No. 19-1023 (and consolidated cases)

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 of Final Agency Action
of the Environmental Protection Agency

INITIAL BRIEF FOR INTERVENORS GROWTH ENERGY, THE NATIONAL BIODIESEL BOARD, AND AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF RESPONDENT ENVIRONMENTAL PROTECTION AGENCY

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January 23, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

Parties, Intervenors, and Amici

A. Petitioners

Growth Energy (Case No. 19-1023).

RFS Power Coalition (Case No. 19-1027).

Monroe Energy (Case No. 19-1032).

Small Retailers Coalition (Case No. 19-1033).

National Biodiesel Board (Case No. 19-1035).

Producers of Renewables United for Integrity Truth and Transparency (Case No. 19-1036).

American Fuel & Petrochemical Manufacturers (Case No. 19-1037).

Valero Energy Corporation (Case No. 19-1038).

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

B. Respondent

Environmental Protection Agency.

C. Intervenors

Intervenors for Respondent: American Fuel & Petrochemical Manufacturers; the American Petroleum Institute; Growth Energy; Monroe Energy; the National Biodiesel Board.

D. Amici

None.

Rulings Under Review

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

Related Cases

The consolidated cases have not been before this Court or any other court.

The related cases are adequately identified in the briefs of petitioners Growth Energy et al., EPA, and intervenors responding to environmental petitioners.

CORPORATE DISCLOSURE STATEMENT

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

The American Petroleum Institute ("API") is a nationwide, not-for-profit association representing over 625 member companies engaged in all aspects of the

oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. API has no parent companies, and no publicly-held company has a 10% or greater ownership interest in API. API is a "trade association" within the meaning of Circuit Rule 26.1(b), and is a continuing association operating for the purpose of promoting the general commercial, regulatory, legislative, and other interests of its members.

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

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

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82 Fed. Reg. 58,486 (Dec. 12, 2017) 2, 3, 5, 11, 17

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https://www.eia.gov/dnav/pet/pet_move_expc_a_EPOOXE_EEX_mbbl_a.htm 6

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GLOSSARY

ACE	*Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017)
AFPM	*American Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559 (D.C. Cir. 2019)
API	American Petroleum Institute
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NBB	Petitioner National Biodiesel Board
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number
Rule	Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, 83 Fed. Reg. 63,704 (Dec. 11, 2018).
RVO	Renewable Volume Obligation

STATUTES AND REGULATIONS

See the principal briefs for relevant statutes and regulations.

SUMMARY OF ARGUMENT

Intervenors submit this brief supporting EPA in response to the brief of the obligated-party petitioners American Fuel & Petrochemical Manufacturers *et al*. This brief focuses on relevant points inadequately elaborated in EPA's brief.[1]

I. Petitioners' challenge to EPA's decision not to issue a general waiver based on severe economic harm fails for the same reason it failed before: the evidence shows obligated parties pass on their compliance costs. Regardless, EPA's finding that the 2019 renewable volume obligations ("RVOs") set under the Renewable Fuel Standard ("RFS") program would not severely harm the economy was sound because the RVOs do not even require obligated parties to meet levels achieved in recent years, when no severe harm resulted. The recent decline in Renewable Identification Number ("RIN") prices confirms that obligated parties expect 2019 compliance to be historically easy. EPA appropriately considered the potentially lost program benefits.

II. Petitioners' challenge to EPA's decision not to issue an inadequate-supply waiver of the advanced standard is foreclosed by precedent. Petitioners

[1] API does not join Parts I-III.

conflate the standard governing that waiver with the standard governing the cellulosic waiver.

III. The same precedent defeats petitioners' challenge to EPA's assessment of the achievable volume of total renewable fuel. They insist that EPA consider factors that this Court has already held EPA could not consider.

