a subset of advanced biofuel derived from cellulose materials such as switchgrass and crop residue that produces even lower lifecycle greenhouse gas emissions than other advanced biofuels. 42 U.S.C. § 7545(o)(1)(E); 40 C.F.R. § 80.1426 Table 1.

Applicable volume targets for total renewable fuel, advanced biofuel and cellulosic biofuel are specified by the Act for each year through 2022. 42 U.S.C. § 7545(o)(2)(B)(i). For biomass-based diesel, the Act specifies applicable volumes only through 2012. Id. After those dates, the applicable volumes are set by EPA in accordance with factors specified in the statute. Id. § 7545(o)(2)(B)(ii). EPA must determine those volumes fourteen months before the year in which they will apply. Id.

Congress directed EPA to establish a compliance program and then to set annual percentage standards to ensure that the applicable volumes are used each

[2] The Act also allows credits for renewable fuels used to replace or reduce the amount of fossil fuel present in home heating oil and jet fuel. See 42 U.S.C. §§ 7545(o)(1)(A), 7545(o)(5)(E).

year. Id. §§ 7545(o)(2)(A)(i), (iii), 7545(o)(3)(B)(i). EPA calculates the annual percentage standards by dividing the applicable volume for each type of renewable fuel by the Energy Information Administration's ("EIA") estimate of the national volume of transportation fuel that will be sold or introduced into commerce that year. Id. § 7545(o)(3)(A). Obligated parties apply those percentage standards to their own annual production or importation of gasoline and diesel to calculate their individual renewable volume obligations. Id. § 7545(o)(3)(B)(ii). EPA must determine the percentage standards for each calendar year by November 30 of the prior year. Id. § 7545(o)(3)(B).

The percentage standards for certain renewable fuels are "nested," meaning more specific forms of renewable fuel are a subset of broader categories of such fuel. Specifically, cellulosic biofuel and biomass-based diesel are subsets of advanced biofuel, and advanced biofuel is a subset of total renewable fuel. See id. § 7545(o)(1)(B), (D), (E), (J). A nested renewable fuel may be used to simultaneously satisfy the more specific standard as well as the broader categories of renewable fuels of which it is a part. Id.; 40 C.F.R. § 80.1427(a)(3). For example, any renewable fuel that qualifies as biomass-based diesel may be simultaneously used to satisfy the biomass-based diesel, advanced biofuel, and total renewable fuel requirements.

CAA Section 211(o)(3)(B)(ii) directs that the annual percentage standards shall "be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. § 7545(o)(3)(B)(ii). EPA identified the "appropriate" obligated parties in its 2007 regulations establishing the RFS program under the EPAct, 72 Fed. Reg. 23,900, 23,923-24 (May 1, 2007), and reaffirmed its approach in its 2010 regulations implementing the EISA amendments. 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010). In a regulation codified at 40 C.F.R. § 80.1406(a)(1) ("Point of Obligation Regulation"), EPA designated refiners and importers of gasoline and diesel fuel as the obligated parties under the program.

Congress gave EPA authority to reduce the statutory applicable volumes under certain circumstances. First, under the "cellulosic waiver provision," the Act requires that EPA evaluate anticipated cellulosic biofuel production volumes, based on estimates provided by EIA. Id. § 7545(o)(7)(D)(i). If EPA's projected volume is lower than the volume specified in the statute, the cellulosic waiver provision directs that EPA "shall reduce the applicable volume of cellulosic biofuel required under [the Act] to the projected volume available during that calendar year." Id. If EPA lowers the applicable volume for cellulosic biofuel, EPA is also authorized—but not required—to lower the applicable volumes for advanced biofuel and total renewable fuel by the same or a lesser amount. Id. The cellulosic waiver provision does not list any specific preconditions or factors that EPA must

consider in determining whether to do so. Id.; see also Monroe Energy, LLC v. EPA, 750 F.3d 909, 915-16 (D.C. Cir. 2014).

The Act also contains a "general waiver provision" that allows, but does not require, EPA to reduce the statutory volume of any type of renewable fuel where, in consultation with the Secretaries of Agriculture and Energy, the Agency determines there is "inadequate domestic supply" or where compliance would "severely harm the economy or environment of a State, a region or the United States." 42 U.S.C. § 7545(o)(7)(A).

The Act further contains provisions to ease the regulatory burden on obligated parties. For example, it requires EPA to establish a credit program to allow obligated parties who over-comply in one year to apply credits toward compliance in a subsequent year or to sell the credits to another obligated party, which can then use them for its own compliance. Id. § 7545(o)(5)(A)-(C). Obligated parties may also carry a deficit forward to the next year, which must then be satisfied together with the next year's compliance obligation. Id. § 7545(o)(5)(D). The statute also allows small refineries to apply "at any time" for a hardship exemption. Id. § 7545(o)(9)(B)(i).

II. Regulatory Background

The RFS regulations do not require obligated parties to blend renewable fuel into transportation fuel themselves to comply with the standards. Instead,

producers and importers of renewable fuels generate renewable identification numbers, or "RINs," for each gallon of renewable fuel they import or produce for use in the United States. 40 C.F.R. § 80.1426(a). RINs form the basis of the credit trading program required by the Act. See 42 U.S.C. § 7545(o)(5); see also 40 C.F.R. §§ 80.1425-29. RINs are assigned to batches of renewable fuel by producers and importers, and may only be "separated" from those batches when purchased by an obligated party or blended to produce transportation fuel. 40 C.F.R. §§ 80.1426(e), 80.1429(b). Once separated, RINs may be traded between any parties registered with EPA. Id. § 80.1428(b). Obligated parties comply with the standards by accumulating RINs and then "retiring" them in an annual compliance demonstration. Id. § 80.1427(a).

The RIN system allows obligated parties to comply in the way they find most economically-efficient, avoiding, if they choose, expenditures associated with fuel blending. 80 Fed. Reg. at 77,483. In addition, should any obligated party accumulate enough RINs to over-comply with the standards, these excess or "carryover" RINs can be used to meet up to twenty percent of an obligated party's compliance obligation in the following year, or sold to parties that need them. Id. at 77,483; 40 C.F.R. § 80.1427(a)(1), (5).

III. Factual and Procedural Background

A. Challenges to Renewable Fuel Growth Under the RFS Program

The Rule under review addresses three converging challenges to renewable fuel growth: an increasing gap between the cellulosic biofuel targets and projected cellulosic biofuel production; saturation in the fuels market of E10—a fuel blend containing up to 10% ethanol; and lower transportation fuel use than anticipated when the RFS program was enacted.

First, the volume targets in the 2007 EISA amendments called for rapid growth in the then-nascent cellulosic biofuel industry. Under the Act, cellulosic volumes grow from 0.1 billion gallons in 2010 to 16 billion gallons in 2022, representing the majority of the anticipated growth in the advanced and total volumes after 2013. 42 U.S.C. § 7545(o)(2)(B)(i)(III). However, production levels for cellulosic biofuels have fallen far short of the statutory targets. 80 Fed. Reg. at 77,428. EPA projected a level of 230 million ethanol-equivalent gallons of cellulosic biofuels in 2016, only 5.4% of the 4.25 billion gallon statutory target. Id. at 77,422 Table I-1.

Second, the market has become saturated with gasoline containing up to 10% ethanol, or "E10"—the most common renewable fuel blend. Id. at 77,456. The use of ethanol increased dramatically early in the RFS program to satisfy the total renewable fuel standards—gasoline on average contained approximately 4%

ethanol in 2006 and grew to contain over 9% in 2010. Id. However, growth in ethanol use has plateaued primarily because, while E10 is widely distributed and used by all vehicles, higher ethanol blends, such as E15 (15% ethanol) and E85 (blend containing between 51% and 83% ethanol) are sold by a small number of retail stations, and only a small subset of vehicles use E85. Id. This plateau presents challenges to achieving the statutory volumes for total renewable fuel.

Third, due in part to improved vehicle mileage standards, lower gasoline volumes are being consumed than forecast at the time of the EISA amendments, providing less volume in which to blend renewable fuels. 80 Fed. Reg. 33,100, 33,126 (June 10, 2015). Prior to EISA's passage, EIA projected that domestic gasoline consumption would rise to about 159 billion gallons in 2016. 80 Fed. Reg. at 33,126. Instead, gasoline consumption has declined considerably to approximately 140 billion gallons in 2016. 80 Fed. Reg. at 77,511 Table V.B.3-1.

While the use of higher ethanol-blends and non-ethanol biofuels continues to grow, supply has not kept pace with the statutory targets.[3] This is because the use

[3] For example, the growth of non-cellulosic advanced biofuels has failed to make up for the rapidly increasing cellulosic shortfall. The statute specifies that, from 2012 to 2015, volumes of advanced biofuels would grow from 2.0 to 5.5 billion gallons, and that the cellulosic biofuel portion would increase from 0.5 billion gallons to 3.0 billion gallons. 42 U.S.C. § 7545(o)(2)(B)(i)(I), (II), (III). While the non-cellulosic advanced biofuel supply grew from about 2 billion gallons in 2012 to about 3 billion gallons in 2015, 80 Fed. Reg. at 77,479, this growth has been insufficient to keep pace with the ever-escalating statutory targets, especially in light of the cellulosic shortfall of nearly 3 billion gallons.

of these fuels is limited in the short term by the need for a multitude of actors in the market—such as fuel producers, suppliers, distributors, and retailers—to make the decisions and investments needed for growth. See 80 Fed. Reg. at 77,442. Significant growth could require construction of renewable fuel production facilities and infrastructure for storage, blending, and distribution. Id. Investments are also needed in cropland to grow feedstocks, and in vehicle types that can accommodate ethanol blends other than E10 or non-ethanol renewable fuels. However, these investment decisions take time to implement and have not kept pace with the rapidly increasing statutory targets. Id. at 77,453.

EPA originally assessed these challenges when it proposed to set volume requirements for advanced biofuels and total renewable fuels below the statutory volumes for 2014 in a November 2013 proposed rulemaking. 78 Fed. Reg. 71,732 (Nov. 29, 2013). However, this proposal "generated significant comment and controversy, particularly about how volumes should be set in light of lower gasoline consumption than" Congress had forecast, "and whether and on what basis the statutory volumes should be waived." 79 Fed. Reg. 73,007-08 (Dec. 9, 2014). Consequently, EPA announced that it would not finalize the 2014 standards before the end of 2014. Id. at 73,008. Instead, EPA issued a new proposal for 2014, together with proposed standards for 2015 and 2016, leading to the Rule challenged here.

B. The Rule

The challenged Rule was published on December 14, 2015. 80 Fed. Reg. at 77,420. In it, EPA established: (1) the final volume requirements and percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel for 2014, 2015, and 2016; and (2) the 2017 biomass-based diesel volume requirement. Id. In establishing the 2014, 2015, and 2016 requirements, EPA used its cellulosic waiver authority to lower the cellulosic biofuel, advanced biofuel, and total renewable fuel volumes, and then separately used its general waiver authority to further lower the total renewable fuel volumes. The final volume requirements are set forth below, with corresponding statutory targets in parentheses:

Fuel	**2014 Volume Requirements**	**2015 Volume Requirements**	**2016 Volume Requirements**	**2017 Volume Requirements**
Cellulosic biofuel	0.033 (1.75)	0.123 (3.0)	0.230 (4.25)	N/A
Biomass-based biofuel	1.63 (≥1.0)	1.73 (≥1.0)	1.90 (≥1.0)	2.00 (≥1.0)
Advanced biofuel	2.67 (3.75)	2.88 (5.5)	3.61 (7.25)	N/A
Total renewable fuel	16.28 (18.15)	16.93 (20.5)	18.11 (22.25)	N/A

42 U.S.C. § 7545(o)(2)(B)(i)(I)-(IV); 80 Fed. Reg. 77,420, 77,422 Table I-1.[4]

[4] Volumes are shown in billions of gallons, and are expressed as ethanol-equivalent volumes of renewable fuel, except for biomass-based diesel which is expressed as

i. Use of Waiver Authorities to Determine Final Volume Requirements

In determining the volume requirement for cellulosic biofuel under 42 U.S.C. § 7545(o)(7)(D), this Court has instructed EPA to "take [a] neutral aim at accuracy," meaning it must estimate projected production volumes as accurately as possible. Am. Petroleum Inst. v. EPA, 706 F.3d 474, 476-81 (D.C. Cir. 2013) ("API"). For 2014—which had already passed—EPA set the cellulosic biofuel volume requirement based on the number of cellulosic RINs actually generated and available for compliance in that year. 80 Fed. Reg. at 77,501-02. For 2015—which had nearly passed—EPA set the volume requirement based on actual cellulosic RIN generation where data was available and on projected cellulosic volumes for the remainder of 2015. Id. at 77,502-07. For 2016, EPA also projected the cellulosic biofuel volumes. Id. at 77,502-09 (projection methodology for 2016 similar to that for 2015).

For its projections, EPA reviewed a range of data and factors to estimate a low-end and high-end range of potential production volumes for each company (or groups of companies) expected to produce cellulosic biofuel in 2016. Id. at 77,503. Because facility-based projections would be too uncertain, EPA created

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biodiesel equivalent volumes. 80 Fed. Reg. at 77,424 Table 1.A-1. A gallon of ethanol counts as one gallon of renewable fuel, while a gallon of other biofuels may count as more, depending on its energy content as compared to ethanol. 40 C.F.R. § 80.1415.

four groups of similarly-situated companies, calculated the total low-end and high-end ranges for each group, and then used the "percentile" within the aggregate range for each group that best represents likely production volumes, based on the risks associated with each group. Id. at 77,503, 77,505-06. The resulting volumes for each group were then summed to derive the overall cellulosic biofuel projection. The cellulosic volumes were far lower than statutory targets, so EPA used its cellulosic waiver authority to derive the 2014, 2015, and 2016 cellulosic biofuel percentage standards based on those lower volumes of 33 million gallons, 123 million gallons, and 230 million gallons, respectively. Id. at 77,422 Table I-1, 77,434; see also 42 U.S.C. § 7545(o)(7)(D)(i).

Once it lowered the cellulosic biofuel volumes, EPA exercised its broad discretion under 42 U.S.C. § 7545(o)(7)(D)(i) to consider whether to lower the advanced biofuel and total renewable fuel volumes by up to the same amount. See Monroe Energy, 750 F.3d at 919. EPA determined that it was appropriate to lower volumes of advanced biofuel using the cellulosic waiver authority in circumstances where advanced biofuels could not make up for the cellulosic shortfall: when there is inadequate projected production of non-cellulosic advanced biofuels, or where constraints exist—such as distribution or infrastructure constraints—that would limit the actual use of such fuels by consumers. 80 Fed. Reg. at 77,434. For past or nearly-past compliance years 2014 and 2015, EPA calculated the volumes of

advanced biofuel based on the number of advanced biofuel RINs actually generated and available for compliance, plus a projection for the remaining three months of 2015 for which data was not available. Id. at 77,439. For 2016, EPA analyzed production, import, and distribution constraints—as well as public comments addressing these and other factors—to project the reasonably attainable level of advanced biofuels. Id. at 77,476-79.

EPA used its cellulosic waiver authority to lower the advanced biofuel volumes to 2.67 billion ethanol-equivalent gallons for 2014, 2.88 billion ethanol-equivalent gallons for 2015, and 3.61 billion ethanol-equivalent gallons for 2016. Id. at 77,422, Table I-1. These reductions are within the amount permitted under the cellulosic waiver authority (i.e., less than the amount that EPA reduced the cellulosic biofuel volumes) and continue to result in growth of advanced biofuels by approximately 1 billion gallons across the three compliance years. See id.

Pursuant to the cellulosic waiver provision, EPA then also lowered the total renewable fuel volumes by the same amount. Id. at 77,434. Even with the reduction obtained with the cellulosic waiver authority, however, EPA determined that the resulting total renewable fuel volumes could not be achieved. EPA therefore relied on its general waiver authority to provide an additional reduction in total renewable fuel volumes for each year based on a finding of "inadequate domestic supply." Id. at 77,435; 42 U.S.C. § 7545(o)(7)(A)(ii).

In considering whether to use the general waiver, EPA interpreted the phrase "inadequate domestic supply" for the first time. 80 Fed. Reg. at 77,435. After considering the statutory text, structure, and purposes of the RFS program, EPA determined that the most reasonable way to interpret the phrase was "to encompass the full range of constraints that could result in an inadequate supply of renewable fuel to the ultimate consumers," including constraints affecting the ability to produce or import qualifying fuels and the ability to distribute, blend, and consume such fuels in vehicles. Id.

Applying this interpretation, EPA analyzed the maximum achievable total renewable fuel volume that could be made available to the ultimate consumer "under real world conditions, taking into account the ability of the standards to cause a market response and result in increase in the supply of renewable fuels." Id. at 77,449. This calculation for 2014 and 2015 was based on EPA's assessment of actual total renewable fuel RINs generated and available (plus a projection for the remainder of 2015 where data was not available). Id. at 77,445-48.

For 2016, EPA analyzed the potential for growth in three broad categories of renewable fuel—ethanol, biomass-based diesel, and other types of renewable fuel—taking into account constraints on the supply of those fuels for use by consumers, such as infrastructure and distribution constraints, as well as public comments on these issues. Id. at 77,457-75. EPA concluded that the volumes of

total renewable fuel calculated using the cellulosic waiver were still out of reach. Id. at 77,444. Accordingly, EPA further lowered the total renewable fuel volumes under the general waiver authority, for final volume requirements of 16.28 billion gallons for 2014, 16.93 billion gallons for 2015, and 18.11 billion gallons for 2016. Id. at 77,422.

In setting both the advanced biofuel and total renewable fuel volumes, EPA also considered whether it should decline—as it has done previously—to reduce the statutory volumes under the cellulosic and general waiver authorities based on the bank of "carryover" RINs available for compliance. Id. at 77,482-87. EPA ultimately determined that, at most, 1.74 billion carryover RINs would be available for compliance with the 2014-2016 standards—significantly less than the amount available in prior years. Id. at 77,483. EPA explained that to retain the statutory volumes based on the existence of carryover RINs in these years would result in complete drawdown of the carryover RIN bank. Id. at 77,485-86. This would deprive obligated parties of necessary compliance flexibility and negatively impact the liquidity of the RIN market and functionality of the RFS program. Id. at 77,483-87. Based on these and other considerations, EPA declined to set the volume requirements at a level expected to result in a drawdown on the carryover RIN bank.

ii. Biomass-Based Diesel Volumes

The Rule also set the biomass-based diesel volumes for 2014, 2015, 2016, and 2017. Id. at 77,430. For all of these years, EPA missed the statutory deadline to promulgate biomass-based diesel volumes 14 months before the year in which the volumes would apply.[5] 42 U.S.C. § 7545(o)(2)(B)(ii); 80 Fed. Reg. at 77,430. EPA acknowledged the lateness of its determination, but explained that the statute requires EPA to set the volumes, even if late. 80 Fed. Reg. at 77,430. EPA further explained that it was exercising its authority reasonably by setting 2014 and 2015 volumes equal to actual production (and projected actual production for months for which data was not available), and setting 2016 and 2017 volumes at levels that achieve only modest incremental increases over prior year requirements. In doing so, EPA considered the importance of the late rules to the biomass-based diesel industry, the impact of other standards on compliance with the nested biomass-based diesel volumes, compliance flexibility options available to obligated parties that could mitigate burdens associated with the Rule's timing, and notice to the parties, and extended compliance deadlines in the Rule. Id. at 77,430, 77,490-92.

iii. RFS Point of Obligation

Finally, as in past rulemakings, EPA did not propose to revisit the Point of Obligation Regulation designating refiners and importers of gasoline and diesel

[5] EPA missed the deadline for 2017 by a month.

fuel as obligated parties. See 80 Fed. Reg. at 33,105-08. Several obligated parties suggested in comments that EPA could require greater renewable fuel volumes by changing the point of obligation. 80 Fed. Reg. at 77,431. EPA responded that "these issues are beyond the scope of this rulemaking. However, we will continue to actively monitor the functioning of the market, assess all relevant data, and review our options as necessary." Id. at 77,431; see also EPA-HQ-OAR-2015-0111-3671 at 883, JA__ ("EPA did not propose any changes to the definition of an obligated party, nor did we specifically seek comment on this issue.").

In separate proceedings, several of the obligated party petitioners filed petitions with EPA requesting revisions to the Point of Obligation Regulation. EPA recently proposed to deny these petitions and opened a 60-day period for public comment. 81 Fed. Reg. 83,776 (Nov. 22, 2016).

C. Petitioners' Challenges to the Rule

Petitioners in these consolidated cases broadly argue that the renewable fuel volumes in the Rule are either too low or too high, or should not apply to them at all. They specifically challenge: (1) EPA's interpretation and use of its cellulosic waiver authority to lower advanced biofuel volumes for 2014 through 2016 (NBB); (2) EPA's interpretation and use of its general waiver authority to further lower total renewable fuel volumes for 2014 through 2016 (ACEI Petitioners); (3) the methodologies and analyses used in setting the 2016 volume requirements for

advanced biofuel (NBB) and total renewable fuel (ACEI Petitioners); (4) the methodology used to project 2016 production of cellulosic biofuel (API, AFPM, and Monroe Energy); (5) promulgation of biomass-based diesel volumes for each year from 2014 through 2017 (API, AFPM, and Monroe Energy); and (6) the absence of a reconsideration of the Point of Obligation Regulation in the Rule (Obligated Party Petitioners, excluding API). These challenges are without merit, and the petitions should be denied.

STANDARD OF REVIEW

Under the CAA, the Court may reverse EPA's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(1)(E), (d)(9)(A), (C). This standard is narrow, and the Court does not substitute its judgment for EPA's. Bluewater Network v. EPA, 370 F.3d 1, 11 (D.C. Cir. 2004). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1160 (D.C. Cir. 1980) ("That the evidence in the record may also support other conclusions, even those that are inconsistent with the [EPA] Administrator's, does not prevent [the court] from concluding that h[er] decisions were rational and supported by the record."); Mississippi v. EPA, 744 F.3d 1334,

1348 (D.C. Cir. 2013). This Court gives an "extreme degree of deference" to EPA's "evaluation of scientific data within its technical expertise," especially "EPA's administration of the complicated provisions of the Clean Air Act." Miss. Comm'n on Envtl. Quality v. EPA, 790 F.3d 138, 150 (D.C. Cir. 2015). "The task of the reviewing court is to apply [this] . . . standard of review to the agency decision based on the record the agency presents to the reviewing court." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (internal citation omitted).

