ORAL ARGUMENT SCHEDULED FOR MAY 1, 2020
No. 19-1023 (and consolidated cases)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GROWTH ENERGY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

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

BRYAN M. KILLIAN
DOUGLAS A. HASTINGS
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004
(202) 739-3000

Counsel for the National Biodiesel Board

JEROME C. MUYS, JR.
MUYS & ASSOCIATES, LLC
910 17th St. NW
Suite 800
Washington, DC 20006
(202) 559-2054

SANDRA P. FRANCO
FRANCO ENVIRONMENTAL LAW LLC
600 Pennsylvania Ave. SE
Unit 15577
Washington, DC 20003

Counsel for Producers of Renewables United for Integrity Truth and Transparency

SETH P. WAXMAN
DAVID M. LEHN
SAURABH SANGHVI
CLAIRE H. CHUNG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

Counsel for Growth Energy

DAVID M. WILLIAMSON
WILLIAMSON LAW + POLICY, PLLC
1850 M St. NW
Suite 840
Washington, DC 20036
(202) 256-6155

Counsel for RFS Power Coalition

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GLOSSARY

ACE	Americans for Clean Energy
AFPM	American Fuel & Petrochemical Manufacturers
API	American Petroleum Institute
CNG/LNG	Compressed and Liquid Gas
DOE	Department of Energy
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NPRA	National Petrochemical & Refiners Ass'n
Producers United	Petitioner Producers of Renewables United for Integrity Truth and Transparency
RFA	Renewable Fuels Ass'n
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number

SUMMARY OF ARGUMENT

I. There is no serious question that EPA erred by refusing to account for retroactive small refinery exemptions in setting the 2019 percentage standards. Contrary to its arguments here, EPA itself disavowed that practice as inconsistent with the statute and substantively unreasonable in its most recent RFS rulemaking. And EPA's argument that petitioners' challenge is untimely misconstrues the nature of that challenge.

II. Failing to adjust the standards, EPA nonetheless also fails to provide any rationale for allowing retroactive 2019 exemptions and "unretired" RINs. Contentions that those issues are not properly before the Court are incorrect.

III. Finally, EPA's new explanations for its omission of electricity fuel from the cellulosic volume are not in the record, are inconsistent with the statute and its existing regulations, and if given effect would improperly rescind the 2014 pathway rule.

ARGUMENT

I. EPA ERRED IN REFUSING TO ACCOUNT FOR RETROACTIVE SMALL REFINERY EXEMPTIONS

A. EPA now concedes in its 2020 rule that its statutory duty to "ensure[]" the volume requirements "are met" compels EPA to account for retroactive exemptions. 42 U.S.C. §7545(*o*)(3)(B)(i). There, EPA "increase[d]" the standards "to account for a projection of the [retroactively] exempted volume." 85 Fed. Reg.

7016, 7050 (Feb. 6, 2020). EPA explained: "These higher percentage standards would have the effect of ensuring that the required volumes of renewable fuel are met when small refineries are granted exemptions from their 2020 obligations after the issuance of the final rule …." *Id.*

EPA nonetheless takes the opposite approach here (Br. 62-63), arguing that its refusal to account for retroactive exemptions in 2019 was "reasonable" because "the statute is silent on how EPA should treat such exemptions."[1] EPA is correct that the statute does not specify the precise mechanics of any exemption accounting, but as EPA's 2020 rule acknowledges, the statute is not completely silent—the duty to "ensure" requires that EPA reasonably account for exemptions. In 2019, EPA did *nothing* to account for them, breaching that statutory obligation.

EPA protests (Br. 63-64) that, at the time of the rulemaking, the amount of retroactive exemptions was "uncertain," and "ensure" "cannot mean absolute certainty"; rather, the "annual rule process … requires predictive judgment." Petitioners agree (Br. 18) that "EPA could develop a reasonable projection of exemptions [to be granted] in the aggregate based on past aggregate extensions."

