ORAL ARGUMENT NOT YET SCHEDULED
No. 19-1023 (and consolidated cases)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GROWTH ENERGY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

INITIAL BRIEF FOR PETITIONERS GROWTH ENERGY, THE NATIONAL BIODIESEL BOARD, PRODUCERS OF RENEWABLES UNITED FOR INTEGRITY TRUTH AND TRANSPARENCY, AND THE RFS POWER COALITION

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October 4, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, petitioners Growth Energy, the National Biodiesel Board, Producers of Renewables United for Integrity Truth and Transparency, and the RFS Power Coalition, through undersigned counsel, hereby certify the following as to parties, rulings, and related proceedings in this case:

Parties, Intervenors, and Amici

A. Petitioners

Growth Energy (No. 19-1023); RFS Power Coalition (No. 19-1027); the National Biodiesel Board ("NBB") (No. 19-1035); Producers of Renewables United for Integrity Truth and Transparency ("Producers United") (No. 19-1036).

Monroe Energy, LLC (No. 19-1032); Small Retailers Coalition (No. 19-1033); American Fuel & Petrochemical Manufacturers (No. 19-1037); Valero Energy Corp. (No. 19-1038).

National Wildlife Federation, Healthy Gulf, and Sierra Club (No. 19-1039).

B. Respondent

Environmental Protection Agency.

C. Intervenors

Intervenors: Growth Energy; NBB; American Petroleum Institute; American Fuel & Petrochemical Manufacturers; Monroe Energy, LLC.

D. Amici

None.

Rulings Under Review

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

Related Cases

The agency action challenged in these consolidated cases has not been before this Court or any other court.

Growth Energy, NBB, and Producers United raise challenges related to EPA's handling of small refinery exemptions under the Renewable Fuel Standard program. The following pending case involves a challenge to EPA's regulation for setting the standards, but does not challenge the 2019 standards at issue in this case: *Renewable Fuels Association et al. v. EPA*, No. 18-1154 (D.C. Cir.). In addition, Producers United raised a challenge to EPA's determination that it could allow generation of "replacement" RINs, which was based on EPA's claimed authority to "unretire" RINs, which this Court transferred to the Tenth Circuit, which remains pending: *Producers United v. EPA*, No. 19-9532 (10th Cir.).

CORPORATE DISCLOSURE STATEMENT

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

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

The National Biodiesel Board is a trade association as defined in D.C. Circuit Rule 26.1(b). It is the national trade association for the biodiesel and renewable diesel industry, and its mission is to advance the interests of its members by creating sustainable biodiesel and renewable diesel industry growth. The National Biodiesel Board has no parent companies, and no publicly held company has a 10% or greater ownership interest. It has not issued shares or debt securities to the public.

Producers of Renewables for Integrity Truth and Transparency is an ad hoc working group of companies that own and operate biomass-based diesel and ethanol production plants and participate in the Renewable Fuel Standard ("RFS") program. Through those operations, they also own Renewable Identification Numbers ("RINs"). These companies have joined together to form a working

group to raise concerns with EPA's recent handling of the small refinery exemptions, which has adversely affected RINs and the operation of the RFS program, and advocate for changes in EPA's handling of these exemptions. Producers United has no parent companies, and no publicly held company has a 10% or greater ownership interest. It has not issued shares or debt securities to the public. None of the members of Producers United have issued shares or debt securities to the public, except Renewable Energy Group, Inc.

The RFS Power Coalition consists of three national trade associations representing some 279 companies and renewable fuel facilities that produce renewable electricity used as transportation fuel. The member associations of the RFS Power Coalition are the American Biogas Council, the Biomass Power Association, and the Energy Recovery Council. Each constituent trade association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b), is not owned in whole or in part by a parent corporation or publicly traded company, and does not issue stock. Further, the RFS Power Coalition is not owned in whole or in part by a parent corporation or publicly traded company, and does not issue stock.

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GLOSSARY

ACE	Americans for Clean Energy
AFPM	American Fuel & Petrochemical Manufacturers
CNG/LNG	Compressed and Liquid Gas
DEC	Declaration (included in an addendum)
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NBB	Petitioner National Biodiesel Board
NPRA	National Petrochemical & Refiners Ass'n
Producers United	Petitioner Producers of Renewables United for Integrity Truth and Transparency
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number

JURISDICTION

This case challenges final agency action relating to the Renewable Fuel Standard ("RFS") under the Clean Air Act, published on December 11, 2018. The challenged action also constitutes a denial of a petition for reconsideration and rulemaking submitted to EPA by Producers United ("Reconsideration Petition") (JA__-__). *See infra* Part II. The consolidated petitions were timely. This Court has jurisdiction under 42 U.S.C. §7607(b)(1).

STATEMENT OF ISSUES

1. Whether EPA erred in setting the 2019 volume requirements without accounting for small refinery exemptions granted after EPA finalized the standards for the compliance year from which the refineries were exempted.

2. Whether EPA erred in deeming comments related to small refinery exemptions "beyond the scope" of its action.

3. Whether EPA's decision to maintain its practices of granting retroactive exemptions when not accounting for those exempt volumes was proper and arbitrarily denied the Reconsideration Petition.

4. Whether EPA erred in setting the 2019 volume requirements without counting renewable electricity in the projected production of cellulosic biofuel.

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in the Addendum.

STATEMENT OF THE CASE

A. The Renewable Fuel Standard Program

"Congress intended the Renewable Fuel Program to be a market forcing policy that would create demand pressure to increase consumption of renewable fuel.'" *American Fuel & Petrochemical Mfrs. v. EPA ("AFPM")*, 2019 WL 4229073, at *1 (D.C. Cir. 2019) (quoting *Americans for Clean Energy v. EPA ("ACE")*, 864 F.3d 691, 705 (D.C. Cir. 2017)). The program's core is the statutorily specified "'applicable volume[s]'—mandatory and annually increasing quantities of renewable fuels that must be 'introduced into commerce in the United States' each year," *id.*—which "are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year," *ACE*, 864 F.3d at 710.[1]

EPA's overarching "'statutory mandate' [is] to 'ensure[]' that those [volume] requirements are met." *ACE*, 864 F.3d at 698-699 (quoting 42 U.S.C. §7545(*o*)(3)(B)(i)). EPA "fulfills that mandate by translating the annual volume

[1] The volume requirements address four "nested" categories of renewable fuel: "[1] cellulosic biofuel and [2] biomass-based diesel are kinds of [3] advanced biofuel, and advanced biofuel in turn is a kind of renewable fuel that may be credited toward [4] the total renewable fuel obligation." *ACE*, 864 F.3d at 697-698; *see* 42 U.S.C. §7545(*o*)(2)(B)(i)(I)-(IV). Corn starch ethanol may also be counted toward the total volume requirement (but not the other requirements). *See id.* §7545(*o*)(1)(F).

requirements into percentage standards," which "represent the percentage of transportation fuel introduced into commerce that must consist of renewable fuel." *Id.* at 699; *see also* 42 U.S.C. §7545(*o*)(3)(B). And as "directed" by Congress, EPA "establish[ed] a 'credit program' through which obligated parties can acquire and trade credits and thereby comply with" their volume obligations. *ACE*, 864 F.3d at 699. These credits—called Renewable Identification Numbers ("RINs")—are generated when renewable fuel is produced and then may be used to show compliance (upon which they are "retired") or traded in an open market. *Id.* If not retired, RINs can be carried over to meet the following year's obligations; the aggregation of "carryover" RINs is colloquially called the "RIN bank." *Id.*

Congress also afforded EPA certain "waiver" authorities, which "allow[] EPA to reduce the statutory volume requirements," *ACE*, 864 F.3d at 698, but "only in limited circumstances," *National Petrochemical & Refiners Ass'n v. EPA ("NPRA")*, 630 F.3d 145, 149 (D.C. Cir. 2010); *see* 42 U.S.C. §7545(*o*)(7)(A)-(E). If EPA determines that the "projected volume of cellulosic biofuel production" in the upcoming compliance year will be less than the statutorily specified volume, EPA "shall reduce" the cellulosic biofuel statutory volume to the "projected volume available"—the mandatory cellulosic waiver. 42 U.S.C. §7545(*o*)(7)(D)(i). If that happens, EPA "may also reduce the applicable volume of renewable fuel and advanced biofuels … by the same or a lesser volume"—the

discretionary cellulosic waiver. *Id.* Separately, EPA may issue a "general" waiver of any volume requirement if EPA determines that (1) "implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States" or (2) "there is an inadequate domestic supply" of renewable fuel. *Id.* §7545(*o*)(7)(A).

Although all refineries are "obligated parties"—entities that must apply the percentage standards to the transportation fuel they introduce into commerce and submit to EPA the corresponding number of RINs annually—Congress provided a "temporary exemption" for "small refineries" from their compliance obligations through 2010. 42 U.S.C. §7545(*o*)(9)(A)(i), *see also id.* §7545(*o*)(1)(K) (defining "small refinery"). Congress directed EPA to "extend th[at] exemption" for any "small refinery that the Secretary of Energy determines … would be subject to a disproportionate economic hardship if required to comply with" the volume requirements. *Id.* §7545(*o*)(9)(A)(ii). Finally, Congress authorized EPA to grant individual "petition[s] … for an extension of the exemption … for the reason of disproportionate economic hardship." *Id.* §7545(*o*)(9)(B)(i).

When setting a given year's percentage standards, EPA adjusts for any exemption extensions that have already been granted for that year, but EPA does not account for exemptions granted after the covered year's percentage standards

are finalized. *AFPM*, 2019 WL 4229073, at *3.[2] Here, EPA reaffirmed its authority to grant exemptions after the standards are set (referred to as "retroactive" exemptions). 83 Fed. Reg. at 63,740 (JA__). These "belated" exemptions create a "shortfall." *AFPM*, 2019 WL 4229073, at *3. EPA, however, refused to address the effect of retroactive exemptions.

Because EPA grants the exemptions through closed-door adjudications, it was not until 2018 that the public became aware of EPA's significant expansion of the volume of exemptions.[3] Importantly, nearly all these exemptions have been granted after the compliance deadline, resulting in "unretiring" of RINs, prompting a July 31, 2018 Reconsideration Petition.

