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

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RFS POWER COALITION, *et al.*,  
*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,  
*Respondent.*

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

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**INITIAL BRIEF FOR THE BIOFUELS PETITIONERS**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28, petitioners Growth Energy; the National Biodiesel Board; Producers of Renewables United for Integrity Truth and Transparency; Waste Management, Inc.; WM Renewable Energy, LLC; Iogen Corporation; and Iogen D3 Biofuels Partners II LLC, through undersigned counsel, hereby certify the following as to parties, rulings, and related proceedings in this case:

***Parties, Intervenors, and Amici*****A. Petitioners**

The National Biodiesel Board (No. 20-1107); Waste Management, Inc. and WM Renewable Energy, LLC (collectively, “Waste Management”) (No. 20-1109); Producers of Renewables United for Integrity Truth and Transparency (“Producers United”) (No. 20-1110); Iogen Corporation and Iogen D3 Biofuels Partners II LLC (collectively, “Iogen”) (No. 20-1111); Growth Energy (No. 20-1113).

American Fuel & Petrochemical Manufacturers (No. 20-1066); Valero Energy Corp. (No. 20-1073); American Petroleum Institute (No. 20-1103); 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; and Wyoming Refining Company (collectively, the “Small Refineries Coalition”) (No. 20-1106).

**B. Respondent**

U.S. Environmental Protection Agency.

**C. Intervenor**

National Biodiesel Board; Waste Management; Producers United; Iogen; Growth Energy; American Fuel & Petrochemical Manufacturers; American Petroleum Institute.

**D. Amici**

None.

***Rulings Under Review***

Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes, 85 Fed. Reg. 7016 (Feb. 6, 2020).

***Related Cases***

The agency action challenged in these consolidated cases has not been before this Court or any other court.

The same or similar issues to those presented in this brief have been presented in the following pending case: *Growth Energy et al. v. EPA*, No. 19-1023 (D.C. Cir.).

## CORPORATE DISCLOSURE STATEMENT

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

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

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

**Producers of Renewables for Integrity Truth and Transparency** is a coalition of companies that own and operate biomass-based diesel and ethanol production plants and participate in the Renewable Fuel Standard (“RFS”) program. Through those operations, they also own Renewable Identification Numbers (“RINs”). These companies have joined together to raise concerns with

EPA's recent handling of the small refinery exemptions, which has adversely affected RINs and the operation of the RFS program, and advocate for changes in EPA's handling of these exemptions. Producers United has no parent companies, and no publicly held company has a 10% or greater ownership interest. It has not issued shares or debt securities to the public. None of the members of Producers United have issued shares or debt securities to the public, except Renewable Energy Group, Inc.

**Waste Management, Inc.**, a Delaware corporation, is a leading provider of integrated waste management and environmental solutions services in North America, including the production of compressed and liquefied renewable natural gas from landfill biogas and the generation of cellulosic renewable identification numbers. Waste Management, Inc. is a holding company, and all operations are conducted by its wholly-owned and majority-owned subsidiaries. Waste Management, Inc. has no parent corporation, and no publicly held company has 10% or greater ownership in Waste Management, Inc.

**WM Renewable Energy, LLC**, a Delaware corporation, develops, operates, and promotes projects for the beneficial use of landfill gas as an alternative to the use of fossil fuels for the generation of energy. WM Renewable Energy, LLC's projects generate cellulosic renewable identification numbers or "D3 RINs." WM Renewable Energy, LLC is a wholly-owned subsidiary of WM Partnership

Holdings, Inc. WM Partnership Holdings, Inc. is a wholly-owned subsidiary of Waste Management Holdings, Inc., which is a wholly-owned subsidiary of Petitioner Waste Management, Inc. Other than WM Partnership Holdings, Inc., no publicly held company holds a 10% or greater interest in WM Renewable Energy, LLC.

**Iogen Corporation and Iogen D3 Biofuels Partners II LLC** are private companies engaged in the business of producing, distributing, and selling cellulosic biofuels and generating and selling renewable identification numbers (RINs). Iogen D3 Biofuels Partners II LLC is owned by Iogen Biofuel Holdings II LLC, which is owned by Iogen Biofuel Holdings II Corporation, which is owned by Salem Holdco Corporation, which is owned by Iogen Corporation, which is owned by Iogen Holdings Corporation. No publicly owned corporation owns 10% or more of the outstanding equity interests in any of the companies listed in this paragraph.

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## GLOSSARY

<i>ACE</i>	<i>Americans for Clean Energy v. EPA</i> , 864 F.3d 691 (D.C. Cir. 2017)
DEC	Declaration (included in the Addendum)
DHS	Department of Homeland Security
EPA	U.S. Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FCC	Federal Communications Commission
JA	Joint Appendix
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number

## JURISDICTION

This case challenges final EPA action under the Clean Air Act, entitled *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes*, 85 Fed. Reg. 7016 (Feb. 6, 2020) (JA1-JATK). The consolidated petitions of the biofuels petitioners were timely. This Court has jurisdiction under 42 U.S.C. §7607(b)(1).

## STATEMENT OF ISSUES

1. Whether EPA erred setting the 2020 renewable fuel standards without accounting for small refinery exemptions issued for prior years that EPA had not previously accounted for in setting prior renewable fuel standards.
2. Whether EPA's failure to include in the "projected volume available during" 2020, 42 U.S.C. §7545(o)(7)(D)(i), carryover cellulosic Renewable Identification Numbers generated in the prior year was contrary to the statute, unreasonable, arbitrary or capricious, or otherwise not in accordance with law.
3. Whether EPA's decision to require producers to maintain records of every location where third-party aggregators collect separated food waste despite producers' inability to obtain that information was arbitrary and not a logical outgrowth of the proposed rule.

## STATUTE

The relevant statute appears in the Addendum.

## STATEMENT OF THE CASE

### A. The Renewable Fuel Standard Program

“Congress intended the Renewable Fuel [Standard (‘RFS’)] Program to be a ‘market forcing policy’ that would create ‘demand pressure to increase consumption’ of renewable fuel.” *American Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 568 (D.C. Cir. 2019) (per curiam) (quoting *Americans for Clean Energy v. EPA* (“ACE”), 864 F.3d 691, 705 (D.C. Cir. 2017)), *cert. denied sub nom. Valero Energy Corp. v. EPA*, 140 S. Ct. 2792 (2020). The program’s core is the statutorily specified “‘applicable volume[s]’—mandatory and annually increasing quantities of renewable fuels that must be ‘introduced into commerce in the United States’ each year” (or “used,” for convenience). *Id.*<sup>1</sup>

EPA’s overarching “‘statutory mandate’” “each year[]” is “to ‘ensure[]’ that those [volume] requirements are met.” *ACE*, 864 F.3d at 698-699 (quoting §7545(o)(3)(B)(i)). EPA “fulfills that mandate by translating the annual volume requirements into ‘percentage standards,’” which “represent the percentage of transportation fuel introduced into commerce that must consist of renewable fuel.”

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<sup>1</sup> The volume requirements address four “nested” categories of renewable fuel: “[1] cellulosic biofuel and [2] biomass-based diesel are kinds of [3] advanced biofuel, and advanced biofuel in turn is a kind of renewable fuel that may be credited toward [4] the total renewable fuel obligation.” *ACE*, 864 F.3d at 697-698; *see* §7545(o)(2)(B)(i)(I)-(IV). Corn starch ethanol counts only toward the total volume requirement. *See* §7545(o)(1)(F).

*Id.* at 699; *see also* §7545(o)(3)(B). “Each obligated party”—refiners and importers of transportation fuel—must ensure that at least the specified percentage of the transportation fuel it uses is renewable fuel. *Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 637 (D.C. Cir. 2019), *cert. denied sub nom. Valero Energy Corp. v. EPA*, 140 S. Ct. 2792 (2020). “If each obligated party meets the required percentage standards, then the Nation’s overall supply of ... renewable fuel will meet the total volume requirements set by EPA.” *ACE*, 864 F.3d at 699; *see also Alon*, 936 F.3d at 637; *Renewable Fuels Ass’n v. EPA*, 948 F.3d 1206, 1222 (10th Cir. 2020), *cert. granted sub nom. HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Ass’n*, No. 20-472 (U.S. Jan. 8, 2021).