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[1] Obligated-Party Intervenors argue (Br. 3) that §7545(*o*)(3)(C)(ii), which directs EPA to account for renewable fuel that exempt refineries *do* use despite their exemption, implies that Congress precluded EPA from accounting for renewable fuel exempt refineries do *not* use. EPA rightly rejected that *expressio unius* argument because that provision addresses a different situation. JA[2020.Response.To.Comments.167-168].

That is, in fact, how EPA projects exemptions in the 2020 rule. 85 Fed. Reg. at 7051 ("We only need to estimate the total exempted volume."); *id.* ("we are projecting the aggregate exempted volume in 2020 … based on a 2016-2018 annual average of exempted volumes"). The 2019 rule is flawed because EPA exercised *no* predictive judgment about the exemptions it would grant—it simply assumed they would be zero despite already knowing that it had exempted 790 million and 1.46 billion RINs for the two most recent years, *see* Biofuels Intervenor Br. 5 n.3.[2]

Moreover, as EPA acknowledges (Br. 64-65), uncertainty arises only with respect to exemptions that would be granted after finalizing the 2019 standards—the "ex ante" adjustment. Biofuels Br. 17. EPA could have accounted for known retroactive exemptions granted in *prior* years —the "ex post" adjustment, *id.*— without hazarding a prediction.

EPA asserts (Br. 65) that an ex post adjustment might have required the volumes to be set "*above* statutory levels," which EPA had no "authority" to do.

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[2] EPA's attempts (Br. 68 n.39) to distinguish the 2020 rule are meritless. As EPA acknowledged there, the statute *requires* EPA to account; doing nothing is not a plausible "manner" by which to fulfill that duty. Second, the suggestion that EPA was "better able to reasonably project" in the 2020 rulemaking because it was concurrently "establishing a prospective policy to adjudicating small refinery exemption petitions" is nonsense. For 2019, EPA had years of data and a "policy" for adjudicating exemption petitions on which to base future projected exemptions. 85 Fed. Reg. at 7051.

That is incorrect because, if EPA had accounted for past exemptions, the 2019 standards still would have been below the statutory levels: EPA used the cellulosic waiver to reduce the 2019 cellulosic, advanced, and total statutory volumes by 8.08 billion gallons each, EPA Br. 10, but at the time of the 2019 rulemaking, the total amount of past retroactive exemptions was substantially less (3.3 billion RINs, covering years 2013-2017).[3] Moreover, the statutory volumes are not a ceiling but a floor: the statute explicitly commands that the standards EPA sets "ensure[]" that "at least" the required volumes are met. §7545(*o*)(2)(A)(i). Indeed, this Court rejected that argument when it approved EPA's decision to add the unmet 2009 biomass-based diesel volume to the 2010 volume requirement, observing that challengers had "overlook[ed] the [statutory] phrase 'at least.'" *National Petrochemical & Refiners Ass'n v. EPA (*"*NPRA*"*)*, 630 F.3d 145, 151-157 (D.C. Cir. 2010). EPA says (Br. 65 n.36) that *NPRA* did not address exemptions or any "requirement" to make up past inadequacies, but *NPRA* confirms that EPA *can* adjust the standards to do so. *See* Biofuels Br. 19-20.[4]

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[3] JA[RFS.Small.Refinery.Exemptions.https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions].

[4] EPA also argues (Br. 65) that the ex post method would violate the cellulosic-waiver provision. But, under *NPRA*, the mandatory language of the cellulosic-waiver provision ("shall reduce," §7545(*o*)(7)(D)(i)) also must be read in light of the statutory phrase "at least."

EPA also admits (Br. 66-67) it "*could* have" used "a lesser cellulosic waiver" to adjust the standards for (past or future) retroactive exemptions. That was petitioners' point; the legal *obligation* to do so derives not from the cellulosic-waiver power but, again, from the duty to "ensure" the requirements "are met." Biofuels Br. 17-18.