B. The 2019 RFS

EPA finalized the percentage standards for 2019 in late 2018. EPA projected that only 418 million gallons of cellulosic biofuel would be produced in

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[2] Petitioners use the term "exemption" to refer to EPA's decision to grant applications to extend a small refinery exemption. But Petitioners maintain that EPA may grant an "extension" only if the refinery was previously exempt and that many applications granted for 2016 and later have not been "extensions" within the meaning of the statute and are therefore unlawful. *See, e.g.*, JA[EPA-HQ-OAR-2018-0167-1292.at.9-12]; JA[EPA-HQ-OAR-2018-0167-0665.at.11-12].

[3] Until recently, the timing of these decisions was known only to EPA and the exempt refineries. In 2018, the media reported the expansion of the exemptions, and, later that year, EPA began releasing periodically the aggregate amount of exemptions.

2019 and accordingly invoked the mandatory cellulosic waiver to reduce the cellulosic volume requirement to that level from the 8.5 billion gallons specified in the statute. 83 Fed. Reg. at 63,705 (JA__). But in projecting cellulosic biofuel production, EPA did not count significant volumes of renewable electricity. *See id.* at 63,710-63,719 (JA__-__). Then, invoking the discretionary cellulosic waiver, EPA reduced the advanced and total volume requirements by the same amount to 4.92 and 19.92 billion gallons, respectively. *Id.* at 63,705, 63,719 (JA__, __). EPA (correctly) declined to invoke its general waiver power. *See id.* at 63,731 (JA__). But EPA did not adjust the volume requirements to reflect any small refinery exemptions granted after the standards for the exempt compliance year were finalized, despite EPA's massive expansion of such exemptions and their significant detrimental effect on the 2019 volumes. *Id.* at 63,740 (JA__).

SUMMARY OF ARGUMENT

I. Recently, EPA dramatically expanded its retroactive exemptions for small refineries, reducing annual RFS volume requirements by billions of gallons. Its refusal to adjust the 2019 standards to make up for past retroactive exemptions or expected retroactive exemptions for 2019 correspondingly reduces the effective volume requirements, violating EPA's statutory duty to ensure that the volume requirements are met, rewriting the statutory waiver provisions, and undermining Congress's central objective of incentivizing increased use of renewable fuel.

Moreover, because the failure to account for retroactive exemptions affects the legality of the 2019 standards, EPA could not declare this issue beyond the scope of the 2019 rulemaking.

II. EPA's expansion of exemptions, without ensuring the volumes, required EPA to reconsider its practices related to retroactive exemptions, which are not authorized by statute or regulation. Given the change in circumstances, EPA cannot rely on claimed prior practices to refuse comments and avoid review.

III. In reducing the 2019 statutorily mandated volume of cellulosic biofuel from 8.5 billion gallons to merely 418 million gallons and then reducing the advanced and total volume requirements by the same amount, EPA illegally failed to count significant volumes of electricity fuel for electric vehicles that is qualified to be counted under the agency's 2010 and 2014 final rules and is currently available from fuel producers for use as transportation fuel.

STANDING

Petitioners' standing is self-evident. Petitioners are organizations whose members produce renewable fuel under the RFS program—including ethanol, biomass-based diesel, and cellulosic biofuels—and generate or own RINs. JA[EPA-HQ-OAR-2018-0167-1292.at.1]; DEC90-91 (Kovarick Decl. ¶¶2-6)[4];

[4] "DEC" citations are in the Addendum of Standing Declarations.

DEC43, 46-47, 50-73 (Franco Decl. ¶¶2 & 9 and Ex. A); DEC2-5 (Cleaves Decl. ¶¶7-11). EPA acknowledges that "[e]ntities potentially affected by this final rule are those involved with the production … of … renewable fuels." 83 Fed. Reg. at 63,704 (JA__). The 2019 volume requirements "directly regulate biofuel producers," *AFPM*, 2019 WL 4229073, at *23, confirming that Petitioners' standing is "self-evident." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733-734 (D.C. Cir. 2003); *see Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) ("petitioner's standing to seek review of administrative action is self-evident … if the complainant is 'an object of the action … at issue'").

Petitioners argue that EPA unlawfully set the 2019 volume requirements too low, by failing to account for small refinery exemptions and by failing to account for the production of renewable electricity. Because of that failure, Petitioners' member producers will suffer a concrete and particularized injury because the unlawfully depressed 2019 volume requirements reduce the demand for their products and reduce RIN prices, adversely affecting their investments and operations. Correcting EPA's errors in setting the 2019 volume requirements could redress these injuries. And as organizations dedicated to promoting the production and use of their members' renewable fuels, Petitioners are proper parties to assert standing on behalf of their members. *Sierra Club*, 292 F.3d at 898. Organizations representing interests of producers are routinely found to have

standing in challenges to EPA RFS actions. *See Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 664-665 (D.C. Cir. 2019); *National Biodiesel Board v. EPA*, 843 F.3d 1010, 1015 (D.C. Cir. 2016); *see also AFPM*, 2019 WL 4229073 (NBB's standing to challenge 2018 RFS undisputed); *ACE*, 864 F.3d 691 (standing of Growth Energy, NBB, and other associations and associations-of-associations of producers to challenge 2014-2016 RFS undisputed).

STANDARD OF REVIEW

The Court "may reverse the EPA's actions under the [RFS] Program if [it] find[s] them to be 'arbitrary, capricious, [or] an abuse of discretion.'" *AFPM*, 2019 WL 4229073, at *6 (quoting 42 U.S.C. §7607(d)(9)(A)). To survive under this standard, EPA must have "consider[ed] all of the relevant factors and demonstrate[d] a reasonable connection between the facts on the record and the resulting policy choice." *Id.* The Court "also may reverse an EPA action under the Program if [it] determine[s] that it is 'otherwise not in accordance with law' or 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *Id.* (quoting 42 U.S.C. §7607(d)(9)(A), (C)). "The court reviews the EPA's interpretation of the Clean Air Act under the familiar two-step [*Chevron*] framework." *Id.*

ARGUMENT

I. EPA ERRED IN REFUSING TO ACCOUNT FOR RETROACTIVE SMALL REFINERY EXEMPTIONS IN SETTING THE 2019 STANDARDS

In 2018, EPA indicated that it had granted a large number of exemptions for prior years after the standards for those years were finalized, i.e., "retroactive" exemptions. When setting the 2019 standards, EPA refused to account for any retroactive exemptions it had previously granted for prior compliance years, as well as for any retroactive exemptions it could expect to grant for 2019. 83 Fed. Reg. at 63,740 (JA__). In theory, EPA would have accounted for any exemptions for 2019 that it granted before finalizing the 2019 standards, but there were no such exemptions. *Id*. EPA's refusal to account for retroactive exemptions nullifies the minimum volume requirements EPA is supposed to ensure. This violates EPA's core statutory duty in setting the standards, 42 U.S.C. §7545(*o*)(3)(B)(i), and effectively waives the volume requirements even though the statutorily prescribed conditions for waiver were not found. It also creates unjustified inconsistencies in EPA's implementation of the program. EPA therefore acted arbitrarily and contrary to the Clean Air Act in setting the 2019 standards without accounting for retroactive small refinery exemptions.

A. EPA's Refusal to Account for Retroactive Exemptions Has Destroyed the 2019 Standards EPA Set

Because EPA does not require that exempt volumes ever be made up, retroactive exemptions reduce the nationwide volume obligations gallon-for-

gallon. Indeed, this Court recently observed that exempt "gallons of renewable fuel simply go unproduced," which "can impede attainment of overall applicable volumes." *AFPM*, 2019 WL 4229073, at *3, *16. Only recently, however, has the magnitude of the effect on the RFS program and particularly on the 2019 volume requirements come into focus. Given the massive amount of retroactive exemptions granted in recent years, EPA's refusal to account for them has rendered the standards that EPA set for 2019 a fiction—they bear no relation to the volumes the 2019 RFS *requires* and they do nothing to compel increased use of renewable fuel. Rather, they reduce the applicable volumes, creating an *effective* volume requirement well below what EPA is bound to "ensure" are met.

Recently, EPA dramatically increased the number of exemptions. Initially, the number of exemptions dwindled (as Congress intended) from fifty-nine in 2010 to eight for 2013, then to seven for 2015.[5] But the number of exemptions EPA granted jumped to nineteen for 2016, thirty-five for 2017, and thirty-one for 2018.[6]

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[5] *See* JA[EPA-HQ-OAR-2018-0167-1281, Ex.A,Attach.1,at 26]; JA[*RFS.Small.Refinery.Exemptions*.https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions]. This Court may take judicial notice of EPA data. *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977).

[6] *See supra* n.5.

Whereas about 200-300 million gallons were exempted annually between 2013 and 2015, EPA exempted 790 million gallons for 2016, 1.82 billion gallons for 2017, and 1.43 billion gallons for 2018.[7] These exemptions are substantial: whereas exemptions represented 1-2% of the annual total volume requirements between 2013 and 2015, they have represented 4%, 9%, and 7% in 2016, 2017, and 2018.[8]

Because all the exemptions granted for 2016-2018 were retroactive, the RIN bank has predictably ballooned each year. The bank grew from about 1.6 billion RINs in 2016 to 2.5 billion RINs in 2017, about 3.0 billion RINs in 2018, and about 3.5 billion RINs today. *See* JA[EPA-HQ-OAR-2018-0167-1298.at.7]; JA[EPA-HQ-OAR-2019-0136-0003]. The RIN bank has constituted an increasingly large proportion of the applicable total volume requirement: 9.1% in 2016, 12.9% in 2017, 15.5% in 2018, and now 17.5% in 2019.[9] Thus, an

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[7] *Id.*

[8] *Id.*

[9] *See* JA[*Renewable.Fuel.Annual.Standards.*https://www.epa.gov/renewable-fuel-standard-program/renewable-fuel-annual-standards].

increasing proportion of the annual volume requirements are now being met through credits.