Questions of statutory interpretation are governed by the familiar two-step test set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). Under step one, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." Id. at 842. If Congress' intent is clear, the inquiry ends. Id. at 842-43. If the statute is silent or ambiguous, step two requires the Court to decide whether the Agency's interpretation is based on a permissible construction of the statute. Id. at 843. To uphold EPA's interpretation, the Court need not find that EPA's interpretation is the only permissible construction, or even the reading the Court would have reached, but only that EPA's interpretation is reasonable. Id. at 843 n.11; Chem. Mfrs. Ass'n v. NRDC, 470 U.S. 116, 125 (1985).

SUMMARY OF ARGUMENT

The Rule represents a reasonable exercise of EPA's discretion and judgment to lower the statutory volumes of cellulosic biofuel, advanced biofuel, and total renewable fuel under the cellulosic waiver authority, to further reduce the total renewable fuel volumes under the general waiver authority, and to set the standards and volumes for all four categories of renewable fuels. Petitioners raise a host of legal and record-based objections to EPA's determination, all of which lack merit.

First, as this Court has established, EPA retains broad discretion under the cellulosic waiver authority to determine, when it reduces the statutory volume of cellulosic biofuel, whether it should also reduce the total renewable fuel and advanced biofuel volumes. EPA exercised that discretion reasonably here. The Agency thoroughly explained its decision to reduce the advanced biofuel volumes to "reasonably attainable" levels that could partly make up for the shortfall in cellulosic biofuels in 2014, 2015, and 2016. Infra Argument Part I.A.

Second, EPA's use, for the first time, of its general waiver authority to further reduce the statutory volumes of total renewable fuel reflects a reasonable interpretation of the ambiguous statutory term "inadequate domestic supply" to mean the volumes of renewable fuels that can be supplied to the ultimate consumer. Such an interpretation is consistent with the text and purposes of the Act and should be upheld. Infra Argument Part I.B.

Third, Petitioners' challenges to the methodology used by EPA to calculate the 2016 advanced biofuel, total renewable fuel, and cellulosic biofuel volumes are without merit. As to NBB's challenges to the 2016 advanced biofuel standard, EPA thoroughly explained its well-reasoned analysis. Infra Argument Part II.A. The ACEI Petitioners' challenge to EPA's consideration of E85 in determining the total renewable fuel standard is likewise unsupported. EPA reasonably relied on available past data in estimating the volume of E85, and Petitioners' reliance on market theory to contradict this analysis, without alternative record data, does not undermine EPA's reasoned judgment. Infra Argument Part II.B. The challenge from API, AFPM, and Monroe Energy to EPA's methodology for projecting 2016 cellulosic biofuel production also fails. EPA used an outcome-neutral methodology that reasonably predicted future production based on known data and uncertainties. Infra Argument Part III.

Fourth, this Court has twice held that EPA does not forfeit its authority to promulgate renewable fuel standards in the manner specified by the Act by missing a statutory deadline. The attempt of API, AFPM, and Monroe Energy to challenge the biomass-based diesel volumes in excess of past volumes on the basis of missed deadlines therefore fails. EPA reasonably took into account actual production for periods that had passed, the lateness of the rule, the importance of the Rule to the biomass-based diesel industry, the impact of other standards on biomass-based

diesel compliance, available compliance flexibility mechanisms, and notice to the parties, and also extended compliance deadlines for 2014 and 2015. Infra Argument Part IV.

Finally, the challenge by some Obligated Party Petitioners to a long-standing regulation designating obligated parties is time-barred: EPA did not expressly or implicitly reopen the Point of Obligation Regulation. In any event, the Act unambiguously confers on EPA discretion to designate obligated parties when and how it deems "appropriate." The proper avenue to seek a change to the point of obligation is in a petition for rulemaking to EPA, not through challenges outside the scope of the Rule. Infra Argument Part V.

ARGUMENT

I. EPA REASONABLY EXERCISED ITS WAIVER AUTHORITIES TO REDUCE THE VOLUMES OF ADVANCED BIOFUEL AND TOTAL RENEWABLE FUEL.

Because EPA lowered the volumes of cellulosic biofuel for 2014, 2015, and 2016, EPA was authorized under the cellulosic waiver authority to reduce, in its discretion, the volumes of advanced biofuel and total renewable fuel by the same or a lesser amount. 42 U.S.C. § 7545(o)(7)(D)(i). In the Rule, EPA appropriately exercised its broad discretion under the cellulosic waiver provision to reduce the applicable volumes of advanced biofuel to a level it determined was "reasonably

attainable" in 2014, 2015, and 2016. EPA then appropriately used that authority to provide an equal reduction in the applicable volume of total renewable fuel.

The general waiver provision, 42 U.S.C. § 7545(o)(7)(A), authorizes EPA, in its discretion, to reduce the applicable volumes of renewable fuel if EPA determines that there is an "inadequate domestic supply" of renewable fuel available to achieve the statutory volumes. In the Rule, EPA reasonably further lowered the applicable volumes of total renewable fuel only under this provision. In exercising its general waiver authority, EPA appropriately set the final volume requirements equal to its assessment of the maximum achievable volumes of total renewable fuel, taking into account the ability of the market under the influence of the RFS standards to supply renewable fuel to consumers for the purposes specified in the Act.

Petitioner NBB challenges EPA's interpretation of and decision to use the cellulosic waiver provision to reduce the applicable volumes of advanced biofuel. The ACEI Petitioners challenge EPA's interpretation of and decision to use its general waiver authority to further reduce the volumes of total renewable fuel beyond the reductions provided using the cellulosic waiver authority. Because EPA's use of its waiver authorities was reasonable, these challenges should be rejected.

A. EPA reasonably exercised its broad discretion to reduce the applicable volumes of advanced biofuel using the cellulosic waiver provision.

The Clean Air Act provides that for any year that EPA reduces the cellulosic biofuel applicable volume, EPA "may also reduce the applicable volume of renewable fuel and advanced biofuels requirement . . . by the same or a lesser volume." 42 U.S.C. § 7545(o)(7)(D)(i). This provision does not identify any specific criteria that EPA must consider in deciding whether to reduce the applicable volumes. Rather, the only stated limitation on EPA's discretion is that a reduction under this authority cannot exceed the amount of the cellulosic biofuel reduction for a calendar year. Id. Because of the absence of prescribed factors, EPA "enjoys broad discretion regarding whether and in what circumstances to reduce the advanced biofuel and total renewable fuel volumes under the cellulosic biofuel waiver provision." Monroe Energy, 750 F.3d at 915.

EPA exercised this broad discretion reasonably. In the Rule, EPA lowered the statutory volumes of cellulosic biofuel for 2014, 2015, and 2016 by, respectively, 1.717 billion gallons, 2.877 billion gallons, and 4.02 billion gallons,[6] meaning that EPA could, in its discretion, reduce the 2014, 2015, and 2016 volumes of advanced biofuel and total renewable fuel by up to those amounts. 80

[6] Challenges to EPA's assessment of the cellulosic biofuel volumes are discussed in Part III, infra.

Fed. Reg. at 77,499 (comparing Tables IV-1 and IV.A-1). Consistent with its past practice, API, 706 F.3d at 476, 481; Monroe Energy, 750 F.3d at 916, and in light of the energy security and greenhouse gas emissions benefits associated with the use of advanced biofuel, see 80 Fed. Reg. at 77,426, the Agency stated that it intended to exercise its discretion under the cellulosic waiver authority in a manner that would allow non-cellulosic advanced biofuels "to fill the gap presented by a shortfall in cellulosic biofuels" to the extent feasible. Id. at 77,434. EPA reasonably concluded that "there would be a substantial justification" to use its cellulosic waiver authority for advanced biofuels where the gap created by the shortfall in cellulosic biofuel could not be completely filled, specifically, "where there is inadequate projected production or import" of advanced biofuels, "or where constraints exist that limit the ability of those biofuels to be used." Id. at 77,434.

To determine the availability of non-cellulosic advanced biofuels in 2014, 2015, and 2016 to make up for the cellulosic shortfall, EPA calculated the level of advanced biofuel volumes that were "reasonably attainable" for each compliance year. EPA first addressed the past time periods—compliance years 2014 and 2015—covered by the Rule, and determined that the required volumes of advanced biofuel for those years should be based on the total number of RINs generated and available for compliance in 2014 and 2015. 80 Fed. Reg. at 77,444-48.

Specifically, EPA set the 2014 advanced biofuel standard equal to the volume of advanced biofuel RINs generated for renewable fuel produced or imported for that year, minus any advanced biofuel RINs that had already been retired for reasons other than compliance with the annual standards, such as to cover exports of renewable fuels or to correct for fuel spills. 80 Fed. Reg. at 77,444-45.

EPA used nearly the same method for 2015. However, when the Rule was published, reliable RIN data existed for just nine months of the year. 80 Fed. Reg. at 77,447-48. Therefore, EPA estimated the 2015 RINs available for compliance for the remaining three months of 2015 using prior-year supply trends. Id.; EPA-HQ-OAR-2015-0111-3669, JA__. Based on these calculations, EPA determined the final reasonably attainable advanced biofuel volumes for 2014 and 2015 were 2.67 and 2.88 billion gallons, respectively, and established the advanced biofuel volume requirements at those levels. Id. As a result, EPA did not use the full extent of its cellulosic waiver authority, reducing the 2014 and 2015 statutory volumes by 1.08 and 2.62 billion gallons, respectively, rather than by the maximum 1.72 and 2.88 billion gallons authorized.

For 2016, EPA calculated the "reasonably attainable" volumes of advanced biofuel by taking into account constraints on production, import, distribution and infrastructure, and consumption of fuels qualifying as advanced biofuels. Id. at 77,476. Because the Rule was issued in late 2015, EPA made its assessment for

2016 based on projections of the reasonably attainable volumes of broad categories of advanced biofuel: advanced ethanol, advanced biodiesel and renewable diesel, and other advanced biofuels. Id. For example, the primary form of ethanol that qualifies as an advanced biofuel is imported sugarcane ethanol from Brazil. Id. After considering projections submitted by commenters and past import data, the Agency determined that reasonably attainable volumes for imported sugarcane ethanol in 2016 would be 200 million gallons. Id. at 77,476-78. To calculate the reasonably attainable levels of advanced biodiesel and renewable diesel, EPA considered constraints on the production, import, distribution, and use of those fuels. Id. at 77,466-75, 77,478. Following this detailed analysis, EPA projected the reasonably attainable 2016 volume for advanced biodiesel and renewable diesel to be 2.1 billion gallons, a 370 million-gallon increase from the 2015 volumes. Id. at 77,479.

EPA also estimated that a modest amount of advanced biofuel other than ethanol, biodiesel, and renewable diesel—25 million gallons—was reasonably attainable in 2016. Id. Finally, due to the nested nature of the standards, EPA added to the projected reasonably attainable volume of advanced biofuel all of the 230 million gallons of cellulosic biofuel projected for 2016. Id.

Adding these four numbers—200 million gallons of imported sugarcane ethanol, 2.1 billion gallons of advanced biodiesel/renewable diesel, 25 million

gallons of other advanced biofuels, and 230 million gallons of cellulosic biofuels—and adjusting for the higher RIN value[7] for biodiesel and renewable diesel, EPA determined that the "reasonably attainable" volume of advanced biofuel in 2016 is 3.61 billion gallons. Id. at 77,479. This final volume requirement represents a 3.64 billion gallon reduction from the statutory target, significantly less than the 4.02 billion gallon reduction authorized under the cellulosic waiver provision. The final advanced biofuel requirements also increase each year, with the 2016 requirement nearly 1 billion gallons higher than the volume requirement for 2014. Id. at 77,432 Table II-1.

i. EPA's application of its broad discretion under the cellulosic waiver provision is not constrained in any specific way.

Despite this robust and reasonable analysis, NBB challenges EPA's decision to lower the volumes of advanced biofuel under the cellulosic waiver provision. In essence, NBB's challenge to EPA's use of the cellulosic waiver provision is grounded in the false premise that EPA's exercise of its discretion is constrained by other waiver provisions in the statute or limited in other specific ways. NBB's assorted arguments include: that EPA's use of the cellulosic waiver should be limited by the other waiver provisions in 42 U.S.C. § 7545(o)(7), NBB Br. 7, 8-9; that EPA should not be permitted to estimate advanced biofuels based on an

[7] Biodiesel and renewable diesel carry a higher RIN value per gallon than other fuels because of their greater energy content. See 40 C.F.R. § 80.1415.

analysis of broad types of renewable fuels, but instead must analyze each individual type of advanced biofuel, NBB Br. 10-11; that EPA should not be permitted to consider constraints on the supply of advanced biofuels to consumers when considering whether and how to use the cellulosic waiver provision, NBB Br. 12-13; and that the "only relevant criterion" for EPA to consider is the availability of advanced biofuels—meaning the amount produced—disregarding whether advanced biofuels can actually be supplied to the ultimate consumer for qualifying uses, NBB Br. 13.

NBB's argument that EPA's discretion is constrained in particular ways is foreclosed by clear precedent. As held by this Court, the cellulosic waiver provision does not list any factors that the Agency must consider in reducing the volumes of advanced biofuel and total renewable fuel, and therefore provides EPA with "broad discretion regarding whether and in what circumstances to reduce the advanced biofuel and total renewable fuel volumes . . . ." Monroe Energy, 750 F.3d at 915. Here, EPA reasonably exercised that discretion when it reduced the advanced biofuel volumes to levels it determined to be "reasonably attainable" in 2014, 2015, and 2016.

NBB's assertion that EPA claims that it may reduce statutory advanced-biofuel volumes "for any reason" is incorrect. NBB Br. 7. To the contrary, EPA concluded that it would not be consistent with the goals of the statute to reduce the

statutory volumes "absent a substantial justification for doing so." 80 Fed. Reg. 77,434. As described above, EPA reasonably determined that such a justification exists where there is inadequate projected production or import of qualifying renewable fuels, or where other constraints exist, such as infrastructure or distribution constraints, that prevent actual use of those fuels by the ultimate consumer for qualifying uses. Id. EPA's reasonable approach falls well within the broad degree of discretion afforded to EPA under the cellulosic waiver provision. Monroe Energy, 750 F.3d at 915.

ii. EPA reasonably applied the cellulosic waiver provision in determining the 2014 and 2015 volumes of advanced biofuel.

NBB contends that EPA acted unreasonably under the cellulosic waiver provision when the Agency set the 2014 and 2015 advanced biofuel volumes to reflect historical data. NBB Br. 15-17. Yet, NBB again ignores the discretion granted to EPA in determining whether to exercise its authority under the cellulosic waiver authority, Monroe Energy, 750 F.3d at 915. EPA's reasonable decision to set the 2014 and 2015 volume requirements as equal to the volumes of advanced biofuels actually used in those compliance years that had passed or largely passed falls well within the bounds of this discretion.

This Court's precedent regarding late issuance of the renewable fuel standards supports the reasonableness of EPA's action. See Nat'l Petrochemical & Refineries Ass'n v. EPA, 630 F.3d 145, 162 (D.C. Cir. 2010) ("NPRA"); Monroe

Energy, 750 F.3d at 919. Under that precedent, in determining late-issued standards, EPA weighs the "burden" of any retroactive effects on obligated parties against the "benefit" of fulfilling the purposes of the statute. NPRA, 630 F.3d at 166; Monroe Energy, 750 F.3d at 920 (upholding EPA's consideration of "obligated parties' interest in regulatory certainty with EPA's statutory obligation to ensure the renewable fuel volumes are annually met"). Here, EPA determined that retaining the statutory volumes for 2014 and 2015—compliance years that had or nearly had already passed—would not alter or promote renewable fuel use in those years. 80 Fed. Reg. at 77,439. Moreover, to retain the volumes in these circumstances would impose an unreasonable burden on obligated parties, necessitating noncompliance or a complete drawdown on the bank of carryover RINs. Id.; see also id. at 77,483-84 (discussing the importance of carryover RINs). EPA therefore reasonably concluded that the most appropriate way to balance its statutory obligation of promoting renewable fuel use against the burden of retroactive application on obligated parties was to set the standards as equal to the number of RINs generated in those years that were available for compliance. In doing so, EPA weighed the "benefits" and the "burdens" of the late-issued

standards by taking into account the unique realities of the delay preceding the Rule.[8] NPRA, 630 F.3d at 166.

That higher volumes of some advanced biofuels were available in 2013, NBB Br. 16-18, does not alter the reasonableness of EPA's exercise of its broad discretion in accordance with this Court's precedent. In fact, NBB's contentions in this regard lack support in the record. For example, NBB states that 450 million gallons of advanced ethanol RINs were generated in 2013, implying that larger volumes of advanced ethanol could have been used in later years. NBB Br. 17. However, EPA's analysis in the Rule found that imports of advanced ethanol are highly uncertain—in 2014, only 64 million gallons were imported, and, at the time the Rule was published, the projected level of imports for 2015 was about 55 million gallons. 80 Fed. Reg. 77,478.

NBB also suggests that an excess of carryover RINs was available for 2014, NBB Br. 17-18, and argues that EPA's consideration of, but ultimate decision not to rely on, the bank of available carryover RINs to retain the applicable volumes of advanced biofuels for 2014 was "irrational" and contrary to its past treatment of carryover RINs. NBB Br. 19. In fact, EPA calculated that the carryover RIN bank

[8] To the extent that NBB relies on materials outside of the administrative record under review here and throughout its opening brief, those materials should be excluded for the reasons discussed in EPA's response in opposition to NBB's motion to supplement the record. See Doc. No. 1637240.

was substantially depleted in order to meet the 2013 standards. 80 Fed. Reg. at 77,485. EPA reasonably determined that it would not assume a drawdown on the bank of carryover RINs to avoid reductions to the volume targets. See infra Argument Part I.B.ii. NBB ignores that EPA's broad discretion under the cellulosic waiver authority has been explicitly held to include the ability to consider—and possibly reject—the use of carryover RINs as a mechanism to retain the statutory volumes. Monroe Energy, 750 F.3d at 915. That EPA did not exercise its discretion vis-à-vis carryover RINs in the way NBB would have liked does not render EPA's determination arbitrary.

iii. EPA's exercise of its cellulosic waiver authority is consistent with Congressional intent and the purposes of the RFS program.

EPA's reasonable exercise of its discretion under the cellulosic waiver provision to lower the advanced biofuel (and total renewable fuel) volumes is also consistent with Congressional intent. NBB is correct that one part of the statute directs EPA to ensure that the specified volumes of renewable fuels are met each year, 42 U.S.C. § 7545(o)(2)(A)(i); NBB Br. 9. However, Congress also expressly authorized EPA to reduce the statutory volumes under the cellulosic waiver authority where, as here, there is a shortfall in cellulosic biofuels to meet the volumes set forth in the statute. 42 U.S.C. § 7545(o)(7)(D); 80 Fed. Reg. at 77,432. EPA recognizes the importance of its decision to exercise this authority. 80 Fed. Reg. 77,434. Indeed, as noted by NBB, this is the first rule in the

program's history that reduces any of the applicable volumes other than the volumes for cellulosic biofuel. NBB Br. 6.

NBB argues that EPA arbitrarily exercised its discretion by considering constraints on the actual use of renewable fuel, including distribution and infrastructure constraints. NBB Br. 12-15. But NBB's contentions ignore the complexities of the renewable fuels market and the goals of the RFS program. EPA did not, as NBB argues, waive the volumes "simply because compliance would require obligated parties to do more than they are willing." NBB Br. 15. Rather, based on a thorough analysis, EPA determined that achievement of the advanced biofuel volumes, taking into account distribution and infrastructure constraints, was simply infeasible. As EPA explained, the nascent cellulosic biofuel industry has been unable to overcome technological and other hurdles at the ambitious pace that Congress sought in establishing the rapidly-increasing statutory volume targets. See 80 Fed. Reg. at 77,428. And, while non-cellulosic advanced biofuels have grown to partially fill this gap, a variety of real-world constraints exist, most of which are outside of the control of any obligated parties, which preclude their ability to fully substitute for the missing cellulosic volumes. Id. at 77,442. To enforce the statutory volumes without taking into consideration these real-world constraints on ultimate use would have imposed large compliance costs without any advancement of the goals of the program.

Nor does EPA's approach undermine investment or growth in the renewable fuels market. NBB Br. 14. To the contrary, EPA determined that forcing infeasible growth rates, as NBB favors, would undermine the "certainty in the RFS program," needed to sustain long-term growth, 80 Fed. Reg. at 77,423, by, for example, resulting in shortfalls in supply, unstable RIN prices, potential non-compliance, and post-Rule requests that EPA use its waiver authorities, leading to a significant period of uncertainty in the market. EPA-HQ-OAR-2015-0111-3671 at 49, JA__.

Moreover, EPA's Rule continues to advance the purposes of the RFS program by requiring substantial increases in the use of advanced biofuels over past years, and also results in a greater opportunity for use of non-cellulosic advanced biofuels than specified in the statute. For example, in 2016 the Act provides for 7.25 billion gallons of advanced biofuel, with 4.25 billion gallons of that dedicated to cellulosic biofuels. 42 U.S.C. § 7545(o)(2)(B)(i)(II), (III). Under the statute, the difference between those two fuels, 3 billion gallons, could be satisfied by non-cellulosic advanced biofuels. However, in the Rule, EPA required 3.61 billion gallons of advanced biofuel, and 0.23 billion gallons of cellulosic biofuel for 2016, resulting in an allowance for 3.38 billion gallons of non-cellulosic advanced—0.38 billion gallons more than envisioned in the statute. See 80 Fed. Reg. at 77,422 Table I-1. In addition, the Rule provides for nearly a

billion gallon increase in the advanced biofuel requirement between 2014 and 2016, consistent with the sustained growth in volumes envisioned by the statute. Id. EPA's reasonable advanced biofuel standards further the goals of the RFS program, and NBB's challenges should be rejected.[9]

iv. NBB's "procedural" challenge is without merit.

NBB asserts that EPA has committed "procedural violations" by excluding certain materials from the record. NBB Br. 27. As explained in EPA's opposition to NBB's motion to supplement the record, the robust record contains all documents required under the Clean Air Act and does not "skew" in EPA's favor. Id. For the reasons discussed in EPA's opposition, NBB's procedural challenge should be dismissed.[10] See Doc. No. 1637240.

[9] EPA interpreted the cellulosic waiver authority as requiring an equal reduction in both advanced and total renewable fuel volume targets. 80 Fed. Reg. at 77,434. Therefore, after determining the appropriate reduction for advanced biofuels, EPA used the cellulosic waiver authority to provide an equal reduction in the statutory total renewable fuel applicable volumes for 2014, 2015, and 2016. Id. No party has challenged this aspect of EPA's action.

