ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1046 and consolidated cases

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

RFS POWER COALITION, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITIONS FOR REVIEW OF FINAL AGENCY ACTION
OF THE ENVIRONMENTAL PROTECTION AGENCY

INITIAL BRIEF OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, VALERO ENERGY CORPORATION, AND SMALL REFINERIES COALITION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, intervenors, and amici

Petitioners:

20-1046	RFS Power Coalition
20-1066	American Fuel & Petrochemical Manufacturers
20-1073	Valero Energy Corporation
20-1103	American Petroleum Institute
20-1106	Alon Refining Krotz Springs, Inc.; Alon USA, LP; American Refining Group, Inc.; Calumet Montana Refining, LLC; Calumet Shreveport Refining, LLC; Delek Refining, Ltd.; Ergon Refining, Inc.; Ergon-West Virginia, Inc.; Hunt Refining Company; Lion Oil Company; Placid Refining Company LLC; Par Hawaii Refining, LLC; Sinclair Wyoming Refining Company; Sinclair Casper Refining Company; U.S. Oil & Refining Company; Wyoming Refining Company ("Small Refineries Coalition")
20-1107	National Biodiesel Board
20-1108	Small Retailers Coalition (petition subsequently dismissed)
20-1109	Waste Management, Inc. and WM Renewable Energy, LLC
20-1110	Producers of Renewables United for Integrity Truth and Transparency
20-1111	Iogen Corporation and Iogen D3 Biofuels Partners II LLC
20-1113	Growth Energy
20-1114	Renewable Fuels Association (petition subsequently dismissed)

Respondents:

Environmental Protection Agency and Andrew Wheeler, or his successor, in his official capacity as EPA Administrator

Respondent-Intervenors:

American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Growth Energy, Iogen Corporation, Iogen D3 Biofuels Partners II LLC,

National Biodiesel Board, Producers of Renewables United for Integrity Truth and Transparency, WM Renewable Energy, LLC, and Waste Management, Inc.

Amici:

None

B. Rulings under review

The agency action under review is EPA's final rule, titled "Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes," 85 Fed. Reg. 7016 (Feb. 6, 2020), which this Brief identifies throughout as the "2020 Rule" or "Rule."

C. Related cases

Each of the Petitions for Review consolidated with No. 20-1046 is related. The consolidated cases have not been reviewed by this or any other Court. In addition, the following pending cases may involve similar or substantially the same issues:

- *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir.) and consolidated cases;
- *Renewable Fuels Ass'n v. EPA*, No. 18-1154 (D.C. Cir.);
- *Renewable Fuels Ass'n v. EPA*, No. 19-1220 (D.C. Cir);
- *Renewable Fuels Ass'n v. EPA*, No. 21-1032 (D.C. Cir.); and
- *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, No. 20-472, (U.S.).

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners provide the following disclosures:

- **Alon Refining Krotz Springs, Inc.** is incorporated under the laws of Delaware. Alon Refining Krotz Springs, Inc. is a refiner of petroleum products. Alon Refining Krotz Springs, Inc. is owned 100 percent by parent company Alon Refining Louisiana, Inc., an indirect wholly owned subsidiary of Delek US Holdings, Inc. Delek US Holdings, Inc. is a publicly traded company and no publicly held company has a 10 percent or greater ownership interest in it.

- **Alon USA, LP** is incorporated under the laws of Texas. Alon USA, LP is a refiner of petroleum products. Alon USA, LP is owned 100 percent by parent company Alon USA Delaware, LLC, an indirect wholly owned subsidiary of Delek US Holdings, Inc. Delek US Holdings, Inc. is a publicly traded company and no publicly held company has a 10 percent or greater ownership interest in it.

- **American Fuel & Petrochemical Manufacturers** is a national trade association whose members comprise most U.S. refining and petrochemical manufacturing capacity. American Fuel & Petrochemical Manufacturers has no parent companies, and no publicly held company has a 10% or greater ownership interest in American Fuel & Petrochemical Manufacturers. American Fuel & Petrochemical Manufacturers is a "trade association" under Circuit Rule 26.1 and operates for the purpose of promoting the general commercial, professional, legislative, or other interests of its memberships.

- **American Petroleum Institute** is a nationwide, not-for-profit association representing approximately 600 member companies engaged in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. American Petroleum Institute has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in American Petroleum Institute. American Petroleum Institute is a "trade association" under Circuit Rule 26.1 and operates for the purpose

of promoting the general commercial, professional, legislative, or other interests of its members.

- **American Refining Group, Inc.** is incorporated under the laws of Pennsylvania. American Refining Group, Inc. is a refiner of petroleum products. American Refining Group, Inc. has no parent company, and no publicly held company has a 10 percent or greater ownership interest in it.

- **Calumet Montana Refining, LLC** is incorporated under the laws of Delaware. Calumet Montana Refining, LLC is owned 100% by Calumet Specialty Products Partners, L.P., which is incorporated under the laws of Delaware. Calumet Specialty Products Partners, L.P. is a refiner of petroleum products. Calumet Specialty Products Partners, L.P. has no parent company, and no publicly held company has a 10 percent or greater ownership interest in it.

- **Calumet Shreveport Refining, LLC** is incorporated under the laws of Dela-ware. Calumet Shreveport Refining, LLC is owned 100 percent by Calumet Specialty Products Partners, L.P., which is incorporated under the laws of Delaware. Calumet Specialty Products Partners, L.P. is a refiner of petroleum products. Calumet Specialty Products Partners, L.P. has no parent company, and no publicly held company has a 10 percent or greater ownership interest in it.

- **Delek Refining, Ltd.** is incorporated under the laws of Texas. Delek Refining, Ltd. is a refiner of petroleum products. Delek Refining, Ltd. is wholly owned by parent company Delek Refining, Inc., an indirect wholly owned subsidiary of Delek US Holdings, Inc. Delek US Holdings, Inc. is a publicly traded company and no publicly held company has a 10 percent or greater ownership interest in it.

- **Ergon Refining, Inc.** is incorporated under the laws of Mississippi. Ergon Refining, Inc. is a refiner of petroleum products. Ergon Refining, Inc. is wholly owned by parent company Ergon, Inc., and no publicly held company has a 10 percent or greater ownership interest in it.

- **Ergon-West Virginia, Inc.** is incorporated under the laws of Mississippi. Ergon-West Virginia, Inc. is a refiner of petroleum products. Ergon-West Virginia, Inc. is wholly owned by parent

company Ergon, Inc., and no publicly held company has a 10 percent or greater ownership interest in it.

- **Hunt Refining Company** is incorporated under the laws of Delaware. Hunt Refining Company is a refiner of petroleum products. Hunt Refining Company is wholly owned by Hunt Consolidated Hydrocarbons, LLC and Hunt Consolidated, Inc., and no publicly held company has a 10 percent or greater ownership interest in it.

- **Lion Oil Company** is incorporated under the laws of Arkansas. Lion Oil Company is a refiner of petroleum products. Lion Oil Company is wholly owned by parent company Delek US Energy, Inc., a wholly owned subsidiary of Delek US Holdings, Inc. Delek US Holdings, Inc. is a publicly traded company and no publicly held company has a 10 percent or greater ownership interest in it.

- **Placid Refining Company LLC** is a limited liability company organized under the laws of Delaware. Placid Refining Company LLC is a refiner of petroleum products. Placid Refining Company LLC is owned 100 percent by its parent companies Placid Holding Company and RR Refining, Inc. and no publicly held company has a 10 percent or greater ownership interest in it.

- **Par Hawaii Refining, LLC** is a limited liability company organized under the laws of Delaware. Par Hawaii Refining, LLC is a refiner of petroleum products. Par Hawaii Refining, LLC is an indirect wholly owned subsidiary of Par Pacific Holdings, Inc., a publicly traded corporation and no publicly held company has a 10 percent or greater ownership interest in it.

- **Sinclair Wyoming Refining Company** is incorporated under the laws of Wyoming. Sinclair Wyoming Refining Company a refiner of petroleum products. Sinclair Wyoming Refining Company is a wholly owned subsidiary of Sinclair Oil Corporation, which is a wholly owned subsidiary of The Sinclair Companies. The Sinclair Companies is a privately held corporation with no parent corporation.

- **Sinclair Casper Refining Company** is incorporated under the laws of Wyoming. Sinclair Casper Refining Company is a refiner of petroleum products. Sinclair Casper Refining Company is a wholly owned subsidiary of Sinclair Oil Corporation, which is a wholly owned

subsidiary of The Sinclair Companies. The Sinclair Companies is a privately held corporation with no parent corporation.

- **U.S. Oil & Refining Co.** is incorporated under the laws of Delaware. U.S. Oil & Refining Co. is a refiner of petroleum products. U.S. Oil and Refining Co. is an indirect wholly owned subsidiary of Par Pacific Holdings, Inc., a publicly held corporation and no publicly held company has a 10 percent or greater ownership interest in it.

- **Wyoming Refining Company** is a trade name for Hermes Consolidated, LLC, a limited liability company organized under the laws of Delaware, doing business as Wyoming Refining Company. Wyoming Refining Company is a refiner of petroleum products. Wyoming Refining Company is an indirect wholly owned subsidiary of Par Pacific Holdings, Inc., a publicly held corporation and no publicly held company has a 10 percent or greater ownership interest in it.

- **Valero Energy Corporation** is a Texas-based energy company incorporated under the laws of Delaware. Valero is the world's largest independent refiner, the world's second largest corn ethanol producer, and the world's second largest renewable-diesel producer. Valero has no parent corporation and no publicly held company owns a 10 percent or greater interest of its stock.

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GLOSSARY

EPA	Environmental Protection Agency
JA	Joint Appendix
RFS	Renewable Fuel Standard
RINs	Renewable Identification Numbers
2020 Rule or Rule	"Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes," 85 Fed. Reg. 7016 (Feb. 6, 2020)
2020 Proposed Rule or Proposed Rule	"Renewable Fuel Standard Program: Standards for 2020 and Biomass-Basee Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes," 84 Fed. Reg. 36762 (July 29, 2019)
2020 Supplemental Proposal or Supplemental Proposal	"Renewable Fuel Standard Program: Standards for 2020 and Biomass-Basee Diesel Volume for 2021, and Response to the Remand of the 2016 Standards; Supplemental Notice of Proposed Rulemaking," 84 Fed. Reg. 57677 (Oct. 28, 2019)
2019 Rule	"Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020," 83 Fed. Reg. 63704 (Dec. 11, 2018)

STATEMENT REGARDING ORAL ARGUMENT

Petitioners request oral argument. This case presents new issues regarding statutory limits governing the RFS program, which plays a critical role in regulating the nation's transportation fuel supply.

JURISDICTION

This Court has jurisdiction under 42 U.S.C. §7607(b)(1)[1] over the nationally applicable 2020 Rule.

STATUTES AND REGULATIONS

The pertinent statutory provisions are within §7545(*o*). The Addendum provides pertinent statutes and regulations.

STATEMENT OF ISSUES

1. Whether the Rule's novel provisions increasing annual renewable-fuel obligations based on projected future small-refinery exemptions are arbitrary, capricious, or otherwise contrary to law.

2. Whether EPA, having claimed that its new reallocation formula was needed to ensure renewable-fuel targets, was required to consider alternative solutions, *i.e.*, did EPA (a) abuse its discretion by refusing to consider whether 2020 RFS obligations were applicable to "appropriate" parties, §7545(*o*)(3)(B)(ii), or (b)

[1] Unless otherwise noted, all statutory citations are to Title 42, U.S. Code.

arbitrarily characterize comments on accounting for exported renewable fuels as "beyond the scope of the rulemaking."

STATEMENT OF THE CASE

This case concerns EPA regulations implementing the RFS program, which governs the introduction of renewable fuel into the Nation's transportation-fuel supply. EPA annually determines what it describes as "volume requirements," which represent targets for renewable-fuel use in the upcoming year. These targets are determined based on statutory volumes and other criteria in §7545(*o*)(2)(B) and the application of waivers in §7545(*o*)(7). 40 C.F.R. §80.1407; *Am. Fuel & Petrochem. Mfrs. v. EPA*, 937 F.3d 559, 568-70 (D.C. Cir. 2019) ("*AFPM*").[2] Pursuant to §7545(*o*)(3)(B), EPA must translate its targets into annual percentage standards that obligated parties—defined by EPA as fuel refiners and importers—must satisfy. *AFPM*, 937 F.3d at 570-71.[3]

EPA's formula for determining the percentage standards divides the renewable-fuel volume targets into the volume of *non*renewable fuel expected to be sold in the year ahead. JA__[85_Fed._Reg._7016,_7019_(Feb._6,_2020)].

[2] Unless otherwise indicated, case quotations omit quotation marks, alterations, footnotes, and citations.

[3] The statute addresses four "nested" renewable-fuels categories: total renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel. EPA prescribes percentage standards for each category. *AFPM*, 937 F.3d at 569.

Obligated parties apply the resulting percentage to the gasoline and diesel they produce or import to determine their annual RFS obligations. 40 C.F.R. §80.1407. Thus, if the renewable-fuel percentage standard for a given year is 10%, and a refiner produces 100 gallons of gasoline, the refiner will be obligated for 10 gallons of renewable fuel. Obligated parties demonstrate compliance by retiring credits known as RINs, which they obtain by blending renewable fuels or purchase from third parties (*e.g.*, unobligated blenders or other RIN-market participants). *AFPM*, 937 F.3d at 571-72.

I. Statutory provisions governing percentage standards

The statute requires EPA's annual determination of the percentage standards be based on Energy Information Administration estimates and meet three "required elements":

(I) "be applicable to refineries, blenders, and importers, as appropriate";

(II) "be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce"; and

(III) "consist of a single applicable percentage that applies to all categories of [obligated parties]."

§7545(*o*)(3)(B)(ii). In calculating the percentage standards, EPA must also "make adjustments" "to prevent the imposition of redundant obligations on any [obligated

party]" and "to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9)." §7545(*o*)(3)(C).

The latter adjustment refers to a provision that exempted all small refineries[4] from RFS-program compliance obligations "until … 2011," §7545(*o*)(9)(A), and permits small refineries to petition "at any time" for "an extension of the exemption under subparagraph (A)" based on "disproportionate economic hardship." §7545(*o*)(9). EPA has consistently understood the adjustment described in §7545(*o*)(3)(C) to be a *downward* one—*i.e.*, accounting for renewable fuel used by exempt small refineries "reduce[s] the total volume of renewable fuel use required of others," thereby "reduc[ing] the percentage standards." JA__[75_Fed._Reg._14670,_14716-17_(Mar._26,_2010)].

