ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1023 and consolidated cases

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

GROWTH ENERGY, et al.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF AN ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

INITIAL BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JEFFREY BOSSERT CLARK
Assistant Attorney General

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General

Of Counsel:

RYLAND (SHENGZHI) LI
U.S. Environmental Protection Agency
Office of General Counsel
Air and Radiation Law Office

BENJAMIN R. CARLISLE
TSUKI HOSHIJIMA
Trial Attorneys
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611

Washington, D.C. 20044
(202) 514-9771 (Carlisle)
(202) 514-3468 (Hoshijima)
benjamin.carlisle@usdoj.gov
tsuki.hoshijima@usdoj.gov

MICHAEL R. EITEL
Senior Trial Attorney
Wildlife & Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street, South Terrace 370
Denver, Colorado 80202
(303) 844-1479
michael.eitel@usdoj.gov

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

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

A. Parties and Amici

All petitioners, respondents, and intervenors appearing in these consolidated cases are accurately identified in the opening brief of Petitioners American Fuel and Petrochemical Manufacturers, *et al.*

B. Rulings Under Review

The agency action under review is EPA's Rule entitled "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020," 83 Fed. Reg. 63,704 (Dec. 11, 2018).

C. Related Cases

Certain Petitioners in this matter were also parties to *Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628 (D.C. Cir. 2019) (per curiam), and *Am. Fuel & Petrochemical Mfrs. v. EPA* (*AFPM*), 937 F.3d 559 (D.C. Cir. 2019) (per curiam). Petitioners there challenged, among other things, EPA's 2010 regulation establishing the framework of the Renewable Fuel Standards (RFS) program, codified at 40 C.F.R. § 80.1406, that designates refiners and importers of gasoline or diesel fuel as "obligated parties." Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard

Program, 75 Fed. Reg. 14,670 (Mar. 26, 2010). Petitioners in *AFPM* also challenged EPA's treatment of exported renewable fuel, which was promulgated in the same 2010 framework rule, codified at 40 C.F.R. § 80.1430, and last revised in 2014. RFS Renewable Identification Number (RIN) Quality Assurance Program, 79 Fed. Reg. 42,078 (July 18, 2014). On December 30, 2019, Valero Energy Corp. and American Fuel & Petrochemical Manufacturers filed a petition for certiorari seeking Supreme Court review of certain of the issues raised in *Alon* and *AFPM*, particularly relating to EPA's designation of the refiners and importers as obligated parties. Pet. for a Writ of Certiorari, *Valero Energy Corp. v. EPA*, No. 19-835 (U.S. Dec. 30, 2019).

Petitioner Valero has also separately filed a complaint in the Northern District of Texas, Case No. 7:17-00004, alleging that EPA violated a non-discretionary duty to annually reconsider its definition of "obligated parties" as promulgated in the 2010 framework rule and codified at 40 C.F.R. § 80.1406, and a non-discretionary duty to conduct periodic reviews, which they contend includes review of EPA's definition of "obligated party." That court granted EPA's motion to dismiss, which Valero has appealed to the Fifth Circuit, Case No. 18-10053. That appeal has been stayed.

Petitioners Growth Energy and National Biodiesel Board have filed a petition for review in this Court, Case No. 18-1154, challenging two agency actions, Periodic Reviews of the Renewable Fuel Standard Program, 82 Fed. Reg. 58,364 (Dec. 12, 2017), and annual standard equations at 40 C.F.R. § 80.1405(c), which EPA established in its 2010 framework rule. That petition was placed in abeyance pending

resolution of an administrative petition relating to these subjects. These same entities filed a second petition for review in this Court, Case No. 19-1201, alleging that EPA "constructively denied" that administrative petition. Both petitions for review are currently in abeyance.

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GLOSSARY

CAA	Clean Air Act
E0	Gasoline without ethanol content
E10	Gasoline blend with 9% to 10% ethanol content by volume
E15	Gasoline blend with >10% to 15% ethanol content by volume
E85	Gasoline blend with 51% to 83% ethanol content by volume
EIA	Energy Information Administration
EISA	Energy Independence and Security Act of 2007
EPA	Environmental Protection Agency
ESA	Endangered Species Act
RFS	Renewable Fuel Standards
RIN	Renewable Identification Number
RTC	EPA's Response to Comments in Support of the 2019 Rule, EPA-HQ-OAR-2018-0167-1387

INTRODUCTION

Under the Renewable Fuel Standard ("RFS") program in the Clean Air Act ("CAA"), EPA sets forward-looking annual standards providing that transportation fuel shall contain certain volumes of four related categories of renewable fuels. 42 U.S.C. § 7545(o)(2)(B)(ii), (3)(B). For three types of renewable fuel—cellulosic biofuel, advanced biofuel, and total renewable fuel—the CAA specifies nationally applicable volumes through 2022. But EPA has authority to reduce the volumes in certain circumstances—and is required to do so in some circumstances. *Id.* § 7545(o)(7). For the fourth category, biomass-based diesel, EPA determines the volumes to be used for years after 2012 based on certain statutory factors.

Different petitioner groups challenge EPA's action adjusting three of the annual renewable fuel volumes for 2019 and setting 2019 percentage standards for all four types of renewable fuel. 83 Fed. Reg. 63,704 (Dec. 11, 2018) ("2019 Rule"). Petitioners representing the biofuels industry[1] argue that EPA set the 2019 standards *too low*. They say EPA failed to account for small refinery exemptions and failed to account for renewable electricity used for transportation. Petitioners representing

[1] Growth Energy; the National Biodiesel Board; Producers of Renewables United for Integrity, Truth, and Transparency ("Producers United"); and the RFS Power Coalition ("RFS Power") (collectively, "Biofuels Petitioners").

parties that must comply with the standards[2] and the Small Retailers Coalition (collectively, "Refiners-Retailers") argue that the 2019 renewable fuel volumes are *too high*. Environmental groups[3] argue that EPA violated the Endangered Species Act ("ESA") and CAA principally due to the RFS program's alleged effect on land use. Finally, all petitioners attempt to use EPA's annual rule as a vehicle to collaterally attack EPA's longstanding regulations that established the framework of the RFS program.

Many of these challenges are foreclosed by this Court's prior rulings in RFS cases. Several others are untimely or otherwise barred. In any event, EPA fully and rationally evaluated the relevant factors. It properly exercised its statutory authority in setting the volumes. And it reasonably declined to revise RFS framework regulations in the context of the annual rulemaking.

JURISDICTION

To the extent that Petitioners challenge the 2019 Rule, Petitioners timely filed petitions for review, and the Court has jurisdiction under the CAA. 42 U.S.C. § 7607(b)(1). Petitioners' challenges to EPA's previously promulgated RFS framework regulations (*see infra* Argument II) are time-barred under the sixty-day

[2] American Fuel and Petrochemical Manufacturers; Monroe Energy, LLC; and Valero Energy Corp. (collectively, "Obligated Parties").

[3] Sierra Club, Healthy Gulf, and the National Wildlife Foundation (collectively, "Environmental Petitioners").

jurisdictional deadline in 42 U.S.C. § 7607(b)(1). *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (explaining jurisdictional nature of that requirement).[4] The Court also lacks jurisdiction over Environmental Petitioners' challenges, as they have failed to establish Article III standing (*see infra* Argument V.A).[5]

PERTINENT STATUTES AND REGULATIONS

Except for the materials in EPA's statutory and regulatory addendum, all of the applicable statutes, etc., are contained in the briefs and statutory addendums for Petitioners.

STATEMENT OF ISSUES

1. Did EPA reasonably project ethanol volumes in 2019 where EPA extensively explained the basis for its projection of total ethanol volumes and its reduced projection of imported sugarcane ethanol volumes?

2. Did EPA reasonably decline to exercise its discretionary general waiver authority where Petitioners have presented no credible evidence that severe economic

[4] There is an exception in Section 7607(b)(1) for petitions "based solely on grounds arising after such sixtieth day," which does not apply here. No petitioner argues this exception is applicable in this case.

[5] Environmental Petitioners also improperly rely on the ESA's citizen-suit provision as a source of this Court's jurisdiction. Envtl. Br. at 2; *see Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 186–87 (D.C. Cir. 2017) (special statutory review provisions, like Section 7607(b)(1) of the CAA, provide "the exclusive means of obtaining judicial review").

harm would result from the volumes EPA set, and where EPA found that the market can and will supply adequate biofuels to satisfy the volume requirements?

3. Does the Court lack jurisdiction over Petitioners' challenges to longstanding RFS framework regulations concerning (a) the point of obligation, (b) how EPA treats exports of renewable fuel, (c) EPA's "aggregate compliance approach," (d) how EPA accounts for small refinery exemptions, and (e) when small refinery exemptions may be granted? In the alternative, did EPA reasonably decline to reconsider the point of obligation and how it accounts for small refinery exemptions?

4. Did EPA reasonably decide not to project cellulosic biofuel volume based on RINs from renewable electricity where it concluded that no facilities were likely to be eligible to generate such RINs in 2019?

5. Are Small Retailers Coalition's arguments that EPA failed to analyze the impacts of the 2019 Rule on small retailers properly before the Court given that they were not raised in comments? Alternatively, do those arguments lack merit given that small retailers are not directly regulated by the 2019 Rule and EPA determined that the 2019 Rule would not negatively impact small retailers?

6. Should Environmental Petitioners' petition be dismissed for lack of Article III standing where they premise standing on the general impacts of biofuels in past years and fail to present specific evidence that the 2019 Rule causes concrete and particularized harms to their members?

7. Based on its analysis of the 2019 Rule's effects on agricultural and fuels markets, did EPA reasonably determine that the 2019 Rule has "no effect" on species listed as threatened or endangered under the ESA and properly decide not to invoke the severe environmental harm waiver?

STATEMENT OF THE CASE

I. Statutory and Regulatory Background.

In 2005, and again in 2007, Congress amended the CAA to establish the RFS program, codified at 42 U.S.C. § 7545(o). *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121 Stat. 1492. The RFS program requires increasing use of "renewable fuel" over time. Renewable fuel is made from renewable biomass and is "used to replace or reduce the quantity of fossil fuel present in a transportation fuel." 42 U.S.C. § 7545(o)(1)(J).

The CAA addresses four categories of renewable fuels—biomass-based diesel (a diesel substitute produced from feedstocks like animal fats), cellulosic biofuel (such as ethanol made from corn stover), advanced biofuel, and total renewable fuel. Biomass-based diesel and cellulosic biofuel are both subsets of advanced biofuel. *Id.* § 7545(o)(1)(D), (E). Advanced biofuels are any renewable fuel, except ethanol from corn starch, with sufficiently low lifecycle greenhouse gas emissions. *Id.* § 7545(o)(1)(B). Total renewable fuel is the broadest category. It includes all three

other categories as well as conventional renewable fuels. *See id.* § 7545(o)(1)(B), (o)(2)(A)(i). All four categories of renewable fuel must be "produced from renewable biomass," as defined by the CAA. *Id.* § 7545(o)(1)(J), (I).

The CAA provides EPA with different authorities regarding each biofuel type. For each year after 2012, EPA must set an annual nationally "applicable volume" for biomass-based diesel based on certain statutory factors. *Id.* § 7545(o)(2)(B)(ii). EPA must determine those volumes fourteen months before the year in which they will apply. *Id.* § 7545(o)(2)(B)(ii).

For cellulosic biofuel, advanced biofuel, and total renewable fuel, the CAA establishes increasing annual nationally applicable volume targets through 2022. *Id.* § 7545(o)(2)(B)(i). Congress authorized EPA to reduce these statutory volumes in limited circumstances. First, under the mandatory component of the "cellulosic waiver provision," if EPA's projection of cellulosic biofuel production volumes is lower than the statutory volume, then EPA must, by November 30 of the preceding year, reduce the applicable volume to the projected volume available. *Id.* § 7545(o)(7)(D)(i); *Am. Petroleum Inst. v. EPA* (*API*), 706 F.3d 474, 476 (D.C. Cir. 2013) (requiring this projection to take a "neutral aim at accuracy"). If EPA lowers the cellulosic biofuel volume, EPA has broad discretion to decide whether to also lower the applicable volumes for advanced biofuel and total renewable fuel "by the same or a lesser" amount. 42 U.S.C. § 7545(o)(7)(D)(i); *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915–16 (D.C. Cir. 2014) (CAA does not prescribe specific factors to

consider in making this determination). Second, under the "general waiver provision," if EPA determines there is "inadequate domestic supply," or the volumes "would severely harm the economy or environment of a State, a region, or the United States," then EPA "may" exercise its discretion to lower the required volumes. 42 U.S.C. § 7545(o)(7)(A); *see also Americans for Clean Energy v. EPA* (*ACE)*, 864 F.3d 691, 715–16 (D.C. Cir. 2017).

To ensure that the applicable volumes are used, Congress directed EPA to annually set percentage standards that apply to obligated parties. 42 U.S.C. § 7545(o)(3)(B)(i). These percentage standards are calculated using a formula that divides the nationally applicable volume for each renewable fuel type by an estimate of the national volume of gasoline and diesel that will be used that year, with certain adjustments. 40 C.F.R. § 80.1405(c). EPA must determine the percentage standards for each calendar year by November 30 of the prior year. 42 U.S.C. § 7545(o)(3)(B)(i). Each obligated party then determines its annual renewable fuel obligation by multiplying the percentage standards by the volume of gasoline and diesel it produces or imports that year. *Id.* § 7545(o)(3)(B)(ii); 40 C.F.R. § 80.1427(a).

The percentage standards for cellulosic biofuel and biomass-based diesel are "nested" within the standard for advanced biofuel. This means that volumes of cellulosic biofuel and biomass-based diesel may be used not only to satisfy standards for those fuels, but also to satisfy the advanced biofuel standard. *See* 42 U.S.C. § 7545(o)(1)(B), (D), (E), (o)(2)(B)(i); 40 C.F.R. § 80.1427(a)(3). The advanced biofuel

standard, in turn, is nested within the total renewable fuel standard. Thus, for example, any renewable fuel that qualifies as cellulosic biofuel may simultaneously be used to satisfy the cellulosic, advanced biofuel, and total renewable fuel standards.

The annual percentage standards shall "be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. § 7545(o)(3)(B)(ii). Pursuant to 42 U.S.C. § 7545(o)(2)(A)(iii)(I), EPA identified refiners and importers of gasoline and diesel as the "appropriate" obligated parties in its 2007 implementing regulations establishing the RFS program. 72 Fed. Reg. 23,900, 23,923–24 (May 1, 2007). EPA thoroughly reexamined and reaffirmed its approach in its 2010 regulations implementing the EISA amendments. 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010); 40 C.F.R. § 80.1406(a)(1) ("Point of Obligation Regulation"). Moreover, EPA did so again more recently in its denial of rulemaking petitions to revise the point of obligation, EPA-HQ-OAR-2018-0167-0065 ("Point of Obligation Denial"), JA____–__.

To comply with the percentage standards, obligated parties are not themselves required to blend renewable fuels into the gasoline and diesel they sell. Instead, producers and importers of renewable fuels generate renewable identification numbers ("RINs") for each gallon of renewable fuel they produce or import into the United States. 40 C.F.R. § 80.1426(a), (e); *see also infra* p.74–75 (discussing certain requirements to generate RINs, including that they be generated via an approved pathway at a registered facility). RINs can be "separated" from batches of renewable fuel and traded between registered parties. 40 C.F.R. §§ 80.1428(b), 80.1429(b); s*ee*

also 42 U.S.C. § 7545(o)(5). Obligated parties can thus meet the standard by blending renewable fuel or by purchasing separated RINs and "retiring" them in an annual compliance demonstration. 40 C.F.R. §§ 80.1427(a), 80.1451(a)(1). In addition, because the RFS program is meant to ensure the domestic use of renewable fuels, exporters of renewable fuels that generated RINs must also retire an equivalent number of RINs. *See* 40 C.F.R. § 80.1430; *see infra* p.51.

Parties that acquire excess RINs in one year may sell such RINs. Or they can "carry over" the RINs and use them to meet up to 20% of their compliance obligations the following year.[6] 42 U.S.C. § 7545(o)(5); 40 C.F.R. §§ 80.1427(a)(1), (5), 80.1428(c). Additionally, obligated parties may carry a compliance deficit forward to the next year, which must then be satisfied together with the next year's compliance obligation. 42 U.S.C. § 7545(o)(5)(D); 40 C.F.R. § 80.1427(b). Small refineries may also apply for a hardship exemption. 42 U.S.C. § 7545(o)(9)(B)(i).

II. The 2019 Rule.

A. Volume Requirements and Percentage Standards Set by the 2019 Rule.

The 2019 Rule established: (1) final adjusted 2019 volume requirements for cellulosic biofuel, advanced biofuel, and total renewable fuel; (2) the 2020 volume

[6] The sum of all RINs carried over from a prior year is known as the carryover RIN bank. *See* 2019 Rule at 63,708–10 (noting the role that carryover RINs play in facilitating compliance and the function of the RFS program).

requirement for biomass-based diesel; and (3) 2019 percentage standards for all four fuel types.[7]

2019 Rule Volume Requirements as Compared to Statutory Volumes
In billion gallons

Fuel	**CAA**	**2019 Rule**
Total renewable fuel	28.0	19.92
Advanced biofuel	13.0	4.92
Biomass-based diesel (for 2020)	>=1.0	2.43
Cellulosic biofuel	8.5	0.418

42 U.S.C. § 7545(o)(2)(B)(i)(I)–(III); 2019 Rule at 63,705.[8]

EPA projected that in 2019, 418 million gallons of cellulosic biofuel would be produced and available for use. Accordingly, EPA exercised the mandatory component of the cellulosic waiver to reduce the statutory volume to that amount. 2019 Rule at 63,706; 42 U.S.C. § 7545(o)(7)(D)(i).[9] EPA then exercised the full extent of its discretionary waiver authority to lower the 2019 advanced biofuel volume and total renewable fuel volume by the same amount (8.08 billion gallons) that it lowered the cellulosic biofuel volume. 2019 Rule at 63,705, 63,720–21, 63,731. Because cellulosic biofuel is a subset of advanced biofuel, which in turn is a subset of total

[7] The 2019 biomass-based diesel percentage standard was calculated using a volume established in the previous year's rulemaking.

[8] Volumes are expressed as ethanol-equivalent volumes on an energy-content basis, except for biomass-based diesel, which is expressed as biodiesel-equivalent volumes. 2019 Rule at 63,705 tbl. I-1 n.a.

[9] EPA does not here further address how it established the biomass-based diesel volume because no petitioner challenges the details of this analysis.

renewable fuel, this approach effectively leaves intact the implied statutory volume of non-cellulosic advanced biofuels (4.5 billion gallons) and conventional renewable fuels (15 billion gallons). *See id.* at 63,705–06 & n.6.

EPA declined to further reduce volumes under the general waiver authority. *Id.* at 63,708; Response to Comments, EPA-HQ-OAR-2018-0167-1387 at 6–24 ("RTC"), JA____–__.

Based on the resulting volumes, EPA applied its longstanding formula in 40 C.F.R. § 80.1405(c) to calculate the percentage standards for 2019. 2019 Rule at 63,707.