[10] For all the reasons discussed above, Argument Part I.A supra, as well as Part II.A, infra, the amicus brief of the American Soybean Association, et al., Doc No. 1636048, also fails to provide a basis to set aside EPA's reasonable use of its cellulosic waiver authority.

B. EPA's interpretation and use of its general waiver authority to further lower the volumes of total renewable fuel was reasonable and consistent with the purposes of the statute.

The general waiver provision, 42 U.S.C. § 7545(o)(7)(A), authorizes EPA, in its discretion, to reduce the applicable volumes of renewable fuel under certain conditions, including (as relevant here) if EPA determines that there is an "inadequate domestic supply" of renewable fuel. Id. § 7545(o)(7)(A)(ii). In the Rule, EPA determined that supply limitations on total renewable fuel for 2014, 2015 and 2016 warranted a further reduction of volumes for that fuel category, beyond reductions associated with use of the cellulosic waiver authority. The ACEI Petitioners challenge EPA's use of its general waiver authority in lowering the total renewable fuel volume requirements. These challenges are without merit.

In establishing the total renewable fuel volume requirement, EPA evaluated whether there would be an "inadequate domestic supply" of renewable fuels that would warrant a further reduction under the general waiver authority, beyond the reductions obtained using the cellulosic waiver authority. As part of that evaluation, EPA interpreted the ambiguous term "supply," calculated the "supply" of renewable fuels available, and then evaluated whether that supply is "inadequate" to achieve the applicable volumes of total renewable fuel as already reduced through use of the cellulosic waiver authority.

The Rule represents the first time that EPA has lowered the statutory volumes of total renewable fuels on the basis of a finding of "inadequate domestic supply." 80 Fed. Reg. at 77,435. Consequently, EPA was required to interpret that phrase. Id. Based on the statutory language, including use of the term "supply" in other provisions of the Clean Air Act, EPA appropriately determined that the term "supply" in the general waiver provision is ambiguous. Id.

The statute does not define "supply" as used in the general waiver provision. The Agency recognized that the common understanding of the term is "an amount of a resource or product that is available for use by the person or place at issue." Id. However, in the context of the RFS program, this common understanding does not provide clarity. Id. Various parties interact across several industries to make renewable fuel available for use by ultimate consumers, each "supplying" different products in varying forms and at different times to different market actors. Id. A variety of different substances—including landfill gas, algae, used cooking grease, soybean oil, sugar from sugarcane and corn starch—are "supplied" as feedstocks to producers making biofuel products such as ethanol and biodiesel. Id. at 77,446. However, many subsequent steps typically exist between biofuel production and the ultimate use of these products in transportation fuel. Id. at 77,435. For example, "supplying" "neat" ethanol or biodiesel[11] to blenders or obligated parties

[11] "Neat" fuel is fuel that is not blended with any other fuels.

is one step, and the "supply" of blended fuels by a retailer to the ultimate consumer who uses it as transportation fuel is another. See id. The question facing EPA was at what point in this chain of production and delivery should "inadequate domestic supply" be assessed.

Faced with this ambiguity, EPA reasonably turned to other statutory provisions in CAA Section 211(o) and Congressional intent to interpret the term "supply." Id. EPA noted that CAA Section 211(o) defines renewable fuels in terms of their use: fuels such as ethanol and biodiesel qualify as "renewable fuels" under the RFS program if they are "used to replace or reduce the quantity of fossil fuel present in transportation fuel." 42 U.S.C. § 7545(o)(1)(J). EPA further explained that the greenhouse gas reduction and energy security goals of the statute are realized only if biofuels are actually used. 80 Fed. Reg. at 77,435. EPA thus determined that Congress' intent in enacting the RFS program was not simply to increase production of biofuel, but to ensure that volumes of biofuels are actually used by the ultimate consumer to displace conventional transportation fuel. Id.

EPA therefore reasonably concluded that "supply" should be assessed at the point of supply to the consumer. Id. Accordingly, EPA determined that its calculation of "supply" of renewable fuels should include "the full range of constraints that could result in an inadequate supply of renewable fuel to ultimate consumers" as well as "factors affecting the ability to produce or import qualifying

renewable fuels as well as factors affecting the ability to distribute, blend, dispense, and consume those renewable fuels in vehicles." Id.

EPA further reviewed other fuel-related provisions in the Clean Air Act with similar waiver authorities, and determined that those provisions support its interpretation of the ambiguous term "inadequate domestic supply." Id. at 77,436. For example, the Agency noted that the waiver provisions in CAA Section 211(k)(6) distinguish between "insufficient capacity to produce" and "insufficient capacity to supply" certain fuels, suggesting that Congress likely intended the "capacity to supply" in that provision to be greater in scope than the "capacity to produce." 80 Fed. Reg. at 77,436. This broader interpretation of "supply" is consistent with EPA's interpretation of the term "supply" in the general waiver provision.

EPA also noted that other waiver authorities provide more specific guidance than the general waiver provision on how to interpret the term "supply," supporting both EPA's conclusion that the term as used in the general waiver authority is ambiguous and its interpretation of the term. Id. at 77,437. For example, CAA Section 211(c)(4)(C)(ii) provides EPA with waiver authority for "extreme and unusual fuel or fuel additive supply circumstances . . . which prevent the distribution of an adequate supply of the fuel or fuel additive to consumers." 42 U.S.C. § 7545(c)(4)(C)(ii)(I). This provision clearly specifies, in contrast to the

general waiver authority, that the adequacy of supply is judged in terms of the availability of fuel or fuel additive to the ultimate consumer. 80 Fed. Reg. at 77,437. Likewise, CAA Section 211(m)(3)(C), in contrast to the general waiver authority, includes additional text that makes clear that EPA's waiver authority involves consideration of "distribution capacity," reducing the ambiguity inherent in the phrase "domestic supply." 42 U.S.C. § 7545(m)(3)(C)(i). EPA determined that these provisions underscore the ambiguity in the general waiver provision's broader term "inadequate domestic supply," as well as support its reasonable interpretation of the phrase as addressing supply to the ultimate consumer. 80 Fed. Reg. at 77,437.

Finally, EPA recognized that prior to final adoption of the EISA amendments, Congress had before it bills with general waiver authority language that would have provided for waiver in situations where there was "inadequate domestic supply or distribution capacity to meet the requirement." Id. Some stakeholders suggested that Congress' final omission of "distribution capacity" suggests a more narrow interpretation of "supply" to exclude distribution and infrastructure constraints. Id. However, with no further clarification from the legislative history as to why the provision was changed, EPA concluded that these prior bills did not reduce the ambiguity of the phrase "inadequate domestic supply." Id. at 77,437-38; Edison Elec. Inst. v. EPA, 2 F.3d 438, 451 (D.C. Cir.

1993) (holding that "the deletion of a word or phrase in the throes of the legislative process does not ordinarily constitute, without more, evidence of a specific legislative intent").

Having reasonably interpreted "supply" to include evaluation of the range of constraints that could result in an inadequate supply of qualifying renewable fuels available to the ultimate consumer, EPA next assessed whether that "supply" was adequate to satisfy the total renewable fuels volumes (as reduced under the cellulosic waiver provision). Because the 2014 compliance year had already passed, EPA concluded that the Rule could not alter the volumes of total renewable fuel produced and consumed that year. Id. at 77,439, 77,447. EPA therefore reasonably found the maximum supply of total renewable fuel available for 2014 was equal to the volume of renewable fuel actually produced and used in that year, measured by the number of 2014 RINs generated and available for compliance. Id. at 77,447.

Likewise, most of the 2015 compliance year had already passed when the Rule was published. The Rule could not influence renewable fuel use during the prior months of 2015, and could not reasonably be expected to influence renewable fuel use in the remaining month. Id. Accordingly, EPA reasonably determined that the maximum supply of total renewable fuel for 2015 was equal to the number of RINs generated and available for compliance in the part of 2015 for which data

were available, plus a projection of the supply of renewable fuel for the remainder of the year. Id. at 77,447-48.

For the forward-looking 2016 total renewable fuel standard, EPA determined that its evaluation of "supply" should compare the volume obtained after using the cellulosic waiver authority with the ability of the market to produce, distribute and use renewable fuels, in the context of a market that is responsive to the RFS standards. Id. at 77,449. To do so, EPA evaluated the maximum achievable total renewable fuel volume that could be made available to the ultimate consumer "under real world conditions, taking into account the ability of the standards we set to cause a market response and result in increases in the supply of renewable fuels." Id. EPA's robust analysis considered the potential for growth in three broad categories of renewable fuel: ethanol, biodiesel and renewable diesel, and other types of renewable fuels. Id. EPA's evaluation of the maximum achievable supply for these categories of fuels included consideration of a wide variety of factors that could affect the supply of renewable fuel, including: feedstock availability; renewable fuel production capacity; renewable fuel imports; renewable fuel exports; distribution infrastructure; refueling infrastructure availability; and the availability of vehicles capable of using certain fuels and total transportation fuel use in the United States (as well as the thousands of public comments on these issues). Id. at 77,451-52.

EPA also considered the degree to which the total renewable fuel standards themselves could influence "supply" by driving investments in the renewable fuels market, recognizing the RFS program to be market forcing. Id. at 77,423, 77,452. However, EPA noted that the total renewable fuel standard is limited in its ability to drive the renewable fuels market because it is issued on an annual basis immediately prior to the compliance year, and the total renewable standard itself does not specify use of any particular form or type of renewable fuel. Id. at 77,452-53. It therefore takes time for the many actors in the market to sort out investment decisions and to implement those decisions based on the annual standards. Id. Moreover, many of these investment and implementation decisions are outside of the control of obligated parties, further limiting the short-term impact of the standards. Id.

This limitation is evident from past annual standards. For example, EPA did not propose to lower the total renewable fuel volume in 2013. Id. at 77,453-54. The market, therefore, could have reasonably anticipated that EPA would maintain the 2013 volume target, which the Agency did. Id. at 77,454. Nonetheless, the supply of renewable fuel available to the ultimate consumer in 2013 did not grow sufficiently to achieve the volume target, indicating that despite the market-driving effect of the RFS standards, the market was constrained from achieving the

statutory volumes set by Congress.[12] Id. Based in part on this experience with past annual standards, EPA reasonably concluded that it could not simply rely on the statutory standards alone to drive the market to achieve those standards, requiring a more comprehensive evaluation of the possible constraints on supply. Id.

Finally, as it had done under the cellulosic waiver provision, EPA considered the bank of carryover RINs available to obligated parties in determining whether and how to use the general waiver authority. Id. at 77,484. The Agency concluded that the ambiguous term "supply" itself should not be interpreted to include carryover RINs, but rather only the actual volume of renewable fuel available each year. Id. However, EPA determined that it can, and should, consider the availability of carryover RINs in determining whether to exercise its discretion under the general waiver provision. Id. EPA found that a smaller number of carryover RINs were available to comply with the standards as compared to prior years. Id. at 77,485. Given the importance of carryover RINs not just to individual compliance flexibility but also to the operability of the RFS program as a whole, EPA determined that it would not assume a drawdown on the bank of carryover RINs in order to avoid using its general waiver authority to

[12] Compliance with the 2013 total renewable standard was possible through the collective use by obligated parties of carryover RINs. 80 Fed. Reg. at 77,486.

reduce the total renewable fuel applicable volumes in 2014, 2015, and 2016. Id. at 77,483-84.

Based on this thorough and well-explained analysis, EPA reasonably concluded that it would lower the statutory volumes of total renewable fuel for all three compliance years beyond reductions to those volumes made under the cellulosic waiver provision. The ACEI Petitioners mount several challenges to EPA's reasonable interpretation of the term "inadequate domestic supply" and its use of the general waiver authority. For the reasons discussed below, those challenges should be rejected.

i. EPA's interpretation of "supply" is reasonable and should be upheld under Chevron step two.

Petitioners challenge EPA's interpretation of the term "supply." They argue that the term "supply" must mean only the amount of biofuel available through production or import for a given compliance year, and cannot reflect any consideration of limits on the ability of the marketplace to distribute those fuels or for consumers to use them as transportation fuel. ACEI Br. 12. However, nothing in the statutory language compels this interpretation of supply, and, in fact, such an interpretation would undermine the purposes of the RFS program.

EPA's interpretation of the general waiver provision is evaluated under the framework of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under Chevron step one, the Court inquires whether

Congress has directly spoken to the precise question at issue," 467 U.S. at 842, and if so, whether it has unambiguously foreclosed the agency's statutory interpretation, Sierra Club v. EPA, 536 F.3d 673, 677 (D.C. Cir. 2008). In evaluating this question, the Court may consider traditional tools of statutory construction, including the entire text, structure, and purpose of the statute. Catawba Cnty. v. EPA, 571 F.3d 20, 35 (D.C. Cir. 2009). Here, the text, structure, and purpose of the statute not only demonstrate that the term "supply" is ambiguous, but also support EPA's reasonable interpretation of that term.

First, the text of the statute is, on its face, ambiguous. Congress provides no definition of "supply" in the statute. Nor does it provide guidance as to how to measure whether "supply" is "inadequate" in order for EPA to, in its discretion, exercise the general waiver authority. In addition, as explained by the Agency, the common understanding of the term supply—"an amount of a resource or product that is available for use by the person or place at issue"—does not resolve the ambiguity of the term. 80 Fed. Reg. at 77,435. Various parties interact across several industries in the RFS program to "supply" products to different market participants to ensure that renewable fuel is used in transportation fuel. Id. Neither the statute nor the ordinary usage of "supply" provide an unambiguous directive as to where in this process "inadequate domestic supply" must be assessed under the general waiver provision. Id.

This ambiguity is further evidenced by the text of other waiver provisions in the CAA. As discussed above, other waiver provisions in the Act provide more specific guidance on what EPA must consider in determining "supply" of renewable fuels, each offering a definition of "supply" that is different in scope from other provisions. See 42 U.S.C. § 7545(k)(6); id. § 7545(c)(4)(C)(ii); id. § 7545(m)(3)(C). These provisions underscore the ambiguity in the general waiver provision's broader term "inadequate domestic supply," and indicate a Congressional intent to leave these questions to EPA's discretion and expertise. Catawba, 571 F.3d at 35-36.

Moreover, other provisions of the statute and the purposes of the Act directly contradict Petitioners' contention that "supply" must unambiguously mean only the capacity of biofuels to be produced or imported to the United States. ACEI Br. 12. The statute's text defines qualifying renewable fuels in terms of use—not production—requiring that the fuels be "used to replace or reduce the quantity of fossil fuel present in transportation fuel." 42 U.S.C. § 7545(o)(1)(J) (emphasis added); see also id. § 7454(o)(1)(A). Contrary to Petitioners' "paper" analogy, ACEI Br. 15-16, EPA does not interpret this text to mean that renewable fuels do not exist until they are used, but that renewable fuels do not fulfill the purposes of the Act until they serve as replacements for fossil fuels present in transportation fuels. 80 Fed. Reg. at 77,435 & n.33. Moreover, the central ambiguity faced by

EPA in interpreting "supply"—namely, supply of renewable fuels to whom—is ignored by Petitioners' analogy.

Likewise, the purposes of the statute do not support Petitioners' narrow interpretation, and instead support EPA's reasonable one. The RFS program was not enacted simply to increase production and import of biofuels; rather, the purpose of the program is to ensure the use of renewable fuels as a replacement for fossil fuels present in transportation fuels. Petitioners' narrow definition of "supply" implies that so long as biofuels can be produced in a given year, EPA must require that obligated parties obtain a corresponding number of RINs—regardless of whether the biofuels could be used by consumers for transportation purposes. Under this approach, for example, EPA would be required to treat as part of the "supply" of renewable fuels all biogas-derived fuels that theoretically could be used in a vehicle, notwithstanding the very limited number of vehicles capable of using such fuel, and the fact that a majority of biogas is used for non-transportation purposes. Such an interpretation not only fails to promote the purposes of the statute, but could potentially impose large compliance costs on obligated parties with no corresponding increase in the use of renewable fuels, contrary to the purposes of the Act.

Petitioners' remaining arguments concerning the interpretation of the term "supply" are also without merit. Petitioners argue that EPA's interpretation

amounts to a focus on "demand" rather than "supply," contrary to the text of the statute. ACEI Br. 13. This simplistic characterization, however, ignores the forces at work in a dynamic renewable fuels market. In interpreting "supply," EPA considered factors such as physical limitations in infrastructure to provide certain renewable fuels to consumers, and the ability of vehicles to use renewable fuels. 80 Fed. Reg. at 77,438. To be sure, these factors do reflect the impact of consumer preference in, for example, the availability of vehicles that can legally use certain types of renewable fuels. Id. But to dismiss these factors as merely "demand," glosses over the complexities of the fuels production and distribution system in favor of an overly simplistic label, and disregards real constraints on the ultimate use of renewable fuels.

Nor does EPA's interpretation of "supply" ignore or undermine the market-driving intent of the statute, as Petitioners contend. ACEI Br. 18. EPA accounts for, and relies on, the responsiveness of the market to its standards when determining the "supply" of renewable fuels. 80 Fed. Reg. at 77,449. In determining whether to use its general waiver authority for the forward-looking 2016 volume, EPA considered the "maximum supply [of renewable fuels] that can reasonably be expected to be produced and consumed by a market that is responsive to the RFS standards." Id. at 77,426. The Agency also explicitly

considered the ability of the standards to overcome market constraints. Id. at 77,452-54.

Petitioners' insistence that "supply" must mean only the capacity to produce or else "entrench" constraints on distribution and use is grounded in the mistaken assumption that the power of the standards to drive the market is limitless. As EPA explained, the annual standards have a limited ability to increase the use of renewable fuels quickly because of the time required for the market to respond to the standards, for various actors to make investment decisions, and for those investment decisions to be implemented. Id. at 77,453. Increasing the supply of renewable fuels requires actions by market participants not directly regulated by the RFS program (such as retail station owners), further complicating the ability of the annual standards to increase the supply of renewable fuels in a single year. Id. In recognizing this limited ability, EPA is not actively "manag[ing] growth," as suggested by the ACEI Petitioners. ACEI Br. 19. Rather, EPA's interpretation of supply reasonably reflects "the potential for growth" under the RFS program, while also rationally recognizing "potential challenges on growth" that simply cannot be overcome in the short term. 80 Fed. Reg. at 77,453. For EPA to refuse to waive the statutory standards in the face of these challenges would be unreasonable, and would ignore the limited ability of the standards, and the limited ability of obligated parties alone, to influence the market.

Furthermore, EPA's approach does not disregard the intended growth in renewable fuels set forth by Congress in the statute, nor does it "nullify" the statutory targets. ACEI Br. 22. While the total renewable fuel volumes are lower than those set forth in the statute, those volumes still reflect annual increases. 80 Fed. Reg. 77,422. Nor is EPA exercising an "ancillary" provision of the statute to lower the volumes. ACEI Br. 21. Congress expressly authorized EPA to lower the statutory volumes of renewable fuel under its waiver authorities. 42 U.S.C. § 7545(o)(7). Petitioners' suggestion that EPA undermines Congressional intent by exercising the very authority authorized by Congress is meritless.

EPA's interpretation of "supply" is also consistent with its prior statements that it would waive the applicable volumes in only limited circumstances.[13] 80 Fed. Reg. at 77,427 ("We are using the waiver authorities in a limited way that reflects our understanding of how to reconcile real marketplace constraints with Congress' intent to cause growth in renewable fuel use over time."). Contrary to Petitioners' suggestion, EPA did not interpret the term "supply" when it set the 2011 standards, 75 Fed. Reg. 76,790, 76,803 (Dec. 9, 2010) (noting that "[n]o commenter" raised the issue). And, in any event, the Agency has rejected the suggestion that the 2011 biomass-based diesel standard should be waived based on

[13] EPA's past statements cited by Petitioners discuss the "severe harm" prong of the general waiver authority, not "inadequate domestic supply." 73 Fed. Reg. 47,168, 47,171 (Aug. 13, 2008); ACEI Br. 18.

what consumption would be "in the absence of a [RFS] mandate," Id. at 76,802—consistent with the Agency's express consideration of the market-forcing impact of the standards in setting the 2016 total renewable fuel volume. 80 Fed. Reg. at 77,449.

Petitioners further contend that EPA's definition of "supply" is improper because it undermines the market certainty provided by the statutory volumes. ACEI Br. 22. While it is true that EPA's consideration of its waiver authorities can potentially reduce the statutory volumes each year, this is a function of, not contrary to, the statutory structure. The statute specifically authorizes EPA to consider, and, if appropriate, exercise its waiver authorities, at its discretion. 42 U.S.C. § 7545(o)(7). Simply because the volumes may change does not render EPA's exercise of its waiver authorities arbitrary. Moreover, the rigid application of the volume targets despite the fact that those fuels cannot be used by the consumer would not only fail to promote the goals of the program, but would undermine market certainty. To mandate volumes of renewable fuels that cannot be achieved could lead to RIN-deficits, non-compliance, or post-Rule waiver petitions, eroding the certainty of standards based on the statute. 80 Fed. Reg. at 77,453; EPA-HQ-OAR-2015-0111-3671 at 51, JA__.

Finally, contrary to Petitioners' argument, EPA's interpretation of "supply" does not render meaningless EPA's ability to waive the statute on the basis of

severe harm to the economy. ACEI Br. 25. In considering the severe economic harm standard, EPA has, in the past, considered harms such as the impact of the RFS program on corn prices, the livestock industry, and food prices. 73 Fed. Reg. at 47,171. A finding under the general waiver authority that the statutory volumes cannot be achieved due to constraints within the transportation fuels market does not inevitably encompass a finding of these types of harms as well. For all of these reasons, EPA's interpretation of the ambiguous term "supply" is reasonable, and should be upheld under Chevron.

ii. EPA properly considered "carryover RINs" in exercising its general waiver authority.

Petitioners further argue that EPA improperly ignored carryover RINs in exercising its general waiver authority. To the contrary, EPA reasonably considered, but rejected, setting requirements that would mandate depletion of the bank of carryover RINs.

In the Rule, EPA considered the extent to which available carryover RINs should influence its assessment of whether to reduce total renewable fuel volumes based on "inadequate domestic supply." EPA determined that phrase should be interpreted to include only a consideration of actual renewable fuel projected to be supplied to consumers in the relevant compliance year, but that the availability of carryover RINs would appropriately be considered by the Agency in exercising its

discretion to waive or not waive the volumes when an inadequate supply is found to exist. 80 Fed. Reg. at 77,484-85.