IV. Petitioners' challenges regarding the RFS program's point of obligation are meritless. The evidence demonstrates that obligated parties pass along their RIN costs and that moving the point of obligation would not change the allocation of RIN costs among market participants.[2] The developments cited by petitioners do not undermine those conclusions or warrant reconsidering the point of obligation—a process that would significantly destabilize the RFS program. Indeed, this Court recently confirmed that EPA has "no duty to reconsider" the point of obligation "as part of its yearly" RFS rulemaking process, *Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 659 (D.C. Cir. 2019), and rejected a nearly identical challenge to the 2018 rule on that basis, *American Fuel & Petrochemical Mfrs. v. EPA ("AFPM")*, 937 F.3d 559, 587 (D.C. Cir. 2019). Regardless, there is no evidence that the small-refinery exemptions cited by

[2] Growth Energy and NBB oppose petitioners' point-of-obligation claims on this basis alone. API opposes petitioners' point-of-obligation claims on all the grounds in Part IV.

petitioners—which accounted for only seven percent of the 2018 total volume requirement—were based on a supposed inability to pass along their RIN costs, and likewise no evidence that the PES bankruptcy had anything to do with the RFS program.

ARGUMENT

I. EPA CORRECTLY DECLINED TO ISSUE A GENERAL WAIVER BASED ON SEVERE ECONOMIC HARM

Petitioners' contention that the 2019 RVOs "would severely harm the economy," permitting a general waiver, is foreclosed by *AFPM*, 937 F.3d at 579. *See* 42 U.S.C. §7545(*o*)(7)(A)(i). In setting the *2018* RVOs, EPA determined that compliance would not severely harm the economy. 82 Fed. Reg. 58,486, 58,487 (Dec. 12, 2017) ("2018 Rule"). On review, this Court recognized that, given Congress' "inten[tion]" that the RFS program be "market forcing," the waiver provision sets a "stringent" and "high bar," requiring "clearly and causally demonstrable harm." 937 F.3d at 580. The Court then concluded that the obligated-party petitioners (many of which are petitioners here) had "fallen far short" of showing that EPA "act[ed] arbitrarily and capriciously in declining to exercise the economic-harm prong of its general waiver authority." *Id.* at 581.

Petitioners now rehash the same failed arguments, except now the foundation of their flawed theory of harm—the prices of the RINs they must acquire to comply with their RVOs—is weaker.

A. The central flaw in petitioners' challenge is that obligated parties can and do pass on their RIN costs by charging other market participants higher prices for the blendstock that is combined with renewable fuel to make the transportation fuel sold to consumers. JA[2019.RTC.at.14-15]; EPA Br. 26-28. EPA has detailed this conclusion repeatedly, including in its denial of a petition to reconsider the point of obligation. JA[EPA-HQ-OAR-2018-0167-0065.at.21-32]. *Alon* affirmed that denial as "grounded" "in studies and data in the record." 936 F.3d at 649. Then *AFPM* concluded that EPA reasonably relied on the denial to find that compliance with the 2018 RVOs would not severely harm the economy. 937 F.3d at 579-581.

Without even mentioning *Alon* or *AFPM*, petitioners recycle the same arguments rejected there. The third time is not a charm. EPA's brief persuasively explains (at 26-31) how petitioners provide no new evidence or reasons to reach a different conclusion.

B. Regardless of RIN pass-through, the notion that the 2019 RVOs would severely harm the economy is risible. As the renewable-fuel petitioners explained (Br. 10-12), because of the massive amount of retroactive small-refinery exemptions EPA has granted recently (without ever being made up), the RIN bank has swelled. Consequently, the 2019 RVOs would not have put any pressure on

the market beyond what it experienced in prior years without severe harm to the economy.

When EPA finalized the 2019 RVOs in late 2018, there were 2.59 billion carryover RINs available for compliance with the 2018 RVOs. Rule at 63,709. The bank had grown by nearly 1 billion RINs in the past two years, JA[EPA-HQ-OAR-2018-0167-1298.at.A-8] (1.64 billion carryover RINs used for 2016 compliance), reflecting the 2.22 billion RINs that EPA had retroactively exempted during that period.[3]

The reality of the RIN bank dispels any concern that the 2019 RVOs would have severely harmed the economy. As EPA has put it, "the availability of rollover RINs can significantly affect the potential impact of implementation of the RFS volume requirements." 77 Fed. Reg. 70,752, 70,759, 70,775 (Nov. 27, 2012). The market could have complied with the 2019 RVOs without any growth from recent years in which compliance did not result in severe harm to the economy. When EPA finalized the 2019 RVOs, it recognized that the market had generated

