

CASE NO. 19-1023 & CONSOLIDATED CASES
(oral argument not yet scheduled)

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

GROWTH ENERGY, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On petition for review from the
United States Environmental Protection Agency

INTERVENOR BRIEF IN RESPONSE TO
ENVIRONMENTAL PETITIONERS

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CIRCUIT RULE 28(A)(1) STATEMENT

Pursuant to Circuit Rule 28, Intervenor the National Biodiesel Board and Growth Energy, through undersigned counsel, hereby certify the following as to parties, rulings, and related proceedings in this case:

Parties, Intervenor, and Amici

A. Petitioners

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

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

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

B. Respondent

Environmental Protection Agency.

C. Intervenor

Growth Energy, the National Biodiesel Board; American Petroleum Institute; American Fuel & Petrochemical Manufacturers; Monroe Energy, LLC.

D. Amici

None.

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Rulings Under Review

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

Related Cases

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

Growth Energy, the National Biodiesel Board, and Producers United raise challenges related to EPA’s handling of small refinery exemptions under the Renewable Fuel Standard program. The following pending cases involve a challenge to EPA’s regulation for setting the standards, but do not challenge the 2019 standards at issue in this case: *Renewable Fuels Association et al. v. EPA*, No. 18 1154 (D.C. Cir.) and *Renewable Fuels Association et al. v. EPA*, No. 19-1201 (D.C. Cir.). In addition, Producers United challenges EPA’s determination that it could allow generation of “replacement” RINs, which was based on EPA’s claimed authority to “unretire” RINs, which this Court transferred to the Tenth Circuit, which remains pending: *Producers United v. EPA*, No. 19-9532 (10th Cir.).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenor the National Biodiesel Board and Growth Energy make the following disclosures:

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

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

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GLOSSARY

2019 Rule	Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, 83 Fed. Reg. 63,704 (Dec. 11, 2018).
BBD	Biomass-based diesel
EPA	Environmental Protection Agency
RFS	Renewable Fuel Standard

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant statutory and regulatory provisions not included in the principal briefs are included in the addendum.

SUMMARY OF ARGUMENT

Environmental Petitioners lack standing because there is no evidence that the renewable fuel volume requirements in the 2019 Rule cause the alleged environmental harms.

In addition, Environmental Petitioners' challenge to EPA's aggregate compliance approach is not properly before this Court because it is an untimely challenge to a 2010 regulation.

Each of Environmental Petitioners' merits arguments also fails. EPA reasonably determined that the 2019 Rule has no effect on endangered species. EPA's aggregate compliance approach is reasonable and consistent with the RFS statute. And EPA reasonably concluded that the 2019 Rule does not cause severe environmental harm.

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I. ENVIRONMENTAL PETITIONERS LACK STANDING.

“[S]tanding is ‘substantially more difficult to establish’ where, as here, the parties invoking federal jurisdiction are not ‘the object of the government action or inaction’ they challenge.” *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1298 (D.C. Cir. 2007) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). In such cases, it must be “substantially probable” that the challenged agency action, rather than the actions of third parties, caused the alleged injury. *See Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996).

Plaintiffs have not met their burden to demonstrate that the 2019 Rule causes their members’ injuries and that those injuries would be redressed by the relief they seek. *See Lujan*, 504 U.S. at 560–61. Environmental Petitioners’ standing theory depends on a tenuous string of events that assumes: (1) the 2019 Rule will increase demand for renewable fuels; (2) which will raise crop prices; (3) which will cause farmers to plant more crops; (4) which farmers will accomplish by converting *non*-agricultural land to croplands; *and* (5) that these land conversions will occur in precisely the areas where particular species or habitats are located. At each step, Environmental Petitioners’ theory is “remote, speculative, conjectural, or hypothetical,” unsupported by the evidence, and dependent on the decisions of third parties. *Grocery Mfrs. Assoc. v. EPA*, 693 F.3d 169, 175–76 (D.C.

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Cir. 2012). It is just a “hypothetical chain of events” that cannot support standing. *Id.*

Environmental Petitioners cannot slide into court on the back of *AFPM v. EPA*, 937 F.3d 559 (D.C. Cir. 2019). That case was materially different. The environmental groups there had standing to raise Endangered Species Act challenges to an annual RFS rulemaking because they alleged a procedural injury—EPA’s failure to make *any* effects determination under the Endangered Species Act. *Id.* at 592. The more relaxed standing requirements for procedural injuries do not apply here because, this time, EPA made an explicit and well-reasoned “no effects” determination. ESA Det. (JA__). Moreover, evidence that was not before the Court in *AFPM* makes clear that the Environmental Petitioners’ theory is false. New data confirms that there is no causal link between the 2019 Rule and third-party agricultural practices and that the alleged third-party agricultural practices are not causing harm to the specified endangered species.

A. THERE IS NO CAUSAL LINK BETWEEN THE 2019 RULE AND THIRD-PARTY AGRICULTURAL PRACTICES.

The 2019 Rule does not regulate land use, determine whether or where farmers plant crops, or dictate agricultural chemical or water usage. Farmers make

those decisions on their own, based on a myriad of considerations. Available evidence makes clear that U.S. farmers will decide how to use land for reasons unrelated to the 2019 Rule.

1. Corn Ethanol

The total renewable fuel volume in the 2019 Rule will not affect ethanol demand. First, the RFS does not contain an ethanol standard. Insofar as the market uses ethanol to meet the annual total volume obligation, that is the result of voluntary choices made by farmers, producers, refiners, and other market participants. *Second*, even if the implied non-advanced volume were viewed (incorrectly) as an ethanol requirement, the 15 billion gallon implied conventional biofuel volume for 2019 would be irrelevant to ethanol production because it currently exerts zero demand pressure on ethanol. Recent ethanol demand comes instead from two factors independent of the 2019 Rule: “the use of ethanol in E10 blends as an octane booster domestically and demand for ethanol from foreign countries,” which together exceed 15 billion gallons. ESA Det. 1, 3–6 (JA__).¹

¹ In fact, because of EPA’s mismanagement of the RFS program in recent years—through low total volume requirements, large unaccounted-for small refinery exemptions, and a refusal to draw down the RIN bank—the 2019 volume requirement is effectively well below 15 billion gallons and does “nothing to compel increased use of renewable fuel.” Initial Br. for Petitioners, *Growth Energy et al.*, No. 19-1023 at 10–14 (D.C. Cir. Oct. 4, 2019).

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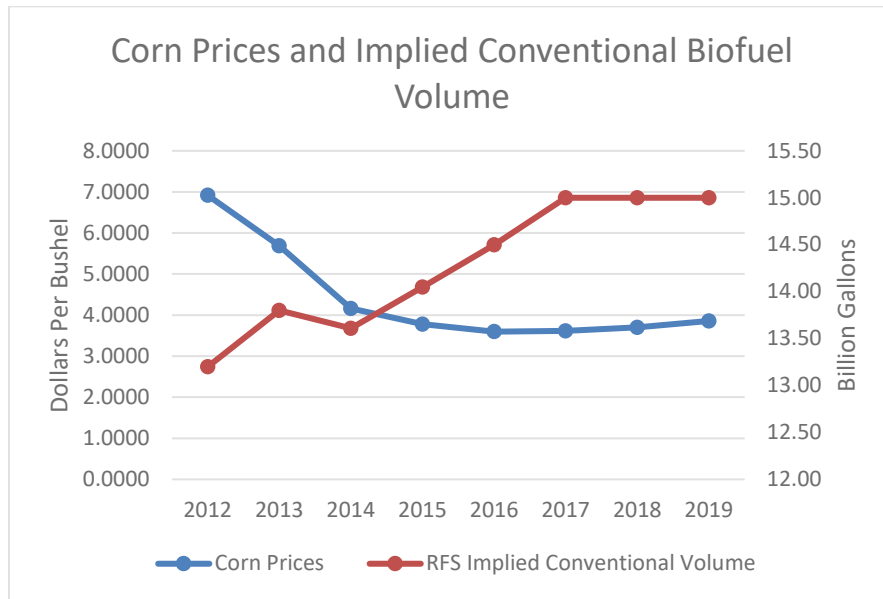
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That disconnect between the 2019 Rule and recent ethanol demand alone is enough to disprove Environmental Petitioners' standing theory. But there are two additional steps necessary to link the total renewable fuel volume to changes in crop planting that Environmental Petitioners also have failed to demonstrate.