Finally, in denying that its refusal to account for retroactive exemptions constitutes an unauthorized *waiver* (*see* Biofuels Br. 15-17), EPA asserts (Br. 66) that retroactive exemptions do "not reduce statutory volumes," but rather constitute a "deviation" due to "inherent uncertainties." But, as EPA stated in the 2020 rule, if EPA grants exemptions "without accounting for them," "those exemptions would effectively reduce the volumes of renewable fuel required by the RFS program." 85 Fed. Reg. at 7050.[5]

B. EPA's claim (Br. 67) that its refusal to account for retroactive exemptions has not undermined the RFS program is wrong. EPA's refusal ensured that obligated parties could fully comply through 2019 without increasing their use of renewable fuel—contrary to Congress's intent, *American Fuel & Petrochemical Mfrs. v. EPA ("AFPM")*, 937 F.3d 559, 568 (D.C. Cir. 2019)—*while still* having

[5] Contrary to EPA's assertion (Br. 66 n.37), the percentage standard is (and is computed as) "a single applicable percentage that applies to all categories of persons." 42 U.S.C. §7545(*o*)(3)(B)(ii).

more than 1 billion carryover RINs in the bank for compliance in 2020. Biofuels Br. 11-14; Biofuels Intervenor Br. 4-7.

EPA argues (Br. 67) that petitioners "assume that obligated parties will use up all carryover RINs for 2019 without carrying over any new RINs into 2020." As just noted, that is false. Moreover, EPA is disregarding the difference between using carryover RINs to comply and using *excess* renewable fuel to *regenerate* a bank of carryover RINs for the next year—a choice that market participants make independently of RFS compliance obligations. Biofuels Br. 13 & n.10; *see also* Biofuels Intervenor Br. 7-8 & n.7. Moreover, there is no evidence supporting EPA's assertion (Br. 67) that a RIN bank of any particular size—let alone more than 1 billion—is "crucial." *See* Biofuels Intervenor Br. 8-9; 83 Fed. Reg. 63,705, 63,708-63,710 (Dec. 11, 2018) (JA__). Regardless, EPA's policy preferences cannot override Congress's. *Americans for Clean Energy v. EPA ("ACE")*, 864 F.3d 691, 712 (D.C. Cir. 2017).

Finally, EPA asserts that (Br. 67) a drop in RIN prices does "not indicate" EPA's refusal to account for retroactive exemptions "is undermining the RFS program." But RIN prices fell precipitously just as EPA massively ramped up the volume of retroactive exemptions and have remained low since. Biofuels Br. 14 & n.12; Biofuels Intervenor Br. 9. There is no plausible explanation for that price

drop other than EPA's failure to account for its exemptions as it was dramatically increasing the volume of those exemptions.

C. EPA contends (Br. 58-62) that petitioners' challenge is untimely because the regulation defining the equation for calculating percentage standards was promulgated in 2010 and not reopened, and EPA was not required to reconsider it. But petitioners do not challenge the 2010 formula; they contend that the 2019 percentage standards were invalid because they failed to satisfy EPA's statutory duty to "ensure[]" the volume requirements "are met"—a duty with which EPA must comply "each" year. §7545(*o*)(3)(B)(i); *see AFPM*, 937 F.3d at 570. *This* challenge is timely. *See Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 654 (D.C. Cir. 2019) (claim that 2018 RFS standards were invalid because they did not reflect "appropriate" point of obligation was "timely" although regulation defining point of obligation was adopted years earlier).

Nor is this a "'back-door' challenge to the 2010 regulation." *Alon*, 936 F.3d at 643. There were various ways EPA could have accounted for retroactive exemptions without altering the standard equation adopted in 2010. For example, the formula includes "[t]he amount of [gasoline and diesel] projected to be produced by exempt small refineries and small refiners." 40 C.F.R. §80.1405(c). EPA could reasonably have interpreted that language to include the amount that is

projected to be exempted after the standards are finalized.[6] Or EPA could have applied a lesser cellulosic waiver. *See supra* at 4-5. Or EPA could have added the (past and projected future) exempt volumes to the 2019 volume requirements, like EPA did when it made up the 2009 biomass-based diesel volume in 2010. *See supra* at 4; *NPRA*, 630 F.3d at 151-157.