This interpretation is reasonable and consistent with its treatment of the term "supply." As discussed above, supra Part I.B.i., the term "supply" is ambiguous, and nothing in the statute requires that carryover RINs be considered as part of "supply" or whether that supply is "inadequate." Id. at 77,484. Faced with this ambiguity, EPA reasonably concluded that carryover RINs should not be included in its assessment of the "supply" available to consumers in a given compliance year. Id. The Agency explained that, because the focus of the annual standards is "on increasing the amount of renewable fuel used in the transportation sector" each year, it would be appropriate to interpret "supply" to refer only to actual renewable fuel levels generated and available for use in the current compliance year, not past-year carryover RINs. Id.

Moreover, EPA properly found that to interpret the term otherwise would result in the complete elimination of the carryover RIN bank in a short time period. Id. Such a result would undermine the compliance flexibility inherent in the credit trading program mandated by the Act,[14] as well as eliminate benefits to the

[14] Contrary to Petitioners' contention, the fact that other mechanisms and waiver authorities provide compliance flexibility does not undermine the reasonable conclusion that carryover RINs are also important for compliance flexibility, and worth retaining. ACEI Br. 30.

program as a whole—such as the increased liquidity in the RIN market—provided by the availability of carryover RINs. Id.; 42 U.S.C. § 7545(o)(5).

However, EPA did not "ignore" carryover RINs in considering whether to lower the volumes. ACEI Br. 28. EPA explained that when an inadequate domestic supply is found to exist, the statute provides the Agency with discretion over whether or not to issue a waiver, and that EPA would consider the availability of carryover RINs in determining the extent to which it should exercise that discretion. Id. at 77,484; see Monroe Energy, 750 F.3d at 916 (upholding EPA decision to consider carryover RINs in deciding whether to exercise discretion to reduce advanced biofuel and total renewable fuel volumes under the cellulosic waiver authority). Thus, EPA reasonably determined that carryover RINs are relevant not to whether EPA can issue a waiver on the basis of inadequate domestic supply, but to whether it should do so. 80 Fed. Reg. at 77,484. In this case, EPA reasonably determined that, because of the smaller RIN bank as compared to prior years, the importance of the bank for compliance flexibility, and the importance of the bank for the operability of the program as a whole, it would not set the volume requirements at levels that would intentionally result in a drawdown of the bank of carryover RINs. Id. at 77,483-84.

Petitioners erroneously state that, in undertaking this analysis, EPA "identified no basis" for assuming that obligated parties would, in fact, collectively

retain the bank of carryover RINs for compliance flexibility, rather than use them to meet the standards. In fact, EPA addressed this very concern in the Rule. Id. at 77,486. EPA recognized the potential for individual obligated parties to comply with the standards through retirement of carryover RINs, rather than investing in efforts to increase biofuel supply. Id. However, the Agency concluded that, in light of the importance of carryover RINs in providing compliance flexibility, obligated parties as a whole would be unlikely to deplete the collective bank of carryover RINs simply to delay purchasing current-year RINs that would lead to needed production and infrastructure investments. Id.

EPA rationally grounded this conclusion on its experience in 2013. Id. That year, 1.4 billion carryover RINs—representing the gap between available renewable fuels and the 2013 standards—could have been used for compliance. Id. Nevertheless, and despite high RIN prices that year, EPA concluded that obligated parties were not avoiding needed investments to comply with the standards and estimated that only 800 million carryover RINs were used. Id.

Moreover, contrary to Petitioners' argument, EPA's process in deciding not to set the 2014, 2015, and 2016 standards so as to intentionally draw down the bank of carryover RINs was not "inscrutab[le]." ACEI Br. 31-32. EPA thoroughly discusses its decision-making process in the record. As it has for past years, see Monroe Energy, 750 F.3d at 916, EPA estimated the amount of available

carryover RINs in the Rule. For 2014-2016, EPA calculated that, at most, 1.74 billion carryover RINs would be available for compliance. 80 Fed. Reg. at 77,485. If these carryover RINs were used as a basis to retain the statutory volumes for 2014 and 2015—the compliance years that have already passed—at most only 0.1 billion carryover RINs would be available for 2016, less than one percent of the 2016 volume target and insufficient to provide compliance flexibility and RIN market liquidity. Id.

Even if the 1.74 billion carryover RINs were not drawn down in 2014 and 2015, EPA further explained that those RINs would represent just 8 percent of the statutory volume for 2016. Id. In contrast, in 2013—a year where EPA did not lower the statutory volumes based, in part, on the availability of carryover RINs—carryover RINs represented 16 percent of that year's total renewable fuel applicable volume. Id. Because of the relativity small number of carryover RINs available as compared to the final volumes for 2014-2016, EPA determined that it would not set the standards so as to intentionally draw down the carryover RIN bank. Id. EPA further stated that it expects to evaluate this issue in a similar manner each year in its annual rulemakings, in light of updated data on carryover RINs. Id. at 77,486. EPA's exercise of its discretion and judgment in this regard was reasonable and transparent, based on EPA's experience and technical expertise, and should be accorded deference.

iii. EPA's approach in setting the 2014 and 2015 total renewable fuel requirements was reasonable and consistent with its general waiver authority.

Petitioners also challenge EPA's use of the general waiver authority to reduce the total renewable fuel volume requirements for 2014 and 2015—compliance years that had passed or nearly passed when the Rule was issued. Petitioners claim that EPA's decision to lower the statutory volumes to represent the amount of RINs available for compliance in those years is impermissibly based only on the agency's delay in issuing the standards. ACEI Br. 25-27. Yet, EPA's use of the general waiver authority in 2014 and 2015 is consistent with its interpretation of "supply" and reasonable under the Court's precedent addressing application of the RFS where there has been delay. EPA's determination of the 2014 and 2015 volumes should be upheld.

EPA did not base its reduction of the 2014 and 2015 volumes solely on "delay." ACEI Br. 26. Although the 2014 and 2015 compliance years represent a unique situation because those years had passed or nearly passed by the time the Rule was published, the Agency's reduction of the volumes is consistent across all years—EPA, in its discretion, reduced volumes of advanced biofuels using the cellulosic waiver authority only; applied the same volume reduction to total renewable fuels using that authority; and then lowered total renewable fuel volumes by an additional increment based on an assessment of inadequate

domestic supply. 80 Fed. Reg. at 77,439. For past compliance years, because the standards could no longer influence the market for renewable fuels, EPA's assessment of "supply" was necessarily limited to the volumes of renewable fuel actually used. Id. at 77,440.

As discussed above, supra Part I.A.ii, EPA's reasonable approach is supported by the Court's precedent regarding retroactive application of the renewable fuel standards and consistent with EPA's past practice. In determining the 2014 and 2015 total renewable volume requirements, EPA concluded that the most appropriate way to balance its statutory obligation to issue renewable fuel standards against the burden of retroactive application on obligated parties was to set the volumes as equal to the number of RINs generated in those years that were available for compliance. NPRA, 630 F.3d at 166.

Contrary to Petitioners' assertion, EPA's past decisions to retain the statutory volumes, even in the face of substantial delay, are distinguishable from the distinctive challenges presented in the Rule. ACEI Br. 26-27. EPA, in its 2010 rulemaking implementing the EISA amendments, set the 2010 percentage standards for cellulosic biofuel, advanced biofuel, biomass-based diesel, and total renewable fuel. NPRA, 630 F.3d at 151. Because EPA missed the statutory deadline for promulgating the EISA regulations and setting the 2009 standards, the 2010 rule combined the 2009 and 2010 statutory volumes of biomass-based diesel

in deriving the biomass-based diesel percentage standard. Id. The Court upheld EPA's late application of the 2009 standards even where the 2009 compliance year had completely passed because EPA had provided advance notice in 2008 that EPA would not meet its deadline for promulgating the 2009 standard, would combine the full 2009 and 2010 requirement, and would allow 2008 RINs to be used to meet this combined requirement. Id. at 149. In contrast, here, EPA did not provide advance notice that it intended to implement the full total renewable fuel volumes for 2014 and 2015, and did not provide notice that it may combine the volumes or permit unique compliance options, weighing against retroactive application, in this case, of the full volumes provided for in the statute. See id.

For these reasons, EPA's approach to setting the 2014 and 2015 requirements was consistent with its rational interpretation of "supply," and represents a reasonable balance of EPA's duty to promote the purposes of the statute against the burden on obligated parties resulting from its delay in issuing the standards. NPRA, 630 F.3d at 166.

II. THE METHODOLOGY USED BY EPA TO SET THE 2016 TOTAL RENEWABLE FUEL AND ADVANCED BIOFUEL STANDARDS WAS REASONABLE.

The ACEI Petitioners and NBB challenge specific additional aspects of EPA's methodology used to calculate the 2016 advanced biofuel and total renewable fuel standards. However, as discussed below, the record demonstrates

that EPA adequately considered the issues raised by the ACEI Petitioners and NBB, and reasonably reduced the volumes using its waiver authorities. EPA's methodological judgments are thorough, well-founded and should be upheld, particularly given their technical nature. Miss. Comm'n on Envtl. Quality, 790 F.3d at 150.

A. EPA reasonably exercised its technical judgment in setting the 2016 advanced biofuel standard.

As discussed above, supra Part I.A, in considering the extent to which it should reduce the statutory volumes of advanced biofuel under the cellulosic waiver authority, EPA calculated the volumes of advanced biofuels that were "reasonably attainable" for the 2016 compliance year. 80 Fed. Reg. at 77,476. EPA determined that 3.61 billion gallons were reasonably attainable, and therefore lowered the applicable volume (7.25 billion gallons) to that amount. Id. at 77,479.

NBB advances three challenges to the process EPA used to reach the required advanced biofuel volume. NBB Br. 21-26. First, NBB argues that EPA articulates no clear standard for setting advanced biofuel volumes, which allegedly impermissibly increased market uncertainty. Id. 21-22. Second, NBB contends that EPA improperly estimated volumes of imported sugarcane ethanol. Id. 22-23. Finally, NBB contends that EPA ignored evidence that the volumes of biomass-based diesel, imported advanced biofuels, and total advanced biofuels could be higher, including evidence that industry can overcome infrastructure constraints

considered by EPA. Id. 23-26. However, EPA's robust analysis of these issues is reasonable, and the advanced biofuel volume set by EPA should be upheld.

First, EPA's approach in evaluating "reasonably attainable" levels of advanced biofuels was thoroughly described in the Rule. As discussed above, EPA has broad discretion to lower advanced biofuel volumes under the cellulosic waiver provision. Supra Part I.A. In exercising this discretion, EPA determined that it should allow "reasonably attainable" volumes of advanced biofuels to fill the gap presented by the shortfall of cellulosic biofuels. 80 Fed. Reg. at 77,476. In determining whether the volumes were reasonably attainable, EPA stated that it would look to such factors as "production, import, distribution and consumption constraints associated with these fuels," and specifically discussed pertinent factors for different fuels in its analysis. Id. at 77,476-79. EPA also explained that, in assessing "reasonably attainable" volumes, it was not required, and did not intend, to necessarily identify the maximum volumes of advanced biofuels that could be used in 2016. Id. at 77,476 n.129. This approach, and EPA's associated analysis for 2016, provides ample "guidance to the industry as to how future volumes will be set." NBB Br. 21.

Second, EPA properly estimated volumes of imported sugarcane ethanol, a primary source of advanced biofuel. Relying on record and extra-record evidence, NBB argues that EPA ignored estimates of increases in sugarcane imports and

improperly relied on data regarding imports for years that the renewable fuel standards were not in place (2014 and 2015). NBB Br. 22. In fact, EPA reasonably considered past data on imports and the considerable uncertainty in estimating future imports in concluding that 200 million gallons was a reasonably attainable volume for 2016. 80 Fed. Reg. at 77,476-78. Specifically, EPA noted that imports ranged from relative highs of 680 million gallons in 2006 and 435 million gallons in 2013 to more recent lows of only 64 and 55 million gallons in 2014 and 2015, with the average over the last ten years at 300 million gallons. Id. at 77,478.

NBB argues that the lower estimates of imports in 2014 and 2015 are attributable only to the fact that there were no RFS standards set by the Agency during those compliance years. NBB Br. 22. Yet, the Agency explained that a number of factors outside the influence of the RFS program appear to have affected the level of imports, including varying rates of gasoline consumption in Brazil and varying contributions of the sugarcane crop to sugar production depending on the market price for sugar. Id. at 77,478. In fact, the highest import levels on record (for 2006) precede implementation of the RFS advanced biofuel requirement in 2010. Id. Taking these factors into account, EPA reasonably exercised its judgment to determine that 200 million gallons of sugarcane ethanol would be reasonably attainable. Id. This Court has upheld a similar exercise of

EPA's judgment in challenges to past renewable fuel standards. API, 706 F.3d at 481.

Likewise, the record provides ample support for EPA's determination of the reasonably attainable volumes of biomass-based diesel. Far from "ignoring" U.S. and foreign registered biodiesel and renewable diesel capacity, EPA considered and analyzed not only these factors but a number of others important to assessing the reasonably attainable volumes of advanced biodiesel and renewable diesel.[15] 80 Fed. Reg. at 77,467-68, 77,478.

NBB also incorrectly states that EPA did not explain how the Agency determined that 400 million gallons of its 2016 estimate of biodiesel and renewable diesel volume should be considered conventional (i.e., non-advanced) rather than advanced biofuel. NBB Br. 24. In the Rule, EPA noted that renewable diesel faces fewer distribution constraints than other biofuels, and that, therefore, demand for renewable diesel is likely to increase.[16] 80 Fed. Reg. at 77,478. EPA further noted that imports of renewable diesel have increased in recent years. Id. Since much of the growing imported volumes of renewable diesel qualifies as

[15]As explained in EPA's opposition to NBB's motion to supplement the record, extra-record documents cited by NBB to address this analysis are not properly part of the record under review, and should be disregarded. Doc. No. 1637240.

[16] Increasing renewable diesel supply in the time period 2011-2015 is depicted graphically in the Rule. 80 Fed. Reg. 77,465 Figure II.E.3-1.

conventional rather than advanced biofuel, EPA concluded that conventional renewable diesel would "continue to be an important source of renewable fuel used in the United States." Id.

In addition, despite EPA's projection that 400 million gallons of the total 2.5 gallons of renewable diesel and biodiesel supply would not qualify as advanced biofuel, the 2016 advanced biofuel volume still represents an increase of about 370 million gallons from that supplied in 2015, which is greater than the annual increase that occurred over the previous two years. Id. Contrary to NBB's argument, therefore, EPA adequately explained its reasoning on this issue, and EPA's final 2016 advanced biofuel volume requirement continues to incentivize increased production and import of advanced biofuel as intended by the statute. Id.

Finally, EPA's thorough analysis of the constraints on the use of biodiesel and renewable fuels supports its assessment of reasonably attainable volumes of advanced biofuel. Id. at 77,470-71. The record evidence cited by NBB does not undercut this analysis. For example, NBB argues that there are no limitations on using blended fuels with a high content of biodiesel, including B100, and that the record shows instances where biodiesel blends of B11, B15, and B20 are being used.[17] NBB Br. 25. NBB also argues that EPA improperly considered the

[17] B100 is fuel containing 100% biodiesel. B11, B15, and B20 represent blended diesel fuels with 11%, 15%, and 20% biodiesel content, respectively.

potential for increased imports from Argentina. Id. at 24. Yet, the record reveals that EPA properly included these considerations in its approach to evaluating limiting factors on total biodiesel and renewable diesel use, 80 Fed. Reg. at 77,471-72 (discussing constraints on the use of higher blends of biodiesel); Id. at 77,467-70 (discussing imports of biodiesel from Argentina) but nevertheless ultimately concluded that the use of biodiesel and renewable diesel was constrained by a variety of factors. Id. at 77,465-75. NBB's complaints about how EPA addressed these factors, and NBB's reliance on several extra-record documents in support, does not warrant setting aside EPA's thorough analysis and technical judgment evaluating these factors, even if these factors could support a different estimate of advanced biofuels. See Mississippi v. EPA, 744 F.3d 1334, 1349 (D.C. Cir. 2013).

In short, EPA's thorough assessment of reasonably attainable volumes of advanced biofuels provides a more than adequate explanation of EPA's decision. EPA considered all of the data and issues raised by NBB that were properly in the record, as well as a number of other factors, and on that basis articulated a "rational connection between the facts found and the choice made." State Farm, 463 U.S. at 43.

B. EPA reasonably evaluated E85 in setting the 2016 total renewable fuel standard.

The ACEI Petitioners contend that the 2016 total renewable fuel volume, calculated by EPA as 18.11 billion gallons, is arbitrary and capricious. Specifically, they argue that one component of EPA's calculation—that the maximum achievable supply of E85, a high-ethanol-content fuel, is 200 million gallons—was not adequately explained in the record. ACEI Br. 32-36. This argument lacks merit.

In calculating the maximum achievable E85 volume, EPA evaluated certain limiting factors on the availability of E85 for use by consumers. For example, EPA determined that E85 is only offered at about 2% of retail stations nationwide, and it can only be used in a limited number of "flex fuel vehicles" specially designed to accommodate this fuel type. 80 Fed. Reg. at 77,460, 77,481.

EPA additionally determined that the supply of E85 to consumers is affected, in part, by the price discount for E85 compared to the more widely available E10. Id. at 77,464. A price discount relative to E10 is needed to increase the supply of E85, because, on average, E85 contains 22% less energy, and therefore provides 22% fewer miles per gallon than a comparable volume of E10. Id. at 77,461. Based on an analysis of past data as well as its own judgment regarding the possible impact of the RFS standards, EPA estimated an average nationwide E85 price discount of 22%, representing the "energy-parity" price

point, as the most likely maximum value that could be attained by a market responsive to the RFS standards in 2016. Id. at 77,464. Petitioners argue that the 22% discount figure calculated by EPA was not adequately explained in the record, and too low.

Contrary to this assertion, EPA provided a detailed evaluation of historic price discounts in the Rule, and appropriately used its judgment, grounded in historic data, to estimate the maximum achievable price discount of E85 in 2016. To derive the 22% discount figure, EPA considered the 2014 nationwide average discount (17.5%), monthly discount data from five states, and other studies evaluating E85 discounts. Id. at 77,461; EPA–HQ–OAR–2015–0111-3666, JA__. EPA noted that "very few" of the months for which data were available showed an average E85 price discount greater than the energy parity level. EPA–HQ–OAR–2015–0111-3666 at 8, 13, 25-35, JA__. EPA then used its judgment to assess the E85 discount rate that could be accomplished under the influence of the 2016 renewable fuel standards. 80 Fed. Reg. at 77,464. Although EPA's analysis did not use a precise formula in calculating the 22% discount rate, EPA projected a larger E85 price discount than reflected in past data, based on EPA's judgment regarding the growth that is possible under the influence of the RFS standards. Id.

Far from providing "no explanation" of this analysis, ACEI Br. 34, therefore, EPA performed a robust evaluation grounded in past data, and

Petitioners provide no alternative analysis that it believes EPA should have undertaken. To the extent that Petitioners prefer a more exacting quantitative analysis, such an analysis is not required for EPA's determination to be upheld. API, 706 F.3d at 481.

Petitioners would have EPA ignore past data in arguing that a higher discount rate is available under "RFS theory." ACEI Br. 34. Under their analysis, higher RFS standards drive higher RIN prices, which have the unlimited ability to then lead to greater discounts in the price of E85 as compared to E10. Id. Yet, as EPA explains in the Rule, reality is not so simple. 80 Fed. Reg. at 77,459-60. In examining past data to determine whether or not higher RIN prices resulted in significantly lower E85 prices at retail, EPA concluded that the E85 market was "not sufficiently responsive to higher RIN prices to drive large increases in E85 sales volumes," as Petitioners' simplified theory would predict. Id. at 77,459. Rather, EPA concluded, by analyzing data between January 2013 and July 2015, that only 44% of RIN-value was passed on to E85 customers in the form of lower prices, indicating that higher RIN prices do not necessarily translate to significantly higher E85 discounts or greatly increased E85 use. Id.

Perhaps recognizing that this analysis undermines their simplified theory, Petitioners also argue that EPA's analysis of this achievable pass-through of RIN prices is unreasonable. They contend that EPA's analysis is based on data from a

time period when the standard "was not binding with respect to E85"—in other words, during a time period where the standards were not requiring E85 use. ACEI Br. 35. The evidence in the record refutes this argument. First, the standards are never "binding" on a particular type of renewable fuel. There is no E85 standard, or even ethanol standard, mandated by the statute.

Moreover, under Petitioners' logic, only data from a time period when the standards were binding on E85 could reasonably be used by EPA in assessing the 2016 E85 volume. Yet, they argue that there has never been such a time period,[18] and do not, in their brief or comments to the Agency, suggest alternative data that EPA should refer to in assessing what price discount could reasonably be attained in 2016.

In any event, the data undermines Petitioners' assertion that a higher discount rate is available during periods of time where the standards generally were binding. Under Petitioners' theory, the E85 discount rate should have been highest between August and December of 2013. ACEI Br. 35 n.14. However, the past data analyzed by EPA demonstrates that the discount rate was higher during other, "non-binding" periods, during which RIN prices were very low. See, e.g., EPA-HQ-OAR-2015-0111-3666 at 26-27 (20.3% average discount in Minnesota

[18] Petitioners assert that the RFS standards in general have only been binding between August and December 2013, and even then they were non-binding with respect to E85. ACEI Br. 35 n.14.

from August to December 2013, compared to 21.07% average discount from June to October 2010), JA__; EPA-HQ-OAR-2015-0111-0062 at 9, Fig. 3 (showing very low RIN prices prior to 2013), JA__.

The ACEI Petitioners further argue that EPA failed to consider that competition between E85 and E10 will exert downward pressure on E85 prices once the standards become binding. ACEI Br. 35. This argument, raised for the first time in litigation and not presented to EPA in comments on the proposed rule, should not be considered by the Court. 42 U.S.C. § 7607(d)(7)(B); Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 553 (D.C. Cir. 2015). However, even if considered, the Agency's analysis in the record undermines this conclusion. As explained by EPA, retailers selling both E10 and E85 are seeking to obtain maximum profits across sales of all their products, and, therefore, may not set prices of each at competitive levels. 80 Fed. Reg. at 77,461. As EPA explained in the record, it is competition between different stations selling E85—competition that is not yet established because of the small number of E85 retailers—that will eventually lead to significant E85 price reductions. Id.

