NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 17-1258 and consolidated cases

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

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,

Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF AN ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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RESPONDENT'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondent United States Environmental Protection Agency ("EPA" or "the Agency") submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici

All petitioners, respondents, and intervenors appearing in these consolidated cases are accurately identified in the opening brief of Petitioners American Fuel and Petrochemical Manufacturers, *et al.*

B. Rulings Under Review

The agency action under review is EPA's Rule entitled "Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019," 82 Fed. Reg. 58,486-58,527 (Dec. 12, 2017).

C. Related Cases

Petitioners in consolidated Case Nos. 17-1258 (American Fuel & Petrochemical Manufacturers), 18-1027 (Valero Energy Corp.), 18-1041 (National Biodiesel Board), and other entities have separately filed petitions in this Court, Case Nos. 17-1044, 17-1045, 17-1047, 17-1049, 17-1051, and 17-1052, challenging EPA's Rule entitled "Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018," 81 Fed. Reg. 89,746 (Dec. 12, 2016). Those cases have been consolidated under Case No. 17-1044.

Petitioner in consolidated Case Nos. 18-1027 (Valero Energy Corp.), among others, separately filed petitions in this Court, Case Nos. 16-1052, and 16-1055, challenging EPA's regulation, promulgated in 2010 and codified at 40 C.F.R. § 80.1406, that designates refiners and importers of gasoline or diesel fuel as "obligated parties" under the Renewable Fuel Standards program. Those cases were held in abeyance while the petitioners filed administrative petitions with EPA seeking to change the definition of "obligated party." EPA has since denied the administrative petitions, and Petitioners in Case Nos. 17-1044 (Coffeyville Resources Refining & Marketing and Wynnewood Refining), 17-1045 (Alon Refining Krotz Springs, et al.), 17-1047 (Valero), and 17-1051 (American Fuel & Petrochemical Manufacturers) and two additional groups have filed separate petitions in this Court challenging EPA's denial, Case Nos. 17-1255, 17-1259, 18-1021, 18-1024, 18-1025, and 18-1029. These cases have all been consolidated under Case No. 16-1052. Growth Energy and the American Petroleum Institute are respondent-intervenors in those cases.

Petitioner in consolidated Case No. 18-1027 (Valero) has also separately filed a complaint in the Northern District of Texas, Case No. 7:17-00004, alleging that EPA violated a non-discretionary duty to annually reconsider its definition under the Renewable Fuel Standards program of "obligated party," promulgated in 2010 and codified at 40 C.F.R. § 80.1406, and a non-discretionary duty to conduct periodic reviews, which they contend includes review of EPA's definition of "obligated party."

That court granted EPA's motion to dismiss, which Valero has appealed to the Fifth Circuit, Case No. 18-10053. That appeal has been stayed pending resolution of the present consolidated cases and certain other of these related cases.

Petitioner in consolidated Case No. 18-1027 (Valero) has also separately filed a petition in this Court, Case No. 18-1028, challenging a document entitled "Periodic Reviews of the Renewable Fuel Standard Program" that explains how EPA has met its obligation to periodically review the Renewable Fuel Standards program, including in its response to the administrative petitions seeking to change EPA's 2010 regulation, 40 C.F.R. § 80.1406, that designates refiners and importers of gasoline or diesel fuel as "obligated parties."

Petitioner in consolidated Case No. 18-1041 (National Biodiesel Board), and other entities including intervenors Renewable Fuels Association and Growth Energy, have filed a petition for review in this Court, Case No. 18-1154, challenging two agency actions, "Periodic Reviews of the Renewable Fuel Standard Program," 82 Fed. Reg. 58,364 (Dec. 12, 2017), and Annual Standard Equations at 40 C.F.R. § 80.1405(c), which were published in *Regulation of Fuels and Fuel Additives, Changes to Renewable Fuel Standard Program*, 75 Fed. Reg. 14,670 (Mar. 26, 2010). That petition is currently in abeyance pending the resolution of administrative proceedings.

The Small Retailers Coalition has filed a complaint in the Northern District of Texas, Case No. 7:17-cv-00121, challenging the 2017 RFS, and alleging, among other things, that EPA has violated a non-discretionary duty to annually revisit its definition

under the Renewable Fuels Standards program of "obligated party," promulgated in 2010 and codified at 40 C.F.R. § 80.1406, and failed to conduct regulatory flexibility analyses under the Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act in promulgating the 2017 RFS. That case was dismissed on May 21, 2018, and the Small Retailers Coalition did not appeal.