B. EPA Declined to Revise RFS Framework Regulations.

Although Congress only directed EPA to establish volumes and percentage standards in the annual rule, commenters sought to expand the scope of the 2019 rulemaking. Some asked EPA to revise its longstanding (and, in several cases, recently reexamined) RFS framework regulations and to resolve separately pending administrative requests. *See* RTC at 188, JA____. These included requests that EPA reconsider:

- The Point of Obligation Regulation that had been established in 2007, and reexamined and reaffirmed in 2010 and again in a late 2017 administrative proceeding, 2019 Rule at 63,707 & n.11;

- Regulations providing that RINs generated from renewable fuel exported from the United States cannot be used to satisfy RFS compliance obligations, 40 C.F.R. § 80.1430;
- The "aggregate compliance" regulation for assessing whether fuel is generated from "renewable biomass," *see* 42 U.S.C. § 7545(o)(1)(I); 40 C.F.R. § 80.1454(g); and
- The methodology used to account for small refinery exemptions in setting the annual percentage standards, which EPA established in 2007, and reexamined and reaffirmed in 2010 and again in 2017, 40 C.F.R. § 80.1405(c).

Commenters also asked EPA to take final action on pending registration applications by potential producers of electricity RINs. RTC at 36, JA____.

EPA, however, "did not propose any changes to the overall structure of the RFS program or otherwise seek comment on these issues." RTC at 180, 183, 188, JA____, ____, ____. It thus found that these comments were beyond the scope of the rulemaking. *Id.*

SUMMARY OF ARGUMENT

The 2019 Rule represents a reasonable exercise of EPA's judgment in setting the renewable fuel standards. Many of Petitioners' challenges are foreclosed by this Court's previous rulings because they reiterate arguments that have already been

considered and rejected. Others are untimely challenges to longstanding RFS framework regulations, or based on misleading descriptions of the record. All lack merit.

First, EPA reasonably projected 2019 ethanol volumes. As to total ethanol, which EPA considered in assessing how the market could respond to the standards EPA set, EPA permissibly analyzed the overall consumption of renewable fuels. EPA found that sufficient to meet the standards. This Court has already rejected Petitioners' arguments that EPA must also conduct a blend-by-blend analysis of ethanol production or consumption. As to sugarcane ethanol imports, which EPA considered in assessing whether the volumes it set were attainable, EPA significantly reduced its projection as compared to 2017 given historic decreases in production. Regardless, Petitioners fail to show that a lower projection would have affected the outcome of the 2019 Rule. *Infra* Argument I.A–B.

Second, EPA reasonably found that the volumes it was setting would not cause severe economic harm to a State, a region, or the United States. Petitioners' claim that this conclusion is inconsistent with EPA's grant of small refinery exemptions is wrong. EPA evaluates small refinery exemptions under a different standard and consistently has maintained that obligated parties, including small refineries, are able to recover RIN costs by passing them through to their customers. Petitioners presented no new evidence undermining this "pass through" conclusion. Instead, they recycle arguments that EPA has already considered and rejected. Finally, EPA

permissibly considered the benefits of the RFS program in deciding whether to exercise its discretionary general waiver authority. Regardless, EPA found that even if it did not consider these benefits, it would still not exercise the severe economic harm waiver. *Infra* Argument I.C.

Third, EPA reasonably decided not to invoke the inadequate domestic supply waiver. EPA found that there was adequate domestic supply to meet the volumes it was setting. Petitioners' arguments conflate this waiver with the cellulosic waiver, under which EPA considers factors, such as demand, that EPA is barred from considering under the inadequate domestic supply waiver. They also inappropriately treat an EPA term of art ("reasonably attainable") used in assessing the cellulosic waiver as a "standard" and attempt to import it into the inadequate domestic supply waiver. Lastly, even setting this aside, the crux of Petitioners' argument is that EPA's finding that the volumes are "attainable" somehow means that domestic supply is "inadequate." This makes no sense. *Infra* Argument I.D.

Fourth, EPA properly declined to revise the basic regulatory framework of the RFS program in this annual rulemaking. As to the point of obligation regulation, EPA's decision not to reconsider this regulation was not an abuse of discretion. EPA comprehensively examined and denied a request to change this regulation just over a year ago. Commenters did not submit new information warranting reconsideration. As to EPA's other RFS framework regulations—governing how it treats exported renewable fuel, its "aggregate compliance" approach, and small refinery exemptions—

EPA did not reopen any of these issues in the 2019 Rule and the Court lacks jurisdiction over those challenges. In any event, EPA's approach was reasonable and consistent with the CAA. *Infra* Argument II.

Fifth, EPA reasonably declined to account for RINs produced from renewable electricity in setting the 2019 cellulosic biofuel volume. The statute requires EPA to project this volume based on a neutral aim at accuracy of what actually will be produced. EPA found that no facilities capable of generating RINs from renewable electricity were likely to be registered in 2019. *Infra* Argument III.

Sixth, Small Retailers Coalition's arguments are not properly before the Court. They were not raised in the comments to the agency with reasonable specificity. Moreover, their arguments that EPA did not comply with the Small Business Regulatory Enforcement Fairness Act ("SBREFA") fail on their merits for two reasons. First, small retailers are not directly regulated by the 2019 Rule and, second, EPA found that the rule would not negatively impact them. *Infra* Argument IV.

Finally, Environmental Petitioners lack standing to challenge the 2019 Rule. The organizations sue on behalf of members allegedly injured by the environmental effects of growing corn and soybeans. But the 2019 Rule does not regulate Environmental Petitioners, their members, or farmers growing crops in the United States. Nor have Environmental Petitioners presented evidence establishing that the 2019 Rule causes unregulated farmers to grow crops in ways that injure the members.

Any environmental injury exists, if at all, as a result of independent third-party farmers. It is not because of EPA's 2019 Rule.

Even if the Court had jurisdiction, Environmental Petitioners' claims lack merit. EPA evaluated the likely effects of the 2019 Rule by examining the scientific literature and updated data on agricultural and fuels markets. Based on this examination, EPA rationally concluded that the 2019 Rule has "no effect" on ESA-listed species or designated critical habitat and would not cause severe environmental harm so as to justify a waiver of the RFS requirements. EPA-HQ-OAR-2018-0167-1381, JA____ ("ESA Det."). *Infra* Argument V.

STANDARD OF REVIEW

The Court may reverse EPA's action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(1)(E), (d)(9); *AFPM*, 937 F.3d at 574.

This standard is narrow, and the Court cannot substitute its policy judgment for EPA's. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its decisions must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Lead Indus. Ass'n Inc. v. EPA*, 647 F.2d 1130, 1160 (D.C. Cir. 1980). This Court gives an "extreme degree of deference" to EPA's "evaluation of scientific data within its technical expertise," especially "EPA's administration of the complicated provisions of the Clean Air Act."

Miss. Comm'n on Envtl. Quality v. EPA, 790 F.3d 138, 150 (D.C. Cir. 2015). Judicial review is "particularly deferential in matters implicating predictive judgments," requiring only that "the agency acknowledge factual uncertainties and identify the considerations it found persuasive." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105, 1108 (D.C. Cir. 2009). The Court's review is limited to the administrative record. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985); 42 U.S.C. § 7607(d)(7)(A).

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

ARGUMENT

I. The 2019 Rule Reasonably Determined the Annual RFS Standards.

Refiners-Retailers attack the volumes that EPA set in the 2019 Rule. They urge that EPA's projection of the available volume of ethanol and EPA's decision not to invoke the general waiver were arbitrary and capricious. EPA reasonably projected

ethanol volumes, applying a methodology that this Court concluded just last year was "more than satisfactory." It also rationally explained its decision not to invoke the severe economic harm waiver. Petitioners' arguments here mostly retread evidence that EPA already considered and rejected. Finally, Petitioners confuse EPA's analysis of the inadequate domestic supply waiver with its analysis of the cellulosic waiver. This results in a nonsensical argument that EPA should have found domestic supply "inadequate" because it found the volumes it set "attainable."

A. Petitioners' Recycled Arguments Are Foreclosed by *AFPM* and Are Meritless.

Refiners-Retailers' challenge to EPA's ethanol projections, Refiners Br. at 28–34, is materially identical to the one that the Court rejected in *AFPM* and is also meritless.

In the 2019 Rule, just as it did in the 2018 Rule, EPA projected ethanol consumption as a component of considering how the market might respond to the standards EPA set and, particularly, whether those standards were achievable. *See* EPA-HQ-OAR-2018-0167-1330 at 4, JA____. In doing so, EPA analyzed the "various conditions and constraints in the marketplace" on ethanol. *Id.* at 1, JA____. And, similar to the 2018 Rule, EPA considered the poolwide average ethanol concentration in transportation fuel in the most recent full year (10.13%), *id.* at 1–2, JA____–__, explaining that this concentration was "demonstrably achievable." *Id.* at 4–5, JA____–__. EPA then projected the volume of ethanol that would be used in

2019 by multiplying this concentration by the amount of gasoline it projected would be used. *Id.*; *see also id.* at 3, JA____. This analysis confirmed that overall consumption of renewable fuels (including ethanol) would be sufficient to meet the 19.92 billion gallon total renewable fuel volume it set. *Id.* at 4–5, JA____–__. In doing so, EPA explained that it was not necessary to project the volumes of specific ethanol-gasoline blends. *See* 2019 Rule at 63,731 & n.133.

Refiners-Retailers attack EPA's conclusions by retreading an argument that *AFPM* already rejected, urging that EPA was required to conduct such a blend-by-blend analysis. There are at least three independent reasons why the Court should reject their argument.

First, *AFPM* controls here because the Court has already held that EPA's approach is "more than enough" and "more than satisfactory." *AFPM*, 937 F.3d at 583–84. So long as EPA has supported its conclusion that the volumes it sets can be met in light of *total* ethanol supply, a blend-by-blend analysis is not necessary. 2019 Rule at 63,731 & n.133; *AFPM*, 937 F.3d at 583–84; 42 U.S.C. § 7545(o)(2)(A)(iii)(II)(bb).

In *AFPM*, two of the same obligated party petitioners challenged the 2018 Rule because EPA did not project the reasonably attainable volumes of specific ethanol-gasoline blends. *See AFPM*, 937 F.3d at 583-84; *see also* EPA Final Br. at 31–32, *AFPM*, No. 17-1258 (D.C. Cir. Jan. 10, 2019), ECF No. 1767773. Rather than doing so, EPA found that overall consumption of renewable fuels would be sufficient to

meet the 19.29 billion gallon total renewable fuel volume it set. *See AFPM*, 937 F.3d at 583–84; *see also AFPM* EPA Final Br. at 31–32; EPA-HQ-OAR-2018-0167-0024 at 11, JA____. EPA supported this determination with a "lengthy memorandum analyzing 'various conditions and constraints in the marketplace . . . for the two most prominent biofuels, ethanol and biodiesel.'" *AFPM*, 937 F.3d at 584 (quoting EPA-HQ-OAR-2018-0167-0024 at 1, JA____). EPA's approach in the 2019 Rule was materially identical to its approach in the 2018 Rule. *Compare* EPA-HQ-OAR-2018-0167-0024, JA____–____, *with* EPA-HQ-OAR-2018-0167-1330, JA____–____.

This Court upheld EPA's approach, explaining that "Obligated Parties misapprehend the EPA's ultimate task." *AFPM*, 937 F.3d at 583. EPA's analysis was "more than enough support for EPA's determination that neither inadequate supply nor economic harm warranted use of the general waiver." *Id.* at 584. It also reiterated that nothing in the statute required EPA to support its decision "with specific numerical projections" or "a high degree of quantitative specificity," *id.* at 584 (quoting *API*, 706 F.3d at 481), and EPA has "no free-floating obligation . . . to estimate the reasonably attainable supply of ethanol," *id.* at 583.

Second, even examining the minutiae of Petitioners' critiques, they are wrong. EPA did not "ignore[] that the market for gasoline-ethanol blends is not fungible." Refiners Br. at 29. It thoroughly discussed the different ethanol blends and their roles in the market, but found that a blend-by-blend projection was unnecessary. *See* EPA-HQ-OAR-2018-0167-1330 at 1–4, JA____–__; RTC at 103–12, JA____–__. Rather,

EPA's approach was "both more straightforward and more robust" than attempting to "separately estimate volumes of E0, E15, and E85, which would contain a high degree of uncertainty." 2019 Rule at 63,731; *see also id.* at 63,731 n.133; Refiners Br. at 31–32 (claiming that EPA has repeatedly mispredicted the number of suppliers of particular blends).

EPA is also not bound to a one-size-fits-all method of analysis. It is rational for EPA to use different approaches to project the volumes of different biofuels. For example, EPA has a specific statutory obligation to project the available volume of cellulosic biofuel, 42 U.S.C. § 7545(o)(7)(D)(i), but no such statutory obligation to project production of particular ethanol blends, *see AFPM*, 937 F.3d at 583–84.

EPA also fully explained how the 630-million-gallon increase in the total renewable fuel standard could be met. One hundred thirty million gallons comes from increased cellulosic biofuel production. 2019 Rule at 63,705 Table I-1, 63,710–19. The remaining 500 million gallons come from the increased production of non-cellulosic advanced biofuels, namely advanced biodiesel and renewable diesel. 2019 Rule at 63,705 Table I-1, 63,721–30. Petitioners concede that these analyses were detailed and thorough. *See* Refiners Br. at 30. [10]

[10] Relatedly, EPA's projection of advanced biodiesel and renewable diesel volumes does not affect EPA's projection of ethanol volumes. Petitioners' argument on this point, Refiners Br. at 30, is a *nonsequitur*.

Petitioners claim that EPA erred in determining the total amount of ethanol the market could achieve. *See* Refiners Br. at 29. But EPA addressed the "factors that constrain growth in ethanol use." EPA-HQ-OAR-2018-0167-1330 at 1–2, JA____–__. It found that "the constraints represent a continuum of mild resistance to growth at the first increments above 10% ethanol." *Id.* at 2–3, JA____–__. And given that the market in 2017 achieved an average ethanol concentration of 10.13%, EPA rationally found that the market could achieve the same average concentration in 2019, and do so without severe economic harm. *See id.* at 3, JA____; RTC at 96–99, JA____–__.[11]

Petitioners also claim EPA failed to account for falling gasoline consumption. Refiners Br. at 29. In fact, EPA explicitly recognized that gasoline consumption in 2019 was projected to be slightly lower than in 2018. EPA-HQ-OAR-2018-0167-1330 at 4–5, JA____–__. It therefore applied its projection of a 10.13% poolwide concentration of ethanol, as "actually occurred [in 2017] and is therefore demonstrably achievable," to this *reduced* projection of gasoline consumption and determined that the volumes it was setting could be met. *Id.*

[11] As EPA explained, the "primary driver of increases" in high-level ethanol blends has been the number of retail stations offering them, and this number has only increased since 2017. *Compare* EPA-HQ-OAR-2018-0167-1330 at 3, JA____, *with* EPA-HQ-OAR-2018-0167-0024 at 3-4, JA____–__.

Petitioners also attack EPA's examples of possible market responses to the 2019 requirements. Refiners Br. at 32–33. These scenarios, which were supplemental to the analysis discussed above, were merely "illustrative" of a "range of possibilities" and were "not EPA's views on the only, or even most likely, ways the market may respond." EPA-HQ-OAR-2018-0167-1330 at 12, JA____. EPA took a materially identical approach in 2018. *See* EPA-HQ-OAR-2018-0167-0024 at 11–13, JA____–__; *AFPM*, 937 F.3d at 584.

These illustrative scenarios are also reasonable. Historical volumes of sugarcane ethanol have often reached or exceeded those in EPA's illustrative volume scenarios. *Compare* EPA-HQ-OAR-2018-0167-1330 at 12 (Table C-1), JA____, *with* 2019 Rule at 63,722. EPA determined "that a volume of *at least* 2.8 billion gallons of advanced biodiesel and renewable diesel is attainable" and "the maximum attainable volume . . . *is greater than 2.8 billion gallons*." 2019 Rule at 63,723 (emphasis added). And EPA's illustrative ethanol volumes simply reflect that a range of possible ethanol concentrations (some higher, some lower) could be used to meet the volumes. *See* EPA-HQ-OAR-2018-0167-1330 at 5 & n.9, 12, JA____, ____.

Third, and finally, Refiners-Retailers fail to show how their preferred analysis would affect EPA's exercise of its waiver authorities. Given that EPA already exercised the cellulosic waiver authority to the maximum permissible extent, only the general waiver authority could potentially be used to further lower volumes. *See AFPM*, 937 F.3d at 583–84. But Petitioners have not even attempted to connect

their preferred blend-by-blend analysis to the statutory requirements for invoking the general waiver.

B. EPA's Projection of Imported Sugarcane Ethanol Was Reasonable.

In determining that 4.92 billion gallons of advanced biofuel was attainable in 2019, EPA projected that a small fraction of that volume (100 million gallons, or roughly 2%) would come from imported sugarcane ethanol. This projection was well below the volumes imported historically in light of data revealing a "continued trend of low imports," in recent years. 2019 Rule at 63,721–22.

Refiners-Retailers' criticism of EPA's imported sugarcane ethanol projections as too high is misleading and fails to show the 2019 Rule is arbitrary and capricious. Refiners Br. at 27–28. First, Petitioners ignore that EPA *reduced* its projection from 200 million gallons in 2017, *see Alon,* 936 F.3d at 663, and amply explained this decision, including EPA's reasons not to reduce its projection further. 2019 Rule at 63,721–22; *see also* RTC at 62–63, JA____–__; *Rural Cellular*, 588 F.3d at 1105, 1108; *AFPM*, 937 F.3d at 576 (rejecting similar argument). Indeed, despite Petitioners' attempt to cherrypick favorable data, EPA's projection for 2019 (100 million gallons) is just slightly higher than volumes achieved in some recent years (89 million gallons in 2015 and 77 million gallons in 2017), and hundreds of millions of gallons less than the volumes achieved in 2012 and 2013. 2019 Rule at 63,721–22. Second, EPA explained that even if sugarcane ethanol imports were less than 100 million gallons, the advanced biofuel volume would still be attainable. *Id.* at 63,722 n.90 (sugarcane

ethanol is a small fraction of the advanced biofuel volume and, even if EPA overestimated the sugarcane ethanol volume, the advanced biofuel volumes can be met). Finally, Petitioners make no effort to show that, even if EPA had lowered its projection further, it would have triggered the statutory criteria for the general waiver authority—EPA's only mechanism to further lower volumes. *See supra* at 23–24.

C. EPA Reasonably Declined to Invoke the Severe Economic Harm Waiver.

EPA thoroughly analyzed whether to invoke its discretion to reduce renewable fuel volumes under the severe economic harm prong of its general waiver authority. *See* 42 U.S.C. § 7545(o)(7)(A)(i); RTC at 13–23, JA____–__. EPA then reasonably "decline[d] to exercise [its] discretion to grant the waiver for multiple reasons." RTC at 13, JA____. First, commenters alleged harm to specific industries, but did not show harm to the economy of a "*State, region, or the United States*." *Id* (emphasis in original). Second, "[c]ommenters generally failed to demonstrate that granting a waiver would be appropriate notwithstanding the beneficial impacts of the 2019 volume requirements." *Id.* at 13–14. Third, even "focus[ing] on the impacts to particular industries, commenters did not demonstrate that the 2019 volume requirements would cause severe harm." *Id.* at 14. EPA also observed that "circumstances have not changed so much since 2018 [when the waiver was not invoked] as to warrant a waiver for severe economic harm." *Id.* at 18, 22, JA____,

____; *see also AFPM*, 937 F.3d at 579–81 (upholding EPA's decision to not exercise this waiver in the 2018 Rule).

As to the refining industry, commenters did not provide any concrete evidence that the financial difficulties experienced by certain refiners "are caused primarily or even significantly by the RFS program." RTC at 14–15, JA____–__. Rather, obligated parties recover their compliance costs (including the cost of RINs) "in the revenues received for their petroleum products," and such costs are "passed through to consumers in the marketplace." *Id.* This conclusion was a well-substantiated expert technical judgment, supported by empirical data and numerous studies, and is entitled to deference. *See* Point of Obligation Denial at 21–31, JA____–__; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *Miss. Comm'n*, 790 F.3d at 150. Just a few months ago this Court upheld EPA's pass-through analysis. *See Alon*, 936 F.3d at 648–53.