EPA also “establish[ed] a ‘credit program’ through which obligated parties can acquire and trade credits and thereby comply with” their volume obligations. *ACE*, 864 F.3d at 699. These credits—called Renewable Identification Numbers (“RINs”)—are “retired” when used to show compliance. *Id.* If not retired, RINs can be carried over to meet the following year’s obligations; the aggregation of “carryover” RINs is colloquially called the RIN bank. *Id.*

Congress also afforded EPA a set of “waiver” authorities, which “allow[] EPA to reduce the statutory volume requirements,” *ACE*, 864 F.3d at 698, but “only in limited circumstances,” *National Petrochemical & Refiners Ass’n v. EPA*, 630 F.3d 145, 149 (D.C. Cir. 2010); *see* §7545(o)(7)(A)-(E). One is the cellulosic



waiver, which has both mandatory and discretionary components. If EPA determines that the “projected volume of cellulosic biofuel production” in the upcoming compliance year will be less than the statutorily specified volume, EPA “shall reduce” the cellulosic biofuel statutory volume to the “projected volume available”—the mandatory cellulosic waiver. §7545(o)(7)(D)(i). If that happens, EPA “may also reduce the applicable volume of renewable fuel and advanced biofuels ... by the same or a lesser volume”—the discretionary cellulosic waiver. *Id.* If EPA exercises its mandatory cellulosic waiver authority, it also must make certain “credits”—known as cellulosic waiver credits—available for sale at prescribed prices tied to the wholesale price of gasoline. §7545(o)(7)(D)(ii). Obligated parties may purchase cellulosic waiver credits from EPA and use them to fulfill their cellulosic volume obligations (though not their advanced or total renewable obligations). 40 C.F.R. §80.1456(b).

Separately, EPA may issue a “general” waiver of any nationwide volume requirement if it determines that (1) “implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States” or (2) “there is an inadequate domestic supply” of renewable fuel. §7545(o)(7)(A).

Congress allowed “small refineries” to be “exempt[ed]” from their RFS obligations under certain conditions. *See* §7545(o)(9); §7545(o)(1)(K). First,

Congress provided a blanket “[t]emporary exemption” for all small refineries through 2010. §7545(o)(9)(A)(i). Congress then directed EPA to “extend the exemption” for two years for any small refineries that the Department of Energy determined “would be subject to a disproportionate economic hardship if required to comply.” §7545(o)(9)(A)(ii)(II). Finally, and most important here, Congress authorized EPA to grant individual refineries’ petitions for “an extension of the exemption” if they showed that RFS compliance would cause them “disproportionate economic hardship.” §7545(o)(9)(B)(i).<sup>2</sup>

In setting the standards for all years before 2020, EPA accounted only for exemptions that (1) applied to the year for which it was setting standards *and* (2) had already been granted by the time the standards were set. JATK[85.FR.7049]. Thus, for example, in setting the standards for 2018, EPA would have adjusted the standards to account for the exemptions granted for 2018 before November 30,

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<sup>2</sup> For convenience, petitioners use the phrase “grant an exemption” to refer to EPA’s decision to grant a petition to “extend” an exemption. Petitioners maintain that EPA may only grant an “extension,” and, thus, many decisions granting exemption petitions have been unlawful. *See, e.g.*, JATK[EPA-HQ-OAR-2018-0167-1292.at.9-12]; JATK[EPA-HQ-OAR-2018-0167-0665.at.11-12]; JATK[EPA-HQ-OAR-2019-0136-0325.at.6-8]. In particular, an extension may be granted only to a refinery that has been previously exempt for all prior years of the RFS program. That issue is not presented in this case but is pending elsewhere. *See Renewable Fuels Ass’n v. EPA*, 948 F.3d 1206, 1245 (10th Cir. 2020), *cert. granted sub nom. HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Ass’n*, No. 20-472 (U.S. Jan. 8, 2021); *Renewable Fuels Ass’n v. EPA*, No. 19-1220 (D.C. Cir.).

2017—except there were none. JATK[82.FR.58523, 58527]. Indeed, all but four exemptions since 2013 have been granted “retroactively”—that is, *after* the year’s percentage standards were final. *See* JATK[78.FR.49798] (accounting for one exemption in 2013); JATK[80.FR.77511] (accounting for three exemptions in 2014).

Failing to adjust the standards to account for these “belated” exemptions created a “shortfall” in renewable-fuel use. *American Fuel*, 937 F.3d at 571. This shortfall had a minimal effect on the volume requirements in the RFS program’s initial years, but beginning with the 2016 compliance year, the volume of exemptions—all of which have been granted retroactively—ballooned: they were worth 790 million RINs for 2016, 1.82 billion for 2017, and 1.43 billion for 2018, accounting for 4% (2016), 9% (2017), and 7% (2018) of the total volume requirements in those years. JATK[EPA-HQ-OAR-2019-0136-0312.at.3-4].<sup>3</sup>

## **B. The 2020 RFS Rule**

In the 2020 RFS Rule, EPA adjusted its approach to account for *retroactive* exemptions, but *only* for the retroactive exemptions EPA projected to be granted

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<sup>3</sup> Because EPA grants the exemptions through closed-door adjudications, it was not until 2018 that the public became aware of EPA’s significant expansion of the volume of exemptions. Until recently, the volume of these decisions was known only to EPA and the exempt refineries. In 2018, the media reported the expansion of the exemptions, and, later that year, EPA began releasing periodically the aggregate amount of exemptions.

for 2020. One of the variables in the equation EPA uses to compute the percentage standards is its “project[ion]” of the volume of transportation fuel “to be sold or introduced into commerce in the United States” in the coming year. §7545(o)(3). In the 2020 Rule, EPA redefined that variable to “account for a projection of the total exempted volume of gasoline and diesel produced at small refineries, *including for those exemptions granted after the final annual rule,*” i.e., to account for the exemptions *for the year whose standards are being set*, whether granted before or after those standards were finalized. JATK[85.FR.7049] (amending 40 C.F.R. §80.1405(c)) (emphasis added). But EPA again refused to account for any retroactive exemptions it had granted for past years.

JATK[Response.to.Comments.at.172]; *see* JATK[84.FR.57679].

EPA also used a mandatory cellulosic waiver to reduce the cellulosic standard by 9.91 billion gallons, to 590 million gallons. In projecting cellulosic biofuel production, EPA did not count the more than 50 million gallons of cellulosic biofuel available for compliance in the carryover RIN bank.

JATK[85.FR.7022]; JATK[EPA-HQ-OAR-2019-0136-2052.at.5]. Nor did EPA consider the availability of cellulosic waiver credits. *Id.* It then used a maximum discretionary cellulosic waiver to reduce the advanced and total standards by 9.91 billion gallons each, to 5.09 billion gallons and 20.09 billion gallons, respectively. JATK[85.FR.7018]. EPA declined to use a general waiver based on severe

economic or environmental harm to further reduce these volumes.

JATK[85.FR.7041].

The 2020 rule also modified recordkeeping requirements for producers who generate renewable fuels from separated food waste (like used cooking oil). Such producers must maintain records demonstrating that their feedstocks are renewable biomass. *See* §80.1454(c)-(d); *see also* §80.1450(b)(1)(vii)(B). Producers typically meet that recordkeeping requirement by maintaining information about the third-party aggregators who collect small volumes of food waste from numerous restaurants and other establishments. §80.1454(j).

Without warning, EPA declared that such producers now must maintain records “demonstrating the location of any establishment from which the waste stream is collected.” JATK[85.FR.7062]. EPA specified that recording an aggregator’s location is insufficient—producers must record the location of each source of separated food waste they convert into renewable fuel. *Id.* EPA provided no explanation for this change.

