ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1023 and consolidated cases

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

GROWTH ENERGY, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW R. WHEELER, as Administrator of the United States Environmental Protection Agency,

Respondents.

On Petition for Review of an Action of the
United States Environmental Protection Agency

INITIAL REPLY BRIEF OF ENVIRONMENTAL PETITIONERS

February 20, 2020

Carrie Apfel
Earthjustice
1001 G Street, NW, Suite 1000
Washington, DC 20001
202-797-4310
capfel@earthjustice.org

Peter Lehner
Surbhi Sarang
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
212-845-7389
plehner@earthjustice.org
ssarang@earthjustice.org

Counsel for Petitioners National Wildlife Federation, Healthy Gulf, and Sierra Club

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Regulations

Other Authorities

GLOSSARY OF ABBREVIATIONS

AFPM	*Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559 (D.C. Cir. 2019)
APA	Administrative Procedure Act
CAA	Clean Air Act
Determination	No Effect Determination
EISA	Energy Independence and Security Act of 2007
EPA 2018 Brief	Brief for Respondent, *AFPM*, ECF No. 1757157
ESA	Endangered Species Act
JA	Joint Appendix
RFS	Renewable Fuel Standard
TR	Triennial Report
2018 Rule	Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volumes for 2019, 82 Fed. Reg. 58,486 (Dec. 12, 2017)
2019 Rule or the Rule	Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volumes for 2020, 83 Fed. Reg. 63,704 (Dec. 11, 2018)

SUMMARY OF ARGUMENT

To avoid confronting the merits of Environmental Petitioners' claims, EPA argues that this Court does not have jurisdiction because Environmental Petitioners lack standing and the Clean Air Act ("CAA") claim is untimely. Neither argument holds water, and EPA cannot escape the facts and law supporting the merits of Environmental Petitioners' claims.

EPA's attack on Environmental Petitioners' standing – as well as on the merits of Environmental Petitioners' Endangered Species Act ("ESA") and Administrative Procedure Act ("APA") claims – rests on the hollow contention that there is no causal link between the 2019 Rule ("the Rule") and environmental harms. EPA would have this Court believe that the Rule – which sets annual renewable biomass volumes with the goal of increasing renewable biomass production – actually has no effect on the production of corn and soy (two of the predominant biofuel feedstocks). That argument is as illogical as it is factually unsupported.

Indeed, this case is all about the Rule's impact on production, as evidenced by the petroleum refineries' concern that the Rule reduces petroleum sales, and the corn growers' and ethanol producers' concern that it does not sufficiently spur biofuel production. Were EPA correct that the Rule has no effect on ethanol or corn production, no party would or could sue. EPA's argument proves too much.

Rather, EPA's 2019 renewable fuel volumes incentivize the market to produce more corn and soy, as the law intended. This leads to conversion of previously uncultivated land and degradation of critical habitat for endangered and threatened species. The Rule thus causes harm to these species, injuring Environmental Petitioners and establishing standing, as this Court recently concluded in the almost identical challenge to the 2018 renewable fuel volumes. Further, because EPA's No Effect determination ("Determination") is also refuted by these facts and by established law, the Rule is unlawful under the ESA and the APA. EPA's decision not to grant a severe environmental harm waiver is likewise unlawful for the same reasons.

EPA's attempt to evade review of Environmental Petitioners' CAA claim fares no better. EPA's Second Triennial Report constructively reopened this issue by providing – for the first time in a Renewable Fuel Standard ("RFS") rulemaking – detailed evidence of land conversion linked in part to renewable biomass production. This new information conclusively demonstrates that EPA's aggregate compliance approach is failing to accomplish the statutory mandate of preventing the conversion of previously uncultivated land and is thus illegal.

ARGUMENT

I. ENVIRONMENTAL PETITIONERS HAVE STANDING.

Despite this Court's finding on the basis of nearly identical facts that Environmental Petitioners had standing to challenge the 2018 volumes, *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 595–96 (D.C. Cir. 2019) ("*AFPM*"), EPA contests Environmental Petitioners' standing, arguing that the Rule cannot be linked to their members' injuries. EPA Br. at 84–85. But the Court already reviewed and dismissed the same arguments EPA now makes.