1. EPA Reasonably Concluded that Petitioners Had Not Presented Credible New Evidence They Cannot Recover RIN Costs.

Once an agency resolves an issue in a separate proceeding, "it may defend against related criticism by 'simply refer[ing]' to the other proceeding, so long as the 'reasoning remains applicable and adequately refutes the challenge.'" *Id.* at 659 (quoting *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993)); *see also AFPM*, 937 F.3d at 587. Here, EPA relied on its thoroughly reasoned determination in the Point of Obligation Denial that obligated parties pass through their RIN costs to their

customers. *See* RTC at 14, JA____; Point of Obligation Denial at 21–31, JA____–__. EPA also carefully scrutinized the comments on the 2019 Rule. It concluded that "commenters provided no new credible evidence to indicate that [refiners] do not or cannot recover the cost of RINs." RTC at 14, JA____.

EPA was right. Petitioners bring nothing new to the table in attacking this conclusion. They rely on two Charles River Associates ("CRA") studies, *see* Refiners Br. at 19–21, but EPA considered and rejected both studies in the Point of Obligation Denial. *See* EPA-HQ-OAR-2016-0544-0518 at 26 & Ex. F, JA____, ____–__; EPA-HQ-OAR-2016-0544-0368, Exs. F & G, JA____–__; *see also* Refiners Br. at 21 n.9 (conceding that these were before EPA); Second Amended Certified Index of Record at 210, 216, *Alon*, No. 16-1052 (D.C. Cir. Jun. 29, 2018), ECF No. 1738482. This is nothing more than a second-bite-at-the-apple collateral attack on the Point of Obligation Denial. It presents the same evidence that was then before EPA, and argues the conclusions in that denial were arbitrary. *See* Refiners Br. at 19–21. But Petitioners were required to challenge the Point of Obligation Denial within sixty days of its publication in the Federal Register. *See* 42 U.S.C. § 7607(b)(1); *infra* p.41 (EPA need not reassess the point of obligation in every annual rule). Indeed, two of the petitioners did challenge EPA's pass-through finding in the *Alon* case. *See* 936 F.3d at 648–53.

Moreover, EPA evaluated these studies in the Point of Obligation Denial and found them unpersuasive. The 2017 CRA Study is addressed by name, and EPA

rejected the critiques which Petitioners parrot here. *Compare* Point of Obligation Denial at 25–26 & n.71, JA____–__ (discussing that critiques of the Knittel paper focused on three issues), *with* Refiners Br. at 20–21 (arguing the same three issues). Although EPA did not cite the 2016 CRA Study by name, EPA recognized that "multiple commenters critiqued methods used by Knittel" (as the 2016 CRA Study did). Point of Obligation Denial at 25, JA____; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (agency decisions upheld so long as the agency's path may reasonably be discerned). EPA ultimately concluded that the Knittel analysis, including a paper which specifically addresses the 2016 CRA Study, "provides compelling evidence that the RIN price is reflected in the wholesale price of refined products subject to an RFS obligation." Point of Obligation Denial at 26, JA____; *see also id.* at 25, JA____. Also, EPA did not rest its "pass through" analysis on the Knittel papers alone. Rather, significant other evidence—including a study by Argus Consulting Services and EPA's evaluation of price data—supported EPA's conclusion. *See, e.g.*, *id.* at 23, 25 & n.69, JA____; *Alon*, 936 F.3d at 649.

The Pirrong Study cited by Petitioners, Refiners Br. at 16-21, also rests on faulty analysis that EPA had already addressed in the Point of Obligation Denial. *See* Point of Obligation Denial at 20–32, JA____. Thus, EPA correctly concluded it also was not new evidence justifying reconsideration of the Point of Obligation Denial or invocation of the severe economic harm waiver.

First, the Pirrong Study assumes that refiners bear a significant portion of the cost of a RIN. *See* Pirrong Study at 27–28 & Ex. 29, JA____–__ (arguing that "[r]efiners would lose about $4.7 billion in transfers to biodiesel producers"; red box representing "Refiner Surplus Transfer"); *see also id.* at 13, 19, 28–29, JA____, ____, ____–__. But the Point of Obligation Denial found that this is not so: the cost of the RIN is fully passed to refiners' customers. *See* Point of Obligation Denial at 23, 25–26, JA____, ____–__. The Pirrong Study offers nothing new to refute this conclusion, as it simply cites to the 2016 CRA Study. *See* Pirrong Study at 27, JA____.

Second, another core premise of the Pirrong Study is that RIN prices significantly affect the retail price of transportation fuel. *See* Pirrong Study at 18–19, 27–29, & Ex. 29, JA____–__, ____–__. But based on its analysis of the data, EPA found that "*RIN prices themselves* were not expected to have a significant impact on retail fuel prices." Point of Obligation Denial at 20–21 (citing external corroborating studies).[12] Instead, RIN prices act as a cross-subsidy between qualifying renewable fuels and petroleum fuels, increasing the price of petroleum fuels while decreasing the price of renewable fuels. *See, also e.g., id.* (explaining that for E10, these price impacts offset each other, with little net impact on retail gasoline prices); *Alon*, 936 F.3d at

[12] The Pirrong Study also relies heavily on an analysis of "crack spreads," Pirrong Study at 11–12 & Exs. 14–20, but EPA explained that crack spreads are a "poor comparison point." RTC at 16.

650–52. Pirrong's assumption is also inconsistent with EPA's finding that the *value* of a RIN is typically passed to customers, such that there should be little overall effect on the price of retail fuel. *See* RTC at 16, JA____.

Third, the Pirrong Study relies on the possibility of refinery closures due to the RFS program. *See* Pirrong Study at 9, 14–16, JA____, ____–__; Refiners Br. at 17–18. Once again, EPA already addressed this argument. *See* Point of Obligation Denial at 64–67, JA____–__. EPA found that refinery closures from 2013–17, a period of elevated RIN prices, were not due to the RFS program; indeed, the majority of closed refineries were not subject to the program at all. *Id.* at 64–66, JA____–__. In fact, in the aggregate, "refineries added additional capacity" and "refinery expansions outnumbered closures 39 to 4" during those years. *Id.* at 65–66, JA____–__.

Moreover, as to the 2019 Rule, "[c]ommenters did not provide concrete information regarding a possible refinery shutdown or a particular refinery's net compliance costs" or "that their financial difficulties are caused primarily or even significantly by the RFS program." RTC at 14–15, 22, JA____–__, ____; *see also id.* at 17, JA____. And the Pirrong Study itself acknowledges that East Coast refineries face a variety of "headwinds" not attributable to the RFS program. *See* Pirrong Study at 1–2, 8–9, 14, JA____–__, ____–__, ____. In *AFPM*, this Court upheld EPA's interpretation of the severe economic harm waiver as setting a "high threshold" requiring direct causation with a high degree of confidence. *AFPM*, 937 F.3d at 580. It also upheld EPA's analysis, including that EPA had not been provided with "'any

concrete evidence that their financial difficulties are caused primarily or even significantly by the RFS program.'" *Id.* at 581. The same result applies here.

In sum, Petitioners have not identified any new evidence presented to EPA in the 2019 Rule that warrants invocation of the severe economic harm waiver. EPA reasonably exercised its discretion not to invoke this waiver.

2. EPA's Analysis Is Consistent with Its Grant of Small Refinery Exemptions.

Refiners-Retailers contend that this "pass-through" conclusion is inconsistent with EPA's granting certain small refineries exemptions from RFS compliance. Refiners Br. at 14; 42 U.S.C. § 7545(o)(9)(B)(i). They are mistaken.

First, small refinery exemption requests are facility-specific and assessed based on a different statutory standard, "disproportionate economic hardship," 42 U.S.C. § 7545(o)(9)(A)(ii), such that these exemptions may be granted even in the absence of severe economic harm to a "State, region, or the United States." *See* RTC at 19, JA____ (discussing differences in these inquiries). Thus, whereas the severe economic harm waiver prescribes a holistic look at whether there will be such harm to a "State, region, or the United States," small refinery exemptions are assessed based on facility-specific information. *Id.* For the latter, EPA considers the recommendation of the Department of Energy regarding the facility and the small refinery's particular financial and operational circumstances. *See* Small Refinery

Guidance at 2.[13] This analysis considers, among other things, the short-term effect of RIN acquisition costs for a specific small refinery that demonstrates, for example, operational losses, cash flow and credit difficulties, and below-average or negative net refining margins.

Thus, a small refinery may experience disproportionate economic hardship even though refineries, including small refineries, pass their RIN costs to their customers.[14] In fact, EPA explicitly found that "obligated parties, *including small entities*, are generally able to recover their costs of acquiring the RINs . . . through higher sales prices of the petroleum products they sell." 2019 Rule at 63,742 (emphasis added); *see also* RTC at 18–19, JA____–__ ("We continue to maintain that the costs of RINs are passed through and that RINs do not represent costs or harm to refiners."). Petitioners present no evidence that EPA has ever granted a single small refinery exemption because the refinery was unable to pass RIN costs onto its customers. EPA is unaware of ever having done so. The Department of Energy similarly does

[13] https://www.epa.gov/renewable-fuel-standard-program/information-be-submitted-2016-renewable-fuel-standard-rfs-small

[14] For example, a small refinery with limited cash reserves and high debt due to rebuilding after a refinery fire may have difficulty purchasing RINs even if it could later pass those costs to its customers.

not recommend small refinery relief based on a refinery's inability to pass through RIN costs.[15]

Ergon-West Virginia Inc. v. EPA, 896 F.3d 600 (4th Cir. 2018), does not support Petitioners' argument. There, according to the court, when EPA denied a specific refinery's request for an exemption, EPA did not appropriately consider the evidence the petitioner presented "of hardship *particular to its refinery*." *Id.* at 613. *Ergon* thus simply required a more particularized response when assessing an exemption request from a specific refinery. It does not undermine EPA's overarching conclusion that refineries typically pass through their RIN costs to their customers. *See id.* at 612–13.

3. EPA May Consider the Benefits Associated with the RFS Program in Considering the Severe Economic Harm Prong of the General Waiver.

Petitioners' last argument, Refiners Br. at 21–22, is that in deciding whether to exercise its discretion under the "severe economic harm" waiver, EPA must conduct a one-sided analysis that cannot consider the RFS program's economic benefits. At the outset, the Court need not reach the merits of this challenge: EPA concluded it would not have exercised this waiver even if it did "not consider the benefits of the program." RTC at 17, JA____; *see AFPM*, 937 F.3d at 583.

[15] The Department previously issued a study listing "RINs net revenue or cost" as a potential metric in its evaluation, but it has never assessed this metric for any small refinery. Small Refinery Exemption Study at 35; *see also Ergon-West Virginia Inc. v. EPA*, 896 F.3d 600, 607, 611 n.12 (4th Cir. 2018).

Even if the Court were to reach the merits of this issue, Petitioners' argument fails because, at a minimum, EPA's consideration of the nationwide benefits of the RFS program is reasonable and entitled to deference under *Chevron*. *See* RTC at 22, JA____; 73 Fed. Reg. 47,168, 47,172 (Aug. 13, 2008) (adopting this interpretation in a notice-and-comment proceeding). The general waiver is discretionary and prescribes no factors for EPA to consider in exercising that discretion. *See* RTC at 17, JA____; 42 U.S.C. § 7545(o)(7) (EPA "may" exercise the general waiver to reduce the volumes "in whole or in part"); *AFPM*, 937 F.3d at 570; *Monroe Energy,* 750 F.3d at 915; *ACE*, 864 F.3d at 733–34. Consideration of the benefits of the program is certainly not precluded by the statute at this stage of EPA's inquiry. *Cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("Consideration of cost . . . ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."). Because they seek to eliminate the other side of the ledger (benefits), thereby forcing EPA to consider only the alleged negative consequences of the volumes, Petitioners would effectively require EPA to curtail nationwide volumes specified by Congress based on alleged harm to one industry in one region. This would rewrite the statute, changing the discretionary term "may" into a mandatory "shall," and the term "a region" into "one industry within a region."

D. EPA Reasonably Declined to Exercise the Inadequate Domestic Supply Waiver.

EPA reasonably declined to exercise the "inadequate domestic supply" waiver. *See* 42 U.S.C. § 7545(o)(7)(A)(ii). EPA found, following robust analysis, that domestic supply would likely be adequate and that, in any event, it would not be appropriate to exercise its discretion to further reduce the RFS volumes. RTC at 9–12, JA____–__; 2019 Rule at 63,721 n.83, *see also id.* at 63,723, 63,730 & n.128. More specifically, EPA found that domestic production alone—without considering imported renewable fuel—"may be sufficient to meet the volumes established in the final rule," and consideration of imports reinforced the conclusion that the volumes likely could be met. RTC at 10–11, JA___–__.

Petitioners do nothing to rebut these conclusions. Thus, their central claim that "EPA refused even to consider whether domestic supply was adequate," Refiners Br. at 22, is fatally contradicted by the record.

Moreover, Petitioners wrongly conflate EPA's actual analysis of the inadequate domestic supply waiver (which Petitioners do not rebut) with EPA's separate analysis of the *cellulosic* waiver. As background, in the 2019 Rule, EPA exercised the full extent of its cellulosic waiver authority to reduce the required volume of advanced biofuel to 4.92 billion gallons. 2019 Rule at 63,705, 63,719. In doing so, it projected both "reasonably attainable" and "attainable" volumes of advanced biofuel. *See id.* at 63,721 (noting that these are terms of art). "[R]easonably attainable" volumes are

defined by EPA as "those that can be reached with minimal market disruptions, increased costs, and/or reduced [greenhouse gas] benefits, and with minimal diversion of advanced biofuels or advanced biofuel feedstocks from existing uses." *Id.* "Attainable" volumes are "those [EPA] believe[s] can be reached, but would likely result in market disruption, higher costs, and/or reduced [greenhouse gas] benefits." *Id.* Both are distinct from the "maximum achievable" level the market could supply. *Id.*

EPA determined that the 4.92-billion-gallon advanced biofuel standard could be met if the market made available various biofuels, including 2.8 billion gallons of advanced biodiesel and renewable diesel. *Id.* at 63,723. It projected that the "reasonably attainable" volume of these latter fuels would be 2.61 billion gallons, but the "attainable" supply of advanced biodiesel and renewable diesel would be "at least 2.8 billion gallons." *Id.* at 63,721, 63,723.

Petitioners do not challenge EPA's determination that 2.8 billion gallons of advanced biofuel is "attainable." Nor do they challenge EPA's exercise of the cellulosic waiver authority.[16] Instead, they incorrectly treat EPA's calculation of

[16] Because EPA exercised the full extent of its cellulosic waiver authority, Petitioners' argument, Refiners Br. at 25, that EPA should have changed its approach to what is "reasonably attainable" or "attainable," for purposes of *that* waiver could not have affected the outcome of the 2019 Rule in their favor. Thus, Petitioners' specific complaints about the cellulosic waiver analysis are immaterial. Refiners Br. at 24–26. In any event, these complaints are all belied by the record. *See, e.g.*, 2019 Rule at 63,724–30 ("attainable" volumes are appropriate notwithstanding certain reduced

"reasonably attainable" volumes for purposes of the cellulosic waiver as establishing some sort of "standard" that must be applied in considering the separate inadequate domestic supply waiver. They then wrongly accuse EPA of changing this purported mandatory standard to "attainable" without adequate explanation. Refiners Br. at 24–25. Petitioners' arguments are untenable.

First, when EPA projects "reasonably attainable" biofuel volumes, it does so solely in the context of exercising the cellulosic waiver, not the inadequate domestic supply waiver. *See* 2019 Rule at 63,721. And importantly, EPA's "reasonably attainable" analysis accounts for many factors unrelated to the *supply* of biofuels, including demand-side considerations, *see* 2019 Rule at 63,726 (considering "the ability for the market to distribute and use advanced biodiesel and renewable diesel," greenhouse gas impacts, and energy security).

By contrast, the inadequate domestic *supply* waiver is triggered solely by a finding of inadequate *supply*. It is not triggered simply because meeting the volumes may cause some negative effects. *See ACE* 864 F.3d at 712–13. Moreover, as this Court confirmed in *ACE*, EPA *cannot* consider demand-side considerations in assessing the inadequate domestic supply waiver. *See* 42 U.S.C § 7545(o)(7)(A), (D);

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benefits of exceeding the "reasonably attainable" volume); *id.* at 63,710 (the volumes are not expected to lead to draw-down of the RIN bank, but the RIN bank is available to address unexpected shortfalls); RTC at 9, 31–33, JA____, ____–__.

ACE, 864 F.3d at 710. Thus, EPA's "reasonably attainable" inquiry is wholly distinguishable from (and not interchangeable with) its consideration of the inadequate domestic supply waiver. *See ACE*, 864 F.3d at 707–16; *AFPM*, 937 F.3d at 581–83. *ACE* thus forecloses Petitioners' argument.

Further, even if this were not the case, Petitioners are effectively urging the Court to import EPA's "reasonably attainable" term of art (found nowhere in the statute) into the text of the inadequate domestic supply waiver, 42 U.S.C. § 7545(o)(7)(A)(ii). Not only would this rewrite the statute, it would make no sense. Petitioners acknowledge that EPA has found certain volumes "attainable" in the context of assessing the application of the cellulosic waiver. But Petitioners cannot explain (and make no effort to) why an EPA determination that certain volumes are "*attainable"* indicates that domestic supply is somehow *inadequate* to meet those "attainable" volumes. 42 U.S.C. § 7545(o)(7)(A)(ii).

II. EPA Properly Declined to Revise the Basic Regulatory Framework of the RFS Program in Setting the Annual RFS Standards.

Petitioners, failing to recognize the narrow focus of EPA's annual rulemakings, inappropriately attempt to use the 2019 Rule as a vehicle to challenge long-settled RFS framework regulations. This Court has repeatedly rejected similar challenges to RFS framework regulations as improper circumventions of Section 7607(b)(1)'s jurisdictional sixty-day deadline for challenging final actions under the CAA. *See AFPM*, 937 F.3d at 586; *Monroe Energy*, 750 F.3d at 919. It should do the same here.

The purpose of EPA's annual rulemakings is to determine the applicable volumes of renewable fuel and set percentage standards for the following year. *See* 42 U.S.C. § 7545(o)(3)(B)(i), (7)(D)(i). Congress specified three required elements for these annual rulemakings. *Id.* § 7545(o)(3)(B)(ii). None requires EPA to broadly revisit RFS framework regulations each year.

This Court recently recognized the narrowness of EPA's annual RFS rulemakings in *Alon*. 936 F.3d at 657–59 (explaining that the "focus of the annual rulemakings" is to calculate percentage standards). Separately, the RFS program contains "a slew of compliance provisions that are not annually re-determined." *Id.* at 657. As the Court observed, "[i]t would be strange indeed if Congress required EPA, as it went about its annual quantitative standard-setting duties, also to rethink [] choice[s] so basic to the RFS program's architecture." *Id.*

Having to annually reconsider the basic regulatory framework of the RFS program would render the RFS program unadministrable. To accomplish its annual standard-setting task, EPA must consider a vast amount of information in a short time frame. EPA conducts an in-depth analysis of renewable-fuels markets and evaluates hundreds of thousands of comments. *Id.* at 658; *see* Certified Index, ECF No. 1779055. Reading into the statute an annual requirement to reconsider the basic framework would also create significant uncertainty for regulated entities and for biofuels and RIN markets. It would also eviscerate Section 7607(b)(1)'s jurisdictional limit. Thus, although EPA could (and sometimes does) revise RFS framework

regulations at the same time it issues its annual rule, it has typically declined—and is certainly not required—to do so. If Petitioners want EPA to revise RFS framework regulations based on new facts, the appropriate avenue for relief is to submit administrative petitions for rulemaking to EPA to modify such rules. They may not try to broaden the scope of the annual rule. *See Alon*, 936 F.3d at 642–46.