## SUMMARY OF ARGUMENT

I. EPA erred in refusing to adjust the 2020 standards to account for past years’ retroactive small-refinery exemptions. EPA is statutorily obligated to set annual RFS standards that “ensure” that the required volumes of renewable fuel are used. As EPA now recognizes, retroactive exemptions result in a renewable-fuel

shortfall, and EPA therefore fails to fulfill its “ensure” duty if it does not account for retroactive exemptions when setting annual standards. Although EPA adjusted the 2020 standards to account for the retroactive exemptions it projected to be granted for 2020, EPA refused to account for retroactive exemptions granted for past years, which have never been accounted for in any annual standards.

By refusing to adjust the 2020 standards to account for the past retroactive exemptions, EPA violated its “ensure” duty. It also acted arbitrarily and capriciously by setting standards that it knew—based on the evidence before it—could not require obligated parties to use the specified amount of renewable fuel. Moreover, EPA’s refusal to account for past retroactive exemptions in effect rewrote the statute to arrogate to EPA a new, non-textual *waiver* authority. The magnitude of the unaccounted-for past retroactive exemptions is so large that EPA’s refusal set the RFS program back several years, undermining Congress’s objective that the program require increasing amounts of renewable fuel be introduced into the transportation-fuel supply each year.

II. EPA exceeded its authority and acted in an arbitrary and capricious manner by failing to include carryover cellulosic RINs in its projection of the volume of cellulosic biofuel “available” for compliance in 2020. When EPA’s cellulosic waiver authority is triggered, EPA must “reduce the applicable volume of cellulosic biofuel” set in the statute “to the projected volume available during

that calendar year.” §7545(o)(7)(D)(i). This mandate unambiguously requires EPA to include *all* volumes “available” for compliance, including volumes produced in the prior year and available for compliance as carryover RINs. EPA’s interpretation of “projected volume *available*” in 2020 to refer only to volumes *produced* that year is unreasonable because EPA has consistently acknowledged that the relevant inquiry is what volumes are available for compliance, which undoubtedly includes carryover RINs. And EPA’s decision to adopt this interpretation, which undermines congressional intent by creating a growing oversupply of cellulosic RINs, was arbitrary and capricious.

III. EPA’s decision to require producers to maintain records of every location where third-party aggregators collect separated food waste was arbitrary because it ignored an important aspect of the problem—producers cannot obtain that information because aggregators treat it as confidential. EPA also failed to consider producers’ reliance interests, and it was not a “logical outgrowth” of the proposed rule.

## STANDING

The biofuels petitioners have standing. They are companies or organizations of companies whose members produce renewable fuel under the RFS program—including ethanol, biomass-based diesel, and cellulosic biofuels—and generate or own RINs. JATK[EPA-HQ-OAR-2019-0136-0312.at.1]; JA[EPA-HQ-OAR-

2019-0136-0325.at.1-6]; JATK[EPA-HQ-OAR-2019-0136-2041.at.1-4]; JATK[EPA-HQ-OAR-2019-0136-0291.at.1-4]; JATK[EPA-HQ-OAR-2019-0136-0539.at.1-4]; JATK[EPA-HQ-OAR-2019-0136-0319.1-2]; JATK[EPA-HQ-OAR-2019-0136-0277.3]; DEC1-DEC7 (attached). EPA acknowledges that “[e]ntities potentially affected by this final rule are those involved with the production ... of ... renewable fuels,” JATK[85.FR.7016], and that “it could be favorable to biofuel producers for [EPA] to” count “carryover RINs as a basis to maintain the statutory volume targets,” JATK[RTC.at.26]; *see also* JATK[RTC.at.48]. Moreover, the 2020 volume requirements “directly regulate biofuel producers.” *American Fuel*, 937 F.3d at 595. Consequently, petitioners’ standing is “self-evident.” *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733-734 (D.C. Cir. 2003); *see Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (“petitioner’s standing to seek review of administrative action is self-evident ... if the complainant is ‘an object of the action ... at issue’”).

Indeed, petitioners argue that EPA unlawfully set the 2020 volume requirements too low, by failing to account for past small refinery exemptions or the availability of cellulosic carryover RINs. Those failures depressed the demand in 2020 for the renewable fuel produced by petitioners’ members, causing them a concrete and particularized injury. Correcting EPA’s errors in setting the 2020 volume requirements would redress these injuries. And as companies and



organizations dedicated to promoting the production and use of renewable fuels, petitioners are proper parties to act on behalf of themselves or their members.

*Sierra Club*, 292 F.3d at 898. The standing of organizations representing the interests of producers challenging EPA's RFS actions is rarely questioned and routinely found. *See, e.g., Alon*, 936 F.3d at 664-665; *National Biodiesel Board v. EPA*, 843 F.3d 1010, 1015 (D.C. Cir. 2016); *see also American Fuel*, 937 F.3d 559; *ACE*, 864 F.3d 691.

### STANDARD OF REVIEW

The Court “may reverse the EPA’s actions under the [RFS] Program if [it] find[s] them to be ‘arbitrary, capricious, [or] an abuse of discretion.’” *American Fuel*, 937 F.3d at 574 (quoting §7607(d)(9)(A)). To survive under this standard, EPA must have “consider[ed] all of the relevant factors and demonstrate[d] a reasonable connection between the facts on the record and the resulting policy choice.” *Id.* The Court “also may reverse an EPA action under the Program if [it] determine[s] that it is ‘otherwise not in accordance with law’ or ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.’” *Id.* (quoting §7607(d)(9)(A), (C)). “The court reviews the EPA’s interpretation of the Clean Air Act under the familiar two-step [*Chevron*] framework.” *Id.*

## ARGUMENT

### **I. EPA ERRED IN REFUSING TO ADJUST THE 2020 STANDARDS TO ACCOUNT FOR PAST RETROACTIVE EXEMPTIONS**

EPA refused to adjust the 2020 standards to account for the retroactive exemptions granted for prior years. As a result, EPA violated its statutory duty to set RFS standards that will “ensure” that the volume requirements are met. EPA’s action was also arbitrary and capricious because it reflected a failure to address an important issue—how the 2020 standards would be affected by past retroactive exemptions—or to rationally connect the 2020 standards to the evidence before it. EPA’s refusal also converted the *exemptions* into a *waiver*, contrary to the statute. So voluminous are the past retroactive exemptions that EPA’s refusal to account for them undermined Congress’s intent that the RFS standards force the market to use increasing amounts of renewable fuel annually. Should EPA argue that this challenge is time barred or outside the rulemaking, its objections would be meritless.

#### **A. EPA Violated Its Statutory Duty to Set Standards That “Ensure” That the Required Volumes Are Met**

“After EPA determines the volume requirements for the various categories of renewable fuel” by considering whether any statutory waivers are appropriate, “it has a ‘statutory mandate’ to ‘ensure[]’ that those requirements are met” by setting percentage standards that will achieve those volumes. *ACE*, 864 F.3d at

698-699 (quoting §7545(o)(3)(B)(i)). EPA violated this duty by refusing to adjust the 2020 standards to account for past retroactive exemptions.

1. If EPA does not “adjust renewable fuel obligations to account for exemptions,” it creates a “renewable-fuel shortfall,” “imped[ing] attainment of overall applicable volumes.” *American Fuel*, 937 F.3d at 571, 588. Recognizing that fact, EPA “raises the percentage standard” for a given year to account for the exemptions “that were granted ... before [it] established the percentage standard for that year.” *Id.* at 588. That solution, however, is “only partial” because it does “not ... account for small refinery exemptions granted *after* [EPA] promulgates percentage standards for that year—so-called retroactive exemptions.” *Id.*

In the 2020 Rule, EPA finally recognized that to fulfill its “ensure” duty, it must also adjust the standards to account for *retroactive* exemptions—but it did so only with respect to the retroactive exemptions it projected it would grant for 2020. JATK[85.FR.7049]. EPA correctly explained that “should [it] grant [exemptions] without accounting for them in the percentage formula, those exemptions would effectively reduce the volumes of renewable fuel required by the RFS program, potentially impacting renewable fuel use in the U.S.” JATK[85.FR.7050]. Raising the standards to account for projected retroactive exemptions, EPA declared, has “the effect of ensuring that the required volumes of renewable fuel are met.” *Id.*

That is only partially true because granting retroactive exemptions in *past* years without accounting for them in any annual volume standards *also*—as EPA acknowledged—“effectively reduced the required volume of renewable fuel for th[ose] year[s].” JATK[85.FR.7050]. Thus, the sound premises of EPA’s analysis implied more remediation: they required EPA to *also* adjust the 2020 standards to account for *past* retroactive exemptions. EPA’s refusal to do that violated its “ensure” duty.<sup>4</sup>

2. EPA is not relieved of that duty just because the compliance years for which those prior retroactive exemptions were granted are past; their depressive effect on the RFS program’s volume requirements continued in 2020.