Because (as EPA recognizes) obligated parties will necessarily use the *entire* RIN bank to comply in 2019 (lest the banked RINs become worthless), *see* 83 Fed. Reg. at 63,708 n.20 (JA__), the effective nationwide total volume requirement (i.e., the volume EPA set minus the available carryover RINs) for 2019 is about 16.42 billion gallons, not 19.92 billion gallons (the volume requirement EPA set and therefore must ensure is used).[10] That is less than the effective volume requirements for 2018—and also for 2017 and 2016.[11] EPA's approach to setting the 2019 volume requirements thus set the program back several years rather than pushing the market forward as Congress intended. And EPA has yet to announce

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[10] EPA sometimes speaks of "maintaining" the RIN bank from one year to the next. *See, e.g.*, 83 Fed. Reg. at 63,710 & n.35 (JA__). That is a misnomer because, as noted, all carryover RINs will necessarily be used to show compliance lest they expire. If there is a RIN bank in 2020, that will be the result of obligated parties' decisions to generate more RINs than needed to comply in 2019 based on economic considerations entirely independent of their 2019 RFS obligations.

[11] *See* JA[*Renewable.Fuel.Annual.Standards*.https://www.epa.gov/renewable-fuel-standard-program/renewable-fuel-annual-standards].

the exemptions for 2019, which will lower the effective 2019 volume requirements further.

In sum, by disregarding the adverse impacts of retroactive exemptions, EPA's 2019 standards do not compel the market to increase its use of renewable fuel at all. Instead, EPA's approach creates disincentives to purchase *gallons* in the face of an expected flood of prior-year RINs re-entering the market. Also, this has caused RIN prices to drop.[12] But, as EPA and this Court have recognized, "higher RIN prices" "incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote." *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919 (D.C. Cir. 2014); *see also, e.g.*, JA[EPA-HQ-OAR-2018-0167-0065.at.19]. Through its refusal to make up exempted volumes, EPA has undermined Congress's carefully crafted incentives to increase the country's use of renewable fuels.

B. EPA's Refusal to Account for Retroactive Exemptions Is Unlawful

EPA's categorical refusal to account for retroactive exemptions when setting the 2019 standards was arbitrary and contrary to the Clean Air Act in several ways.

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[12] For example, with the expansion of exemptions, prices for D6 RINs (reflecting non-advanced biofuels) have fallen from about $1.00 in late 2016 to about $0.10 today. JA[EPA-HQ-OAR-2019-0136-0312.at.8]. When EPA announced that it had exempted 1.43 billion RINs for 2018, D6 RIN prices experienced their largest 3-day drop ever (in percentage terms). *Id.*

First, EPA's refusal violated EPA's statutory duties. EPA's has a duty to promulgate annual percentage standards that "ensure[] that the requirements of paragraph 2 are met." 42 U.S.C. §7545(*o*)(3)(B)(i). Paragraph 2 specifies the minimum applicable volumes for each category of renewable fuel. *Id.* §7545(*o*)(2)(B). EPA therefore has an obligation "make certain" that those statutory volumes are met, unless and to the extent that certain waiver authorities apply. *NPRA*, 630 F.3d at 153; *see also* Merriam-Webster Dictionary (*Ensure*: "to make sure, certain, or safe"), https://www.merriam-webster.com/dictionary/ensure. EPA failed to fulfill that mandate when it computed the 2019 standards without accounting for exemptions.

Second, EPA's refusal to account for retroactive exemptions impermissibly converted them into a *waiver* of the 2019 volume requirements, in contradiction of the statute's plain text and structure. Congress explicitly granted EPA the power to reduce the required nationwide volume requirements, but labeled those powers "waivers" and permitted EPA to use them "only" in the "limited circumstances" specified in the statute. *NPRA*, 630 F.3d at 149; 42 U.S.C. §7545(*o*)(7), (8)(D). In contrast, the exemption provisions contain neither of those features: they do not say that EPA may reduce the nationwide volume requirements or use the label "waiver"; rather, they are labeled "exemption," and they authorize EPA to determine merely that the compliance obligation "shall not apply to" the specific

applicant refinery because of special circumstances relating to that refinery. 42 U.S.C. §7545(*o*)(9). There is no reason here to depart from "the usual rule that when the legislature uses certain language in one part of the statute and different language in another, [courts and agencies must] assume[] different meanings were intended." *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011).

By not accounting for retroactive exemptions in setting the 2019 volume obligations, EPA disregarded this principle and in effect treated small refinery exemptions as a waiver of the volume requirements. That impermissibly expands EPA's waiver power to situations where the statutorily specified waiver triggers are not met and procedures are not followed. As EPA has acknowledged, "small refinery exemptions are held to a different standard than a waiver," including a waiver for "severe economic harm." JA[EPA-HQ-OAR-2018-0167-1387.at.19]. Repeating an error it committed in setting the 2016 volume requirements, "EPA has not explained why Congress would have established the severe-harm waiver standard only to allow waiver" under the small refinery exemption provision "based on lesser degrees of economic harm." *ACE*, 864 F.3d at 712; *see also* 42 U.S.C. §7545(*o*)(7)(A). If Congress intended to grant EPA a power to waive volume requirements based on findings that individual refineries will suffer "disproportionate economic hardship" if they must comply, it would have said so—it certainly knew how to. EPA has no authority to rewrite the statute or create

a new, non-textual waiver power. *See, e.g.*, *NLRB v. SW General, Inc.*,137 S. Ct. 929, 940 (2017) (Congress's "expressi[on]" of certain types of waivers "excludes another [type of waiver] left unmentioned"); *In re Sealed Case*, 237 F.3d 657, 670 (D.C. Cir. 2001) ("Agencies are not empowered to carve out exceptions to statutory limits on their authority.").

Finally, EPA's refusal to account for retroactive extensions negated the central purpose of the RFS program. Congress intended the RFS program—and specifically the volume obligations—"to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year." *ACE*, 864 F.3d at 710. But as explained above, EPA's refusal to account for retroactive exemptions means that the 2019 standards will exert *no* pressure on the market to increase its use of renewable fuel above levels already achieved repeatedly.

C. EPA Has Authority to Account for Exemptions in Setting the Standards

To fulfill its statutory duties and avoid undermining the statute, EPA should have accounted for retroactive exemptions in setting the 2019 standards. Specifically, EPA should have adjusted the standards to reflect the amount of retroactive exemptions it reasonably expected to grant for 2019—the "ex ante" approach. And EPA should have adjusted the standards by the amount of retroactive exemptions it has granted for prior years, which have never been made up—the "ex post" approach. As a practical matter, EPA could have achieved this

result by applying a lesser cellulosic waiver to the advanced and total volume requirements and raising the BBD requirement under §7545(*o*)(2)(B)(ii). *See, e.g.*, JA[EPA-HQ-OAR-2018-0167-1292.at.22]; JA[EPA-HQ-OAR-2018-0167-0711.at.20-23]. EPA has asserted several reasons for refusing to adopt these approaches. They are meritless.

First, EPA claims its position reflects Congress's intent to have "forward-looking standards issued by a statutory deadline." Br. for Respondent EPA 73 ("EPA *AFPM* Br."), *AFPM v. EPA*, No. 17-1258, ECF #1767773 (D.C. Cir. Jan. 10, 2019). But neither the ex ante nor ex post method described above would undermine that—EPA would still issue forward-looking standards each year. The only difference is that the values of those standards would be set in a way that accounts for the reality of EPA's retroactive exemptions.

Second, EPA has said the ex ante method would require it to "prejudg[e]" and "speculat[e]" about hypothetical extension applications. EPA *AFPM* Br. 73-74. But EPA would have to neither evaluate individual refineries (or reach any firm conclusion about them) nor shoot in the dark. Rather, EPA could develop a reasonable projection of exemptions in the aggregate based on past aggregate extensions, changes in the number of small refineries, and the expertise EPA has accumulated through administering the exemption program for years. Moreover, exemption applications "must specify … the date the refiner anticipates that

compliance with the requirements can reasonably be achieved," 40 C.F.R. §80.1441(e)(2)(i); assuming EPA enforces that requirement, it could have based its estimates on such statements by previously exempt refineries.

EPA has argued that the ex post approach contradicts the statute, which requires EPA "to prospectively set applicable percentages for the specific 'following calendar year,' based on the statutory tables and EPA's projections for that year." EPA *AFPM* Br. 76 (quoting 42 U.S.C. §7545(*o*)(3)(B)). That argument disregards this Court's and EPA's own precedents, as well as the broader statutory structure. EPA and this Court have recognized that making up one year's required volumes by adding them to a later year's volume requirement best fulfills what "Congress expected and intended." JA[RFS2.Summary.and.Analysis.of. Comments.at.3-186-188.(pdf=238-240).https://nepis.epa.gov/Exe/ZyPDF.cgi /P1007GC4.PDF?Dockey=P1007GC4.PDF]. For example, EPA did not issue the 2009 biomass-based diesel volume requirement on schedule, but because Congress was "focus[ed] on ensuring the annual volume requirement[s are] met regardless of EPA delay," *NPRA*, 630 F.3d at 163, EPA "combined" the 2009 and 2010 volumes "into a single requirement" to "ensure that … two years' worth of [biofuel] will be used," 75 Fed. Reg. 14,670, 14,718 (Mar. 26, 2010) (JA__). This Court upheld that approach, finding that it satisfied EPA's statutory duty to "ensure" that the volume requirements "are met." *NPRA*, 630 F.3d at 153 n.23, 155-156, 158.

Indeed, the Court declared that *not* requiring that the 2009 volume be "eventually" used would have been "'flatly contrary to Congress' intent and would turn agency delay into a windfall for the regulated entities.'" *Id*. at 156-157; *see also Monroe Energy*, 750 F.3d at 916, 919-921 ("Congress' focus on ensuring the annual volume requirement was met regardless of EPA delay."). This "combined" approach to making up RFS rulemaking delays is functionally no different from the ex post approach to accounting for retroactive exemptions.

Moreover, as a time-shifting mechanism, the ex post approach functions like the carryover RIN bank that EPA has read into the statute. Through the mechanism of carryover RINs, EPA credits excess generation of prior-year RINs to *decrease* the required volumes for the next year. Given that allowance, it is irrational for EPA to claim it is powerless to make up prior-year exemptions because that would time-shift obligations in a way that would *increase* the next year's required volumes.