A. The Court Lacks Jurisdiction to Review RFS Framework Regulations that EPA Did Not Reopen.

Once the sixty-day deadline for challenging a CAA rule has passed, judicial review is generally unavailable. 42 U.S.C. § 7607(b)(1). A new round of judicial review does not become available when EPA "in a later rulemaking restates the policy or otherwise addresses the issue again without altering the original decision." *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998). Nor does the application of a longstanding regulation to new facts reset the long-since-passed jurisdictional deadline to challenge that regulation. *See Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 458 (D.C. Cir. 2013); *Med. Waste Inst.*, 645 F.3d at 427. Rather, under the "reopening doctrine," an otherwise untimely challenge to a previously promulgated rule may proceed only "where an agency has—either explicitly or implicitly—undertaken to 'reexamine its former choice.'" *Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1351 (D.C. Cir. 1995) (quoting *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 151 (D.C. Cir. 1990)). Reopening occurs only when "the entire context demonstrates that the agency ha[s] undertaken a

serious, substantive reconsideration of the [existing] rule." *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008). As Petitioners bear the burden of demonstrating jurisdiction, they bear the "burden of proving" by "evidence," *Envtl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C. Cir. 2006), that the agency's "intention to initiate a reopening [is] clear from the administrative record," *Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.C. Cir. 2007); *see also Free Access & Broad. Telemedia, LLC v. FCC*, 865 F.3d 615, 619 (D.C. Cir. 2017) ("The window for challenging the [agency action] shut 60 days after that order was entered, and it will stay shut unless cracked open again by the [agency] itself.").[17]

The reopening doctrine is well established in this circuit. *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006). Neither *Alon* nor *AFPM* cast it aside. In *Alon*, the Court considered whether the CAA requires EPA to reassess the point of obligation in each annual RFS rulemaking. 936 F.3d at 653–59. The provision at issue, 42 U.S.C. § 7545(o)(3)(B)(ii)(I), specified that EPA's annual rules have three "required elements," including that the rule "be applicable to refineries, blenders, and importers, as appropriate." *Alon* held that EPA was not required to reconsider the point of obligation in its annual rulemaking and that EPA reasonably addressed the

[17] This Circuit has recognized that prior regulations may be constructively reopened. *Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017 (D.C. Cir. 2016); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996). No petitioner has invoked the constructive reopening doctrine, so any constructive reopening argument is waived.

question in its separate Point of Obligation Denial. 936 F.3d at 659. While *Alon* held that "EPA's determination as to whether it is 'appropriate' to reconsider the point of obligation in the context of an annual volumetric rulemaking is reviewable for abuse of discretion," *Alon* did not hold that an agency's decision whether to reopen a prior regulation is generally reviewable for abuse of discretion. *Id.* That would have been a significant *sub silentio* departure from the long-established reopening doctrine. Rather, *Alon* held that specific language in Section 7545(o)(3)(B)(ii)(I) allows abuse-of-discretion review of EPA's annual decision whether or not to reconsider the point of obligation.[18]

In *AFPM*, the Court held that Petitioners' challenge to EPA's longstanding regulation on the exporter renewable volume obligation was not properly before the Court because EPA had not reopened it in the annual rule. 937 F.3d at 585–86. The Court noted in dicta that "the Obligated Parties have not explained how a change in the EPA's RIN policy for renewable fuel exports would have required the agency also to change its proposed applicable volumes and percentage standards." *Id.* at 587. But the Court did not hold that if a change in a prior policy would have required a change in the volumes and percentage standards, then that prior policy would be reviewable

[18] *Alon*'s consideration of 42 U.S.C. § 7545(o)(3)(B)(ii)(I) is what distinguishes it from *Monroe Energy*, 750 F.3d at 919, which held that a challenge to the Point of Obligation Regulation was untimely and did not suggest that abuse-of-discretion review was available.

even if the agency had not reopened it. That, too, would have been a significant departure from the reopening doctrine. And Petitioners' approach would render untenably large swaths of the RFS framework regulations reviewable every year, so long as creative petitioners could contrive claims that a change in the regulations could somehow affect the volumes and percentage standards.[19]

In sum, neither *Alon* nor *AFPM* abandoned this Court's longstanding reopening doctrine. Parties may not advance time-barred challenges to aspects of the RFS program that EPA finalized years ago unless EPA reopens them. *Nat'l Min. Ass'n*, 70 F.3d at 1351 ("Permitting any affected rule to be reopened for purposes of judicial review by a rulemaking that does not directly concern that rule would stretch the notion of 'final agency action' beyond recognition . . . ."). The Court should reiterate that to the extent that Petitioners seek revisions to these regulations, the proper course is to administratively petition EPA for rulemaking to modify the rule.

B. EPA Reasonably Declined to Consider Revising the Point of Obligation in the 2019 Rule.

For the reasons just explained, only one challenge to EPA's RFS framework regulations is subject to review by the Court. Namely, Petitioners can challenge EPA's decision not to reconsider the point of obligation notwithstanding the

[19] To the extent Petitioners have a contrary view, they have not developed that argument (indeed, none even cite this portion of *AFPM*), and have therefore waived it. *See Sierra Club v. EPA*, 925 F.3d 490, 499 (D.C. Cir. 2019).

reopening doctrine. *Alon* held that Section 7545(o)(3)(B)(ii)(I) allows for abuse-of-discretion review of this decision in the context of an annual rulemaking. EPA's decision, however, was well-reasoned.

EPA first designated refiners and importers as obligated parties in 2007. It reaffirmed these obligated parties in 2010. 75 Fed. Reg. at 14,722; 72 Fed. Reg. at 23,924. Year after year, however, some obligated parties have unsuccessfully sought to require EPA to change this regulation in its annual rulemakings. But EPA addressed requests to change the Point of Obligation Regulations in separate administrative proceedings, as this Court allowed in *ACE*, 864 F.3d at 737. After considering over 18,000 comments, EPA denied the administrative petitions in November 2017, accompanied by an 85-page analysis. 82 Fed. Reg. 56,779, 56,779–80 (Nov. 30, 2017); Point of Obligation Denial. In the 2019 Rule, EPA again reaffirmed the point of obligation and found that commenters had submitted no credible evidence warranting reconsideration of its findings in the Point of Obligation Denial. 83 Fed. Reg. at 63,707 & n.11.

This Court upheld the Point of Obligation Denial in *Alon*. 936 F.3d at 648–53. Petitioners nonetheless take a seventh run[20] at the point-of-obligation issue. They

[20] (1) *AFPM*, 937 F.3d at 587; (2) *Alon*, 936 F.3d at 641–59; (3) *ACE*, 864 F.3d at 737; (4) *Monroe Energy*, 750 F.3d at 919; (5) Order at 8–9, *Small Retailers Coalition v. EPA*, No. 17-cv-00121 (N.D. Tex. May 21, 2018), (6)ECF No. 29; *Valero Energy Corp. v. EPA*, No. 7:17-cv-00004, 2017 WL 8780888, at *3–5 (N.D. Tex. Nov. 28, 2017), *appeal docketed*, No. 18-10053 (5th Cir.); and now (7) this case.

now argue that EPA unreasonably failed to reconsider the point of obligation in the 2019 Rule. They claim that the record underlying the 2019 Rule was so different from the information EPA previously considered that EPA abused its discretion when it relied on the Point of Obligation Denial. *See* Refiners Br. at 35. This argument is meritless.

Petitioners claim that the information in Sections I-A.1-3 of their brief "precluded continued reliance on the pass-through theory." *Id.* at 35.[21] As already discussed, Petitioners have not presented new information that calls into question EPA's conclusion that refiners pass their RIN costs to their customers. *Supra* pp.26–28. Notably, Petitioners are challenging a rule that issued just a year after EPA's Point of Obligation Denial.

Petitioners next point to Philadelphia Energy Solutions' ("PES") decision to seek bankruptcy protection. *See* Refiners Br. at 36. But EPA reasonably concluded that the RFS program did not cause PES's bankruptcy. RTC at 18, JA____. PES's bankruptcy filings indicated that large distributions to investor-owners and poor business decisions caused PES's inability to cover its obligations. *See id.* (noting also that PES had emerged from bankruptcy and was continuing to comply with the RFS

[21] Petitioners also suggest that granting exemptions gives small refineries a competitive advantage. *See* Refiners Br. at 37. But this is simply the result of Congress's choice to authorize exemptions for small refineries, but not for other refineries.

program); *see also* Motion & Memo of Law ¶ 63, *In re PES Holdings, LLC*, No. 18-10122 (Bankr. D. Del. Mar. 30, 2018), ECF No. 347 ("Bankruptcy Motion"). These facts are consistent with EPA's conclusion that refiners did not present concrete evidence that the RFS program caused their financial difficulties. RTC at 14–15, JA____–__.

EPA never suggested in PES's bankruptcy settlement that refiners generally or PES in particular could not pass along their RIN costs to their customers. The settlement was based on "the unique facts and circumstances of th[e] case," Bankruptcy Motion ¶¶ 5, 61, 63, particularly that "PES's [bankruptcy] plan is already approaching the limit of viability" and further RFS compliance would "decrease [its] projected cash on hand." Bankruptcy Motion Ex. A ¶¶ 5, 10–12. Notwithstanding that RIN costs are passed to refineries' customers, reducing PES's obligations to spend its limited cash reserves helped ensure its viability. *See id.*; *see also* Bankruptcy Motion ¶¶ 10, 38, 41, 65–66 ($350 million upfront cost). Moreover, the settlement was a compromise reached in light of several factors including litigation risk, that PES's initial plan proposal provided for no compliance with its pre-plan RFS obligations, and the need to harmonize RFS compliance obligations with bankruptcy law. *See id.* ¶¶ 12, 28, 43, 47–50, 61-63, 69–70.

EPA also addressed Petitioners' argument regarding RIN prices. *See* Refiners Br. at 38; RTC at 165–66, JA____–__. Petitioners claim that the ethanol blend rate has hovered around 10% despite fluctuating RIN prices, which allegedly demonstrates

that the point of obligation is not incentivizing greater renewable fuel use. This conclusion wrongly equates the ethanol blend rate with renewable fuel use. In fact, EPA reaffirmed that higher RIN prices "have been very effective at increasing the use of non-ethanol renewable fuels." RTC at 166, JA ____; *see also* Point of Obligation Denial at 16–17, 19, JA____–__, ____; *Alon*, 936 F.3d at 652. More generally, given constraints on the use and distribution infrastructure of high ethanol blends, higher RFS standards have "generally result[ed] in greater use of biodiesel and renewable diesel, rather than ethanol, as it has generally been more cost effective to increase the use of these fuels." RTC at 166, JA____.

Moreover, Petitioners fail to address the many other reasons EPA provided for declining to change the point of obligation. *See* Point of Obligation Denial at 1–4, JA____–__. EPA's evaluation of the effects on refiners was only a fraction of its 85-page decision not to change the point of obligation. *Id.* Assuming *arguendo* Petitioners' criticisms have some force, Petitioners would still need to show that their arguments are so compelling that EPA abused its discretion not to reconsider the point of obligation despite the many other factors justifying the current regulations. They do not even attempt to do so.

Petitioners also argue that EPA was required to reassess the point of obligation in the 2019 Rule under the "periodic review" provision of the RFS program. *See* Refiners Br. at 38–39 (citing 42 U.S.C. § 7545(o)(11)). No commenter suggested that Section 7545(o)(11) required reassessment of the point of obligation in the 2019 Rule.

Because this objection was not "raised with reasonable specificity during the period for public comment," it is not properly before the Court. 42 U.S.C. § 7607(d)(7)(B); *see also id.* § 7607(d)(1)(E); *EPA v. EME Homer City Generation L.P.*, 134 S. Ct. 1584, 1602 (2014). The Court "enforce[s] this provision strictly." *NRDC v. EPA*, 571 F.3d 1245, 1259 (D.C. Cir. 2009).

Petitioners are also wrong on the merits. First, Section 7545(o)(11) creates no duty to periodically review the point of obligation. It provides that EPA is to conduct periodic reviews of certain matters—none of which is the point of obligation—for the specific purpose of informing the "appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2)." 42 U.S.C. § 7545(o)(11). The statutory cross-reference is to Section 7545(o)(2)(B), the annual *volume* requirements, not the point of obligation. Thus, Congress prescribed that these reviews are meant to inform EPA as it adjusts these volumes, not to reassess the point of obligation.[22]

Second, Section 7545(o)(11) does not create an annual obligation for EPA to do anything—rather, it requires only that EPA conduct "periodic" reviews. *Id.* § 7545(o)(11). Petitioners are well aware that their legal argument is invalid given that two of them have already litigated this issue and lost. *See* Order at 4–5, *Small Retailers*

[22] The periodic review provision was not briefed in *Alon*, and *Alon*'s remarks on this provision are dicta. 936 F.3d at 658–59. Regardless, EPA has not found that the point of obligation is obstructing compliance. Indeed, in setting the volume standards each year, EPA determines that compliance is feasible. *See, e.g.*, 2019 Rule Sections III–IV; EPA-HQ-OAR-2018-0167-1330, JA____–__.

Coalition, No. 17-cv-00121 (N.D. Tex. May 21, 2018); *Valero*, 2017 WL 8780888, at *3–5. Even if this provision required EPA to "periodically" review the point of obligation, EPA concluded such a review just a year before the 2019 Rule, in the Point of Obligation Denial. *See* Periodic Reviews for the Renewable Fuel Standard Program, at 12 (November 2017).[23]

Third, EPA considered and rejected Petitioners' arguments that large retailers are using the profit from RIN sales to subsidize lower fuel prices to the detriment of small retailers. *See* RTC at 165, JA____ ("[T]erminal level pricing data clearly demonstrates that the RIN value is being reflected in the wholesale price of E10 and diesel fuel," including for both large and small retailers);[24] *id.* at 15, JA____ (point of obligation is not harming small retailers); Point of Obligation Denial at 26–32, JA____–__ (explaining, among other things, that "RINs are not 'free' to large retailers" and are not leading to windfall profits); *Alon*, 936 F.3d at 649.

Petitioners also reiterate their failed argument that 42 U.S.C. § 7545(o)(3)(B)(ii)(I) requires EPA to annually reexamine the point of obligation. *See*

[23] https://www.epa.gov/renewable-fuel-standard-program/periodic-reviews-renewable-fuel-standard-program

[24] Since the RIN value is reflected in the wholesale price of E10 and diesel fuel, when large retailers purchase unblended gasoline and ethanol to produce E10 (and acquire RINs) they must use the value obtained from the RIN sales to produce E10 at the same price this fuel is being offered at the terminal. Thus, their prices are equal to the terminal price of E10, which is also the price at which small retailers lacking blending capabilities may buy the fuel.

Refiners Br. at 41–42.[25] However, they concede that *Alon* resolved this issue against them and that *Alon* is binding. *Id.* *Alon* is correct on this point, and EPA preserves all arguments in support of its position that Section 7545(o)(3)(B)(ii)(I) does not require annual reassessment of the point of obligation.

C. This Court Lacks Jurisdiction Over the Remainder of Petitioners' Challenges to RFS Framework Regulations.

Unlike Refiners-Retailers' challenge to EPA's decision not to reconsider the point of obligation—where judicial review is available in light of *Alon* and Section 7545(o)(3)(B)(ii)(I)—Petitioners' other challenges to RFS framework regulations are not properly before this Court.

1. Petitioners' Challenge to RFS Regulations' Treatment of Exported Renewable Fuel Is Untimely.

Refiners-Retailers' challenge to EPA's policy on exported renewable fuel, Refiners Br. at 42–47, is an untimely attack on a longstanding regulation over which this Court lacks jurisdiction. *See* 42 U.S.C. § 7607(b)(1); *United Transp. Union-Ill. Legislative Bd. v. Surface Transp. Bd.*, 132 F.3d 71, 76 (D.C. Cir. 1998); *Kennecott*, 88 F.3d at 1226. EPA properly concluded that this issue was "beyond the scope" of the 2019 Rule. RTC at 188, JA___.

[25] As noted *supra* p.ii, Petitioner Valero has filed a petition for certiorari relating to this issue.

EPA has consistently interpreted the statute to require volumes of renewable fuel to be consumed within the United States. 72 Fed. Reg. at 23,936; *see also* 75 Fed. Reg. at 14,724–25. Accordingly, EPA's RFS framework regulations provide that RINs generated from renewable fuel that is exported from the United States cannot be used to satisfy the annual volume requirements of the RFS program. 79 Fed. Reg. 42,078, 42,115 (July 18, 2014) (promulgating current version of 40 C.F.R. § 80.1430). Thus, when renewable fuel that has generated RINs is exported, the exporter must retire an equivalent number of RINs. *See* 40 C.F.R. § 80.1430. Otherwise, an obligated party could purchase and retire those RINs toward its RFS compliance obligation even though the renewable fuel was used abroad.

Any challenge to 40 C.F.R. § 80.1430 had to be brought within sixty days of its promulgation. 42 U.S.C. § 7607(b)(1); *AFPM*, 937 F.3d at 586. Thus, Petitioners' challenge is untimely. EPA did not explicitly or implicitly reopen this regulation in the 2019 Rule. *Supra* pp.40–41 (explaining reopening doctrine). *AFPM* rejected a similar argument that, in the 2018 Rule, EPA had reopened or was otherwise required to reconsider 40 C.F.R. § 80.1430. *AFPM*, 937 F.3d at 585–87. Noting that EPA had "unambiguously communicat[ed] its decision not to solicit comment on its RIN policy for renewable fuel exports," the Court held that EPA permissibly treated comments on this issue as beyond the scope of its rulemaking. *Id.* at 586. *AFPM* controls here. As in the 2018 Rule, EPA did not reopen 40 C.F.R. § 80.1430. RTC at 188, JA____ (stating that this issue was beyond the scope of rulemaking); *Am. Rd. &*

Transp. Builders Ass'n, 705 F.3d at 457 (crediting EPA's statement in response to comments that it was not reopening an issue).

Petitioners try to distinguish *AFPM* on the basis that the 2018 Proposed Rule included "exclusionary language" not found in the 2019 Proposed Rule. Refiners Br. at 43; *see also AFPM*, 937 F.3d at 586. This argument lacks merit. The sixty-day statutory time limit for judicial review may be deemed "reopened" only if Petitioners can show that EPA in fact reconsidered the issue. *Supra* pp.40–41. The "exclusionary language" in *AFPM* was *sufficient* to conclude that EPA had not reopened 40 C.F.R. § 80.1430. Nothing says such language is *necessary*. *See, e.g.*, *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 457.

Petitioners grasp for EPA's generic statement inviting comment on "all aspects" of its proposal and "any aspect of this rulemaking." Refiners Br. at 43 (quoting 2019 Proposed Rule, 83 Fed. Reg. 32,024, 32,057–58 (July 10, 2018)). They also cite EPA's solicitation of comments on possible RIN market reforms, the use of waivers, and the RIN bank. *Id.* at 45. These broad statements do not reflect "serious, substantive reconsideration" of 40 C.F.R. § 80.1430. *P & V*, 516 F.3d at 1024. "When an agency invites debate on some aspects of a broad subject . . . it does not automatically reopen all related aspects including those already decided." *Nat'l Ass'n of Reversionary Prop. Owners*, 158 F.3d at 142. The purpose of EPA's rulemaking was to set RFS volumes and percentage standards, not to revisit the RFS framework

regulations broadly or 40 C.F.R. § 80.1430 specifically. *See* 2019 Proposed Rule, 83 Fed. Reg. at 32,026–27 (summarizing major provisions).

