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

AMERICANS FOR CLEAN ENERGY et al.,	)	
Petitioners,	)	
v.	)	Case No. 16-1005 (and consolidated cases)
ENVIRONMENTAL PROTECTION AGENCY and ANDREW R. WHEELER,	)	
Respondents.	)	

MOTION OF RENEWABLE-FUELS PETITIONERS TO ENFORCE THE MANDATE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 10

I. THE COURT SHOULD COMPEL EPA TO CURE ITS UNLAWFUL 2016 WAIVER 10

A. Mandamus Is Available to Compel EPA to Comply Promptly With the *ACE* Mandate 10

B. EPA's Three-Year Failure to Cure on Remand Is an Egregious Delay That Nullifies the Mandate 13

II. THE COURT SHOULD CLARIFY THAT EPA CANNOT RETAIN ITS ORIGINAL 2016 STANDARD 16

A. *ACE* and the Clean Air Act Require EPA to Impose a 500-Million-Gallon Curative Obligation 17

B. A Future Curative Obligation Would not Be "Retroactive" 20

CONCLUSION 22

CORPORATE DISCLOSURE STATEMENT

CERTIFICATE OF PARTIES AND AMICI CURIAE

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Alon Refining Krotz Springs, Inc. v. EPA,
936 F.3d 628 (D.C. Cir. 2019).....14

Americans for Clean Energy v. EPA,
864 F.3d 691 (D.C. Cir. 2017).....2-7, 16-18

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.,
333 U.S. 103, 113 (1948) 18

City of Cleveland v. Federal Power Commission,
561 F.2d 344 (D.C. Cir. 1977).....16

In re Core Communications, Inc.,
531 F.3d 849 (D.C. Cir. 2008)..... 11-13, 22

In re Flynn,
973 F.3d 74 (D.C. Cir. 2020).....11

In re People's Mojahedin Organization of Iran,
680 F.3d 832 (D.C. Cir. 2012)..... 11-13, 22

In re Public Employees for Environmental Responsibility,
957 F.3d 267 (D.C. Cir. 2020).....12

In re Trade & Commerce Bank ex rel. Fisher,
890 F.3d 301 (D.C. Cir. 2018).....12

Landgraf v. USI Film Products,
511 U.S. 244 (1994).....21

MCI Telecommunications Corp. v. AT&T Co.,
512 U.S. 218 (1994).....18

Monroe Energy, LLC v. EPA, 750 F.3d 909 (D.C. Cir. 2014) 14, 21

Multicultural Media, Telecom & Internet Council v. FCC,
873 F.3d 932 (D.C. Cir. 2017).....18

National Petrochemical & Refiners Ass'n v. EPA,
630 F.3d 145 (D.C. Cir. 2010) 2, 15, 19-20

NetCoalition v. SEC, 715 F.3d 342 (D.C. Cir. 2013) 10, 11

Office of Consumers' Counsel, State of Ohio v. FERC,
826 F.2d 1136 (D.C. Cir. 1987) 10

Telecommunications Reserach & Action Center v. FCC,
750 F.2d 70 (D.C. Cir. 1984) 12

U.S. Postal Service v. Postal Regulatory Commission,
747 F.3d 906 (D.C. Cir. 2014) 16

United States Sugar Corp. v. EPA,
844 F.3d 268 (D.C. Cir. 2016) 11

Whitman v. American Trucking Ass'ns,
531 U.S. 457 (2001) 18

WildEarth Guardians v. EPA,
830 F.3d 529 (D.C. Cir. 2016) 11, 16

STATUTES, RULES, AND REGULATIONS

75 Fed. Reg. 14,670 (Mar. 26, 2010) 16

80 Fed. Reg. 33,100 (June 10, 2015) 4

80 Fed. Reg. 77,420 (Dec. 14, 2015) 3-4

82 Fed. Reg. 58,486 (Dec. 12, 2017) 6

83 Fed. Reg. 32,024 (July 10, 2018) 7

83 Fed. Reg. 63,704 (Dec. 11, 2018) 8

84 Fed. Reg. 36,762 (July 29, 2019) 8-9, 15, 19

85 Fed. Reg. 7016 (Feb. 6, 2020) 9, 14

42 U.S.C. §7545(*o*) 2-3, 19

OTHER AUTHORITIES

EPA, *Carryover RIN Bank Calculations for 2019 Final Rule*, (Nov. 7, 2018), EPA-HQ-OAR-2018-0167-1298 14

EPA, *EnviroFlash Announcements about EPA Fuel Programs, RFS 2017 Annual Compliance Deadline* (Jan. 12, 2018), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/enviroflash-announcements-about-epa-fuel-programs#compliance-deadline.....6, 22