II. EPA CANNOT AVOID REVIEW OF PRODUCERS UNITED'S CLAIMS

To avoid judicial oversight, EPA (Br. 68) claims the "policy" Producers United challenges "was not even applied here." But, EPA stated "any exemptions for 2019 that are granted after the final rule is released will not be reflected in the percentage standards that apply … in 2019." 83 Fed. Reg. at 63,740 (JA__). When no 2019 exemptions had been granted, this directed the process for 2019 exemptions, which EPA changes (*e.g.*, EPA Br. 68 n.39), and left "unretired" RINs in place, indicating exemptions may occur *after* compliance. Because information established these uncodified policies do not "ensure" the volumes, "maintaining" this approach was arbitrary.

EPA's attempts to avoid review must be rejected.

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[6] EPA previously "interpreted" the statute to preclude "[p]eriodic revisions to the standards" once finalized. 75 Fed. Reg. 76,790, 76,804 (Dec. 9, 2010); *see also* Obligated-Party Intervenor Br. 4-5. But the ex ante and ex post accounting methods would not require revising already-final standards. Although EPA has declined to use those methods, it has done so only as a matter of practice in setting annual standards. 75 Fed. Reg. at 76,804; 83 Fed. Reg. at 63,740 (JA__).

First, EPA (Br. 69) implies Producers United should challenge specific exemption decisions. But, EPA outlined its nationwide approach for 2019. *Cf. Advanced Biofuels Ass'n v. EPA*, No. 18-1115, Judgment at 5 (D.C. Cir. Nov. 12, 2019) [Doc. #1815176] (finding failure to "identify" action "announcing" challenged "methodological" approach), *cited in* EPA Br. 69. EPA cannot create such rules via adjudication, particularly secret ones avoiding review, which this Court has found "troubling." *Id.*

Second, EPA cannot avoid review, because (as some supported) it chose not to propose policy changes. *Cf.* 83 Fed. Reg. 32,024, 32,057 (July 10, 2018) (requesting comment on "any aspect of this rulemaking") (JA__). Because of EPA's secrecy, only recently was evidence made available showing "the approach followed by the agency from 2016-forward has opened up a gaping and ever-widening hole in the statute." *Renewable Fuels Ass'n v. EPA* ("*RFA*"), 948 F.3d 1206, 1248 (10th Cir. 2020). Despite this evidence, EPA *chose* to retain its approach, reiterating its policy.[7] *Kennecott Utah Copper Corp. v. Department of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996) ("reiterate[ing]" previously adopted rule" can subject it to renewed challenge). This isn't seeking to "revisit every

[7] EPA does not deny that retroactive exemptions allow RIN manipulation or avoidance of other regulatory restrictions. EPA Br. 70; *cf.* Biofuels Br. 26, 29-30. Ignoring these factors was arbitrary.

aspect of the RFS program that relates to those standards"; it is a challenge to a determination that's integral to how EPA sets the standards under §7545(*o*)(3). EPA Br. 70.

Third, EPA (Br. 71) argues that this case does not involve "prediction[s]" to distinguish *American Petroleum Institute v. EPA ("API")*, 706 F.3d 474, 477 (D.C. Cir. 2013). But, EPA (Br. 64) admits the standard-setting process "requires predictive judgment." And EPA's defense of this policy was that Congress allowed "imprecision" in the standards, which no longer holds. Biofuels Br. 29.

Fourth, EPA asserts Producers United's claim is foreclosed by collateral estoppel, misstating the holding in *Producers United v. EPA*, No. 18-1202 (D.C. Cir. May 24, 2019) [Doc. #1789354]. There, the panel found grounds-arising-after claims relating to other EPA actions untimely, stating: "we do not pass on the validity, or the susceptibility to challenge through an appropriate vehicle." *Id.* at 4. This is not a grounds-arising-after claim, making collateral estoppel inapplicable. *See National Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015), *cited in* EPA Br. 71.