Specifically, EPA argues here, as in its *AFPM* brief, that market forces, not the RFS, drive production. *Id.* at 87-90; Brief for Respondent at 91–94, *AFPM*, ECF No. 1757157 ("EPA 2018 Brief"). This Court rejected that argument, finding that the Lark declaration and Triennial Report establish injury-in-fact for standing and show a "substantial probability" that the 2018 Rule injured Environmental Petitioners. *AFPM* at 595. Similarly, the 2019 Rule causes Environmental Petitioners' injuries: The Triennial Report documents how the RFS increases demand for corn and soy and drives conversion of uncultivated land to cropland, which, as Dr. Lark explains, leads to destruction of critical habitat and adverse impacts to threatened and endangered species. In fact, at oral argument, Judge Tatel stated that there has never been an "agency report that quite as clearly

demonstrates standing as [the Triennial Report] does." *AFPM* Oral Argument at 2:18:40.[1] The same holds true here.

A. The Relaxed Procedural Standing Requirements Apply.

EPA tries to distinguish *AFPM* by asserting that here, unlike in *AFPM*, it made a No Effect determination, converting this case into something other than a procedural challenge. EPA Br. at 85. EPA is simply wrong – the preparation of an adequate No Effect determination is part of the duty to consult, and thus the challenge to a woefully inadequate No Effect determination remains a procedural challenge. *See Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 19 (D.D.C. 2014) (finding that a challenge to Biological Opinion and the No Effect determination based on it "are really part of the same [procedural] claim that consultation was required"). And Environmental Petitioners' assertion that EPA failed to consult raises the "archetypal procedural injury." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017) (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013)); *see also AFPM* at 592; *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008) (finding that failure to comply with § 7 consultation process by relying on faulty Biological Opinion is procedural harm); *Defs. of Wildlife v. EPA*, 420 F.3d

[1] Recording available at https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/9CB31AA1DB2550E2852583A7005F99B8/$file/17-1258.mp3.

946, 957 (9th Cir. 2005), *rev'd on other grounds and remanded sub nom. Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007) (finding that failure to consult, including relying on illegal Biological Opinion, is a procedural harm). Relaxed redressability and immediacy-of-injury requirements therefore apply to the standing inquiry. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

B. Environmental Petitioners' Members Establish Injury-in-Fact.

AFPM squarely precludes EPA's strained argument that Environmental Petitioners cannot show adequately likely injury from the Rule. This Court already concluded that the Lark Declaration, Triennial Report, and member declarations – all part of this record – establish that the Rule causes land conversion, which causes Environmental Petitioners' injury. *See AFPM* at 595; *see also* Envtl. Pet'rs' Br. at 20–22.

EPA cites to *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), in an attempt to argue that Environmental Petitioners have not demonstrated sufficiently specific injury. However, *Summers* presents a wholly distinguishable situation. There, members failed to identify *any* specific sites they used that were affected by the challenged regulation, and thus the Court determined they failed to establish injury-in-fact. *See id.* at 495. By contrast, here, members' declarations establish that they view, and plan to view in the future, species in areas threatened by the

Rule, including: the Piping Plover and Yellow-Billed Cuckoo in the middle Mississippi Basin, *see* Helmers Decl. ¶ 9; Gulf Sturgeon along the Mississippi River and in Grand Lake, Big Lake River, and Grand Isle, *see* Viles Decl. ¶¶ 11, 17; Whooping Cranes in the Aransas National Wildlife Refuge, *see* Giessel Decl. ¶ 21; and Dakota Skipper in Sibley State Park, *see* Slama Decl. ¶¶ 10–11.[2] Coupled with the Triennial Report and Lark Declaration, which establish that the RFS has harmed and will continue to harm these species at these very sites, *see, e.g.*, Lark Decl. ¶¶ 16, 17, 18, 19, 29, JA __, __, __, __, __, the declarations show that the members "share a geographic nexus with areas likely affected by" the Rule and thus show injury for standing. *AFPM* at 595; *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.") (internal quotation marks omitted).