Because EPA did not account for past retroactive exemptions granted when it set the standards for those years, those exemptions freed up RINs corresponding to the exemption volumes for compliance in a future year. By “effectively reduc[ing]” the volume of renewable fuel that obligated parties were required to use in the covered years, the past retroactive exemptions provided obligated parties with a RIN windfall—RINs that should have been needed to meet the required volumes but, because of the retroactive exemptions, were not. Using the

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<sup>4</sup> Had EPA accounted for past retroactive exemptions in setting the 2020 standards, its new practice of accounting for projected (i.e., *future*) retroactive exemptions would likely eliminate the need to account for *past* retroactive exemptions again in future annual standard settings.

mechanism of the RIN bank, obligated parties carried their RIN windfall forward for compliance in a future year, in effect transferring the renewable-fuel shortfall caused by the retroactive exemptions to a later year. By disregarding the shortfall from past retroactive exemptions that was embedded in the RIN bank, EPA set standards that could not “ensure” that the market would use the required amount of renewable fuel in 2020.

This conclusion follows from how carryover (or banked) RINs and RFS compliance work. As EPA recognized when it set the 2020 standards (and many times before), obligated parties would *necessarily* use *all* available carryover RINs to comply with their 2020 RFS obligations because any unused carryover RINs would expire and become worthless. JATK[85.FR.7021] n.15; *see also* JA[77.FR.70759, 70775] (“[T]he availability of rollover RINs can significantly affect the potential impact of implementation of the RFS volume requirements.”). To meet their RFS obligations, obligated parties first apply their carryover RINs to their fullest extent and then use renewable fuel produced in the compliance year until they meet their volume obligation. Thus, the *effective* volume requirement—the amount of renewable fuel that the standards actually *require* obligated parties to use—is the nominal volume requirement *minus* the available carryover RINs, i.e., minus the RIN bank. If and to the extent that obligated parties use more than the effective volume requirement, that is only because of purely voluntary

decisions, not because the standards actually required them to do so—and the RINs from such additional use are banked for the next year. JATK[85.FR.7021] n.15. That the bank appears to maintain a “balance” from one year to the next thus is a fiction, concealing the reality that the bank is *regenerated*—often enabled by the carryover RINs from the prior year. *See id.*<sup>5</sup>

So, to the extent the RIN bank contains RINs because of unaccounted-for past retroactive exemptions, the standards will not force the market to use the required renewable fuel. And accordingly, to the extent EPA set the 2020 standards without accounting for such RINs, EPA set standards that *could not* “ensure” that the required volumes of renewable fuel would be met. *See National Petrochemical*, 630 F.3d at 153 (“ensure” means “make sure, [or] certain”).

When EPA set the 2020 standards, there were 3.48 billion carryover RINs in the bank available for compliance. JATK[85.FR.7021].<sup>6</sup> Consequently, when

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<sup>5</sup> For example: If the volume requirement is 10 billion and there are 1 billion carryover RINs before compliance is due (i.e., from the prior year), obligated parties will apply the 1 billion carryover RINs and use an additional 9 billion gallons of renewable fuel to meet their obligation. Any renewable fuel they use above that amount reflects only obligated parties’ election to use more renewable fuel than necessary to comply with EPA’s standards.

<sup>6</sup> Although those RINs were carried over from 2018 and would be used for compliance with the 2019 standards, EPA expected that “the carryover RIN bank will not significantly change” for 2020. JATK[EPA-HQ-OAR-2019-0136-2052.at.1].

EPA set the 2020 standards, the effective volume requirement it was setting was not 20.09 billion gallons, but 16.61 billion gallons. Most if not all of the 3.48 billion RINs in the bank, and thus most if not all of the reduction in the effective volume requirement for 2020, stemmed from past retroactive exemptions. For example, in just the second half of 2019, the RIN bank increased by 1.29 billion RINs, and EPA stated that that increase was “primarily” the result of retroactive exemptions for the prior year granted during those six months.

JATK[85.FR.7021]. And more broadly, as the volume of exemptions grew over the years immediately preceding the 2020 rulemaking (790 million RINs for 2016, 1.82 billion for 2017, 1.43 billion for 2018), the size of the RIN bank grew as well (from 1.6 billion to 2.5 billion to 3.0 billion to 3.48 billion). JATK[EPA-HQ-OAR-2019-0136-0312.at.3, 6-7]. The retroactive exemptions for 2016 to 2018 were worth the equivalent of 4.04 billion RINs—more than the size of the bank itself—and none of those exemptions have ever been accounted for through adjustments to RFS standards.

In sum, insofar as the RINs associated with past retroactive exemptions were banked, they created a shortfall in the volume of renewable fuel that the 2020 standards would require be used and thus undermined the 2020 standards’ ability to ensure that the required volumes would be met. Because of those exemptions, the effective total volume requirement for 2020 of 16.61 billion gallons was

roughly the amount of renewable fuel actually used in 2013 (16.92 billion gallons), 2014 (16.31 billion gallons), and 2015 (17.00 billion gallons). *See* JATK[EPA-HQ-OAR-2018-0167-1298.at.7]. Thus, EPA’s refusal to account for past retroactive exemptions set the RFS program back almost to Square One, nullifying its intended power to “force the market to create ways to produce and use greater and greater volumes of renewable fuel each year.” *ACE*, 864 F.3d at 710.

**B. EPA Acted Arbitrarily and Capriciously**

EPA’s refusal to account for past retroactive exemptions in setting the 2020 RFS standards was arbitrary and capricious, rather than the product of reasoned decisionmaking. In setting the standards, EPA had to “consider [all] important aspect[s] of the problem” and “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted). EPA failed to do so.

1. As explained above, when EPA set the 2020 standards, EPA knew it had a duty to set standards that would ensure that the required volumes of renewable fuel would be used, and it knew—or at least should have known given its experience with the RFS program and the data it had regarding the volume of past retroactive exemptions and the size of the RIN bank—that if it did not adjust



the standards to account for those past retroactive exemptions, the 2020 standards would not ensure that the required volume of renewable fuel would be used and the inflated supply of carryover RINs would create disincentives for new production. EPA thus blinded itself to a critical problem with the 2020 standards it was setting, and set standards that could not rationally be justified by the evidence before it. That is arbitrary and capricious.

The biofuel petitioners acknowledge that uncertainty, and thus imperfection, may be inherent elements of setting RFS standards: *See* JATK[Response.to.Comments.175] (“All projections contain inherent uncertainty, including the projections mandated by Congress to implement the RFS program.”). EPA’s task is to set standards that, based on its “project[ion]” of the volume of transportation fuel, §7545(o)(3), are designed to cause the market to use (at least) the statutorily specified volume of renewable fuel (reduced by any valid waivers). *See supra* pp.2-4. But by intentionally disregarding the lingering depressive effect of past retroactive exemptions, EPA consciously set standards for 2020 that, even if its projection of transportation-fuel use proved 100% accurate, could *not* require the market to use the specified amount of renewable fuel.

2. Moreover, EPA should have known it had the tools to make the necessary adjustment. On several prior occasions, EPA has acknowledged at least two available options for accounting for past retroactive exemptions. First, EPA

could have applied a lesser discretionary cellulosic waiver to the advanced and total volume requirements. *See, e.g.*, JA[EPA-HQ-OAR-2018-0167-1292.at.22]. EPA has admitted that power. JATK[D.C.Cir.Case.No.19-1023.ECF#1823451.66-67].