II. The 2020 Rule's revised formula for determining percentage standards

Since the RFS program's inception in 2007, EPA has employed the following formula to calculate each year's percentage standards:

$$Std_{RF,i} = 100 \times \frac{RFV_{RF,i}}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

The numerator represents the annual renewable-fuel-volume target (*i.e.*, the statutory targets adjusted for any waivers), and the denominator is based on an estimate of

[4] *See* §7545(*o*)(1)(K) (defining "small refinery").

total *non*renewable-fuel use, with certain exclusions. JA__[85_Fed._Reg._7049]. Until issuance of the 2020 Rule, EPA employed the symbols GE_i and DE_i to represent "the amount of gasoline and diesel projected to be produced by small refineries that have *already been granted exemptions* … prior to [EPA's] issuing the final rule for the relevant compliance year." JA__[*Id.*_7050] (emphasis added). Subtracting these amounts from the denominator increases the resulting percentage standard, and thus the compliance burden on nonexempt obligated parties. JA__[75_Fed._Reg._76790,_76805_(Dec._9,_2010)] (reducing denominator by GE_i and DE_i "result[s] in a proportionally higher percentage standard for remaining obligated parties" and "affect[s]" their ability to "acquire sufficient RINs for compliance").

Before the 2020 Rule, however, EPA's formula never incorporated exclusions based on small-refinery exemptions that *might* be granted *after* EPA issues the final rule for a given year. *See* JA__[75_Fed._Reg._76804-05]; JA__[85_Fed._Reg._7050]; JA__[84_Fed._Reg._36762,_36797_(July_29,_2019)]. In January 2019, EPA told this Court that doing so would be "nigh impossible," requiring EPA to "pile prejudgment [on] speculation on the one hand and amount to a re-write of [§7545(*o*)] on the other." JA__[EPA_*AFPM*_Br._74-75]. Guessing wrong, EPA cautioned, could result in percentage standards that are "unachievable for obligated parties." JA__[*Id.*_75].

EPA's 2020 Proposed Rule, published in July 2019, reflected this longstanding position. EPA explained that "no [small-refinery] exemptions ha[d] been approved for 2020" and EPA was "therefore … calculat[ing] the percentage standards for 2020 without any adjustment for exempted volumes." JA__[84_Fed._Reg._36797_&_n.165]. The Proposed Rule thus "maintain[ed]" EPA's "approach that any exemptions … granted after the final rule is released will not be reflected in the percentage standards." JA__[*Id.*]. EPA expressly declined to reopen any aspect of the percentage-standards formula or its treatment of small-refinery exemptions. JA__[*Id.*].

EPA reversed course in a Supplemental Proposal published in October 2019. JA__[84_Fed._Reg._57677_(Oct._28,_2019)]. The Supplemental Proposal embraced a new formula that subtracts from the denominator not only fuel produced by small refineries that have *already* been granted exemptions for the relevant year, but also a projected amount of fuel production related to small-refinery exemptions that *might* be granted in the *future*. This new formula "amend[s] the definitions of" GE_i and DE_i to incorporate "the *projected* volumes of exempt gasoline and diesel in the compliance year," regardless whether exemption petitions have been filed or adjudicated when the final rule is issued. JA__[*Id.*_57679] (emphasis added). This change increased the burden on nonexempt obligated parties by "approximately 770 million" gallons of renewable fuel in 2020 alone. JA__[*Id.*_57682].

EPA adopted the 2020 Supplemental Proposal's new formula in the final Rule. JA__[85_Fed._Reg._7050]. Thus, for the first time in the RFS program's history, the Rule (1) estimates gasoline and diesel volumes "projected to be exempt" from RFS obligations in the year ahead, JA__[*Id.*_7074], and (2) "redistribute[s]"—*i.e.*, reallocates—the renewable-fuel obligations associated with those volumes to other, nonexempt parties, JA__[*Id.*_7050].

III. EPA's new projection methodology to reallocate renewable-fuel obligations

When it published the Rule in February 2020, EPA had not adjudicated any small-refinery exemptions for 2019 *or* 2020 and therefore did not know the number of small-refinery exemptions that would be granted or the volume of fuel that would be exempted for either year. JA__[*Id.*_7052_n.180]. The Rule thus relies on a "projection methodology" to determine hypothetically exempt small-refinery production in 2020. This projected figure is subtracted from the nonrenewable fuel factor in the percentage-standards formula's denominator. This step increases the percentage standards for nonexempt obligated parties.

EPA's methodology for projecting future exempt volumes is not based on a projection of the number of small-refinery exemptions that will be granted for 2020 or the small-refinery volumes EPA actually exempted before 2020. Instead, the Rule's projection relies on an annual *average* of volumes that hypothetically *would have been exempted previously* in three *particular* compliance years (2016-2018), *if*

EPA had followed recommendations from the Department of Energy in those years (instead of rejecting them as contravening the "best interpretation" of the statute).[5] JA__-__[*Id.*_7051-52]. EPA did not incorporate into its projection other factors that could affect the need for small-refinery exemptions in 2020, such as the overall supply and demand for fuel, broader national or state economic conditions, or information bearing specifically on the operation of small refineries.

EPA also announced in the Rule that, going forward, its "general approach" for small-refinery exemptions will be to follow the Department of Energy's recommendations "where appropriate." JA__[*Id.*_7051]. The Rule notes, however, that those recommendations are merely one factor EPA may consider; EPA has discretion to depart from the Department's recommendations; and "final decisions on 2020 [exemptions] must await EPA's receipt and adjudication of those petitions." JA__[*Id.*]. In the past, for example, when the Department recommended partial exemptions, EPA granted full ones, reasoning that doing so was the "best interpretation" of the statute. JA__-__[*Id.*_7051-52]. It is therefore unclear whether EPA will actually grant partial exemptions in the future and, if so, whether EPA has authority to do so under the statute. The Rule also acknowledges that "[o]ther factors,

[5] In evaluating petitions for small-refinery exemptions, the statute directs EPA to consult with the Secretary of Energy and consider the findings of a 2011 Department of Energy study as well as "other economic factors." §7545(*o*)(9)(B)(ii).

such as judicial resolution of pending decisions … could potentially affect EPA's [exemption] policy going forward." JA__[*Id.*_7051_n.168]. EPA declared that the manner in which it decides small-refinery-exemption petitions is beyond the scope of this rulemaking. JA__[RTC_182-84_(EPA-HQ-OAR-2019-0136-2157)].

The Rule's revisions to the percentage-standards formula and articulation of a new approach for considering small-refinery exemptions will "increase the percentage standards that apply to nonexempt parties to offset future small refinery exemptions." JA__[84_Fed._Reg._57677]. EPA concedes, however, that if fewer exemptions are granted than projected, the renewable-fuel burdens imposed on nonexempt obligated parties will exceed the Rule's mandates. JA__[85_Fed._Reg._7051].

SUMMARY OF ARGUMENT

EPA lacks authority to increase obligated parties' compliance burdens to account for hypothetical future small-refinery exemptions. Congress directly addressed the impact of small-refinery exemptions by requiring EPA to *reduce* the annual percentage standards based on use of renewable fuel by exempt small refineries during the previous year. Congress also directed EPA to *reduce* annual percentage standards to avoid imposing redundant obligations on obligated parties. The absence of any parallel language authorizing *increases* due to *future* small-refinery exemptions demonstrates that EPA may not take that step. EPA itself

adhered to this view for the first decade of the RFS program's operation, explaining that reallocation to reflect possible future exemptions "would be inconsistent with the statutory text." JA__-__[75_Fed._Reg._76804-05]. The Rule erroneously abandons that longstanding interpretation, purportedly based on EPA's duty to "ensure" that the statutory volume targets are met, but this Court rejected a similarly expansive interpretation of the "ensure" provision in *Americans for Clean Energy v. EPA*, 864 F.3d 691, 714 (D.C. Cir. 2017) ("*ACE*").

EPA's percentage-standards formula, projection method, and resulting percentage standards are arbitrary and capricious. EPA failed to adequately justify its 180-degree reversal regarding reallocation based on hypothetical future small-refinery exemptions. In addition, the projection method critical to the Rule's new percentage-standards formula is irrational, unreliably speculative, and unreasonable in its fundamental assumptions. EPA's projection methodology also entirely ignores EPA's twin statutory duties to account for the use of renewable fuel by exempt small refineries in the prior compliance year and to prevent the imposition of redundant obligations on obligated parties.

EPA's reallocation of renewable-fuel obligations rests on an impermissible exemption policy.[6] The Rule's amendments to the percentage-standards formula are

[6] Only American Petroleum Institute presents this argument. The Small Refineries Coalition and American Fuel & Petrochemical Manufacturers do not join this

ultra vires because they rely on an unlawfully permissive small-refinery-exemption policy. Although the Rule projects that EPA will grant a significant number of exemptions and reallocates massive burdens to nonexempt parties on that basis, the statute makes clear that EPA's exemption authority is narrow and that only a small (and declining) handful of refineries remains eligible for exemptions.

EPA acted unreasonably by refusing to consider two alternatives to the Rule's reallocation policy.[7] These alternatives, unlike the new percentage-standards formula, are within EPA's statutory authority and would address the purported concern EPA claimed it was trying to solve. First, EPA was required to consider adjusting the point of obligation. Aligning the point of obligation with the means of compliance by obligating blenders would largely eliminate the need for small-refinery exemptions and any corresponding reallocation, while facilitating increased renewable-fuel use. Refusing to even consider this option was an abuse of discretion. Likewise, EPA arbitrarily failed to reconsider its policy of not counting toward annual volume targets millions of gallons of renewable fuel that are produced in the United States, then exported and used abroad. Removing compliance penalties

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argument and note that the Supreme Court has granted certiorari in *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1258 (10th Cir. 2020). *See HollyFrontier Cheyenne Refin., LLC, v. Renewable Fuels Ass'n*, No. 20-472, 2021 WL 77244 (U.S. Jan. 8, 2021).

[7] American Fuel & Petrochemical Manufacturers and Valero present this argument, joined by the Small Refineries Coalition.

associated with fuel exports would more accurately reflect domestic renewable fuel production and further undermine the purported need for projection and reallocation.

STANDARDS OF REVIEW

Courts must set aside EPA action that is "in excess of statutory jurisdiction, authority or limitations, or short of statutory right," or that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." §7607(d)(9)(A), (C). These rules apply where EPA's statutory interpretations are unreasonable, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) ("*UARG*"), and where EPA fails to provide a reasoned justification for its action, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

STANDING

Petitioners and their members[8] are directly regulated under the 2020 Rule and therefore have Article III standing. *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014). Petitioners likewise fall within the statute's zone of interests. *Nat'l Petrochem. & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147-48 (D.C. Cir. 2002).

[8]American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and the Small Refineries Coalition have associational standing to challenge the Rule, which imposes compliance obligations on their members. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

ARGUMENT

I. EPA lacks authority to reallocate renewable-fuel obligations based on projected small-refinery exemptions.

The Rule reallocates RFS compliance burdens by increasing obligations on nonexempt parties to account for projected future small-refinery exemptions. That approach contradicts the text and structure of §7545(*o*), as well as longstanding agency precedent. The Court therefore should vacate the Rule's unlawful reallocation scheme—the new formula and projection methodology, and the resulting percentage standards.

Section 7545(*o*) grants EPA only narrow and specific authority to adjust annual RFS requirements due to small-refinery exemptions, and those provisions do not authorize the Rule's reallocation approach. The only directly applicable provision states that EPA "shall make adjustments" in determining annual percentage standards "to account for the *use* of renewable fuel during the previous calendar year by small refineries that are exempt.…" §7545(*o*)(3)(C)(ii) (emphasis added). Thus, if an exempt refinery uses renewable fuel in year 1, EPA must downwardly adjust the percentage standards in year 2 to account for the entry of that biofuel into the fuel supply. *See* JA__[75_Fed._Reg._14717] (EPA must "reduce the percentage standards" in this scenario). Congress also directed EPA to adjust percentage standards "to prevent the imposition of redundant obligations on any [obligated party]." §7545(*o*)(3)(B)(ii)(III), (C)(i). The statute accordingly (1) looks

solely to the *use* of "renewable" fuel by exempt refineries, (2) does so only on a *retrospective* basis, (3) and mandates a *reduction* of nonexempt parties' obligations.

The 2020 Rule contravenes these limitations. In contrast to §7545(*o*)(3)(C)(ii), the Rule adopts a *prospective projection* of *nonrenewable fuel production* by hypothetically exempt small refineries. The absence of language permitting EPA to adjust requirements to account for future exemptions, paired with the presence of explicit language speaking directly to exemptions, precludes this approach. "The fact that Congress knew how to" address the interaction of small-refinery exemptions and annual RFS mandates "when it wanted to," but did not authorize increasing obligations to account for uncertain, future exemptions, confirms that the Rule's amendments to the percentage-standards formula are *ultra vires*. *ACE*, 864 F.3d at 733 (applying interpretive principle to cellulosic waiver authority); *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001) (where statute "expressly grant[s]" authorization "to consider" a particular factor, courts have "refused to find" authorization to consider that factor "implicit" in other provisions).[9] EPA therefore cannot graft additional provisions onto the statute's

[9] Surrounding statutory provisions reinforce this conclusion. Congress understood that small-refinery exemptions may affect the broader RFS program and provided explicit directions governing that relationship. For example, an exempt refinery is permitted to waive the exemption and generate RINs, but becomes subject to annual percentage standards. §§7545(*o*)(5)(A)(iii), (*o*)(9)(D).

carefully crafted framework. *See UARG*, 573 U.S. at 328 (EPA "may not rewrite clear statutory terms to suit its own sense of how the statute should operate").

Other provisions expressly address projected fuel volumes, but none authorizes the Rule's reallocation framework. For example, the Energy Information Administration must estimate nonrenewable fuel volume "projected to be sold or introduced into commerce" the following year, and EPA must issue annual percentage standards "based on" that estimate. §7545(*o*)(3)(A)-(B)(i). Additionally, based on Energy Information Administration estimates of cellulosic biofuel levels, EPA must "reduce the [targeted] volume of cellulosic biofuel" to "the projected" production level if the latter "is less than" the former—thus ensuring that obligated parties are not saddled with impossible-to-meet obligations. §7545(*o*)(7)(D)(i). The absence of similar language regarding projections related to future small-refinery exemptions signals that EPA lacks authority to reallocate volume obligations on that speculative basis. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act ... unless and until Congress confers power upon it").

Further, the statutory mandate to avoid redundant obligations demonstrates that Congress did not leave EPA the interpretive authority it asserts here. Congress directed EPA, "[i]n determining the applicable percentage for a calendar year," to "make adjustments … to prevent the imposition of redundant obligations on any"

obligated party. §7545(*o*)(3)(C)(i). Reallocating obligations from exempt to nonexempt obligated parties based on EPA's new percentage-standards formula contravenes that mandate. When EPA's projection of exempted volumes is too high, the resulting percentage standards exceed that necessary to attain the renewable-fuel targets adopted in EPA's final rule. In that circumstance, non-exempt obligated parties must bear not only an obligation exceeding what they would have absent EPA's mistaken projection, but also an obligation that is *being satisfied twice*, *i.e.*, redundantly. Obligations resulting from the higher-than-necessary percentage standard are imposed *both* on obligated parties never eligible for a small-refinery exemption *and* on small refineries whose volumes were projected to be exempted, but which did not in fact receive exemptions.