C. The 2019 Rule Causes Environmental Petitioners' Injuries.

Although EPA goes to great lengths to argue that the Rule causes *no* increase in corn or soy production, and thus *no* environmental harm or injury to Environmental Petitioners, its contentions defy record evidence and common

[2] The Helmers, Viles, Giessel, and Slama declarations are attached to Environmental Petitioners' Opening Brief.

sense. Just as the Court found in *AFPM*, the establishment of renewable fuel volumes will affect renewable biomass (primarily corn and soy) production volumes, which affect the conversion of land to produce renewable biomass, which will, in turn, harm endangered and threatened species and their habitats, and thus harm Environmental Petitioners' members. *See AFPM* at 593–96.

EPA nevertheless claims there is no causal link between fuel volumes and corn and soybean demand or cultivation in the United States because, in certain years, fuel volumes increased but fewer crop acres were planted. EPA Br. at 87. This argument fails. Planted acres alone do not reveal whether land was *converted* to produce corn. *See* Lark Decl. App. 2 at 13–14, JA__-__. Cropland comes out of production for numerous reasons, most notably development, and thus there can be fewer acres planted coupled with harmful land conversion to produce renewable biomass. Envtl. Pet'rs' Br. at 30. Moreover, a decrease in overall corn and soy acres does not necessarily indicate a decrease in acres attributed to the RFS program. For example, in the U.S., in most years, over 85 million acres are devoted to corn,[3] mostly for animal feed, with about 40 percent used for renewable fuel.[4] Thus, EPA's reference to overall acreage is no more meaningful than a

[3] USDA, Corn Acres: United States (Jan. 10, 2020), https://www.nass.usda.gov/Charts_and_Maps/graphics/cornac.pdf.
[4] USDA, U.S. Bioenergy Statistics, Table 5—Corn Supply (Jan. 22, 2020), https://www.ers.usda.gov/data-products/us-bioenergy-statistics/us-bioenergy-statistics/#Feedstocks.

reference to national educational test scores is to test scores in a particular neighborhood. EPA cannot overcome its own report and other evidence that RFS volumes give rise to increases in planted acres for biomass production. *See, e.g.*, Triennial Report ("TR") at 24–38, 43, JA __-__, __.

EPA's reliance on *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015), is misplaced. In *Arpaio*, the Court declined to find a causal link based *only* on a purported chronological connection between two events. *See id.* at 21. Here, there is chronological evidence, TR at 37–38, JA __–__, *and* studies that "suggest[] a causal link" between the Rule and land conversion. *Id.* at 35, JA__.

It suffices that Environmental Petitioners "demonstrate . . . a substantial probability that local conditions will be adversely affected and thereby injure a member of the organization." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (internal quotation marks omitted). Environmental Petitioners' members have seen land converted for corn and the resulting adverse environmental impacts on areas they use. *See, e.g.*, Slama Decl. ¶¶ 9, 13; Giessel Decl. ¶¶ 7, 14–5. The Triennial Report found that "[t]here is strong correlational evidence that biofuels are responsible for some of this observed land use change." TR at 44, JA __; *see also id*. at 43, 53–54, JA __, __-__. And the Lark Declaration links this to Environmental Petitioners' members' experiences. Lark Decl. at 15–35, JA__-__; *see also AFPM* at 595 ("The EPA's Triennial Report and the Lark declaration

provide evidence of [substantial probability]. They describe the effects of the annual standards promulgated over the past decade, and the 2018 Rule is simply the next iteration of those standards."); Envtl. Pet'rs' Br. at 12–17. Thus, as with the 2018 Rule, "[i]t requires no great speculative leap to conclude that the EPA caused an injury" to Environmental Petitioners' members. *AFPM* at 595 (internal quotation marks omitted).