EPA, *Reporting Deadlines for Fuel Programs* (Feb. 13, 2019), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/reporting-deadlines-fuel-programs 1

Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, EPA-HQ-OAR-2015-0111-2604 (July 27, 2015) 4

Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, EPA-HQ-OAR-2018-0167-1292 (Aug. 17, 2018) 7

National Biodiesel Board Comments on Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, EPA-HQ-OAR-2018-0167 (Aug. 17, 2018) 7

National Corn Growers Association Comments on Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020,EPA-HQ-OAR-2018-0167 (Aug. 17, 2018).....7

Renewable Fuels Association Comments on the Proposed Rule for 2014-2016 Standards for the Renewable Fule Standard Program, EPA-HQ-OAR-2015-0111 (July 27, 2015).....4

Renewable Fuels Association Comments on Renewable Fuel Standard Rogram: Standards for 2019 and Biomass-Based Diesel Volume for 2020; Propsoed Rule, EPA-HQ-OAR-2018-0167 (Aug. 17, 2018) 7

INTRODUCTION

In this case, the Court vacated EPA's 500-million-gallon reduction of the 2016 total volume requirement under the Renewable Fuel Standard ("RFS") program and remanded to EPA for further consideration. More than three years later, EPA still has taken no action to comply with the Court's mandate. EPA's failure nullifies the Court's judgment and undermines the RFS program. Movants—renewable-fuels petitioners Growth Energy, Renewable Fuels Association, National Corn Growers Association, the National Biodiesel Board, American Coalition for Ethanol, National Sorghum Producers, and National Farmers Union—respectfully ask the Court to compel EPA to comply with the mandate.[1] Specifically, the Court should order EPA to issue a 500-million-gallon curative obligation with an effective date of no more than six months after the Court's order and with a compliance-demonstration deadline no more than three months after that effective date.[2] The Court should also declare that it will not extend these deadlines.

[1] Americans for Clean Energy, Inc., is defunct.

[2] This period accords with EPA's ordinary RFS compliance-demonstration periods. *See* EPA, *Reporting Deadlines for Fuel Programs* (Feb. 13, 2019), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/reporting-deadlines-fuel-programs [attached as Ex. A].

BACKGROUND

A. The RFS program "requires that increasing volumes of renewable fuel be introduced into the Nation's supply of transportation fuel each year. Congress enacted those requirements in order to move the United States toward greater energy independence and security and increase the production of clean renewable fuels." *Americans for Clean Energy v. EPA ("ACE")*, 864 F.3d 691, 697 (D.C. Cir. 2017) (quotation marks omitted). To accomplish this, Congress specified the minimum amount of total renewable fuel (and the minimum amount of three subcategories of renewable fuel) that must be used each year. *Id.* at 697-698; 42 U.S.C. §7545(*o*)(2)(A)(i) & (B)(i)

Congress "allow[ed] EPA to reduce the statutory volume requirements," *ACE*, 864 F.3d at 698, but "only in limited circumstances," *National Petrochem. & Refiners Ass'n v. EPA ("NPRA")*, 630 F.3d 145, 149 (D.C. Cir. 2010). Specifically, EPA may "reduce" the statutory total volume requirement only if the conditions for a "general" or "cellulosic" "waiver" are met: (1) "there is an inadequate domestic supply," §7545(*o*)(7)(A)(ii); (2) "implementation of the [statutory] requirement would severely harm the economy or environment of a State, a region, or the United States," §7545(*o*)(7)(A)(i); or (3) "the projected volume of cellulosic biofuel production is less than" the statutory volume, §7545(*o*)(7)(D)(i). *See ACE*, 864 F.3d at 698.

Congress then directed EPA to "ensure" that the transportation fuel sold in the United States "contains at least" that amount of renewable fuel. §7545(*o*)(2)(A)(i). Accordingly, Congress imposed on EPA "a statutory mandate to 'ensure'" that the statutory volume requirements—after any reductions under a waiver—"are met," which EPA "fulfills" by "translating" the required volumes "into 'percentage standards'" that "represent the percentage of transportation fuel introduced into commerce that must consist of renewable fuel." *ACE*, 834 F.3d at 698-699 (quoting §7545(*o*)(3)(B)(i) (brackets omitted)). "By statute, EPA is required to promulgate the percentage standards for a given year no later than November 30 of the preceding calendar year." *Id.* at 699; *see* §7545(*o*)(3)(B)(i).