Second, EPA could have increased the nominal 2020 volume requirements. For example, after failing to issue the 2009 biomass-based diesel standard on schedule, EPA “combined” the 2009 and 2010 volumes “into a single requirement” to “ensure that ... two year[s]’ worth of [biofuel] will be used.” JATK[75.FR.at.14,718]. This Court upheld that approach, concluding that “EPA had clear albeit implicit [statutory] authority ... to apply both the 2009 and 2010 volume requirements in the 2010 calendar year in order to achieve the statutory purpose,” and that the combined requirement “best ... carr[ied] out Congress’ mandate that [EPA] ‘ensure’ the applicable volume requirement for 2009 is met.” *National Petrochemical*, 630 F.3d at 163, 166; *see id.* at 153 n.23, 155-156, 158. Indeed, the Court declared that *not* requiring that the 2009 volume be “eventually” used would have been “‘flatly contrary to Congress’ intent and would turn agency delay into a windfall for the regulated entities.’” *Id.* at 156-157; *see also Monroe Energy, LLC v. EPA*, 750 F.3d 909, 916, 919-921 (D.C. Cir. 2014). Similarly, EPA could have combined the required 2020 volumes with appropriate volumes reflecting past retroactive exemptions when setting the 2020 standards.

EPA's categorical disregard of these options rendered its 2020 RFS standards arbitrary and capricious.

**C. EPA Impermissibly Created for Itself a Non-textual Waiver Power**

By refusing to adjust the 2020 standards to account for past retroactive exemptions, EPA also impermissibly converted the exemptions into waivers, contrary to the statute's text. As discussed, the effect of the unaccounted-for retroactive exemptions was to reduce the nationwide volume requirement, but Congress authorized EPA to reduce that requirement only through a duly issued "waiver."

Congress expressly granted EPA the power to "reduce" nationwide volume requirements, but labeled those powers "waiver," §7545(o)(7), (8)(D), and permitted EPA to use them "only" in the "limited circumstances" specified in the statute, *National Petrochemical*, 630 F.3d at 149, such as where "implementation of the [statutory volume] requirement would severely harm the economy ... of a State, a region, or the United States," §7545(o)(7)(A). In contrast, the "exemption" provision—as Congress labeled it—does not say that EPA may "reduce" the volume requirements, but rather authorizes EPA to determine merely that the compliance obligation "shall not apply to" a specific refinery because of a different special circumstance, namely, that compliance would cause the refinery "disproportionate economic hardship." §7545(o)(9)(A)(i), (B)(i).

“[T]he usual rule [is] that when the legislature uses certain language in one part of the statute and different language in another”—here, *exemption* rather than *waiver*—courts and agencies must “assume[] different meanings were intended,” *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011), and there is no reason to depart from that rule here. Indeed, as EPA has acknowledged, exemption petitions “are held to a different standard”—“economic hardship”—“than a waiver under severe economic harm.” JATK[Response.to.Comments.14]. Congress would not have “established the severe-harm waiver standard only to allow waiver” under the small-refinery exemption provision “based on lesser degrees of economic harm.” *ACE*, 864 F.3d at 712 (quotation marks omitted); *see also* §7545(o)(7)(A). EPA has no authority to rewrite the statute to convert its “exemption” power into a new “waiver” power. *See, e.g., Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 721 (D.C. Cir. 2016); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995).

**D. This Issue Is Properly Before the Court**

1. EPA may argue that petitioners’ challenge is time-barred because EPA already rejected a request to account for past retroactive exemptions during the 2012 rulemaking. *See* JATK[77.FR.1340]. That argument would fail for multiple reasons.

First, the context in 2019, when EPA set the 2020 standards, was very different from the context in 2012. Back then, “EPA did not expect significant exempted volumes” and there had been at most only three retroactive exemptions, JATK[RTC.at.172], whereas EPA has relieved obligated parties of the duty to use 4.04 billion of gallons of renewable fuel just in the past few years, negating the RFS program’s market-forcing purpose. *See supra* pp.18-19. Whether disregarding past exemptions was a reasonable approach in 2012 “is not the same as” whether that approach *remains* reasonable under the extraordinarily different circumstances surrounding the 2020 standards. *American Petroleum Institute v. EPA*, 706 F.3d 474, 477 (D.C. Cir. 2013) (no time bar to challenging previously used approach in light of changed circumstances); *see also Sierra Club v. EPA*, 705 F.3d 458, 467 (D.C. Cir. 2013) (same).

Second, any time-bar argument fails because the legal duties that EPA violated here—to set standards that “ensure” that the required volumes are met, to engage in reasoned decisionmaking, and to not contradict the statute—applied independently when EPA set RFS standards for 2020. EPA may never act arbitrarily and capriciously or contrary to a statute. §7607(d)(9). And its “ensure” duty must be performed “each ... year[],” i.e., each time it sets RFS annual standards. §7454(o)(3)(B)(i). EPA’s failure to comply with these freshly

applicable duties in 2020 is not insulated from review merely because that failure flowed from an old policy.

Two of this Court's recent RFS decisions confirm as much. *Alon* held that a challenge to EPA's 2010 point-of-obligation rule was time-barred, but then held that the time bar did *not* preclude a challenge the 2017 RFS standards based on the claim that the statute required EPA to "reassess" the point of obligation "each year." 936 F.3d at 653-654. And *American Fuel* held that a challenge to EPA's RIN policy for exported fuel was time-barred, but distinguished that challenge from a challenge to the *annual standards* premised on that same RIN policy, stating: The petitioners had "not explained how a change in the ... policy ... would have required the agency also to change its proposed applicable volumes and percentage standards." 937 F.3d at 587. Here, petitioners *do* explain how a change in EPA's policy toward past retroactive exemptions would require a change in the standards EPA set for 2020.

2. EPA might also argue that it defined this issue outside the 2020 rulemaking. *See* JATK[84.FR.57679]. But again, because of EPA's refusal to account for past retroactive exemptions, the RFS standards that EPA set for 2020 are substantively invalid. Placing past retroactive exemptions outside the rulemaking is therefore tantamount to placing EPA's compliance with its legal duties outside the rulemaking. EPA has no discretion to do that. *See Marketing*

*Assistance Program, Inc. v. Bergland*, 562 F.2d 1305, 1307 (D.C. Cir. 1977); *see also State Farm*, 463 U.S. at 43.

## **II. EPA ERRED IN FAILING TO INCLUDE CARRYOVER CELLULOSIC RINS IN THE VOLUME OF CELLULOSIC BIOFUEL “AVAILABLE” FOR COMPLIANCE IN 2020<sup>7</sup>**

As a separate issue, EPA projected 2020 cellulosic biofuel production to be less than the “minimum applicable volume” specified in the statute, triggering the mandatory cellulosic waiver under §7545(o)(7)(D)(i). When that waiver is triggered, EPA “shall reduce the applicable volume of cellulosic biofuel” set forth in the volumetric table “to the projected volume available during that calendar year.” §7545(o)(7)(D)(i). EPA erred in making that adjustment for 2020. By its plain meaning, the “volume available during [2020]” encompasses *all* of the volume of cellulosic biofuel available to obligated parties for RFS compliance in 2020, including volumes produced in 2020 *and* volumes produced in 2019 that are available for compliance in 2020 through the mechanism of carryover RINs. In the final 2020 rule, however, EPA decided to exclude 2019 carryover RINs from the “volume available during [2020],” undercounting the available volume of cellulosic biofuel by over 50 million gallons. EPA’s interpretation and resulting

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<sup>7</sup> Only Growth Energy, Waste Management, and Iogen present this issue.

undercount contravenes the statute at *Chevron* step one, is unreasonable at *Chevron* step two, and is arbitrary and capricious.

**A. “Projected Volume Available” Unambiguously Includes All Volumes That Are “Available” for Compliance, Whether Generated in the Current or Prior Year**

The statutory text, structure, and purpose unambiguously require EPA to include in the (adjusted) applicable volume of cellulosic biofuel *all* volumes “available” for compliance, including volumes produced in 2019 and available for compliance in 2020 as carryover RINs.