EPA tries to import into the injury analysis a degree of specificity that the law does not require. Contrary to EPA's contentions, Environmental Petitioners need not identify specific land actually converted due to the 2019 Rule, *see* EPA Br. at 91, but need only show "substantial probability" that harm will occur. *Ctr. for Biological Diversity*, 861 F.3d at 184. By identifying very specific areas Environmental Petitioners use, that Dr. Lark shows through maps are near refineries and experiencing land conversion for corn feedstock, *see* Lark Decl. App. 3 at 83, Apps. 6–10, JA__, __- __, Environmental Petitioners make the adequate showing. *See* Giessel Decl. ¶¶ 22–24; Slama Decl. ¶ 13. EPA objects to the fact that the identified areas are large, but the fact that those specified areas are part of greater affected regions does not change the geographic nexus between the harm and the caused injury. *AFPM* at 595 ("The EPA action here…affects the local conditions that matter to Giessel and Fontenot.").

D. Environmental Petitioners' Injuries Are Redressable.

Given that Environmental Petitioners suffer procedural harm, they need only show that consultation *could* alter EPA's decision. *See AFPM* at 595; *Ctr. for Biological Diversity*, 861 F.3d at 185. Consultation could have led to EPA's invoking its waiver authority to reduce the 2019 volumes or implementing mitigation measures, and thus, as in *AFPM*, Environmental Petitioners' injuries are redressable. *See AFPM* at 595.

E. Environmental Petitioners Also Satisfy Traditional Standing Requirements.

Even if traditional standing requirements apply, Environmental Petitioners meet them. Environmental Petitioners' members' injuries are immediate, as the RFS is tied "to documented land use changes and ensuing environmental consequences which may potentially have detrimental impacts on federally listed species and their designated critical habitat," Lark Decl. at 3–4, JA __-__, and the Rule is simply the "next iteration" of the standards. *AFPM* at 595. The Rule will continue these harms, imminently risking Environmental Petitioners' members' interest in conserving and observing endangered and threatened species. *See, e.g*, Giessel Decl. ¶ 21–23 (ongoing conversion of land for biomass crops near whooping crane critical habitat threatens interest in continuing to visit these areas). Given the substantial harms documented in the record, it is likely that, after consultation, EPA would have to modify the volumes or include mitigation

measures to avoid these harms and ensure compliance with the ESA, and thus the injury is redressable. *See Lujan*, 504 U.S. at 590 (setting out test for standing).

II. EPA VIOLATED THE ESA BY FAILING TO CONSULT.

As set forth in Environmental Petitioners' Opening Brief, EPA violated the ESA by failing to consult. EPA's flawed Determination does not rectify its procedural failures. The ESA is clear: EPA must formally consult if it determines its proposed action "*may* affect listed species or critical habitat," 50 C.F.R. § 402.14(a) (emphasis added); 16 U.S.C. § 1536. The facts are clear that the Rule easily meets this standard. *See* Envtl. Pet'rs' Br. at 22–25.

To avoid its consultation obligations, EPA asserts that the Rule will "not cause increased cultivation of corn," that the economics of ethanol and infrastructure built around E10 use would drive demand for corn even without the Rule, and that, while the Rule does increase biodiesel use, soy production is driven by the market for animal feed and unaffected by the RFS. Determination at 2, 8, JA __, __. EPA raised these same arguments when defending the 2018 Rule, *see, e.g*, *AFPM* Oral Argument at 2:20:31; EPA 2018 Brief at 92–93, 99, and this Court rejected them. *See AFPM* at 594–95, 598.

EPA conveniently ignores that a stated purpose of the renewable fuel program is to "increase the production of clean renewable fuels." Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121 Stat.

1492; *see also AFPM* at 569. Indeed, this Court has found that, "[b]y requiring upstream market participants ... to introduce increasing volumes of renewable fuel into the transportation fuel supply, Congress intended the Renewable Fuel Program to be a 'market forcing policy' that would create 'demand pressure to increase consumption' of renewable fuel." *AFPM* at 568 (quoting *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 705 (D.C. Cir. 2017)). It is thus no surprise that increased volumes directly lead to increased production of renewable crops.