First, a fundamental premise of Environmental Petitioners' argument (and Dr. Lark's Declaration) is that ethanol demand due to the 2019 Rule heavily influences the price of corn. *See* Env'tl. Br. 32. Not so. Aside from the fact that the 2019 Rule will not drive existing ethanol demand, Environmental Petitioners ignore the complex economic and policy factors that determine corn prices, including oil prices, currency exchange rates, economic growth (and demand for food) in developing countries, market speculation, U.S. agricultural policies, trade restrictions, and macroeconomic shocks. The most recent data available (not before the Court in *AFPM*) demonstrate that there is no predictable effect between recent RFS obligations and corn prices, let alone a substantial probability that the 2019 Rule will appreciably affect the demand for corn. *See* Figure 1.

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Figure 1: Corn Prices vs. Implied Conventional Ethanol Volumes, 2012–2019²

Second, Environmental Petitioners have not established that, as a result of alleged impacts of the 2019 Rule on ethanol demand and corn prices, farmers will plant more corn. *See* Env'tl. Br. at 31–32. Individual farmers' decisions concerning what to plant are driven by numerous factors other than corn prices, including

² *See* *Prices Received by Month*, USDA (2019), https://www.nass.usda.gov/Charts_and_Maps/graphics/data/pricecn.txt. The Court may properly consider official government data in evaluating standing. *See Pharm. Research & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs.*, 43 F. Supp. 3d 28, 33 (D.D.C. 2014).

weather and government policies, as well as production costs, availability of financing, lending practices, crop insurance, and technology and equipment.³ Given the complex factors and policies that drive farmers' behavior, a particular farmer's decision to plant more corn cannot be fairly traced to EPA's 2019 rule.

2. Biomass-based diesel ("BBD")

The RFS's annual BBD volume requirement does not cause changes in agricultural practices because BBD is produced from oils that are surplus or waste products of crops grown for other purposes. See 83 Fed. Reg. at 63,727. Those other purposes may affect agricultural practices, but the BBD volume does not.

For example, when soybeans are crushed and processed, the vast majority of revenue comes from the meal portion rather than the oil portion. See LMC International, *How the Vegetable Oil Market Works* (Aug. 2018) (JA__). This means that "when farmers make planting decisions, they consider primarily the price of meal, not oil," and more soybeans will be planted if demand for meal is high, "regardless of whether the vegetable oil market really needs more oil." *Id.*

The 2019 Rule will not affect the price of soybean oil or other vegetable oils. Between 2011 and 2019, EPA more than doubled BBD volumes (and substantially

³ See Triennial Report at 53 (citing Gray and Gibson (2013), "Actor–Networks, Farmer Decisions, and Identity. Culture, Agriculture," *Food and Environment* 35(2): 82-101: 10.1111/cuag.12013).

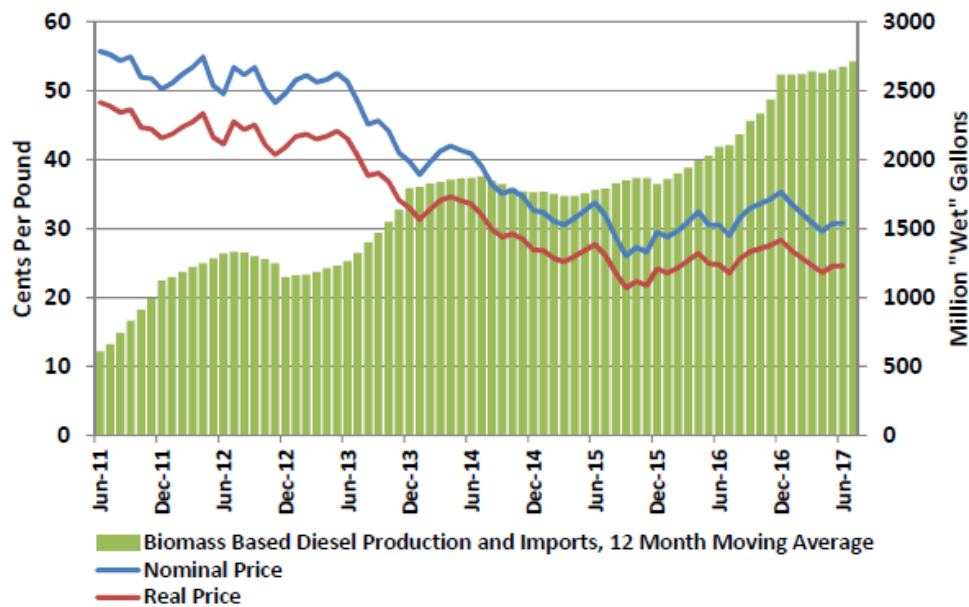
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increased the advanced biofuel volume), yet the price of soybean oil decreased.

See Figure 2.

Figure 2: Soybean oil price compared to BBD production 2011–2017⁴



The same holds true for other BBD feedstocks, such as tallow, yellow grease, and used cooking oil. Tallow and yellow grease are co-products of meat produced for human consumption. See NBB Comments at 15 (JA__). Used cooking oil is used for cooking, and restaurants often give it away for free to avoid the expense

⁴ Source: *Soybean Oil Price, Crude De-Gummed, Central Illinois*, THE JACOBSEN (July 2017). Real prices were calculated using the consumer price index for urban consumers from the Federal Reserve Bank of St. Louis, and BBD data are from EPA's EMTS website.

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of disposal. *Id.* The BBD volumes have not plausibly increased demand for meat or for restaurant meals.

And even if the 2019 Rule did affect demand for BBD feedstocks, it would not follow that more soy or corn will be planted, that more livestock will be raised, or that more cooking oil will be used in restaurants. Innumerable economic factors affect each of those decisions. For example, farmers often plant soybeans to replenish nitrogen in soil, rotating soybeans with other crops. *See* Steven Walander, USDA, *While Crop Rotations Are Common, Cover Crops Remain Rare*, AMBER WAVES (Mar. 4, 2013). It is thus merely Environmental Petitioners' speculation that there is a link between the BBD volumes and additional crop production.

3. Cellulosic Biofuel

Cellulosic biofuel is also generated from co-products and waste products. Most cellulosic biofuel currently comes from landfill biogas, and a small amount is produced from residues associated with the production of other crops. *See* ESA Det. 11 (JA__). Thus, for much the same reasons as with BBD, the cellulosic biofuel volume in the 2019 Rule does not affect land-use decisions and does not support standing.