Presumably EPA is arguing collateral estoppel by claiming Producers United is really challenging 40 C.F.R. §80.1441. EPA Br. 69-70. But, Producers United argued that §80.1441 *does not* allow retroactive exemptions (especially after

refineries *have complied*).[8] Biofuels Br. 26; *see also RFA*, 948 F.3d at 1250-1251 (rejecting similar claim where "neither the preamble nor the administrative rule contains any discussion of what the word 'extension' actually means"). Rather, whether EPA will grant such exemptions for 2019 is outlined in the challenged 2019 RFS. *Cf. AFPM*, 937 F.3d at 585-586 (no reopening where commenters requested removal of existing regulation), *cited in* EPA Br. 70.

Finally, EPA acknowledges Producers United's reconsideration petition was before the agency and its denial presents "another avenue of relief." EPA Br. 72 (citing *Alon*, 936 F.3d at 646). EPA then references its Response to Comments to contend the petition remains pending. *Id.* (citing JA[EPA-HQ-OAR-2018-0167-1387.at.183-185]). But that document provides no indication that the petition is undergoing review. Rather, EPA chose *not* to "reexamine" its approach. Citing no authority requiring any specific format, EPA argues only over the denial's form. When annual requirements are involved, attempts to avoid oversight by sitting on reconsideration petitions despite an expressed intent to continue the challenged policy should not be condoned.

EPA tries to avoid review because its only defense is that it "must consider" petitions received "at any time." EPA Br. 68. But, this does not mean EPA must

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[8] EPA has not cited a definition of "at any time" from any rulemaking.

"grant[]" exemptions at any time. *RFA*, 948 F.3d at 1248. As Producers United argued (Br. 25-26), once small refineries lose their exemption, they can no longer seek an *extension*. *Id.* at 1243-1249. And, the exemptions must be based on hardship *from compliance*. *Id.* at 1253-1254. The phrase "at any time" cannot be viewed in isolation and does not allow exemptions *after* they lapse or *after* the refineries show they can comply, especially when it allows circumvention of other statutory provisions.[9]

While EPA does not defend its attendant practice of "unretiring" RINs, Obligated-Party Intervenors claim this practice is within EPA's inherent authority. First, ignoring regulatory prohibitions on re-use of retired RINs, they admit (Br. 17) the statute directs "*rules* governing transfer and retirement of RINs" (emphasis added). *See* 42 U.S.C. §7545(*o*)(2)(A)(iii), (5) (requiring regulations) & (7) (requiring notice and comment on waivers). EPA also has acknowledged that this practice is generally applied (*i.e.*, it's a "rule"). 84 Fed. Reg. 10,584, 10,618 (Mar. 21, 2019). Despite no regulation authorizing "unretiring" of RINs, Obligated-Party Intervenors then claim EPA is simply undertaking reconsideration. But, unretiring

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[9] EPA's statutory argument (Br. 63) cannot support failing to account for exemptions, while also claiming authority to grant retroactive exemptions. EPA does not explain how it can comply with the statute when it grants exemptions *after* setting the standards.

RINs does not involve correcting an erroneous decision. It *is* the decision, resulting from delay in refineries getting extensions.[10]

Regardless, any claimed inherent authority must yield to *statutory* requirements. *See Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 87-88 (D.C. Cir. 2014). RIN availability is the linchpin of understanding the biofuel market, making notice-and-comment vital to ensuring EPA is not undermining Congress's carefully crafted statutory scheme. And failure to consider the market impacts rendered EPA's maintaining its "policy" arbitrary. *See RFA*, 948 F.3d at 1236 (recognizing "ongoing effects" of unretired RINs).

Finally, Obligated-Party Intervenors cry wolf. Here, EPA is not setting the volumes *too high*.[11] Rather, granting the exemptions retroactively impermissibly reduces the actual volumes required. Even if EPA delayed in acting, this does not require RIN retirement, where the statute provides for deficits. 42 U.S.C.

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[10] EPA is not enforcing rules regarding invalid RINs; it is *allowing* prohibited actions. 40 C.F.R. §§80.1427(a)(6)(ii), 80.1431(a), 80.1460(b)(2). This is amending regulations without proper rulemaking.