EPA also ignores that the Rule drives demand by reducing market uncertainty. *See* Comments of USDA, EPA-HQ-OAR-2018-0167-1038 at 2, JA __ ("The USDA agrees [that methodology resulting in decreased fuel volumes] increases the uncertainty for market participants."). Crop and ethanol producers rely on these standards to increase demand. For example, Petitioner Growth Energy asserts standing—not challenged by EPA—on the basis that their "member producers will suffer a concrete and particularized injury because the unlawfully depressed 2019 volume requirements reduce demand for their products and reduce RIN prices, adversely affecting their investments and operations." Growth Energy Br. at 9. Others expressed concerns that small refinery exemptions reduced volumes and increased uncertainty for farmers by reducing corn and ethanol demand. *See, e.g.*, Comments of Nat'l Corn Growers Ass'n, EPA-HQ-OAR-2018-0167-0539 at 3–4, JA__-__ ("The demand destruction caused by these exemptions

impacts corn farmers by reducing use of our crop for biofuels, lowering our crop sales and incomes."); Comments of Am. Farm Bureau Fed'n, EPA-HQ-OAR-2018-0167-0657 at 1–2, JA ___ ("[EPA's small refinery waivers] essentially solidifies an estimated 1.5 billion gallons of lost demand."); Comments of the Am. Coal. for Ethanol, EPA-HQ-OAR-2018-0167-1285 at 1, JA__("The RFS is a significant demand driver for U.S. crops and the prices received by farmers."). EPA even conceded in its Response to Comments that the Rule had "benefits" for "renewable fuel producers, farmers, and other industries." RTC at 13, JA ____. This would not be the case if the Rule had *no* impact on crop or ethanol production.

Equally problematic, EPA misunderstands what triggers its consultation obligations. *See* Determination at 7, JA___. The threshold is not whether the Rule's impacts are "reasonably certain" to affect species or habitat, as EPA claims, EPA Br. at 99–100, but whether they "may affect" them. 16 U.S.C. § 1536. This threshold is "low." *Nat'l Parks Conservation Ass'n*, 62 F. Supp. 3d at 12–13.

Moreover, as this Court found in *AFPM*, "the inability to 'attribute[]' environmental harms 'with reasonable certainty'" to the Rule "is not the same as a finding that the . . . Rule 'will not affect' or 'is not likely to adversely affect' listed species or critical habitat." *AFPM* at 598. And this Court already dismissed

EPA's argument that these environmental harms are not indirect effects of renewable fuel volumes. *Id.* at 595.

Furthermore, even if EPA determines that "the proposed action is not likely to adversely affect any listed species or critical habitat," EPA can forgo formal consultation only after preparation of a biological assessment or through informal consultation, and only with the written concurrence of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. 50 C.F.R. § 402.14(b)(1). Thus, "actions that have *any* chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc) (emphasis added). EPA failed to comply with these requirements, and this failure renders the Rule unlawful.

III. EPA'S NO EFFECT DETERMINATION IS ARBITRARY AND CAPRICIOUS.

Not only does the Rule violate the ESA because EPA failed to consult, but it also is unlawful under the APA. Indeed, the same flawed Determination renders the Rule – which relies on that Determination – arbitrary and capricious. For all the reasons described *supra*, Section II, EPA's contention that this Determination is "well-reasoned," EPA Br. at 95, cannot be taken seriously. Instead, it impermissibly ignores evidence that the Rule is likely to affect listed species and

habitat and thus it "was not a rational conclusion," in violation of the APA. *Nat'l Parks Conservation Ass'n*, 62 F. Supp. 3d at 17; *see also* Envtl. Pet'rs' Br. at 27–28.[5]

IV. EPA'S FAILURE TO GRANT AN ENVIRONMENTAL HARM WAIVER VIOLATES THE CLEAN AIR ACT.

The harms described by Dr. Lark, the Triennial Report, and set forth in member declarations, as described *supra* Sections I-III, do not just show that the Rule "may affect" ESA-listed species and habitat, but also document severe environmental harm that has occurred and continues to occur with each new fuel volume requirement EPA promulgates. They thus require EPA to grant a waiver, as the evidence clearly shows that the Rule "would severely harm the . . . environment." 42 U.S.C. § 7545(o)(7)(A)(i); 42 U.S.C. § 7607(d)(9)(A). Absent taking other remedial measures to reduce the environmental harm, such as ensuring no land conversion to produce renewable biomass, *see infra* Point V, granting the waiver is the only option EPA has to reduce the severe harm caused by the Rule.