B. THERE IS NO CAUSAL LINK BETWEEN THE ALLEGED THIRD-PARTY AGRICULTURAL PRACTICES AND IMPACTS TO ENDANGERED SPECIES.

Environmental Petitioners' standing theory also requires them to link harms to endangered species with the alleged changes in third-party agricultural practices. Petitioners argue that the 2019 Rule "induces increased production of renewable biomass, leading to unfettered land conversion," citing the fact that "total production of corn and soybeans has increased over time since the enactment of the EISA." Env'tl. Br. 12. But "increased production of corn and soybeans" does not mean expanded agricultural land use. On the contrary, EPA has repeatedly found agricultural land in the United States has *decreased* since the RFS was implemented. See EPA Br. 89; see also Section II, *infra*.

Even when market conditions might incentivize farmers to grow more crops, it is costly to convert non-agricultural land to grow those crops. As a result, increased demand for crops in the U.S. is more likely met by *intensification* (increased production on existing land or crop rotation) rather than *extensification* (conversion of uncultivated land into agricultural land).⁵ Environmental Petitioners appear to concede this point and, thus, their standing theory. See Env'tl. Br.

⁵ See Triennial Report at 40 (citing Beckman *et al.* 2013), 70 (citing Plourde *et al.* 2013 and Ren *et al.* 2016).

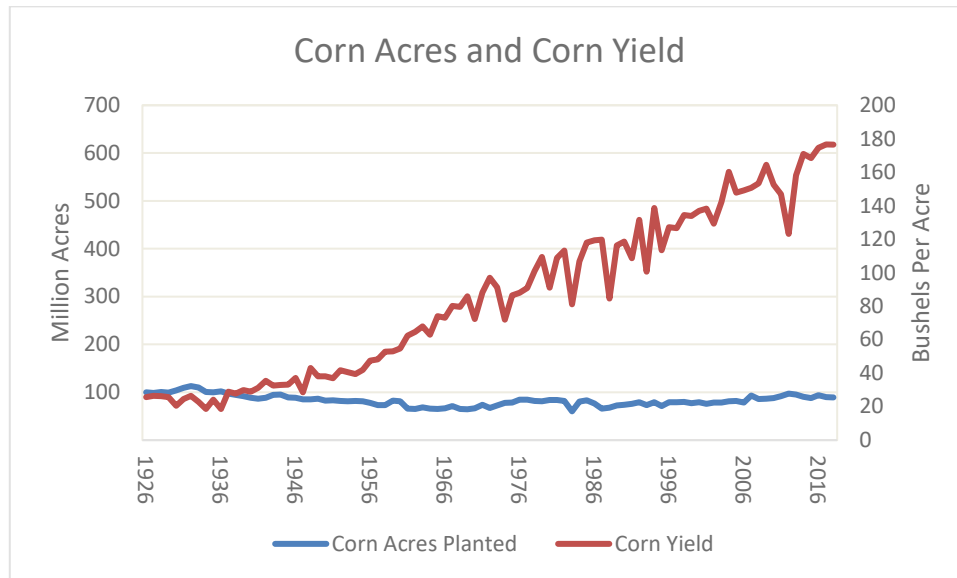
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13, n.3 (“Additional corn and soy production occurred on land that was *previously cultivated for other crops.*”) (emphasis added).

Increasing crop yields, due to advances in production efficiency and improvements in farming technology and practices,⁶ is not a recent phenomenon. Nearly a century of USDA data illustrate that corn yields per acre have steadily increased while total corn acreage has plateaued. *See* Figure 3. Substantial gains in corn production have not needed additional corn acreage. Soybean production has likewise almost doubled since 1980 while land used for soybean production has decreased. *See* NBB Comments 13 (JA__).

⁶ Triennial Report at 15 (“It is important to recognize the improvements in corn and soybean production per acre and the associated per bushel change in applied nutrients”), 18 n.18 (increased use of precision agriculture leading to greater yields).

Figure 3: Corn Acreage in U.S. Compared to Yield 1926–2018⁷

Moreover, even *if* the RFS increased agricultural land use, that would not necessarily mean that endangered species have been harmed. Environmental Petitioners have attempted to show that the alleged land use conversions impact particular populations of endangered species or habitat, by relying on a declaration they submitted in *AFPM*—the Lark Declaration. But the Lark Declaration’s conclusions are not supported by evidence and should be rejected. As just a few examples:

⁷ See *National Statistics for Corn*, USDA-NASS (2019), <https://perma.cc/2KYB-2UA2>; *Crop Production Historical Track Records*, USDA (2019), https://www.nass.usda.gov/Publications/Todays_Reports/reports/croptr19.pdf.

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- There is no evidence that the whooping crane is affected by annual RFS rules. Lark Decl. 13–14 (JA__). The population has been increasing over time and has grown at an accelerated rate after the RFS was implemented.⁸
- There is no evidence that the Black-footed ferret is affected by annual RFS rules. Lark Decl. 15–16 (JA__). Populations have been rapidly increasing since 2000, with no dip apparent in the years after the RFS was implemented.⁹
- There is no evidence that annual RFS rules are affecting piping plover populations in the Great Lakes region. *See* Lark Decl. 64 (JA__). The study Lark cites studied piping plover in a barrier island in New York and attributed land conversion to urban development, not agriculture.¹⁰
- There is no evidence that annual RFS rules are impacting Gulf Sturgeon by exacerbating the Gulf of Mexico dead zone. Lark Decl. 21–22 (JA__). The Gulf Sturgeon’s critical habitat is located east of the Mississippi River delta, while the Gulf of Mexico hypoxic zone is exclusively to the west.¹¹ Moreover, there is no evidence that land use tied to the RFS has impacted nutrient

⁸ *See Historical Data Search, Audubon Society Christmas Bird Count Database* (2018), <http://netapp.audubon.org/CBCObservation/Historical/ResultsBySpecies.aspx?1> (search for “whooping crane” over years 1900-2018 in the United States).

⁹ *The Black-Footed Ferret: An Endangered Species Act Success*, Center for Biological Diversity (last visited Jan. 14, 2020), https://www.biologicaldiversity.org/species/mammals/black-footed_ferret/.

¹⁰ Cohen et al., *Nesting Density and Reproductive Success of Piping Plovers in Response to Storm- and Human-Created Habitat Changes*, *Wildlife Monographs* 173:1-24 (2009).

¹¹ *Compare Gulf Sturgeon Critical Habitat Map and GIS Data*, NOAA (2019), <https://www.fisheries.noaa.gov/resource/map/gulf-sturgeon-critical-habitat-map-and-gis-data> with *Gulf of Mexico ‘dead zone’ is the*

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loading in the Gulf of Mexico. The dead zone had been forming on a regular basis for decades before the EISA was enacted, and annual nitrate loading to the Gulf of Mexico has remained relatively constant from 1980 through 2017.¹²

II. EPA REASONABLY DETERMINED THAT THE 2019 RULE DOES NOT AFFECT ENDANGERED SPECIES.

In 2018, EPA did not make a “no effects” determination for the 2018 Rule and concluded that it is “impossible to know” whether the RFS affects endangered species. This Court rejected that approach. *See AFPM*, 937 F.3d at 598. Here, by contrast, EPA conducted a thorough analysis and found that “the 2019 RFS standards will have no effect on listed species or their critical habitat, either directly or indirectly.” ESA Det. 1 (JA__). EPA properly determined that the 2019 Rule will not affect endangered species.