Producers of Renewables United for Integrity Truth and Transparency ("PRUITT") has filed a petition for review in this Court, Case No. 18-1202. PRUITT expressly seeks review of an EPA "decision to allow the generation of Renewable Identification Numbers (RINS) by obligated parties . . . that do not represent biofuel production in the year the RIN was generated" and an EPA action entitled "Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program," 75 Fed. Reg. 14,670 (Mar. 26, 2010). Pet. for Review, *PRUITT v. EPA*, 18-1202, Dkt. No. 1743716 at 2 (D.C. Cir. July 31, 2018). PRUITT also states that these actions "call[ ] into question" certain other agency actions, including the agency action under review in this case. *Id.*

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GLOSSARY

CAA	Clean Air Act
E0	Gasoline without ethanol content
E10	Gasoline blend with 9% to 10% ethanol content
E15	Gasoline blend with >10% to 15% ethanol content
E85	Gasoline blend with 51% to 83% ethanol content
EIA	Energy Information Administration
EISA	Energy Independence and Security Act of 2007
EPA	Environmental Protection Agency
NBB	National Biodiesel Board
OPSR	Obligated Parties and Small Retailers Coalition
RFS	Renewable Fuel Standards
RIN	Renewable Identification Number
RTC	EPA's Response to Comments in Support of the 2018 Rule, EPA-HQ-OAR-2017-0091-4990

INTRODUCTION

Under the Renewable Fuel Standards ("RFS") program in the Clean Air Act ("CAA" or "the Act"), the United States Environmental Protection Agency ("EPA" or "the Agency") sets forward-looking annual standards providing that transportation fuel shall contain certain volumes of four related categories of renewable fuels. 42 U.S.C. § 7545(o)(3)(B); *id.* § 7545(o)(2)(B)(ii). For three types of renewable fuel—cellulosic biofuel, advanced biofuel, and total renewable fuel—the Act specifies volumes to be sold through 2022. But EPA has authority, and even the obligation, to reduce the volumes in certain circumstances. 42 U.S.C. § 7545(o)(2)(B)(i), (7)(A)–(F). For the fourth category, biomass-based diesel, EPA determines the volumes to be sold for years after 2012 "based on a review of the implementation of the program" and certain statutory factors.

Petitioners variously challenge EPA's action setting the annual biomass-based diesel volume for 2019 and adjusting the other annual renewable fuel volumes for 2018. 82 Fed. Reg. 58,486-58,527 (Dec. 12, 2017) ("2018 Rule" or "the Rule"). A petitioner representing the biodiesel industry, the National Biodiesel Board ("NBB"), argues that EPA set the 2019 biomass-based diesel volume *too low*. Petitioners representing parties that must comply with the standards, American Fuel and Petrochemical Manufacturers and Valero Inc. ("obligated parties"), and intervenor the Small Retailers Coalition (collectively, "Obligated Parties and Small Retailers") argue that the 2018 renewable fuel volumes are *too high*. Both NBB and Obligated Parties

and Small Retailers Coalition also attempt to use EPA's annual rule as a vehicle to attack EPA's long-standing regulations implementing the RFS Program. Finally, Sierra Club and the Gulf Restoration Network ("Environmental Petitioners") argue that EPA violated the Endangered Species Act ("ESA"). They alleged EPA failed to engage in a consultation under the ESA for the RFS program.

Many of these challenges are foreclosed by this Court's prior rulings in RFS cases. Several others are waived or otherwise barred. In any event, EPA fully and rationally evaluated the relevant factors, properly exercised its authority under the Act in setting the volumes, and reasonably declined to revise its implementing regulations in the context of the Rule.

JURISDICTION

To the extent Petitioners challenge the 2018 Rule, Petitioners timely filed petitions for judicial review, and the Court has jurisdiction under the CAA, 42 U.S.C. § 7607(b)(1). For Petitioners' challenges to aspects of EPA's implementing regulations of the RFS program or the broad "RFS program," the Court lacks jurisdiction because these challenges are time-barred under 42 U.S.C. § 7607(b)(1) and/or do not challenge final agency action. *See* Argument II.A-B; IV.A. Environmental Petitioners lack standing to challenge the 2018 Rule. *See* Argument IV.C.