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[3] *See* JA[RFS.Small.Refinery.Exemptions. https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions] (790 million 2016 exemptions); JA[EPA-HQ-OAR-2018-0167-0043.at.3, 7] (1.46 billion 2017 exemptions as of proposed 2018 rule); JA[EPA-HQ-OAR-2018-0167-1298.at.3] (no additional 2017 exemptions granted as of final 2018 rule).

18.93 billion new RINs in 2017 (the latest year with data). JA[EPA-HQ-OAR-2018-0167-1298.at.2].[4] For 2018, EPA set the total volume requirement at 19.28 billion. Accordingly, when EPA was finalizing the 2019 RVOs, this much was clear to EPA: even if RIN generation did not grow in 2018 *and* 2019 beyond the 2017 level, the market could comply with the RVOs for both years and *still* have 1.24 billion carryover RINs in the bank.[5] Thus, the 2019 RVOs (like the 2018 RVOs) required no growth compared to years in which there had been no severe harm to the economy, contrary to Congress's intent, and so there could not have been a reasonable expectation that compliance with the 2019 RVOs would severely harm the economy, either. Petitioners make no argument that 2019 would have been so different from 2018 that maintaining the level of renewable-fuel use would have severely harmed the economy in 2019 when it did not previously. Further,

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[4] This figure does not include exported renewable fuel. It therefore defines a conservative baseline because any exported fuel *could* be used domestically to meet the RFS requirements if needed. And more than 1 billion gallons of renewable fuel have been exported annually in recent years. Energy Information Administration, *Petroleum & Other Liquids: Exports by Destination*, https://www.eia.gov/dnav/pet/pet_move_expc_a_EPOOXE_EEX_mbbl_a.htm.

[5] Of the 2.59 billion carryover RINs available when EPA finalized the 2019 rule, 350 million would be needed for 2018 (= 19.28 billion required RINs - 18.93 billion new RINs) and another 990 million would be needed for 2019 (= 19.92 billion required RINs - 18.93 billion new RINs), for a total of 1.35 billion carryover RINs, leaving 1.24 billion carryover RINs.

this analysis assumes unrealistically that EPA would grant no more retroactive exemptions for 2017 and none for 2018 and 2019.

As it turned out, compliance will be easier. RIN generation increased in 2018, to 19.32 billion, JA[EPA-HQ-OAR-2019-0136-0003.at.2], and EPA subsequently exempted an additional 360 million RINs for 2017 (1.82 billion RINs total) and 1.43 billion RINs for 2018. JA[RFS.Small.Refinery.Exemptions].[6] Consequently, there are now 3.48 billion 2018 carryover RINs available to comply with the 2019 RVOs. [2020 Final Rule at 17]; Renewable-Fuel Producers Br. 12. Because these carryover RINs can and will be used for compliance, the 2019 total volume requirement requires only that 16.44 billion new RINs have been generated, not the nominally required 19.92 billion. *See* Renewable-Fuel Producers Br. 13. Assuming that 2019 RIN generation has not increased from 2018 (19.32 billion), the market could fully comply with the 2019 volume requirements and still have 2.9 billion carryover RINs for 2020. The 2019 RVOs, therefore, will in fact exert no pressure to increase renewable-fuel use and not threaten severe harm to the economy.