First, EPA correctly determined that the 2019 Rule does not directly affect endangered species because the Rule does not dictate farmers’ “[d]ecisions on what type of feedstock to use ..., where such feedstocks are grown, the type of

Largest Ever Measured, NOAA (2017), <https://www.noaa.gov/media-release/gulf-of-mexico-dead-zone-is-largest-ever-measured>.

¹² *See Gulf of Mexico Dead Zone—The Last 150 Years*, USGS (Mar. 2006), <https://pubs.usgs.gov/fs/2006/3005/fs-2006-3005.pdf>; *Trends in Annual Water-Quality Loads to the Gulf of Mexico Through 2018*, USGS (2018), https://nrtwq.usgs.gov/mississippi_loads/#/GULF.

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volumes of agricultural inputs to use ..., and what types of renewable fuel will ultimately be produced.” ESA Det. 2 (JA__).

Second, EPA correctly determined there are no indirect effects. *Id.* For all of the reasons discussed in Section I, the 2019 Rule does not affect land use and therefore has no effect on listed species or habitat. This finding is supported by substantial evidence in the record, including a study that EPA specifically commissioned to assess biofuel demand. *See id.* at 4–5; *see also Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 150 (D.C. Cir. 2015) (deference to EPA’s evaluation of data within its technical expertise).

Petitioners challenge EPA’s no effects determination as inconsistent with statements in EPA’s Second Triennial Report. *See, e.g., Env’tl. Br.* 15. But that report “did not specifically evaluate potential effects of biofuels on listed species or critical habitat.” ESA Det. 15 (JA__). In contrast with EPA’s no effects determination here, the Triennial Report did not examine whether there was a causal link between the annual RFS rules and harms to endangered species. *See* ESA Det. 16 (“[the Triennial report] did not purport to establish a causal relationship between biofuels (or the 2019 RFS specifically) and soybean cultivation”); *id.* at 6 (“Corn plantings are a function of a large number of worldwide agricultural sector market factors...”). The Triennial Report, therefore, does not undermine EPA’s more on-point analysis here.

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Petitioners also try to use the Lark Declaration to challenge EPA's "no effects" determination. But EPA considered the evidence discussed in the Lark Declaration and found shortcomings, including that the underlying studies were based on inconclusive temporal and spatial associations using satellite imagery. *See* ESA Det. 7 (JA__). As EPA explained, "there is no way to determine if the crops grown on a particular parcel were used for biofuel production versus some other use ... [the studies cited in the Lark Declaration] remain probabilistic and limited and scope, and [insufficient to] identify impacts on particular parcels of land." *Id.* Accordingly, nothing presented by Environmental Petitioners refutes EPA's no effects determination.

III. ENVIRONMENTAL PETITIONERS' CHALLENGE TO THE AGGREGATE COMPLIANCE APPROACH IS UNTIMELY AND MERITLESS.

A. THE AGGREGATE COMPLIANCE APPROACH WAS ESTABLISHED IN 2010 AND HAS NOT BEEN REOPENED.

In 2010, EPA promulgated a set of regulations implementing the RFS program. 75 Fed. Reg. 14670, 14701-04 (Mar. 26, 2010). One of those regulations is the aggregate compliance provision, which reduces recordkeeping requirements for producers in the United States as long as agricultural land in the United States

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remains at or below 2007 levels. 40 C.F.R. § 80.1454(g). Under that regulation, EPA annually verifies the overall amount of cropland in the United States. *Id.*

Environmental Petitioners argue that the aggregate compliance approach “violates the text and purpose of the CAA.” *Envtl. Br.* 37. Their argument is a challenge to the 2010 regulation and is untimely by almost a decade. *See* 42 U.S.C. § 7607(b)(1). Environmental Petitioners have not even attempted to identify an excuse for their late challenge.

Environmental Petitioners believe they can challenge the aggregate compliance approach because EPA verified overall cropland during the 2019 Rule. *Envtl. Br.* 29–30. But EPA discussed the aggregate compliance approach in the preamble to the 2019 Rule solely in the context of confirming that cropland in the United States remained below 2007 levels. 83 Fed. Reg. at 63,741. EPA’s fulfillment of the aggregate compliance approach did not reconsider or otherwise reopen the approach. Rather, because the aggregate compliance approach requires annually assessing land use in the United States, it was an essential *component* of that approach.

EPA had no obligation to reexamine the aggregate compliance approach as part of the 2019 rule. As in *Alon Ref. Krotz Springs v. EPA*, 936 F.3d 628, 659 (D.C. Cir. 2019) and *AFPM v. EPA*, 937 F.3d 559 (D.C. Cir. 2019), Environmental Petitioners are trying to “side-step the sixty-day filing requirement” by asserting

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that an untimely challenge is somehow implicated by EPA's annual RFS rules. *AFPM*, 937 F.3d at 587. And just as in those cases, there is nothing about setting annual percentage standards that requires reevaluating the aggregate compliance approach each year.

B. THE AGGREGATE COMPLIANCE APPROACH IS REASONABLE AND CONSISTENT WITH THE RFS STATUTE.

EPA reasonably concluded in 2010 that it would be more appropriate to determine whether U.S. cropland in the aggregate remains at or below pre-RFS levels than to require burdensome individual recordkeeping procedures for every entity that produces renewable fuel from U.S. crops. 75 Fed. Reg. at 14,701. EPA based this conclusion in part on its correct assessment that economic factors in the United States favor increasing yields on existing land rather than converting non-agricultural lands. *Id.*; see Section I, *supra*.

If EPA were to eliminate the aggregate compliance approach, it would place an additional burden on not only EPA but also renewable fuel producers across the country. Every renewable fuel producer in the country would need to comply with extensive "map and track" recordkeeping requirements that would involve maintaining records linking each gallon of produced fuel to land that was in agricultural production prior to December 19, 2007. 40 C.F.R. § 80.1454(b), (d). Such

requirements would run counter to Congress's explicit goal of "increase[ing] production of clean renewable fuels," Pub. L. No. 110-140, by making it more difficult and costly to generate renewable fuel in the United States. EPA therefore reasonably determined that the aggregate compliance approach is consistent with the RFS statute.

IV. THE 2019 RULE WILL NOT CAUSE SEVERE ENVIRONMENTAL HARM.

The RFS statute's "general waiver authority" allows EPA to reduce statutory volumes if they would "severely harm the economy or the environment." 42 U.S.C. § 7545(o)(7)(A). The severe harm necessary to trigger that authority is "a high bar." *AFPM v. EPA*, 937 F.3d 559, 580 (D.C. Cir. 2019). In *AFPM*, this Court upheld EPA's interpretation of severe *economic* harm, which required "a demonstration that the RFS Program itself would cause severe economic harm," as opposed to merely contributing to such harm. *Id.* at 579. Because the statutory term "severely harm" interpreted in *AFPM* modifies both "economy" and "environment," whether severe *environmental* harm exists must be determined based on the same strict standard.

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Environmental Plaintiffs have not demonstrated severe environmental harm. For all the reasons discussed above, Environmental Petitioners have not established a causal relationship between the 2019 Rule and any environmental harm, much less *severe* harm.

CONCLUSION

The Court should deny Environmental Petitioners' petition for review.

Respectfully submitted,

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January 23, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1), I certify that the INTERVENOR BRIEF IN RESPONSE TO ENVIRONMENTAL PETITIONERS meets the type-volume limitations of Rule 32(a)(7)(B) and Circuit Rule 32(e)(1) because it contains 3,595 words.