[11] Obligated-Party Intervenors (Br. 18) reference EPA's refunding of purchased EPA-issued credits after it "unwound the 2012" cellulosic biofuel requirement. *Cf.* 80 Fed. Reg. 77,420, 77,509 (Dec. 14, 2015) (providing notice-and-comment on refunds for 2011-issued credits). But, that decision removed EPA's authority to issue credits. 42 U.S.C. §7545(*o*)(7)(D)(iii). And, unlike EPA-issued credits, refiners recoup RIN costs. EPA Br. 26; *RFA*, 948 F.3d at 1255-1257.

§7545(*o*)(5)(D); 84 Fed. Reg. at 10,618. Regardless, Congress provided limited remedies when the volumes are *too high* versus EPA's obligation to "ensure" the volume requirements are met. 42 U.S.C. §7545(*o*)(2)-(3), (7). And, Congress sought to move small refineries toward compliance. *RFA*, 948 F.3d at 1246-1247. Retroactive exemptions and "unretiring" of RINs undermine those goals.[12]

III. EPA FAILED TO PROPERLY COUNT ELECTRICITY FUEL PRODUCTION

EPA offers several new meritless justifications (which appear nowhere in the proposed rule, final rule, or response to comments) for not counting electricity fuel when it invokes the cellulosic waiver in setting annual fuel volumes for 2019. EPA Br. 74.

A. EPA's Flawed Fuel Production Estimate

In its brief, EPA argues for the first time that it can disregard actual electricity fuel production because it is (illegally) blocking RIN generation by facilities producing this cellulosic fuel under the 2014 pathway rule.[13] EPA is

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[12] Threats of litigation notwithstanding, Producers United seeks *rules* to avoid the harms EPA's (uncodified) policies have caused. No one disputes EPA could impose deadlines. Biofuels Br. 25-26. Instead, EPA references *2016 guidance* (Br. 69 (citing Small Refinery Guidance, JA__)), based on an approach EPA now disavows, *RFA*, 948 F.3d at 1228, and belied by the requirement EPA consider *forward-looking* analyses, 42 U.S.C. §7545(*o*)(9)(B)(ii).

[13] Contrary to EPA's statement that "[n]o volumes of qualified renewable electricity have ever been produced," EPA Br. 74, the record shows electricity fuel

impermissibly conflating potential RINs with fuel. The statute speaks of cellulosic "biofuel production," not RINs. 42 U.S.C. §7545(*o*)(7)(D); *ACE*, 864 F.3d at 710 ("text-defying" construction must be rejected). Under the cellulosic waiver, EPA can depart from the default statutory volume (8.5 billion gallons in 2019) *only* as needed to match the "projected volume available during that calendar year," where "projected volume" grammatically refers to the cellulosic biofuel production counted by EPA. §7545(*o*)(7)(D). Once EPA determines cellulosic biofuel production, EPA must reduce the volume to that amount; the language does not require or authorize EPA to undertake a second determination of what biofuel is available—the level of biofuel production, once determined, *is* the available volume.[14] Tellingly, the waiver provision nowhere cross-references the RIN credit program in §7545(*o*)(5). EPA's focus on RINs impermissibly "tailors" the plain language of the statute to count the number of RINs rather than the volume of

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actually being produced and used by electric vehicles "in reality," *API*, 706 F.3d at 477; *see* Biofuels Br. 34-35; 79 Fed. Reg. 42,128, 42,141 n.51 (July 18, 2014); 83 Fed. Reg. at 63,713 (JA__).

[14] Because Congress did not delegate policymaking responsibilities to EPA beyond counting fuel production and mechanically substituting that volume in the statutory tables, no *Chevron* deference is due. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006).

"biofuel production." *ACE*, 864 F.3d at 712 (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014)).