PERTINENT STATUTES AND REGULATIONS

Except for the materials in EPA's statutory and regulatory addendum, all of the applicable statutes, etc., are contained in the briefs and statutory addendums for Petitioners.

STATEMENT OF ISSUES

1. Was EPA's exercise of its cellulosic waiver authority arbitrary and capricious where EPA applied a methodology this Court has previously approved, updated with the most recent data, in projecting cellulosic biofuel production?

2. Given that the statute does not require EPA to estimate the supply of ethanol or any ethanol blend and that this Court has repeatedly held that EPA has broad discretion under the cellulosic waiver to reduce volumes of advanced biofuel and total renewable fuel, did EPA act arbitrarily and capriciously in exercising this waiver by (a) considering the costs of advanced biofuel to society or (b) estimating total ethanol volumes, rather than the volumes of particular ethanol blends?

3. Did EPA reasonably decline to exercise its general waiver authority when it concluded that there would be neither severe economic harm nor inadequate domestic supply of biofuels after exercise of its cellulosic waiver authority?

4. Did EPA reasonably set the 2019 volume for biomass-based diesel based on six statutory factors related to economic and environmental impacts and production rates of renewable fuels and its review of "implementation of the program"?

5. Did EPA reasonably decline to revise its implementing regulations concerning the point of obligation, how EPA treats exports of renewable fuel, and how EPA accounts for exemptions granted to small refineries where EPA either did not propose to reconsider those issues or where the arguments now brought before the Court were not raised in the comments?

6. Are Small Retailers Coalition's arguments properly before the Court given that it is an intervenor rather than a petitioner, it is not directly regulated by the 2018 Rule, and EPA determined that the 2018 Rule would not negatively impact a substantial number of small entities, including small retailers?

7. Does the Court lack jurisdiction over Environmental Petitioners' ESA challenge to the 2018 Rule for lack of standing, does the CAA's judicial review provision bar the ESA challenge, and did EPA rationally determine that the 2018 Rule does not affect ESA-listed species or designated critical habitat so that the ESA's consultation obligation does not apply?

STATEMENT OF THE CASE

I. Statutory and Regulatory Background.

In 2005, and again in 2007, Congress amended the CAA to establish the RFS program, codified at 42 U.S.C. § 7545(o). *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005); Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121 Stat. 1492 (2007). To "move the United States

toward greater energy independence and security," 121 Stat. 1492, the Act requires increasing use of "renewable fuel" over time. This is fuel made from renewable biomass "used to replace or reduce the quantity of fossil fuel present in a transportation fuel." 42 U.S.C. § 7545(o)(1)(J).

The Act addresses four related categories of renewable fuels—biomass-based diesel (diesel fuel from feedstocks such as animal fats), cellulosic biofuel (derived from cellulose materials such as corn stover), advanced biofuel, and total renewable fuel. Biomass-based diesel and cellulosic biofuel are both subsets of advanced biofuel. *Id.* § 7545(o)(1)(D), (E); 40 C.F.R. § 80.1426 tbl. 1. Advanced biofuels are any renewable fuel, except ethanol from cornstarch, having at least 50% lower lifecycle greenhouse gas emissions than fossil fuels. 42 U.S.C. § 7545(o)(1)(B). Total renewable fuel is the broadest category. It includes all three other categories as well as conventional renewable fuels, including but not limited to corn-based ethanol, renewable diesel, and certain biodiesel. *See id.* § 7545(o)(1)(B), (o)(2)(A)(i).

Each year after 2012, EPA must set an annual "applicable volume" for biomass-based diesel "based on a review of the implementation of the program during calendar years specified" in the Act and six statutory factors addressing future renewable fuel production rates and impacts on the economy and environment. *Id.* § 7545(o)(2)(B)(ii). Biomass-based diesel volumes set under this authority "shall not be less than" 1.0 billion gallons. *Id.* § 7545(o)(2)(B)(v). EPA must determine those

volumes fourteen months before the year in which they will apply. *Id.* § 7545(o)(2)(B)(ii).