Indeed, EPA never even mentioned 40 C.F.R. § 80.1430 or discussed the merits of the exporter renewable fuel obligation in the proposed or final rule. Where EPA has sought comments on RFS framework regulations, it has done so expressly, and only as to discrete issues. *See, e.g.*, 82 Fed. Reg. 34,206, 34,211, 34,242 (July 21, 2017); 80 Fed. Reg. 33,100, 33,100 (June 10, 2015). It did not do so here.

Petitioners nonetheless argue that their comments were linked to determining reasonably attainable annual volumes. Refiners Br. at 43. Petitioners put the cart before the horse. Unless the 2019 Rule reopened 40 C.F.R. § 80.1430—and it did not—their comments urging that this regulation be changed are beyond the scope of the rulemaking. *See Nat'l Ass'n of Reversionary Prop. Owners*, 158 F.3d at 142. EPA's task is to set the standards in light of its existing framework regulations. Petitioners' comments urging a change in those regulations cannot force EPA to reopen Section 80.1430 in its annual rule. The reopening doctrine "is not a license for bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue." *West Virginia v. EPA*, 362 F.3d 861, 872 (D.C. Cir. 2004); *Biggerstaff*, 511 F.3d at 185.

Petitioners also argue that EPA's treatment of exports under 40 C.F.R. § 80.1430 is "centrally relevant" to the 2019 Rule. Refiners Br. at 45. But that is not

the standard for when a longstanding regulation is reopened. *Supra* pp.40–41. Petitioners are wrong anyway. *Cf. AFPM*, 937 F.3d at 587 (noting that petitioners had failed to show that a change in EPA's RIN export policy would have required it to change the volumes or percentage standards). Petitioners claim that, unless RINs from exported renewable fuel could be used for compliance, EPA's proposed volumes could not be achieved, would cause substantial harm to obligated parties, and would necessitate the use of the general waiver. *See* Refiners Br. at 45–46. However, EPA came to contrary conclusions *without* the need to change the exporter regulation. *See supra* Argument I. Indeed, nowhere do Petitioners explain how a change in the regulation would have required EPA to establish different volumes in the 2019 Rule.

The Court should reject Petitioners' attempt to broaden the scope of the 2019 Rule—and this Court's jurisdiction—to address untimely challenges to 40 C.F.R. § 80.1430.

2. Environmental Petitioners' Challenge to EPA's Aggregate Compliance Regulation Is Untimely.

Environmental Petitioners' challenge to EPA's aggregate compliance regulation, Envtl. Br. at 28–30, is similarly not properly before the Court. EPA

established its aggregate compliance regulation in 2010. Environmental Petitioners' challenge therefore comes well outside the CAA's jurisdictional time limit for review.[26]

By way of background, renewable fuel must be "produced from renewable biomass." 42 U.S.C. § 7545(o)(1)(J). "Renewable biomass," as pertinent here, includes "[p]lanted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to December 19, 2007 [the date of the enactment of EISA], that is either actively managed or fallow, and nonforested." *Id.* § 7545(o)(1)(I)(i).

In 2010, EPA promulgated its "aggregate compliance" regulation for determining whether biomass qualifies as "renewable biomass" under the above definition. 75 Fed. Reg. 14,670, 14,701–03 (March 26, 2010) (codified at 40 C.F.R. § 80.1454(g)). EPA determined that, for purposes of recordkeeping and reporting requirements, all feedstocks derived from planted crops and crop residues from the United States will be considered to be consistent with the definition of "renewable biomass" unless and until EPA finds that the total amount of agricultural land in the United States exceeds the amount as of the enactment of EISA. *Id.* at 14,701 (noting that if that baseline were exceeded, individual recordkeeping and reporting requirements would be triggered). In turn, EPA committed to monitor the acreage of

[26] It is not clear that Petitioners have standing to advance this challenge, *see, e.g.*, *infra* Argument V.A, but because the CAA's timeliness requirement is jurisdictional, the Court need not address this issue here.

U.S. agricultural lands and annually determine whether the baseline acreage had been exceeded. *Id.* at 14,703; 40 C.F.R. § 80.1454(g)(1). EPA concluded that this approach "will fully ensure that the EISA renewable biomass provisions related to crops and crop residue are satisfied." 75 Fed. Reg. at 14,701 (explaining the five factors supporting this approach).[27]

In every year since, EPA has applied 40 C.F.R. § 80.1454(g). In doing so, EPA compared the prior year's agricultural data with the baseline, and consistently found that agricultural acreage fell below the baseline. The 2019 Rule reached this same conclusion. 2019 Rule at 63,741; *see also* Envtl. Br. at 7–8, 18 (recognizing that EPA's approach was pursuant to this regulation).

Petitioners' challenge to EPA's aggregate compliance approach, as set forth in 40 C.F.R. § 80.1454(g) is thus untimely. They attack a nine-year-old regulation. Yet Petitioners make no effort to show jurisdiction in light of 42 U.S.C. 7607(b)(1)'s sixty-day time limit. This waived any argument that they have met that limit.

In any event, EPA did not reopen this regulation. *See* RTC at 188, JA___. And Petitioners advance no argument that it did so. Mere application of the longstanding

[27] Petitioners argue that this approach contravenes the statutory text and is inconsistent with EISA's purposes. EPA disagrees, but these are merits arguments that the Court cannot reach for the reasons discussed below. It is worth noting, however, that EISA, like most statutes, had diverse purposes. *See* Pub. L. No. 110-140, 121 Stat. 1492 (2007) (preamble); 42 U.S.C. § 7545(o)(2)(B)(ii)(I)–(VI), (o)(7), (o)(9).

regulation did not reopen it for review. *Supra* p.40–41. Indeed, in very similar circumstances, the Court found that EPA's mere application of a parallel regulation (relating to ensuring the "renewable biomass" requirement for foreign producers, 40 C.F.R. § 80.1454(h)) also did not reopen it for judicial review. *See Nat'l Biodiesel Bd.*, 843 F.3d at 1016–17 (holding that the challenge to this regulation was untimely).

Petitioners' untimely claim is all the more problematic because—contrary to Petitioners' claim that EPA overlooked the issues they raise—Petitioners' arguments were explicitly addressed in the 2010 rulemaking. *See* 75 Fed. Reg. at 14,703 (acknowledging "some of the land available under EISA for crop production on the date of EISA enactment could be retired and other land brought into production, without altering the assessment of the aggregate amount" but EPA expected such shifts would be de minimus); *see also, e.g.*, *id.* at 14,772–80 (analyzing possible land use changes in the context of greenhouse gas emissions). In fact, Petitioner National Wildlife Federation and another party actually challenged the aggregate compliance approach at the time, bringing essentially the same statutory argument that Petitioners now recycle. *See* Jt. Br. of Envt'l Pet. at 49–51, *Nat'l Chicken Council v. EPA*, No. 10-1107 (D.C. Cir. Dec. 21, 2011), ECF No. 1349095.[28]

To the extent Petitioners think that new facts justify EPA revising the aggregate compliance approach, the proper vehicle for their argument is an

[28] Those petitioners subsequently voluntarily dismissed their petition.

administrative petition for rulemaking to EPA. *See Alon*, 936 F.3d at 639, 642–46. While Petitioners have submitted an administrative petition, EPA has not yet responded to that petition. This action seeks review of the 2019 Rule, not any future forthcoming response that is not yet a final agency action. Awaiting that response is particularly important because the aggregate compliance regulation implicates important technical issues relating to land use and fuel and agricultural markets that are not addressed in the record for the 2019 Rule.

3. Biofuels Petitioners' Challenge to the RFS Regulations' Treatment of Small Refinery Exemptions Is Untimely and EPA's Approach Is Reasonable.

Biofuels Petitioners argue that EPA acted unlawfully by calculating the 2019 standards without accounting for small refinery exemptions that may be granted after the standards are finalized. Biofuels Br. at 10–23. Petitioners' argument is untimely and meritless.

a. Biofuels Petitioners' Challenge Is Untimely.

The Court lacks jurisdiction over Petitioners' untimely challenge to EPA's percentage standards formula. To calculate the 2019 standards, EPA used the same methodology that it did in all prior years. 2019 Rule at 63,739. Using the formula in 40 C.F.R. § 80.1405(c), EPA divided the nationally applicable volume for each renewable fuel type by the estimated national volume of transportation fuel that will be used that year less any volume attributable to small refineries already exempted from their RFS obligations. 2019 Rule at 63,707, 63,739–40. This adjustment for any

small refinery exemptions granted by the date of the rule results in a higher percentage. The final standard thus requires non-exempted obligated parties to obtain more RINs.[29] *AFPM*, 937 F.3d at 587-88.

Congress, however, authorized EPA to grant small refinery exemptions "at any time," including after the annual standards for the year have been finalized.[30] 42 U.S.C. § 7545(o)(9)(B)(i). Petitioners refer to these post-finalization exemptions as "retroactive" exemptions. Biofuels Br. at 10. The formula in Section 80.1405(c) does not account for such exemptions. 2019 Rule at 63,740. EPA has consistently explained that accounting for such exemptions by periodically and retroactively altering the standards would not be consistent with the statutory requirement that EPA set the standards by November 30. *See, e.g.*, 75 Fed. Reg. 76,790, 76,804–05 (Dec. 9, 2010) (2011 standards). And doing so would inappropriately render the standards a moving target. *Id.*

EPA promulgated the percentage standards formula in 40 C.F.R. § 80.1405(c) in 2010, 75 Fed. Reg. 14,670, 14,717, 14,867 (Mar. 26, 2010). EPA has uniformly

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[29] Specifically, the percentage standard increases as the denominator in the formula is reduced by "[t]he amount of [gasoline and diesel] projected to be produced by exempt small refineries and small refiners . . . in any year they are exempt." 40 C.F.R. § 80.1405(c) (definitions of GE^i and DE^i).

[30] In evaluating exemption petitions, EPA routinely considers the operational and financial status of the small refinery over the course of the compliance year, and thus often decides petitions after the standards have been set. *See* Small Refinery Guidance, JA____.

interpreted the formula this way since the 2011 standards. 75 Fed. Reg. at 76,804–05. So Petitioners' challenge to this longstanding interpretation of an almost decade-old regulation is untimely under the CAA's sixty-day jurisdictional bar. 42 U.S.C. § 7607(b)(1).

EPA did not reopen this policy. On the contrary, the 2019 Proposed Rule clearly stated that "EPA is not soliciting comments on how small refinery exemptions are accounted for in the percentage standards formulas in 40 C.F.R. § 80.1405, and any such comments will be deemed beyond the scope of this rulemaking." 2019 Proposed Rule at 32,057. When finalizing the 2019 Rule, EPA reaffirmed that this issue was beyond the scope of the rulemaking. RTC at 183–85, JA____–__. Having unambiguously communicated its decision not to reopen, EPA permissibly declined to address this issue in the 2019 Rule. *AFPM*, 937 F.3d at 585–86.

Petitioners nonetheless argue that it was arbitrary and capricious for EPA to not reconsider the percentage standard formula within the 2019 rulemaking. Biofuels Br. at 21–23. But the proper framework for determining whether Petitioners' untimely challenge can nonetheless proceed is the reopening doctrine. They cannot bootstrap such issues into a subsequent rulemaking by claiming it arbitrary and capricious not to reconsider.[31] *Supra* pp.40–43.

[31] The only case that Petitioners cite for arbitrary-and-capricious review of the scope of a rulemaking is *Mktg. Assistance Program, Inc. v. Bergland*, 562 F.2d 1305, 1307 (D.C. Cir. 1977). Biofuels Br. at 21; *see also id.* at 23 (citing cases that only generally articulate

Moreover, nothing in the statute required EPA to revisit its methodology for calculating percentage standards in the 2019 Rule. Petitioners argue that EPA has a "recurring, annual duty" to determine the renewable fuel obligation. Biofuels Br. at 22 (citing 42 U.S.C. § 7545(o)(3)(B)(i)). But EPA complied with any such requirement—which is distinct from the methodology itself. EPA applied its longstanding formula to calculate the 2019 standards to determine the obligation. EPA promulgated that formula in 2010 under the one-time requirement in 42 U.S.C. § 7545(o)(2)(A)(i) that it revise the RFS regulations to implement the EISA amendments. 75 Fed. Reg. at 14,675. Neither Section 7545(o)(3)(B)(i), nor any other provision of the CAA, imposes a recurring, annual duty on EPA to reconsider that formula.[32]

Even if EPA's decision not to reopen this issue from the 2019 rulemaking were reviewable, EPA has not abused its discretion. Indeed, EPA has reopened this issue twice in the past three years. In the 2018 annual rulemaking, EPA sought comment on the issue but decided to retain its existing approach. 82 Fed. Reg. 58,486, 58,523

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arbitrary-and-capricious standard). That case did not involve the question of when a prior agency decision can be challenged outside jurisdictional time limits.

[32] To argue that EPA was required to have reconsidered its approach, Petitioners rely on an interagency-review draft of the proposed 2019 Rule that is not part of the record. Biofuels Br. at 22–23; Certified Index, ECF No. 1779055. The Court should not consider this extra-record material, 42 U.S.C. § 7607(d)(7)(A), but in any event, the consideration of a different approach in a draft proposal does not show that the approach that EPA took was unlawful.

(Dec. 12, 2017); 82 Fed. Reg. 34,206, 34,241–42 (July 21, 2017). A petitioner unsuccessfully sought judicial review of that decision in *AFPM*, 937 F.3d at 587–90. Then, in the 2020 annual rulemaking, EPA reopened this issue yet again. In that rule, EPA adopted a new approach that accounts for small refinery exemptions that may be granted after the percentage standard is finalized. Final Rule, Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes[33]; 84 Fed. Reg. 57,677, 57,679–80 (Oct. 28, 2019).[34] Thus, EPA has revisited this very issue twice within the last three years, even though it was under no statutory obligation to do so. EPA did not abuse its discretion by failing to reconsider the issue in the 2019 Rule as well.

b. EPA Took a Permissible Approach to Account for Small Refinery Exemptions.

Even if EPA were required to reconsider its longstanding percentage standard formula, EPA reasonably decided not to change its approach to accounting for small refinery exemptions. Section 7545(o) has only one requirement for how EPA is to

[33] The 2020 annual rule was finalized on December 19, 2019, but not published in the Federal Register as of the filing date of this brief. The prepublication version is available at: https://www.epa.gov/renewable-fuel-standard-program/final-renewable-fuel-standards-2020-and-biomass-based-diesel-volume.

[34] EPA took comment on this issue in the 2020 rulemaking partially in response to a petition for administrative reconsideration, 84 Fed. Reg. at 57,680 & n.12, underscoring the point that such administrative petitions can provide an avenue to relief to Petitioners even where judicial review of RFS framework regulations is time-barred. *See Alon*, 936 F.3d at 642–46.

account for small refinery exemptions when calculating percentage standards: EPA must make adjustments "to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt." 42 U.S.C. § 7545(o)(3)(C)(ii); *see also* 75 Fed. Reg. at 14,717. Beyond that, the statute is silent on how EPA should treat such exemptions, leaving EPA discretion to settle on a reasonable approach. *See Catawba Cty.*, 571 F.3d at 35–36.

In the absence of statutory direction, EPA rationally chose to account for small refinery exemptions granted by the time of the final rule but not those granted thereafter. 75 Fed. Reg. at 76,804–05. The former is a known quantity. The latter is uncertain. The number of exemptions that may be granted after the final rule will vary from year to year, and is affected by matters outside EPA's control. These include which small refineries apply for relief and when they do so.[35] EPA's decision to draw a line between exemptions granted before the rule is issued and those that are not, and to only include the former in calculating the standards, was reasonable and not foreclosed by the statute.

Petitioners identify two possible alternative approaches. An "ex ante" approach would adjust forthcoming standards to account for projected "retroactive" exemptions. In an "ex post" approach, EPA would adjust standards in later years to

[35] Petitioners themselves recognize the year-to-year variation in the number of small refinery exemptions granted. Biofuels Br. at 11–12.

account for "retroactive" exemptions in prior years. Biofuels Br. at 17. But Petitioners fail to show that any part of the CAA makes EPA's current approach impermissible or otherwise compels one of those alternative approaches.

Petitioners argue that EPA must "ensure[]" that the percentage standards in its annual rulemakings achieve applicable volumes. Biofuels Br. at 15 (quoting 42 U.S.C. § 7545(o)(3)(B)(i)). But "ensure[]" cannot mean absolute certainty. The annual rule process is forward-looking. And it requires predictive judgment. The statute requires EPA to establish standards by November 30 of the prior year. So EPA reasonably translates the nationally applicable volumes into standards. But EPA cannot know with certainty that those standards will result in the volumes being met. 77 Fed. Reg. at 1340. For example, if the national consumption of gasoline and diesel is lower than projected, obligated parties' compliance with the standards will not lead to the use of the entire applicable volumes of renewable fuel. On the other hand, higher-than-projected gasoline and diesel consumption would result in use of more than the applicable volumes. Given the nature of the task, Congress could not have intended to impose—nor did it, as the statute's text shows—the impossible requirement that EPA "ex ante" ensure with exact precision that its standards will result in the

applicable volumes being met. EPA's approach was a reasonable and permissible way to "ensure[]" that applicable volumes would be met.[36]

The term "ensure[]" also does not require EPA to account "ex post" for a prior year's "retroactive" exemptions, just as it does not require EPA to account for lower-than-expected fossil fuel usage in a prior year. In fact, such an adjustment could conflict with other parts of Section 7545. In years where actual production of a renewable fuel is at or near the statutory targets, an "ex post" adjustment would require EPA to raise the applicable volumes in those years to *above* statutory levels. But EPA has only waiver authorities, not authority to increase the statutory volumes. *See, e.g.*, 42 U.S.C. § 7545(o)(7)(A), (D)(i), (E)(ii). In addition, EPA *must* lower the statutory volume of cellulosic biofuel to the projected volume if the latter is lower. 42 U.S.C. § 7545(o)(7)(D)(i). If EPA were required to adjust "ex post" for cellulosic biofuel volumes that were not attained the prior year, EPA would have to set standards at a level that would require cellulosic volumes *above* the amount EPA

[36] *National Petrochemical and Refiners Ass'n v. EPA* is not to the contrary. 630 F.3d 145 (D.C. Cir. 2010). In that case, the Court upheld EPA's issuance of retroactive RFS standards under its authority to ensure that applicable volumes are achieved. *Id.* at 152–58. The case says nothing about small refinery exemptions, any requirement that standards actually result in the exact applicable volumes being used, or any requirement that EPA later make up for any shortfall resulting from the inherently uncertain nature of the standard-setting process.

projects will be available that year. *See* 83 Fed. Reg. at 63,710–11 (interpreting the available volume as comprising cellulosic biofuel produced or imported in that year).[37]

Petitioners also incorrectly argue that EPA's approach impermissibly rewrites the CAA to give EPA an additional atextual waiver authority. Biofuels Br. at 15–17. Unlike the waiver authorities Congress enacted, EPA's approach to accounting for small refinery exemptions does not reduce statutory volumes. Rather, to the extent any applicable volumes are not achieved, this is because EPA must set the percentage standards well in advance of the conclusion of the compliance period. Some deviation from volumes due to such inherent uncertainties is not a waiver.