A strict reading of the statutory language accords with Congress's policy goals; if the annual volume matches actual fuel production, the "market forcing" nature of the program incentivizes EPA to remove market constraints caused by its own inaction.[15] *ACE*, 864 F.3d. at 705, 710 (volumes "are designed to force the market to create ways to produce" biofuel). Counting zero electricity when qualified biofuel is in fact being produced is not the "neutral aim at accuracy" *API* requires because it dramatically "undershoots" the actual available fuel. 706 F.3d at 476. Unlike in *API*, here there are no "technological challenges" slowing fuel production nor any artificially high estimate of fuel actually being produced. *Id.* To the contrary, the record shows that cellulosic electricity fuel is available in significant quantities.

Although EPA must make "predictive judgment" of fuel production, here EPA is merely predicting its own continued implementation delay, not actual fuel production. If allowed, EPA would have unreviewable power to thwart Congress's

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[15] The record is devoid of support for EPA's incorrect assertion that it actually examined electricity production or only considered registered facilities. EPA Br. 77; *cf.* 83 Fed. Reg. at 63,712 (EPA investigated liquid biofuel and CNG/LNG, but not electricity) (JA__), 63,713 (JA__), 63,717 (counting CNG/LNG facilities not yet registered) (JA__); JA__[EPA-HQ-OAR-2018-0167-1340] (projections for available CNG/LNG fuel).

policy objectives by merely asserting that "regulatory and technical issues" are preventing RIN generation.

In sum, EPA did not follow the text of §7545(*o*)(7)(D) and failed to provide a reasoned basis in the record contrary to §7607(d)(3) and (d)(6) (requiring "statement of basis and purpose" and "summary of … major legal interpretations and policy considerations"). Similarly, EPA's failure to consider the devastating impact on electricity producers of undermining the program's core economic incentives renders its action arbitrary.

B. EPA's Unsupported Explanation

In its brief, EPA identifies "double-counting" and "equivalence value" as "outstanding technical and regulatory issues" blocking RIN generation. EPA Br. 75-76. But both considerations were already decided in the 2014 pathway rule. In its brief, EPA cites the 2016 notice of proposed rulemaking that discussed implementation of the 2014 pathway rule. But the administrative record for the 2019 rule did not rely on or even cite the 2016 notice, which was never finalized and has no legal significance.

Under EPA's existing regulations, every gallon of fuel is individually traceable to its biomass feedstock origin and to its ultimate transportation fuel use, which avoids double counting. 40 C.F.R. §80.1426(f)(11)(i) (producer must document that "[n]o other party relied upon the renewable electricity for the

creation of RINs"). Every gallon is accounted for with a serialized RIN. *Id.* §§80.1401, 80.1425 (each RIN is "unique number"), 80.1401 ("mechanism for screening and tracking" RINs), 80.1452. Notably, EPA has never officially determined that any electricity facility seeking registration is not "in conformity" with these regulatory criteria. *Cf.* EPA Br. 76-77. Moreover, EPA's 2019 Rule counted significant volumes of CNG/LNG compressed gas fuel—which has an identical 2014 pathway and comparable supply chain to electricity fuel, §80.1426(f)(11)(ii)—but EPA never explains why double counting is a concern for electricity fuel but not for CNG/LNG, or why such concerns have not been resolved in the five years since the 2014 pathway rule was finalized. Biofuels Br. 35.

Similarly, there is no genuine issue implicating the "equivalence value" which is used to translate electricity fuel volumes into liquid ethanol gallon equivalents. EPA's regulations already include an equivalence value of 22.6 kW-hr/gallon. §80.1415(b)(6). And EPA has previously applied a further 3:1 conversion for electric vehicles to account for the greater mechanical efficiency of the electric motor compared to internal combustion engines. 78 Fed. Reg. 36,042, 36,050 (June 14, 2013). EPA never explains why the existing equivalence value approach is not appropriate, or why the agency could not promptly decide to use a different value.

EPA similarly fails to explain its "resource constraints and competing priorities," EPA Br. 76, 78, or why it cannot act quickly to resolve any issues so as to help achieve the cellulosic volumes set by Congress. The cases cited, EPA Br. 79 n.46, do not support EPA's assertion that it can delay a congressional mandate with no explanation other than it "reasonably considered its resource constraints with regard to acting on approvals of registration applications." EPA Br. 78-79.