For cellulosic biofuel, advanced biofuel, and total renewable fuel, the Act establishes increasing annual applicable volume targets through 2022. *Id.* § 7545(o)(2)(B)(i). Congress authorized EPA to reduce these statutory volumes in limited circumstances. First, under the "cellulosic waiver provision," if EPA's projection of cellulosic biofuel production volumes is lower than the volume specified in the statute, then EPA "*shall* reduce the applicable volume of cellulosic biofuel required . . . to the projected volume available during that calendar year." 42 U.S.C. § 7545(o)(7)(D)(i) (emphasis added); *see also Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 478 (D.C. Cir. 2013) ("*API*") (projection methodology must be outcome-neutral). If EPA lowers the applicable volume for cellulosic biofuel, EPA has broad discretion to decide whether to also lower the applicable volumes for advanced biofuel and total renewable fuel "by the same or a lesser" amount. 42 U.S.C. § 7545(o)(7)(D)(i); *see also, e.g., Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915–16 (D.C. Cir. 2014) (CAA does not prescribe specific factors to consider in making this determination). Second, under the Act's "general waiver provision," if EPA determines there is "inadequate domestic supply" or the volumes "would severely harm the economy or environment of a State, a region, or the United States," then EPA "*may*" exercise its discretion to lower the required volumes. 42 U.S.C. § 7545(o)(7)(A); *see also Americans for Clean*

Energy v. EPA, 864 F.3d 691, 704–13 (D.C. Cir. 2017) ("*ACE*"); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("may" typically implies discretion).

To ensure that the applicable volumes are sold each year, EPA sets annual percentage standards. 42 U.S.C. § 7545(o)(3)(B)(i); 40 C.F.R. § 80.1405(c). These percentage standards are calculated using a formula that divides the applicable volume for each renewable fuel type by an estimate of the national volume of gasoline and diesel that will be used that year, with certain adjustments. 40 C.F.R. § 80.1405(c). Obligated parties determine their annual renewable fuel obligation by multiplying the percentage standards by the volume of gasoline and diesel they produce or import every year. 42 U.S.C. § 7545(o)(3)(B)(ii); 40 C.F.R. § 80.1427(a). EPA must determine the percentage standards for each calendar year by November 30 of the prior year. 42 U.S.C. § 7545(o)(3)(B)(i).

The percentage standards for cellulosic biofuel and biomass-based diesel are "nested" within the standard for advanced biofuel. This means that volumes of cellulosic biofuel and biomass-based diesel may be used not only to satisfy the cellulosic biofuel and biomass-based diesel requirements (as applicable), but also to satisfy the advanced biofuel requirement. *See id.* § 7545(o)(1)(B), (D), (E), (J), (o)(2)(B)(i)(I)–(IV); 40 C.F.R. § 80.1427(a)(3). The advanced biofuel standard, in turn, is nested within the total renewable fuel standard. Thus, for example, any renewable fuel that qualifies as biomass-based diesel may simultaneously be used to satisfy the biomass-based diesel, advanced biofuel, and total renewable fuel requirements.

The annual percentage standards shall "be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. § 7545(o)(3)(B)(ii). Pursuant to 42 U.S.C. § 7545(o)(2)(A)(iii)(I), EPA identified the "appropriate" obligated parties in its 2007 implementing regulations establishing the RFS program, 72 Fed. Reg. 23,900, 23,923–24 (May 1, 2007), designating refiners and importers of gasoline and diesel fuel as the obligated parties. EPA reaffirmed its approach in its 2010 regulations implementing the EISA amendments, 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010); 40 C.F.R. § 80.1406(a)(1) ("Point of Obligation Regulation"), and more recently in its denial of rulemaking petitions to revise the point of obligation, EPA-HQ-OAR-2017-0091-4939 (JA__).

Obligated parties are not themselves required to blend renewable fuels into the gasoline and diesel they sell. Instead, producers and importers of renewable fuels generate renewable identification numbers ("RINs") for each gallon of renewable fuel they produce or import into United States. 40 C.F.R. § 80.1426(a), (e). RINs can be "separated" from batches of renewable fuel and traded between registered parties. *Id.* §§ 80.1428(b), 80.1429(b); s*ee also* 42 U.S.C. § 7545(o)(5). Obligated parties accumulate RINs and "retire" them in an annual compliance demonstration. 40 C.F.R. §§ 80.1427(a), 80.1451(a)(1). Exporters of renewable fuels that generated RINs must also retire an equivalent number of RINs. *See* 40 C.F.R. § 80.1430.