EPA seeks to overcome these hurdles by relying on language directing EPA to "ensure" that statutory renewable-fuel volume targets are met. JA__[85_Fed._Reg._7050] (citing §7545(*o*)(3)(B)(i)). But that provision does not grant EPA *carte blanche* to impose increased obligations. As this Court explained in *ACE*, Congress "did not pursue its purposes of increased renewable fuel generation at all costs," but to the contrary, "included waiver provisions that allow EPA to lessen the Renewable Fuel Program's requirements in specified circumstances…." 864 F.3d at 714. Small-refinery exemptions are another example of this statutory balance. So is the requirement to prevent imposing redundant

obligations. §7545(*o*)(3)(C)(i). Further, although EPA must "use the [statutory] volumes to set the percentage standards," "there are no provisions for ensuring that the percentage standards actually result in the specified volumes actually being consumed." JA__[77_Fed._Reg._1320,_1340_(Jan._9,_2012)]. EPA agrees that Congress allowed for "imprecision … in the actual volumes of renewable fuel that are consumed." JA __[85_Fed._Reg._7051]. The possibility that the statutory volume targets will not be met in practice is inherent in the structure of §7545(*o*).[10]

EPA has long embraced Petitioners' reading of the statute. Since 2010, EPA has taken the position that "[p]eriodic revisions to the [percentage] standards to reflect [exemptions] issued to small refineries or refiners would be inconsistent with the statutory text." JA__-__[75_Fed._Reg._76804-05].[11] As recently as 2019, EPA acknowledged that its longstanding interpretation may be "required by the statute." JA__[EPA_*AFPM*_Br._73]. Even if the statute were ambiguous, EPA's new interpretation, which "conflicts with the agency's earlier interpretation" would be

[10] Many factors can contribute to actual renewable-fuel usage. For example, if the total transportation fuel sold in a year is meaningfully lower than EPA's estimate for that year, applying the percentage standards will yield a lower-than-targeted renewable-fuel volume.

[11] EPA repeatedly reaffirmed this understanding. *E.g.*, JA__[76_Fed._Reg._38884,_38859_(July_1,_2011)]; JA__[77_Fed._Reg._1320,_1340_(Jan._9,_2012)]; JA__[78_Fed._Reg._9282,_9303_(Feb._7,_2013)]; JA__[78_Fed._Reg._49794,_49826_(Aug._15,_2013)].

"entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987).

Nor is the Rule's reallocation of renewable-fuel obligations justified by EPA's occasional practice of adjusting annual percentage standards to account for small-refinery exemptions granted *before* a final rule is issued. JA__[85_Fed._Reg._7049]. Regardless whether that practice is lawful, accounting for volumes *already exempted* is quite different from reallocating based on a *projection of future* exempted volumes, which may or may not actually be exempted—an approach EPA has repeatedly acknowledged involves "inherent difficulties." JA__[*Id.*_7051].

II. The Rule's formula, speculative projection methodology, and resulting percentage standards are arbitrary and capricious.

Although agencies may change existing policies, they must provide a "reasoned explanation for the change," including by "show[ing] that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016). If the "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must provide "a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

The Rule's new percentage-standards formula is unreasoned and unreasonable because the record does not support EPA's stated rationale for departing from its longstanding view that reallocation of future exempt volumes is

contrary to the statute and presents intractable implementation challenges. Additionally, the Rule's methodology is arbitrary and capricious because EPA has no reasonable expectation of accuracy in its projection of potentially exempt volumes. EPA until recently maintained that accurate prediction of future exemptions is "nigh impossible," and the Rule fails to provide a sufficient explanation for why that is no longer true. Lastly, contrary to EPA's stated rationale for its abrupt change, previous small-refinery exemptions have *not* significantly affected market demand for renewable fuel, a point EPA has emphasized in Congressional testimony.

A. EPA did not adequately justify the Rule's methodology changes.

Most fundamentally, EPA has not provided an adequate explanation for abandoning its longstanding position that the statute precludes reallocation based on hypothetical future exemptions. EPA adopted that position in 2010, consistently adhered to it thereafter,[12] and informed this Court in 2019 that "the year-to-year variance in the number of [small-refinery exemptions] sought and granted *confirms that EPA cannot accurately predict future exemptions*." JA_[EPA_*AFPM*_Br._74_n.34] (emphasis added). In prior rulemakings, including the 2019 Rule, EPA addressed and rejected requests that EPA increase annual percentage standards to account for potential future exemptions.

[12] *See* pp. 5-6, *supra*.

JA__[83_Fed._Reg._63704,_63740_(Dec._11,_2018)]; JA__-__[2019_RTC_183-85]. Accordingly, the 2020 Proposed Rule computed the percentage standards without adjusting for post-final-rule exemptions. JA__[84_Fed._Reg._36797].

Months after declaring accurate projections impossible, EPA reversed course, citing a purported need to "ensure" that renewable-fuel volume targets are met, comments from renewable-fuel producers, and an increased number of small-refinery exemptions granted for 2018. JA__[85_Fed._Reg._7050]. None of the factors EPA may consider in setting the annual obligations materially changed in the months between EPA's July 2019 Proposed Rule and its Supplemental Proposal, and commenters pointed to a litany of undue and extra-statutory political interference as motivating the abrupt change of course. [Small_Refineries_Coalition_Supp._Comments_4_(EPA-HQ-OAR-2019-0136-0733)]; JA_[AFPM_Supp._Comments_12,_nn.41-43_(EPA-HQ-OAR-2019-0136-0735)]. EPA could say only that absent the newly formulated "redistribution" approach, small-refinery exemptions would "*potentially* impact[ ] renewable fuel use in the U.S." JA__[85_Fed._Reg._7050] (emphasis added). EPA's proposed change would produce the desired effect, moreover, only if "EPA's projection … is accurate." JA_[*Id.*].

The record demonstrates, however, that EPA's projection is almost certainly inaccurate. EPA, expressly acknowledging "inherent uncertainty in projecting the exempted volume," JA__[*Id.*_7051], failed to adequately explain otherwise. *Nat'l*

Ass'n of Clean Water Agencies v. EPA, 734 F.3d 1115, 1140-45 (D.C. Cir. 2013). The Court cannot "rubber-stamp EPA's invocation of statistics without some explanation of the underlying principles or reasons why its formulas would produce an accurate result," particularly when the formula cherry-picks a data set and rests on unsubstantiated speculation. *Id.*

First, significant fluctuation in EPA's exemption policies makes the Rule's 2020 projection unreliable. As EPA conceded, "in prior years, EPA has taken different approaches in evaluating small refinery petitions … because there are many factors that affect the number of [exemptions] that are granted in a given year and the aggregate exempted volume." JA__[85_Fed._Reg._7052]. As the table below reflects as of November 21, 2019, the number of petitions received and granted has fluctuated significantly over time.[13]

Compliance Year	Petitions Received	Grants Issued	Denials Issues	Ineligible Petitions	Petitions Withdrawn	Pending Petitions
2013	16	8	7	0	1	0
2014	13	8	5	0	0	0
2015	14	7	6	1	0	0
2016	20	19	1	0	0	0
2017	37	35	1	0	1	0
2018	42	31	6	2	3	0
2019	10	0	0	0	0	0

[13] For current data, see EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions.

JA__[EPA_SRE_Dashboard_Nov._2019_(EPA-HQ-OAR-2019-0136-2124)]; *see also* JA__[85_Fed._Reg._7052] (showing that "the volume of gasoline and diesel" exempted would have "varied significantly in previous years" under EPA's new approach). The record does not meaningfully explain these fluctuations or provide adequate reason to believe that similar changes will not occur in 2020. "[T]he deference owed agencies' predictive judgments gives them no license to ignore the past when the past relates directly to the question at issue." *BellSouth Telecomm's, Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006).

Second, EPA reserves considerable discretion in the Rule for its evaluation of exemption requests for 2020, which further exacerbates this uncertainty.[14] The Rule indicates that EPA's new "general approach" will follow Department of Energy recommendations "where appropriate." JA_[85_Fed._Reg._7051]. But the Rule acknowledges that other factors may affect EPA's decisions and cautions that rulings on 2020 exemption requests "must await EPA's receipt and adjudication of those petitions." JA_[85_Fed._Reg._7051]. As EPA's Supplemental Proposal noted, there

[14] As of January 29, 2021, EPA has not issued any exemption decisions for 2020, underscoring continued uncertainty. To date, EPA has adjudicated only two of the 32 exemption petitions submitted for 2019. *See* JA__[85_Fed._Reg._7052_n.180]; JA__[https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions]. Biofuels advocates immediately challenged both exemptions and moved for an emergency stay of those orders. *See* Order, *Renewable Fuels Ass'n v. EPA*, No. 21-1032, Doc. #1880862 (D.C. Cir. Jan. 21, 2021) (granting administrative stay to facilitate consideration of emergency stay motion).

are various situations where "EPA may deviate from [the Department's] recommendations." JA_[84_Fed._Reg._57682_n.29].

Compounding this uncertainty, EPA has asserted discretion to apply differing methodologies to different small-refinery-exemption petitions. EPA has argued that "[a]n EPA decision to grant or deny a small refinery petition applies only to that small refinery. EPA may apply the same methodology underlying its decision to evaluate other small refinery petitions. But it is not required to." JA__[EPA_Br._25,_*Advanced_Biofuels_Ass'n_v._EPA*,_No._18-1115,_Doc._#1785554_(D.C._Cir._July_8,_2019)]; *see also Sinclair Wyo. Refin. Co. v. EPA*, 887 F.3d 986, 993 (10th Cir. 2017) (exemption decisions "hold no precedential value for third parties … [or] even for the *refiner*"). Indeed, the Fourth Circuit recently vacated an exemption decision in part because EPA evaluated similarly situated small refineries differently. *Ergon-W. Va., Inc. v. EPA*, 980 F.3d 403, 420-21 (4th Cir. 2020).

Third, EPA's projection arbitrarily fails to account for *any* information specific to 2020. EPA's methodology is backward-looking only, and it relies solely on data from three selected years—2016-2018—not the ten-year life of the RFS program. EPA did not determine that the chosen time period is representative of the past or the future, nor offer any other meaningful justification for that temporal limitation. Indeed, EPA's Supplemental Proposal solicited comment on the

alternative of using the 2015-2017 period, which would have materially reduced the projected exempt volume. JA_[84_Fed._Reg._57682]. Nonetheless, neither the Rule nor EPA's Response to Comments even mention this alternative, which alone renders EPA's action arbitrary. *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015) ("To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses" and "engage the arguments raised before it."). EPA unreasonably ignored all prior compliance periods and subsequent developments, and it did not explain why the three years selected are representative, particularly given the year-to-year fluctuations discussed above. JA__[AFPM_Supp._Comments_11] (questioning how conditions over a three-year period are relevant to conditions that could reasonably be predicted to exist in 2020).

Fourth, EPA admits that "judicial resolution of pending decisions … could potentially affect EPA's [exemption] policy going forward," but makes no attempt to account for these considerations in the Rule. JA__[85_Fed._Reg._7051_n.168]. Judicial decisions can significantly affect administration of small-refinery exemptions. In fact, just weeks before the Rule was published, the Tenth Circuit vacated three exemptions EPA granted for 2016 and 2017 and interpreted

§7545(*o*)(9) to limit EPA's authority to grant small-refinery exemptions. *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1258 (10th Cir. 2020) ("*RFA*").[15]

In addition, there are numerous other pending proceedings challenging grants or denials of past small-refinery petitions. A challenge to *all* of the exemptions EPA granted for 2018 is pending before this Court. *Renewable Fuels Ass'n v. EPA*, No. 19-1220 (D.C. Cir.). More than a dozen other lawsuits concerning small-refinery exemptions are pending here and in multiple other courts.[16] The Rule does not account for the uncertainty generated by *any* of this litigation.

This combination of historic fluctuations, policy shifts, legal challenges, and discrepancies renders the projection critical to EPA's 2020 percentage standards arbitrary and capricious. On this record, it is unreasonable to predicate the projection on a counter-factual assumption that EPA would have followed a specific and uniform approach in adjudicating past exemption petitions. It is likewise

[15] On January 8, 2021, the Supreme Court granted certiorari in *RFA* and is expected to issue a decision this term. *HollyFrontier*, No. 20-472, 2021 WL 77244.

[16] *See, e.g.*, *Kern Oil & Refin. Co. v. EPA*, No. 20-1456 (D.C. Cir.); *Wynnewood Refin. Co., LLC v. EPA*, No. 20-1099 (D.C. Cir.); *Kern Oil & Refin. Co. v. EPA*, No. 19-1216 (D.C. Cir.); *Sinclair Wyo. Refin. Co. v. EPA*, No. 19-1196 (D.C. Cir.); *Renewable Fuels Ass'n v. EPA*, No. 18-1154 (D.C. Cir.); *Suncor Energy v. EPA*, No. 19-9612 (10th Cir.); *Producers of Renewables United for Integrity Truth & Transparency v. EPA*, No. 19-9532 (10th Cir.); *United Refin. Co. v. EPA*, No. 1:20-cv-1956 (D.D.C.); *Renewable Fuels Ass'n v. EPA*, No. 1:18-cv-2031-JEB (D.D.C.).

impermissible to consider only a limited time period characterized by an all-time high number of exemptions.

EPA's Rule does not justify either of those choices or adequately consider their obvious deficiencies. Instead, EPA attempts to explain another aspect of its changed methodology: projecting an "aggregate exempted volume" rather than analyzing particular refineries or particular past exemption decisions. EPA says that by averaging, it avoided "wrestl[ing] with the difficulties of predicting precisely which refineries will apply or the economic circumstances of specific refineries in 2020." JA__[85_Fed._Reg._7051]. For several reasons, that explanation fails to salvage EPA's unreasonable approach.

Although averaging might help address variances within the cherry-picked data sets, it does nothing to address the inaccuracy that previously deterred EPA from attempting to project exempt volumes. EPA claims that its new approach "averages out the effects of unique events or market circumstances that occurred in individual past years that may or may not occur in 2020." JA__[85_Fed._Reg._7052]. But EPA does not identify what "unique events" occurred in the chosen years, explain why years preceding the chosen period are irrelevant, or analyze whether or how 2020 might differ. Similarly, while EPA generally asserts that averaging "accounts for … changes in EPA's policies," JA_[RTC_175], it offers no explanation for why using the three-year period where

EPA most liberally granted exemptions accurately anticipates its future approach to small-refinery exemptions or related litigation. This fundamental flaw was pointed out by commenters, JA_[API_Supp._Comments_16_(EPA-HQ-OAR-2019-0136-0721)], but went unaddressed. Elsewhere, EPA simply asserts that its averaging "accounts for the variability in number of petitions, volumes of gasoline and diesel, changing circumstances for small refineries, changes in EPA's policies, and other factors that change from year to year." JA__[RTC_175]. Yet the record is devoid of any analysis regarding what the "other factors" are, how these factors have changed year-on-year, or why the number of exemptions increased in the 2016-2018 period. Where an agency "finds it necessary to make predictions or extrapolations from the record, it must fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003).