B. In setting the percentage standards for 2016, EPA first invoked its cellulosic-waiver power to reduce the statutory total volume requirement by 3.64 billion gallons, and then invoked its "inadequate domestic supply" general-waiver power to reduce the total volume by an additional 500 million gallons. 80 Fed. Reg. 77,420, 77,439 (Dec. 14, 2015) ("2016 Rule"); *ACE*, 864 F.3d at 701-702.

With respect to the second waiver, "EPA concluded that the best reading of the 'inadequate domestic supply' provision is that it refers to the supply of renewable fuel available to *consumers* for use in their vehicles—not to the supply of renewable fuel available to *refiners, blenders, and importers* for use in meeting the statutory volume requirements." *ACE*, 864 F.3d at 706 (citing 2016 Rule at

77,435-77,436). EPA claimed that, under its interpretation, it could "not only … consider supply-side constraints affecting the availability of renewable fuel—such as renewable fuel production or import capacity—but also … consider demand-side factors affecting consumers' desire or ability to consume renewable fuels." *Id.*

EPA's interpretation was crucial to its determination that there was inadequate domestic supply. It was undisputed that there was ample renewable fuel available for obligated parties—refiners and importers—to meet the statutory volume requirement, after adjusting for the cellulosic waiver, i.e., that there were no supply-side constraints on renewable fuel. *See* Growth Energy Comments on Proposed 2016 Rule at 28-32 (July 27, 2015) [attached as Ex. B]; Renewable Fuels Association Comments on Proposed 2016 Rule at 4-7 (July 27, 2015) [attached as Ex. C]; 2016 Rule at 77,438. But EPA nonetheless found that the "supply" was "inadequate," and accordingly reduced the total volume requirement, solely because of "constraints … related to the infrastructure build out and fuel consumption" of ethanol—that is, solely because of demand-side factors. 2016 Rule at 77,450; *see id.* at 77,740, 77,452, 77,456-77,465; 80 Fed. Reg. 33,100, 33,113 (June 10, 2015).

C. Representatives of producers of renewable fuel—including movants—petitioned for review of EPA's supply waiver. Agreeing with petitioners, this

Court held that "the 'inadequate domestic supply' provision authorizes EPA to consider *supply-side* factors affecting the volume of renewable fuel that is available to *refiners, blenders, and importers* to meet the statutory volume requirements. It does not allow EPA to consider the volume of renewable fuel that is available to ultimate *consumers* or the *demand-side* constraints that affect the consumption of renewable fuel by consumers." *ACE*, 864 F.3d at 696. "Th[e] prohibited factors include, for example, constraints on the infrastructure needed to distribute fuel from blenders to gas stations or the number of retail outlets that offer renewable fuel blends," as well as the "pricing of renewable fuel, prevalence of vehicle engines that can use renewable fuel, and marketing efforts of those promoting renewable fuel products." *Id.* at 709.

The Court explained that "[t]he central problem with EPA's 'supply equals demand' argument (in addition to the text of the statute, of course) is that it runs contrary to how the Renewable Fuel Program is supposed to work." *ACE*, 864 F.3d at 710. "[T]he Renewable Fuel Program's increasing requirements are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year. EPA's interpretation of the 'inadequate domestic supply' provision flouts that statutory design: Instead of the statute's volume requirements forcing demand up, the lack of demand allows EPA to bring the volume requirements down." *Id.*

Accordingly, the Court "vacate[d] EPA's decision to reduce the total renewable fuel volume requirements for 2016 through use of its 'inadequate domestic supply' waiver authority, and remand[ed] the rule to EPA for further consideration in light of [its] decision." *ACE*, 864 F.3d at 696-697.

D. *ACE* was decided on July 28, 2017. Now, after more than three years—and three annual RFS rulemakings—EPA still has taken no action to comply with the Court's mandate.

Starting just a few months after *ACE* was decided, EPA acknowledged the importance of implementing the Court's mandate. EPA's 2018 Rule noted "considerable uncertainty" about the number of available "carryover RINs," i.e., the size of the "carryover RIN bank," because of "the possible impact of an action to address the remand in *ACE*," 82 Fed. Reg. 58,486, 58,494 (Dec. 12, 2017); *see ACE*, 864 F.3d at 699-700 (describing carryover-RIN bank), as if the uncertainty were an external factor outside EPA's control. A month later, EPA issued an EnviroFlash again acknowledging "some uncertainty" about available RINs "in light of … the fact that the EPA has not yet indicated its intentions with respect to responding to the remand" in *ACE*. EPA, *RFS 2017 Annual Compliance deadline* (Jan. 12, 2018), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/enviroflash-announcements-about-epa-fuel-programs#compliance-deadline [attached as Ex. D]. In the EnviroFlash, EPA "noted that [it] currently believe[s]

that it would be appropriate for the EPA to allow use of current-year RINs (including carryover-RINs) to satisfy further obligations, if any, for a past compliance year that may result from the *ACE* remand." *Id.*