Petitioners also argue that EPA has the authority to account for "retroactive" exemptions by applying a lesser discretionary cellulosic waiver to advanced and total renewable fuel requirements and by raising the biomass-based diesel requirement. Biofuels Br. at 17–18. That EPA *could* have exercised its broad discretion under those authorities does not mean that it was unlawful for EPA to not have done so. *See* RTC at 26–29, JA___ (explaining EPA's decision to not limit its exercise of the cellulosic waiver authority to account for past small refinery exemptions). Petitioners fail to

[37] Petitioners attempt to distinguish "retroactive" exemptions from lower-than-projected fossil-fuel use on the basis that the former keeps "the nationwide percentage obligation" from being met. Biofuels Br. at 20–21. But there is no percentage obligation that applies to the nation as a whole, just standards that apply to individual obligated parties. 42 U.S.C. § 7545(o)(3)(B)(ii). Neither "retroactive" exemptions nor lower-than-projected fossil-fuel use relieves obligated parties (unless exempted) from compliance with those standards.

make any argument that the text of any waiver provision required EPA to account for "retroactive" exemptions. *See ACE*, 864 F.3d at 714.

Finally, Petitioners are wrong that EPA's approach to this issue has undermined the RFS program. Biofuels Br. at 10–14, 17. Cellulosic biofuel production continues to rise, 2019 Rule at 63,712 tbl. III.B.1-1, and the same is true for advanced biodiesel and renewable diesel, *id.* at 63,724 tbl. IV.B.3-2. In addition, growth in the carryover RIN bank does not create an effective total volume requirement of 16.42 billion rather than 19.92 billion gallons. Biofuels Br. at 12–13. In making that argument, Petitioners assume that obligated parties will use up all carryover RINs for 2019 without carrying over any new RINs into 2020—a faulty assumption since the market has never eliminated the entire carryover RIN bank in one year. Instead, the market has consistently maintained a significant bank of carryover RINs, EPA-HQ-OAR-2018-0167-1298 at 7, JA____, and that bank is crucial to the smooth functioning of the RIN market, 2019 Rule at 63,708–10.[38] Finally, a drop in RIN prices does not indicate that EPA's method of accounting for small refinery exemptions is undermining the RFS program. RIN prices have fluctuated greatly over time, 2019 Rule at 63,736 fig. VI.B.2-1, and those market

[38] For that reason, in *ACE*, this Court recognized the importance of maintaining a carryover RIN bank and held that "EPA need not consider carryover RINs as a supply source of renewable fuel for purposes of determining the supply of renewable fuel available in a given year." 864 F.3d at 716.

fluctuations are the result of a variety of factors such as the price of feedstocks used in biofuel production. RTC at 164, JA____. In any event, the Court's role is not to redesign the RFS program to function as Petitioners would prefer. The Court is to consider whether EPA has acted contrary to the statute. EPA has not.[39]

4. Producers United's Challenge to EPA's Small Refinery Exemptions Is Directed at the Wrong Agency Action and Is Also Untimely.

Petitioner Producers United challenges EPA's policy of granting so-called "retroactive" exemptions to small refineries after the establishment of annual volume requirements. Biofuels Br. at 24–32. Judicial review of the 2019 Rule is not the proper vehicle for this challenge. The policy was not even applied here. The challenge is also untimely and foreclosed by collateral estoppel.

Small refineries may petition EPA for exemptions from the RFS volume requirements "at any time" based on "disproportionate economic hardship," and EPA must consider these requests. 42 U.S.C. § 7545(o)(9)(B). In 2010, EPA issued a regulation that similarly provided that a small refinery may petition for such an

[39] That EPA finalized a different approach in the 2020 Rule does not mean that EPA's approach in the 2019 Rule was impermissible. In the 2020 Rule, EPA explained that "the statute does not specifically require EPA to redistribute exempted volumes in th[e] manner" adopted in the 2020 Rule. 2020 Rule, *supra* n. 32, at 75. EPA also described "several recent developments" that explained its change in policy. *Id.* at 76. In particular, EPA explained that it was better able to reasonably project small refinery exemptions that may be granted after the 2020 Rule because unlike in prior years, it was establishing a prospective policy to adjudicating small refinery exemption petitions concurrently with issuing the 2020 Rule. *Id.*

exemption "at any time." 40 C.F.R. § 80.1441(e)(2). EPA has consistently applied this regulation to grant small refinery exemptions after the percentage standards for a given year are set—*i.e.*, with "retroactive" effect. To wit, information about whether a small refinery will suffer disproportionate economic hardship may only become available during a compliance year, after the standards are set. Small Refinery Guidance, JA____.

Less than a year ago, Producers United sought judicial review of this approach, arguing that EPA cannot grant "retroactive" exemptions. *See Producers of Renewables United for Integrity, Truth, & Transparency v. EPA*, 778 F. App'x 1, 4 (D.C. Cir. 2019) (per curiam) (unpublished). It lost, as this Court held that Producers United's arguments were untimely under 42 U.S.C. § 7607(b)(1). *Id.* at 4–6.

Producers United now tries to raise the same issue again in this case. But the 2019 Rule is the wrong vehicle to argue that EPA may not grant "retroactive" small refinery exemptions or "unretire" RINs. First, the 2019 Rule did not grant any small refinery exemptions—retroactive or otherwise. Nor did it "unretire" any RINs as the result of such exemptions. Thus, judicial review is unavailable because the 2019 Rule does not apply or address the policy Producers United is complaining about. *See Adv. Biofuels Ass'n v. EPA*, D.C. Cir. No. 18-1115 (Nov. 12, 2019) (judicial review of small refinery exemption policy unavailable absent final agency action applying policy).

Further, Producers United's challenge is an untimely attack on EPA's longstanding RFS framework rules. *See* 40 C.F.R. § 80.1441(e)(2) (providing that a

small refinery may petition for an exemption "at any time"). EPA did not reopen its longstanding policy to judicial review. *Supra* pp.40–41 (reopening doctrine). EPA did not solicit comment on whether it had authority to grant "retroactive" exemptions or "unretire" RINs. To the contrary, EPA explained that any comments on such issues were beyond the scope of the rulemaking. *See* RTC at 183–85, JA____–__. Indeed, the Proposed Rule stated that it "would not change the compliance flexibilities currently offered to small entities under the RFS program (including the small refinery hardship provisions we continue to implement)." 2019 Proposed Rule, 83 Fed. Reg. 32,024, 32,059 (July 10, 2018); *see AFPM*, 937 F.3d at 585–86 (exclusionary language left no doubt that EPA had not reopened an issue). Nor did EPA reopen the issue by expressing concern about RIN market manipulation and soliciting comment on a handful of "specific potential regulatory changes" (none of which was changing its approach to retroactive exemptions). 2019 Proposed Rule at 32,027.

Producers United is simply wrong in casting the small refinery policies they challenge as "key considerations" underlying the 2019 Rule. Biofuels Br. at 30. EPA's task in the 2019 Rule was to set the annual volume standards, not to broadly revisit every aspect of the RFS program that relates to those standards. And EPA's exemption of small refineries occurs through separate agency actions, pursuant to a different statutory subsection. *Compare* 42 U.S.C. § 7545(o)(3)(B)(ii), *with id.* § 7545(o)(9)(B).

Producers United's reliance on *API* is also misplaced. Biofuels Br. at 24. In that case, API challenged EPA's application of its methodology for projecting cellulosic biofuel volumes. *API*, 706 F.3d at 477. The Court held that this challenge was timely, even though EPA had applied this method in a past rule, because "the petitioner attacks a methodology used for *prediction*, which can look more arbitrary the longer it is applied" if the methodology proved to be unsuccessful "in the face of experience." *Id.* Notably, the statute requires EPA to project cellulosic biofuel volume on a yearly basis. *See id.* (citing 42 U.S.C. § 7545(o)(7)(D)(i)).

Here, by contrast, Producers United is challenging a regulation that EPA did not apply or consider *at all* (and, of course, there is no statutory requirement mandating that EPA do so in its annual rules). Moreover, Producers United is not challenging a "methodology used for *prediction*" but rather is attacking EPA's long-settled and consistent statutory and regulatory construction of 42 U.S.C. § 7545(o)(9)(B) and 40 C.F.R. § 80.1441.

As a result, Producers United's challenge is untimely. In fact, collateral estoppel forecloses Producers United from arguing to the contrary. Collateral estoppel "bars successive litigation of an issue of fact or law actually litigated and resolved that was essential to the prior judgment, even if the issue recurs in the context of a different claim." *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015). This includes relitigation of threshold jurisdictional issues. *Id.*; *see also Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 n.9 (1982);

Durfee v. Duke, 375 U.S. 106, 111–14 (1963). The Court in *Producers United* held that Producers United's challenge to EPA's practice of granting "retroactive" small refinery exemptions was untimely. 778 F. App'x at 4–6. Producers United is advancing the exact same challenge here, but has thinly disguised it as a challenge to the 2019 Rule. Once that disguise falls away, Producers United's challenge is revealed as a second bite at the apple on an issue it has already litigated and lost.

In any event, as Producers United acknowledges, *see* Biofuels Br. at 30–31, it is already pursuing another avenue of relief. On July 31, 2018, Producers United submitted an administrative petition arguing that EPA should revise its approach to the issues it raises here. A decision on that petition could potentially be subject to judicial review. *See Alon*, 936 F.3d at 646. But Producers United is wrong that EPA denied that petition as part of the 2019 Rule. Biofuels Br. at 1, 31–32. EPA did not act on that petition in the 2019 Rule, and the petition remains pending. *See* RTC at 183–85, JA____–__ (finding that these issues are beyond the scope of the 2019 Rule). And EPA was not required to address the petition in the 2019 Rule, since EPA does not need to address every issue tangentially related to the matters before it in the same rulemaking. *See Alon*, 936 F.3d at 659; *Nat'l Mining Ass'n.*, 116 F.3d at 549.

III. EPA Reasonably Determined the Cellulosic Biofuel Volume.

A. The Court Should Not Consider Biofuels Petitioners' Extra-Record Evidence.

Biofuels Petitioners attempt to bolster their brief with 94 pages of extra-record declarations. They are purportedly in support of their two-paragraph standing argument.[40] Biofuels Br. at DEC1–94. But Petitioners do not confine their reliance on these declarations (all of which postdate the 2019 Rule) to the issue of standing. *See id.* at 32–33, 35, 37. Moreover, certain unsupported statements in their merits argument track these "standing" declarations almost verbatim. *Compare, e.g.*, *id.* at 37, *with id.* at DEC20 ¶ 35.

Judicial review of the 2019 Rule is limited to the administrative record. *Fla. Power & Light Co.*, 470 U.S. at 743–44; *Camp v. Pitts*, 411 U.S. 138, 142 (1973); 42 U.S.C. § 7607(d)(7)(A). EPA's certification of the record is entitled to a presumption of regularity and good faith. *Citizens to Pres. Overton Park Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Petitioners have not moved to supplement the record or otherwise challenged EPA's certified index. The Court should not consider extra-record evidence in these declarations on the merits, including as to any unsupported attorney argument that relies on them *sub silentio*.

[40] EPA does not dispute Biofuels Petitioners' standing in this case.

B. EPA Reasonably Projected the 2019 Cellulosic Biofuel Volume Without Including Renewable Electricity.

By misleadingly omitting discussion of a key regulatory step necessary for renewable electricity to generate RINs, RFS Power leaves the Court with the mistaken impression that EPA inexplicably ignored "qualified" electricity fuel in projecting the cellulosic biofuel volume. *See* Biofuels Br. at 32–33. The reality is far different. At the time the 2019 Rule was finalized, there were no facilities approved to generate RINs from renewable electricity ("eRINs"). RTC at 37, JA____. RFS Power is thus incorrect in claiming its members produce "significant volumes of qualified electricity fuel." Biofuels Br. at 33. *No* volumes of qualified renewable electricity have ever been produced under the RFS program. And EPA found that none were likely to be produced in 2019. Thus, EPA did not include renewable electricity in its projection of 2019 cellulosic biofuel production.

Congress required EPA to annually project the volume of cellulosic biofuel production for the following year. 42 U.S.C. § 7545(o)(7)(D)(i). In making this projection, EPA must take a "neutral aim at accuracy." *API*, 706 F.3d at 476; *id.* at 479 (CAA "call[s] for a prediction of what will *actually* happen"). To comply with that mandate, EPA may not project volumes based on a potential source of RINs that is unlikely to be realized. That would be an impermissible "tilt . . . toward promoting growth in the cellulosic biofuel industry." *Id.* at 479. That would also undermine obligated parties' abilities to comply with the RFS standards. *See id.* at 479–80.

EPA found that no eRINs were likely to be generated in 2019. In 2014, EPA added "a new cellulosic biofuel pathway for renewable electricity (used in electric vehicles)." 79 Fed. Reg. 42,128, 42,128 (July 18, 2014); *see also* 40 C.F.R. § 80.1426(f). Approval of a pathway, however, is not the final step for the generation of eRINs. To actually generate eRINs, a facility must meet the applicable requirements set forth in 40 C.F.R. § 80.1426. *See* 40 C.F.R. § 80.1426(a), (f)(10)(i), (f)(11)(i). To demonstrate that a facility meets the applicable requirements, it must register with EPA, which will review and—if appropriate—approve the registration. *See* 40 C.F.R. § 80.1450(b); *see also id.* § 80.1450(b)(1)(v)(D).

Due to significant outstanding technical and regulatory issues, no facilities have been approved to generate eRINs. In a 2016 notice, EPA discussed those technical and regulatory issues at length. *See* 81 Fed. Reg. 80,828, 80,890–900 (Nov. 16, 2016).[41] EPA explained that it had received a "number of registration requests . . . [that] vary considerably in their approach," including proposed approaches that "conflict with one another," creating an "untenable environment for the approval of any single registration request." *Id.* at 80,890–91. These conflicting approaches raised concerns as to how to avoid "double-counting of RINs for the same quantity of electricity," *i.e.*, ensuring that a single unit of fuel does not generate multiple eRINs. *Id.* at 80,891; *see*

[41] EPA had anticipated some of these difficulties even at the time it added the renewable electricity pathway in 2014. *See* 79 Fed. Reg. 42,143–45.

also 40 C.F.R. § 80.1426(f)(11)(i)(F). EPA therefore sought comment on several potential RIN generation structures for renewable electricity. 81 Fed. Reg. at 80,891.

Another set of significant technical issues was determining the "equivalence value" of eRINs. *See* 81 Fed. Reg. at 80,896–900. Briefly, not all renewable fuels are created equal (particularly in terms of their energy content), a factor EPA accounts for by assigning them different "equivalence values." *See id.* at 80,896. Equivalence values for renewable electricity are particularly complicated. *Id.* at 80,896–900. Accordingly, EPA broadly solicited comment on systematic approaches to these issues. *Id.* at 80,896–900. EPA did so without proposing any approach to resolving these issues, but rather with the intent of issuing a subsequent proposal. *Id.* at 80,900.[42]

EPA has not yet resolved these issues. As a result, at the time the 2019 Rule was signed, there were no facilities with approved registrations to generate eRINs, and EPA did not anticipate that any such facilities would be registered in 2019. RTC at 36–37, JA____–__ (noting resource constraints and competing priorities in resolving such requests); *id.* at 56, JA____. EPA therefore reasonably did not include in its projection of cellulosic biofuel volumes production from such unregistered facilities. *Id.* Approval of facility registrations is not "a mere formality," *id.*; rather, it is a

[42] The 2016 notice was not an exhaustive list of the issues associated with eRIN generation.

significant mechanism by which EPA ensures that RINs are being generated in conformity with the RFS statute and regulations, *see supra* pp.74–75.[43] Thus, under the statutory mandate to project the cellulosic biofuel volume with a neutral aim at accuracy, *API*, 706 F.3d at 479, EPA could not have included renewable electricity in its cellulosic biofuel projection. RTC at 37, JA____.

EPA's conclusion in the 2019 Rule was nothing new. As a general matter, EPA has consistently considered facility registration status when projecting cellulosic biofuel volumes and has generally confined its projection to facilities that are registered or reasonably likely to be registered to generate RINs in the applicable compliance year. *See, e.g.*, 2019 Rule at 63,711–14 & n.49. Following that approach, EPA has noted that in every annual rule since 2016 that due to outstanding technical issues precluding registration, EPA would not include renewable electricity in its projections of cellulosic biofuel volumes. *See* EPA-HQ-OAR-2018-0167-0095 at 550, 559, JA____, ____; EPA-HQ-OAR-2016-0004-3753 at 431–32, JA____, ____; EPA-HQ-OAR-2018-0167-1400 at 47, 69, JA____, ____.

EPA's rationale for not including renewable electricity in its cellulosic biofuel projection was thus consistent with its longstanding approach and more than

[43] Petitioner's claim that former Assistant Administrator Wehrum represented that no technical or regulatory issues existed, Biofuels Br. at 37, is extra-record. Regardless, EPA is unaware of any instance in which such a statement was made and, for the reasons discussed above, any such statement would have been incorrect.

adequately explained. Indeed, RFS Power's professed confusion as to EPA's reasoning, *see* Biofuels Br. at 34, 39, is nothing more than litigation posturing. Two of its members submitted extensive comments on this exact issue in response to the 2016 notice.[44] And on October 24, 2018, one of its members sent EPA a notice of intent to sue regarding EPA's failure to approve outstanding registration requests that acknowledged essentially *all* of the foregoing.[45] RFS Power is well aware of the relevant technical and regulatory issues.

Regardless, RFS Power's substantive critiques are baseless. The Court is "particularly deferential" to agencies' predictive judgments and requires only that "the agency acknowledge factual uncertainties and identify the considerations it found persuasive." *Rural Cellular*, 588 F.3d at 1105, 1108; *see also Alon*, 936 F.3d at 663. Here, EPA projected 2019 cellulosic biofuel volumes in light of complicated unresolved regulatory and technical issues. While acknowledging uncertainty, EPA reasonably predicted that no eRINs would be generated. RTC at 36–37, JA____–__; *see also API*, 706 F.3d at 476, 479. In making this prediction, EPA also reasonably considered its resource constraints with regard to acting on approvals of registration

[44] EPA-HQ-OAR-2016-0041-0230 (Biomass Power Association); EPA-HQ-OAR-2016-0041-0264 (American Biogas Council).

[45] https://www.epa.gov/sites/production/files/2018-10/documents/bpa_noi_10242018.pdf

applications,[46] which affect the status of facility registrations and therefore the available volume of cellulosic biofuel.

Although RFS Power's brief is obscure on this point, its declarations concede that because EPA has "failed to approve or disapprove" any eRIN "facility registrations," its members have not generated "any RIN credits" derived from renewable electricity. Cleaves Decl. ¶¶ 47–48; Yeransian Decl. ¶¶ 10–12. To the extent that RFS Power's actual complaint is that EPA improperly failed to resolve registration applications allowing these facilities to generate eRINs, judicial review of the 2019 Rule is the wrong forum. This Court lacks jurisdiction over any claim concerning EPA's delay in processing registration applications, as district courts have exclusive jurisdiction over such claims. 42 U.S.C. § 7604(a). And in any event, nothing in the statute requires EPA to resolve these registration applications in its annual rule. *Id.* § 7545(o)(3)(B)(ii). Indeed, even if EPA were to revise the cellulosic volume higher, that would still not resolve their members' registration applications or allow them to generate any eRINs.[47]

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[46] EPA has broad discretion to manage its own priorities and choose how best to use its limited resources. *See EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004); *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991).

[47] In addition to disposing of RFS Power's challenge to EPA's calculation of the cellulosic biofuel volume, the above facts also negate its challenge to EPA's exercise of the discretionary aspect of the cellulosic waiver. Biofuels Br. at 40–41.