Starting with the text, the mandatory cellulosic waiver provision provides:

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), ... [EPA] shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the *projected volume available* during that calendar year.

§7545(o)(7)(D)(i) (emphasis added). By its plain meaning, the term “projected volume available during [a] calendar year” means *all* cellulosic volume obligated parties may use to comply with their RFS obligations. The ordinary meaning of “available” denotes something capable of being used by a particular person for a particular purpose. *See English v. Trump*, 279 F. Supp. 3d 307, 322 (D.D.C. 2018). Here, the projected volume “available” must mean the volume available to *obligated parties* for the purpose of *RFS compliance*. Indeed, EPA itself acknowledged that whether particular volumes are part of the “projected volume



available” depends on whether they are “available to obligated parties for compliance.” JATK[85.FR.at.7024] n.28. And as this Court noted in construing the general waiver provision, “it is the *refiners, blenders, and importers*”—*i.e.*, obligated parties—“who must have access to an adequate supply of renewable fuel in order to meet the ... Program’s statutory volume requirements.” *ACE*, 864 F.3d at 708 (quotation marks omitted). That is “the only reasonable interpretation”; the statute is “[n]o[t] ... ambiguous.” *Id.*

As explained, “[o]bligated parties (refiners and importers) comply with their renewable fuel obligations by accumulating or purchasing the requisite number of RINs.” *ACE*, 864 F.3d at 699. RINs are generated for every physical gallon (or renewable natural gas equivalent) of renewable fuel produced in or imported into the United States. *See id.*; §80.1426. By statute, RINs “shall be valid to show compliance for the 12 months as of the date of generation”—*i.e.*, in two calendar years. §7545(o)(5)(C). And by regulation, “a RIN is valid for compliance during the calendar year in which it was generated [*i.e.*, current year RINs], or the following calendar year,” *i.e.*, carryover RINs. §80.1428(c). EPA has described carryover RINs as “a valid compliance mechanism” whose “availability” is an “important factor” in EPA’s administration of the RFS. JA[80.FR.at.77,484-85] & n.153. In this rulemaking, EPA described carryover RINs as “available for compliance” and “available to satisfy the 2020 standards.” JATK[EPA-HQ-OAR-

2019-0136-2052.at.4]; JATK[EPA-HQ-OAR-2019-0136-0003.at.4]; *see* JATK[85.FR.at.7024] n.28 (similar). This Court, too, has described carryover RINs as “available for compliance.” *Monroe*, 750 F.3d at 918; *see American Fuel*, 937 F.3d at 582 (similar).

The statutory structure reinforces that the “volume available” includes cellulosic volumes reflected in carryover RINs. “Where Congress uses certain language in one part of a statute and different language in another, it is presumed that Congress acts intentionally,” *National Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012)—“especially” where different words “are used in the same sentence,” *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 12 (D.C. Cir. 2011) (quotation marks omitted). Here, the first sentence of the mandatory cellulosic waiver provision uses three volumetric terms— “applicable volume,” “volume of cellulosic biofuel production,” and “volume available.” §7545(o)(7)(D)(i). “[A]pplicable volume” undisputedly refers to the numerical targets set forth in the statutory table, subject to EPA’s waiver authorities. *See* §7545(o)(2)(B). The remaining two terms—“volume of ... production” and “volume available”—presumptively cannot mean the same thing. The only inference permitted by the statutory structure is that “volume of ... cellulosic biofuel *production*” refers to volume of cellulosic biofuel *produced* during the year in question, while “volume *available*” refers to the volume *available* to obligated parties for compliance

during that year—which by definition includes volume produced in the prior year but available for compliance in the form of carryover RINs. Yet under EPA’s interpretation, those two different statutory terms would both mean cellulosic biofuel produced during the year in question.

Including carryover RINs in “the projected volume available” is also consistent with the purpose of the RFS and the mandatory cellulosic waiver provision. Again, the RFS is a “market forcing policy intended to overcome constraints in the market by creating demand pressure to increase consumption of renewable fuels.” *ACE*, 864 F.3d at 710 (quotation marks omitted). Excluding carryover RINs from the “projected volume available” severely undercuts that goal by causing a build-up of supply over demand in the RIN market, depressing RIN prices and discouraging investment. That is the opposite of “creating demand pressure.” *Id.*

Once a carryover cellulosic RIN bank emerges excluding carryover RINs from the “volume available” under §7545(o)(7)(D)(i) ensures that the number of cellulosic RINs obligated parties must retire for compliance will be less than the number available. Those extra cellulosic RINs will be carried forward into the next year, and then the year after that, and so on, resulting in a persistent surplus (even setting aside cellulosic waiver credits, discussed below). Under principles of supply and demand, a persistent surplus pushes prices downward, relieving any

pressure to invest in increased production. *Including* carryover RINs in the “projected volume available,” by contrast, would ensure that the supply of current-year RINs and carryover RINs available for compliance is met with appropriate demand.

Including carryover RINs in the “projected volume available” also furthers the purpose of the mandatory cellulosic waiver provision. That provision “serves as a non-discretionary safety valve when [obligated parties] subject to §7545(o)’s mandate would otherwise be put in an impossible position, or at least a highly punitive one—that is, forced to purchase volumes of cellulosic biofuel greater than total production, or pay fines for failing to do so.” *American Petroleum*, 706 F.3d at 479. In other words, the mandatory cellulosic waiver, like the general waiver, “is just that: a waiver provision. It authorizes EPA to ease the ... Program’s requirements *when complying with those requirements would be infeasible*.” *ACE*, 864 F.3d at 708 (emphasis added). Including carryover RINs in the cellulosic “volume available,” however, causes no such infeasibility; instead, it sets the volume requirements at the level actually projected to be *available* to obligated parties for compliance, just as the statutory text requires. Excluding carryover RINs thus eases renewable fuel obligations *unnecessarily*, contrary to the waiver provision’s purpose.

The Final Rule offers little justification for EPA's interpretation. In framing the issue, EPA asserted that "there are multiple reasonable constructions" of the mandatory cellulosic waiver provision and identified three. JATK[RTC.at.49]. In EPA's view, "[o]ne reading is to construe 'the projected volume available' as a shortened reference to the 'projected volume of cellulosic biofuel production,'" such that "both refer only to projected production." *Id.* A second (as advocated by intervenors here) would "construe 'the projected volume available' to include carryover RINs." *Id.* And a third—which the Final Rule adopts—would "construe 'the projected volume available' to mean all cellulosic biofuel produced in that year (in this case 2020) which will be available for use in the United States." *Id.*<sup>8</sup> EPA asserts that these readings are all permissible because "the provision does not specifically address" carryover RINs, a term "created by EPA," nor does it "refer to the credit provisions ... under which EPA created the RIN program." *Id.*

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<sup>8</sup> EPA also asserts that its reading is "consistent with [its] interpretation in past annual rulemakings." JATK[RTC.at.49]. That is misleading. The 2014-2016 rulemaking avoided "substantively evaluat[ing]" this issue because the number of carryover cellulosic RINs was too small to "make a difference." JA[2014.to.2016.RFS.Rule.RTC.at.598]. Other prior RFS rulemakings have not substantively addressed this issue. Regardless, even if EPA could be said to have adopted this interpretation in prior rulemakings, EPA reopened the issue by discussing and considering alternative approaches here. *See P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1023-1024 (D.C. Cir. 2008).

In fact, however, Congress did “specifically address” carryover RINs through use of the term “volume available,” whose plain meaning encompasses volumes reflected in carryover RINs. Furthermore, by providing that credits may be used for compliance in two calendar years, *see* §7545(o)(5)(C), Congress expressly contemplated that cellulosic biofuel produced in one year could be “available” for compliance the next year. Regardless, as long as cellulosic volumes are “available” to obligated parties for compliance in a given year, *how* EPA’s implementing regulations make them available, through carryover RINs, or otherwise, is immaterial—they are still available.