EPA may consider carryover RINs when setting RVOs and specifically when assessing whether compliance would severely harm the economy because

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[6] RIN generation data for 2019 is not yet available and EPA has yet to resolve the 21 exemption petitions submitted for 2019.

obligated parties can and certainly will use them to comply (lest they expire worthless). Renewable-Fuel Producers Br. 13; *see* 77 Fed. Reg. at 70,759. Obligated parties may prefer to maintain a large RIN bank as a compliance "buffer" in tough times. Rule at 63,709-63,710 & n.25. But if they have a bank after complying with the 2019 RVOs, that will be entirely the result of their voluntary decision to generate excess RINs in 2019—and thus cannot be a harm "clearly and causally" due to implementation of the 2019 RVOs. *AFPM*, 937 F.3d at 580.[7]

In any event, as shown above, even without excess RIN generation obligated parties could comply through 2019 and still have a large RIN bank. There has never been a showing that having only 1.24 billion (let alone 2.9 billion) carryover RINs would be inadequate for 2020 (or any year). Moreover, having few or no

[7] EPA's brief seems to deny (at 67) that the effective volume requirement is the nominal requirement minus available carryover RINs. EPA's discussion is misleading and contradicts prior statements in final agency actions. EPA says (*id.*) that computing an effective requirement this way "assume[s] that obligated parties will use up all carryover RINs for 2019 *without carrying over any new RINs into 2020*" (emphasis added). No, it assumes only that obligated parties will use up all carryover RINs; any positive balance of carryover RINs afterward will be the result of obligated parties' *voluntary* decision to generate excess RINs. Renewable-Fuel Producers Br. 13 n.10. EPA recognized these concepts in the Rule and in the recently-issued 2020 rule: "For the bank of carryover RINs to be preserved from one year to the next, individual carryover RINs are used for compliance before they expire and are essentially replaced with newer vintage RINs that are then held for use in the next year." Rule at 63,708 at n.20; [2020 Final Rule at 15] n.15 (signed Dec. 19, 2019); *accord* 77 Fed. Reg. at 70,759.

carryover RINs is not itself harmful to the economy. Quite the contrary, using carryover RINs to ease compliance should the 2019 RVOs turn out to be more demanding than expected is precisely the purpose of carryover RINs, and so EPA must consider them in assessing whether the RVOs would severely harm the economy.

In fact, the market—which principally comprises obligated parties—has clearly concluded that the 2019 RVOs would *not* severely harm the economy. Whereas D6 RINs have occasionally been $1 or higher without the economy experiencing severe harm, they were much lower throughout 2018—as EPA was dramatically increasing small refinery exemptions and the RIN bank was accordingly ballooning—and they fell to about 20 cents as EPA was finalizing the 2019 RVOs. EPA, *RIN Trades and Price Information*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information.[8] That shows how little compliance pressure the market believed the 2019 RVOs would exert when adopted. *See* JA[2019.RTC.at.15] (“RIN prices [were] significantly lower in the second half of 2018 than in recent [prior] years, which would … significantly reduce the alleged impacts” on obligated parties expected in 2019). Currently, as the 2019 compliance-demonstration deadline approaches, D6

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[8] D6 RINs are used to meet the implied non-advanced portion of the total volume requirement and thus best reflect the program’s overall incentives.

RINs are about 15 cents, *RIN Trades and Price Information*, confirming that the market believes compliance will be easier than originally expected.

These historically low RIN prices belie the claim that compliance will severely harm the economy. Even "large compliance costs," i.e., high RIN prices, do not qualify as the type of "severe[] harm" required to trigger EPA's general-waiver power. *Americans for Clean Energy v. EPA* ("*ACE*"), 864 F.3d 691, 711-712 (D.C. Cir. 2017). But even if they did, EPA's recent mismanagement of the RFS program—granting vast amounts of retroactive small refinery exemptions without requiring that they be made up, refusing to set volume requirements high enough to reduce the amount of excess RIN generation, and setting RVOs that force little or no growth in renewable-fuel use—has ensured that the cost of 2019 compliance will be negligible.

C. Petitioners also fault (Br. 21) EPA for considering the overall "beneficial impacts" of the RFS program in assessing whether to issue a general waiver. Their objection is irrelevant because EPA concluded that it would not have exercised the waiver even if it did "not consider the benefits of the program." JA[2019.RTC.at.17].

Regardless, it is appropriate to consider potentially lost benefits. Even if EPA makes a severe-harm finding, EPA has "discretion to waive" the volume requirements or not. *ACE*, 864 F.3d at 705. EPA has repeatedly taken the position

that in exercising that discretion, EPA may consider the program's benefits, and consider them nationally, not just for the same area or sector where the harm arises. *See* 2018 Rule at 58,517-58,518 n.138; 77 Fed. Reg. at 70,755; 73 Fed. Reg. 47,168, 47,172 (Aug. 13, 2008).