EPA next deemed the *ACE* remand outside the scope of the 2019 rulemaking, despite acknowledging the "compelling need to respond to the remand" and re-affirming its "inten[t] to expeditiously move ahead." 83 Fed. Reg. 32,024, 32,027 (July 10, 2018). Movants nonetheless urged EPA to "immediately address the D.C. Circuit's vacatur of EPA's general waiver of the 2016 total volume requirement," pointing out that "EPA could easily remedy the vacatur by adding the 500 million RINs covered by the vacated general waiver to the total 2019 volume requirement it would otherwise impose," so that obligated parties could use current-year RINs to make up the unlawful waiver (as EPA had suggested in January 2018). Growth Energy Comments on Proposed 2019 Rule at 3, 49-50 (Aug. 17, 2018) [attached as Ex. E]; *accord* Renewable Fuels Association Comments on Proposed 2019 Rule at 13-14 (Aug. 17, 2018) [attached as Ex. F]; National Biodiesel Board Comments on Proposed 2019 Rule at 11 (Aug. 17, 2018) [attached as Ex. G]; National Corn Growers Association Comments on Proposed 2019 Rule at 11-12 (Aug. 17, 2018) [attached as Ex. H].

In the final 2019 Rule, however, EPA took no action to address the *ACE* remand. Instead, it reiterated that "there remains considerable uncertainty

surrounding the number of carryover RINs that will be available for use in 2019 for a number of reasons, including the potential impact of any future action to address the remand in *ACE*." 83 Fed. Reg. 63,704, 63,709 (Dec. 11, 2018).

In the proposed 2020 Rule, EPA finally proposed a response to *ACE*, recognizing that its "obligation [was] to reevaluate the 2016 total renewable fuel volume requirement in accordance with the court's decision." 84 Fed. Reg. 36,762, 36,788 (July 29, 2019) ("2020 NPRM"). Shockingly, however, EPA proposed to take *no curative* action, stating: "In light of the fact that we can no longer incent additional renewable fuel generation in 2016, and the significant burden on obligated parties of imposing an additional standard, we are proposing to retain the original 2016 total renewable fuel standard." *Id.* EPA considered several approaches to curing the unlawful 2016 supply wavier, but it asserted that "in the case of the 2016 renewable fuel volumes, any approach that requires additional volumes of renewable fuel use" would constitute "a retroactive standard" imposing "a significant burden on obligated parties, without any corresponding benefit as any additional standard cannot result in additional renewable fuel use in 2016." *Id.*

One approach that EPA's proposal rejected was functionally what movants had urged during the rulemaking for the 2019 standards and what EPA had suggested in its January 2018 EnviroFlash: "imposing an additional obligation as a

supplement to the 2020 standards and allowing compliance with 2019 and 2020 RINs." 2020 NPRM at 36,789. EPA asserted that because "there are very limited opportunities to use biofuels beyond the volumes [EPA was] proposing for 2020, [EPA] believe[s] that this is unlikely to incent significant new biofuel generation in 2020." *Id.* "Instead," EPA said, that approach "would likely lead to a significant drawdown of the carryover RIN bank, which [EPA] do[es] not believe to be appropriate," even though, it acknowledged, "there would likely be sufficient [2019 and 2020] RINs to comply with an additional 500 million gallon standard." *Id.*

EPA's final 2020 Rule, however, again refused to adopt *any* response to the *ACE* remand—not even its facially improper proposal of retaining the invalidated volume. EPA stated that it was "still actively considering th[e] issue," which it "deferr[ed] … to a separate action … anticipate[d] in early 2020." 85 Fed. Reg. 7016, 7019 (Feb. 6, 2020) ("2020 Rule").

Early 2020 has come and gone; it is now *late* 2020 and EPA still has not taken action in response to the *ACE* remand.[3]

[3] EPA has not even *proposed* the 2021 RFS standards, though the statutory deadline to *finalize* them is imminent.

ARGUMENT

When an agency has unreasonably delayed curative action in response to a decision of this Court, a prevailing party may call upon the Court's mandamus power to compel the agency to comply promptly with the mandate. EPA's failure to act on remand for more than three years is beyond the pale. Long ago, EPA could easily have set a supplemental 500-million-gallon obligation to cure its unlawful waiver of the 2016 total volume requirement. Its failure to do so undermines the structure and goals of the RFS program. To date, EPA's only proposed response to *ACE* has been to retain the same volume requirement that *ACE* declared unlawful. Lest EPA override this Court's judgments and immunize its RFS actions from future judicial review, the Court should compel EPA not merely to act in response to the remand but to impose a curative obligation.