Finally, RFS Power's proposed remedy is inappropriate. Despite baldly invoking mandamus, Biofuels Br. at 41–42, RFS Power offers no explanation for why the Court should not follow its typical practice of remanding to the agency. *See N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997) (mandamus is an extraordinary remedy and a party seeking mandamus must show its right to the writ is clear and indisputable); *see also Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."). By failing to brief the issue, RFS Power has waived the opportunity to show that it meets the stringent requirements for mandamus relief. Moreover, the requested remedy of requiring obligated parties to immediately comply with the full statutory amount of 8.5 billion gallons of cellulosic biofuel (only to later have this number vastly reduced)[48] is facially unreasonable, practically infeasible, and would cause havoc in the regulated community. There is no reason to displace the proper role of EPA as the expert administrative agency in assessing the proper path forward and, if appropriate, its role in balancing the relevant considerations in imposing retroactive RFS obligations. *See, e.g.*, *ACE*, 864 F.3d at 721.

[48] Even RFS Power's self-serving extra-record declaration suggests a volume of no more than two billion gallons. Biofuels Br. at 34–35.

IV. Small Retailers Coalition's Challenge to the 2019 Rule Is Meritless.

The Court should reject Small Retailers Coalition's ("Coalition") argument that EPA improperly failed to conduct a Regulatory Flexibility Act analysis as to small retailers. Refiners Br. at 47–49.

First, the Coalition's arguments are not properly before the Court because they were not "raised with reasonable specificity during the period for public comment." 42 U.S.C. § 7607(d)(7)(B); *see supra* pp.47–48. No entity commented that EPA was required to conduct a Regulatory Flexibility Act analysis as to small retailers. The Coalition itself submitted no comments at all.

Second, agencies need conduct Regulatory Flexibility Act analyses only with regard to small entities that are directly "*subject to the proposed regulation*—that is, those 'small entities *to which the proposed rule will apply*.'" *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 867–69 (D.C. Cir. 2001); *see also Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998). The Coalition does not and cannot identify any provision of the 2019 Rule that regulates small fuel retailers. The only entities obligated to comply with annual RFS standards are refiners and importers. *See supra* p.8; 42 U.S.C. § 7545(o)(3)(B)(ii)(I) (excluding "distributors" from the list of entities to whom "[t]he renewable fuel obligation determined for a calendar year . . . shall be applicable"); *Alon*, 936 F.3d at 655–56; *ACE*, 864 F.3d at 704.

Third, EPA certified that the 2019 Rule will not "have a significant economic impact on a substantial number of small entities," and therefore EPA was not

required to conduct either an initial or final regulatory flexibility analysis. 5 U.S.C. § 605(b). Although EPA focused on small refiners in its discussion in the proposed and final rules (because they, unlike small retailers, *are* directly regulated by the rule), it broadly made this certification as to all "small entities." 2019 Rule at 63,742; 2019 Proposed Rule at 32,058. EPA also observed that it had, in its denial of requests to change the point of obligation, found that the RFS program does not negatively affect small retailers. *See* RTC at 15 & n. 19, 127, JA____, ____. This denial is part of the record for the 2019 Rule and its conclusions are well supported, *see* Certified Index at 4; Point of Obligation Denial at 31–32, JA____–__, such that the certification is also supported as to small retailers.

V. The Court Lacks Jurisdiction over Environmental Petitioners' Challenge, Which Also Is Meritless.

A. Environmental Petitioners Failed to Establish Standing to Challenge the 2019 Rule.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation omitted). Standing is an "essential and unchanging part of the case-or-controversy" and requires a petitioner to show an actual and imminent, concrete and particularized injury that is fairly traceable to the challenged agency action and not the result of the "'independent action of some third party not before the court.'" *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560 (1992) (citation omitted). A petitioner also must

establish that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." *Id.* at 561 (citation omitted). "An association 'has standing to sue . . .only if (1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit.'" *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013) (citation omitted).

Environmental Petitioners argue they have standing because their members would have standing. Envtl. Br. at 21 (citing member declarations).[49] The members contend that they use vast geographic areas—the Mississippi River, the Gulf of Mexico, entire states, and ecosystems—where farmers are diminishing their use and enjoyment of the areas by planting crops and degrading the land.[50] EPA neither regulates Environmental Petitioners' members nor farmers through the 2019 Rule.

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[49] Two declarants are NWF and Sierra Club employees who assert injures allegedly suffered by unidentified members. Envtl. Br. at 21 (citing Exhibit 1, Sibbing Decl. ¶ 7, and Exhibit 4, Linhardt Decl. ¶¶ 9–10). The Supreme Court has held, however, that standing cannot hinge on an organization's assertion that unidentified members are harmed. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497–99 (2009).

[50] Mr. Helmers, for example, asserts harm from nutrient and sediment pollution in the Mississippi River and habitat loss and pollution in "nearby ecosystems." Envtl. Ex. 2 ¶¶ 6-10, 12. Mr. Viles and Mr. Fontenot assert interests in species and habitats in the Mississippi River drainage, the Gulf of Mexico, and other broad geographic areas and opine that farmers are degrading these areas. Envtl. Ex. 3 ¶¶ 11–17; Envtl. Ex. 5 ¶¶ 14, 18, 20-22. Ms. Giessel and Ms. Slama likewise assert that they are harmed because croplands dominate landscapes and degrade the environment throughout the Midwest. Envtl. Ex. 6 ¶¶ 7–18, 20–23; Envtl. Ex. 7 ¶¶ 9–17.

Environmental Petitioners' standing thus depends on whether they have "adduce[d] facts showing" that unregulated farmers will respond to the 2019 Rule in specific ways that injure their members and that a favorable ruling will cause unregulated farmers to stop the allegedly injurious conduct. *Lujan*, 504 U.S. at 562.

In *AFPM*, this Court held that environmental groups established standing to challenge the prior 2018 Rule. *AFPM*, 937 F.3d at 593–95. The Court applied a relaxed procedural standing inquiry because the case involved a procedural omission—EPA's absence of any required ESA "effects" determination. *Id.* at 592. The Court then considered analyses on the past impacts of biofuel use on the environment in the Lark Declaration (EPA-HQ-OAR-2018-0167-1036, JA____) and EPA's Triennial Report (EPA-HQ-OAR-2018-0167-1334, JA____). *Id.* at 593–95. It concluded that these sources showed that *past* biofuel use was associated with environmental harms. *Id.* Because the 2018 Rule constituted the "next iteration" of prior RFS rules, the Court determined that Environmental Petitioners adequately demonstrated standing to challenge the 2018 Rule. *Id.* at 595.

This case is different. First, the relaxed procedural rights standing law applied by *AFPM* does not apply here. EPA expressly addressed its ESA obligations and no procedural omission thus exists. Second, recent evidence not reviewed in *AFPM* refutes Environmental Petitioners' inference that the 2019 Rule causes environmental harm. Third, even speculating that the 2019 Rule causes some environmental harm,

Environmental Petitioners fail to produce evidence that the 2019 Rule harms their members.

1. The Court's Inquiry Is Not Governed by a Relaxed Procedural Standing Inquiry.

In *AFPM*, the Court applied a relaxed procedural standing inquiry because EPA failed to make a "no effect" determination under the ESA. 937 F.3d at 592; *see also Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 183-84, 188 (D.C. Cir. 2017) (applying a procedural standing inquiry where EPA issued no ESA determination). But this case does not involve the "omission of a procedural requirement." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009). *AFPM* held EPA must make a substantive determination under the ESA. *AFPM*, 937 F.3d at 598, and EPA did so here, *see* ESA Det., JA___. Environmental Petitioners, in turn, challenge that substantive determination. Envtl. Br. at 26–28.[51] The Court therefore should not relax the imminence or redressability requirements but, instead, apply the traditional Article III inquiry when evaluating Environmental Petitioners' standing.

[51] While Environmental Petitioners label the challenge as one addressing EPA's "failure to consult," this is no more than an "objection to an agency action . . . dressed up as an agency's failure to act." *Pub. Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988). *Compare* Envtl. Br. at 23 (arguing EPA "failed to consult" because the "no effect" determination "is contrary to the evidence before the Agency," among other reasons), *with id.* at 26 (arguing the "no effect" determination is "contrary to the evidence before the Agency").

2. Environmental Petitioners Fail to Establish that the 2019 Rule Causes Harm to the Environment.

Environmental Petitioners must connect the 2019 Rule to the specific environmental harms asserted by their members. This first requires them to provide evidence that the 2019 Rule causes environmental harm. *Lujan,* 504 U.S. at 560. Environmental Petitioners rely on a very specific relationship to show the 2019 Rule causes environmental harm—that RFS rules increase demand for domestic biofuels produced from corn and soybeans, which leads unregulated farmers to plant more corn and soybeans to meet that demand, which leads to a "steady pattern of conversion of uncultivated land to biofuel feedstock crops such as corn and soy." Lark Decl. at 004, JA____; id. at 036, JA___; Envtl. Br. at 13 (positing that farmers are converting uncultivated lands to cropland "[t]o satisfy the growing demand for corn and soybeans" from RFS rules).[52] Environmental Petitioners base this relationship on the Lark Declaration and EPA's Triennial Report, which generally evaluate impacts of biofuels and agricultural activities before 2016. Envtl. Br. at 12–13; Lark Decl. at 005, 008-09, 024-25, JA___, __-__, __-__ (citing study of conversion based on data through 2012); *id.* at 100, 102, 105, 107, JA____, __, __, __ (updating data in a few cases through 2016); Triennial Report at 7-19, JA____-__

[52] Environmental Petitioners do not allege that biofuels produced from other feedstocks, such as canola oil or sugarcane ethanol, harm their members or the environment. We therefore do not address these biofuels or associated feedstocks.

(analyzing data generally through 2016). This is the same evidence reviewed by the *AFPM* Court. *AFPM*, 937 F.3d at 593–95.

Environmental Petitioners thus contend they have standing because of an unqualified rule of causation—RFS rules, like the 2019 Rule, *necessarily* lead to increased cultivation of corn and soybeans and thus environmental harm. But recent evidence not reviewed in *AFPM* proves that this is not the case. Evidence shows that recent RFS rules, like the 2019 Rule, are *not* associated with increased corn and soybean demand or cultivation in the United States. Three examples are instructive.

First, the implied conventional renewable fuel volume is the difference between the total renewable fuel and the advanced biofuel volumes. *See* 83 Fed. Reg. 63705 n.6. This volume increased from 14.5 billion gallons in 2016 to 15 billion gallons in 2017, and is satisfied mainly by corn ethanol, ESA Det. at 3, JA____; EPA-HQ-OAR-2018-0167, JA____.[53] Despite an RFS volume increase, farmers planted *fewer* acres of corn in 2017 (90,167,000 acres) than in 2016 (94,004,000 acres).[54]

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[53] The implied conventional renewable fuel volume was 14.5 billion gallons in 2016 and 15 billion gallons in 2017 through 2019. *See* 80 Fed. Reg. 77,420, 77,422 (Dec. 14, 2015); 81 Fed. Reg. 89,746, 89,747 (Dec. 12, 2016); 82 Fed. Reg. 58,486, 58,487-88 (Dec. 12, 2017); 83 Fed. Reg. 63,704, 63,705 (Dec. 11, 2018).

[54] United States Department of Agriculture (USDA), National Agricultural Statistics Service (NASS), National Statistics for Corn, https://perma.cc/2KYB-2UA2. The Court properly may consider official agricultural and market census data from the USDA and the Department of Energy in evaluating standing. *See Pharm. Research & Mfrs. of Am. v. United States Dep't of Health & Human Servs.*, 43 F. Supp. 3d 28, 33 (D.D.C. 2014) ("Courts in this jurisdiction have frequently taken judicial notice of

Second, the implied conventional renewable fuel volume remained static at 15 billion gallons between 2017 and 2019.[55] Yet farmers reduced the acreage planted to corn between 2017 and 2019, from 90,167,000 acres to 89,942,000 acres.[56] The lack of a definite cause-and-effect relationship also exists at local levels. Ms. Giessel claims that increased corn plantings in Kansas injures her interests. *See. e.g.*, Envtl. Ex. 6 ¶¶ 18–20. But, with no change to the implied conventional renewable fuel volumes from 2017 to 2019, farmers varied corn production; they reduced the acres planted to corn in Kansas by 50,000 acres from 2017 to 2018 but increased acres planted to corn by 950,000 acres from 2018 to 2019.[57]

The data does not support Environmental Petitioners' theory that recent RFS rules (rather than other factors) are causing increased demand for or cultivation of corn. *See* Figure 1.

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information posted on official public websites of government agencies" (citing *Cannon v. Dist. of Columbia,* 717 F.3d 200, 205 n. 2 (D.C. Cir. 2013)).

[55] *See* 81 Fed. Reg. 89,746, 89,747 (Dec. 12, 2016); 82 Fed. Reg. 58,486, 58,487-88 (Dec. 12, 2017); 83 Fed. Reg. 63,704, 63,705 (Dec. 11, 2018).

[56] *See* USDA, NASS, https://perma.cc/2KYB-2UA2.

[57] *See* USDA, NASS, https://perma.cc/R99F-AY8L.

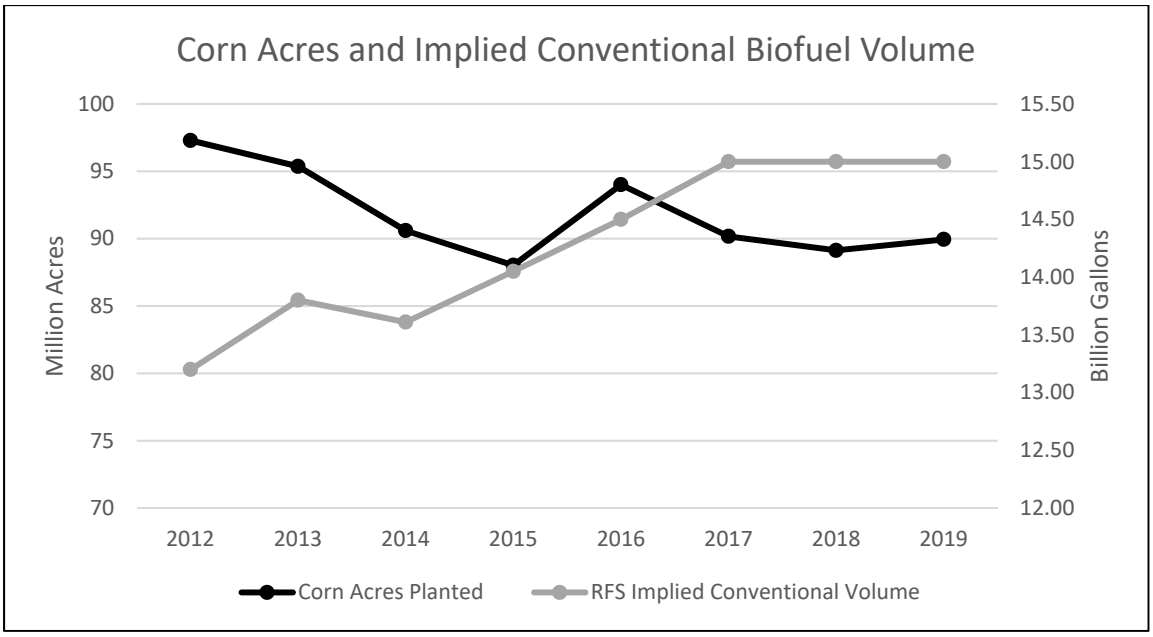

Figure 1. Annual implied conventional renewable fuel volumes and acres planted to corn in the United States from 2012 to 2019.[58]

Third, Environmental Petitioners' members assert harm from soybean production. *See, e.g.*, Envtl. Ex. 2 ¶¶ 4–5. Under the RFS, non-cellulosic advanced biofuel volumes are satisfied predominately by soybean oil, and these volumes increased from 3.4 to 4.5 billion gallons between 2016 and 2019.[59] Despite increasing volumes, unregulated farmers *decreased* the acres planted to soybeans by almost 7 million acres, from 83.453 million acres planted in 2016 to 76.457 million acres in

[58] Figure 1 graphs RFS annual implied conventional renewable fuel volumes from 2012 to 2019. S*ee* 77 Fed. Reg. 1320, (Jan. 9, 2012); 78 Fed. Reg. 49,794, 49,795 (Aug. 15, 2013); 80 Fed. Reg. at 77422; 81 Fed. Reg. at 89747; 82 Fed. Reg. at 58,487–88; 83 Fed. Reg. at 63705. The figure also graphs acres planted to corn for each year as reported by the USDA, https://perma.cc/2KYB-2UA2.

[59] *See* RTC at 158, JA____; 80 Fed. Reg. at 77,422; 83 Fed. Reg. at 63,705.

2019.[60] Similar disconnects occur at regional levels; farmers *decreased* soybeans plantings in Kansas, for example, by 550,000 acres between 2017 and 2019.[61]

These examples show that the specific relationship relied on by Environmental Petitioners—that RFS rules necessarily lead to increased demand for and cultivation of corn and soybeans—does not exist given recent evidence. *See, e.g.*, Envtl. Br. at 12-13 (discussing *past* increases of corn and soybean production, without addressing recent trends or data).[62] In this regard, *Arpaio v. Obam*a, 797 F.3d 11 (D.C. Cir. 2015), is instructive. The Court there considered a similar argument that a current immigration policy has the same effects as past policies. The Court rejected this argument, explaining that the reasoning "suffers from the logical fallacy *post hoc ergo propter hoc* (after this, therefore because of this)." *Id.* at 21. When "myriad economic, social, and political" factors and uncertainties exist, the Court required more than assumptions or logic; it demanded evidence connecting the challenged action with harm. *Id.* at 21–22. Farmers plant crops for many reasons, and Environmental Petitioners rely on unfounded assumptions, not evidence, to connect the 2019 Rule to crop production decisions in the United States.

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[60] USDA, NASS, https://perma.cc/B7S5-U4A6.

[61] *See* USDA, NASS, https://perma.cc/5WAK-TBSX.

[62] Environmental Petitioners argue in passing that "one study showed" certain amounts of historical land conversion near biofuel refineries. Envtl. Br. at 14 n.4. Even this claim assumes associations between the 2019 Rule and increased ethanol production and crop cultivation, associations that are refuted by recent data.

3. Even Assuming the 2019 Rule Causes Some Environmental Harm, Environmental Petitioners Fail to Show that the Specific Harms Asserted by the Members Are the Same Harms Caused by the 2019 Rule.

Environmental Petitioners cannot show standing for another foundational reason. In *Summers*, the Supreme Court held that "generalized harm to the . . . environment" will not establish standing. *Summers*, 555 U.S. at 494. The members instead must show that they are "directly affected" by the challenged rule—that they use the *specific* areas or species affected by the 2019 Rule and "not an area [or species] roughly 'in the vicinity' of it." *Lujan*, 504 U.S. at 563, 565–66 (citations omitted). It therefore does not suffice to claim effects over "unspecified portions of an immense tract of territory, on some portions of which [harm] has occurred or probably will occur." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). Even speculating that the 2019 Rule increases crop production or farmland conversion in the United States, Environmental Petitioners produce no evidence that these assumed effects occur in the specific areas used by the allegedly affected members.