/s/ Bryan Killian

CERTIFICATE OF SERVICE

I certify that, on January 23, 2020, I electronically filed the INTERVENOR BRIEF IN RESPONSE TO ENVIRONMENTAL PETITIONERS with the Clerk for the United States Court of Appeals for the D.C. Circuit. I used the Court's CM/ECF system, which serves registered CM/ECF users. All attorneys in this case are registered CM/ECF users and were served accordingly.

/s/ Bryan Killian

ADDENDUM

REGULATIONS

40 C.F.R. § 80.1454..... A-1

§ 80.1453

40 CFR Ch. I (7–1–12 Edition)

§ 80.1453 What are the product transfer document (PTD) requirements for the RFS program?

(a) On each occasion when any party transfers ownership of renewable fuels or separated RINs subject to this subpart, the transferor must provide to the transferee documents identifying the renewable fuel and any RINs (whether assigned or separated) which include all of the following information, as applicable:

- (1) The name and address of the transferor and transferee.
- (2) The transferor's and transferee's EPA company registration numbers.
- (3) The volume of renewable fuel that is being transferred, if any.
- (4) The date of the transfer.
- (5) [Reserved]
- (6) The quantity of RINs being traded.
- (7) The D code of the RINs.
- (8) The RIN status (Assigned or Separated).
- (9) The RIN generation year.
- (10) The associated reason for the sell or buy transaction (e.g., standard trade or remedial action).
- (11) Additional RIN-related information, as follows:
 - (i) If assigned RINs are being transferred on the same PTD used to transfer ownership of the renewable fuel, then the assigned RIN information shall be identified on the PTD.

(A) The identifying information for a RIN that is transferred in EMTS generically is the information specified in paragraphs (a)(1) through (a)(10) of this section.

(B) The identifying information for a RIN that is transferred in EMTS uniquely is the information specified in paragraphs (a)(1) through (a)(10) of this section, the RIN generator company ID, the RIN generator facility ID, and the batch number.

(C) The identifying information for a RIN that is generated prior to July 1, 2010, is the 38-digit code pursuant to § 80.1425, in its entirety.

(ii) If assigned RINs are being transferred on a separate PTD from that which is used to transfer ownership of the renewable fuel, then the PTD which is used to transfer ownership of the renewable fuel shall include all the following:

(A) The number of gallon-RINs being transferred.

(B) A unique reference to the PTD which is transferring the assigned RINs.

(C) The information specified in paragraphs (a)(11)(i)(A) through (a)(11)(i)(C) of this section, as appropriate.

(iii) If no assigned RINs are being transferred with the renewable fuel, the PTD which is used to transfer ownership of the renewable fuel shall state "No assigned RINs transferred."

(iv) If RINs have been separated from the renewable fuel or fuel blend pursuant to § 80.1429(b)(4), then all PTDs which are at any time used to transfer ownership of the renewable fuel or fuel blend shall state "This volume of fuel must be used in the designated form, without further blending."

(b) Except for transfers to truck carriers, retailers, or wholesale purchaser-consumers, product codes may be used to convey the information required under paragraphs (a)(1) through (a)(11) of this section if such codes are clearly understood by each transferee.

(c) For renewable fuel, other than ethanol, that is not registered as motor vehicle fuel under 40 CFR Part 79, the PTD which is used to transfer ownership of the renewable fuel shall state "This volume of renewable fuel may not be used as a motor vehicle fuel."

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26045, May 10, 2010]

§ 80.1454 What are the recordkeeping requirements under the RFS program?

(a) *Requirements for obligated parties and exporters.* Beginning July 1, 2010, any obligated party (as described at § 80.1406) or exporter of renewable fuel (as described at § 80.1401) must keep all of the following records:

(1) Product transfer documents consistent with § 80.1453 and associated with the obligated party's or exporter's activity, if any, as transferor or transferee of renewable fuel or separated RINs.

(2) Copies of all reports submitted to EPA under § 80.1451(a), as applicable.

(3) Records related to each RIN transaction, including all of the following:

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(i) A list of the RINs owned, purchased, sold, separated, retired, or reinstated.

(ii) The parties involved in each RIN transaction including the transferor, transferee, and any broker or agent.

(iii) The date of the transfer of the RIN(s).

(iv) Additional information, including contracts, correspondence, and invoices, related to details of the RIN transaction and its terms.

(4) Records related to the use of RINs (by facility, if applicable) for compliance, including all of the following:

(i) Methods and variables used to calculate the Renewable Volume Obligations pursuant to § 80.1407 or § 80.1430.

(ii) List of RINs used to demonstrate compliance.

(iii) Additional information related to details of RIN use for compliance.

(5) Records related to the separation of assigned RINs from renewable fuel volume.

(6) For exported renewable fuel, invoices, bills of lading and other documents describing the exported renewable fuel.

(b) *Requirements for all producers of renewable fuel.* Beginning July 1, 2010, any domestic or RIN-generating foreign producer of a renewable fuel as defined in § 80.1401 must keep all of the following records in addition to those required under paragraphs (c) or (d) of this section:

(1) Product transfer documents consistent with § 80.1453 and associated with the renewable fuel producer's activity, if any, as transferor or transferee of renewable fuel or separated RINs.

(2) Copies of all reports submitted to EPA under §§ 80.1449 and 80.1451(b).

(3) Records related to the generation and assignment of RINs for each facility, including all of the following:

(i) Batch volume in gallons.

(ii) Batch number.

(iii) RIN as assigned under § 80.1426, if applicable.

(iv) Identification of batches by renewable category.

(v) Type and quantity of co-products produced.

(vi) Type and quantity of feedstocks used.

(vii) Type and quantity of fuel used for process heat.

(viii) Feedstock energy calculations per § 80.1426(f)(4).

(ix) Date of production.

(x) Results of any laboratory analysis of batch chemical composition or physical properties.

(xi) For RINs generated for ethanol produced from corn starch at a facility using a pathway in Table 1 to § 80.1426 that requires the use of one or more of the advanced technologies listed in Table 2 to § 80.1426, documentation to demonstrate that employment of the required advanced technology or technologies was conducted in accordance with the specifications in Tables 1 and 2 to § 80.1426, including any requirement for application to 90% of the production on a calendar year basis.

(xii) All commercial documents and additional information related to details of RIN generation.

(4) Records related to each RIN transaction, separately for each transaction, including all of the following:

(i) A list of the RINs owned, purchased, sold, retired, or reinstated.

(ii) The parties involved in each transaction including the transferor, transferee, and any broker or agent.

(iii) The date of the transfer of the RIN(s).

(iv) Additional information related to details of the transaction and its terms.

(5) Records related to the production, importation, ownership, sale or use of any volume of renewable fuel for which RINs were generated or blend of renewable fuel for which RINs were generated and gasoline or diesel fuel that any party designates for use as transportation fuel, jet fuel, or heating oil and the use of the fuel or blend as transportation fuel, jet fuel, or heating oil without further blending, in the designated form.

(6) Copies of registration documents required under § 80.1450, including information on fuels and products, feedstocks, facility production processes, process changes, and capacity, energy sources, and a copy of the independent third party engineering review submitted to EPA per § 80.1450(b)(2).

(c) *Additional requirements for imports of renewable fuel.*—(1) Beginning July 1,

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2010, any RIN-generating foreign producer of a renewable fuel or RIN-generating importer must keep records of feedstock purchases and transfers associated with renewable fuel for which RINs are generated, sufficient to verify that feedstocks used are renewable biomass (as defined in § 80.1401).