EPA misleadingly claims that its projection "takes a middle ground" between prior approaches to adjudicating exemptions by assuming that in 2020 EPA will follow Department of Energy recommendations. JA__, __[85_Fed._Reg._7051_n.171,_7052_n.178]. This "middle ground" concerns only one potential aspect of EPA's approach—whether to grant partial exemptions—not the various reasons for fluctuation in the number and extent of past exemptions. EPA does not explain why the Rule's approach *excludes* consideration of exemption levels for 2013, 2014,

2015—the years preceding a material increase in the number of exemption applications received and granted. Had EPA included those years, the "average" and the reallocated percentage standards would have been significantly lowered. Although EPA might have said "*that* it believed the … [limited] data gave an accurate picture" of possible exempted fuel volume in 2020, "it never adequately said *why* it believed this." *Sierra Club v. EPA*, 167 F.3d 658, 663 (D.C. Cir. 1999).

Lastly, EPA failed to reasonably explain why the same information gaps that compelled its prior conclusion—that any projections would be plagued with inaccuracy—are not likewise fatal to its new one. The uncertainties that make projecting individual exemptions speculative are also inherent in projecting *aggregate* exemptions. JA__[85_Fed._Reg._7051]; JA__[EPA_Br._63-64,_*Growth_Energy_v._EPA*,_No._19-1023_(D.C._Cir._Mar._25,_2020),_Doc._#1831996] ("The number of exemptions that may be granted after the final rule will vary from year to year, and is affected by matters outside EPA's control. These include which small refineries apply for relief and when they do so."). Just as when EPA determined in the 2019 Rule that a projection was impossible, JA__[83_Fed._Reg._63740]; JA__-__[2019_RTC_183-85], in the 2020 Rule EPA had no record of refinery financial conditions to support its assumptions, had a history of frequently changing methods for evaluating any petitions it might receive, and was subject to intervening judicial decisions affecting its ability to grant

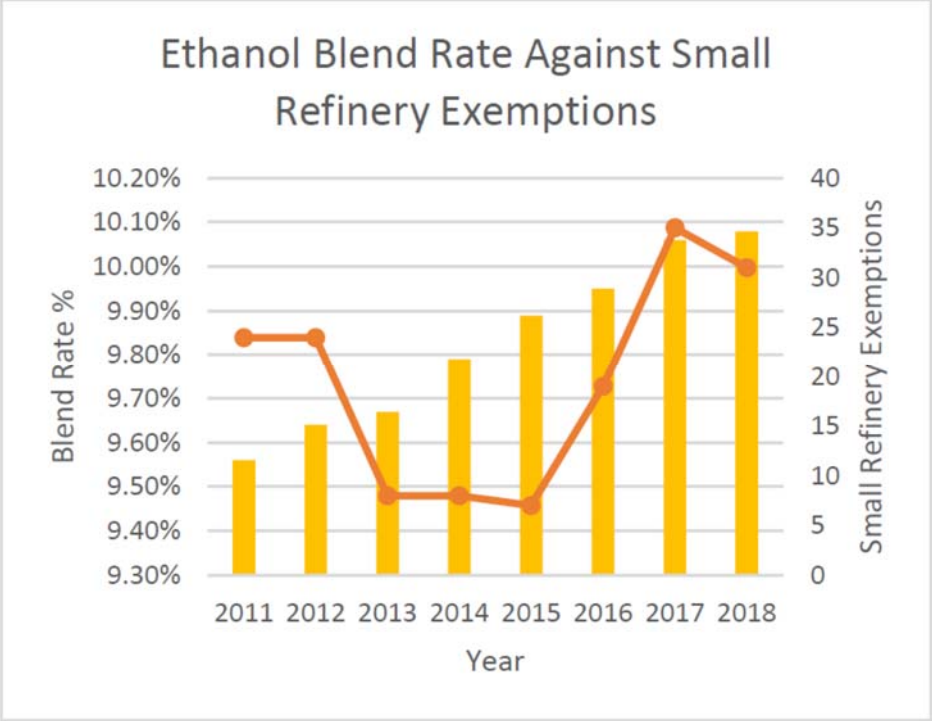
exemptions. *See, e.g.*, JA__, __-_[AFPM_Supp._Comments_6,_9-10]; JA__[Small_Refineries_Coalition_Supp._Comments_5]; JA__-__[AFPM_Reconsideration_Petition_1-6]; JA__-_, __-_, __-_[API_Supp._Comments_3-4,_12-18,_21-22]; JA__-__, __-_[API_Reconsideration_Petition_2-3,_9-10_(EPA-HQ-OAR-2019-0136-2170)]; JA__-__[Monroe_Energy_Supp._Comments_11-12_(EPA-HQ-OAR-2019-0136-1284)].

B. EPA's reallocation methodology is unnecessary to achieve its stated goals.

EPA's new methodology is also arbitrary and capricious because EPA has failed to "show that there are good reasons for [it]." *Encino Motorcars*, 136 S.Ct. at 2126.

Although EPA says it must account for hypothetical future small-refinery exemptions to "ensure" that renewable fuel volume targets are met, JA__[85_Fed._Reg._7050], EPA has maintained that such exemptions have not affected overall renewable-fuel volumes or demand. In late 2019, EPA's then-current Acting Administrator testified to Congress that "[e]thanol demand has not been impacted by the small refinery program. … And we do not see any demand disruption from the small refinery program on ethanol production." JA__n.2[Valero_Supp._Comments_5_n.2_(EPA-HQ-OAR-2019-0136-1487)]. The then-current Secretary of Agriculture agreed: "[m]ost of the macroeconomic issues we have had with ethanol [in 2019] have been because of lower exports"—not small-

refinery exemptions. JA__, __[AFPM_Supp._Comments_5]; JA__-__[*Id.*_App.'x_A_15-17]. As shown in the chart below, there is no correlation—much less causation—between the number of small-refinery exemptions (which has varied, as shown by the dotted line) and ethanol production and blending (which has increased steadily, as shown by the bars).[17]



JA__[Small_Refineries_Coalition_Supp._Comments_6].

Indeed, EPA defended its *rejection of* redistribution of exempt volumes in the 2019 Rule on the ground that cellulosic-biofuel, advanced-biodiesel, and renewable-

[17] In contrast, market forces and mandates outside the RFS program factor heavily in determining renewable-fuel use. For example, virtually all gasoline blendstock is blended with 10 percent ethanol to meet octane specifications for sale to the public. JA__[AFPM_Supp._Comments_5]; *see also* JA__[83_Fed._Reg._63731].

diesel production all had continued to rise, regardless of EPA's exemption decisions. JA__[EPA_*Growth_Energy*_Br._63-68]. After reviewing various program indicators, EPA said renewable-fuel petitioners were "wrong that EPA's approach [prior to 2020] has undermined the RFS program." JA__[*Id.*].

By ignoring this information and failing to resolve its own inconsistency, EPA acted arbitrarily and "failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Before adopting the proposed changes to the percentage-standards formula, EPA did not consider evidence supporting its own prior determinations that small-refinery exemptions did not affect actual renewable-fuel use. For example, during 2016-2018, RIN retirements—*i.e.*, demonstration of compliance with the RFS program's requirements—nearly equaled the volume requirements for those years, despite the increasing number of small-refinery exemptions granted. JA__-__[HollyFrontier_Supp._Comments_3-6_(EPA-HQ-OAR-2019-0471)]. In contrast, EPA merely asserted that exemptions would "*potentially*" affect renewable-fuel use if not reallocated. JA__,__[85_Fed._Reg._7050,_7051] (emphases added). The Rule is devoid of evidence that increasing percentage standards is needed to ensure the requirements of the statute are met.

EPA also acted arbitrarily by failing to address the statutory mandate to "make adjustments . . . to account for the use of renewable fuel during the previous calendar

year by small refineries that are exempt under [§7545(*o*)(9)].” §7545(*o*)(3)(C)(ii). Nor did EPA adjust its percentage-standards formula to prevent the imposition of redundant obligations, as the statute directs. §7545(*o*)(3)(C)(i); *cf.* JA_, _[RTC_168_181-92] (acknowledging these requirements while sidestepping an explanation of why they were not considered). If EPA decided that it could project the amount of fuel to be exempted in 2020, it was also incumbent on EPA to project renewable-fuel use by exempt small refineries in 2019 to comply with those statutory mandates. JA__[AFPM_Supp._Comments_8-9].

EPA also failed to adequately consider and justify the relationship between its changed approach and preservation of a critical supply of “banked” RINs. Throughout the life of the RFS program, EPA has identified a healthy RIN bank as an “important and necessary programmatic and cost spike buffer that will both facilitate individual compliance and provide for smooth overall functioning of the program.” JA__[85_Fed._Reg._7022]; JA__[HollyFrontier_Supp._Comments_6]; JA__[AFPM_Supp._Comments_3]; JA__[Valero_Supp._Comments_3]; JA_, _[API_Supp._Comments_4,_6]. The RIN bank’s “extremely important” role has historically led EPA to set renewable-fuel requirements at levels attainable through blending, without resort to banked RINs from prior years. JA__[85_Fed._Reg._7021]; JA__[EPA_*Growth_Energy*_Br._67]. EPA repeated that position in the Rule. JA__[85_Fed._Reg._7022] (“We do not believe we should

intentionally draw down the carryover RIN bank in setting the 2020 volumes."). The changed policy, however, inevitably will result in reducing the RIN bank. Before the change, EPA preserved the bank by determining the maximum volume of renewable-fuel blending that could be attained in the overall transportation-fuel market, then translating that volume into percentage standards applicable to *each* obligated party according to its production. The Rule's new percentage formula effectively forces *a subset* of those obligated parties to bear disproportionate burdens to satisfy targets calculated for the industry *as a whole*.

III. EPA's reallocation formula relies on unlawful small-refinery-exemption policies.[18]

The Rule increases the compliance obligations of nonexempt parties by 770 million gallons based on an unlawfully permissive policy for granting future small-refinery exemptions. Because the policy assumptions underlying the Rule's reallocation approach contravene the text and structure of §7545(*o*), the Rule's changed percentage formula, projection methodology, and resulting percentage standards must be vacated.

A. First, contrary to the Rule's assumptions, §7545(*o*) contemplates a process through which declining numbers of small refineries will receive

[18] Only American Petroleum Institute presents this argument. The Small Refineries Coalition and American Fuel & Petrochemical Manufacturers do not join this section or arguments made therein. *See supra* n.6.

continuous, time-limited exemptions. All small refineries were exempted from the RFS program's requirements until 2011. §7545(*o*)(9)(A)(i). Recognizing that some small refineries might need additional time to comply, Congress authorized EPA to "extend" that initial exemption for "a period of not less than 2 additional years" for small refineries that faced disproportionate hardship. §7545(*o*)(9)(A)(ii)(II). Thereafter, small refineries could petition EPA "for an extension of the exemption" based on disproportionate economic hardship. §7545(*o*)(9)(B)(i). By repeatedly referring to "*the* exemption," the statute establishes a single, continuous exemption, which can be extended in limited circumstances and eventually ends. Accordingly, once a small refinery's exemption lapses, the refinery is no longer eligible for an extension under §7545(*o*)(9)(B)(i).

The Rule's approach is inconsistent with that statutory scheme. In contrast to §7545(*o*), the Rule projects future small-refinery exemptions based on a policy that would allow small refineries to receive exemptions in years *after* their original exemption lapses. *See RFA*, 948 F.3d at 1244-49; JA__-__[85_Fed._Reg._7052-53]. That approach conflicts with the ordinary meaning of the terms "extend" and "extension," both of which presuppose an existing exemption, JA__[API_Supp._Comments_25-26], and likewise contravenes the structure and purpose of §7545(*o*), "which contemplate a '*temporary* exemption' for small refineries with an eye toward eventual compliances with the renewables fuel

program for all refineries," *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 578 (D.C. Cir. 2015). Under this (correct) interpretation of the statute, at most seven small refineries—the number of exemptions granted in 2015—were eligible for exemptions in 2020. *See RFA*, 948 F.3d at 1225. In contrast, between 2016 and 2018, the period on which EPA based the Rule's projection of 2020 exempted volumes, EPA granted an average of 28 small-refinery exemptions annually. *See id.*; JA__[85_Fed._Reg._7052].

The Tenth Circuit recently rejected EPA's reasoning on grounds equally applicable here, and held that small refineries must obtain an exemption each year to remain eligible for an extension in subsequent years. *RFA*, 948 F.3d at 1242-49; *see also* JA__[API_Supp._Comments_4], JA__-__[API_Supp._Comments_App'x._24-28] (American Petroleum Institute rulemaking comments making same argument). Specifically, the court concluded that "ordinary definitions of 'extension,' along with common sense, dictate that the subject of an extension must be in existence before it can be extended." *RFA*, 948 F.3d at 1245. A "small refinery which did not seek or receive an exemption in prior years is ineligible for an extension, because at that point there is nothing to prolong, enlarge, or add to." *Id.* Based on this reasoning, the Tenth Circuit vacated EPA orders granting 2016 and 2017 exemptions to three small refineries whose original exemptions lapsed in 2012.

Id. at 1227-29, 1249. The Rule relies on these now-vacated exemptions in projecting 2020 exempt volumes. JA__[85_Fed._Reg._7052].

EPA has denied requests to retroactively grant exemptions to small refineries to fill gaps going back to the original 2010 exemption.[19] In doing so, EPA acknowledged the holding of *RFA* and that there are "open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since passed." *Id*. The exemption policy animating the Rule thus no longer exists, the 2020 small-refinery exemptions projected by the Rule will not materialize, and the Rule's reallocation of 770 million gallons of compliance obligations will far exceed the volume actually exempted in 2020. In short, the Tenth Circuit's decision invalidates critical assumptions underlying EPA's reallocation approach.[20]

B. Second, EPA's projection methodology assumes an unreasonable interpretation of the "disproportionate economic hardship" requirement in

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[19] EPA, *Denial of Petitions for Small Refinery Exemptions from the Renewable Fuel Standard* 4-5 (Sept. 14, 2020), https://www.epa.gov/sites/production/files/2020-09/documents/rfs-denial-small-refinery-gap-filling-petitions-2020-09-14.pdf.

[20] *RFA* issued after EPA adopted the Rule, but before it was published. American Petroleum Institute made nearly identical arguments in its rulemaking comments, *see* JA__[API_Supp._Comments_26], and likewise timely petitioned EPA for mandatory reconsideration of the Rule in light of *RFA*. *See* JA__-__[API_Reconsideration_Petition]; JA__-__[AFPM_Reconsideration_Petition].

§7545(*o*)(9)(B).[21] The Rule assumes that small refineries qualify for exemptions based on hardships caused by factors *other than* the RFS program. *See RFA*, 948 F.3d at 1227-30, 1244-49, 1253-54; JA__[85_Fed._Reg._7052-53] (basing Rule's analysis on 2016-2018 exemption decisions). That approach exceeds "the scope of the EPA's statutory authority" because §7545(*o*) makes clear that exemptions may be granted only based on hardships caused by the RFS program itself. *RFA*, 948 F.3d at 1254; *see* JA__[API_Supp._Comments_31-32].

Similarly, EPA's implicit finding of widespread disproportionate economic hardship conflicts with EPA's longheld view that obligated parties, including small refineries, can recoup their RFS compliance costs by passing those costs along to customers. JA__[API_Supp._Comments_28-30]. Despite holding that view, EPA did not "analyze the possibility of RIN cost recoupment." *RFA*, 948 F.3d at 1255-57; JA__[API_Supp._Comments_31].