EPA also cites this Court’s holding in *ACE* that EPA is not required to consider carryover RINs when determining whether there is “inadequate domestic supply,” which triggers EPA’s general waiver authority under §7545(o)(3)(B)(ii). *See* JATK[RTC.at.49] & n.66. That holding is irrelevant here because the mandatory cellulosic waiver provision differs from the general waiver provision in two important ways. First, the statutory text is different—the key term for the cellulosic waiver is the “projected volume available,” while the key term for the general waiver is “inadequate domestic supply.” *ACE* carefully analyzed the text of the general waiver provision, *see* 864 F.3d at 714, but did not opine on the meaning of “projected volume available” in the cellulosic waiver provision.

Second, while EPA contends that carryover RINs play an important backstop role in other RIN markets, they do not do so for cellulosic RINs.<sup>9</sup> In *ACE*, this Court credited EPA’s explanation that, “were [EPA] to consider carryover RINs as a supply source . . . , the number of carryover RINs would be reduced to almost zero,” eliminating critical “flexibility and liquidity provided by carryover RINs.” 864 F.3d at 715. That rationale does not apply to cellulosic RINs. That is because §7545(o)(7)(D)(ii) directs EPA, whenever the mandatory cellulosic waiver is triggered, to enable obligated parties to satisfy their cellulosic volume obligations by purchasing cellulosic waiver credits at prices tied to the wholesale price of gasoline. The number of credits that EPA makes available is “equal to the reduced cellulosic biofuel volume established by EPA for the compliance year.” 40 C.F.R. §80.1456(b). Congress directed EPA to sell cellulosic waiver credits at predetermined prices “to assist market liquidity and transparency” and “to provide appropriate certainty for regulated entities and renewable fuel producers,” §7545(o)(7)(D)(iii)—ensuring that obligated parties can *always* comply with their cellulosic volume obligations and providing liquidity for the cellulosic RIN market that carryover RINs provide in other markets. Carryover

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<sup>9</sup> The statute establishes a unique scheme for the cellulosic biofuel market RINs. Petitioners take no position on EPA’s rationale for a RIN bank for other renewable fuel categories.

RINs are thus unnecessary to provide liquidity and stability to the cellulosic RIN market; if anything, a persistent cellulosic RIN bank *destabilizes* that market by providing an oversupply.

**B. EPA’s Reading of “Projected Volume Available” Is Unreasonable**

Even if the mandatory cellulosic waiver provision were ambiguous, EPA’s interpretation is unreasonable at *Chevron* step two.

EPA’s interpretation is unreasonable because EPA has long determined that the “projected volume available during [a] calendar” cannot mean that year’s production, whether domestic or global, since cellulosic biofuel can be imported and exported. Domestically produced volumes “projected to be exported,” EPA explains, are “not *available* for qualifying domestic use.” JATK[RTC.at.49]. Similarly, it would not be reasonable “to include in the projection all cellulosic biofuel produced throughout the world ..., since volumes that are not imported would not be *available to obligated parties for compliance*.” JATK[85.FR.at.7023-7024] n.28 (emphasis added).

If what matters, however, is not that year’s production volume but rather what volume is “available to obligated parties for compliance,” there is no reasonable basis to include *some* volumes available for compliance (current-year domestic production plus net imports) but exclude others (prior-year production available for compliance as reflected in carryover RINs). “*Chevron* ... does not



license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.” *Michigan v. EPA*, 576 U.S. 743, 754 (2015).

Nor can EPA claim that the statutory “volume available during [2020]” is the volume “available for use in the United States” in 2020 *by consumers*. JATK[RTC.at.49]. This Court rejected that notion in *ACE*. “[I]t is the *refiners, blenders, and importers*—not consumers—who must ‘use’ the statutorily required volumes of renewable fuel.” *ACE*, 864 F.3d at 708. That is “the only reasonable interpretation.” *Id.*

### **C. EPA’s Reading of “Projected Volume Available” Is Arbitrary and Capricious**

Even if excluding volumes reflected in carryover RINs *theoretically* could be justified on the text, selecting that interpretation based on the record here was arbitrary and capricious.

Most fundamentally, EPA failed to grapple with how its interpretation undermines the purposes of the mandatory cellulosic waiver provision and the RFS. At most, EPA asserted that “at this time we believe that the benefits of carryover RINs [in the general waiver context] ... also apply to cellulosic carryover RINs.” JATK[RTC.at.50]. That kind of “*ipse dixit* conclusion ... epitomizes arbitrary and capricious decisionmaking.” *American Pub. Commc’ns Council v. FCC*, 215 F.3d 51, 53 (D.C. Cir. 2000) (citation omitted). As explained,

cellulosic waiver credits make liquidity afforded by carryover cellulosic RINs unnecessary. *Supra* pp.33-34. And EPA never acknowledges that its interpretation undermines incentives to invest in cellulosic biofuel, flouting the RFS's "market forcing policy." *ACE*, 864 F.3d at 710 (quotation marks omitted).

EPA's reasoning in the Final Rule also contradicts its reasoning in the Response to Comments. In the Final Rule, EPA correctly acknowledged that what matters is whether cellulosic volumes are "available to *obligated parties* for compliance," JATK[85.FR.at.7023-7024] n.28, but the agency did not apply that principle to carryover RINs, and in the Response to Comments, it contradicted itself, reasoning that volumes must be "available for use" *by consumers*, JATK[RTC.at.49]. Similarly, elsewhere in the Response to Comments, EPA correctly rejected a reading whereby "'the projected volume available' [is] a shortened reference to the 'projected volume of ... production,'" such that they "both" refer to the same thing. *Id.* But the Final Rule says the opposite, interpreting those terms to mean the same thing—*both* terms "include volumes of cellulosic biofuel likely to be made available in the U.S., including from both domestic production and [net] imports." JATK[85.FR.at.7023-7024] n.28. "Because [EPA]'s decision is internally inconsistent, it is arbitrary and capricious." *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018).

EPA also reasoned that it “address[ed] many of the concerns” because other aspects of the Final Rule will keep the carryover RIN bank from continually growing. JATK[RTC.at.50]. But EPA never suggests that the Final Rule will *reduce* the substantial existing carryover RIN bank, as would be necessary to match supply and demand and incentivize investment as Congress intended.

Finally, EPA expressed concern that including cellulosic carryover RINs” in the “projected volume available” would require “provid[ing] the opportunity for another round of comment.” JATK[RTC.at.50]. That is baseless. EPA cannot manipulate the scope of its own rulemaking to avoid complying with the statute. And regardless, to satisfy the APA, a final rule need only represent a “logical outgrowth of its proposed rule,” which occurs “if interested parties should have anticipated that the change was possible.” *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 508 (D.C. Cir. 2019) (citation omitted). Here, the proposal explained EPA’s proposed “[t]reatment of [c]arryover RINs.” JATK[84.FR.at.36,767]. Tellingly, multiple parties commented on the inclusion of carryover RINs in the “projected volume available,” yet EPA did not disregard those comments as beyond the rulemaking’s scope, addressing them substantively. JATK[RTC.at.48-50].

### **III. EPA’S NEW RECORDKEEPING REQUIREMENT FOR SEPARATED FOOD WASTE IS ARBITRARY AND NOT A LOGICAL OUTGROWTH OF THE PROPOSED RULE<sup>10</sup>**

EPA’s decision to require producers to maintain records of every location where third-party aggregators collect separated food waste “failed to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43. Producers don’t have that information because aggregators keep their sources confidential. EPA’s new recordkeeping requirement is practically impossible for producers to satisfy and thus will likely lead them to stop generating renewable fuel from separated food waste.

EPA failed to justify this new requirement. For example, EPA did not explain why affidavits from aggregators are insufficient to establish that fuel is produced from separated food waste. Failure to provide a “reasoned explanation” for a regulatory change is a hallmark of arbitrary-and-capricious rulemaking. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It is particularly arbitrary in light of renewable fuel producers’ reasonable reliance on EPA’s prior policy. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

Producers had no opportunity to comment because EPA failed to mention this new recordkeeping requirement in the proposed rule. EPA cannot justify its

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<sup>10</sup> Only National Biodiesel Board presents this issue.

new requirement as a “logical outgrowth.” *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). The proposal mentioned no changes to recordkeeping requirements for separated food waste, and “something is not a logical outgrowth of nothing.” *Id.*

### **CONCLUSION**

The Court should grant the petitions and remand for further proceedings consistent with the arguments above.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limit of this Court's order of October 26, 2020, because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 8,611 words.