I. THE COURT SHOULD COMPEL EPA TO CURE ITS UNLAWFUL 2016 WAIVER

A. Mandamus Is Available to Compel EPA to Comply Promptly With the *ACE* Mandate

A "party always has recourse to the court to seek enforcement of its mandate." *Office of Consumers' Counsel, State of Ohio v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) (per curiam). The Court has "authority … to issue a writ of mandamus to effectuate or prevent the frustration of orders previously issued." *NetCoalition v. SEC*, 715 F.3d 342, 354 (D.C. Cir. 2013) (quotation marks omitted). The Court "may do so either" to address "unreasonable agency delay" or

"to correct any misconception of [its] mandate by [an] … administrative agency." *Id*. (quotation marks omitted); *see also, e.g.*, *United States Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016) (petitioners "may bring a mandamus petition to this court in the event that the EPA fails to revise its standards under the Clean Air Act on remand in a manner consistent with our earlier opinion" (quotations and brackets omitted)); *WildEarth Guardians v. EPA*, 830 F.3d 529, 535 (D.C. Cir. 2016) ("if EPA were to fail to initiate that sort of remedial response, WildEarth could then file a mandamus petition to compel agency action").

Here, mandamus is appropriate if EPA's delay in responding to the *ACE* mandate is "unreasonable." *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 836 (D.C. Cir. 2012); *see, e.g.*, *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008).[4] In assessing whether an agency's delay is unreasonable, the Court ordinarily considers the so-called *TRAC* factors:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in

[4] In the context of compelling an agency to comply with a mandate, this Court ordinarily does not tarry over the traditional test for granting mandamus relief. *See In re Trade & Commerce Bank ex rel. Fisher*, 890 F.3d 301, 303 (D.C. Cir. 2018) ("our mandamus cases dealing with enforcement of the mandate may not explicitly spell out each of the factors"). Because an agency "has a 'clear duty' to respond to this Court's remand" without unreasonable delay, *People's Mojahedin*, 680 F.3d at 836, and there is no alternative remedy where an agency refuses to do so, the only pertinent question is whether the agency's delay in responding is unreasonable. *See generally In re Flynn*, 973 F.3d 74, 78 (D.C. Cir. 2020) (en banc) (reciting traditional mandamus test).

> the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Telecommunications Research & Action Ctr. v. FCC ("TRAC"), 750 F.2d 70, 80 (D.C. Cir. 1984) (citations and quotation marks omitted). Under *TRAC*, "[a]lthough there is no *per se* rule as to how long is too long, a reasonable time for agency action is typically counted in weeks or months, not years." *In re Public Emps. for Envtl. Responsibility*, 957 F.3d 267, 274 (D.C. Cir. 2020) (quotation marks omitted).

But in this case, the *TRAC* standard does not drive the analysis. What is "[d]ecisive" is that EPA "has failed to heed [the Court's] remand." *People's Mojahedin*, 680 F.3d at 837. The *TRAC* standard was crafted for cases "involv[ing] delay by agencies in concluding their own rulemakings or in responding to requests by private parties to take administrative action." *Core Commc'ns*, 531 F.3d at 855-856. When the delay pertains instead to complying with the Court's mandate, the Court's "overriding concern" is ensuring that the delay does not have "the effect of nullifying [the Court's] decision while at the same time preventing [the affected petitioner] from seeking judicial review."

People's Mojahedin, 680 F.3d at 838; *accord Core Commc'ns*, 531 F.3d at 856. In such circumstances, the Court's intervention is imperative. *See People's Mojahedin*, 680 F.3d at 837-838.

B. EPA's Three-Year Failure to Cure on Remand Is an Egregious Delay That Nullifies the Mandate

EPA's utter failure to take any curative action at all more than three years after the mandate issued is inexcusable and renders the mandate meaningless.

1. Congress provided a timetable that should have guided EPA and should now guide the Court: EPA was statutorily required to issue the 2016 standards by November 30, 2015. And for each year since, EPA has been statutorily obligated to issue the applicable standards by the preceding November 30. *Supra* p.3. Thus, once the Court held that EPA issued an unlawful standard for 2016, EPA should have taken curative action by the next annual RFS rulemaking, i.e., by the time it had to set the 2018 standards (November 30, 2017), or, if that was impracticable, by the time it had to set the 2019 standards (November 30, 2018).