EPA has objected that if it must use the ex post method for retroactive exemption, then it would also have to "use later rules to 'true up' the applicable volumes from a previous rule" whenever consumers "use less transportation fuel in a given year than EPA projected." EPA *AFPM* Br. 77-78. Instead, EPA has contended, the statute allows for "some imprecision." 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012) (JA__). But there are critical differences between lower-than-

projected fossil-fuel use and small-refinery exemptions. Congress specified that the nationwide "renewable fuel obligation" be expressed as a percentage of the projected nationwide transportation-fuel use, and lower-than-projected fossil fuel use does not result in obligated parties coming up short of that percentage. 42 U.S.C. §7545(*o*)(3)(B)(ii). In contrast, retroactive exemptions (if not made up) "create[]" a "shortfall" relative to the nationwide percentage obligation. *AFPM*, 2019 WL 4229073, at *3. Moreover, whereas EPA has no control over nationwide transportation-fuel use, it can affect the volume and timing of exemptions. Indeed, it was EPA's recent expansion of exemptions that reduced demand for renewable fuels by billions of gallons.

D. EPA Cannot Plausibly Claim That This Issue Is Outside the Scope of This Rulemaking

EPA asserts that the question of whether to account for retroactive exemptions was "beyond the scope of this rulemaking" because it "did not propose changes to, take comment on, or otherwise reexamine … issues relating to the reallocation of exempt small refinery volumes." JA[EPA-HQ-OAR-2018-0167-1387.at.183]. Notwithstanding the discretion EPA generally enjoys in defining the scope of a rulemaking, its exercise of that discretion must not be arbitrary and capricious. *Marketing Assistance Program, Inc. v. Bergland*, 562 F.2d 1305, 1307 (D.C. Cir. 1977). Here, it was unreasonable and thus impermissible for EPA to exclude this issue from the 2019 rulemaking.

EPA cannot disregard or avoid its statutory obligations by deeming them "beyond the scope" of a rulemaking. But that is what it has attempted to do here. As described above, EPA's duty to "ensure" that the required annual volumes of renewable fuel are met obligates it to account for small refinery exemptions. *See* Part I.B, *supra*. That duty is part of EPA's recurring, annual duty to "determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation." 42 U.S.C. §7545(*o*)(3)(B)(i). By failing to account for retroactive exemptions, EPA did not fulfill its duty to ensure that the 2019 standards are met. Moreover, setting the 2019 standards without accounting for retroactive extensions resulted in a rule that negates the efficacy of the very volume requirements being set and undermines the principal purpose of the RFS program.

EPA previously recognized that need to account for the effect of retroactive exemptions in setting the 2019 standards. In an earlier draft of the proposed 2019 standards, EPA acknowledged that its "grant of small refinery exemptions affects the amount of transportation fuel subject to the renewable fuel obligation for that year." JA[EPA-HQ-OAR-2018-0167-0103.at.73(pdf=74)]. To "address this effect" and "facilitate the satisfaction of the RFS program [volume] requirements"—i.e., to "implement[]" its statutory mandate to "'ensure[]'" the required volumes "'are met'"—EPA proposed to adjust the volume obligations to

account for the "[p]roject[ed] … total exempted volume [for 2019] based on the most recent exemption data." *Id.* EPA, however, abandoned this approach without disavowing the analysis that necessitated it.

In other words, the issue of accounting for retroactive exemptions was not a severable regulatory issue but rather was "an important aspect of the problem" to be confronted when setting the 2019 volume requirements, and therefore EPA's "fail[ure] to consider" the issue was "arbitrary and capricious." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also, e.g.*, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (agency must address comments that "raise points relevant to the agency's decision" and that "cast doubt on [its] reasonableness").[13]

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[13] In *AFPM*, NBB challenged EPA's refusal to account for retroactive exemptions in setting the *2018* volume requirements. The Court's rejection of that challenge has no effect here. First, the Court found the challenge unpreserved. *AFPM*, 2019 WL 4229073, at *17-18. Here, petitioners preserved their objection. *See, e.g.*, JA[EPA-HQ-OAR-2018-0167-1292.at.7-15]; JA[EPA-HQ-OAR-2018-0167-0711.at.5-10]; JA[EPA-HQ-OAR-2018-0167-1199.at.1-6]. Second, the Court concluded NBB could not avoid the preservation requirement by invoking the "key assumption" doctrine because "[h]ow the EPA accounts for exemptions … is hardly an assumption undergirding the entire 2018 Rule." *AFPM*, 2019 WL 4229073, at *18. But that demanding standard does not apply here where EPA received multiple, thorough comments on the issue.

II. EPA IMPERMISSIBLY DECIDED TO MAINTAIN ITS APPROACH OF GRANTING RETROACTIVE EXEMPTIONS[14]

In addition to Part I, Producers United challenges EPA's "maintaining [its] approach" of granting retroactive exemptions when they "will not be reflected in the percentage standards." 83 Fed. Reg. at 63,740 (JA__). Given EPA's recent expansion of the small refinery exemptions, maintaining this "approach"—the implications of which became known in 2018—does not ensure the volume requirements are met. *See* Part I.B, *supra*. This is because it impermissibly reduces those volume requirements and allows retired RINs to re-enter the market, both without proper procedures. Nothing, however, authorizes EPA to grant retroactive exemptions or "unretire" RINs when it does. And, EPA's choice to continue this approach, without adjusting the volumes, is arbitrary.

While EPA may claim it has long followed these practices, this Court has found the "reasonableness of adopting" an approach "is not the same as the reasonableness of *maintaining* one in the face of experience; considering whether to maintain [it] necessarily invites reflection …." *American Petroleum Inst. v. EPA*, 706 F.3d 474, 477 (D.C. Cir. 2013). The standard-setting process requires some projections but must "ensure" the volume requirements are met. In prior years, the exemptions had minimal (if any) effect on meeting the volumes. Now,

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[14] Only Producers United presents this argument.

however, the expansion of these exemptions undermines the volume requirements, *see, e.g.*, Part I.A, *supra*, which "necessarily invites reflection" and shows that EPA was arbitrary in "maintaining" these practices.

First, neither the statute nor EPA's regulations authorize "retroactive" exemptions. Rather, this is EPA's practice. Even if a consistent interpretation of its authority, that is immaterial when it is "contrary to the plain language of the statute when read as a whole." *Carlson v. Postal Regulatory Comm'n*, 2019 WL 4383260, at *8 (D.C. Cir. 2019).

The statute creates *prospective* mandates that EPA must "ensure." 42 U.S.C. §7545(*o*)(2)(A), (*o*)(3)(B). The statute also limits refineries to receiving "extensions," which indicates seeking "an increase in length of time" or prolonging of an existing exemption,[15] not a new exemption reaching backwards. *Id.* §7545(*o*)(9). EPA has (belatedly) referenced the provision allowing extension petitions "at any time," applying it differently in different contexts.[16] While the provision references extending exemptions under Subparagraph (A) (i.e., "at any time" during the initial exemption period or the extension period based on a U.S.

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[15] Merriam-Webster Dictionary (*Extension*), https://www.merriam-webster.com/dictionary/extension.

[16] *Compare* Resp't's Final Briefs in *Producers United v. EPA*, No. 18-1202, ECF #1780504, at 28 (D.C. Cir. Apr. 1, 2019), and *Advanced Biofuels Ass'n v. EPA*, No. 18-1115, ECF #1796068, at 49-52 (D.C. Cir. July 8, 2019).

Department of Energy study, *id.* §7545(*o*)(9)(A), (B)(i)), EPA's asserted reading would impose no limits at all. This is absurd. Surely Congress did not intend the phrase "at any time" to undermine the program and violate EPA's statutory obligations. Moreover, EPA has not explained its change from its prior positions where it agreed it *could* impose deadlines. JA[EPA-HQ-OAR-2018-0167-1199.at.5-6].

Nor does EPA explain how its interpretation is consistent with regulations that state the refinery "be *projected* to meet the definition … for the year or years for which an exemption is sought." 40 C.F.R. §80.1441(e)(2)(iii) (emphasis added). Refineries also must identify the hardships they "would face" and when "compliance with the requirements can reasonably be achieved." *Id.* §80.1441(e)(2)(i). EPA's regulations also limit when exempt refineries may separate and transfer RINs, but EPA allows them to act "like any other obligated party" and then seek exemptions. 72 Fed. Reg. 23,900, 23,926 (May 1, 2007) (JA__); 40 C.F.R. §80.1429(b)(8).[17] These regulations function only if the exemptions are *prospective*.

[17] Generally, an obligated party "separates" RINs upon ownership of biofuel. 40 C.F.R. §80.1429(b)(1). Separation allows parties to sell or retire RINs.

Second, this approach apparently has led EPA to "unretire" RINs, which has increased the RIN bank, undermining the incentives Congress created to promote production and use through increasing volume requirements. *See* Part I.A, *supra*.[18] "Unretired" RINs are created when a refinery *achieves compliance* (i.e., retires RINs) yet receives a "hardship" exemption for that compliance year.[19] EPA does not explain its authority to "unretire" these RINs. Nor can it.

RINs are meant to serve as the compliance mechanism and to implement a "credit" program. Unretired RINs from retroactive exemptions do not fall under the credit program, which establishes limited instances when a "credit" can be generated, which do not apply here. 42 U.S.C. §7545(*o*)(5)(A). First, credits may be generated when any person uses more biofuels than required. Retiring RINs for compliance does not evidence a refinery's blending or using biofuels. Rather, small refineries complain that they must rely on credits generated by others. JA[EPA-HQ-OAR-2018-0167-1281.at.1]. Second, credits can be generated for

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[18] These "unretired" RINs have included new RINs that extend the life of retired RINs that expired. *Cf.* 42 U.S.C. §7545(*o*)(5)(C). For compliance year 2018, EPA granted *all* thirty-one exemptions *after the March 31, 2019 compliance deadline*. *See* EPA News Release, Aug. 9, 2019, https://www.epa.gov/newsreleases/epa-announces-biofuel-and-small-refinery-exemption-priorities.

[19] If refiners cannot meet their obligations, they may carry a deficit for one year. 42 U.S.C. §7545(*o*)(5)(D). In such cases, retroactive exemptions eliminate the deficit, nullifying that portion of that year's volume requirement and reducing the next year's statutorily mandated demand.

biodiesel, but the refiner getting the credits—"unretired" RINs—are not producing biofuel. And, finally, credits can be generated by refineries "in accordance with paragraph (9)(C)," which applies only to refineries that *waived* the initial exemption through 2010 or 2012 if extended as a result of a U.S. Department of Energy study. 42 U.S.C. §7545(*o*)(5)(A)(iii), (9)(C) (referencing §7545(*o*)(9)(A)).