That interpretation is reasonable—indeed, required. Any government policy encouraging certain market outcomes will advantage some actors and disadvantage others. Congress certainly understood that when it specified "the *national* quantity of renewable fuel" that must be used annually to achieve *national* economic, environmental, and security goals, and created a general-waiver power that correspondingly can reduce only those *national* requirements, 42 U.S.C. §7545(*o*)(2), (7)(A) (emphasis added); 700; Pub. L. No. 110-140, preamble, 121 Stat. 1492, 1492 (Dec. 19, 2007); *ACE*, 864 F.3d at 697. It makes no sense to imagine that Congress intended for the achievement of national goals through a nationwide program to be thwarted automatically whenever some market participants will suffer localized harm. Indeed, were EPA to blind itself to the potentially lost program benefits, it would "entirely fail[] to consider an important aspect of the problem" Congress created the program to solve. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. EPA CORRECTLY DECLINED TO ISSUE A GENERAL WAIVER BASED ON "INADEQUATE DOMESTIC SUPPLY" OF ADVANCED BIOFUELS

EPA determined that it could not use its general-waiver power to reduce the advanced standard based on "inadequate domestic supply." Petitioners' challenge to that determination is foreclosed by *ACE*, which they omit from the relevant part of their brief (at 22-26).

ACE held that, when assessing whether supply is adequate, EPA may only consider "*supply-side* factors affecting the volume of renewable fuel that is available to *refiners, blenders, and importers* to meet the statutory volume requirements." 864 F.3d at 696. Accordingly, EPA here found that it could not use this waiver power on the advanced standard because it did not believe "that feedstock supplies or production capacity would preclude the domestic industry from meeting the standard." JA[2019.RTC.at.11]. Petitioners do not contest that finding, and so their challenge must be rejected.[9]

Instead, petitioners attack (Br. 23-26) EPA's analysis of how much advanced biofuel would be "attainable" or "reasonably attainable." EPA has explained that those standards relate to the separate and distinct *cellulosic* waiver.

[9] EPA reached that finding without considering imported renewable fuel, JA[2019.RTC.at.11], though EPA is permitted to count such fuel toward the "domestic supply," *AFPM*, 937 F.3d at 581-583, as petitioners acknowledge (at 26 n.10).

Rule at 63,708. And petitioners focus (Br. 24) on EPA's consideration of "market disruption, higher costs, and feedstock and/or foreign advanced biofuel diversion." *See* Rule at 63,730 n.128. Those factors do not affect the *adequacy* of the *supply* of renewable fuel, and so, although they may be considered for purposes of the *cellulosic* waiver, they *cannot* be considered for purposes of the inadequate-supply general waiver. *ACE*, 864 F.3d at 731-734.[10] Petitioners' challenge to EPA's general-waiver decision, therefore, fails under *ACE*.[11]

III. PETITIONERS' CHALLENGE TO EPA'S ASSESSMENT OF THE VOLUME OF NON-ADVANCED RENEWABLE FUEL FAILS

Petitioners march (Br. 26-34) through a litany of supposed flaws in EPA's assessment of the total achievable volume of non-advanced renewable fuel (principally conventional ethanol) in 2019: assuming that the poolwide concentration of ethanol in 2019 would be the same as in 2017; declining "to review factors affecting the production, distribution, use, and cost of gasoline-

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[10] These factors may reflect possible undesirable collateral consequences of achieving adequate supply but they do not show that the supply cannot meet the volume requirements. *See* Rule at 63,719-63,720. There is a separate waiver to address circumstances other than inadequate supply—i.e., to avoid *severe* harm to the economy—but as discussed, that standard was not met. *ACE*, 864 F.3d at 712 (inadequate-supply waiver cannot be "based on 'lesser degrees' of economic harm").