2. EPA's inaction drags down the entire RFS program and prejudices movants. The 2016 supply waiver unlawfully reduced the amount of renewable fuel that was required to be used in 2016 by 500 million gallons—fuel that movants' members produce. Given that obligated parties were unlawfully relieved of such a large obligation even though there was ample renewable fuel available to

meet it, the effect of the unlawful waiver was to increase the number of carryover RINs available for compliance in subsequent years. In fact, the unlawful waiver enlarged the bank RIN-for-RIN by 500 million.[5]

That was bad for the RFS program because increasing the supply of carryover RINs decreases RIN prices. As both the Court and EPA have recognized, rising RIN prices are the mechanism by which the RFS forces the market to use greater amounts of renewable fuel. *See Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 651 (D.C. Cir. 2019) (rising RIN prices "provide a price signal to consumers to help achieve the Congressional goals of greater renewable fuel production and use"); *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919 (D.C. Cir. 2014) ("high RIN prices" "incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote"). And because EPA has not imposed a curative 500-million-gallon obligation, the unlawful 2016 waiver's inflation of the RIN bank continues today, to the detriment of the RFS program, renewable-fuel producers, consumers, and the country as a whole.[6]

[5] Between 2016 and 2017, the RIN bank increased by 835 million. EPA, *Carryover RIN Bank Calculations for 2019 Final Rule* at 7 (Nov. 7, 2018) [attached as Ex. I]. But for the waiver, obligated parties would have retired 500 million more RINs to meet their 2016 obligations.

[6] Today, there are about 3.48 billion carryover RINs. 2020 Rule at 7,021.

3. Finally, it is inconceivable that EPA would need so much time to figure out how to cure its unlawful 2016 waiver. EPA could easily have imposed a supplemental obligation that could be met using current-year RINs, whether combined with an annual obligation or issued as a stand-alone obligation. EPA recognized this option in its January 2018 EnviroFlash and in the 2020 NPRM. *Supra* pp.6-9. And movants proposed this more than two years ago. *Supra* p.7.

Nor is this approach theoretical; it is the approach that EPA has already used to cure an unlawfully low volume requirement from a prior year. In the early days of the RFS program, EPA missed the 2008 statutory deadline for issuing the 2009 biomass-based diesel standard. *NPRA*, 630 F.3d at 149. To correct that failure, EPA later (in March 2010, to be precise) issued a biomass-based diesel standard for 2010 that "combined" the required 2009 volume with the required 2010 volume. *Id.* at 151. EPA explained that it "had adopted the combined 2009/2010 approach because it 'more closely represented what would have occurred if EPA had been able to implement the [biomass-based diesel volume] requirement in 2009.'" *Id.* at 152 (quoting 75 Fed. Reg. 14,670, 14,719 (Mar. 26, 2010) (brackets omitted)). This Court approved of EPA's solution. *Id.* at 152-158; *see also id.* at 158-166. EPA could have used this simple approach as soon as *ACE* invalidated the 2016 waiver.

II. THE COURT SHOULD CLARIFY THAT EPA CANNOT RETAIN ITS ORIGINAL 2016 STANDARD

The closest EPA has come to acting on remand from *ACE* was to propose in 2019 that it "retain the original 2016 total renewable fuel standard." 2020 NPRM at 36,788; *see supra* p.8. In other words, EPA proposed to respond to *ACE* as if the Court had *not* "vacate[d] EPA's decision to reduce the total renewable fuel volume requirements for 2016 [by 500 million gallons] through use of its 'inadequate domestic supply' waiver authority." *ACE*, 864 F.3d at 696-697. It should go without saying that EPA is required to comply with *ACE* by curing its adjudicated legal error. This duty stems from both the *ACE* mandate and the Clean Air Act. *See, e.g.*, *WildEarth Guardians*, 830 F.3d at 535 ("The necessary consequence of vacating the Implementation Rule on the ground that it failed adequately to adhere to Subpart 4 would be some kind of corrective EPA action strictly implementing that Subpart ….").

EPA's proffered reasons for rejecting any cure—and particularly the cure of setting a future 500-million-gallon obligation that could be met with current-year RINs—are nonsense and would nullify not only this Court's mandate but also the Court's power to review *any* EPA action whose effect was to reduce an RFS volume obligation.

A. *ACE* and the Clean Air Act Require EPA to Impose a 500-Million-Gallon Curative Obligation

EPA is "without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion" rendered in *ACE*. *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (quotation marks omitted); *accord U.S. Postal Serv. v. Postal Regulatory Comm'n* ("*PRC*"), 747 F.3d 906, 910 (D.C. Cir. 2014). And the letter and spirit of *ACE*—along with the text and purpose of the Clean Air Act—command EPA to enforce the 2016 total volume requirement as if there had not been a 500-million-gallon supply waiver.