Also, EPA must promulgate regulations regarding these credits and compliance. 42 U.S.C. §7545(*o*)(2)(A), (5)(A), (9)(C). But EPA's regulations provide no authority to "unretire" RINs here. *Cf.* 40 C.F.R. §§80.1427(a)(4)(iv), (a)(7), 80.1429(g). Instead, once RINs are retired, they cannot be used again. *Id.* §80.1427(a)(6)(ii). These regulations are important to enforce Congress's carefully crafted incentives. When available RINs establish supply, it is key that, once retired, they stay retired. EPA's uncodified practice is invalid and undermines these incentives by inflating supply, creating market uncertainty and price volatility. It is clear that continuing EPA's "approach" cannot ensure the required volumes, rendering EPA's maintaining such approach unlawful. JA[EPA-HQ-OAR-2018-0167-0670]; JA[EPA-HQ-OAR-2018-0167-1038]; JA[Reconsideration.Petition.at.11].

While EPA claims it has addressed these issues in prior determinations, JA[EPA-HQ-OAR-2018-0167-1387.at.184],[20] the new circumstances show EPA's prior rationale bears no relation to the record, and it was incumbent on EPA to explain why it was maintaining this position. At best, EPA claimed it was protecting against uncertainty and Congress allowed some "imprecision" in meeting the volumes. 77 Fed. Reg. at 1,340 (JA__). But, EPA's expansion is creating uncertainty and goes beyond mere imprecision. *See* JA[EPA-HQ-OAR-2018-0167-1298.at.4 n.7].[21] EPA is knowingly undermining the demand and certainty Congress sought and is doing so outside its authority.

Further, EPA cannot ignore a significant aspect of a problem and claim reasoned decision-making. EPA itself raised concerns regarding potential RIN-market manipulation. 83 Fed. Reg. 32,024, 32,027 (July 10, 2018) (JA__). While the compliance deadlines (and 90-day limit to respond to petitions) should incentivize prompt action, retroactive exemptions (and "unretiring" of RINs) incentivize waiting. Small refineries can buy and hold RINs without taking any

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[20] EPA never explained the basis or scope of its claimed authority.

[21] For example, EPA granted exemptions for 2017 in *2019*, which caused uncertainty in compliance for 2018 and increased RIN supply and thus decreased demand in 2019. *See* EPA, *EnviroFlash Announcements about EPA Fuel Programs*, Mar. 14 and 28, 2019, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/enviroflash-announcements-about-epa-fuel-programs.

actions to promote biofuels and even circumvent other limitations on RIN use. They can wait-and-see how RIN markets are operating and dump RINs when advantageous. They can comply and, if RIN prices dictate, seek to get those RINs back. These actions adversely affect RIN-market operations. While EPA indicated it was considering "reforms" in a separate proceeding, JA[EPA-HQ-OAR-2018-0167-1387.at.5],[22] EPA cannot ignore how this impacts the 2019 volumes and renders the standards meaningless.

Indeed, EPA's arbitrary decision to limit the "scope" of its action allowed it to ignore required procedures. EPA's allowing retroactive exemptions and unretiring RINs were key considerations. *See, e.g.*, 83 Fed. Reg. at 63,709-63,710 (JA__-__) (discussing carryover RINs); *id.* at 63,740 (JA__). Yet, EPA has shut the public out from understanding its process at every turn and *refused* to respond to comments regarding the impacts of EPA's decision. *See, e.g.*, JA[EPA-HQ-OAR-2018-0167-0530.at.1-3]; JA[EPA-HQ-OAR-2018-0167-0711.at.8-10]; Ja[EPA-HQ-OAR-2018-0167-1038]; JA[EPA-HQ-OAR-2018-0167-1199].

Further, any claim that EPA's retroactive exemptions and whether to account for them are issues "beyond the scope" of the 2019 RFS does not allow

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[22] There, however, EPA again found these comments "beyond the scope." JA[EPA-HQ-OAR-2018-0775-1174.at.125].

EPA to escape judicial review. The July 2018 Reconsideration Petition was before EPA during the proceeding,[23] requesting reconsideration of EPA's determination that it can grant retroactive exemptions (and "unretire" RINs), JA[Reconsideration.Petition.at.14], and the volumes used to set the standards for 2016, 2017, and 2018, JA[Reconsideration.Petition.at.1].[24] It specifically referenced the potential impact to the 2019 volumes if EPA did not account for exemptions and the reentry of RINs into the market.[25] JA[Reconsideration.Petition.at.7]. Yet EPA "refuse[d]" to convene such a proceeding in claiming that such concerns are "beyond the scope."[26] 42 U.S.C. §7607(d)(7)(B); *see also* 5 U.S.C. §553(e) (requiring petitions for rulemaking). A specific form of the response from the agency is not required. It was arbitrary for EPA to deny this request given the significant questions of the legality of EPA's

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[23] EPA met with Producers United during the rulemaking. JA[EPA-HQ-OAR-2018-0167-1402].

[24] Because EPA did not publicly disclose these decisions, only EPA knew the basis and scope of its claimed authority. Consequently, this challenge should not be dismissed for any claimed lack of specificity in the Reconsideration Petition.

[25] As explained above, adding the lost volumes from one year's exemptions onto a later year's volume is an appropriate remedy.

[26] Unlike here, EPA did seek further comment related to the Reconsideration Petition's request to increase transparency of EPA's decisions. 84 Fed. Reg. 36,762, 36,765 (July 29, 2019).

actions and the adverse impacts on the program and biofuels producers. Thus, to the extent EPA claims it is "simply appl[ying] [its] longstanding regulations and policies in this action," JA[EPA-HQ-OAR-2018-0167-1387.at.184], this Court still has jurisdiction to hear these claims.

III. EPA ERRED IN REFUSING TO COUNT RENEWABLE ELECTRICITY IN SETTING THE 2019 CELLULOSIC BIOFUEL STANDARD[27]

A. EPA Failed to Count Electricity Fuel for the 2019 Standard

Although transportation fuel is more familiar as liquid fuel (*e.g.*, liquid corn ethanol) or compressed and liquified gas ("CNG/LNG"), electricity is increasingly becoming a mainstream vehicle fuel. DEC10 (Cleaves Decl. ¶22). EPA qualified electricity as a transportation fuel under the cellulosic renewable-fuel category in 2010 and 2014 rulemakings to meet Congress' statutory volume targets. 79 Fed. Reg. 42,128, 42,128 (July 18, 2014) (JA__) ("We also … add a new cellulosic biofuel pathway for renewable electricity (used in electric vehicles) … By qualifying these new fuel pathways, this rule provides opportunities to increase the volume of advanced, low-GHG renewable fuels—such as cellulosic biofuels—under the RFS program."); 75 Fed. Reg. at 14,686 (JA__) (approving electricity as a renewable fuel; "we are allowing fuel producers … to include electricity … made from renewable biomass as a RIN-generating renewable fuel in RFS"); 74 Fed.

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[27] Only the RFS Power Coalition presents this argument.

Reg. 24,904, 24,921 (May 26, 2009) (JA__) ("[o]ur proposal to allow electricity … to generate RINs under certain conditions is consistent with … EISA's requirement that all transportation fuels be included").[28] The status of electricity as a qualified renewable fuel was codified in EPA's regulations over five years ago. 40 C.F.R. §80.1426(f) Table 1, Row Q (electricity fuel from biogas qualifies as "D Code 3" corresponding to the cellulosic biofuel category). RFS Power Coalition members produce significant volumes of qualified electricity fuel, which is actually being used in the real world as transportation fuel in electric buses, delivery trucks, electric cars, and other uses, and have the capacity to produce even more electricity fuel. DEC10-11 (Cleaves Decl. ¶22-23).

For 2019, Congress mandated 8.5 billion gallons of cellulosic biofuel, yet EPA specified only 418 million cellulosic gallons in the 2019 standard —less than 5% of the goal set by Congress. 83 Fed. Reg. at 63,705-63,706 (JA__-__). But EPA can reduce the statutory volumes for cellulosic biofuel *only* if it first determines that available supplies of cellulosic biofuel are less than the statutorily mandated volume. 42 U.S.C. §7545(*o*)(7)(D)(i). Here, EPA did not count

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[28] EPA's regulations qualifying electricity fuel were in response to a congressional mandate requiring EPA to study issuing credits to electricity producers. *Energy Independence and Security Act*, Pub. L. 110-140, §206, 121 Stat. 1492 (Dec. 19, 2007) (EPA "shall conduct a study on the feasibility of issuing credits … to electric vehicles powered by electricity produced from renewable energy sources.").

available electricity fuel in the 2019 volumes, even though it had explicitly acknowledged electricity as an RFS-qualified fuel in 2010 and 2014 and even though it was aware that electricity fuel was available and being produced by fuel producers.