The RFS program provides considerable flexibility for compliance. For example, parties can purchase separated RINs rather than blend renewable fuel. *See*

id. §§ 80.1428(b), 80.1429(a)–(b). Parties that overcomply in one year can sell excess RINs or can "carryover" RINs and use them to meet up to 20% of their compliance obligations the following year. 42 U.S.C. § 7545(o)(5)(A)–(C); 40 C.F.R. §§ 80.1427(a)(1), (5), 80.1428(c). Additionally, obligated parties may carry a deficit forward to the next year, which must then be satisfied together with the next year's compliance obligation. 42 U.S.C. § 7545(o)(5)(D); 40 C.F.R. § 80.1427(b). Small refineries may also apply for a hardship exemption. 42 U.S.C. § 7545(o)(9)(B)(i).

II. Factual and Procedural Background: The 2018 Rule.

A. Volume Requirements and Percentage Standards Set by the 2018 Rule.

The 2018 Rule established: (1) the volume requirement for biomass-based diesel for 2019;[1] (2) final volume requirements for cellulosic biofuel, advanced biofuel, and total renewable fuel for 2018; and (3) percentage standards for all four fuel types for 2018.

2018 Rule Volume Requirements as Compared to Statutory Volumes

In billion gallons

Fuel	**2018 Volumes**		**2019 Volumes**	
	CAA	**2018 RFS**	**CAA**	**2018 RFS**
Total renewable fuel	26.0	19.29	N/A	N/A
Advanced biofuel	11.0	4.29	N/A	N/A

[1] The 2018 biomass-based diesel standard was set using a volume established in the previous year's rulemaking. Likewise, the 2019 biomass-based diesel volume established in the 2018 Rule will be used, in a subsequent rulemaking, to determine the 2019 annual percentage standard for biomass-based diesel. *See* 2018 Rule at 58,518-19.

Biomass-based diesel	N/A	N/A	>= 1.0	2.1
Cellulosic biofuel	7.0	0.288	N/A	N/A

42 U.S.C. § 7545(o)(2)(B)(i)(I)–(III); 2018 Rule at 58,487-58,488.[2]

In setting the 2019 biomass-based diesel volume, EPA reviewed the implementation of the RFS program and assessed the six statutory factors. 82 Fed. Reg. at 58,491, 58,518-22. A major consideration in setting this volume was EPA's conclusion that biomass-based diesel usage has been driven not by the biomass-based diesel requirements but by the advanced biofuel requirements of the RFS, which can also be satisfied with biomass-based diesel RINs. *Id.*; *see also* 40 C.F.R. § 80.1427(a)(3). With this in mind, EPA set the biomass-based diesel volume at 2.1 billion gallons—the same level as in 2018 and over twice the statutory minimum. EPA concluded that this volume "strikes the appropriate balance between providing a market environment where the development of other advanced biofuels is incentivized, while also maintaining support for the [biomass-based diesel] industry." 82 Fed. Reg. at 58,522; *see also* EPA-HQ-OAR-2017-0091-4953 at 1 (JA__).

In setting the 2018 cellulosic biofuel volume, EPA's analysis had two main parts. For liquid cellulosic biofuel, EPA projected production volumes using the same basic methodology it had used in the 2017 Rule and previous years. *Id.* at

[2] Volumes are expressed as ethanol-equivalent volumes of renewable fuel, except for biomass-based diesel, which is expressed as biodiesel-equivalent volumes. 82 Fed. Reg. at 58,488 tbl. I-1 fn. A.

58,495, 58,498-58,501; *see also* 80 Fed. Reg. at 77,502–09; 81 Fed. Reg. at 89,756; *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 727-30 (D.C. Cir. 2017) (describing in detail and upholding this methodology). However, EPA updated some elements of that model based on the actual production volumes achieved in 2016 and the data EPA had available on actual and anticipated production volumes in 2017. 2018 Rule at 58,500. For cellulosic biofuel in the form of compressed natural gas or liquid natural gas derived from biogas, EPA projected production using a new, industry-wide methodology. *Id.* at 58,495, 58,501-02, 58,504. EPA projected that a total of 288 million gallons of cellulosic biofuel would be produced in 2018. EPA accordingly lowered the statutory cellulosic biofuel volume (7 billion gallons) by 6.71 billion gallons to this amount. *Id.* at 58,487, 58,501-02.