In the Act, Congress: specified the minimum amount of renewable fuel that EPA must ensure is used each year; granted EPA the power to reduce those volumes, but only if the statutorily specified waiver conditions are present; and mandated that EPA annually set percentage standards that ensure that the statutorily specified amounts of renewable fuel, after any waiver reductions, are met. *Supra* pp.2-3. In setting the 2016 total standard, EPA reduced the statutory volume through a cellulosic waiver and then through a supply waiver. *ACE* upheld the former but invalidated the latter. 864 F.3d at 701-704. Consequently, EPA is now statutorily bound to *ensure* that the congressionally prescribed 2016 total volume requirement, reduced *only* by the 3.64-billion-gallon cellulosic waiver, is

met. EPA's suggestion that it retain its original 2016 standard, which reflects the unlawful 500-million-gallon reduction, obviously does not do that.

On the contrary, retaining EPA's original 2016 standard would nullify *ACE*'s holding. A "decision that the agency's action was substantively unreasonable generally means that, on remand, the agency must exercise its discretion differently and reach a different bottom-line decision." *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 936 (D.C. Cir. 2017); *see Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government."). Further, retaining the original 2016 standard would in effect reduce the 2016 volume requirement without a valid waiver—something that *ACE* and other precedents make clear EPA cannot do. *See* 864 F.3d at 712 ("EPA has not explained why Congress would have established the severe-harm waiver standard only to allow waiver … based on lesser degrees of economic harm. … [T]he fact that EPA thinks a statute would work better if tweaked does not give EPA the right to amend the statute." (quotation marks omitted)); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 485 (2001) ("EPA may not construe the statute in a way that completely nullifies textually applicable

provisions meant to limit its discretion."); *MCI Telecommc'ns Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

As the Court and EPA have recognized, EPA's statutory mandate to ensure that the statutory volumes (after valid waivers) are met does not disappear just because the standard is imposed after the statutory deadline for issuing the standard or even after the initial deadline for demonstrating compliance. After EPA failed to issue the 2009 biomass-based diesel standard by the statutory deadline, the Court approved of EPA's determination that issuing a combined 2009-2010 biomass-based diesel standard "best … carr[ied] out Congress' mandate that it 'ensure' the applicable volume requirement for 2009 is met." *NPRA*, 630 F.3d at 166; *see id.* at 157. The Court observed that "[b]y including the authorizing phrase 'at least' Congress … signaled its intent that volumes not be reduced" (absent a valid waiver). *Id.* at 156 (quoting §7545(*o*)(2)(A)(i)). Congress also signaled its intent that each year's statutory volume be met even if the compliance period was shifted into another year through statutory provisions allowing RIN credits and deficits to be carried into a future year. *See NPRA*, 630 F.3d at 157; §7545(*o*)(5)(C)-(D). Thus, the Court concluded, combining the 2009 and 2010 volumes into a single standard "reflect[ed] Congress' vision in expanding the renewable fuel program without." *NPRA*, 630 F.3d at 156.

B. A Future Curative Obligation Would not Be "Retroactive"

In its proposal for 2020, EPA asserted that remedying the unlawful waiver by setting a future 500-million-gallon curative obligation to be met with current-year RINs would impose a "retroactive" "burden on obligated parties." 2020 NPRM at 36,788. According to EPA, this approach would not "incent significant new biofuel generation in 2020" but rather would "likely lead to a significant drawdown of the carryover RIN bank." *Id.* at 36,789. That is classic doublespeak.

Congress set the volume requirement to which obligated parties were subject, except to the extent EPA reduces it through a *valid* waiver. *See supra* p.2. Issuing a future obligation to remedy the unlawful 500-million-gallon reduction would merely restore the compliance obligation to which obligated parties were always properly subject. If obligated parties choose to meet a future curative obligation with carryover RINs (rather than by increasing renewable-fuel use), the RIN bank's balance would not be *drawn down* but rather *restored* to reflect what it would have been but for the unlawful waiver. *See supra* pp.13-14. In other words, the bank has 500 million more RINs than it should have; those RINs reflect not obligated parties' prior renewable-fuel use above the required amount but rather "a windfall for the regulated entities" stemming from EPA's illegal waiver. *NPRA*, 630 F.3d at 157 (quotation marks omitted). EPA, therefore, cannot claim that the bank's balance should be maintained. Finally, a future curative obligation would

indeed incentivize increased use of renewable fuel: a long enough timetable, such as the one proposed in this motion (nine months from the order to the compliance deadline), is ample to spur greater use; but even if obligated parties use carryover RINs to comply, the resulting reduction in the RIN bank would raise RIN prices and thus help spur greater use *in subsequent years*, *see supra* p.19.