(i) RIN-generating foreign producers and importers of renewable fuel made from feedstocks that are planted crops or crop residue from existing foreign agricultural land, planted trees or tree residue from actively managed tree plantations, slash and pre-commercial thinnings from forestlands or biomass obtained from wildland-urban interface must maintain all the following records to verify the location where these feedstocks were produced:

(A) Maps or electronic data identifying the boundaries of the land where each type of feedstock was produced.

(B) Bills of lading, product transfer documents, or other commercial documents showing the quantity of feedstock purchased from each area identified in paragraph (c)(1)(i)(A) of this section, and showing each transfer of custody of the feedstock from the location where it was produced to the renewable fuel production facility.

(ii)(A) RIN-generating foreign producers and importers of renewable fuel made from planted crops or crop residue from existing foreign agricultural land must keep records that serve as evidence that the land from which the feedstock was obtained was cleared or cultivated prior to December 19, 2007 and actively managed or fallow, and nonforested on December 19, 2007. RIN-generating foreign producers or importers of renewable fuel made from planted trees or tree residue from actively managed tree plantations must keep records that serve as evidence that the land from which the feedstock was obtained was cleared prior to December 19, 2007 and actively managed on December 19, 2007.

(B) The records must be provided by the feedstock producer, traceable to the land in question, and consist of at least one of the following documents:

(1) Sales records for planted crops or trees, crop or tree residue, or livestock; purchasing records for fertilizer, weed

control, or reseedling, including seeds, seedlings, or other nursery stock.

(2) A written management plan for agricultural or silvicultural purposes; documentation of participation in an agricultural or silvicultural program sponsored by a Federal, state, or local government agency.

(3) Documentation of land management in accordance with an agricultural or silvicultural product certification program, an agreement for land management consultation with a professional forester that identifies the land in question.

(4) Evidence of the existence and ongoing maintenance of a road system or other physical infrastructure designed and maintained for logging use, together with one of the aforementioned documents in this paragraph (c)(1)(ii)(B).

(iii) RIN-generating foreign producers and importers of renewable fuel made from any other type of renewable biomass must have documents from their feedstock supplier certifying that the feedstock qualifies as renewable biomass as defined in § 80.1401, describing the feedstock and identifying the process that was used to generate the feedstock.

(2) Beginning July 1, 2010, any RIN-generating importer of renewable fuel (as defined in § 80.1401) must keep all of the following records:

(i) Product transfer documents consistent with § 80.1453 and associated with the renewable fuel importer's activity, if any, as transferor or transferee of renewable fuel.

(ii) Copies of all reports submitted to EPA under §§ 80.1449 and 80.1451(b).

(iii) Records related to the generation and assignment of RINs for each facility, including all of the following:

(A) Batch volume in gallons.

(B) Batch number.

(C) RIN as assigned under § 80.1426.

(D) Identification of batches by renewable category.

(E) Type and quantity of feedstocks used.

(F) Type and quantity of fuel used for process heat.

(G) Date of import.

(H) Results of any laboratory analysis of batch chemical composition or physical properties.

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(I) The EPA registration number of the foreign renewable fuel producers producing the fuel.

(J) Additional information related to details of RIN generation.

(iv) Records related to each RIN transaction, including all of the following:

(A) A list of the RINs owned, purchased, sold, separated, retired, or reinstated.

(B) The parties involved in each transaction including the transferor, transferee, and any broker or agent.

(C) The date of the transfer of the RIN(s).

(D) Additional information related to details of the transaction and its terms.

(v) Copies of registration documents required under §80.1450.

(vi) Records related to the import of any volume of renewable fuel that the importer designates for use as transportation fuel, jet fuel, or heating oil.

(d) *Additional requirements for domestic producers of renewable fuel.* Except as provided in paragraphs (g) and (h) of this section, beginning July 1, 2010, any domestic producer of renewable fuel as defined in §80.1401 that generates RINs for such fuel must keep documents associated with feedstock purchases and transfers that identify where the feedstocks were produced and are sufficient to verify that feedstocks used are renewable biomass (as defined in §80.1401) if RINs are generated.

(1) Domestic producers of renewable fuel made from feedstocks that are planted trees or tree residue from actively managed tree plantations, slash and pre-commercial thinnings from forestlands or biomass obtained from areas at risk of wildfire must maintain all the following records to verify the location where these feedstocks were produced:

(i) Maps or electronic data identifying the boundaries of the land where each type of feedstock was produced.

(ii) Bills of lading, product transfer documents or other commercial documents showing the quantity of feedstock purchased from each area identified in paragraph (d)(1)(i) of this section, and showing each transfer of custody of the feedstock from the location

where it was produced to the renewable fuel production facility.

(2) Domestic producers of renewable fuel made from planted trees or tree residue from actively managed tree plantations must keep records that serve as evidence that the land from which the feedstock was obtained was cleared prior to December 19, 2007 and actively managed on December 19, 2007. The records must be provided by the feedstock producer and must include at least one of the following documents, which must be traceable to the land in question:

(i) Sales records for planted trees or tree residue.

(ii) Purchasing records for fertilizer, weed control, or reseeded, including seeds, seedlings, or other nursery stock.

(iii) A written management plan for silvicultural purposes.

(iv) Documentation of participation in a silvicultural program sponsored by a Federal, state, or local government agency.

(v) Documentation of land management in accordance with a silvicultural product certification program, an agreement for land management consultation with a professional forester.

(vi) Evidence of the existence and ongoing maintenance of a road system or other physical infrastructure designed and maintained for logging use, together with one of the aforementioned documents.

(3) Domestic producers of renewable fuel made from planted crops or crop residue from existing foreign agricultural land must keep all the following records:

(i) Records that serve as evidence that the land from which the feedstock was obtained was cleared or cultivated prior to December 19, 2007 and actively managed or fallow, and nonforested on December 19, 2007. The records must be provided by the feedstock producer and must include at least one of the following documents, which must be traceable to the land in question:

(A) Sales records for planted crops, crop residue, or livestock.

(B) Purchasing records for fertilizer, weed control, seeds, seedlings, or other nursery stock.

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(C) A written management plan for agricultural purposes.

(D) Documentation of participation in an agricultural program sponsored by a Federal, State, or local government agency.

(E) Documentation of land management in accordance with an agricultural product certification program.

(ii) Records to verify the location where the feedstocks were produced:

(A) Maps or electronic data identifying the boundaries of the land where each type of feedstock was produced; and

(B) Bills of lading, product transfer documents or other commercial documents showing the quantity of feedstock purchased from each area identified in paragraph (d)(3)(ii)(A) of this section, and showing each transfer of custody of the feedstock from the location where it was produced to the renewable fuel facility.

(4) Domestic producers of renewable fuel made from any other type of renewable biomass must have documents from their feedstock supplier certifying that the feedstock qualifies as renewable biomass as defined in § 80.1401, describing the feedstock. Separated yard and food waste and separated municipal solid waste are subject to the requirements in paragraph (j) of this section.

(e) *Additional requirements for producers of fuel exempt from the 20% GHG reduction requirement.* Beginning July 1, 2010, any production facility with a baseline volume of fuel that is not subject to the 20% GHG threshold, pursuant to § 80.1403(c) and (d), must keep all of the following:

(1) Detailed engineering plans for the facility.

(2) Federal, State, and local (or foreign governmental) preconstruction approvals and permitting.