Furthermore, the increasing number and extent of exemptions EPA previously granted cannot be reconciled with the "disproportionate economic hardship" test. As of 2019, there were 53 small refineries in the United States, *see In re Sealed Case*,

[21] Although the Supreme Court is reviewing *RFA*'s holding regarding the exemption-timing issue addressed above, the remainder of *RFA*—including its ruling regarding the "disproportionate economic hardship" issue—is not before the Supreme Court. Accordingly, it is unlikely that the Supreme Court's ruling will affect the arguments asserted in Part III.B of this brief.

971 F.3d 324, 328 (D.C. Cir. 2020), yet EPA granted 35 exemptions in 2017 and 31 in 2018, *RFA*, 948 F.3d at 1225. EPA has never explained how a majority of small refineries could suffer *disproportionate* hardship. *See* JA__[API_Supp._Comments_30]. That omission further undermines EPA's reliance on 2016-2018 as reference years to project exemptions for 2020.

Finally, the Rule is procedurally defective in two respects. *First*, the small-refinery-exemption proceedings the Rule relies upon are conducted and decided in secret. By statute, EPA must include its factual, legal, and policy considerations as part of the rulemaking record. §7607(d). Yet when EPA issued the Rule, none of its exemption decisions (other than a handful released under the Freedom of Information Act) were publicly available. Although agencies may rely upon other proceedings if the "reasoning remains applicable and adequately refutes the challenge," *Alon Ref. Krotz Springs, Inc., v. EPA*, 936 F.3d 628, 659 (D.C. Cir. 2019), that principle cannot apply where, as here, interested parties had no opportunity to participate in (or even know about the existence of) those proceedings, *see Adv. Biofuels Ass'n v. EPA*, 792 F. App'x 1, 5 (D.C. Cir. 2019) (EPA's exemption policy "paint[s] a troubling picture of intentionally shrouded and hidden agency law that could have left" aggrieved parties "without a viable avenue for judicial review"); *see also Ergon-W. Va., Inc.*, 980 F.3d at 421 (expressing concern that the secretive nature of the exemption process means various

"contradictory evidence would not normally be something we—or a refinery—would have access to when considering a final agency decision"). By sealing the decisions and excluding them from the record, EPA stripped affected parties of the ability to challenge the bases for a critical element of the Rule's approach.

Second, EPA violated the requirement that agencies make available to the public "final opinions" and "orders, made in the adjudication of cases." 5 U.S.C. §552(a)(2). If such opinions are not published, they may not be "relied on, used, or cited as precedent" in other proceedings unless affected parties "ha[ve] actual and timely notice thereof." *Id.* §552(a)(1)(A). EPA violated that rule by basing the Rule's reallocation scheme on undisclosed small-refinery exemption decisions.

C. Seeking to avoid judicial scrutiny, EPA declared that the validity of its small-refinery-exemption policy is beyond the scope of this proceeding. JA__[RTC_182-84]. That argument fails for three reasons.

First, EPA put that policy at issue by making it the basis for its projection of 2020 small-refinery exempt volumes. *See* JA__-__[85_Fed._Reg._7051-53]. EPA expressly "articulat[ed]" its "prospective policy [for] adjudicating [small-refinery-exemption] petitions" in the Rule, and likewise put at issue its past approaches by incorporating previous-year exemption decisions in its going-forward projections. JA__-__[*Id.*_7051-53]; JA__[API_Supp._Comments_33].

Second, by proposing to reallocate projected exempt volumes, EPA has constructively reopened its exemption policy. An agency effects a constructive reopening when "the revision of accompanying regulations significantly alters the stakes of judicial review" of previous regulations or interpretations, "as the result of a change that could not have been reasonably anticipated" when the initial rules or interpretations were adopted. *Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017 (D.C. Cir. 2016) (cleaned up). As described above, from the RFS program's inception until the Rule issued, EPA consistently interpreted §7545(*o*) as prohibiting reallocation of volumes exempted after issuance of an annual final rule. Thus, until now, other obligated parties had no substantial stake in how small-refinery exemptions (which historically were mostly granted after each year's percentage standards issued) were decided. Now, EPA has converted small-refinery exemptions into additional burdens on other, nonexempt parties, totaling roughly 770 *million* RINs in 2020 alone. JA__[85_Fed._Reg._7053]. The regulatory landscape has radically shifted.

Third, EPA must consider important aspects of the problem it sought to address in the Rule. *See Am. Forest & Paper Ass'n, Inc., v. EPA*, 294 F.3d 113, 116 n.3 (D.C. Cir. 2002). EPA's exemption policy is self-evidently an "important aspect of the problem" regarding whether and how to reallocate small-refinery exempt volumes. *See* JA__[API_Supp._Comments_34]. EPA thus had a duty to consider the lawfulness of its exemption policy in this proceeding.

IV. The circumstances required EPA to address two alternative approaches commenters proposed.[22]

Having determined that "ensuring" volume requirements required reallocating obligations through increased applicable percentages, EPA was obliged to consider "significant alternatives to the course [EPA] ultimately ch[ose]" and "engage the arguments raised before it." *Del. Dep't of Nat. Res. & Envtl. Control*, 785 F.3d at 11. Because EPA refused to consider or respond to comments presenting two significant alternatives for "ensuring" renewable-fuel volumes, the 2020 Rule is arbitrary and capricious.

Commenters proposed adjusting the obligated-parties definition in 40 C.F.R. §80.1406 to apply annual obligations to all parties, *including blenders*, who control transportation fuel at the point where renewable fuel is blended. JA__[Valero_Supp._Comments_10-11].[23] By making blenders obligated parties,

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[22] American Fuel & Petrochemical Manufacturers and Valero present this argument, joined by the Small Refineries Coalition.

[23] Various commenters addressed the point of obligation and suggested alternatives to the current blender exclusion. *See, e.g.*, JA__[Small_Refineries _Coalition_Supp._Comments_8] ("The definition of 'obligated party' disincentivizes more renewable fuel production and blending for the simple reason that the parties best positioned to invest in more renewable fuel production and blending—actual blenders—have no legal obligation or financial incentive to do so."); JA__-__[PBF_Energy_Comments_6-8_(EPA-HQ-OAR-2019-0136-0212)] (EPA is obliged to change the obligated-party definition to encompass "rack sellers" and "provide appropriate incentives that will better advance the RFS program goals.").

EPA could ensure that all gasoline and diesel entering the market is subject to RFS obligations, while eliminating most small-refinery exemptions. Refineries with no means of blending would not be obligated to purchase RINs on the market and therefore would not suffer disproportionate economic harm or need exemption. Parties with control over blending would be obligated proportionately, which would incentivize renewable-fuel investment, eliminate the potential for windfall profits from RIN-market speculation, and greatly reduce inefficiencies in the RIN market. To date, however, EPA has excused blenders from any RFS obligation. JA__[*Id.*_10-11].

EPA abused its discretion by responding to related comments only by invoking its 2017 decision to deny petitions for reconsideration of EPA's obligated-parties definition. JA_[RTC at 219]. This Court upheld the 2017 decision under an extreme-deference standard of review. *Alon Refin.*, 936 F.3d at 648. Although the Court concluded EPA could consider the point of obligation in a separate, contemporaneous proceeding rather than in the annual RFS rulemaking for 2017, the Court made clear EPA did not have "limitless … discretion" to ignore the issue in future RFS annual rulemakings. *Id*. An agency may invoke past decisions in separate proceedings only so long as its "reasoning remains applicable and adequately refutes the challenge." *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993).

Here, the record belies EPA's claim that it was "unaware of new information" requiring attention to the question whether it was applying 2020 obligations to "appropriate" parties, as the statute requires, §7545(*o*)(3)(B)(ii)(I). EPA's resort to the speculative redistribution mechanism in the 2020 Rule brought this issue to the forefront with new urgency. Adjusting the point of obligation would have solved concerns that purportedly motivated EPA's changed approach and, unlike EPA's newly hatched redistribution formula, presented an alternative that the statute expressly authorizes. §7545(*o*)(3)(B)(ii). Discontinuing the blender exclusion also would have addressed EPA's concerns in the Rule regarding increased numbers of small-refinery exemptions, JA__[84_Fed._Reg._57682], as well as cumulative waiver determinations, JA__[84_Fed._Reg._36766], and petitions from numerous states seeking waivers based on severe economic harm, JA__-__[State_Waiver_Petitions_(EPA-HQ-OAR-2019-0136-0340_attach.4_66-77)], all of which post-dated the record underlying the 2017 point-of-obligation decision on which EPA relied to ignore comments on the 2020 Rule.

"To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses." *Del. Dep't of Nat. Res. & Envtl. Control*, 785 F.3d at 11. EPA also acted arbitrarily in treating as beyond the scope of the rulemaking a second alternative to "ensure" statutory volumes: fully recognizing all domestic renewable-fuel production by removing penalties on

renewable fuel that is produced in the United States and then exported. JA__[RTC_223]. This includes more than a billion gallons of ethanol that meet the statutory definition of "renewable fuel," §7545(*o*)(1)(J), but that EPA excludes from compliance with RFS obligations. JA_[Valero_Supp._Comments_12-13]; 40 C.F.R. §80.1430. Changing EPA's policy to account for exported renewable fuel would have accurately reflected the total volume of renewable fuel, helped to "ensure" that statutory goals are met, and eliminated any purported need for increased annual percentages or speculative reallocation projections. Rather than finalizing an unauthorized and unreasonable change in its longstanding percentage-standards formula, EPA instead could have adjusted its approach towards exports in accordance with statutory provisions. JA__[*Id.*].

Commenters raised this issue in connection with the 2020 Rule, but EPA treated it as "beyond the scope" and gave it no consideration. JA__[RTC_223]. Although this Court upheld the same response in connection with the 2018 Rule, it said that EPA had not acted arbitrarily then because obligated parties did not explain how an export-RIN-policy change would have altered the 2018 rule's applicable volumes and percentage standards. *AFPM*, 937 F.3d at 589-87. In connection with the 2020 Rule, however, commenters clearly explained how accounting for exports would have decreased proposed percentage standards. JA_[Valero_Supp._Comments_12-13]. EPA therefore was required to consider and respond to this

significant alternative before choosing to increase obligations through its reallocation approach.

CONCLUSION

EPA's changed formula and projection methodology for determining the percentage standards are unlawful. Petitioners request that the Court (1) vacate EPA's changed formula and methodology, and the resulting percentage standards in the Rule and (2) hold that §7545(*o*) does not allow EPA to increase obligations on nonexempt parties based on speculative and unreliable projections of future small-refinery exemptions.

Respectfully submitted,

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January 29, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and this Court's briefing order because this brief contains 9,093 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

Dated: January 29, 2021

/s/ Brittany Pemberton
Brittany M. Pemberton

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 15(c) and 25, I hereby certify that on January 29, 2021, I have caused the foregoing Initial Joint Opening Brief of Petitioners to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Brittany Pemberton
Brittany M. Pemberton

ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1046 and consolidated cases

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

RFS POWER COALITION, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITIONS FOR REVIEW OF FINAL AGENCY ACTION
OF THE ENVIRONMENTAL PROTECTION AGENCY

ADDENDUM TO INITIAL BRIEF OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, VALERO ENERGY CORPORATION, AND SMALL REFINERIES COALITION

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provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87–256.

In paragraph (2), the words ''of any character'' are omitted as surplusage.

In paragraph (3), the words ''and a person or agency admitted by an agency as a party for limited purposes'' are substituted for ''but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes''.

In paragraph (9), a comma is supplied between the words ''limitation'' and ''amendment'' to correct an editorial error of omission.

In paragraph (10)(C), the words ''of any form'' are omitted as surplusage.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

REFERENCES IN TEXT

Sections 1884 and 1891–1902 of title 50, appendix, referred to in par. (1)(H), were a part of the various Housing and Rent Acts which were classified to section 1881 et seq. of the former Appendix to Title 50, War and National Defense, and had been repealed or omitted from the Code as executed prior to the elimination of the Appendix to Title 50. See Elimination of Title 50, Appendix note preceding section 1 of Title 50. Section 1641 of title 50, appendix, referred to in par. (1)(H), was repealed by Pub. L. 87–256, § 111(a)(1), Sept. 21, 1961, 75 Stat. 538. See Historical and Revision Note above.

CODIFICATION

Section 551 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2242 of Title 7, Agriculture.

AMENDMENTS

2011—Par. (1)(H). Pub. L. 111–350 struck out ''chapter 2 of title 41;'' after ''title 12;''.

1994—Par. (1)(H). Pub. L. 103–272 substituted ''subchapter II of chapter 471 of title 49; or sections'' for ''or sections 1622,''.

1976—Par. (14). Pub. L. 94–409 added par. (14).

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94–409, set out as an Effective Date note under section 552b of this title.

STUDY AND REPORTS ON ADMINISTRATIVE SUBPOENAS

Pub. L. 106–544, § 7, Dec. 19, 2000, 114 Stat. 2719, provided that:

''(a) STUDY ON USE OF ADMINISTRATIVE SUBPOENAS.—Not later than December 31, 2001, the Attorney General, in consultation with the Secretary of the Treasury, shall complete a study on the use of administrative subpoena power by executive branch agencies or entities and shall report the findings to the Committees on the Judiciary of the Senate and the House of Representatives. Such report shall include—

''(1) a description of the sources of administrative subpoena power and the scope of such subpoena power within executive branch agencies;

''(2) a description of applicable subpoena enforcement mechanisms;

''(3) a description of any notification provisions and any other provisions relating to safeguarding privacy interests;

''(4) a description of the standards governing the issuance of administrative subpoenas; and

''(5) recommendations from the Attorney General regarding necessary steps to ensure that administrative subpoena power is used and enforced consistently and fairly by executive branch agencies.

''(b) REPORT ON FREQUENCY OF USE OF ADMINISTRATIVE SUBPOENAS.—

''(1) IN GENERAL.—The Attorney General and the Secretary of the Treasury shall report in January of each year to the Committees on the Judiciary of the Senate and the House of Representatives on the number of administrative subpoenas issued by them under this section and the identity of the agency or component of the Department of Justice or the Department of the Treasury issuing the subpoena and imposing the charges.

''(2) EXPIRATION.—The reporting requirement of this subsection shall terminate in 3 years after the date of the enactment of this section [Dec. 19, 2000].''

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format—

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have

become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term ''search'' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)))[1] shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term ''a representative of the news media'' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-

[1] See References in Text note below.

media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)(I) Except as provided in subclause (II), an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under paragraph (6).

(II)(aa) If an agency has determined that unusual circumstances apply (as the term is defined in paragraph (6)(B)) and the agency provided a timely written notice to the requester in accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an additional 10 days. If the agency fails to comply with the extended time limit, the agency may not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees).

(bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has provided a timely written notice to the requester in accordance with paragraph (6)(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

(cc) If a court has determined that exceptional circumstances exist (as that term is defined in paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time provided by the court order.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98–620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of—

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination—

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, ''unusual circumstances'' means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term ''exceptional circumstances'' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term ''compelling need'' means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(8)(A) An agency shall—

(i) withhold information under this section only if—

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of

areas having the highest design value for carbon monoxide will have a priority in obtaining oxygenated gasoline which meets the requirements of paragraph (2).