EPA's failure to count electricity fuel in the 2019 standard is particularly inexplicable given that as early as 2012, EPA projected that at least 300 million gallons of electricity fuel were available for the RFS. 77 Fed. Reg. at 1333 ("Another potential source of advanced biofuels is electricity … equivalent to about 300 mill[ion] ethanol-equivalent gallons. … [T]his remains a very large potential source of advanced biofuel RINs.").[29] If EPA had properly counted electricity fuel, as required by the statute, the volume of cellulosic biofuel for which fuel producers would be paid under 42 U.S.C. §7545(*o*)(3)(B)(i) would have

[29] Although a pathway adding electricity fuel to the RFS regulations at 40 C.F.R. §80.1426(f) had not yet been approved in 2012, as noted the electricity pathway was finalized in EPA's 2014 rule. 77 Fed. Reg. at 1333 ("Currently, there are no valid pathways in Table 1 to §80.1426 for the generation of RINs representing electricity used as transportation fuel. However, several companies have approached EPA with requests for such a pathway, and investigations are underway. It is possible that one or more new pathways for electricity may be available for use in 2012").

dramatically increased from 418 million gallons to as much as 2 billion gallons. DEC23-24 (Cleaves Decl. ¶40-41).[30]

When calculating available fuel volumes, EPA typically prepares a market analysis. EPA's projections must be based, at a minimum, on Energy Information Administration data, 42 U.S.C. §7545(*o*)(3)(A), although the agency can consider other information that it gathers. *ACE*, 864 F.2d at 723-724. For example, in the 2019 Rule, EPA studied the availability of CNG/LNG, another type of qualified non-liquid renewable fuel like electricity, and concluded that 398.9 million ethanol-equivalent gallons of CNG/LNG fuel would be used in buses, truck fleets, and other vehicles. JA[EPA-HQ-OAR-2018-0167-1359.at.4 n.5]. This Court has previously described the methodology that EPA must use to "project" available cellulosic biofuel volumes, which includes various sources of information. *ACE*, 864 F.3d at 725-728 ("EPA had calculated a total volume projection for each of the two main categories of cellulosic biofuel: liquid cellulosic biofuel and biogas. … EPA determined which renewable fuel production plants had the potential to produce commercial scale volumes of cellulosic biofuel in 2016. … EPA calculated a range of likely production from each individual cellulosic biofuel

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[30] The exact calculation of available electricity fuel is not directly at issue in this challenge to the 2019 Rule, but EPA must undertake in good faith such a calculation on remand.

producer. … EPA performed its own investigation of each plant's ability to produce … cellulosic biofuel ….") (quotation marks omitted); *AFPM*, 2019 WL 4229073, at *7 (EPA considers various factors to project available cellulosic biofuel such as commercial-scale production, start-up date, ramp-up period, and facility capacity). The projection of available fuel is not limited to existing production, and EPA typically includes fuel volumes of production facilities that have the capability to produce fuel. 83 Fed. Reg. at 63,713 (JA__) (noting with respect to other fuels that "[t[here are several companies and facilities … that have either already begun producing cellulosic biofuel for use as transportation fuel … or are anticipated to be in a position to do so at some time during 2019"). But EPA prepared no analysis of the availability of electricity fuel for the 2019 standard, and EPA credited zero volume for electricity fuel.

The only explanation offered in the record for not counting electricity is in EPA's Response to Comments: EPA "have not, however, included in our projections production from facilities that must address significant *technical and regulatory issues* prior to facility registration (such as … facilities seeking to generate RINs for electricity generated from biogas used as transportation fuel)." JA[EPA-HQ-OAR-2018-0167-1387.at.37 (emphasis added)]. But EPA nowhere explains in the record what "technical and regulatory issues" exist or why such issues would prevent the agency from counting available supplies of electricity

fuel. And this single statement was contradicted by EPA's own top air pollution official, William Wehrum, who stated in a meeting with Petitioner that there were no technical or regulatory issues preventing the deployment of electricity fuel. DEC19-20 (Cleaves Decl. ¶34). Further contradicting its own excuse that technical and regulatory issues were standing in the way, EPA complained that "resource constraints and competing priorities" supposedly prevented it from evaluating facility registration requests and pathway petitions for electricity. JA[EPA-HQ-OAR-2018-0167-1387.at.36]. But EPA never explains in the record why its workload is a barrier to the availability of renewable fuel, and the statute nowhere authorizes EPA to consider its own internal workload when projecting available volumes of renewable fuel. Notably, EPA has never invoked the "we are too busy" excuse for any other type of renewable fuel.

B. EPA's Failure to Count Electricity Fuel Was Illegal

By omitting available electricity fuel, EPA failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *ACE*, 864 F.3d at 726 (citing *State Farm*, 463 U.S. at 43). Merely alluding to "technical and regulatory issues" is not a satisfactory explanation for EPA's failure to count any electricity fuel. Nor is agency workload a factor that EPA may consider under the statute, nor is workload any basis to justify a decision to exclude a source of renewable fuel

that could triple the amount of cellulosic biofuel under the RFS program, particularly where EPA has never invoked such an excuse for any other fuel (or for granting small refinery exemptions). *AFPM*, 2019 WL 4229073, at *6 ("We also may reverse an EPA action under the Program if we determine that it is 'otherwise not in accordance with law' or 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'") (citing 42 U.S.C. §7607(d)(9)(A), (C)).

It is clear from the record that EPA was aware that significant quantities of electricity fuel were available because, *inter alia*, (1) Congress told the agency to study electricity as transportation fuel, (2) EPA recognized the availability of significant amounts of electricity as transportation fuel as early as 2012, (3) EPA qualified electricity as RFS fuel in 2014 by creating a fuel pathway, and (4) producers consistently objected that available fuel was not being counted in the 2019 volumes.

EPA had no authority under the statute to reduce the 2019 volumes for cellulosic biofuel below the congressionally mandated 8.5 billion gallons unless it first properly projected the amount of available cellulosic biofuel in the marketplace. In making this projection, EPA could have and should have considered EIA data on transportation use of electricity fuel, and it could have and should have gathered information about current electricity fuel production capacity in the same way that it gathered information on availability of the other cellulosic

biofuel types: by issuing surveys to fuel producers, requesting data, and considering facility registrations and pathway petitions that had been submitted. Although EPA has some latitude in projecting available volumes of renewable fuel, *Monroe Energy,* 750 F.3d. at 916, EPA cannot entirely ignore large available volumes of cellulosic biofuel, particularly, as here, where the record reflects that fuel is actually being produced in real time by cellulosic-biofuel producers. Even if there were some legitimate "technical and regulatory issues" to be considered, EPA never explains why it could not resolve those issues in time for the 2019 period, especially given that EPA qualified electricity fuel five years ago through the 2014 rulemaking. And as noted, EPA's excuse was disavowed by then-Assistant Administrator Wehrum.

EPA's action is not "reasonable and reasonably explained" and therefore is arbitrary and capricious. *ACE*, 684 F.3d at 735. Because the record is so scant, Petitioner (and the Court) is forced to guess at what EPA might raise as a justification in its response brief, but the 2019 Rule must be judged only on the basis of the record that EPA created. Moreover, the unreasonableness of EPA's undercounting of available volumes of electricity fuel must be viewed in the context of Congress's statutory mandate to increase cellulosic biofuel production to 8.5 billion gallons by 2019, which the program is failing to achieve because of EPA's failure to properly implement the program.

C. EPA Illegally Exercised the Discretionary Cellulosic Waiver Without First Determining Available Cellulosic Supply

The statute also requires 28 billion gallons of total renewable fuel and 13 billion gallons of advanced biofuel for 2019, both of which include the nested volumes of cellulosic biofuel. EPA's arbitrary approach to not counting electricity fuel is especially damaging to all renewable-fuel producers because EPA used the zero estimate for electricity fuel to lower the volume of advanced biofuel and total renewable fuel in the 2019 Rule–thus further artificially constraining the renewable-fuel market. 83 Fed. Reg. at 63,705 (JA__).

As a precondition to the discretionary cellulosic waiver under §7545(*o*)(7)(D)(i), EPA must first have properly determined that the available supply of cellulosic biofuel for 2019 is less than the statutorily mandated volume of 8.5 billion gallons. Since electricity also qualifies as an advanced biofuel and total renewable fuel under the program's nested fuel categories in addition to qualifying as cellulosic biofuel, for the same reason that EPA erred in not counting electricity as available cellulosic biofuel for purposes of the "projected volume available" of cellulosic biofuel under §7545(*o*)(7)(D)(i), EPA also erred in determining that electricity fuel was not part of the volume of noncellulosic biofuel "reasonably attainable" for purposes of setting the advanced-biofuel and total renewable-fuel volumes. 83 Fed. Reg. at 63,719 (JA__) ("we project that there will be insufficient reasonably attainable volumes of noncellulosic advanced

biofuels in 2019"); *AFPM*, 2019 WL 4229073, at *6 (EPA must estimate "reasonably attainable" volumes of other advanced biofuels as a condition of the discretionary cellulosic waiver). Accordingly, the statutory volumes for advanced biofuel and total renewable fuel (13.0 billion gallons and 28.0 billion gallons, respectively) should have been used to establish the percentage standards for the 2019 period until EPA properly determined the amount of available cellulosic biofuel.

* * *

EPA's failure to provide any rational explanation of its exclusion of electricity fuel from the 2019 standard warrants action by this Court to exercise its "power … to ensure justice" in the face of agency refusal to act. *Friedman v. Federal Aviation Admin.*, 841 F.3d 537, 543, 545 (D.C. Cir. 2016) (agency's refusal to act illegally put applicant in "administrative limbo"). Because EPA has not properly determined the amount of available cellulosic biofuel and therefore cannot invoke the mandatory or discretionary cellulosic waiver, Petitioner RFS Power Coalition respectfully asks this court to remand the rule to EPA with instructions to implement the 2019 volumes and associated percentage standards at the statutory levels for 2019—8.5 billion gallons of cellulosic biofuel and concomitant volumes of advanced and total renewable fuel—until such time as EPA properly determines the amount of available cellulosic biofuel, including

electricity. In addition, because the 2019 period will have expired by the time of this Court's decision, Petitioner requests that this Court direct the agency to add the shortfall from the 2019 volumes to future annual compliance periods starting with the remainder of the 2020 period and carrying over any volumes that cannot be reasonably accommodated in the 2020 period to future annual periods. *United States Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016) (circuit court may exercise mandamus powers to force agency action).

CONCLUSION

The Court should grant the petitions and remand for further proceedings consistent with the arguments above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of this Court's order of August 20, 2019, because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 9,011 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s/ Seth P. Waxman
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October 4, 2019

ADDENDUM OF STATUTES AND REGULATIONS

ADDENDUM OF STATUTES AND REGULATIONS

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(*o*) Renewable fuel program

(1) Definitions

In this section:

(A) Additional renewable fuel

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

(B) Advanced biofuel

(i) In general

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

(ii) Inclusions

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

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

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

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

(IV) Biomass-based diesel.

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

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

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

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

(D) Biomass-based diesel

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

(E) Cellulosic biofuel

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

(F) Conventional biofuel

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

(G) Greenhouse gas

The term ''greenhouse gas'' means carbon dioxide, hydrofluorocarbons, methane, ni-

trous oxide, perfluorocarbons,[9] sulfur hexafluoride. The Administrator may include any other anthropogenically-emitted gas that is determined by the Administrator, after notice and comment, to contribute to global warming.

(H) Lifecycle greenhouse gas emissions

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

(I) Renewable biomass

The term ''renewable biomass'' means each of the following:

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

(ii) Planted trees and tree residue from actively managed tree plantations on non-federal[10] land cleared at any time prior to December 19, 2007, including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.

(iii) Animal waste material and animal byproducts.