Finally, Petitioners' objection to EPA's "demand curve"—the relationship between the E85 price discount and E85 sales volumes—is irrelevant to the Rule under review. ACEI Br. 35-36. Petitioners argue that EPA unreasonably relied on actual data on E85 price discounts and sales volumes in determining that there

would be a linear increase in E85 sales at price discounts greater than energy parity, when a number of academic studies suggested that sales could increase in a greater, non-linear, manner with these greater price discounts (making E85 a relative bargain to consumers beyond the energy-parity price point). Id. However, that aspect of EPA's analysis did not influence EPA's assessment of the E85 sales volume in the Rule. Based on past data and consideration of the ability of the RFS standards to incentivize increased renewable fuel use, EPA determined that the E85 price discount would be 22%—the energy-parity price point. The fact that other academic studies suggest there could be a different relationship between the price discount and sales volume beyond this point does not undermine EPA's reasoned determination of the discount rate.

In sum, EPA's analysis of E85 in the record was thorough, reasonable, and well within the agency's expertise. That the ACEI Petitioners may disagree with the outcome of this analysis, or would have themselves projected E85 supply differently, does not render EPA's determination irrational. See Mississippi v. EPA, 744 F.3d at 1349.

III. EPA'S METHODOLOGY FOR PROJECTING CELLULOSIC BIOFUEL PRODUCTION IN 2016 WAS REASONABLE AND OUTCOME-NEUTRAL.

Certain obligated parties—API, AFPM, and Monroe Energy—argue that EPA overestimated cellulosic biofuel production for 2016. See Cellulosic Br. 13-26. These arguments are unsupported by the record.

As discussed above, EPA's annual obligation with respect to cellulosic biofuel is to determine the "projected volume of cellulosic biofuel production" for each year based on estimates provided by EIA and on EPA's own analysis. 42 U.S.C. §§ 7545(o)(7)(D)(i), (3)(A); Am. Petroleum Inst. v. EPA, 706 F.3d 474, 478 (D.C. Cir. 2013) ("API"). If the projection is lower than statutory targets, EPA must use its cellulosic waiver authority to lower the applicable volume of cellulosic biofuel for that year accordingly. 42 U.S.C. § 7545(o)(7)(D)(i).

A. API: EPA's cellulosic biofuel predictions must aim for accuracy using an outcome-neutral methodology.

Since inception of the RFS program, the cellulosic biofuel industry has been gradually transitioning from research and development to commercial-scale facilities, but production levels, though gradually increasing, have fallen short of statutory volumes. 80 Fed. Reg. at 77,428. In setting the 2012 renewable fuel standards, EPA projected cellulosic volumes using a method that balanced uncertainties "with the objective of promoting growth in the industry." API, 706 F.3d at 478 (internal quotation marks omitted). Rather than attempt to project the

most likely volumes, EPA chose projections that would "provide the appropriate economic conditions for the cellulosic biofuel industry to grow." Id. (internal quotation marks omitted).

In API, this Court vacated the 2012 cellulosic volume holding that the statutory text did not support "EPA's decision to adopt a methodology in which the risk of overestimation is set deliberately to outweigh the risk of underestimation." Id. at 479, 481. Rather, the Act "call[s] for a prediction of what will actually happen." Id. at 479. While EPA may deviate from the EIA estimate based on its own analysis, that supplemental analysis must use an outcome-neutral methodology. Id. at 478, 480. Put another way, EPA must attempt to accurately estimate actual cellulosic biofuel production without putting its thumb on the scale to overestimate or underestimate likely production.

B. EPA's methodology for predicting 2016 cellulosic biofuel volumes took a "neutral aim at accuracy."

In developing the Rule, EPA had available actual production numbers for recent years. In 2014, cellulosic production increased substantially to 33 million gallons. 80 Fed. Reg. at 33,106. That year, new commercial-scale cellulosic ethanol facilities opened, and a significant number of cellulosic RINs were generated using biogas-derived fuels[19] through a new pathway approved that year

[19] The record and Petitioners refer to these fuels as "CNG/LNG," which is compressed natural gas and liquid natural gas produced from biogas from landfills,

by EPA. Id. at 33,106-07; 80 Fed. Reg. at 77,428. For 2015, based on actual production through September 2015 and an extrapolation of likely production for the remaining months, EPA projected that 123 million gallons of cellulosic biofuel would be produced in 2015. 80 Fed. Reg. at 77,426-28. The 2015 projection was almost a four-fold increase over 2014, and Petitioners do not challenge either the 2014 or the 2015 volumes.

For 2016, EPA projected cellulosic biofuel production of 230 million ethanol-equivalent gallons. 80 Fed. Reg. at 77,428. This projection is based on a combination of information from EIA; information received from individual facilities about capacity, production start dates and biofuel production plans; and EPA's own engineering judgment. Id. As part of this analysis, EPA researched all potential production sources by company and facility, including facilities in the planning stages, under construction, in the commissioning or start-up phases, and in production. Id. From this universe, EPA identified a subset expected to produce commercial volumes of qualifying cellulosic biofuel, excluding facilities that typically have not generated RINs, such as those designed for research and development. Id. at 77,428. EPA then developed projection ranges for each facility based on a number of factors, including: technology being used, progress

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municipal waste-water treatment facility digesters, agricultural digesters, and separated municipal solid waste digesters. 80 Fed. Reg. at 77,499.

toward construction and production goals, facility registration status, production volumes achieved, and other factors that could potentially impact fuel production and the ability to generate cellulosic RINs. Id.

EPA determined, however, that it was not possible to precisely project volumes for each facility. Id. at 77,504-05. Moreover, because the cellulosic industry is still in its infancy and projecting future production volumes from any individual facility would involve a great deal of uncertainty, evidence did not exist to suggest that individual facility projections would produce more accurate results than a more generalized approach.[20] Id.

Instead, EPA separated them into four groups of similarly situated facilities and projected the likely production from each group. Id. at 77,505. Those four groups are: liquid biofuel producers who have already achieved commercial-scale production; liquid biofuel producers who have not yet achieved commercial-scale production; biogas producers who have already achieved commercial-scale production; and biogas producers who have not yet achieved commercial-scale production. Id. at 77,505, 77,507. Biogas and liquid biofuel producers were assessed separately because there is very little technological risk associated with biogas in comparison to liquid biofuel. Id. at 77,505.

[20] Indeed, past attempts to project individual company production had produced inaccurate projections. Id. at 77,505.

EPA then defined an aggregate likely range of production volumes for each group. The low end of the production range for each group was based on the most recent 12 months for which data was available.[21] Id. at 77,503, 77,507 (2016 method is similar to the 2015 method). To calculate the high end of the production range for each group, EPA started with a production estimate from each company. Id. at 77,507. EPA tested these by generating its own estimate from expected start-up dates, facility capacity, and, for liquid biofuel producers, an optimistic benchmark six-month straight-line ramp-up period from start-up to full capacity.[22] Id. at 77,503 n.213. The lower of these two estimates was used as the high-end projection for that company. Id. at 77,503-04. The high-end and low-end ranges for each company in a group were then added together to get the ranges for each group. Id. at 77,507.

EPA explained that to account for the uncertainty in individual facility production, it was appropriate to identify a specific value within the range for each group that reflects the varying probable production associated with each group. Id. at 77,506. For the group of liquid biofuel facilities that have not achieved

[21] For facilities that had produced nothing in the most recent 12 months for which data was available, the low-end projection was, not surprisingly, zero. See id. at 77,505.

[22] For facilities generating cellulosic RINs from biogas, EPA assumed no ramp-up period was necessary because the vast majority of facilities EPA considered are already producing biogas-derived fuels for other purposes. Id. at 77,503 n.213.

commercial-scale production, EPA projected production at the 25th percentile of the range for that group. Id. This percentile was used in light of the uncertainties and significant technological risks these facilities face as they attempt to begin operation and ramp up to production at commercial scale and based on EPA's past experience in which the projections of similar cellulosic facility operators were not met. Id. For liquid biofuel facilities that have already achieved commercial-scale production, EPA projected production at the 50th percentile of the range for that group. Id. This accounts for the uncertainty related to scale-up from the volume produced in the most recent 12 months. Id. EPA's method of averaging probable production across multiple facilities also accounts for the possibility that some facilities will be able to deliver the volumes they expect while others may experience challenges and produce at the low end. Id.

For the group of biogas facilities that have not achieved commercial-scale production of cellulosic RINs, EPA projected production at the 50th percentile; for the biogas facilities that have achieved commercial-scale production of cellulosic RINs, EPA projected production at the 75th percentile of the production range for that group. Id. at 77,506. These are higher than the percentiles used in the Proposed Rule, which were at the 25th and 50th percentiles, respectively. Id. EPA had received a number of comments about the mature state of the technology required to produce and collect biogas, suggesting that this class of facilities

experience fewer uncertainties and that EPA's proposal had therefore underestimated the potential for RIN generation for biogas-derived fuels. Id. After taking another look at the fuel production and RIN generation history of these facilities, including what had occurred to date in 2015, the differences in technology risks between liquid cellulosic biofuel production and production of biogas-derived fuels, and these comments, EPA determined there was a sufficient basis to estimate production at the higher percentiles. Id.

As required by the Act and API, EPA used an outcome-neutral methodology to achieve the most accurate possible projection of cellulosic biofuel production in 2016. EPA reasonably chose this method based on its sound engineering judgment after considering the record and relevant factors and articulating a "rational connection between the facts found and the choices made." State Farm, 463 U.S. at 43; Miss. Comm'n on Envtl. Quality, 790 F.3d at 150.

C. Petitioners point to no legitimate flaw in EPA's 2016 cellulosic biofuel projections.

Despite EPA's detailed explanation of its outcome-neutral methodology for projecting cellulosic biofuel production levels in 2016, API, AFPM, and Monroe Energy argue that EPA acted unreasonably. See Cellulosic Br. 13-26. Pointing to errors in past projections and methodologies, see, e.g., id. at 5-9, 13-14, 15, 21-22, and trying to pick apart various factors as though they had been used in isolation, Petitioners essentially seek to require EPA to put its thumb on the side of

underestimation. But consistent with API, EPA properly adhered to an outcome-neutral methodology. 706 F.3d at 478, 480. As EPA explained, the cellulosic biofuel industry is changing and growing rapidly, e.g., 80 Fed. Reg. at 77,502-03, and EPA has developed a process that uses all available information—including its past experience with liquid biofuel facilities and the rapid increase in RINs generated from biogas facilities—to generate annual projections that are as accurate as reasonably possible.

i. EPA's methodology reasonably addressed uncertainties in projecting liquid cellulosic biofuel.

Petitioners point to five components of EPA's methodology and argue that, when viewed in isolation, they reflect a failure to take a neutral aim at accuracy in projections for liquid biofuel facilities. Cellulosic Br. 13-23. But Petitioners fail to identify flaws in EPA's analysis, even when methodological components are viewed in isolation, and EPA's methodology, viewed as a whole, accounts for all of the various uncertainties identified by Petitioners. Petitioners identify no reason why this Court should not defer to EPA's reasonable exercise of its technical and scientific expertise. See Miss. Comm'n on Envtl. Quality, 790 F.3d at 150.

First, Petitioners claim that EPA should not have considered data on projected start-up production dates provided by liquid cellulosic facilities anticipated to begin generating RINs in 2016 because some facilities did not meet their anticipated start-up dates in the past. Cellulosic Br. 15. Under API, however,

EPA has discretion to consider data provided by the facilities, so long as EPA uses an outcome-neutral methodology to achieve a reasonably accurate projection. 706 F.3d at 477-78 (describing EPA's consideration of facilities' data and other factors as "little more than a technocratic exercise of agency discretion").

EPA used the facilities' own anticipated start-up dates as one part of the calculation to derive the high end of the production range for facilities expected to generate RINs in 2016 that had not yet achieved consistent commercial-scale production. 80 Fed. Reg. at 77,428, 77,503, 77,507. But EPA also considered the low-end of the ranges (which were sometimes zero), and those ranges were then aggregated with the ranges of facilities in similar circumstances. Id. at 77,503, 77,505, 77,506. And then, to account for EPA's professional judgment and past experience concerning technological risks associated with liquid biofuel facilities, EPA projected production at the 25th percentile of the aggregate range. Id. at 77,506. This method reasonably accounted for the level of uncertainty that exists at any one facility, including in start-up dates, and reflects EPA's technical assessment of likely production in the liquid cellulosic biofuel market, based on EPA's experience and research. See Miss. Comm'n on Envtl. Quality, 790 F.3d at 150 (Court defers to EPA's technical expertise). Petitioners seem to suggest that EPA should assume that no new liquid biofuel facility will start up in 2016, despite

evidence that the industry is growing. This would improperly produce a significant under-estimation rather than an outcome-neutral projection.

Second, Petitioners claim that EPA should not have used the six-month ramp-up period in estimating the high-end production range for liquid cellulosic biofuel facilities because "many cellulosic facilities take substantially longer" to reach capacity. Cellulosic Br. 16-18. Petitioners ignore the details of EPA's analysis. EPA did not use the six-month ramp-up period in all circumstances, but as an "optimistic" benchmark that was only used to estimate the high end of a facility's projected range if it resulted in a lower projection than the facility's own estimates. 80 Fed. Reg. at 77,503-04. Petitioners' specific concern is accounted for in EPA's estimate of the low-end range, which "is designed to represent the volume of fuel EPA believes each company would produce . . . if they experience challenges that result in reduced production volumes or a longer than expected ramp-up period." 80 Fed. Reg. at 33,141. The high-end and low-end facility projections were then aggregated with projections from similar facilities, and then EPA used the 25th percentile of this range for facilities that had not yet achieved commercial production to account for the possibility that, depending on their circumstances, some facilities will not achieve the optimistic benchmark. 80 Fed. Reg. at 77,506. Petitioners fail to acknowledge that EPA's use of the 25th percentile did in fact account for the possibility they refer to, that certain facilities

may not ramp up to full production within 6 months. As EPA explained, at least one liquid cellulosic facility recently met the 6-month ramp up period, and delays are expected to become less common as companies are gaining experience in starting up cellulosic facilities. EPA-HQ-2015-0111-3671 at 557, JA__. To use the worst-case scenario (i.e. no production) to calculate the high-end range as Petitioners seem to suggest, or even to use an extended ramp-up period, would not create an outcome-neutral methodology; it would more likely impermissibly tilt the analysis toward under-estimation. See API, 706 F.3d at 478, 480.

Third, Petitioners argue that EPA should not have set the low-end of the production ranges for liquid biofuel facilities at the level of actual production for the most recent 12-month period for which data was available because there is a risk that facilities will reduce production or cease production altogether. Cellulosic Br. 18-19. But EPA expressly accounted for this in its analysis. In EPA's judgment, the majority of facilities currently in the start-up and ramp-up phases would increase production from year to year. 80 Fed. Reg. at 77,503. While EPA acknowledged a risk of reduced production levels at individual facilities, EPA did not believe, in its technical judgment, this was likely to occur for any of the groups of companies assessed. Id. Moreover, EPA did not consider it appropriate to set the low-end ranges at the "worst-case scenario," which would be zero, for facilities that had already achieved commercial-scale production unless data exists to show

that achieving a minimum level equal to past production is unlikely. Id. This analysis was reasonable and made even more so by EPA's aggregation method.

Fourth, Petitioners argue that EPA did not adequately explain its use of the 25th percentile for liquid cellulosic biofuel facilities that have not achieved commercial-scale production or the 50th percentile for those that have achieved commercial status. Cellulosic Br. 20-22. On the contrary, the record is rife with EPA's explanations of its professional judgment that led to these projections. EPA explained the recent growth in the industry, its use of data on progress toward construction and production, the technological risks associated with new facilities, its expectation that producing facilities currently in start-up and ramp-up phases would increase production, and many more factors. 80 Fed. Reg. at 77,428, 77,504-06. Petitioners nitpick EPA's projections for individual facilities as inaccurate, but EPA ultimately used aggregate modeling precisely because it is not possible to predict the production levels of any one facility. Id. at 77,504-05. The 25th percentile method was used to account for the very uncertainties and past over-estimation Petitioners identify. Petitioners' complaints about the 50th percentile method is especially meritless; in light of uncertainties on either side of the equation, it was certainly reasonable for EPA to project production at a percentile in the middle of the high and low-end ranges. Petitioners' preferred calculation method notwithstanding, EPA's method was reasonable, based on its

technical expertise to which this Court defers, and with a neutral aim at accuracy.[23] API, 706 F.3d at 480; Miss. Comm'n on Envtl. Quality, 790 F.3d at 150.

Fifth, Petitioners claim that EPA did not give sufficient due to, or provide adequate notice of, EIA's estimates in its projections for liquid cellulosic biofuel. Cellulosic Br. 22-23. It is well-settled that while EIA must supply an estimate, EPA need not simply adopt EIA projections. API, 706 F.3d at 478. "Congress didn't contemplate slavish adherence by EPA to the EIA estimate." Id. Rather, EPA must give the estimate respect while also taking a "neutral aim at accuracy" in its ultimate projection of cellulosic biofuel production. Id. at 476, 478. As explained in the Rule, EPA received EIA's projection of liquid cellulosic biofuel production in September 2016, which helped form the basis of EPA's projections. 80 Fed. Reg. at 77,425, 77,428, 77,502. That projection, however, arrived after the Proposed Rule, as the statute intended. See 42 U.S.C. § 7545(o)(3)(A), (B) (EIA estimates due October 31; EPA rule due November 30). Moreover, EIA's projection did not include estimates for cellulosic biofuel from biogas facilities—a fast-growing and currently dominant source of cellulosic biofuel RINs—nor did it

[23] Petitioners' attempt to attack these predictions simply based on past production rates is not relevant. See Cellulosic Br. 21. As EPA explained, the cellulosic biofuel industry is experiencing rapid growth. E.g., 80 Fed. Reg. at 77,502-03. Moreover, to the extent Petitioners imply that EPA did not improve upon its prior production method, see Cellulosic Br. 22, this is simply not true. As API and AFPM themselves noted in their joint comment letter, "EPA has improved its assessment from previous years." EPA-HQ-OAR-2015-0111-1948 at 42, JA__.

include projections for cellulosic renewable heating oil or imported cellulosic biofuel. 80 Fed. Reg. at 77,501-02. It was especially appropriate for EPA to conduct its own analysis and deviate from EIA's estimates where, as here, its own information showed that the EIA estimate did not account for all sources and was therefore an under-estimation. Notably, however, when comparing the EIA estimate to EPA's analysis of the same facilities, the volume projections generated by the two agencies were very similar. Id.

ii. "CNG/LNG" projections are adequately explained and reasonable.

Petitioners' argument that EPA did not adequately explain its projection of production at the 50th percentile and 75th percentile for facilities generating RINs for biogas-derived fuels is inconsistent with the record. See Cellulosic Br. 23-25. As EPA explained, biogas facilities were grouped separately from liquid biofuel production facilities because they have different risks associated with them. 80 Fed. Reg. at 77,504-05. While EPA originally proposed to use the 25th percentile for biogas facilities that had not achieved commercial-scale production of cellulosic RINs and the 50th percentile for those that had—the same percentiles it used for liquid cellulosic biofuel—several commenters provided data and claimed that EPA had underestimated the potential for RIN generation from biogas-derived fuels. 80 Fed. Reg. at 77,506. EPA ultimately agreed and determined that it was appropriate to use the higher percentiles. Id.

Unlike the infant liquid biofuel industry, many facilities have already been collecting biogas from sources such as landfills and digesters at a commercial scale. See id. at 77,504. After EPA's 2014 approval of a new pathway to generate cellulosic RINs from biogas-derived fuels, a significant number of cellulosic RINs were generated using biogas. Id. at 77,428. Because of the mature state of biogas collection technology, all that is necessary for many facilities to begin generating RINs is to register with EPA and demonstrate that the fuel being produced meets qualifications, including use as transportation fuel. EPA-HQ-OAR-2015-0111-0015 at 8, JA__. Many facilities had already registered and others were expected to do so. EPA-HQ-OAR-2015-0111-0015 at 4, Tbl. 2, JA__. In light of the public comments, EPA considered the relative technological maturity of biogas facilities as compared to liquid biofuel facilities and data on actual RIN production history (which was updated since the Proposed Rule), and determined that RIN generation from biogas-derived fuels would likely be at the higher percentiles. 80 Fed. Reg. at 77,506. In other words, EPA reasonably compared the fewer uncertainties associated with biogas facilities over liquid biofuel facilities and selected the higher percentiles based on its own data and its own technological judgment. EPA's method was reasonable, based on its technical expertise, and should be upheld.

Petitioners argue that EPA's model does not explain biogas-derived fuel production in past years, Cellulosic Br. 24, but EPA explained that registration with EPA, not technology, was the primary hurdle to cellulosic RIN generation from such facilities. EPA-HQ-OAR-2015-0111-0015 at 5, JA__. Therefore, EPA had no reason to attempt to correlate past industry production, which would have included production that does not qualify under the RFS program, with current projections. Petitioners cite their own public comment to argue that EPA did not consider whether biogas facilities are located near a pipeline suitable for shipping fuel for transportation purposes. Cellulosic Br. 24. But EPA limited its analysis to biogas facilities that had registered or were likely to register to generate RINs from biogas-derived fuels. EPA-HQ-OAR-2015-0111-0015, JA__. As EPA noted in response to another comment, "biogas is only eligible to generate RINs if it is used as transportation fuel, and if this use can be verified according to EPA's regulations." EPA-HQ-OAR-2015-0111-3671 at 571, JA__. Petitioners assert that EPA should not have relied on projections from the Coalition for Renewable Natural Gas because that organization overestimated production in 2014. Cellulosic Br. 24-25. But again, EPA directly addressed this issue. After noting past overestimations, EPA said that "[w]hile we believe the projections provided by [the Coalition for Renewable Natural Gas] and other producers are a valuable part of the information we consider when making our projections, we do not think

it would be appropriate to simply adopt these projections." EPA-HQ-OAR-2015-0111-3671 at 569, JA__. Rather than accepting producers' optimistic estimates or obligated parties' pessimistic estimates, EPA conducted its own analysis based on a range of information including data on past production, its own analysis of industry capacity and technological constraints, and public comments.

In short, these claims are meritless, and the Court should defer to EPA's expertise. Miss. Comm'n on Envtl. Quality, 790 F.3d at 150.

iii. EPA disclosed production data.