(iv) As used in this subparagraph, the term distribution capacity includes capacity for transportation, storage, and blending.

(4) Fuel dispensing systems

Any person selling oxygenated gasoline at retail pursuant to this subsection shall be required under regulations promulgated by the Administrator to label the fuel dispensing system with a notice that the gasoline is oxygenated and will reduce the carbon monoxide emissions from the motor vehicle.

(5) Guidelines for credit

The Administrator shall promulgate guidelines, within 9 months after November 15, 1990, allowing the use of marketable oxygen credits from gasolines during that portion of the year specified in paragraph (2) with higher oxygen content than required to offset the sale or use of gasoline with a lower oxygen content than required. No credits may be transferred between nonattainment areas.

(6) Attainment areas

Nothing in this subsection shall be interpreted as requiring an oxygenated gasoline program in an area which is in attainment for carbon monoxide, except that in a carbon monoxide nonattainment area which is redesignated as attainment for carbon monoxide, the requirements of this subsection shall remain in effect to the extent such program is necessary to maintain such standard thereafter in the area.

(7) Failure to attain CO standard

If the Administrator determines under section 7512(b)(2) of this title that the national primary ambient air quality standard for carbon monoxide has not been attained in a Serious Area by the applicable attainment date, the State shall submit a plan revision for the area within 9 months after the date of such determination. The plan revision shall provide that the minimum oxygen content of gasoline referred to in paragraph (2) shall be 3.1 percent by weight unless such requirement is waived in accordance with the provisions of this subsection.

(n) Prohibition on leaded gasoline for highway use

After December 31, 1995, it shall be unlawful for any person to sell, offer for sale, supply, offer for supply, dispense, transport, or introduce into commerce, for use as fuel in any motor vehicle (as defined in section 7554(2)[8] of this title) any gasoline which contains lead or lead additives.

(*o*) Renewable fuel program

(1) Definitions

In this section:

(A) Additional renewable fuel

The term ''additional renewable fuel'' means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.

(B) Advanced biofuel

(i) In general

The term ''advanced biofuel'' means renewable fuel, other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

(ii) Inclusions

The types of fuels eligible for consideration as ''advanced biofuel'' may include any of the following:

(I) Ethanol derived from cellulose, hemicellulose, or lignin.

(II) Ethanol derived from sugar or starch (other than corn starch).

(III) Ethanol derived from waste material, including crop residue, other vegetative waste material, animal waste, and food waste and yard waste.

(IV) Biomass-based diesel.

(V) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.

(VI) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass.

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

The term ''baseline lifecycle greenhouse gas emissions'' means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

(D) Biomass-based diesel

The term ''biomass-based diesel'' means renewable fuel that is biodiesel as defined in section 13220(f) of this title and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwithstanding the preceding sentence, renewable fuel derived from co-processing biomass with a petroleum feedstock shall be advanced biofuel if it meets the requirements of subparagraph (B), but is not biomass-based diesel.

(E) Cellulosic biofuel

The term ''cellulosic biofuel'' means renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 per-

[8] So in original. Probably should be section ''7550(2)''.

cent less than the baseline lifecycle greenhouse gas emissions.

(F) Conventional biofuel

The term ''conventional biofuel'' means renewable fuel that is ethanol derived from corn starch.

(G) Greenhouse gas

The term ''greenhouse gas'' means carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons,[9] sulfur hexafluoride. The Administrator may include any other anthropogenically-emitted gas that is determined by the Administrator, after notice and comment, to contribute to global warming.

(H) Lifecycle greenhouse gas emissions

The term ''lifecycle greenhouse gas emissions'' means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

(I) Renewable biomass

The term ''renewable biomass'' means each of the following:

(i) Planted 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.

(ii) Planted trees and tree residue from actively managed tree plantations on non-federal[10] land cleared at any time prior to December 19, 2007, including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.

(iii) Animal waste material and animal byproducts.

(iv) Slash and pre-commercial thinnings that are from non-federal[10] forestlands, including forestlands belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States, but not forests or forestlands that are ecological communities with a global or State ranking of critically imperiled, imperiled, or rare pursuant to a State Natural Heritage Program, old growth forest, or late successional forest.

(v) Biomass obtained from the immediate vicinity of buildings and other areas regularly occupied by people, or of public infrastructure, at risk from wildfire.

(vi) Algae.

(vii) Separated yard waste or food waste, including recycled cooking and trap grease.

(J) Renewable fuel

The term ''renewable fuel'' means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.

(K) Small refinery

The term ''small refinery'' means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(L) Transportation fuel

The term ''transportation fuel'' means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).

(2) Renewable fuel program

(A) Regulations

(i) In general

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B). Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(ii) Noncontiguous State opt-in

(I) In general

On the petition of a noncontiguous State or territory, the Administrator may allow the renewable fuel program established under this subsection to apply in the noncontiguous State or territory at the same time or any time after the Administrator promulgates regulations under this subparagraph.

(II) Other actions

In carrying out this clause, the Administrator may—

(aa) issue or revise regulations under this paragraph;

[9] So in original. The word ''and'' probably should appear.

[10] So in original. Probably should be ''non-Federal''.

(bb) establish applicable percentages under paragraph (3);

(cc) provide for the generation of credits under paragraph (5); and

(dd) take such other actions as are necessary to allow for the application of the renewable fuels program in a noncontiguous State or territory.

(iii) Provisions of regulations

Regardless of the date of promulgation, the regulations promulgated under clause (i)—

(I) shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met; but

(II) shall not—

(aa) restrict geographic areas in which renewable fuel may be used; or

(bb) impose any per-gallon obligation for the use of renewable fuel.

(iv) Requirement in case of failure to promulgate regulations

If the Administrator does not promulgate regulations under clause (i), the percentage of renewable fuel in gasoline sold or dispensed to consumers in the United States, on a volume basis, shall be 2.78 percent for calendar year 2006.

(B) Applicable volumes

(i) Calendar years after 2005

(I) Renewable fuel

For the purpose of subparagraph (A), the applicable volume of renewable fuel for the calendar years 2006 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of renewable fuel (in billions of gallons):
2006	4.0
2007	4.7
2008	9.0
2009	11.1
2010	12.95
2011	13.95
2012	15.2
2013	16.55
2014	18.15
2015	20.5
2016	22.25
2017	24.0
2018	26.0
2019	28.0
2020	30.0
2021	33.0
2022	36.0

(II) Advanced biofuel

For the purpose of subparagraph (A), of the volume of renewable fuel required under subclause (I), the applicable volume of advanced biofuel for the calendar years 2009 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of advanced biofuel (in billions of gallons):
2009	0.6
2010	0.95
2011	1.35
2012	2.0
2013	2.75
2014	3.75
2015	5.5
2016	7.25
2017	9.0
2018	11.0
2019	13.0
2020	15.0
2021	18.0
2022	21.0

(III) Cellulosic biofuel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of cellulosic biofuel for the calendar years 2010 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of cellulosic biofuel (in billions of gallons):
2010	0.1
2011	0.25
2012	0.5
2013	1.0
2014	1.75
2015	3.0
2016	4.25
2017	5.5
2018	7.0
2019	8.5
2020	10.5
2021	13.5
2022	16.0

(IV) Biomass-based diesel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of biomass-based diesel for the calendar years 2009 through 2012 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of biomass-based diesel (in billions of gallons):
2009	0.5
2010	0.65
2011	0.80
2012	1.0

(ii) Other calendar years

For the purposes of subparagraph (A), the applicable volumes of each fuel specified in the tables in clause (i) for calendar years after the calendar years specified in the tables shall be determined by the Ad-

ministrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the implementation of the program during calendar years specified in the tables, and an analysis of—

(I) the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;

(II) the impact of renewable fuels on the energy security of the United States;

(III) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);

(IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;

(V) the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and

(VI) the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

The Administrator shall promulgate rules establishing the applicable volumes under this clause no later than 14 months before the first year for which such applicable volume will apply.

(iii) Applicable volume of advanced biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of advanced biofuel shall be at least the same percentage of the applicable volume of renewable fuel as in calendar year 2022.

(iv) Applicable volume of cellulosic biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of cellulosic biofuel established by the Administrator shall be based on the assumption that the Administrator will not need to issue a waiver for such years under paragraph (7)(D).

(v) Minimum applicable volume of biomass-based diesel

For the purpose of making the determinations in clause (ii), the applicable volume of biomass-based diesel shall not be less than the applicable volume listed in clause (i)(IV) for calendar year 2012.

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

Not later than October 31 of each of calendar years 2005 through 2021, the Administrator of the Energy Information Administration shall provide to the Administrator of the Environmental Protection Agency an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.

(B) Determination of applicable percentages

(i) In general

Not later than November 30 of each of calendar years 2005 through 2021, based on the estimate provided under subparagraph (A), the Administrator of the Environmental Protection Agency shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.

(ii) Required elements

The renewable fuel obligation determined for a calendar year under clause (i) shall—

(I) be applicable to refineries, blenders, and importers, as appropriate;

(II) be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States; and

(III) subject to subparagraph (C)(i), consist of a single applicable percentage that applies to all categories of persons specified in subclause (I).

(C) Adjustments

In determining the applicable percentage for a calendar year, the Administrator shall make adjustments—

(i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and

(ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

(4) Modification of greenhouse gas reduction percentages

(A) In general

The Administrator may, in the regulations under the last sentence of paragraph (2)(A)(i), adjust the 20 percent, 50 percent, and 60 percent reductions in lifecycle greenhouse gas emissions specified in paragraphs (2)(A)(i) (relating to renewable fuel), (1)(D) (relating to biomass-based diesel), (1)(B)(i) (relating to advanced biofuel), and (1)(E) (relating to cellulosic biofuel) to a lower percentage. For the 50 and 60 percent reductions, the Administrator may make such an adjustment only if he determines that generally such reduction is not commercially feasible for fuels made using a variety of feedstocks, technologies, and processes to meet the applicable reduction.

(B) Amount of adjustment

In promulgating regulations under this paragraph, the specified 50 percent reduction

in greenhouse gas emissions from advanced biofuel and in biomass-based diesel may not be reduced below 40 percent. The specified 20 percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below 10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

(C) Adjusted reduction levels

An adjustment under this paragraph to a percent less than the specified 20 percent greenhouse gas reduction for renewable fuel shall be the minimum possible adjustment, and the adjusted greenhouse gas reduction shall be established by the Administrator at the maximum achievable level, taking cost in consideration, for natural gas fired corn-based ethanol plants, allowing for the use of a variety of technologies and processes. An adjustment in the 50 or 60 percent greenhouse gas levels shall be the minimum possible adjustment for the fuel or fuels concerned, and the adjusted greenhouse gas reduction shall be established at the maximum achievable level, taking cost in consideration, allowing for the use of a variety of feedstocks, technologies, and processes.

(D) 5-year review

Whenever the Administrator makes any adjustment under this paragraph, not later than 5 years thereafter he shall review and revise (based upon the same criteria and standards as required for the initial adjustment) the regulations establishing the adjusted level.

(E) Subsequent adjustments

After the Administrator has promulgated a final rule under the last sentence of paragraph (2)(A)(i) with respect to the method of determining lifecycle greenhouse gas emissions, except as provided in subparagraph (D), the Administrator may not adjust the percent greenhouse gas reduction levels unless he determines that there has been a significant change in the analytical methodology used for determining the lifecycle greenhouse gas emissions. If he makes such determination, he may adjust the 20, 50, or 60 percent reduction levels through rulemaking using the criteria and standards set forth in this paragraph.

(F) Limit on upward adjustments

If, under subparagraph (D) or (E), the Administrator revises a percent level adjusted as provided in subparagraphs (A), (B), and (C) to a higher percent, such higher percent may not exceed the applicable percent specified in paragraph (2)(A)(i), (1)(D), (1)(B)(i), or (1)(E).

(G) Applicability of adjustments

If the Administrator adjusts, or revises, a percent level referred to in this paragraph or makes a change in the analytical methodology used for determining the lifecycle greenhouse gas emissions, such adjustment, revision, or change (or any combination thereof) shall only apply to renewable fuel from new facilities that commence construction after the effective date of such adjustment, revision, or change.

(5) Credit program

(A) In general

The regulations promulgated under paragraph (2)(A) shall provide—

(i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2);

(ii) for the generation of an appropriate amount of credits for biodiesel; and

(iii) for the generation of credits by small refineries in accordance with paragraph (9)(C).

(B) Use of credits

A person that generates credits under subparagraph (A) may use the credits, or transfer all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(C) Duration of credits

A credit generated under this paragraph shall be valid to show compliance for the 12 months as of the date of generation.

(D) Inability to generate or purchase sufficient credits

The regulations promulgated under paragraph (2)(A) shall include provisions allowing any person that is unable to generate or purchase sufficient credits to meet the requirements of paragraph (2) to carry forward a renewable fuel deficit on condition that the person, in the calendar year following the year in which the renewable fuel deficit is created—

(i) achieves compliance with the renewable fuel requirement under paragraph (2); and

(ii) generates or purchases additional renewable fuel credits to offset the renewable fuel deficit of the previous year.

(E) Credits for additional renewable fuel

The Administrator may issue regulations providing: (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports additional renewable fuels specified by the Administrator; and (ii) for the use of such credits by the generator, or the transfer of all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(6) Seasonal variations in renewable fuel use

(A) Study

For each of calendar years 2006 through 2012, the Administrator of the Energy Information Administration shall conduct a study of renewable fuel blending to determine whether there are excessive seasonal variations in the use of renewable fuel.

(B) Regulation of excessive seasonal variations

If, for any calendar year, the Administrator of the Energy Information Adminis-

tration, based on the study under subparagraph (A), makes the determinations specified in subparagraph (C), the Administrator of the Environmental Protection Agency shall promulgate regulations to ensure that 25 percent or more of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) is used during each of the 2 periods specified in subparagraph (D) of each subsequent calendar year.

(C) Determinations

The determinations referred to in subparagraph (B) are that—

(i) less than 25 percent of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) has been used during 1 of the 2 periods specified in subparagraph (D) of the calendar year;

(ii) a pattern of excessive seasonal variation described in clause (i) will continue in subsequent calendar years; and

(iii) promulgating regulations or other requirements to impose a 25 percent or more seasonal use of renewable fuels will not prevent or interfere with the attainment of national ambient air quality standards or significantly increase the price of motor fuels to the consumer.

(D) Periods

The 2 periods referred to in this paragraph are—

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

Renewable fuel blended or consumed in calendar year 2006 in a State that has received a waiver under section 7543(b) of this title shall not be included in the study under subparagraph (A).

(F) State exemption from seasonality requirements

Notwithstanding any other provision of law, the seasonality requirement relating to renewable fuel use established by this paragraph shall not apply to any State that has received a waiver under section 7543(b) of this title or any State dependent on refineries in such State for gasoline supplies.

(7) Waivers

(A) In general

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2)—

(i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or

(ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

(B) Petitions for waivers

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, shall approve or disapprove a petition for a waiver of the requirements of paragraph (2) within 90 days after the date on which the petition is received by the Administrator.