For example, Environmental Petitioners rely on Dr. Lark's identification of "potential" farmland conversion sites in areas used by certain declarants. *See, e.g.*, Lark Decl. at 100, JA____ (Kansas). But they present no evidence that a farmer converted a single parcel in Kansas because of the 2019 Rule. Nor is it axiomatic that the 2019 Rule causes some perceptible harm to any member's interest in any ESA-listed species or critical habitat in Kansas. Dr. Lark generalizes that, across the United States, only

27% of uncultivated lands that unregulated farmers converted to croplands were planted to corn. Lark Decl. at 005-06, JA___-__. This means most of the lands are converted for other reasons. Even when farmers plant corn on converted land, most of this corn is grown for non-biofuel uses.[63] Even for corn that is ultimately used for biofuel production, Environmental Petitioners present no evidence that such biofuels are ultimately used for RFS compliance (as opposed to being exported).[64] And assuming some corn grown on some undisclosed plot of converted land was used to produce biofuels satisfying the RFS volumes, Environmental Petitioners present no evidence that the unregulated farmer would not have converted the specific parcel or planted corn but for the 2019 Rule (much less that the farmer would stop growing corn or converting land with a favorable decision).[65]

For these reasons, Dr. Lark admits the critical "uncertainty regarding the exact location and magnitude of land conversion and impacts that are directly attributable

[63] *See* U.S. Department of Energy (DOE), https://perma.cc/4TUE-7GSU.

[64] *See* DOE, https://perma.cc/RD9W-7N8G (trends of total ethanol fuel production, consumption, and trade from 2000 to 2018).

[65] Dr. Lark's discussion of Conservation Reserve Program (CRP) lands is illustrative. He argues farmers are taking lands out of the CRP program to grow crops because of annual RFS rules. Lark Decl. ¶ 12, p.062; Envtl. Ex. 7 ¶ 8. But CRP acreage has declined consistent with Congress' decision to lower annual CRP caps, which reflects other causes for CRP loss. *See* 16 U.S.C. § 3831(d)(1) (2012 ed. & supp. V) (CRP caps from 2014-18); *see also* https://perma.cc/22MH-ZELQ. It is sheer speculation to assume an RFS rule (as opposed to lowered CRP caps or myriad other factors) caused a farmer to cultivate a CRP parcel.

to biofuel production and the RFS." Lark Decl. at 036, JA____; *see also id.* at 047, JA____ ("[S]everal counties within a given state might show substantial cropland expansion while another group of counties exhibit countervailing losses."). Indeed, based on prior data and relationships that no longer exist, Dr. Lark could only venture a guess on "potential impacts" to species and that past RFS rules "may potentially have detrimental impacts" on species. *Id.* at 003-05, JA____-__; *see also id.* at 011-12, 013, 018, 022, JA____-__, __, __, __. These admissions confirm that Environmental Petitioners' standing rests on probabilities—that the 2019 Rule theoretically could cause harm in specific areas used by the members. But it is not enough to show a mere "chance" or "statistical probability" of injury, *Summers*, 555 U.S. at 495, 497, or even an "objectively reasonable likelihood" of harm, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). Environmental Petitioners must produce "substantial evidence of a causal relationship between the government policy and the third party conduct, *leaving little doubt* as to causation and the likelihood of redress." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004) (emphasis added). Given the generalized evidence and conflicting data, they have not met this standard.

B. EPA Complied with the ESA when Issuing the 2019 Rule.

The ESA requires EPA to ensure that its actions are not likely to jeopardize listed species or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). To aid the agency's compliance with this mandate, a consultation with the expert wildlife agencies is required whenever EPA determines that its action "may affect"

listed species or critical habitat. 50 C.F.R. § 402.14(a).[66] If EPA determines the action has "no effect" on listed species or critical habitat, the agency has satisfied its ESA obligations and no consultation is required. *Ctr. for Biological Diversity*, 563 F.3d at 475.

In *AFPM*, the Court held that EPA must address its ESA obligations when issuing annual RFS rules. 937 F.3d at 597–98. In doing so, the Court rejected Environmental Petitioners' arguments that the "evidence conclusively establishes that the 2018 Rule 'may affect' listed species or critical habitat." *Id.* at 598. Instead, EPA must "develop the record and decide the issue in the first instance on remand." *Id.* EPA did just that in the 2019 Rule. It considered the relevant evidence and data on the likely effects of the 2019 Rule on ESA-listed species and critical habitat, and found none. ESA Det. at 1. Environmental Petitioners disagree, arguing that EPA "ignored" evidence and made "implausible" findings. Envtl. Br. at 22–28. But they do not grapple with EPA's actual determination, much less show that EPA acted arbitrarily and capriciously. 42 U.S.C. § 7607(d)(1)(E), (d)(9)(A), (C).

[66] The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) administer the ESA, and they recently jointly promulgated revisions to the regulations implementing Section 7(a)(2). 84 Fed. Reg. 44,976 (Aug. 27, 2019). "The revisions to the regulations in this rule are prospective," *id.* at 44,976, and therefore do not apply to EPA's determination. In any event, FWS and NMFS did not alter the agencies' longstanding interpretation that consultation is not required for actions with no effects on listed species and critical habitat. *See id.* at 44,996.

1. EPA's "No Effect" Determination is Well-Reasoned.

Because the 2019 Rule regulates only the use of renewable fuels, it does not directly affect ESA-listed species or designated critical habitat. ESA Det. at 2, JA____. EPA thus considered whether the 2019 Rule has indirect effects by inducing feedstock cultivation in ways that could affect listed species or critical habitats. *Id.*; *see* 50 C.F.R. § 402.02 (2018) (indirect effects are those "that are caused by the proposed action and are later in time, but still are reasonably certain to occur"). The two main feedstocks used to produce biofuels are corn (corn ethanol) and soybeans (biodiesel), and EPA analyzed whether the 2019 Rule volumes lead to increased corn and soybean cultivation in the United States.[67]

For corn ethanol, obligated parties rely on this biofuel to satisfy a large portion of the implied conventional renewable fuel volume. ESA Det. at 3, JA____. EPA analyzed the available evidence to determine whether the 2019 Rule volumes induce increased production of corn ethanol or cultivation of corn crops. *Id.*

In the United States, corn ethanol is blended into nearly every gallon of gasoline to produce gasoline with 10% ethanol content (E10). ESA Det. at 4, JA____; 83 Fed. Reg. at 63731. This practice will continue regardless of the RFS program. Corn ethanol is cheaper than gasoline to produce, making E10 economical.

[67] As noted, EPA also considered whether other biofuels impact crop cultivation and land use decisions, ESA Det. at 2, 11–12, JA____-__, findings Environmental Petitioners do not contest.

In addition, the gasoline industry has transformed its capital infrastructure to rely on ethanol to meet fuel octane requirements; reversing this infrastructure "would require much more than a reduction in the 2019 RFS standards" and "take years and likely billions of dollars to implement." ESA Det. at 4, JA____. With or without the RFS, the industry will continue to produce E10 in substantial quantities. *Id.* (the industry is expected to produce 14.3 billion gallons of corn ethanol for E10 in 2019). Moreover, even as domestic demand for corn ethanol has remained relatively flat, corn ethanol *production* has increased in response to a growing market for corn ethanol exports. *Id.* at 5-6 & Fig. 1, JA____-__ (domestic production reaching 15.8 billion gallons, where the difference between that number and domestic E10 use is primarily attributable to foreign exports). Given the strong momentum for continued use of E10 and the increasing market for corn ethanol exports, EPA rationally concluded that the 2019 Rule is not driving corn ethanol production or corn cultivation (much less farmers' decisions on when, where, and how to plant crops in 2019). *Id.* at 6–7, JA____-__.

Unlike corn ethanol, the 2019 Rule causes increased production of biodiesel derived from oilseeds (soybeans, canola) because they are more expensive to produce than petroleum diesel. ESA Det. at 8, JA____. But the 2019 Rule does not influence the quantity of oilseeds produced, for two main reasons.

First, "production of oilseed crops, such as soybeans and canola, are driven by demand for high protein animal feed and crop rotation, rather than demand for vegetable oils as biodiesel and renewable diesel feedstocks." ESA Det. at 11, JA____;

id. at 8–11, JA____-__. As domestic and international markets for meat have increased, so too has demand for high protein animal feed (soy and canola meal). *Id.* at 8 & Fig. 2, JA____-__. And farmers grow oilseeds as a rotational crop (for instance, planting soybeans to replace nitrogen used by corn). *Id.* These factors drive oilseed demand and production, not the 2019 Rule. Indeed, while reducing RFS volumes may reduce the market price for vegetable oils, market prices have not driven oilseed production in recent years. Soybean oil prices, for example, have fallen since 2013, but soybean production increased through 2017 to meet the increasing demand for feed and crop rotation. *Id.* at 8–9 & Fig. 3, JA____-__ (explaining that, if vegetable oil prices were to fall by eliminating the 2019 Rule volumes, prices for primary oilseed products (soy meal) are likely to increase and continue to support existing demand for oilseed production). The evidence thus shows that biodiesel derived from oilseeds is a by-product or co-product of crops grown for other purposes. *Id.*; 83 Fed. Reg. at 63727 & n.105.[68]

Second, factual conditions in 2019 reinforce the lack of a connection between the 2019 Rule and oilseed crop cultivation. In 2019, the United States was projected to have a substantial surplus of soybeans for reasons unrelated to the RFS. Domestic

[68] Soybean farmers and independent scientists agree. EPA-HQ-OAR-2018-0167-0389, JA___ (South Dakota Soybean Association: "[S]oybean production is driven by global protein demand," which "has resulted in steadily increased soybean production in the U.S. over the past thirty years"); EPA-HQ-OAR-2018-0167-0389, JA____ (Union of Concerned Scientists) (same).

production of oilseed crops was projected to be five to nine percent higher in fiscal year 2019 than prior years. ESA Det. at 10, JA____. At the same time, demand for soybeans was expected to decrease substantially based on Chinese tariffs. *Id.*; 83 Fed. Reg. at 63,727. Because of these market conditions and projected surplus of soybeans, EPA rationally found that the 2019 Rule would not be expected to stimulate increased or altered cultivation of oilseed crops.

EPA possesses substantial expertise in administering the RFS program and evaluating the response of fuels markets to annual RFS rules, and EPA's predictive judgments are entitled to substantial deference. *See Alon*, 936 F.3d at 663. That deference is appropriate here, where EPA considered the relevant factors and rationally determined that the 2019 Rule would not be expected to cause increased crop cultivation or environmental harm in the United States. ESA Det. at 10–11, JA____-__. *See Envtl. Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (arbitrary and capricious "standard mandates judicial affirmance if a rational basis for the agency's decision is presented") (citation omitted).

2. Environmental Petitioners Do Not Meaningfully Address EPA's "No Effect" Determination.

"A party seeking to have a court declare an agency action to be arbitrary and capricious carries a heavy burden indeed." *Vill. of Bensenville v. FAA*, 457 F.3d 52, 70–71 (D.C. Cir. 2006) (citation omitted). Despite this heavy burden, Environmental Petitioners choose not to meaningfully address the substance of EPA's determination.

They argue EPA's determination boils down to a simple finding that the 2019 Rule "does not change the volumes much," Envtl. Br. at 24, and that EPA merely determined that effects to species or habitats "could not be attributed with reasonable certainty to the 2019 Rule standards." *Id.* at 25 (quoting ESA Det. at 2, JA____). These arguments mischaracterize EPA's determination. Based on its expert analysis of the fuels and agricultural markets, EPA *first* concluded that the evidence failed to establish a connection between the 2019 Rule and domestic corn and soybean crop cultivation. While EPA *also* addressed remaining uncertain links between crop cultivation and harm to specific listed species, ESA Det. at 6–7, 11, JA_____-__, __, that secondary analysis simply does not constitute the whole of EPA's determination.

In any event, EPA's secondary analysis adheres to the ESA and supports the agency's broader determination. The ESA regulations define an "effect" as including indirect effects, which are those effects "that are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02 (2018); *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 178 & n.2 (D.C. Cir. 2017) (regulatory definition of "effects of the action" governs an agency's ESA effects determination). EPA thus considers elements of foreseeability and certainty when identifying the effects of an action and excludes those effects that are too contingent or speculative (and thus not "reasonably certain to occur"). *Id.*; *cf.* 51 Fed. Reg. 19,926, 19,933 (June

3, 1986) (preamble to 1986 ESA regulations, explaining that there must be "more than a mere possibility" that an effect will occur to be "reasonably certain to occur").[69]

EPA adhered to this law by examining the factors required to connect the 2019 Rule to an effect on ESA-listed species or critical habitat, *assuming* the 2019 Rule influences crop production. ESA Det. at 6–7, JA____-__. Those factors range from the independent choices of unregulated farmers to the lack of evidence connecting specific parcels of cropland to biofuels used to satisfy RFS volumes. *Id.* Given the many variables and independent actors involved, EPA rationally determined that any impact on ESA-listed species would be too remote and speculative to constitute an effect of the 2019 Rule. *Id.*

Environmental Petitioners' remaining argument asserts that EPA's determination conflicts with retrospective analyses of past RFS rules in the Lark

[69] Environmental Petitioners misconstrue the preamble language in arguing that "[a]ny possible effect" triggers consultation. Envtl. Br. at 22 (citing 51 Fed. Reg. 19,926, 19,949–50). The preamble language addressed the *types* of effects that trigger consultation—those that are "beneficial, benign, adverse, or of an undetermined character." 51 Fed. Reg. at 19,949–50. The preamble did not change the regulatory definition of "indirect effects" to include those effects that are *not* "reasonably certain to occur." 50 C.F.R. § 402.02 (2018) (defining "indirect effects"). Environmental Petitioners similarly err in arguing that an agency must consult if there is "any chance" that its action may affect a listed species, as the Ninth Circuit's summary cannot eliminate the regulatory limitation that an effect must be reasonably certain to occur. Envtl. Br. at 22 (quoting *Karuk Tribe of Cal. v. U.S. Forest Serv.* 681 F.3d 1006, 1027 (9th Cir. 2012)); *but see* 50 C.F.R. § 402.02 (2018) ("effects of the action" includes those that are "reasonably certain to occur."); c*f. Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666–67 (2007) (controlling deference owed to the ESA regulations when construing EPA's consultation obligations).

Declaration and EPA's Triennial Report, as well as the Court's *AFPM* decision. *See, e.g.*, Envtl. Br. at 23–24. They are wrong.

Beginning with the Triennial Report, EPA explicitly found that the Triennial Report aligned with EPA's "no effect" determination. ESA Det. at 15–16, JA____-__. The Report explored *general* associations between biofuel production (much of which has no relation to RFS rules), crop cultivation, and environmental impacts. Triennial Report at 53–54, JA___-__. Although the Report also inferred some land-use impacts related to biofuel production were linked to the RFS program, it did not causally link specific RFS annual rules with land-use impacts. The Report instead emphasized the difficulties in making such a causal attribution. *Id.* at ix, 53-54, JA____, __-__. And, critically, the Report did not attempt an analysis of impacts caused by the later released 2019 Rule. ESA Det. at 15-16, JA___-__.

The Lark Declaration had a similar focus as the Triennial Report, which addressed much of the Lark Declaration's underlying analyses. *See* Triennial Report at 33-40, JA____-__. And *AFPM* considered the Lark Declaration and the Triennial Report, not EPA's 2019 "no effect" determination. 937 F.3d at 593–94. In this regard, *AFPM* could not have rejected "the same evidence" EPA addressed in 2019, Envtl. Br. at 27, as the "no effect" determination was not before that Court and the data EPA relied on (*e.g.*, fiscal year 2019 oilseed production) did not exist at the time of the 2018 Rule.

Environmental Petitioners thus seek to toss aside EPA's determination in favor of prior analyses that addressed different issues. The Court should reject this sleight of hand, as the Ninth Circuit did in analogous circumstances in *Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906 (9th Cir. 2018). There, the U.S. Army Corps of Engineers (Corps) issued a "no effect" determination on a permit issued for a development project. The Corps analyzed specific evidence on whether project discharges containing dissolved copper were likely to reach a river and impact ESA-listed steelhead, a salmonid fish. In response, the plaintiffs relied on a NMFS technical memorandum addressing the effects of dissolved copper on salmonids. *Id.* at 923–24. The Ninth Circuit rejected this challenge because the technical memorandum did not address the project at issue and "the Corps could reasonably conclude that the NMFS Memorandum does not contain the best scientific data available for the Project." *Id.* at 924; *see also Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1446, 1448-49 (9th Cir. 1996) (upholding reasoned "no effect" determination despite tension with earlier-issued FWS policy on the listed species). So too here. EPA rationally relied on the most relevant and up-to-date data in analyzing the 2019 Rule, and EPA's analysis is not undermined by the Triennial Report and Lark Declaration, both of which evaluated materially different issues.

C. EPA Reasonably Declined to Exercise the Severe Environmental Harm Waiver.

Environmental Petitioners rest on essentially the same flawed arguments to claim that EPA was required to exercise the "severe environmental harm" waiver. Envtl. Br. at 32–33.

Petitioners do not have standing, as just discussed. *See supra* Argument V.A. On the merits, as with their ESA claim, Petitioners have failed to demonstrate that EPA's analysis of the environmental effects of the 2019 Rule is arbitrary and capricious, particularly in light of the extreme deference afforded to EPA's technical judgments. *See* ESA Det at 12–14, JA____–__; *see also* RTC 173–81, 144–48, JA____–__, ____–__. EPA's decision not to invoke the waiver is not in conflict with the Triennial Report or *AFPM*, neither of which addressed the findings in the 2019 Rule or the severe environmental harm waiver. *See supra* pp.100–01.

Moreover, Petitioners fail to address the distinct nature of the severe environmental harm waiver, which demands a much more stringent showing than ESA consultation in several key respects. In contrast to the ESA's "may affect" standard, the severe environmental harm waiver is triggered only if the volumes EPA sets in a given year "*would (not 'might')* cause *severe* environmental harm to *a State, a region, or the United States*." ESA Det. at 12–14, JA____–__ (emphases added) (citing 42 U.S.C. § 7545(o)(7)(A)(i)). The attenuated chain of causation Petitioners allege does not demonstrate "direct causation with a high degree of confidence" of any

environmental harm due to the 2019 Rule, let alone "severe" harm. *AFPM*, 937 F.3d at 580. Moreover, Section 7545(o)(7)(A)(i) specifies that the harm must be due to "implementation of the requirement"—*i.e.*, the 2019 Rule that Petitioners challenge, not EPA's previous RFS rules—precluding Petitioners' reliance on general allegations about the impacts of biofuels and the RFS program. Applying the proper statutory standard, EPA reasonably found that the 2019 Rule would not cause severe environmental harm, and that expert technical judgment is entitled to deference. *See supra* pp.16–17. And even a finding of "severe environmental harm" only means that EPA "may," but is not required to, exercise the waiver. 42 U.S.C. § 7545(o)(7)(A)(i).

CONCLUSION

For these reasons, the Court should deny the petitions for review.

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA

JEFFREY BOSSERT CLARK
Assistant Attorney General

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General

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/s/ Benjamin R. Carlisle
BENJAMIN CARLISLE
TSUKI HOSHIJIMA
NY Bar # 4734612 (Carlisle)
MA Bar # 693765 (Hoshijima)
Environmental Defense Section
Environment and Natural Resources Division

U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
Phone: (202) 514-9771 (Carlisle)
Phone: (202) 514-3468 (Hoshijima)
Fax: (202) 514-8865
Benjamin.Carlisle@usdoj.gov
Tsuki.Hoshijima@usdoj.gov

MICHAEL R. EITEL
NE Bar # 22889
Wildlife & Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street, South Terrace 370
Denver, Colorado 80202
Phone: (303) 844-1479
Fax: (303) 844-1350
Michael.Eitel@usdoj.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 25,849 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Benjamin R. Carlisle
BENJAMIN R. CARLISLE

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I HEREBY CERTIFY that the foregoing was filed on January 9, 2020, through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ Benjamin R. Carlisle
BENJAMIN R. CARLISLE