(3) Procurement and construction contracts and agreements.

(f) *Requirements for other parties that own RINs.* Beginning July 1, 2010, any party, other than those parties covered in paragraphs (a) and (b) of this section, that owns RINs must keep all of the following records:

(1) Product transfer documents consistent with § 80.1453 and associated with the party's activity, if any, as

transferor or transferee of renewable fuel or separated RINs.

(2) Copies of all reports submitted to EPA under § 80.1451(c).

(3) Records related to each RIN transaction by renewable fuel category, including all of the following:

(i) A list of the RINs owned, purchased, sold, retired, or reinstated.

(ii) The parties involved in each RIN transaction including the transferor, transferee, and any broker or agent.

(iii) The date of the transfer of the RIN(s).

(iv) Additional information related to details of the transaction and its terms.

(4) Records related to any volume of renewable fuel that the party designated for use as transportation fuel, jet fuel, or heating oil and from which RINs were separated pursuant to § 80.1429(b)(4).

(g) *Aggregate compliance with renewable biomass requirement.* Any producer or RIN-generating importer of renewable fuel made from planted crops or crop residue from existing U.S. agricultural land as defined in § 80.1401, or from planted crops or crop residue from existing agricultural land in a country covered by a petition approved pursuant to § 80.1457, is covered by the aggregate compliance approach and is not subject to the recordkeeping requirements for planted crops and crop residue at § 80.1454(g)(2) unless EPA publishes a finding that the 2007 baseline amount of agricultural land in the U.S. has been exceeded or, for the aggregate compliance approach in a foreign country, that the withdrawal of EPA approval of the aggregate compliance approach is warranted pursuant to § 80.1457(e).

(1) EPA will make findings concerning whether the 2007 baseline amount of agricultural land in the U.S. or other country covered by a petition approved pursuant to § 80.1457 has been exceeded and will publish these findings in the FEDERAL REGISTER by November 30 of the year preceding the compliance period.

(2) If EPA finds that the 2007 baseline amount of agricultural land in the U.S. or other country covered by a petition approved pursuant to § 80.1457 has been exceeded, beginning on the first day of

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July of the compliance period in question any producer or RIN-generating importer of renewable fuel made from planted crops or crop residue in the country for which such a finding is made must keep all the following records:

(i) Records that serve as evidence that the land from which the feedstock was obtained was cleared or cultivated prior to December 19, 2007 and actively managed or fallow, and nonforested on December 19, 2007. The records must be provided by the feedstock producer and must include at least one of the following documents, which must be traceable to the land in question:

(A) Sales records for planted crops, crop residue or livestock.

(B) Purchasing records for fertilizer, weed control, seeds, seedlings, or other nursery stock.

(C) A written management plan for agricultural purposes.

(D) Documentation of participation in an agricultural program sponsored by a Federal, state, or local government agency.

(E) Documentation of land management in accordance with an agricultural product certification program.

(ii) Records to verify the location where the feedstocks were produced:

(A) Maps or electronic data identifying the boundaries of the land where each type of feedstock was produced; and

(B) Bills of lading, product transfer documents or other commercial documents showing the quantity of feedstock purchased from each area identified in paragraph (g)(2)(ii)(A) of this section, and showing each transfer of custody of the feedstock from the location where it was produced to the renewable fuel facility.

(h) *Alternative renewable biomass tracking requirement.* Any foreign or domestic renewable fuel producer or RIN-generating importer may comply with the following alternative renewable biomass tracking requirement instead of the recordkeeping requirements in paragraphs (c)(1), (d), and (g) of this section:

(1) To comply with the alternative renewable biomass tracking requirement under this paragraph (h), a renewable fuel producer or importer

must either arrange to have an independent third party conduct a comprehensive program of annual compliance surveys, or participate in the funding of an organization which arranged to have an independent third party conduct a comprehensive program of annual compliance surveys, to be carried out in accordance with a survey plan which has been approved by EPA.

(2) The annual compliance surveys under this paragraph (h) must be all the following:

(i) Planned and conducted by an independent surveyor that meets the requirements in §80.68(c)(13)(i).

(ii) Conducted at renewable fuel production and import facilities and their feedstock suppliers.

(iii) Representative of all renewable fuel producers and importers in the survey area and representative of their feedstock suppliers.

(iv) Designed to achieve at least the same level of quality assurance required in paragraphs (c)(1), (d) and (g) of this section.

(3) The compliance survey program shall require the independent surveyor conducting the surveys to do all the following:

(i) Conduct feedstock audits of renewable fuel production and import facilities in accordance with the survey plan approved under this paragraph (h), or immediately notify EPA of any refusal of these facilities to allow an audit to be conducted.

(ii) Obtain the records and product transfer documents associated with the feedstocks being audited.

(iii) Determine the feedstock supplier(s) that supplied the feedstocks to the renewable fuel producer.

(iv) Confirm that feedstocks used to produce RIN-generating renewable fuels meet the definition of renewable biomass as defined in §80.1401.

(v) Immediately notify EPA of any case where the feedstocks do not meet the definition of renewable biomass as defined in §80.1401.

(vi) Immediately notify EPA of any instances where a renewable fuel producer, importer or feedstock supplier subject to review under the approved plan fails to cooperate in the manner described in this section.

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(vii) Submit to EPA a report of each survey, within thirty days following the completion of each survey, such report to include all the following information:

(A) The identification of the person who conducted the survey.

(B) An attestation by the officer of the surveyor company that the survey was conducted in accordance with the survey plan and the survey results are accurate.

(C) Identification of the parties for whom the survey was conducted.

(D) Identification of the covered area surveyed.

(E) The dates on which the survey was conducted.

(F) The address of each facility at which the survey audit was conducted and the date of the audit.

(G) A description of the methodology used to select the locations for survey audits and the number of audits conducted.

(viii) Maintain all records relating to the survey audits conducted under this section (h) for a period of at least 5 years.

(ix) At any time permit any representative of EPA to monitor the conduct of the surveys, including observing audits, reviewing records, and analysis of the audit results.

(4) A survey plan under this paragraph (h) must include all the following:

(i) Identification of the parties for whom the survey is to be conducted.

(ii) Identification of the independent surveyor.

(iii) A methodology for determining all the following:

(A) When the audits will be conducted.

(B) The audit locations.

(C) The number of audits to be conducted during the annual compliance period.

(iv) Any other elements determined by EPA to be necessary to achieve the level of quality assurance required under paragraphs (c)(1), (d), and (g) of this section.

(5)(i) Each renewable fuel producer and importer who participates in the alternative renewable biomass tracking under this paragraph (h) must take all reasonable steps to ensure that each

feedstock producer, aggregator, distributor, or supplier cooperates with this program by allowing the independent surveyor to audit their facility and by providing to the independent surveyor and/or EPA, upon request, copies of management plans, product transfer documents, and other records or information regarding the source of any feedstocks received.

(ii) Reasonable steps under paragraph (h)(5)(i) of this section must include, but typically should not be limited to: Contractual agreements with feedstock producers, aggregators, distributors, and suppliers, which require them to cooperate with the independent surveyor and/or EPA in the manner described in paragraph (h)(5)(i) of this section.

(6) The procedure for obtaining EPA approval of a survey plan under this paragraph (h), and for revocation of any such approval, are as follows:

(i) A detailed survey plan which complies with the requirements of this paragraph (h) must be submitted to EPA, no later than September 1 of the year preceding the calendar year in which the surveys will be conducted.