(C) Termination of waivers

A waiver granted under subparagraph (A) shall terminate after 1 year, but may be renewed by the Administrator after consultation with the Secretary of Agriculture and the Secretary of Energy.

(D) Cellulosic biofuel

(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(ii) Whenever the Administrator reduces the minimum cellulosic biofuel volume under this subparagraph, the Administrator shall make available for sale cellulosic biofuel credits at the higher of $0.25 per gallon or the amount by which $3.00 per gallon exceeds the average wholesale price of a gallon of gasoline in the United States. Such amounts shall be adjusted for inflation by the Administrator for years after 2008.

(iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum appli-

cable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

(E) Biomass-based diesel

(i) Market evaluation

The Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall periodically evaluate the impact of the biomass-based diesel requirements established under this paragraph on the price of diesel fuel.

(ii) Waiver

If the Administrator determines that there is a significant renewable feedstock disruption or other market circumstances that would make the price of biomass-based diesel fuel increase significantly, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall issue an order to reduce, for up to a 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomass-based diesel. For any calendar year in which the Administrator makes a reduction under this subparagraph, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(iii) Extensions

If the Administrator determines that the feedstock disruption or circumstances described in clause (ii) is continuing beyond the 60-day period described in clause (ii) or this clause, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, may issue an order to reduce, for up to an additional 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed an additional 15 percent of the applicable annual requirement for biomass-based diesel.

(F) Modification of applicable volumes

For any of the tables in paragraph (2)(B), if the Administrator waives—

(i) at least 20 percent of the applicable volume requirement set forth in any such table for 2 consecutive years; or

(ii) at least 50 percent of such volume requirement for a single year,

the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).

(8) Study and waiver for initial year of program

(A) In general

Not later than 180 days after August 8, 2005, the Secretary of Energy shall conduct for the Administrator a study assessing whether the renewable fuel requirement under paragraph (2) will likely result in significant adverse impacts on consumers in 2006, on a national, regional, or State basis.

(B) Required evaluations

The study shall evaluate renewable fuel—

(i) supplies and prices;

(ii) blendstock supplies; and

(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

Based on the results of the study, the Secretary of Energy shall make specific recommendations to the Administrator concerning waiver of the requirements of paragraph (2), in whole or in part, to prevent any adverse impacts described in subparagraph (A).

(D) Waiver

(i) In general

Not later than 270 days after August 8, 2005, the Administrator shall, if and to the extent recommended by the Secretary of Energy under subparagraph (C), waive, in whole or in part, the renewable fuel requirement under paragraph (2) by reducing the national quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

Clause (i) does not limit the authority of the Administrator to waive the requirements of paragraph (2) in whole, or in part, under paragraph (7).

(9) Small refineries

(A) Temporary exemption

(i) In general

The requirements of paragraph (2) shall not apply to small refineries until calendar year 2011.

(ii) Extension of exemption

(I) Study by Secretary of Energy

Not later than December 31, 2008, the Secretary of Energy shall conduct for the Administrator a study to determine whether compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship on small refineries.

(II) Extension of exemption

In the case of a small refinery that the Secretary of Energy determines under subclause (I) would be subject to a disproportionate economic hardship if required to comply with paragraph (2), the Administrator shall extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.

(ii) Evaluation of petitions

In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.

(iii) Deadline for action on petitions

The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.

(C) Credit program

If a small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A), the regulations promulgated under paragraph (2)(A) shall provide for the generation of credits by the small refinery under paragraph (5) beginning in the calendar year following the date of notification.

(D) Opt-in for small refineries

A small refinery shall be subject to the requirements of paragraph (2) if the small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A).

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

Not later than 180 days after August 8, 2005, and annually thereafter, the Federal Trade Commission shall perform a market concentration analysis of the ethanol production industry using the Herfindahl-Hirschman Index to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior.

(ii) Scoring

For the purpose of scoring under clause (i) using the Herfindahl-Hirschman Index, all marketing arrangements among industry participants shall be considered.

(B) Report

Not later than December 1, 2005, and annually thereafter, the Federal Trade Commission shall submit to Congress and the Administrator a report on the results of the market concentration analysis performed under subparagraph (A)(i).

(11) Periodic reviews

To allow for the appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2), the Administrator shall conduct periodic reviews of—

(A) existing technologies;

(B) the feasibility of achieving compliance with the requirements; and

(C) the impacts of the requirements described in subsection (a)(2)[11] on each individual and entity described in paragraph (2).

(12) Effect on other provisions

Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 7475) of this chapter. The previous sentence shall not affect implementation and enforcement of this subsection.

(q)[12] Analyses of motor vehicle fuel changes and emissions model

(1) Anti-backsliding analysis

(A) Draft analysis

Not later than 4 years after August 8, 2005, the Administrator shall publish for public comment a draft analysis of the changes in emissions of air pollutants and air quality due to the use of motor vehicle fuel and fuel additives resulting from implementation of the amendments made by the Energy Policy Act of 2005.

(B) Final analysis

After providing a reasonable opportunity for comment but not later than 5 years after August 8, 2005, the Administrator shall publish the analysis in final form.

(2) Emissions model

For the purposes of this section, not later than 4 years after August 8, 2005, the Administrator shall develop and finalize an emissions model that reflects, to the maximum extent practicable, the effects of gasoline characteristics or components on emissions from vehicles in the motor vehicle fleet during calendar year 2007.

(3) Permeation effects study

(A) In general

Not later than 1 year after August 8, 2005, the Administrator shall conduct a study, and report to Congress the results of the study, on the effects of ethanol content in gasoline on permeation, the process by which fuel molecules migrate through the elastomeric materials (rubber and plastic parts) that make up the fuel and fuel vapor systems of a motor vehicle.

(B) Evaporative emissions

The study shall include estimates of the increase in total evaporative emissions likely to result from the use of gasoline with ethanol content in a motor vehicle, and the fleet of motor vehicles, due to permeation.

(r) Fuel and fuel additive importers and importation

For the purposes of this section, the term ''manufacturer'' includes an importer and the term ''manufacture'' includes importation.

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[11] So in original. Subsection (a) does not contain a par. (2).

[12] So in original. No subsec. (p) has been enacted.

to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions*. The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability*. This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity*. Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 306 of the Air Act [this section].

SEC. 12. *Order Superseded*. Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)[1] or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the[2] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),,[3] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph,[4] the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[3] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)[1] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such six-

[1] See References in Text note below.

[2] So in original. Probably should be ''this''.

[3] So in original.

[4] So in original. Probably should be ''subsection,''.

tieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to[5] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV–A (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the cleanfuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV–A (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a ''rule''). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

[5] So in original. The word ''to'' probably should not appear.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the ''comment period''). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing

alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section[6] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

[6] So in original. Probably should be ''sections''.

(July 14, 1955, ch. 360, title III, § 307, as added Pub. L. 91–604, § 12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 92–157, title III, § 302(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 93–319, § 6(c), June 22, 1974, 88 Stat. 259; Pub. L. 95–95, title III, §§ 303(d), 305(a), (c), (f)–(h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub. L. 95–190, § 14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101–549, title I, §§ 108(p), 110(5), title III, § 302(g), (h), title VII, §§ 702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681–2684.)

REFERENCES IN TEXT

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101–549, title II, § 230(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101–549, title II, § 230(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original ''section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)'', meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93–319, § 3, 88 Stat. 248, (which was classified to section 1857c–10 of this title) as in effect prior to the enactment of Pub. L. 95–95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95–95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93–319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93–319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101–549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95–95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I, referred to in subsec. (d)(1)(J), was in the original ''subtitle C of title I'', and was translated as reading ''part C of title I'' to reflect the probable intent of Congress, because title I does not contain subtitles.

CODIFICATION

In subsec. (h), ''subchapter II of chapter 5 of title 5'' was substituted for ''the Administrative Procedures Act'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h–5 of this title.

PRIOR PROVISIONS

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91–604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly § 14, as added Dec. 17, 1963, Pub. L. 88–206, § 1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89–272, renumbered section 310 by Pub. L. 90–148, and renumbered section 317 by Pub. L. 91–604, and is set out as a Short Title note under section 7401 of this title.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101–549, § 703, struck out par. (1) designation at beginning, inserted provisions authorizing issuance of subpoenas and administration of oaths for purposes of investigations, monitoring, reporting requirements, entries, compliance inspections, or administrative enforcement proceedings under this chapter, and struck out ''or section 7521(b)(5)'' after ''section 7410(f)''.

(d) The price for cellulosic biofuel waiver credits will be calculated in accordance with § 80.1456(d) and published on EPA's Web site.

[77 FR 1354, Jan. 9, 2012, as amended at 78 FR 49830, Aug. 15, 2013; 79 FR 25031, May 2, 2014; 80 FR 18140, Apr. 3, 2015; 80 FR 77517, Dec. 14, 2015; 81 FR 89804, Dec. 12, 2016; 82 FR 58527, Dec. 12, 2017; 83 FR 63744, Dec. 11, 2018]

§ 80.1406 Who is an obligated party under the RFS program?

(a)(1) An *obligated party* is any refiner that produces gasoline or diesel fuel within the 48 contiguous states or Hawaii, or any importer that imports gasoline or diesel fuel into the 48 contiguous states or Hawaii during a compliance period. A party that simply blends renewable fuel into gasoline or diesel fuel, as defined in § 80.1407(c) or (e), is not an obligated party.

(2) If the Administrator approves a petition of Alaska or a United States territory to opt-in to the renewable fuel program under the provisions in § 80.1443, then ''obligated party'' shall also include any refiner that produces gasoline or diesel fuel within that state or territory, or any importer that imports gasoline or diesel fuel into that state or territory.

(b) For each compliance period starting with 2010, an obligated party is required to demonstrate, pursuant to § 80.1427, that it has satisfied the Renewable Volume Obligations for that compliance period, as specified in § 80.1407(a).

(c) *Aggregation of facilities*—(1) Except as provided in paragraphs (c)(2), (d) and (e) of this section, an obligated party may comply with the requirements of paragraph (b) of this section in the aggregate for all of the refineries that it operates, or for each refinery individually.

(2) An obligated party that carries a deficit into year i + 1 must use the same approach to aggregation of facilities in year i + 1 as it did in year i.

(d) An obligated party must comply with the requirements of paragraph (b) of this section for all of its imported gasoline or diesel fuel in the aggregate.

(e) An obligated party that is both a refiner and importer must comply with the requirements of paragraph (b) of this section for its imported gasoline or diesel fuel separately from gasoline or diesel fuel produced by its domestic refinery or refineries.

(f) Where a refinery or import facility is jointly owned by two or more parties, the requirements of paragraph (b) of this section may be met by one of the joint owners for all of the gasoline or diesel fuel produced/imported at the facility, or each party may meet the requirements of paragraph (b) of this section for the portion of the gasoline or diesel fuel that it produces or imports, as long as all of the gasoline or diesel fuel produced/imported at the facility is accounted for in determining the Renewable Volume Obligations under § 80.1407. In either case, all joint owners are subject to the liability provisions of § 80.1461(d).

(g) The requirements in paragraph (b) of this section apply to the following compliance periods: Beginning in 2010, and every year thereafter, the compliance period is January 1 through December 31.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26037, May 10, 2010]

§ 80.1407 How are the Renewable Volume Obligations calculated?

(a) The Renewable Volume Obligations for an obligated party are determined according to the following formulas:

(1) *Cellulosic biofuel.*

$$RVO_{CB,i} = (RFStd_{CB,i} * (GV_i + DV_i)) + D_{CB,i-1}$$

Where:

$RVO_{CB,i}$ = The Renewable Volume Obligation for cellulosic biofuel for an obligated party for calendar year i, in gallons.

$RFStd_{CB,i}$ = The standard for cellulosic biofuel for calendar year i, determined by EPA pursuant to § 80.1405, in percent.

GV_i = The non-renewable gasoline volume, determined in accordance with paragraphs (b), (c), and (f) of this section, which is produced in or imported into the 48 contiguous states or Hawaii by an obligated party in calendar year i, in gallons.

DV_i = The non-renewable diesel volume, determined in accordance with paragraphs (d), (e), and (f) of this section, produced in or imported into the 48 contiguous states or Hawaii by an obligated party in calendar year i, in gallons.

$D_{CB,i-1}$ = Deficit carryover from the previous year for cellulosic biofuel, in gallons.

(2) *Biomass-based diesel.*

$RVO_{BBD,i} = (RFStd_{BBD,i} * (GV_i + DV_i)) + D_{BBD,i-1}$

Where:

$RVO_{BBD,i}$ = The Renewable Volume Obligation for biomass-based diesel for an obligated party for calendar year i, in gallons.

$RFStd_{BBD,i}$ = The standard for biomass-based diesel for calendar year i, determined by EPA pursuant to §80.1405, in percent.

GV_i = The non-renewable gasoline volume, determined in accordance with paragraphs (b), (c), and (f) of this section, which is produced in or imported into the 48 contiguous states or Hawaii by an obligated party in calendar year i, in gallons.

DV_i = The non-renewable diesel volume, determined in accordance with paragraphs (d), (e), and (f) of this section, produced in or imported into the 48 contiguous states or Hawaii by an obligated party in calendar year i, in gallons.

$D_{BBD,i-1}$ = Deficit carryover from the previous year for biomass-based diesel, in gallons.

(3) *Advanced biofuel.*

$RVO_{AB,i} = (RFStd_{AB,i} * (GV_i + DV_i)) + D_{AB,i-1}$

Where:

$RVO_{AB,i}$ = The Renewable Volume Obligation for advanced biofuel for an obligated party for calendar year i, in gallons.

$RFStd_{AB,i}$ = The standard for advanced biofuel for calendar year i, determined by EPA pursuant to §80.1405, in percent.

GV_i = The non-renewable gasoline volume, determined in accordance with paragraphs (b), (c), and (f) of this section, which is produced in or imported into the 48 contiguous states or Hawaii by an obligated party in calendar year i, in gallons.

DV_i = The non-renewable diesel volume, determined in accordance with paragraphs (d), (e), and (f) of this section, produced in or imported into the 48 contiguous states or Hawaii by an obligated party in calendar year i, in gallons.

$D_{AB,i-1}$ = Deficit carryover from the previous year for advanced biofuel, in gallons.

(4) *Renewable fuel.*

$RVO_{RF,i} = (RFStd_{RF,i} * (GV_i + DV_i)) + D_{RF,i-1}$

Where:

$RVO_{RF,i}$ = The Renewable Volume Obligation for renewable fuel for an obligated party for calendar year i, in gallons.

$RFStd_{RF,i}$ = The standard for renewable fuel for calendar year i, determined by EPA pursuant to §80.1405, in percent.

GV_i = The non-renewable gasoline volume, determined in accordance with paragraphs (b), (c), and (f) of this section, which is produced in or imported into the 48 contiguous states or Hawaii by an obligated party in calendar year i, in gallons.

DV_i = The non-renewable diesel volume, determined in accordance with paragraphs (d), (e), and (f) of this section, produced in or imported into the 48 contiguous states or Hawaii by an obligated party in calendar year i, in gallons.