(iv) Slash and pre-commercial thinnings that are from non-federal[10] forestlands, including forestlands belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States, but not forests or forestlands that are ecological communities with a global or State ranking of critically imperiled, imperiled, or rare pursuant to a State Natural Heritage Program, old growth forest, or late successional forest.

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

(vi) Algae.

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

(J) Renewable fuel

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

(K) Small refinery

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

(L) Transportation fuel

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

(2) Renewable fuel program

(A) Regulations

(i) In general

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B). Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(ii) Noncontiguous State opt-in

(I) In general

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

(II) Other actions

In carrying out this clause, the Administrator may—

(aa) issue or revise regulations under this paragraph;

(bb) establish applicable percentages under paragraph (3);

(cc) provide for the generation of credits under paragraph (5); and

(dd) take such other actions as are necessary to allow for the application of the renewable fuels program in a noncontiguous State or territory.

[9] So in original. The word ''and'' probably should appear.

[10] So in original. Probably should be ''non-Federal''.

(iii) Provisions of regulations

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

(I) shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met; but

(II) shall not—

(aa) restrict geographic areas in which renewable fuel may be used; or

(bb) impose any per-gallon obligation for the use of renewable fuel.

(iv) Requirement in case of failure to promulgate regulations

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

(B) Applicable volumes

(i) Calendar years after 2005

(I) Renewable fuel

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

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

(II) Advanced biofuel

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

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

(III) Cellulosic biofuel

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

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

(IV) Biomass-based diesel

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

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

(ii) Other calendar years

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

mentation of the program during calendar years specified in the tables, and an analysis of—

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

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

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

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

(V) the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and

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

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

(iii) Applicable volume of advanced biofuel

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

(iv) Applicable volume of cellulosic biofuel

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

(v) Minimum applicable volume of biomass-based diesel

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

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

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

(B) Determination of applicable percentages

(i) In general

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

(ii) Required elements

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

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

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

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

(C) Adjustments

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

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

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

(4) Modification of greenhouse gas reduction percentages

(A) In general

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

(B) Amount of adjustment

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

percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below 10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

(C) Adjusted reduction levels

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

(D) 5-year review

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

(E) Subsequent adjustments

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

(F) Limit on upward adjustments

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

(G) Applicability of adjustments

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

(5) Credit program

(A) In general

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

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

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

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

(B) Use of credits

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

(C) Duration of credits

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

(D) Inability to generate or purchase sufficient credits

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

(i) achieves compliance with the renewable fuel requirement under paragraph (2); and

(ii) generates or purchases additional renewable fuel credits to offset the renewable fuel deficit of the previous year.

(E) Credits for additional renewable fuel

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

(6) Seasonal variations in renewable fuel use

(A) Study

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

(B) Regulation of excessive seasonal variations

If, for any calendar year, the Administrator of the Energy Information Administration, based on the study under subparagraph (A), makes the determinations speci-

fied in subparagraph (C), the Administrator of the Environmental Protection Agency shall promulgate regulations to ensure that 25 percent or more of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) is used during each of the 2 periods specified in subparagraph (D) of each subsequent calendar year.

(C) Determinations

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

(i) less than 25 percent of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) has been used during 1 of the 2 periods specified in subparagraph (D) of the calendar year;

(ii) a pattern of excessive seasonal variation described in clause (i) will continue in subsequent calendar years; and

(iii) promulgating regulations or other requirements to impose a 25 percent or more seasonal use of renewable fuels will not prevent or interfere with the attainment of national ambient air quality standards or significantly increase the price of motor fuels to the consumer.

(D) Periods

The 2 periods referred to in this paragraph are—

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

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

(F) State exemption from seasonality requirements

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

(7) Waivers

(A) In general

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

(i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or

(ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

(B) Petitions for waivers

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

(C) Termination of waivers

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

(D) Cellulosic biofuel

(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

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

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

(E) Biomass-based diesel

(i) Market evaluation

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

(ii) Waiver

If the Administrator determines that there is a significant renewable feedstock disruption or other market circumstances that would make the price of biomass-based diesel fuel increase significantly, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall issue an order to reduce, for up to a 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomass-based diesel. For any calendar year in which the Administrator makes a reduction under this subparagraph, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(iii) Extensions

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

(F) Modification of applicable volumes

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

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

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

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

(8) Study and waiver for initial year of program

(A) In general

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

(B) Required evaluations

The study shall evaluate renewable fuel—

(i) supplies and prices;

(ii) blendstock supplies; and

(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

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

(D) Waiver

(i) In general

Not later than 270 days after August 8, 2005, the Administrator shall, if and to the extent recommended by the Secretary of Energy under subparagraph (C), waive, in whole or in part, the renewable fuel requirement under paragraph (2) by reducing the national quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

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

(9) Small refineries

(A) Temporary exemption

(i) In general

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

(ii) Extension of exemption

(I) Study by Secretary of Energy

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

(II) Extension of exemption

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

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

A small refinery may at any time petition the Administrator for an extension of

the exemption under subparagraph (A) for the reason of disproportionate economic hardship.

(ii) Evaluation of petitions

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

(iii) Deadline for action on petitions

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

(C) Credit program

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

(D) Opt-in for small refineries

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

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

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

(ii) Scoring

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

(B) Report

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

(11) Periodic reviews

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

(A) existing technologies;

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

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

(12) Effect on other provisions

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

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

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

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

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

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

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

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

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

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

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

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

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

§ 80.1427 How are RINs used to demonstrate compliance?

(a) *Obligated party renewable volume obligations.* (1) Except as specified in paragraph (b) of this section or § 80.1456, each party that is an obligated party under § 80.1406 and is obligated to

meet the Renewable Volume Obligations under § 80.1407 must demonstrate pursuant to § 80.1451(a)(1) that it has retired for compliance purposes a sufficient number of RINs to satisfy the following equations:

(i) *Cellulosic biofuel.*

$(\Sigma RINNUM)_{CB,i} + (\Sigma RINNUM)_{CB,i-1} = RVO_{CB,i}$

Where:

$(\Sigma RINNUM)_{CB,i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the cellulosic biofuel RVO, were generated in year i, and are being applied towards the $RVO_{CB,i}$, in gallons.

$(\Sigma RINNUM)_{CB,i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the cellulosic biofuel RVO, were generated in year i-1, and are being applied towards the $RVO_{CB,i}$, in gallons.

$RVO_{CB,i}$ = The Renewable Volume Obligation for cellulosic biofuel for the obligated party for calendar year i, in gallons, pursuant to § 80.1407.

(ii) *Biomass-based diesel.* Except as provided in paragraph (a)(7) of this section,

$(\Sigma RINNUM)_{BBD,i} + (\Sigma RINNUM)_{BBD,i-1} = RVO_{BBD,i}$

Where:

$(\Sigma RINNUM)_{BBD,i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year i, and are being applied towards the $RVO_{BBD,i}$, in gallons.

$(\Sigma RINNUM)_{BBD,i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year i-1, and are being applied towards the $RVO_{BBD,i}$, in gallons.

$RVO_{BBD,i}$ = The Renewable Volume Obligation for biomass-based diesel for the obligated party for calendar year i after 2010, in gallons, pursuant to § 80.1407.

(iii) *Advanced biofuel.*

$(\Sigma RINNUM)_{AB,i} + (\Sigma RINNUM)_{AB,i-1} = RVO_{AB,i}$

Where:

$(\Sigma RINNUM)_{AB,i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the advanced biofuel RVO, were generated in year i, and are being applied towards the $RVO_{AB,i}$, in gallons.

$(\Sigma RINNUM)_{AB,i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the advanced biofuel RVO, were generated in year i-1, and are being applied towards the $RVO_{AB,i}$, in gallons.

$RVO_{AB,i}$ = The Renewable Volume Obligation for advanced biofuel for the obligated party for calendar year i, in gallons, pursuant to § 80.1407.

(iv) *Renewable fuel.*

$(\Sigma RINNUM)_{RF,i} + (\Sigma RINNUM)_{RF,i-1} = RVO_{RF,i}$

Where:

$(\Sigma RINNUM)_{RF,i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the renewable fuel RVO, were generated in year i, and are being applied towards the $RVO_{RF,i}$, in gallons.

$(\Sigma RINNUM)_{RF,i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the renewable fuel RVO, were generated in year i-1, and are being applied towards the $RVO_{RF,i}$, in gallons.

$RVO_{RF,i}$ = The Renewable Volume Obligation for renewable fuel for the obligated party for calendar year i, in gallons, pursuant to § 80.1407.

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

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

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

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

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

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

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

(4) Notwithstanding the requirements of § 80.1428(c) or paragraph (a)(6)(i) of this section, for purposes of demonstrating compliance for calendar years 2010 or 2011, RINs generated pursuant to § 80.1126 that have not been used for compliance purposes may be used for compliance in 2010 or 2011, as follows, insofar as permissible pursuant to paragraphs (a)(5) and (a)(7)(iii) of this section:

(i) A RIN generated pursuant to §80.1126 with a D code of 2 and an RR code of 15, 16, or 17 is deemed equivalent to a RIN generated pursuant to §80.1426 having a D code of 4.

(ii) A RIN generated pursuant to §80.1126 with a D code of 1 is deemed equivalent to a RIN generated pursuant to §80.1426 having a D code of 3.

(iii) All other RINs generated pursuant to §80.1126 are deemed equivalent to RINs generated pursuant to §80.1426 having D codes of 6.

(iv) A RIN generated pursuant to §80.1126 that was retired pursuant to §80.1129(e) because the associated volume of fuel was not used as motor vehicle fuel may be reinstated for use in complying with a 2010 RVO pursuant to §80.1429(g).

(5) The value of $(\Sigma RINNUM)_{i-1}$ may not exceed values determined by the following inequalities except as provided in paragraph (a)(7)(iii) of this section and §80.1442(d)

$(\Sigma RINNUM)_{CB,i-1} \leq 0.20 * RVO_{CB,i}$
$(\Sigma RINNUM)_{BBD,i-1} \leq 0.20 * RVO_{BBD,i}$
$(\Sigma RINNUM)_{AB,i-1} \leq 0.20 * RVO_{AB,i}$
$(\Sigma RINNUM)_{RF,i-1} \leq 0.20 * RVO_{RF,i}$

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

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

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

(7) *Biomass-based diesel in 2010.*

(i) Prior to determining compliance with the 2010 biomass-based diesel RVO, obligated parties may reduce the value of $RVO_{BBD,2010}$ by an amount equal to the sum of all 2008 and 2009 RINs that they used for compliance purposes for calendar year 2009 which have a D code of 2 and an RR code of 15, 16, or 17.