[11] Even if petitioners meant to challenge EPA's handling of the cellulosic waiver, it would fail because EPA already used the cellulosic waiver to reduce the advanced standard to the maximum extent legally possible. Rule at 63,720, 63,723, 63,730; *see AFPM*, 937 F.3d at 583.

ethanol blends," such as E15 and E85; and devising "Possible Volume Scenarios" for how the market could meet the 2019 RVOs by relying on merely the "attainable" (rather than "reasonably attainable") volume of certain renewable fuels" and on "possible" poolwide concentrations of ethanol.

None of these supposed errors could support an *inadequate-supply* waiver because they address (at most) only *non-supply* factors, which (again) are verboten in this context. *ACE*, 864 F.3d at 697. Further, "[t]he Program imposes no free-floating obligation on the EPA to estimate the reasonably attainable supply of ethanol," nor any requirement that EPA assess the supply or achievable volume of any particular *transportation* fuel, such as E15 or E85. *AFPM*, 937 F.3d 583-584. Given these prior holdings, there is nothing left of petitioners' arguments.[12]

Consequently, the Court should not wade into the specifics of petitioners' arguments about ethanol, with which intervenors disagree. If anything, EPA understated the achievable ethanol use in 2019. EPA's assumption that the poolwide concentration of ethanol would be the same as in 2017 contravenes Congress's market-forcing intent, and the extensive evidence showing that the market could achieve higher RFS volume requirements if EPA were to set them, JA[EPA-HQ-OAR-2018-0167-1292.at.42-48].

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[12] Again, these supposed errors could not invalidate EPA's decision regarding the *cellulosic* waiver because EPA fully used that power. *See supra* note 11.

IV. EPA REASONABLY DECLINED TO REVISIT THE POINT OF OBLIGATION

Intervenors Growth Energy, NBB, and API support EPA's decision not to revisit the point of obligation in the course of the 2019 rulemaking. Growth Energy and NBB oppose petitioners' point-of-obligation objections because the evidence is clear that market participants pass on the cost of their RINs, which refutes the claim that moving the point of obligation would change the allocation of RIN costs among market participants. *See* EPA Br. 26-28, 45. API opposes petitioners' challenges for that reason and the following additional reasons.[13]

This Court rejected equivalent challenges to the point of obligation in *Alon*, 936 F.3d at 659, and *AFPM*, 937 F.3d at 587. There were good reasons for the Court's rulings: The Act does not require EPA to reconsider one of the RFS program's foundational elements every year, and such a requirement would significantly disrupt the program's operation. *See Alon*, 936 F.3d at 658 ("It is not plausible that Congress meant EPA to consider uprooting the baseline of the RFS program every year."). As EPA recently explained, reconsidering the point of obligation annually would "undermin[e] long settled expectations" that are "critical to … success of the program," and would "cause delays to the investments

[13] API does not join Parts I-III of this brief.

necessary to expand the supply of renewable fuels." JA[EPA-HQ-OAR-2016-0544-0525.at.2]; *see also Alon*, 936 F.3d at 653 (making this point).

Although petitioners cite (Br. 35) "important developments" in once again challenging the point of obligation, their arguments do not warrant a different outcome here.

First, petitioners disregard (Br. 34) significant limits on judicial review of their point-of-obligation claims. *Alon* held that EPA has "no duty to reconsider the appropriateness of its point of obligation regulation as part of its yearly determination of volumetric requirements," and therefore EPA may treat point-of-obligation comments as "beyond the scope of" these annual rulemakings. 936 F.3d at 659. Accordingly, this Court summarily rejected point-of-obligation challenges to the RFS 2018 rule. *AFPM*, 937 F.3d at 587.

Second, petitioners point (Br. 35-36) to EPA's grant of small-refinery exemptions to "approximately 25% of refineries nationwide." However, those refineries are "small" by definition, accounting for only seven percent of the total volume requirement for 2018. *See* Renewable-Fuel Producers Br. 12.