C. EPA's De Facto Rescission of the 2014 Pathway

There is another serious problem lurking in EPA's brief. EPA now explains that because of the 2016 notice, it is blocking all electricity facility registrations without consideration of whether any individual application is "in conformity" with the statute. EPA Br. 77. This is tantamount to revoking the 2014 pathway rule and modifying EPA's existing regulations—but without rulemaking procedures, contrary to §7607(d). *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (agency stay of existing rule requires notice-and-comment). Even if procedures were followed, because EPA has failed to provide a rational explanation for its refusal to apply the existing 2014 pathway regulations, EPA's action must be set aside. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (unexplained inconsistency is arbitrary).

D. An Effective Remedy Is Needed

Electricity producers who produce qualified cellulosic fuel are in crisis from being shut out from the renewable fuel program. EPA urges this Court to defer to the agency's role "as the expert administrative agency in assessing the proper path forward." EPA Br. 80. But for over five years since the 2014 pathway rule, EPA has persistently failed to implement congressional policy. Instead, EPA has reduced Congress's 8.5 billion-gallon requirement by 95% while ignoring some 2 billion gallons of actual fuel production. Even more alarmingly, EPA is now indicating that it will *never* make up undercounted volumes, even if a court invalidates EPA's rule, such that fuel producers will have no effective remedy without a court mandate. *See* 84 Fed. Reg. 36,762, 36,787-36,788 (July 29, 2019) (refusing to remedy undercounting of 500 million gallons on remand of the 2016 volume rule).

This Court has the power to fashion mandamus to remedy an agency's attempt to excuse its own delay and delinquency. *Northern States Power Co. v. DOE*, 128 F.3d 754, 756 (D.C. Cir. 1997). At a minimum, this Court should set aside the flawed cellulosic adjustment that fails to count electricity (restoring the statutory volumes), direct EPA to count electricity biofuel production, and set a

deadline of not more than 90 days to readjust the 2019 volumes, or alternatively, add the undercounted 2019 volumes to the 2020 or subsequent annual periods.[16]

CONCLUSION

The Court should grant the petitions and remand for further proceedings.

[16] To the extent EPA is slow to act on remand, "other protections" are available to mitigate any temporary effect on obligated parties. *ACE*, 864 F.3d. at 712.

Respectfully submitted,

/s/ Bryan M. Killian
BRYAN M. KILLIAN
DOUGLAS A. HASTINGS
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004
(202) 739-3000
bryan.killian@morganlewis.com
douglas.hastings@morganlewis.com

Counsel for the National Biodiesel Board

/s/ Jerome C. Muys, Jr.
JEROME C. MUYS, JR.
MUYS & ASSOCIATES, LLC
910 17th St. NW
Suite 800
Washington, DC 20006
(202) 559-2054
jmuys@muyslaw.com

SANDRA P. FRANCO
FRANCO ENVIRONMENTAL LAW LLC
600 Pennsylvania Ave. SE
Unit 15577
Washington, DC 20003
sandra@francoenvironmentallaw.com

Counsel for Producers of Renewables United for Integrity Truth and Transparency

/s/ Seth P. Waxman
SETH P. WAXMAN
DAVID M. LEHN
SAURABH SANGHVI
CLAIRE H. CHUNG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com
david.lehn@wilmerhale.com
saurabh.sanghvi@wilmerhale.com
claire.chung@wilmerhale.com

Counsel for Growth Energy

/s/ David M. Williamson
WILLIAMSON LAW + POLICY, PLLC
1850 M St. NW
Suite 840
Washington, DC 20036
(202) 256-6155
maxwilliamson@williamsonlawpolicy.com

Counsel for RFS Power Coalition

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of this Court's order of August 20, 2019, because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 4,537 words.

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

/s/ Seth P. Waxman
SETH P. WAXMAN

February 20, 2020

CERTIFICATE OF SERVICE

I certify that on February 20, 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.

/s/ Seth P. Waxman
SETH P. WAXMAN

February 20, 2020