$D_{RF,i-1}$ = Deficit carryover from the previous year for renewable fuel, in gallons.

(b) The non-renewable gasoline volume, GV_i, for an obligated party for a given year as specified in paragraph (a) of this section is calculated as follows:

$$GV_i = \sum_{x=1}^{n} G_x - \sum_{y=1}^{m} RBG_y$$

Where:

x = Individual batch of gasoline produced or imported in calendar year i.

n = Total number of batches of gasoline produced or imported in calendar year i.

G_X = Volume of batch x of gasoline produced or imported, as defined in paragraph (c) of this section, in gallons.

y = Individual batch of renewable fuel blended into gasoline in calendar year i.

m = Total number of batches of renewable fuel blended into gasoline in calendar year i.

RBG_y = Volume of batch y of renewable fuel blended into gasoline, in gallons.

(c) Except as specified in paragraph (f) of this section, all of the following products that are produced or imported during a compliance period, collectively called ''gasoline'' for the purposes of this section (unless otherwise specified), are to be included (but not double-counted) in the volume used to calculate a party's Renewable Volume

Obligations under paragraph (a) of this section, except as provided in paragraph (f) of this section:

(1) Reformulated gasoline, whether or not renewable fuel is later added to it.

(2) Conventional gasoline, whether or not renewable fuel is later added to it.

(3) Reformulated gasoline blendstock that becomes finished reformulated gasoline upon the addition of oxygenate (RBOB).

(4) Conventional gasoline blendstock that becomes finished conventional gasoline upon the addition of oxygenate (CBOB).

(5) Blendstock (including butane, pentane, and gasoline treated as blendstock (GTAB)) that has been combined with other blendstock and/or finished gasoline to produce gasoline.

(6) Any gasoline, or any unfinished gasoline that becomes finished gasoline upon the addition of oxygenate, that is produced or imported to comply with a state or local fuels program.

(d) The diesel non-renewable volume, DV_i, for an obligated party for a given year as specified in paragraph (a) of this section is calculated as follows:

$$DV_i = \sum_{x=1}^{n} D_x - \sum_{y=1}^{m} RBD_y$$

Where:

x = Individual batch of diesel produced or imported in calendar year i.

n = Total number of batches of diesel produced or imported in calendar year i.

D_X = Volume of batch x of diesel produced or imported, as defined in paragraph (e) of this section, in gallons.

y = Individual batch of renewable fuel blended into diesel in calendar year i.

m = Total number of batches of renewable fuel blended into diesel in calendar year i.

RBD_y = Volume of batch y of renewable fuel blended into diesel, in gallons.

(e) Except as specified in paragraph (f) of this section, all products meeting the definition of *MVNRLM diesel fuel* at §80.2(qqq) that are produced or imported during a compliance period, collectively called ''diesel fuel'' for the purposes of this section (unless otherwise specified), are to be included (but not double-counted) in the volume used to calculate a party's Renewable Volume Obligations under paragraph (a) of this section.

(f) The following products are not included in the volume of gasoline or diesel fuel produced or imported used to calculate a party's Renewable Volume Obligations according to paragraph (a) of this section:

(1) Any renewable fuel as defined in §80.1401.

(2) Blendstock that has not been combined with other blendstock, finished gasoline, or diesel to produce gasoline or diesel.

(3) Gasoline or diesel fuel produced or imported for use in Alaska, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianas, unless the area has opted into the RFS program under §80.1443.

(4) Gasoline or diesel fuel produced by a small refinery that has an exemption under §80.1441 or an approved small refiner that has an exemption under §80.1442.

(5) Gasoline or diesel fuel exported for use outside the 48 United States and Hawaii, and gasoline or diesel fuel exported for use outside Alaska, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianas, if the area has opted into the RFS program under §80.1443.

(6) For blenders, the volume of finished gasoline, finished diesel fuel, RBOB, or CBOB to which a blender adds blendstocks.

(7) The gasoline or diesel fuel portion of transmix produced by a transmix processor, or the transmix blended into gasoline or diesel fuel by a transmix blender, under §80.84.

(8) Any gasoline or diesel fuel that is not transportation fuel.

[75 FR 14863, Mar. 26, 2010, as amended at 79 FR 23655, Apr. 28, 2014]

§§ 80.1408–80.1414 [Reserved]

§ 80.1415 How are equivalence values assigned to renewable fuel?

(a)(1) Each gallon of a renewable fuel, or gallon equivalent pursuant to paragraph (b)(5) or (b)(6) of this section, shall be assigned an equivalence value by the producer or importer pursuant to paragraph (b) or (c) of this section.

year are less than or equal to a limit set as follows:

(i) For RINs with a D code of 3, the limit shall be equal to RVO_{CB}.

(ii) For RINs with a D code of 4, the limit shall be equal to RVO_{BBD}.

(iii) For RINs with a D code of 7, the limit shall be equal to the larger of RVO_{BBD} or RVO_{CB}.

(iv) For RINs with a D code of 5, the limit shall be equal to $RVO_{AB} - RVO_{CB} - RVO_{BBD}$.

(v) For RINs with a D code of 6, the limit shall be equal to $RVO_{RF} - RVO_{AB}$.

(8) Small refiners and small refineries may only separate RINs that have been assigned to volumes of renewable fuel that the party blends into gasoline or diesel to produce transportation fuel, heating oil, or jet fuel, or that the party used as transportation fuel, heating oil, or jet fuel. This paragraph (b)(8) shall apply only under the following conditions:

(i) During the calendar year in which the party has received a small refinery exemption under §80.1441 or a small refiner exemption under §80.1442; and

(ii) The party is not otherwise an obligated party during the period of time that the small refinery or small refiner exemption is in effect.

(9) Except as provided in paragraphs (b)(2) through (b)(5) and (b)(8) of this section, parties whose non-export renewable volume obligations are solely related to either the importation of products listed in §80.1407(c) or §80.1407(e) or to the addition of blendstocks into a volume of finished gasoline, finished diesel fuel, RBOB, or CBOB, can only separate RINs from volumes of renewable fuel if the number of gallon-RINs separated in a calendar year is less than or equal to a limit set as follows:

(i) For RINs with a D code of 3, the limit shall be equal to RVO_{CB}.

(ii) For RINs with a D code of 4, the limit shall be equal to RVO_{BBD}.

(iii) For RINs with a D code of 7, the limit shall be equal to the larger of RVO_{BBD} or RVO_{CB}.

(iv) For RINs with a D code of 5, the limit shall be equal to $RVO_{AB} - RVO_{CB} - RVO_{BBD}$.

(v) For RINs with a D code of 6, the limit shall be equal to $RVO_{RF} - RVO_{AB}$.

(10) Any party that produces a volume of renewable fuel may separate any RINs that have been generated to represent that volume of renewable fuel or that blend if that party retires the separated RINs to replace invalid RINs according to §80.1474.

(c) The party responsible for separating a RIN from a volume of renewable fuel shall change the K code in the RIN from a value of 1 to a value of 2 prior to transferring the RIN to any other party.

(d) Upon and after separation of a RIN from its associated volume of renewable fuel, the separated RIN must be accompanied by a PTD pursuant to §80.1453 when transferred to another party.

(e) Upon and after separation of a RIN from its associated volume of renewable fuel, product transfer documents used to transfer ownership of the volume must meet the requirements of §80.1453.

(f) [Reserved]

(g) Any 2009 or 2010 RINs retired pursuant to §80.1129 because renewable fuel was used in a nonroad vehicle or nonroad engine (except for ocean-going vessels), or as heating oil or jet fuel may be reinstated by the retiring party for sale or use to demonstrate compliance with a 2010 RVO.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26042, May 10, 2010; 77 FR 1355, Jan. 9, 2012; 79 FR 42115, July 18, 2014]

§80.1430 Requirements for exporters of renewable fuels.

(a) Any exporter of renewable fuel, whether in its neat form or blended shall acquire sufficient RINs to comply with all applicable Renewable Volume Obligations under paragraphs (b) through (e) of this section representing the exported renewable fuel. No provision of this section applies to renewable fuel purchased directly from the renewable fuel producer and for which the exporter can demonstrate that no RINs were generated through the recordkeeping requirements of §80.1454(a)(6).

(b) *Exporter Renewable Volume Obligations (ERVOs).* An exporter of renewable fuel shall determine its Exporter Renewable Volume Obligations from

the volumes of the renewable fuel exported.

(1) *Cellulosic biofuel.*

$ERVO_{CB,k} = VOL_k * EV_k$

Where:

$ERVO_{CB,k}$ = The Exporter Renewable Volume Obligation for cellulosic biofuel for discrete volume k in gallons.
k = A discrete volume of renewable fuel that the exporter knows or has reason to know is cellulosic biofuel that is exported in a single shipment.
VOL_k = The standardized volume of discrete volume k, in gallons, calculated in accordance with §80.1426(f)(8).
EV_k = The equivalence value associated with discrete volume k.

(2) *Biomass-based diesel.*

$ERVO_{BBD,k} = VOL_k * EV_k$

Where:

$ERVO_{BBDI,k}$ = The Exporter Renewable Volume Obligation for biomass-based diesel for discrete volume k, in gallons.
k = A discrete volume of renewable fuel that is biodiesel or renewable diesel and is exported in a single shipment.
VOL_k = The standardized volume of discrete volume k calculated in accordance with §80.1426(f)(8).
EV_k = The equivalence value associated with discrete volume k.

(3) *Advanced biofuel.*

$ERVO_{AB,k} = VOL_k * EV_k$

Where:

$ERVO_{AB,k}$ = The Exporter Renewable Volume Obligation for advanced biofuel for discrete volume k, in gallons.
k = A discrete volume of renewable fuel that is advanced biofuel (including biomass-based diesel, renewable diesel, cellulosic biofuel and other advanced biofuel) and is exported in a single shipment.
VOL_k = The standardized volume of discrete volume k, in gallons, calculated in accordance with §80.1426(f)(8).
EV_k = The equivalence value associated with discrete volume k.

(4) *Renewable fuel.*

$ERVO_{RF,i} = VOL_k * EV_k$

Where:

$ERVO_{RF,i}$ = The Renewable Volume Obligation for renewable fuel for discrete volume k, in gallons.
k = A discrete volume of exported renewable fuel that is exported in a single shipment.
VOL_k = The standardized volume of discrete volume k, in gallons, calculated in accordance with §80.1426(f)(8).
EV_k = The equivalence value associated with discrete volume k.

(c) If the exporter knows or has reason to know that a volume of exported renewable fuel is cellulosic diesel, he must treat the exported volume as either cellulosic biofuel or biomass-based diesel when determining his Renewable Volume Obligations pursuant to paragraph (b) of this section.

(d) For the purposes of calculating the Renewable Volume Obligations:

(1) If the equivalence value for a volume of exported renewable fuel can be determined pursuant to §80.1415 based on its composition, then the appropriate equivalence value shall be used in the calculation of the exporter's Renewable Volume Obligations under paragraph (b) of this section.

(2) If the category of the exported renewable fuel is known to be biomass-based diesel but the composition is unknown, the value of EV_k shall be 1.5.

(3) If neither the category nor composition of a volume of exported renewable fuel can be determined, the value of EV_k shall be 1.0.

(e) For renewable fuels that are in the form of a blend at the time of export, the exporter shall determine the volume of exported renewable fuel based on one of the following:

(1) Information from the supplier of the blend of the concentration of renewable fuel in the blend.

(2) Determination of the renewable portion of the blend using Method B or Method C of ASTM D 6866 (incorporated by reference, see §80.1468), or an alternative test method as approved by the EPA.

(3) Assuming the maximum concentration of the renewable fuel in the blend as allowed by law and/or regulation.

(f) Each exporter of renewable fuel must fulfill its ERVO for each discrete volume of exported renewable fuel within thirty days of export, and must demonstrate compliance with its ERVOs pursuant to §80.1427(c).

(g) Each exporter of renewable fuel must fulfill any 2014 ERVOs existing as of September 16, 2014 for which RINs have not yet been retired by the compliance demonstration deadline for the

2013 compliance period, and must demonstrate compliance with such ERVOs pursuant to § 80.1427(c).

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26042, May 10, 2010; 79 FR 42115, July 18, 2014]

§ 80.1431 Treatment of invalid RINs.

(a) *Invalid RINs.* (1) An invalid RIN is a RIN that is any of the following:

(i) A duplicate of a valid RIN.

(ii) Was based on incorrect volumes or volumes that have not been standardized to 60 °F.

(iii) Has expired, as provided in § 80.1428(c).

(iv) Was based on an incorrect equivalence value.

(v) Deemed invalid under § 80.1467(g).

(vi) Does not represent renewable fuel as defined in § 80.1401.

(vii) Was assigned an incorrect ''D'' code value under § 80.1426(f) for the associated volume of fuel.

(viii) [Reserved]

(ix) Was otherwise improperly generated.

(2) In the event that the same RIN is transferred to two or more parties, all such RINs are deemed invalid, unless EPA in its sole discretion determines that some portion of these RINs is valid.

(b) Except as provided in § 80.1473, the following provisions apply in the case of RINs that are invalid:

(1) Upon determination by any party that RINs owned are invalid, the party must keep copies and adjust its records, reports, and compliance calculations in which the invalid RINs were used. The party must retire the invalid RINs in the applicable RIN transaction reports under § 80.1451(c)(2) for the quarter in which the RINs were determined to be invalid.

(2) Invalid RINs cannot be used to achieve compliance with the Renewable Volume Obligations of an obligated party or exporter, regardless of the party's good faith belief that the RINs were valid at the time they were acquired.

(3) Any valid RINs remaining after invalid RINs are retired must first be applied to correct the transfer of invalid RINs to another party before applying the valid RINs to meet the party's Renewable Volume Obligations at the end of the compliance year.

(c) Notwithstanding paragraph (b) of this section, improperly generated RINs may be used for compliance provided that all of the following conditions and requirements are satisfied and the renewable fuel producer or importer who improperly generated the RINs demonstrates that the conditions and requirements are satisfied through the reporting and recordkeeping requirements set forth below, that:

(1) The number of RINs generated for a batch exceeds the number of RINs that should have been properly generated.

(2) The RINs were improperly generated as a result of a broken meter, an inadvertent temperature correction error, or an inadvertent administrative error.

(3) The renewable fuel producer or importer had in place at the time the RINs were improperly generated a quality assurance/quality control plan designed to ensure that process measuring equipment such as meters and temperature probes are properly maintained and to prevent inadvertent administrative errors.

(4) The renewable fuel producer or importer has taken any appropriate additional steps to prevent similar violations from occurring in the future.

(5) The improperly generated RINs have been transferred to another party.

(6) The renewable fuel producer or importer has not improperly generated RINs for the reasons described in paragraph (c)(2) of this section on more than five batches during any calendar year.

(7) All of the following remedial actions have been implemented within 30 days of the EMTS submission date of the improper RIN generation:

(i) The renewable fuel producer or importer retires an equal number of valid RINs with the same D Code and RIN year as the properly generated RINs, using an EMTS retire code of 110.

(ii) The renewable fuel producer or importer reports all the following information to EPA via EMTS, which EPA may make publicly available:

(A) Company name.

(B) Company ID.

(C) Facility name.