Finally, Petitioners argue that the 2016 cellulosic fuel volumes must be vacated because, they claim, EPA did not separately disclose 2014 and 2015 production data on liquid cellulosic biofuel and biogas. Cellulosic Br. 25. Petitioners are wrong. First, EPA did disclose past production data, detailing RIN generation, exports, adjustment, and net supply for ethanol, biogas, and other fuel types on the public docket. EPA-HQ-OAR-2015-0111-0003, 3609, 3669; see also Public Data for the Renewable Fuel Standards (showing RIN activity by month and year), available at https://www.epa.gov/fuels-registration-reporting-and-compliance-help/public-data-renewable-fuel-standard. Second, even if Petitioners could point to a procedural error in EPA's disclosure, Petitioners have failed to show how they were harmed by it or that there is a substantial likelihood that the

Rule would have been different without it. See 42 U.S.C. § 7607(d)(8). Therefore, this claim must be denied.

IV. UNDER THIS COURT'S WELL-SETTLED PRECEDENT, EPA MAY PROMULGATE BIOMASS-BASED DIESEL VOLUMES EXCEEDING PRIOR YEARS' VOLUMES.

Unlike for other types of renewable fuel, subparagraph (B)(i) in CAA Section 211(o)(2) specifies applicable volumes for biomass-based diesel only through 2012. 42 U.S.C. § 7545(o)(2)(B)(i)(IV). For later years, subparagraph (B)(ii) requires that EPA "shall" promulgate annual volume requirements for biomass-based diesel—which must be above 1 billion gallons—based on EPA's review of the program to date, consideration of six factors, and consultation with the Secretaries of Agriculture and Energy. 42 U.S.C. § 7545(o)(2)(B)(ii), (B)(v). The required volumes under subparagraph (B)(ii) are due 14 months before the year for which the volumes will apply. Id.

EPA missed its biomass-based diesel volume deadline for the years 2014, 2015, 2016, and 2017. 80 Fed. Reg. at 77,430. The statutory directive, however, requires EPA action, even if late. Id.; see also Nat'l Petrochemical & Refiners Ass'n v. EPA, 630 F.3d 145, 163 (D.C. Cir. 2010) ("NPRA"). Therefore, in the Rule, EPA promulgated biomass-based diesel volumes for all four years. 80 Fed. Reg. at 77,430, 77,490-92. EPA acknowledged its lateness but explained that it was exercising its authority in a reasonable way by setting 2014 volumes equal to

actual production, 2015 volumes equal to actual production for months for which data was available and projected actual production for the remaining months, and 2016 and 2017 volumes at a level that achieves only a modest incremental increase over 2015 projected actual production. Id. at 77,430, 77,490-92. EPA further noted that, because obligated parties were expected to retire 1.63 billion biomass-based diesel RINs to satisfy their obligations with 2014 advanced biofuel and total renewable standards, obligated parties would experience no additional burden from a biomass-based diesel volume set at 1.63 billion gallons for that year; indeed, some obligated parties would likely already find themselves in compliance. Id. at 77,491-92. And EPA also considered the amount of notice parties had received and flexibility mechanisms that could mitigate any burden from the lateness of the rule—noting the availability of a substantial number of carryover biomass-based diesel RINs and the option to carry forward a RIN deficit—and established extended compliance deadlines for 2014 and 2015. Id.

Ignoring the statutory directive, API, AFPM, and Monroe Energy now claim that EPA cannot set biomass-based diesel volumes in an amount that exceeds 1.28 billion gallons, the applicable volume for 2013, for those four years. Cellulosic Br. 26-32. This Court has now twice rejected similar arguments, in NPRA, 630 F.3d 145, and in Monroe Energy v. EPA, 750 F.3d 909 (D.C. Cir. 2014). The same result should follow here.

B. NPRA and Monroe Energy, which control this case, hold that EPA has authority to issue renewable fuel standards after the statutory deadline.

In NPRA, this Court reviewed EPA's March 2010 rulemaking, which set percentage standards for each renewable fuel type for 2010 and included a biomass-based diesel percentage standard implementing volume requirements for 2009 and 2010 (which were at that time specified in the statute). 630 F.3d at 146, 149, 151. Similar to Petitioners' current arguments, NPRA argued that EPA lacked authority to implement the 2009 biomass-based diesel volumes having missed its statutory deadline and, alternatively, that the 2010 percentage standards were impermissibly retroactive and "violate[d] statutory lead time" provisions. Id. at 147, 152, 158. This Court disagreed. Id. at 153-56, 158, 163.

The Court held that EPA retained its authority to implement volume requirements even though EPA had promulgated the rule implementing 2009 biomass-based diesel volumes 15 months after the start of 2009. Id. at 153. The Court focused on the Act's requirement that EPA "shall" promulgate regulations to "ensure" that transportation fuels contain "at least the applicable volume . . . determined in accordance with subparagraph (B)," which in that case referred to statutory volumes under subparagraph (B)(i). 630 F.3d at 153 (quoting 42 U.S.C. § 7545(o)(2)(A)(i)). "[C]ourts should not assume Congress intended for the agency to lose its power to act" simply because an agency misses a statutory

deadline. Id. at 154 (citing Brock v. Pierce Cnty., 476 U.S. 253, 260 (1986)); see also 630 F.3d at 154 (Supreme Court has declined to treat statutory directives that an agency "shall act within a specified time" as a jurisdictional limit precluding later action) (quoting Barnhart v. Peabody Coal Co., 537 U.S. 149, 158 (2003) (internal quotation marks omitted)). The Court further held that EPA had "clear albeit implicit" authority to promulgate the late-issued 2010 standards despite any retroactive effect, id. at 163, and that EPA reasonably met its obligation to "consider the relative benefits and burdens" of any retroactive effect when it concluded that the parties had adequate lead times for compliance, that obligated parties had received sufficient notice from the 2009 proposed rule and other sources, and considered but rejected alternative effective dates and percentage standards. Id. at 164-65.

In Monroe Energy, this Court reviewed the 2013 renewable fuel standards, which were also promulgated late. 750 F.3d at 919. Again, obligated parties argued that EPA lacked authority to issue late percentage standards and that the 2013 standards were impermissibly retroactive. Id. Pointing to NPRA, this Court noted that it had already resolved the question of EPA's authority to promulgate renewable fuel standards following a missed deadline. Id. at 919-20. The petitioners in that case attempted to argue that Congress did not anticipate retroactive effects beyond the first year of the program, but the Court found this

unpersuasive. Id. at 920. "Congress' focus on ensuring the annual volume requirement was met regardless of EPA delay" was no less compelling and required the same result. Id. (internal quotation marks omitted). And again, EPA exercised its authority reasonably by mitigating the hardship to the obligated parties by extending the compliance deadlines by four months. Id.

NPRA and Monroe Energy are controlling here. Like in both prior cases, Petitioners seek to invalidate portions of the Rule implementing or promulgated under subparagraph (B) of CAA Section 211(o)(2), 42 U.S.C. § 7545(o)(2)(B), because of missed deadlines. Cellulosic Br. 26-32. Like in the prior cases, Petitioners argue that EPA may not promulgate volumes or percentage standards in the manner required under subparagraph (B). Id. And like in those cases, the Court should reject this nearly identical claim.

Petitioners attempt to distinguish Monroe Energy and NPRA by arguing that a different statutory deadline is at issue here and that the 14-month lead time under subparagraph (B)(ii) is longer than the lead times addressed in those cases. The specific amount of lead-time at issue did not factor into this Court's holding that EPA has authority to promulgate volume requirements and fuel standards in the manner specified by the Act, even late. NPRA, 630 F.3d at 153-58; Monroe Energy, 750 F.3d at 919-20. Rather, the Court's holdings were based on EPA's duty to promulgate volumes and percentage standards as described in the Act and

EPA's reasonableness in exercising that duty. Id. The holdings and reasoning of NPRA and Monroe Energy logically extend to the deadline at issue here because the pertinent statutory text authorizes EPA to ensure that applicable volumes as determined under subparagraph (B) are met. Specifically, subparagraph (B)(ii) states that EPA "shall" promulgate applicable volumes to be determined in a specified manner. 42 U.S.C. § 7545(o)(2)(B)(ii). Once established, EPA must "ensure" that those volumes are met. Id. § 7545(o)(2)(A)(i).

Petitioners argue incorrectly that EPA's obligation to promulgate volume requirements is dependent on meeting the statutory deadline. Cellulosic Br. 26-27. Subparagraph (B)(ii) states that EPA "shall" promulgate volume requirements using specified procedures, and nothing in the Act specifies any consequences of failing to meet the deadline under that section. 42 U.S.C. § 7545(o)(2)(B)(ii); see also NPRA, 630 F.3d at 154 (noting that the Supreme Court has declined to treat statutory directives that an agency "shall act within a specified time" as a jurisdictional limit precluding later action (internal quotation marks omitted)). As this Court explained in both NPRA and Monroe Energy, the Act "focus[ses] on ensuring the annual volume requirement was met regardless of EPA delay." Monroe Energy, 750 F.3d at 920; NPRA, 630 F.3d at 163.

Petitioners further argue that Monroe Energy and NPRA do not apply here because Petitioners are not seeking complete vacatur as in those cases but only a

reduction of the applicable volumes to the 2013 level of 1.28 billion gallons. Cellulosic Br. 30. This is a distinction without a difference. In essence, they admit that EPA has authority to promulgate volume requirements but argue that EPA may not do so in the manner specified by the Act. Petitioners cannot have it both ways. EPA has authority to promulgate volume requirements, as this Court has held, and the Act requires that EPA do so based on a review of implementation of the program, specified factors, and consultation with the Secretaries of Energy and Agriculture. 42 U.S.C. § 7545(o)(2)(B)(ii). Petitioners do not, and cannot, point to any authority for the Court to impose an arbitrary volume of 1.28 billion gallons, derived in an analysis specific to 2013, to the requirements for 2014 through 2017. Nothing in the Act imposes a volume requirement from bygone years simply because EPA missed a deadline.[24] Nor do Petitioners explain why it would be appropriate to use the lower volume from 2013 when actual production for 2014 and 2015 was higher than that amount.

[24] Not even practical considerations could justify doing so. As EPA explained in the Rule, the market for biomass-based diesel has been growing primarily because obligated parties can use biomass-based diesel RINs to comply with their advanced biofuel and total renewable fuel standards. 80 Fed. Reg. at 77,492-93. A lower biomass-based diesel volume would likely have no real world impact on obligated parties. Id. at 77,492.

B. EPA exercised its authority reasonably.

Petitioners argue that the 14-month lead time under subparagraph (B)(ii) indicates a special emphasis on notice and suggest that this Court's prior holdings, which discussed notice in the context of 30-day lead times, do not apply. Cellulosic Br. 29. Nothing in NPRA or Monroe Energy indicate that the amount of lead-time provided by the statutory deadline fundamentally alters the Court's analysis. Rather, both cases considered generally whether EPA had reasonably exercised its authority in light of the lateness of the rules and considered EPA's treatment of notice in that context. In NPRA, the Court determined that EPA reasonably met its obligation to "consider the relative benefits and burdens" of the late rule when it considered alternatives for effective dates and concluded that the parties had adequate lead times for compliance and had received sufficient notice. 630 F.3d at 164-65. And in Monroe Energy, the Court held that EPA exercised its authority reasonably by balancing the lateness of the rule, considering ways to minimize the hardship to the obligated parties, and extending the compliance deadlines by four months. 750 F.3d at 920.

Like in those prior cases, EPA here exercised its authority to promulgate the biomass-based diesel volumes, even late, in a reasonable way. EPA based the volumes for 2014 and 2015 on actual production volumes, ensuring that RINs were available for compliance and considered the availability of carryover RINs and the

ability of obligated parties to carry forward a RIN deficit. 80 Fed. Reg. at 77,430, 77,490-92. For 2016 and 2017, EPA increased the volumes by only modest increments notwithstanding extensive evidence that greater volumes of biomass-based diesel would likely be produced to fulfill the advanced biofuel requirements. Id. at 77,430, 77,492-93. As EPA noted in response to comments, retaining the 2013 volumes for these years would be contrary to the objectives of the Act. Id. at 77,492.

And here, too, EPA reasonably determined that the obligated parties had adequate notice. Id. at 77,491. Petitioners had statutory notice that EPA may increase the biomass-based diesel volumes over past volumes, as it had done in 2013. See 42 U.S.C. § 7545(o)(2)(B)(ii), (B)(v) (requiring a minimum volume of 1.0 billion gallons of biomass-based diesel per year, but requiring EPA to consider raising this level based on statutory considerations). And the annually increasing statutory targets for total renewable fuel and advanced biofuel, which can be satisfied using RINs from biomass-based diesel, provided notice that obligated parties may need to obtain such RINs in excess of the 2013 volumes. See id. § 7545(o)(2)(B)(i).

As to the 2014 and 2015 volumes, Petitioners were on specific notice since November 2013 when EPA issued the later-withdrawn proposed rule that EPA was considering volumes in excess of 2013 levels. 80 Fed. Reg. at 77,491; see also 78

Fed. Reg. at 71,752. While EPA at that time proposed to maintain 2013 levels, it expressly "invite[d] comment on any different approaches that might be appropriate for balancing the factors . . . , including requiring an increase in the minimum volume of biomass-based diesel above 1.28 bill gal in both 2014 and 2015." 78 Fed. Reg. at 71,753. And Petitioners knew that EPA was proposing biomass-based diesel volumes for 2014 through 2017 well in excess of the 2013 levels since the June 10, 2015 Proposed Rule.

Moreover, Petitioners had ample notice of the biomass-based diesel volumes prior to their compliance deadlines. They had notice of the proposed 2017 volumes roughly 17 months before the start of 2017, which is 32 months prior to the 2017 compliance deadline. See 40 C.F.R. § 80.1415(a)(1). For 2016 volumes, Petitioners will have until March 31, 2017, 21 months from the date of the Proposed Rule, to comply. See 40 C.F.R. § 80.1451(a)(1); 80 Fed. Reg. at 77,430, 77,491. And like in the prior cases, EPA extended certain compliance deadlines in light of the lateness of the Rule, providing substantial extensions of the normal compliance demonstration deadlines for 2014 and 2015. 80 Fed. Reg. at 77,491. EPA set the 2014 compliance deadline at August 1, 2016, which was 14 months following the Proposed Rule and 8 months following the Rule. See id. at 77,491; 40 C.F.R. § 80.1451(a)(1) (normal deadline three months after end of compliance year). And EPA set the 2015 compliance deadline at December 1, 2016, which

was 18 months after the Proposed Rule and 12 months following the Rule. 80 Fed. Reg. at 77,491.

Therefore, like in the prior cases, EPA reasonably exercised its authority to promulgate volume requirements, even late, and adequately satisfied its obligation to "consider the relative benefits and burdens" of the late rule. NPRA, 630 F.3d at 164-65; see also Monroe Energy, 750 F.3d at 919-20.

V. EPA WAS NOT REQUIRED TO RECONSIDER THE POINT OF COMPLIANCE OBLIGATION IN THE RULE.

The Point of Obligation Regulation, establishing refiners and importers as the obligated parties under the RFS program, is not part of the Rule. It was issued in 2007 as part of EPA's implementing regulations setting up the RFS program and was reaffirmed in EPA's 2010 revisions to its implementing regulations. See 40 C.F.R. § 80.1406(a)(1); 75 Fed. Reg. at 14,722; 72 Fed. Reg. at 23,924. No annual rulemaking setting yearly renewable fuel volumes and percentage standards has reconsidered the point of obligation. Indeed, this Court squarely rejected a prior attempt to challenge the Point of Obligation Regulation in the context of the 2013 RFS Rule "because the decision to place compliance obligations on importers and refiners, rather than blenders, was reaffirmed in 2010" and was not a part of the 2013 RFS Rule. Monroe Energy, 750 F.3d at 919.

As in past annual standards, the Proposed Rule sought comments on renewable fuel volumes and standards—without revisiting the point of obligation

or any other implementing regulation. See, e.g., 80 Fed. Reg. at 33,103 ("Purpose of This Action"). EPA was more explicit in the Rule, when responding to comments from obligated parties suggesting that EPA change the current point of obligation: "these comments are beyond the scope of this rulemaking." 80 Fed. Reg. at 77,431; see also EPA-HQ-OAR-2015-0111-3671 at 883, JA__ ("EPA did not propose any changes to the definition of an obligated party, nor did we specifically seek comment on this issue.").

The Obligated Party Petitioners excluding API,[25] nonetheless, claim that EPA should have reconsidered, in the context of the Rule, the Point of Obligation Regulation. Petitioners are wrong.

A. The Obligated Party Petitioners' claim that EPA reopened the pre-existing Point of Obligation Regulation wholly lacks merit.

As an initial matter, the Obligated Party Petitioners' challenge to a six-year-old regulation setting the point of compliance obligation is untimely. See 42 U.S.C. § 7607(b) (judicial challenges to CAA rulemakings must be filed within 60 days of the action); see also United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd., 132 F.3d 71, 76 (D.C. Cir. 1998) (challenge to pre-existing rules in context of subsequent rulemaking that did not solicit comments on the pre-existing rule was untimely); Kennecott Utah Copper Corp. v. U.S. Dep't of

[25] Argument Part V refers to this group simply as "Obligated Party Petitioners" or "Petitioners."

Interior, 88 F.3d 1191, 1226 (D.C. Cir. 1996) (following Agency response that comment on pre-existing definition "was beyond the scope of the rulemaking," Court held that challenge to the definition was time-barred).

The statutory time limit for review of a pre-existing regulation may only be deemed "reopened" for purposes of judicial review if EPA "either explicitly or implicitly reconsidered" it in a subsequent rulemaking. West Virginia v. EPA, 362 F.3d 861, 872 (D.C. Cir. 2004). EPA did neither with respect to the Point of Obligation Regulation. Nothing in the Proposed Rule explicitly addressed changing—or not changing, for that matter—the point of obligation. See 80 Fed. Reg. at 33,103, 33,105-08 ("Summary of Major Provisions in this Action").

Petitioners argue that their comments suggesting that EPA change the point of obligation were in direct response to the Proposed Rule, see OPP Br. 27, but they inaccurately describe what EPA did. EPA did not "s[eek] recommendations that would allow it to increase renewable-fuel over time" while accounting for real-world limitations. See OPP Br. 27. Rather, EPA calculated the domestic supply of renewable fuels in light of real-world constraints on the production and distribution of renewable fuel to the ultimate consumer and sought comment on the proposed requirements that took those calculations into account. 80 Fed. Reg. at 33,101-02. EPA sought no "recommendations" other than what the volume requirements and percentage standards should be. Id. EPA did not hold out the

unchanged point of obligation "as a proposed regulation" or "solicit[] comments on its substance," Sierra Club v. EPA, 551 F.3d 1019, 1024 (D.C. Cir. 2008), and did not broadly seek comments on whether to take action to alter the pre-existing regulations.[26] See also Monroe Energy, 750 F.3d at 919.

Petitioners seem to argue, in essence, that EPA implicitly reopened the Point of Obligation Regulation issue by seeking comment on the proposed renewable fuel standards. See OPP Br. 27-33. Because, in their view, the non-obligated status of blenders is itself a constraint on the renewable fuel market, they argue that the Rule should have included attempts to correct it instead of simply setting the annual volumes in light of this alleged constraint. See OPP Br. 29, 30-31. But a constructive reopening of a pre-existing rule does not occur simply because the pre-existing rule may affect a later rule. Rather, it occurs when "the revision of accompanying regulations significantly alters the stakes of judicial review [of the pre-existing rule]," in other words, when a later rule effectively changes the pre-existing rule. Sierra Club, 551 F.3d at 1025 (internal quotation marks and citations omitted). Petitioners do not and cannot point to any change in the pre-existing point of compliance obligation arising from the Rule. Just as before, refiners and importers are obligated to obtain RINs to demonstrate compliance with annual

[26] Notably, the Obligated Party Petitioners do not suggest that EPA reopened other aspects of the 2010 rulemaking.

renewable fuel standards. See also Envtl. Def. v. EPA, 467 F.3d 1329, 1333 (D.C. Cir. 2006) (even "minor changes" to a pre-existing rule are insufficient to re-open the pre-existing rule).

Petitioners incorrectly argue that by not reconsidering the point of obligation in the Rule, EPA failed to consider an important aspect of the problem. See OPP Br. 28 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983)). That EPA was obligated to consider factors that figured into the decision it was making, such as constraints that impact fuel volumes, does not mean it was obligated to take up and attempt to eliminate every pre-existing potential constraint that might affect the decision it was making. See, e.g., Nat'l Mining Ass'n v. Mine Safety & Health Admin., 116 F.3d 520, 549 (D.C. Cir. 1997) (agency does not have to make progress on every issue to make progress on one). This Court has rejected attempts to similarly shoehorn tangential topics into agency rulemakings. See, e.g., Massachusetts v. ICC, 893 F.2d 1368, 1370-71 (D.C. Cir. 1990) (Commission's call for comments on "any possible problems" with the cost of capital, the only component of opportunity cost addressed in the rulemaking, was not a solicitation for comments on opportunity cost).

Petitioners' comments suggesting changes to the point of obligation did not change the limited scope of EPA's rulemaking. The reopener doctrine "is not a license for bootstrap procedures by which petitioners can comment on matters

other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened [sic] the issue." West Virginia, 362 F.3d at 872. Nor did EPA's response here suggest that it was broadening the scope of the rulemaking in response to these comments.[27] EPA merely acknowledged that "other actions can also play a role" in overcoming challenges, that commenters had provided ideas in this regard, but that "these issues are beyond the scope of this rulemaking."[28] 80 Fed. Reg. at 77,431. In short, given the actual limited scope of the rulemaking, EPA reasonably and correctly treated comments regarding the point of obligation as outside the rulemaking's scope.

B. The CAA does not require EPA to reconsider the point of obligation in the Rule.

In its 2007 and 2010 implementing regulations, EPA interpreted the Act to permit it to identify the "appropriate" obligated parties in a prospective manner rather than reconsidering the question every year when establishing annual renewable fuel standards. See 72 Fed. Reg. at 23,924; 75 Fed. Reg. at 14,722.

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[27] It is worth noting that comments requesting a change in the point of obligation came primarily from parties that are currently obligated. EPA-HQ-OAR-2015-0111-3671 at 883, JA__. However, other stakeholders would need to be invited to comment on any reconsideration of the longstanding Point of Obligation Regulation.

[28] Petitioners misleadingly invert EPA's reasoning, stating that EPA "acknowledged that the point of obligation 'can . . . play a role in improving incentives.'" OPP Br. 17. EPA did not opine in the Rule on whether changing the point of obligation would improve incentives. 80 Fed. Reg. at 77,431.

Even if the Court considers the merits of the Obligated Party Petitioners' untimely challenge to this long-standing statutory interpretation, EPA's procedures for designating obligated parties is based on a correct interpretation of CAA Section 211(o)(3)(B).

i. The Act unambiguously gives EPA discretion to promulgate obligated party designations as and when appropriate.