(ii) The survey plan must be signed by a responsible corporate officer of the renewable fuel producer or importer, or responsible officer of the organization which arranges to have an independent surveyor conduct a program of renewable biomass compliance surveys, as applicable.

(iii) The survey plan must be sent to the following address: Director, Compliance and Innovative Strategies Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW. (6406J), Washington, DC 20460.

(iv) EPA will send a letter to the party submitting a survey plan under this section, either approving or disapproving the survey plan.

(v) EPA may revoke any approval of a survey plan under this section for cause, including an EPA determination that the approved survey plan had proved inadequate in practice or that it was not fully implemented.

(vi) The approving official for an alternative quality assurance program under this section is the Director of

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the Compliance and Innovative Strategies Division, Office of Transportation and Air Quality.

(vii) Any notifications required under this paragraph (h) must be directed to the officer designated in paragraph (h)(6)(vi) of this section.

(7)(i) No later than December 1 of the year preceding the year in which the surveys will be conducted, the contract with the independent surveyor shall be in effect, and an amount of money necessary to carry out the entire survey plan shall be paid to the independent surveyor or placed into an escrow account with instructions to the escrow agent to pay the money to the independent surveyor during the course of the conduct of the survey plan.

(ii) No later than December 15 of the year preceding the year in which the surveys will be conducted, EPA must receive a copy of the contract with the independent surveyor, proof that the money necessary to carry out the survey plan has either been paid to the independent surveyor or placed into an escrow account, and, if placed into an escrow account, a copy of the escrow agreement, to be sent to the official designated in paragraph (h)(6)(iii) of this section.

(8) A failure of any renewable fuel producers or importer to fulfill or cause to be fulfilled any of the requirements of this paragraph (h) will cause the option for such party to use the alternative quality assurance requirements under this paragraph (h) to be void *ab initio*.

(i) Beginning July 1, 2010, all parties must keep transaction information sent to EMTS in addition to other records required under this section.

(j) A renewable fuel producer that produces fuel from separated yard and food waste as described in §80.1426(f)(5)(i)(A) and (B) and separated municipal solid waste as described in §80.1426(f)(5)(i)(C) shall keep all the following additional records:

(1) For separated yard and food waste as described in §80.1426(f)(5)(i)(A) and (B):

(i) Documents demonstrating the amounts, by weight, purchased of separated yard and food waste for use as a feedstock in producing renewable fuel.

(ii) Such other records as may be requested by the Administrator.

(2) For separated municipal solid waste as described in §80.1426(f)(5)(i)(C):

(i) Contracts and documents memorializing the sale of paper, cardboard, plastics, rubber, textiles, metals, and glass separated from municipal solid waste for recycling.

(ii) Documents demonstrating the amounts by weight purchased of post-recycled separated yard and food waste for use as a feedstock in producing renewable fuel.

(iii) Documents demonstrating the fuel sampling methods used pursuant to §80.1426(f)(9) and the results of all fuel analyses to determine the non-fossil fraction of fuel made from separated municipal solid waste.

(iv) Such other records as may be requested by the Administrator.

(k) A renewable fuel producer that generates RINs for biogas or electricity produced from renewable biomass (renewable electricity) for fuels that are used for transportation pursuant to §80.1426(f)(10) and (11), or that uses process heat from biogas to generate RINs for renewable fuel pursuant to §80.1426(f)(12) shall keep all of the following additional records:

(1) Contracts and documents memorializing the sale of biogas or renewable electricity for use as transportation fuel relied upon in §80.1426(f)(10), §80.1426(f)(11), or for use of biogas for use as process heat to make renewable fuel as relied upon in §80.1426(f)(12), and the transfer of title of the biogas or renewable electricity and all associated environmental attributes from the point of generation to the facility which sells or uses the fuel for transportation purposes.

(2) Documents demonstrating the volume and energy content of biogas, or kilowatts of renewable electricity, relied upon under §80.1426(f)(10) that was delivered to the facility which sells or uses the fuel for transportation purposes.

(3) Documents demonstrating the volume and energy content of biogas, or kilowatts of renewable electricity, relied upon under §80.1426(f)(11), or biogas relied upon under §80.1426(f)(12),

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that was placed into the common carrier pipeline (for biogas) or transmission line (for renewable electricity).

(4) Documents demonstrating the volume and energy content of biogas, or kilowatts of renewable electricity, relied upon under § 80.1426(f)(12) at the point of distribution.

(5) Affidavits from the biogas or renewable electricity producer and all parties that held title to the biogas or renewable electricity confirming that title and environmental attributes of the biogas or renewable electricity relied upon under § 80.1426(f)(10) and (11) were used for transportation purposes only, and that the environmental attributes of the biogas relied upon under § 80.1426(f)(12) were used for process heat at the renewable fuel producer's facility, and for no other purpose. The renewable fuel producer shall create and/or obtain these affidavits at least once per calendar quarter.

(6) The biogas or renewable electricity producer's Compliance Certification required under Title V of the Clean Air Act.

(7) Such other records as may be requested by the Administrator.

(1) The records required under paragraphs (a) through (d) and (f) through (k) of this section and under § 80.1453 shall be kept for five years from the date they were created, except that records related to transactions involving RINs shall be kept for five years from the date of the RIN transaction.

(m) The records required under paragraph (e) of this section shall be kept through calendar year 2022.

(n) On request by EPA, the records required under this section and under § 80.1453 must be made available to the Administrator or the Administrator's authorized representative. For records that are electronically generated or maintained, the equipment or software necessary to read the records shall be made available; or, if requested by EPA, electronic records shall be converted to paper documents.

(o) The records required in paragraphs (b)(3) and (c)(1) of this section must be transferred with any renewable fuel sent to the importer of that renewable fuel by any foreign producer not generating RINs for his renewable fuel.

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(p) Copies of all reports required under § 80.1464.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26046, May 10, 2010; 75 FR 76829, Dec. 9, 2010; 75 FR 79978, Dec. 21, 2010]

§ 80.1455 What are the small volume provisions for renewable fuel production facilities and importers?

(a) *Standard volume threshold.* Renewable fuel production facilities located within the United States that produce less than 10,000 gallons of renewable fuel each year, and importers who import less than 10,000 gallons of renewable fuel each year, are not subject to the requirements of § 80.1426(a) and (e) related to the generation and assignment of RINs to batches of renewable fuel. Except as stated in paragraph (b) of this section, such production facilities and importers that do not generate and assign RINs to batches of renewable fuel are also exempt from all the following requirements of this subpart:

(1) The registration requirements of § 80.1450.

(2) The reporting requirements of § 80.1451.

(3) The EMTS requirements of § 80.1452.

(4) The recordkeeping requirements of § 80.1454.

(5) The attest engagement requirements of § 80.1464.

(6) The production outlook report requirements of § 80.1449.

(b)(1) Renewable fuel production facilities and importers who produce or import less than 10,000 gallons of renewable fuel each year and that generate and assign RINs to batches of renewable fuel are subject to the provisions of §§ 80.1426, 80.1449 through 80.1452, 80.1454, and 80.1464.

(2) Renewable fuel production facilities and importers who produce or import less than 10,000 gallons of renewable fuel each year but wish to own RINs will be subject to all requirements stated in paragraphs (a)(1) through (a)(6) and (b)(1) of this section, and all other applicable requirements of this subpart M.

(c) *Temporary volume threshold.* Renewable fuel production facilities located within the United States that produce less than 125,000 gallons of renewable fuel each year are not subject