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

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January 29, 2021

## **ADDENDUM**



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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 percent 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, ni-

**(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

trous oxide, perfluorocarbons,<sup>9</sup> 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<sup>10</sup> 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<sup>10</sup> 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;

(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.

<sup>9</sup> So in original. The word “and” probably should appear.

<sup>10</sup> So in original. Probably should be “non-Federal”.

**(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):
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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 Administrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the imple-

mentation 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 es-

timate, 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 Administration, based on the study under subparagraph (A), makes the determinations speci-

fied 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.

tunity 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 applicable 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)<sup>11</sup> 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.

<sup>11</sup> So in original. Subsection (a) does not contain a par. (2).

**(Declaration of Kurt Kovarik)**

NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RFS POWER COALITION, *et al.*

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

*Respondent.*

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No. 20-1046 (and  
consolidated cases)

**DECLARATION OF KURT KOVARIK**

I, Kurt Kovarik, hereby attest as follows:

**Background**

1. I am over 21 years of age and competent to make this declaration.

The facts set forth in this declaration are based on both my personal knowledge and information gathered in the course of my business activities. I am submitting this declaration on behalf of the National Biodiesel Board in the above-captioned matter.

2. I am the Vice President of Federal Affairs for the National Biodiesel Board, spearheading its federal regulatory efforts. In this capacity, I am familiar

with the Renewable Fuel Standard program (“RFS”) and EPA’s implementation of that program.

3. The National Biodiesel Board (“NBB”) is the national trade association representing America’s first advanced biofuels, biodiesel and renewable diesel (collectively, “biomass-based diesel” or “BBD”). NBB is comprised of biodiesel producers, feedstock and feedstock processor organizations, fuel marketers and distributors, and technology providers. The group works to create sustainable BBD industry growth through education, communication, government affairs, technical, and quality assurance programs.

4. NBB members own and operate BBD facilities in the United States, and are registered to participate in the RFS program. They use renewable biomass to produce BBD, including, but not limited to, soybean oil, canola oil, distiller’s corn oil, animal fats, and separated food waste including used cooking oil.

5. On behalf of its members, NBB has commented every year on EPA’s implementation of the RFS and advocated for a practical, yet enforceable program. As relevant here, NBB submitted comments on EPA’s Renewable Fuel Standards for 2020 and Biomass-Based Diesel Volume for 2021.

6. NBB has also frequently participated in litigation regarding the RFS, both challenging certain aspects of EPA’s implementation of the RFS and defending EPA against challenges by obligated parties. Cases in which NBB has

participated include *AFPM v. EPA*, No. 17-1258 (D.C. Cir.), *Coffeyville Resources v. EPA*, No. 17-1044 (D.C. Cir.), *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017), *Nat'l Biodiesel Board v. EPA*, 843 F.3d 1010 (D.C. Cir. 2016), *Monroe Energy v. EPA*, 750 F.3d 909 (D.C. Cir. 2014), and *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 30 F.3d 145 (D.C. Cir. 2010).

### **The Impacts of EPA's 2020 Rule**

#### **A. Small Refinery Exemptions**

7. EPA's Renewable Fuel Standards for 2020 and Biomass-Based Diesel Volume for 2021, which is commonly referred to as "the 2020 rule," has harmed NBB members by failing to account for the impacts of small-refinery exemptions for years 2019 or earlier.

8. Because exempt small refiners do not need to comply with the requirements of the RFS, each small-refinery exemption reduces the volumes of renewable fuel the RFS requires, unless EPA makes up those volumes in its annual rules. Prior to the 2020 Rule, EPA had not accounted for the small-refinery exemptions it grants unless it grants them prior to finalizing its standards for a particular year. For example, EPA granted all of its small-refinery exemptions for 2018 after finalizing the standards. EPA therefore accounted for exactly zero of those exemptions.

9. While EPA used a projection in the 2020 Rule to account for anticipated 2020 small-refinery exemptions, it did not account for any exemptions from prior years. Those prior-year exemptions are numerous. In particular, EPA dramatically expanded its grants of exemptions beginning in 2016, including 19 for 2016, 35 for 2017, and 32 for 2018.

10. EPA's own data shows that billions fewer RINs were required in 2016 through 2018 as a result of small-refinery exemptions. In 2017 alone, those exemptions reduced required volumes by over 1.8 billion gallons.

11. The impact has been especially acute for BBD producers. NBB estimates, based on EPA data, that the impacts of small-refinery exemptions on the advanced biofuel and BBD volumes alone have reduced BBD demand by about 240 million gallons in 2017 and 185 million gallons in 2018. An analysis by Dr. Scott Irwin, which includes the potential lost demand for BBD as a result of a lower total renewable fuel volume, estimated even greater impacts. Dr. Irwin estimates that the collective impacts of small-refinery exemptions on the BBD, advanced biofuel, and total renewable fuel volumes have resulted in lowered demand for BBD by over 900 million gallons in 2018 alone. *See* Scott Irwin, *Small Refinery Exemptions and Biomass-Based Diesel Demand Destruction*, Farmdoc Daily (9): 45 (March 14, 2019). EPA has granted one additional exemption for 2018 since the time Dr. Irwin's analysis was published.

12. The impact of those prior small-refinery exemptions continues to impact biofuel demand in 2020. Many refineries that receive small-refinery exemptions have already retired RINs to comply with their RFS obligations, which means that they are left with excess RINs after they receive an exemption. These excess RINs can be carried over to the following year, resulting in a “RIN bank” that obligated parties can use each year. The RIN bank included 3.48 billion gallons at the time EPA finalized the standards for 2020. Obligated parties can use the RINs in the RIN bank to meet their 2020 obligations, effectively lowering the number of RINs they must acquire for new renewable fuel in 2020.

13. That lowered demand for renewable fuel in 2020 directly affects BBD producers. The decreased demand both lowers the total amount of biofuel they can sell and decreases the price that they receive when they sell that fuel.

### **B. Separated Food Waste**

14. EPA’s decision to require producers to maintain records for every location from which third-party aggregators collect separated food waste also harms NBB members.

15. A number of NBB members generate BBD from separated food waste, particularly used cooking oil. Some NBB members use used cooking oil as their only feedstock, while other NBB members use used cooking oil along with other feedstocks.

16. Approximately 16 percent of 2.23 billion gallons of total domestic BBD generated in 2019 came from used cooking oil. U.S. Energy Information Administration, *Monthly Biodiesel Production Report*, <https://www.eia.gov/biofuels/biodiesel/production/> (last visited Jan. 29, 2021).

17. Because it is costly and time-consuming to collect used cooking oil from many different restaurants or other sources, few BBD producers collect used cooking oil. Instead, used cooking oil is collected by third-party aggregators who sell it to BBD producers. Those aggregators treat the locations of their used cooking oil sources as confidential business information.

18. EPA's decision to require producers to maintain records of the location of each original source of separated food waste will render production of BBD from used cooking oil impossible for many NBB members. Because aggregators consider their sources of used cooking oil confidential, NBB members cannot obtain information regarding the location of those sources. And many NBB members lack the resources to collect used cooking oil on their own.


19. As a result, EPA's decision will force NBB members to stop generating biomass-based diesel from used cooking oil or other separated food waste. Those members will need to either generate less BBD or switch to using other feedstocks that are less economically advantageous. The impact will be



particularly acute for those NBB members who use only used cooking oil – those members may be forced to shut or idle their plants entirely.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on January 29, 2021 in Washington D.C.



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Kurt Kovarik

**CERTIFICATE OF SERVICE**

I certify that on January 29, 2021, I filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ Seth P. Waxman

SETH P. WAXMAN

January 29, 2021