The Act unambiguously gives EPA discretion to determine when and how to designate the parties who are obligated to demonstrate compliance with annual renewable fuel standards. Under CAA Section 211(o)(3)(B)(i), 42 U.S.C. § 7545(o)(3)(B)(i), EPA must, by November 30 of each year, determine and publish the renewable fuel obligations applicable to the following year. Under a separate subsection describing the required format and applicability, the Act states that those annual renewable fuel obligations shall, among other things, "be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. § 7545(o)(3)(B)(ii)(I). Thus, EPA must determine which parties are "appropriate" at some point, and the fuel standards issued annually must be made "applicable to" those appropriate obligated parties. See 72 Fed. Reg. at 23,910. But, unlike the renewable fuel standards, which must be promulgated every year, nothing in the Act's text requires the designation or redesignation of "appropriate" obligated parties to occur at any particular time. Compare 42 U.S.C. § 7545(o)(3)(B)(i) to

Id. § 7545(o)(3)(B)(ii)(I). See Catawba, 571 F.3d at 35, 36 (a congressional mandate in one section and silence in another often "suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion."). As this Court has held when interpreting similar terms under the CAA, the phrase "as appropriate" is "extraordinarily broad" and confers a significant delegation of authority. See e.g., Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1229 (D.C. Cir. 2007).

EPA first exercised its discretion with respect to designating obligated parties in its 2007 implementing regulations when it promulgated a definition of "obligated party" to mean refiners and importers of gasoline in the United States. 72 Fed. Reg. at 23,924. EPA exercised its discretion again in 2010, when it considered and took comment on alternate approaches. 75 Fed. Reg. at 14,721-22; 40 C.F.R. § 80.1406(a)(1). EPA refined the definition of obligated parties to reflect EISA's expanded application of the program to diesel fuels, but maintained the prospective designation of refiners and importers as the parties who must demonstrate compliance with the annual renewable fuel standards.[29] Id. The

[29] EPA considered alternate approaches, which "have the potential to" more evenly align a party's access to RINs with its obligations under the RFS program. 75 Fed. Reg. at 14,722. While market conditions had changed since the 2007 rulemaking and while the original rationale was no longer valid, EPA determined that a change in the designation of obligated parties was not necessary in light of the functioning of the RIN market because a change "would result in a significant change in the

definition was, from the very beginning, prospective and understood by all to apply to future annual renewable fuel standards unless and until EPA exercises its discretion to alter the definition of obligated parties. No commenter in either rulemaking disagreed with EPA's authority to do this prospectively or to designate obligated parties in a codified regulation rather than through annual rulemakings, and the provision was not judicially challenged. See id. As EPA's interpretation of Section 211(o)(3)(B)(ii)(I) was "promulgate[d] contemporaneously with its own regulation" and subject to notice and comment in a rulemaking for which the judicial review period has passed, the interpretation warrants "a high degree of deference." Appalachian Power Co. v. EPA, 249 F.3d 1032, 1048 (D.C. Cir. 2001).

Petitioners' faulty interpretation of the phrase "required element" to require annual reconsideration of the point of obligation does not follow from the statute. See OPP Br. 22. The only annual requirement is promulgation of renewable fuel obligations. 42 U.S.C. § 7545(o)(3)(B)(i). The Act merely says that those renewable fuel obligations "shall be applicable to" the appropriate obligated parties. Id. § 7545(o)(3)(B)(ii)(I). As long as EPA has designated the "appropriate" obligated parties, nothing in the Act says the designation of

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number of obligated parties and the movement of RINs, changes that could disrupt the operation of the RFS program." Id.

obligated parties must occur annually. Rather, it unambiguously confers on EPA an "extraordinarily broad" delegation of authority to make that assessment as appropriate. See Nat'l Ass'n of Clean Air Agencies, 489 F.3d at 1229.

ii. Annual reconsideration of the point of obligation would be inconsistent with the structure of the RFS program.

Moreover, the Act must be read in light of the entire text, structure, and purpose of the statute. Catawba, 571 F.3d at 35. Here, to read the Act in a manner that requires annual reconsideration of the point of obligation would undermine regulatory certainty and impair the objectives of the RFS program.

The Act mandates increasing annual volumes of renewable fuels, 42 U.S.C. § 7545(o)(2)(B)(i), (ii), to "increase the production of clean renewable fuels." 121 Stat. 1492. As EPA has explained time and again in its annual renewable fuel standard rulemakings, this increased use of renewable fuels over time requires private parties to invest in production facilities and infrastructure to accommodate such fuels. E.g., 80 Fed. Reg. at 77,453, 77,459-60. Annual reconsideration of the definition of obligated parties would reduce the regulatory certainty required for private parties to plan for growth.

Additionally, the compliance flexibility mechanisms built into the Act suggest that Congress did not intend that the point of obligation would be reassessed—and therefore potentially changed—every year. For example,

obligated parties are permitted to carry forward RIN deficits or excess RINs from year to year. 42 U.S.C. § 7545(o)(5)(A)-(C). These provisions would make little sense if the identity of the obligated parties was at risk of changing from year to year or anytime EPA considers exercising its general waiver authority.

EPA's construction that it need not designate obligated parties in annual renewable fuel standard rulemakings is supported by the plain meaning of the statute and should be upheld under Chevron step one. Nat'l Res. Def. Council v. Browner, 57 F.3d 1122, 1127, 1129 (D.C. Dir. 1995).

iii. Even if the Act is ambiguous, EPA's statutory interpretation should be upheld under Chevron step two.

Even if CAA Section 211(o)(3)(B)(ii)(I) were ambiguous as to when EPA must identify the appropriate obligated parties, EPA's construction should be upheld under Chevron step two. 467 U.S. at 843. The Act is silent on when, how, and how often EPA must determine the appropriate obligated parties, 42 U.S.C. § 7545(o)(3)(B)(i)-(ii), which indicates that Congress intended to confer broad discretion on EPA. See, e.g., Entergy Corp. v. Riverkeeper, Inc. 556 U.S. 208, 222-23 (2009) (absence of statutorily-defined factors demonstrated Congress' intent to confer greater discretion on EPA); see also Envtl. Def. Fund v. EPA, 210 F.3d 396, 397 (D.C. Cir. 2000) (Court defers to EPA on when and how questions).

The Obligated Party Petitioners raise no plausible argument that EPA's construction is inconsistent with the CAA's text or goals. See Nat'l Ass'n of Clean Air Agencies, 489 F.3d at 1230 (EPA construction entitled to great deference unless contrary to Act). Their reliance on Michigan v. EPA, 135 S. Ct. 2699 (2015), is misplaced. See OPP Br. 24-25. In Michigan, the Supreme Court held that EPA erred by failing to consider cost in deciding whether to regulate power plants. Id. at 25. Here, EPA did not fail to consider any required factor in setting annual volumes, and EPA has previously considered and designated the appropriate obligated parties in a prior rulemaking.

Petitioners argue that EPA's long-standing statutory interpretation was "particularly" unreasonable in the context of the Rule because EPA exercised its waiver authority. See OPP Br. 25-26. The argument goes somewhat like this. To exercise its general waiver authority, EPA determined that, taking into account constraints on the fuel market, there is an inadequate domestic supply of renewable fuels to meet statutory targets for specified years. Id. Because the Obligated Party Petitioners hypothesize that the present point of obligation is a constraint, EPA should have attempted to change the underlying constraint in an attempt to avoid using the general waiver authority. Id. That faulty logic does not undermine EPA's reasonable interpretation of the Act.

First, EPA does not share Petitioners' view about the effects of the present point of obligation. Contrary to Petitioners' repeated statement that EPA "admits" that its only justification for the current point of obligation is "no longer valid," e.g., OPP Br. 26, the Rule says nothing about the validity of the current point of obligation. See generally 80 Fed. Reg. 77,420. Rather, the language quoted by Petitioners out of context is from EPA's 2010 implementing regulation explaining that while EPA's original rationale from the 2007 rulemaking was no longer valid, other considerations warranted maintaining the designation of obligated parties.[30] See 75 Fed. Reg. at 14,721-22.

Second, even if EPA's use of the general waiver did suggest that it is time for EPA to take another look at the "obligated party" definition, Petitioners can provide no valid reason why this should have occurred in the context of the Rule. A reconsideration of the point of obligation in this context would have required another round of notice and comment and would have further delayed promulgation of the annual standards. See 80 Fed. Reg. at 77,426. EPA's

[30] Two amici argue that the current point of obligation combined with the fact that blenders who are not also refiners and importers can generate RINs causes a market dysfunction. See generally Doc. Nos. 1636058, 1636056. This litigation is not the proper venue to work through the impacts of potentially including blenders from the definition of "obligated party." These matters are being considered in a separate agency action. 81 Fed. Reg. 83,776.

reasonable interpretation of the Act permits it to reconsider the Point of Obligation Regulation, in its discretion, separately from any annual renewable fuel standards.

In short, even if the Act is ambiguous with respect to when and how often EPA must designate the appropriate obligated parties, EPA's reasonable interpretation that it need not reconsider the point of obligation in annual rulemakings must be upheld under Chevron step two. 467 U.S. at 844.

iv. EPA's treatment of comments regarding the point of obligation as beyond the scope of the Rule is consistent with EPA's past practices and this Court's precedent.

Despite EPA's consistent practice of fulfilling its duty to designate obligated parties through prospective regulations rather than in annual renewable fuel standards, and despite this Court's holding in Monroe Energy rejecting a challenge to the pre-existing Point of Obligation Regulation as beyond the scope of the 2013 RFS Rule, 750 F.3d at 919, the Obligated Party Petitioners oddly argue that EPA's continuation of this practice is inconsistent with its prior findings. See OPP Br. 33-35. Not so.

In EPA's 2010 implementing regulation (which the Obligated Party Petitioners quote out of context), EPA considered comments taking significantly different positions on alternative approaches to the point of obligation that "have the potential to" more evenly align RIN access to a party's obligations. 75 Fed. Reg. at 14,722. Ultimately, EPA did not change the point of obligation because

the market provides opportunities for those who need RINs to purchase them and a change would have disrupted the operation of the RFS program during an important transition period. Id. EPA concluded that "[s]hould we determine that the RIN market is not operating as intended, driving up prices for obligated parties and fuel prices for consumers, we will consider revisiting this provision in future regulatory efforts." Id.

These prior statements are entirely consistent with EPA's statements in the Rule. First, the Rule explains that RINs are "available for compliance," "obligated parties can buy and sell RINs in order to ensure compliance," and that this is exactly how the RIN "system was designed to operate." 80 Fed. Reg. at 77,446-47. Petitioners suggest that EPA does not believe the RIN market is functioning but cite only EPA's statement that "the RIN is currently an inefficient mechanism for reducing the price for higher level ethanol blends at retail," which was made in reference to whether a higher percentage standard could incentivize additional supply of a particular fuel blend. See id. at 77,457. Second, it is simply not true that EPA has "refused" to consider which parties to obligate, as Petitioners repeatedly contend. See, e.g., OPP Br. 5, 6, 18, 19, 34. EPA simply said "these issues are beyond the scope of this rulemaking." 80 Fed. Reg. at 77,431 (emphasis added). This is entirely consistent with EPA's prior rulemakings and interpretation of its authority and with this Court's precedent under Monroe Energy.

v. The proper place for Petitioners to seek to change the point of obligation is in a petition to EPA to reconsider the pre-existing regulation.

In separate proceedings, the Obligated Party Petitioners formally petitioned EPA to change the definition of "obligated party." On November 10, 2016, EPA proposed to deny these petitions. 81 Fed. Reg. 83,776. In a document containing 48 pages of analysis, EPA proposed to leave the current Point of Obligation Regulation unchanged. Id. It includes lengthy consideration of how changing the point of obligation might affect the program in achieving its overarching policy goal to increase renewable fuel use, alter the number of obligated parties and change administrative and enforcement burdens, or disrupt implementation of the RFS program. Id. EPA is currently seeking public comment on all aspects of the proposal. Id.

This separate petition process is the appropriate context for addressing Petitioners' suggestion that EPA reconsider the Point of Obligation Regulation. If, following finalization of EPA's administrative action, Petitioners remain unsatisfied, they will then have the right to seek judicial review of that action. 42 U.S.C. § 7607(b).

Moreover, an annual renewable fuel standard is not a suitable or efficient avenue for addressing the kind of considerations addressed in the proposed petition denial, such as which parties are best able to comply or how a change to the long-

standing Point of Obligation Regulation might impact the pace of growth in renewable fuel use. See 81 Fed. Reg. 83,776. To attempt to do so would only cause further delay in the annual standards, complicate compliance, and add confusion and uncertainty into the RFS program that would interfere with the intended increase of volumes over time.

CONCLUSION

For the reasons explained above, the Court should deny the petitions for review.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division

/s/ Lisa M. Bell
LISA M. BELL
SAMARA M. SPENCE
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
T: (202) 514-9275
Lisa.Bell@usdoj.gov

Dated: December 15, 2016

Counsel for Respondents

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that the above Brief of Respondent EPA contains 27,788 words, as counted by Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), and complies with the word-limit in this Court's order of June 24, 2016 (Doc. No. 1621554). This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

DATED: December 15, 2016

/s/ Lisa M. Bell
Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I caused copies of the foregoing to be served by the Court's CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ Lisa M. Bell

United States Department of Justice
Counsel for Respondents

STATUTORY AND REGULATORY ADDENDUM

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Except for the following, all applicable statutes and regulations are contained in the Petitioners' opening briefs.

42 U.S.C.A. § 7545(c)

(c) Offending fuels and fuel additives; control; prohibition

(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or (B)[2] if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

* * *

(4)(A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine--

(i) if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 7543(a) of this title has at any time been waived under section 7543(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

(C)(i) A State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 7410 of this title so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements. The Administrator may find that a State control or prohibition is necessary to achieve that standard if no other measures that would bring about timely attainment exist, or if other measures exist and are technically possible to implement, but are unreasonable or impracticable. The Administrator may make a finding of necessity under this subparagraph even if the plan for the area does not contain an approved demonstration of timely attainment.

(ii) The Administrator may temporarily waive a control or prohibition respecting the use of a fuel or fuel additive required or regulated by the Administrator pursuant to

subsection (c), (h), (i), (k), or (m) of this section or prescribed in an applicable implementation plan under section 7410 of this title approved by the Administrator under clause (i) of this subparagraph if, after consultation with, and concurrence by, the Secretary of Energy, the Administrator determines that--

(I) extreme and unusual fuel or fuel additive supply circumstances exist in a State or region of the Nation which prevent the distribution of an adequate supply of the fuel or fuel additive to consumers;

(II) such extreme and unusual fuel and fuel additive supply circumstances are the result of a natural disaster, an Act of God, a pipeline or refinery equipment failure, or another event that could not reasonably have been foreseen or prevented and not the lack of prudent planning on the part of the suppliers of the fuel or fuel additive to such State or region; and

(III) it is in the public interest to grant the waiver (for example, when a waiver is necessary to meet projected temporary shortfalls in the supply of the fuel or fuel additive in a State or region of the Nation which cannot otherwise be compensated for).

* * *

42 U.S.C. 7545(k)

(k) Reformulated gasoline for conventional vehicles

(1) EPA regulations

(A) In general

Not later than November 15, 1991, the Administrator shall promulgate regulations under this section establishing requirements for reformulated gasoline to be used in gasoline-fueled vehicles in specified nonattainment areas. Such regulations shall require the greatest reduction in emissions of ozone forming volatile organic compounds (during the high ozone season) and emissions of toxic air pollutants

(during the entire year) achievable through the reformulation of conventional gasoline, taking into consideration the cost of achieving such emission reductions, any nonair-quality and other air-quality related health and environmental impacts and energy requirements.

* * *

(2) General requirements

The regulations referred to in paragraph (1) shall require that reformulated gasoline comply with paragraph (3) and with each of the following requirements (subject to paragraph (7)):

(A) NO_x emissions

The emissions of oxides of nitrogen (NO_x) from baseline vehicles when using the reformulated gasoline shall be no greater than the level of such emissions from such vehicles when using baseline gasoline. If the Administrator determines that compliance with the limitation on emissions of oxides of nitrogen under the preceding sentence is technically infeasible, considering the other requirements applicable under this subsection to such gasoline, the Administrator may, as appropriate to ensure compliance with this subparagraph, adjust (or waive entirely), any other requirements of this paragraph or any requirements applicable under paragraph (3)(A).

(B) Benzene content

The benzene content of the gasoline shall not exceed 1.0 percent by volume.

(C) Heavy metals

The gasoline shall have no heavy metals, including lead or manganese. The Administrator may waive the prohibition contained in this subparagraph for a heavy metal (other than lead) if the Administrator determines that addition of the heavy metal to the gasoline will not increase, on an aggregate mass or cancer-risk basis, toxic air pollutant emissions from motor vehicles.

(3) More stringent of formula or performance standards

The regulations referred to in paragraph (1) shall require compliance with the more stringent of either the requirements set forth in subparagraph (A) or the requirements of subparagraph (B) of this paragraph. For purposes of determining the more stringent provision, clause (i) and clause (ii) of subparagraph (B) shall be considered independently.

(A) Formula

(i) Benzene

The benzene content of the reformulated gasoline shall not exceed 1.0 percent by volume.

(ii) Aromatics

The aromatic hydrocarbon content of the reformulated gasoline shall not exceed 25 percent by volume.

(iii) Lead

The reformulated gasoline shall have no lead content.

(iv) Detergents

The reformulated gasoline shall contain additives to prevent the accumulation of deposits in engines or vehicle fuel supply systems.

(B) Performance standard

(i) VOC emissions

During the high ozone season (as defined by the Administrator), the aggregate emissions of ozone forming volatile organic compounds from baseline vehicles when using the reformulated gasoline shall be 15 percent below the aggregate

emissions of ozone forming volatile organic compounds from such vehicles when using baseline gasoline. Effective in calendar year 2000 and thereafter, 25 percent shall be substituted for 15 percent in applying this clause, except that the Administrator may adjust such 25 percent requirement to provide for a lesser or greater reduction based on technological feasibility, considering the cost of achieving such reductions in VOC emissions. No such adjustment shall provide for less than a 20 percent reduction below the aggregate emissions of such air pollutants from such vehicles when using baseline gasoline. The reductions required under this clause shall be on a mass basis.

(ii) Toxics

During the entire year, the aggregate emissions of toxic air pollutants from baseline vehicles when using the reformulated gasoline shall be 15 percent below the aggregate emissions of toxic air pollutants from such vehicles when using baseline gasoline. Effective in calendar year 2000 and thereafter, 25 percent shall be substituted for 15 percent in applying this clause, except that the Administrator may adjust such 25 percent requirement to provide for a lesser or greater reduction based on technological feasibility, considering the cost of achieving such reductions in toxic air pollutants. No such adjustment shall provide for less than a 20 percent reduction below the aggregate emissions of such air pollutants from such vehicles when using baseline gasoline. The reductions required under this clause shall be on a mass basis.

Any reduction greater than a specific percentage reduction required under this subparagraph shall be treated as satisfying such percentage reduction requirement.

(4) Certification procedures

(A) Regulations

The regulations under this subsection shall include procedures under which the Administrator shall certify reformulated gasoline as complying with the requirements established pursuant to this subsection. Under such regulations, the Administrator shall establish procedures for any person to petition the Administrator to certify a fuel formulation, or slate of fuel formulations. Such procedures shall further require that the Administrator shall approve or deny such petition within 180 days of receipt. If the Administrator fails to act within such 180-

day period, the fuel shall be deemed certified until the Administrator completes action on the petition.

(B) Certification; equivalency

The Administrator shall certify a fuel formulation or slate of fuel formulations as complying with this subsection if such fuel or fuels--

(i) comply with the requirements of paragraph (2), and

(ii) achieve equivalent or greater reductions in emissions of ozone forming volatile organic compounds and emissions of toxic air pollutants than are achieved by a reformulated gasoline meeting the applicable requirements of paragraph (3).

(C) EPA determination of emissions level

Within 1 year after November 15, 1990, the Administrator shall determine the level of emissions of ozone forming volatile organic compounds and emissions of toxic air pollutants emitted by baseline vehicles when operating on baseline gasoline. For purposes of this subsection, within 1 year after November 15, 1990, the Administrator shall, by rule, determine appropriate measures of, and methodology for, ascertaining the emissions of air pollutants (including calculations, equipment, and testing tolerances).

(5) Prohibition

Effective beginning January 1, 1995, each of the following shall be a violation of this subsection:

(A) The sale or dispensing by any person of conventional gasoline to ultimate consumers in any covered area.

(B) The sale or dispensing by any refiner, blender, importer, or marketer of conventional gasoline for resale in any covered area, without (i) segregating such gasoline from reformulated gasoline, and (ii) clearly marking such conventional

gasoline as "conventional gasoline, not for sale to ultimate consumer in a covered area".

Any refiner, blender, importer or marketer who purchases property[6] segregated and marked conventional gasoline, and thereafter labels, represents, or wholesales such gasoline as reformulated gasoline shall also be in violation of this subsection. The Administrator may impose sampling, testing, and record-keeping requirements upon any refiner, blender, importer, or marketer to prevent violations of this section.

(6) Opt-in areas

(A) Classified areas

(i) In general

Upon the application of the Governor of a State, the Administrator shall apply the prohibition set forth in paragraph (5) in any area in the State classified under subpart 2 of part D of subchapter I of this chapter as a Marginal, Moderate, Serious, or Severe Area (without regard to whether or not the 1980 population of the area exceeds 250,000). In any such case, the Administrator shall establish an effective date for such prohibition as he deems appropriate, not later than January 1, 1995, or 1 year after such application is received, whichever is later. The Administrator shall publish such application in the Federal Register upon receipt.

(ii) Effect of insufficient domestic capacity to produce reformulated gasoline

If the Administrator determines, on the Administrator's own motion or on petition of any person, after consultation with the Secretary of Energy, that there is insufficient domestic capacity to produce gasoline certified under this subsection, the Administrator shall, by rule, extend the effective date of such prohibition in Marginal, Moderate, Serious, or Severe Areas referred to in clause (i) for one additional year, and may, by rule, renew such extension for 2 additional one-year periods. The Administrator shall act on any petition submitted under this subparagraph within 6 months after receipt of the petition. The Administrator shall issue such extensions for areas with a lower ozone classification before issuing any such extension for areas with a higher classification.