In any event, setting a future curative obligation would not impose a retroactive obligation at all. A rule is retroactive only if it "attaches new legal consequences to events completed before its enactment," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-270 (1994), but, again, obligated parties were always legally bound to meet the 2016 statutory volume requirement except to the extent EPA validly waived it; obligated parties could not have had settled "expectations" in an ultra vires waiver. *See Monroe Energy*, 750 F.3d at 920. Even if they did, moreover, "unsettl[ing]" those expectations would not render a future curative obligation "retroactive." *Landgraf*, 511 U.S. at 269 n.24 (law not impermissibly "retroactive" merely because its application depends on preexisting facts). A future curative obligation would not penalize obligated parties for their past conduct; it would ensure that the statutory requirements are met while minimizing any compliance burden caused by EPA's unlawful waiver, by affording them ample notice and opportunity to plan their future activity to achieve compliance. *See Monroe Energy*, 750 F.3d at 920 (suggesting "'retroactivity' label" did not

apply where "EPA finalized its [RFS] standards during the compliance year, well before the compliance demonstration deadline, [because] the rule did not change the legal effect of a completed course of conduct").[7]

At bottom, if EPA could invoke the specter of "retroactivity" to avoid curing its unlawful 2016 waiver, this Court's ruling in *ACE* would be a nullity and judicial review of *any* action by EPA that lowers an RFS volume requirement would be pointless. Judicial decisions invalidating such actions will always issue after the relevant compliance year is over.[8] Thus, EPA could always invoke concerns about "retroactive" obligations to avoid curing its adjudicated legal errors, "effectively nullif[ying]" the Court's decisions. *Core Commc'ns*, 531 F.3d at 856; *accord People's Mojahedin*, 680 F.3d at 837-838. EPA should not be allowed to do that.

CONCLUSION

For the foregoing reasons, the Court should order EPA to comply with the mandate by issuing a 500-million-gallon curative obligation whose effective date is no more than six months after the Court's order and whose compliance-demonstration deadline is no more than three months after the obligation's

[7] Presumably, EPA would issue a notice of proposed rulemaking in connection with the corrective obligation. Obligated parties have also received notice through *ACE* itself and EPA's 2018 EnviroFlash statement that it would be "appropriate" to allow "use of current-year RINs … to satisfy further obligations … result[ing] from the *ACE* remand." *RFS 2017 Annual Compliance deadline*.

[8] That has been the case in all six lawsuits challenging EPA's annual standards to date.

effective date. The Court should also declare that it will not extend these deadlines.

Respectfully submitted,

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Counsel for Movants

November 23, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, movants state:

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 for the purpose of promoting the general commercial, legislative, and other common interests of its members. Growth Energy does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Renewable Fuels Association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting 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.

National Corn Growers Association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are corn farmers and supporters of the agriculture and ethanol industries. It operates for the purpose of promoting 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.

National Sorghum Producers is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are sorghum producers and supporters of the sorghum industry. It operates for the purpose of promoting 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 Farmers Educational & Cooperative Union of America (doing business as the **National Farmers Union**) is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members include farmers who are producers of biofuel feedstocks and consumers of large quantities of fuel. It

operates for the purpose of promoting 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.

American Coalition for Ethanol is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members include ethanol and biofuel facilities, agricultural producers, ethanol industry investors, and supporters of the ethanol industry. It operates for the purpose of promoting 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.

Respectfully submitted,

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CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to Circuit Rule 27(a)(4), movants certify that the parties in these consolidated cases are:

Petitioners: American Coalition for Ethanol; Biotechnology Innovation Organization; Growth Energy; National Corn Growers Association; National Biodiesel Board; National Farmers Union; National Sorghum Producers; and Renewable Fuels Association; Alon Refining Krotz Springs, Inc.; American Fuel & Petrochemical Manufacturers, American Petroleum Institute; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Ergon-West Virginia, Inc.; Hunt Refining Company; Lion Oil Company; Monroe Energy, LLC; Placid Refining Company LLC; U.S. Oil & Refining Co.; Valero Energy Corporation; and Wyoming Refining Company.[9]

Respondents: United States Environmental Protection Agency; Andrew R. Wheeler.

Intervenors: All petitioners and E.I. du Pont de Nemours & Co.

Amici curiae: American Soybean Association; Arvegenix, Inc.; CVR Energy, Inc.; Canola Council of Canada; National Renderers Association; Small Retailers Coalition; U.S. Canola Association.

[9] Americans for Clean Energy, Inc., is defunct.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,190 words, excluding the exempted portions, as provided in Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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

/s/ Seth P. Waxman
Seth P. Waxman

CERTIFICATE OF SERVICE

I certify that on November 23, 2020, I filed the foregoing 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