[5] EPA's contention that Petitioners did not "meaningfully address" its Determination is baseless. EPA Br. at 98. Petitioners explained in detail why the Determination was unreasonable in light of the evidence before the Agency. *See, e.g.*, Envtl. Pet'rs' Br. at 23–28.

V. THE AGGREGATE COMPLIANCE CLAIM IS TIMELY AND VALID.

Rather than address the merits of Environmental Petitioners' challenge to the Rule's inclusion of the aggregate compliance scheme, EPA maintains that this claim is untimely. EPA Br. at 54. That is not true. And because the aggregate compliance scheme violates the text and purpose of EISA, the Rule is unlawful.

In the Rule, EPA continued to rely upon the aggregate compliance scheme, despite its findings in the Triennial Report that the RFS caused land conversion. The Triennial Report effectively reopened the aggregate compliance scheme, rendering Environmental Petitioner's claim timely. EPA ignored evidence in that report – incorporated into the rulemaking record – that shows that EPA permitted the production of renewable biomass on newly converted cropland as prohibited by the CAA. *See* 42 U.S.C. § 7545(o)(1)(I)(i) (requiring that renewable biomass consist only of "[p]lanted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to December 19, 2007, that is either actively managed or fallow, and nonforested"). By looking only to total cropland acres – as EPA again does even in its opposition brief – EPA is knowingly allowing the Rule to result in unlawful conversion of previously uncultivated land to produce renewable biomass.

The Triennial Report thus "significantly alter[ed] the stakes of judicial review" of the aggregate compliance provision, thereby reopening the issue.

Kennecott Utah Copper Corp. v. U.S. Dep't of Interior, 88 F.3d 1191, 1227 (D.C. Cir. 1996). By providing indisputable evidence that the aggregate compliance provision is resulting in illegal conversion, it "gave [the provision] a new significance" in two ways: (1) by demonstrating that the impact it was having was not consistent with EPA's original projection that "new lands are unlikely to be cleared for agricultural purposes," Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,703 (Mar. 26, 2010); and (2) by demonstrating that even in the face of clear evidence that it was leading to unlawful land conversion, EPA would continue to follow this approach. *See Kennecott Utah Copper Corp.*, 88 F.3d at 1226–27. It therefore reopened the issue, rendering Environmental Petitioners' challenge timely.

As to the merits, EPA entirely ignores Environmental Petitioners' argument that aggregate compliance renders the Rule unlawful, perhaps recognizing the futility of such an effort. As discussed in detail in Environmental Petitioners' Opening Brief, record evidence shows that under this scheme, the RFS is leading to the use for renewable biomass production of land that was not cleared or cultivated before December 19, 2007, in clear violation of the text and purpose of the CAA. *See* 42 U.S.C. § 7545(o)(1)(I); Envtl. Pet'rs' Br. at 30–32. The Rule – which incorporates this scheme – is therefore unlawful.

CONCLUSION

For the foregoing reasons, as well as those in Environmental Petitioners' Opening Brief, this Court should find that the Rule is unlawful, and should grant the relief described in Environmental Petitioners' Opening Brief.

Dated: February 20, 2020

Respectfully submitted,

/s/ Carrie Apfel

Carrie Apfel
Earthjustice
1001 G Street, NW, Suite 1000
Washington, DC 20001
202-797-4310
capfel@earthjustice.org

Peter Lehner
Surbhi Sarang
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
212-845-7389
plehner@earthjustice.org
ssarang@earthjustice.org

Counsel for Petitioners National Wildlife Federation, Healthy Gulf, and Sierra Club

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations in this Court's Order of August 20, 2019 because it contains 3,870 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1). Microsoft Word 2016 computed the word count.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

Dated: February 20, 2020

/s/ Carrie Apfel
Carrie Apfel