(B) Ozone transport region

(i) Application of prohibition

(I) In general

On application of the Governor of a State in the ozone transport region established by section 7511c(a) of this title, the Administrator, not later than 180 days after the date of receipt of the application, shall apply the prohibition specified in paragraph (5) to any area in the State (other than an area classified as a marginal, moderate, serious, or severe ozone nonattainment area under subpart 2 of part D of subchapter I of this chapter) unless the Administrator determines under clause (iii) that there is insufficient capacity to supply reformulated gasoline.

* * *

42 U.S.C. § 7545(m)

(m) Oxygenated fuels

(1) Plan revisions for CO nonattainment areas

(A) Each State in which there is located all or part of an area which is designated under subchapter I of this chapter as a nonattainment area for carbon monoxide and which has a carbon monoxide design value of 9.5 parts per million (ppm) or above based on data for the 2-year period of 1988 and 1989 and calculated according to the most recent interpretation methodology issued by the Administrator prior to November 15, 1990, shall submit to the Administrator a State implementation plan revision under section 7410 of this title and part D of subchapter I of this chapter for such area which shall contain the provisions specified under this subsection regarding oxygenated gasoline.

(B) A plan revision which contains such provisions shall also be submitted by each

State in which there is located any area which, for any 2-year period after 1989 has a carbon monoxide design value of 9.5 ppm or above. The revision shall be submitted within 18 months after such 2-year period.

(2) Oxygenated gasoline in CO nonattainment areas

Each plan revision under this subsection shall contain provisions to require that any gasoline sold, or dispensed, to the ultimate consumer in the carbon monoxide nonattainment area or sold or dispensed directly or indirectly by fuel refiners or marketers to persons who sell or dispense to ultimate consumers, in the larger of--

(A) the Consolidated Metropolitan Statistical Area (CMSA) in which the area is located, or

(B) if the area is not located in a CMSA, the Metropolitan Statistical Area in which the area is located,

be blended, during the portion of the year in which the area is prone to high ambient concentrations of carbon monoxide to contain not less than 2.7 percent oxygen by weight (subject to a testing tolerance established by the Administrator). The portion of the year in which the area is prone to high ambient concentrations of carbon monoxide shall be as determined by the Administrator, but shall not be less than 4 months. At the request of a State with respect to any area designated as nonattainment for carbon monoxide, the Administrator may reduce the period specified in the preceding sentence if the State can demonstrate that because of meteorological conditions, a reduced period will assure that there will be no exceedances of the carbon monoxide standard outside of such reduced period. For areas with a carbon monoxide design value of 9.5 ppm or more of[7] November 15, 1990, the revision shall provide that such requirement shall take effect no later than November 1, 1992 (or at such other date during 1992 as the Administrator establishes under the preceding provisions of this paragraph). For other areas, the revision shall provide that such requirement shall take effect no later than November 1 of the third year after the last year of the applicable 2-year period referred to in paragraph (1) (or at such other date during such third year as the Administrator establishes under the preceding provisions of this paragraph) and shall include a program for implementation and enforcement of the requirement consistent with guidance to be issued by the Administrator.

(3) Waivers

(A) The Administrator shall waive, in whole or in part, the requirements of paragraph (2) upon a demonstration by the State to the satisfaction of the Administrator that the use of oxygenated gasoline would prevent or interfere with the attainment by the area of a national primary ambient air quality standard (or a State or local ambient air quality standard) for any air pollutant other than carbon monoxide.

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

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

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

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

* * *

42 U.S.C.A. § 7607(b)

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,„[2] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

40 C.F.R. § 80.1426

§ 80.1426 How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers?

(a) General requirements.—

(1) To the extent permitted under paragraphs (b) and (c) of this section, producers and importers of renewable fuel must generate RINs to represent that fuel if all of the following occur:

(i) The fuel qualifies for a D code pursuant to § 80.1426(f), or the EPA has approved a petition for use of a D code pursuant to § 80.1416.

(ii) The fuel is demonstrated to be produced from renewable biomass pursuant to the reporting requirements of § 80.1451 and the recordkeeping requirements of § 80.1454.

(A) Feedstocks meeting the requirements of renewable biomass through the aggregate compliance provision at § 80.1454(g) are deemed to be renewable biomass.

(B) [Reserved]

(iii) Was produced in compliance with the registration requirements of § 80.1450, the reporting requirements of § 80.1451, the recordkeeping requirements of § 80.1454, and all other applicable requirements of this subpart M.

(iv) The renewable fuel is designated on a product transfer document (PTD) for use

as transportation fuel, heating oil, or jet fuel in accordance with § 80.1453(a)(12).

(2) To generate RINs for imported renewable fuel, including any renewable fuel contained in imported transportation fuel, heating oil, or jet fuel, importers must obtain information from a foreign producer that is registered pursuant to § 80.1450 sufficient to make the appropriate determination regarding the applicable D code and compliance with the renewable biomass definition for each imported batch for which RINs are generated.

(3) A party generating a RIN shall specify the appropriate numerical values for each component of the RIN in accordance with the provisions of § 80.1425(a) and paragraph (f) of this section.

(b) Regional applicability.—

(1) Except as provided in paragraph (c) of this section, a RIN must be generated by a renewable fuel producer or importer for a batch of renewable fuel that satisfies the requirements of paragraph (a)(1) of this section if it is produced or imported for use as transportation fuel, heating oil, or jet fuel in the 48 contiguous states or Hawaii.

(2) If the Administrator approves a petition of Alaska or a United States territory to opt-in to the renewable fuel program under the provisions in § 80.1443, then the requirements of paragraph (b)(1) of this section shall also apply to renewable fuel produced or imported for use as transportation fuel, heating oil, or jet fuel in that state or territory beginning in the next calendar year.

(c) Cases in which RINs are not generated.—

(1) Fuel producers and importers may not generate RINs for fuel that does not satisfy the requirements of paragraph (a)(1) of this section.

(2) Small producer/importer threshold. Pursuant to § 80.1455(a) and (b), renewable fuel producers that produce less than 10,000 gallons a year of renewable fuel, and importers that import less than 10,000 gallons a year of renewable fuel, are not required to generate and assign RINs to batches of renewable fuel that satisfy the

requirements of paragraph (a)(1) of this section that they produce or import.

(3) Temporary new producer threshold. Pursuant to § 80.1455(c) and (d), new renewable fuel producers that produce less than 125,000 gallons of renewable fuel a year are not required to generate and assign RINs to batches of renewable fuel to satisfy the requirements of paragraph (a)(1) of this section.

(i) The provisions of this paragraph (c)(3) apply only to new facilities, for a maximum of three years beginning with the calendar year in which the production facility produces its first gallon of renewable fuel.

(ii) [Reserved]

(4) Importers shall not generate RINs for renewable fuel imported from a foreign renewable fuel producer, or for renewable fuel made with ethanol produced by a foreign ethanol producer, unless the foreign renewable fuel producer or foreign ethanol producer is registered with EPA as required in § 80.1450.

(5) Importers shall not generate RINs for renewable fuel that has already been assigned RINs by a registered foreign producer.

(6) A party is prohibited from generating RINs for a volume of fuel that it produces if the fuel has been produced by a process that uses a renewable fuel as a feedstock, and the renewable fuel that is used as a feedstock was produced by another party, except that RINs may be generated for such fuel if allowed by the EPA in response to a petition submitted pursuant to § 80.1416 and the petition approval specifies a mechanism to prevent double counting of RINs.

(7) For renewable fuel oil that is heating oil as defined in paragraph (2) of the definition of heating oil in § 80.1401, renewable fuel producers and importers shall not generate RINs unless they have received affidavits from the final end user or users of the fuel oil as specified in § 80.1451(b)(1)(ii)(T)(2).

(d)(1) Definition of batch. For the purposes of this section and § 80.1425, a "batch of renewable fuel" is a volume of renewable fuel that has been assigned a unique identifier within a calendar year by the producer or importer of the renewable fuel in accordance with the provisions of this section and § 80.1425.

(i) The number of gallon–RINs generated for a batch of renewable fuel may not exceed 99,999,999.

(ii) A batch of renewable fuel cannot represent renewable fuel produced or imported in excess of one calendar month.

(2) Multiple gallon–RINs generated to represent a given volume of renewable fuel can be represented by a single batch–RIN through the appropriate designation of the RIN volume codes SSSSSSSS and EEEEEEEE.

(i) The value of SSSSSSSS in the batch–RIN shall be 00000001 to represent the first gallon–RIN associated with the volume of renewable fuel.

(ii) The value of EEEEEEEE in the batch–RIN shall represent the last gallon–RIN associated with the volume of renewable fuel, based on the RIN volume V_{RIN} determined pursuant to paragraph (f) of this section.

(iii) Under § 80.1452, RIN volumes will be managed by EMTS. RIN codes SSSSSSSS and EEEEEEEE do not have a role in EMTS.

(e) Assignment of RINs to batches.—

(1) Except as provided in paragraph (g) of this section for delayed RINs, the producer or importer of renewable fuel must assign all RINs generated to volumes of renewable fuel.

(2) A RIN is assigned to a volume of renewable fuel when ownership of the RIN is transferred along with the transfer of ownership of the volume of renewable fuel, pursuant to § 80.1428(a).

(3) All assigned RINs shall have a K code value of 1.

(f) Generation of RINs—

(1) Applicable pathways. D codes shall be used in RINs generated by producers or importers of renewable fuel according to the pathways listed in Table 1 to this section, paragraph (f)(6) of this section, or as approved by the Administrator. In choosing an appropriate D code, producers and importers may disregard any incidental, de minimis feedstock contaminants that are impractical to remove and are related to customary feedstock production and transport. Tables 1 and 2 to this section do not apply to, and impose no requirements with respect to, volumes of fuel for which RINs are generated pursuant to paragraph (f)(6) of this section.

Table 1 to § 80.1426—Applicable D Codes for Each Fuel Pathway for Use in Generating RINs

Fuel type	Feedstock	Production process requirements	D-Code
A ..... Ethanol	Corn starch	All of the following: Dry mill process, using natural gas, biomass, or biogas for process energy and at least two advanced technologies from Table 2 to this section.	6
B ..... Ethanol	Corn starch	All of the following: Dry mill process, using natural gas, biomass, or biogas for process energy and at least one of the advanced technologies from Table 2 to this section plus drying no more than 65%	6

			of the distillers grains with solubles it markets annually	
C	Ethanol	Corn starch	All of the following: Dry mill process, using natural gas, biomass, or biogas for process energy and drying no more than 50% of the distillers grains with solubles it markets annually	6
D	Ethanol	Corn starch	Wet mill process using biomass or biogas for process energy	6
E	Ethanol	Starches from crop residue and annual covercrops	Fermentation using natural gas, biomass, or biogas for process energy	6
F	Biodiesel, renewable diesel, jet fuel and heating oil	Soy bean oil; Oil from annual covercrops; Oil from algae grown photosynthetically; Biogenic waste oils/fats/greases; Non-food grade corn oil; Camelina sativa oil.	One of the following: Trans-Esterification Hydrotreating Excluding processes that co-process renewable biomass and petroleum.	4

G	Biodiesel, heating oil	Canola/Rapeseed oil	Trans-Esterification using natural gas or biomass for process energy	4
H	Biodiesel, renewable diesel, jet fuel and heating oil	Soy bean oil; Oil from annual covercrops; Oil from algae grown photosynthetically; Biogenic waste oils/fats/greases; Non-food grade corn oil; Camelina sativa oil.	One of the following: Trans-Esterification Hydrotreating Includes only processes that co-process renewable biomass and petroleum.	5
I.....	Naphtha, LPG	Camelina sativa oil	Hydrotreating	5
J.....	Ethanol	Sugarcane	Fermentation	5
K	Ethanol	Crop residue, slash, pre-commercial thinnings and tree residue, switchgrass, miscanthus, energy cane, Arundo donax, Pennisetum purpureum, and separated yard waste; biogenic components of separated MSW; cellulosic components of separated food waste; and cellulosic components of	Any process that converts cellulosic biomass to fuel	3

		annual cover crops		
L.....	Cellulosic diesel, jet fuel and heating oil	Crop residue, slash, pre-commercial thinnings and tree residue, switchgrass, miscanthus, energy cane, Arundo donax, Pennisetum purpureum, and separated yard waste; biogenic components of separated MSW; cellulosic components of separated food waste; and cellulosic components of annual cover crops	Any process that converts cellulosic biomass to fuel	7
M....	Renewable gasoline and renewable gasoline blendstock	Crop residue, slash, pre-commercial thinnings, tree residue, and separated yard waste; biogenic components of separated MSW; cellulosic components of separated food waste; and cellulosic components of annual cover crops	Catalytic Pyrolysis and Upgrading, Gasification and Upgrading, Thermo-Catalytic Hydrodeoxygenation and Upgrading, Direct Biological Conversion, Biological Conversion and Upgrading utilizing natural gas, biogas, and/or biomass as the only process energy sources providing that process used	3

			converts cellulosic biomass to fuel; any process utilizing biogas and/or biomass as the only process energy sources which converts cellulosic biomass to fuel	
N	Naphtha	Switchgrass, miscanthus, energy cane, Arundo donax, and Pennisetum purpureum	Gasification and upgrading processes that converts cellulosic biomass to fuel	3
O	Butanol	Corn starch	Fermentation; dry mill using natural gas, biomass, or biogas for process energy.	6
P	Ethanol, renewable diesel, jet fuel, heating oil, and naphtha	The non-cellulosic portions of separated food waste and non-cellulosic components of annual cover crops	Any	
Q	Renewable Compressed Natural Gas, Renewable Liquefied Natural Gas, Renewable Electricity	Biogas from landfills, municipal wastewater treatment facility digesters, agricultural digesters, and separated MSW digesters; and biogas	Any	3

		from the cellulosic components of biomass processed in other waste digesters		
R	Ethanol	Grain Sorghum	Dry mill process using biogas from landfills, waste treatment plants, and/or waste digesters, and/or natural gas, for process energy.	6
S	Ethanol	Grain Sorghum	Dry mill process, using only biogas from landfills, waste treatment plants, and/or waste digesters for process energy and for on-site production of all electricity used at the site other than up to 0.15 kWh of electricity from the grid per gallon of ethanol produced, calculated on a per batch basis.	5
T	Renewable Compressed Natural Gas, Renewable Liquefied Natural Gas, and Renewable Electricity	Biogas from waste digesters	Any	5

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40 C.F.R. § 80.1428

§ 80.1428 General requirements for RIN distribution.

(a) RINs assigned to volumes of renewable fuel.

(1) Assigned RIN, for the purposes of this subpart, means a RIN assigned to a volume of renewable fuel pursuant to § 80.1426(e) with a K code of 1.

(2) Except as provided in § 80.1429, no person can separate a RIN that has been assigned to a batch pursuant to § 80.1426(e).

(3) An assigned RIN cannot be transferred to another person without simultaneously transferring a volume of renewable fuel to that same person.

(4) No more than 2.5 assigned gallon–RINs with a K code of 1 can be transferred to another person with every gallon of renewable fuel transferred to that same person.

(5)(i) On each of the dates listed in paragraph (a)(5)(ii) of this section in any calendar year, the following equation must be satisfied for assigned RINs and volumes of renewable fuel owned by a person:

$\Sigma\ (RIN)_D \leq \Sigma\ (V_{si} * 2.5)_D$

Where:

D = Applicable date.

$\Sigma\ (RIN)_D$ = Sum of all assigned gallon–RINs with a K code of 1 that are owned on

date D.

$(V_{si})_D$ = Volume i of renewable fuel owned on date D, standardized to 60 °F, in gallons.

(ii) The applicable dates are March 31, June 30, September 30, and December 31.

(6) Any transfer of ownership of assigned RINs must be documented on product transfer documents generated pursuant to § 80.1453.

(i) The RIN must be recorded on the product transfer document used to transfer ownership of the volume of renewable fuel to another person; or

(ii) The RIN must be recorded on a separate product transfer document transferred to the same person on the same day as the product transfer document used to transfer ownership of the volume of renewable fuel.

(b) RINs separated from volumes of renewable fuel.

(1) Separated RIN, for the purposes of this subpart, means a RIN with a K code of 2 that has been separated from a volume of renewable fuel pursuant to § 80.1429.

(2) Any person that has registered pursuant to § 80.1450 can own a separated RIN.

(3) Separated RINs can be transferred any number of times.

(c) RIN expiration. Except as provided in § 80.1427(a)(7), a RIN is valid for compliance during the calendar year in which it was generated, or the following calendar year. Any RIN that is not used for compliance purposes for the calendar year in which it was generated, or for the following calendar year, will be considered an expired RIN. Pursuant to § 80.1431(a), an expired RIN will be considered an invalid RIN and cannot be used for compliance purposes.

(d) Any batch–RIN can be divided into multiple batch–RINs, each representing a

smaller number of gallon–RINs, if all of the following conditions are met:

(1) All RIN components other than SSSSSSSS and EEEEEEEE are identical for the original parent and newly formed daughter RINs.

(2) The sum of the gallon–RINs associated with the multiple daughter batch–RINs is equal to the gallon–RINs associated with the parent batch–RIN.

40 C.F.R. § 80.1429

§ 80.1429 Requirements for separating RINs from volumes of renewable fuel.

(a)(1) Separation of a RIN from a volume of renewable fuel means termination of the assignment of the RIN to a volume of renewable fuel.

(2) RINs that have been separated from volumes of renewable fuel become separated RINs subject to the provisions of § 80.1428(b).

(b) A RIN that is assigned to a volume of renewable fuel can be separated from that volume only under one of the following conditions:

(1) Except as provided in paragraphs (b)(7) and (b)(9) of this section, a party that is an obligated party according to § 80.1406 must separate any RINs that have been assigned to a volume of renewable fuel if that party owns that volume.

(2) Except as provided in paragraph (b)(6) of this section, any party that owns a volume of renewable fuel must separate any RINs that have been assigned to that volume once the volume is blended with gasoline or fossil-based diesel to produce a transportation fuel, heating oil, or jet fuel. A party may separate up to 2.5 RINs per gallon of blended renewable fuel.

(3) Any party that exports a volume of renewable fuel must separate any RINs that have been assigned to the exported volume. A party may separate up to 2.5 RINs per gallon of exported renewable fuel.

(4) Any party that produces, imports, owns, sells, or uses a volume of neat renewable fuel, or a blend of renewable fuel and diesel fuel, must separate any RINs that have been assigned to that volume of neat renewable fuel or that blend if:

(i) The party designates the neat renewable fuel or blend as transportation fuel, heating oil, or jet fuel; and

(ii) The neat renewable fuel or blend is used without further blending, in the designated form, as transportation fuel, heating oil, or jet fuel.

(5) Any party that produces, imports, owns, sells, or uses a volume of electricity or biogas for which RINs have been generated in accordance with § 80.1426(f) must separate any RINs that have been assigned to that volume of renewable electricity or biogas if:

(i) The party designates the electricity or biogas as transportation fuel; and

(ii) The electricity or biogas is used as transportation fuel.

(6) RINs assigned to a volume of biodiesel (mono-alkyl ester) can only be separated from that volume pursuant to paragraph (b)(2) of this section if such biodiesel is blended into diesel fuel at a concentration of 80 volume percent biodiesel (mono-alkyl ester) or less.

(i) This paragraph (b)(6) shall not apply to biodiesel owned by obligated parties or to exported volumes of biodiesel.

(ii) This paragraph (b)(6) shall not apply to parties meeting the requirements of paragraph (b)(4) of this section.

(7) For RINs that an obligated party generates for renewable fuel that has not been blended into gasoline or diesel to produce a transportation fuel, heating oil, or jet fuel, the obligated party can only separate such RINs from volumes of renewable

fuel if the number of gallon–RINs separated in a calendar year are less than or equal to a limit set as follows:

(i) For RINs with a D code of 3, the limit shall be equal to RVO_{CB}.

(ii) For RINs with a D code of 4, the limit shall be equal to RVO_{BBD}.

(iii) For RINs with a D code of 7, the limit shall be equal to the larger of RVO_{BBD} or RVO_{CB}.

(iv) For RINs with a D code of 5, the limit shall be equal to RVO_{AB}-RVO_{CB}-RVO_{BBD}.

(v) For RINs with a D code of 6, the limit shall be equal to RVO_{RF}-RVO_{AB}.

(8) Small refiners and small refineries may only separate RINs that have been assigned to volumes of renewable fuel that the party blends into gasoline or diesel to produce transportation fuel, heating oil, or jet fuel, or that the party used as transportation fuel, heating oil, or jet fuel. This paragraph (b)(8) shall apply only under the following conditions:

(i) During the calendar year in which the party has received a small refinery exemption under § 80.1441 or a small refiner exemption under § 80.1442; and

(ii) The party is not otherwise an obligated party during the period of time that the small refinery or small refiner exemption is in effect.

(9) Except as provided in paragraphs (b)(2) through (b)(5) and (b)(8) of this section, parties whose non-export renewable volume obligations are solely related to either the importation of products listed in § 80.1407(c) or § 80.1407(e) or to the addition of blendstocks into a volume of finished gasoline, finished diesel fuel, RBOB, or CBOB, can only separate RINs from volumes of renewable fuel if the number of gallon–RINs separated in a calendar year is less than or equal to a limit set as follows:

(i) For RINs with a D code of 3, the limit shall be equal to RVO_{CB}.

(ii) For RINs with a D code of 4, the limit shall be equal to RVO_{BBD}.

(iii) For RINs with a D code of 7, the limit shall be equal to the larger of RVO_{BBD} or RVO_{CB}.

(iv) For RINs with a D code of 5, the limit shall be equal to RVO_{AB}-RVO_{CB}-RVO_{BBD}.

(v) For RINs with a D code of 6, the limit shall be equal to RVO_{RF}-RVO_{AB}.

(10) Any party that produces a volume of renewable fuel may separate any RINs that have been generated to represent that volume of renewable fuel or that blend if that party retires the separated RINs to replace invalid RINs according to § 80.1474.

(c) The party responsible for separating a RIN from a volume of renewable fuel shall change the K code in the RIN from a value of 1 to a value of 2 prior to transferring the RIN to any other party.

(d) Upon and after separation of a RIN from its associated volume of renewable fuel, the separated RIN must be accompanied by a PTD pursuant to § 80.1453 when transferred to another party.

(e) Upon and after separation of a RIN from its associated volume of renewable fuel, product transfer documents used to transfer ownership of the volume must meet the requirements of § 80.1453.

(f) [Reserved by 79 FR 42115]

(g) Any 2009 or 2010 RINs retired pursuant to § 80.1129 because renewable fuel was used in a nonroad vehicle or nonroad engine (except for ocean-going vessels), or as heating oil or jet fuel may be reinstated by the retiring party for sale or use to demonstrate compliance with a 2010 RVO.