Third, petitioners incorrectly infer from these exemptions that RIN costs cannot be passed through to consumers. Small-refinery-exemption decisions are not publicly available, and therefore petitioners resort to speculation about EPA's grounds for granting the exemptions. Moreover, publicly-available information

indicates that pass-through of RIN costs is *not* one of the "principal factors" (Br. 14-15) EPA considers. The Department of Energy does not even *evaluate* whether RIN costs are passed through.[14] *See Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 607 (4th Cir. 2018) (no assessment of "'RINs net revenue or cost' factor"). Moreover, alternative inferences can be drawn from EPA's exemptions. For example, a small refinery could face hardship even if, in general, refineries are able to recoup their RIN costs. *See id.* at 613. Alternatively, EPA may have improperly issued small-refinery exemptions.[15] Petitioners thus cannot show that EPA validly granted small-refinery exemptions because small refineries are unable to recoup their RIN costs.

Fourth, the PES bankruptcy does not support petitioners' argument (Br. 36-37). Petitioners selectively quote from the Government's briefing in that case, but other portions of the briefing (not quoted by petitioners) demonstrate that the bankruptcy's causes were "separate and apart from anything having to do with RINs or the RFS program," such as "unwise business decisions" and factors

[14] EPA recently explained that "EPA has never granted an SRE because the refinery could not pass through the costs of RINs to their customers or because of high RIN prices." 2020 Response to Comments 15 (Dec. 2019), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100YAPQ.pdf.

[15] Challenges to EPA's small-refinery exemptions for the 2018 and 2017 compliance years are pending. *See Renewable Fuels Ass'n v. EPA*, No. 19-1220 (D.C. Cir.); *Renewable Fuels Ass'n v. EPA*, No. 18-9533 (10th Cir.).

"unique" to PES. Br. of United States, *In re PES Holdings, LLC*, No. 18-10122, ECF No. 347, at 23, 27 (Bankr. D. Del. Mar. 30, 2018). Moreover, the bankruptcy settlement requires PES to comply "fully" with 2019 and later volume obligations, indicating that there is no hardship from going-forward compliance with the RFS even given PES's financial situation. *Id.* Petitioners do not explain how it could be an abuse of discretion for EPA to decline to revisit the point of obligation based on the bankruptcy of a single refinery representing less than two percent of total U.S. refining capacity.[16]

Fifth, petitioners assert (Br. 38) that the "blendwall" requires reevaluation of the point of obligation. However, petitioners misstate EPA's past position: higher RIN prices "*reflect the increasing cost* associated with 'getting ever-greater volumes of renewable fuel into the transportation fuel pool.'" *Alon*, 936 F.2d at 629 (emphasis added). That the blendwall remains a significant obstacle resulting in higher RIN prices does not require EPA to revisit the point of obligation.

Finally, petitioners claim (Br. 38-40) that 42 U.S.C. §7545(*o*)(11) requires reevaluation of the point of obligation. But nothing in the statute links that periodic-review provision to EPA's annual volumetric rulemakings. To the extent petitioners challenge EPA's failure to conduct periodic reviews, that issue is not

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[16] *See* U.S. Energy Information Administration, *Refinery Capacity Report* Table 5 (Jan. 1, 2019), https://www.eia.gov/petroleum/refinerycapacity/table5.pdf.

before the Court and must instead be addressed through separate litigation. *See Valero Energy Corp. v. EPA*, 927 F.3d 532, 538 (D.C. Cir. 2019). *Alon* does not suggest otherwise: the Court simply observed that "if" such a review concluded that the point of obligation "was obstructing compliance," EPA may be required to revisit it. 936 F.3d at 659. In any event, EPA conducted a detailed review of the point-of-obligation issue in November 2017, and in guidance addressing §7545(*o*)(11) explained that the 2017 proceeding satisfied any periodic-review-duty relating to the point of obligation.[17]

CONCLUSION

The Court should deny the obligated-party petitioners' petitions for review.

[17] EPA, *Periodic Reviews for the Renewable Fuel Standard Program*, EPA-420-S-17-002, at 12 (Nov. 2017), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100TDK5.pdf.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of this Court's August 20, 2019 order because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this response contains 4,187 words.

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

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January 23, 2020

CERTIFICATE OF SERVICE

I certify that on January 23, 2020, I filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

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January 23, 2020