(ii) For calendar year 2010 only, the following equation shall be used to determine compliance with the biomass-based diesel RVO instead of the equation in paragraph (a)(1)(ii) of this section

$$(\Sigma RINNUM)_{BBD,2010} + (\Sigma RINNUM)_{BBD,2009} + (\Sigma RINNUM)_{BBD,2008} = RVO_{BBD,2010}$$

Where

$(\Sigma RINNUM)_{BBD,2010}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2010, and are being applied towards the $RVO_{BBD,2010}$, in gallons.

$(\Sigma RINNUM)_{BBD,2009}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2009, have not previously been used for compliance purposes, and are being applied towards the $RVO_{BBD,2010}$, in gallons.

$(\Sigma RINNUM)_{BBD,2008}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2008, have not previously been used for compliance purposes, and are being applied towards the $RVO_{BBD,2010}$, in gallons.

$RVO_{BBD,2010}$ = The Renewable Volume Obligation for biomass-based diesel for the obligated party for calendar year 2010, in gallons, pursuant to §80.1407 or §80.1430, as adjusted by paragraph (a)(7)(i) of this section.

(iii) The values of $(\Sigma RINNUM)_{2008}$ and $(\Sigma RINNUM)_{2009}$ may not exceed values determined by both of the following inequalities

$(\Sigma RINNUM)_{BBD,2008} \leq 0.087 * RVO_{BBD,2010}$
$(\Sigma RINNUM)_{BBD,2008} + (\Sigma RINNUM)_{BBD,2009} \leq 0.20 * RVO_{BBD,2010}$

(8) A party may only use a RIN for purposes of meeting the requirements of paragraph (a)(1) or (a)(7) of this section if that RIN is a separated RIN with a K code of 2 obtained in accordance with §§80.1428 and 80.1429.

(9) The number of gallon-RINs associated with a given batch-RIN that can be used for compliance with the RVOs shall be calculated from the following formula:

$$RINNUM = EEEEEEEE - SSSSSSSS + 1$$

Where:

RINNUM = Number of gallon-RINs associated with a batch-RIN, where each gallon-RIN represents one gallon of renewable fuel for compliance purposes.

EEEEEEEE = Batch-RIN component identifying the last gallon-RIN associated with the batch-RIN.

SSSSSSSS = Batch-RIN component identifying the first gallon-RIN associated with the batch-RIN.

(b) *Deficit carryovers.* (1) An obligated party that fails to meet the requirements of paragraph (a)(1) or (a)(7) of

this section for calendar year i is permitted to carry a deficit into year i + 1 under the following conditions:

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

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

(iii) For compliance with the biomass-based diesel RVO in calendar year 2011, the deficit which is carried over from 2010 is no larger than 57% of the party's 2010 biomass-based diesel RVO as determined prior to any adjustment applied pursuant to paragraph (a)(7)(i) of this section.

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

(2) A deficit is calculated according to the following formula:

$$D_i = RVO_i - [(\Sigma RINNUM)_i + (\Sigma RINNUM)_{i-1}]$$

Where:

D_i = The deficit, in gallons, generated in calendar year i that must be carried over to year i + 1 if allowed pursuant to paragraph (b)(1) of this section.

RVO_i = The Renewable Volume Obligation for the obligated party or renewable fuel exporter for calendar year i, in gallons.

$(\Sigma RINNUM)_i$ = Sum of all acquired gallon-RINs that were generated in year i and are being applied towards the RVO_i, in gallons.

$(\Sigma RINNUM)_{i-1}$ = Sum of all acquired gallon-RINs that were generated in year i-1 and are being applied towards the RVO_i, in gallons.

(c) *Exporter Renewable Volume Obligations (ERVOs).* (1) Each exporter of renewable fuel that is obligated to meet Exporter Renewable Volume Obligations under §80.1430 must demonstrate pursuant to §80.1451(a)(1) that is has retired for compliance purposes a sufficient number of RINs to meet its ERVOs by the deadline specified in §80.1430(f).

(2) In fulfillment of its ERVOs, each exporter is subject to the provisions of paragraphs (a)(2), (a)(3), (a)(6), and (a)(8) of this section.

(3) No more than 20 percent of the ERVO calculated according to a formula at §80.1430(b) may be fulfilled using RINs generated in the year prior to the year in which the RVO was incurred.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26042, May 10, 2010; 79 FR 42114, July 18, 2014]

§ 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]

(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.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26042, May 10, 2010; 77 FR 1355, Jan. 9, 2012; 79 FR 42115, July 18, 2014]

§ 80.1441 Small refinery exemption.

(a)(1) Transportation fuel produced at a refinery by a refiner, or foreign refiner (as defined at §80.1465(a)), is exempt from January 1, 2010 through December 31, 2010 from the renewable fuel standards of §80.1405, and the owner or operator of the refinery, or foreign refinery, is exempt from the requirements that apply to obligated parties under this subpart M for fuel produced at the refinery if the refinery meets the definition of a small refinery under §80.1401 for calendar year 2006.

(2) The exemption of paragraph (a)(1) of this section shall apply unless a refiner chooses to waive this exemption (as described in paragraph (f) of this section), or the exemption is extended (as described in paragraph (e) of this section).

(3) For the purposes of this section, the term ''refiner'' shall include foreign refiners.

(4) This exemption shall only apply to refineries that process crude oil through refinery processing units.

(5) The small refinery exemption is effective immediately, except as specified in paragraph (b)(3) of this section.

(6) Refiners who own refineries that qualified as small under 40 CFR 80.1141 do not need to resubmit a small refinery verification letter under this subpart M. This paragraph (a) does not supersede §80.1141.

(b)(1) A refiner owning a small refinery must submit a verification letter to EPA containing all of the following information:

(i) The annual average aggregate daily crude oil throughput for the period January 1, 2006 through December 31, 2006 (as determined by dividing the aggregate throughput for the calendar year by the number 365).

(ii) A letter signed by the president, chief operating or chief executive officer of the company, or his/her designee, stating that the information contained in the letter is true to the best of his/

her knowledge, and that the refinery was small as of December 31, 2006.

(iii) Name, address, phone number, facsimile number, and e-mail address of a corporate contact person.

(2) Verification letters must be submitted by July 1, 2010 to one of the addresses listed in paragraph (h) of this section.

(3) For foreign refiners the small refinery exemption shall be effective upon approval, by EPA, of a small refinery application. The application must contain all of the elements required for small refinery verification letters (as specified in paragraph (b)(1) of this section), must satisfy the provisions of §80.1465(f) through (i) and (o), and must be submitted by July 1, 2010 to one of the addresses listed in paragraph (h) of this section.

(4) Small refinery verification letters are not required for those refiners who have already submitted a complete verification letter under subpart K of this part 80. Verification letters submitted under subpart K prior to July 1, 2010 that satisfy the requirements of subpart K shall be deemed to satisfy the requirements for verification letters under this subpart M.

(c) If EPA finds that a refiner provided false or inaccurate information regarding a refinery's crude throughput (pursuant to paragraph (b)(1)(i) of this section) in its small refinery verification letter, the exemption will be void as of the effective date of these regulations.

(d) If a refiner is complying on an aggregate basis for multiple refineries, any such refiner may exclude from the calculation of its Renewable Volume Obligations (under §80.1407) transportation fuel from any refinery receiving the small refinery exemption under paragraph (a) of this section.

(e)(1) The exemption period in paragraph (a) of this section shall be extended by the Administrator for a period of not less than two additional years if a study by the Secretary of Energy determines that compliance with the requirements of this subpart would impose a disproportionate economic hardship on a small refinery.

(2) A refiner may petition the Administrator for an extension of its small refinery exemption, based on disproportionate economic hardship, at any time.

(i) A petition for an extension of the small refinery exemption must specify the factors that demonstrate a disproportionate economic hardship and must provide a detailed discussion regarding the hardship the refinery would face in producing transportation fuel meeting the requirements of §80.1405 and the date the refiner anticipates that compliance with the requirements can reasonably be achieved at the small refinery.

(ii) The Administrator shall act on such a petition not later than 90 days after the date of receipt of the petition.

(iii) In order to qualify for an extension of its small refinery exemption, a refinery must meet the definition of ''small refinery'' in §80.1401 for the most recent full calendar year prior to seeking an extension and must be projected to meet the definition of ''small refinery'' in §80.1401 for the year or years for which an exemption is sought. Failure to meet the definition of small refinery for any calendar year for which an exemption was granted would invalidate the exemption for that calendar year.

(f) At any time, a refiner with a small refinery exemption under paragraph (a) of this section may waive that exemption upon notification to EPA.

(1) A refiner's notice to EPA that it intends to waive its small refinery exemption must be received by November 1 to be effective in the next compliance year.

(2) The waiver will be effective beginning on January 1 of the following calendar year, at which point the transportation fuel produced at that refinery will be subject to the renewable fuels standard of §80.1405 and the owner or operator of the refinery shall be subject to all other requirements that apply to obligated parties under this Subpart M.

(3) The waiver notice must be sent to EPA at one of the addresses listed in paragraph (h) of this section.

(g) A refiner that acquires a refinery from either an approved small refiner (as defined under §80.1442(a)) or another refiner with an approved small refinery exemption under paragraph (a) of this

section shall notify EPA in writing no later than 20 days following the acquisition.

(h) Verification letters under paragraph (b) of this section, petitions for small refinery hardship extensions under paragraph (e) of this section, and small refinery exemption waiver notices under paragraph (f) of this section shall be sent to one of the following addresses:

(1) *For US mail:* U.S. EPA, *Attn:* RFS Program, 6406J, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

(2) *For overnight or courier services:* U.S. EPA, *Attn:* RFS Program, 6406J, 1310 L Street, NW., 6th floor, Washington, DC 20005. (202) 343–9038.

[75 FR 14863, Mar. 26, 2010, as amended at 79 FR 42163, July 18, 2014]

CERTIFICATE OF SERVICE

I certify that on October 4, 2019, I filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ Seth P. Waxman
SETH P. WAXMAN

October 4, 2019