EPA then exercised the full extent of its cellulosic waiver authority to lower the advanced biofuel volume the same amount (6.71 billion gallons) that it lowered the cellulosic biofuel volume, from the statutory 11.0 billion gallons to 4.29 billion gallons. *Id.* at 58,487. It did so based upon a detailed analysis of the availability of advanced biofuels, energy security and greenhouse gas impacts, costs, and other factors. *See id.* at 58,505-17. Consistent with its longstanding statutory interpretation, EPA then used the cellulosic waiver to lower the 2018 applicable volume of total renewable fuel by the same amount it lowered the advanced biofuel volume, to 19.29 billion gallons. *Id.* at 58,488, 58,513-14; *see also* 81 Fed. Reg. 89,752-53 (explaining EPA's interpretation). Because cellulosic biofuel is a subset of advanced biofuel,

which in turn is a subset of total renewable fuel, this approach effectively leaves intact the implied statutory volume of non-cellulosic advanced biofuels (4 billion gallons) and conventional renewable fuels (15 billion gallons) that do not qualify as advanced biofuels. *See* 2018 Rule at 58,487, 58,490 n.9, 58,492.

EPA also assessed whether to exercise its general waiver authority to further lower the applicable volumes. It found insufficient evidence to conclude that the volume requirements set by the 2018 Rule would cause severe economic or environmental harm. *Id.* at 58,517-18. EPA further determined that reducing the volumes based on "inadequate domestic supply" would not be warranted, regardless of whether it construed the statutory term "domestic supply" to refer to domestic production of biofuels or to domestically-available biofuels, including imports. *Id.* at 58,516-17.

Based on these applicable volumes, EPA applied its long-standing formula in 40 C.F.R. § 80.1405 to calculate the percentage standards for 2018. 2018 Rule at 58,523-24.

B. EPA Permissibly Declined to Revise the Underlying Implementing Regulations.

As in prior years, EPA declined in the context of its annual rulemaking to reconsider the Point of Obligation Regulation that had been established in 2007, reaffirmed in 2010, and was being considered in a contemporaneous administrative proceeding. Indeed, the 2018 Proposed Rule expressly stated it was not reopening

this issue. *See, e.g.*, 82 Fed. Reg. at 34,207–09, 34,211 & n.11. Nevertheless, comments were submitted both in favor of and against changing the point of obligation. *See, e.g.*, Response to Comments, EPA-HQ-OAR-2017-0091-4990 ("RTC") at 222-23 (JA__). In response, EPA explained that this issue was outside the scope of the rulemaking. *See id.* EPA noted that it had recently denied separate administrative petitions seeking to change the existing point of obligation. *See also* 82 Fed. Reg. at 56,779.

EPA also declined to reopen long-standing regulations. These provide that RINs generated from renewable fuel that is exported from the United States cannot be used to satisfy the annual volume requirements of the RFS program. *See* 40 C.F.R. § 80.1430; *infra* at 63-64. EPA explained that comments proposing changes to this regulation were beyond the scope of the rulemaking. EPA "did not propose any changes to the overall structure of the RFS program or otherwise seek comment on these issues." RTC at 223 (JA__).

Finally, EPA solicited comment on whether it should re-examine its approach to calculating the annual percentage standards with respect to the exemptions granted to small refineries from complying with the RFS requirements, which is codified in a formula in 40 C.F.R. § 80.1405. *See* 82 Fed. Reg. at 34,242. Based on the comments it received, EPA decided not to revise this regulation. 2018 Rule at 58,523 & n.160; RTC at 216-17 (JA__).

SUMMARY OF ARGUMENT

The 2018 Rule represents a reasonable exercise of EPA's judgment to lower the 2018 statutory volumes of cellulosic biofuel, advanced biofuel, and renewable fuel and set the 2019 volume for biomass-based diesel. Many of Petitioners' legal and record-based challenges are foreclosed under this Court's previous rulings in RFS cases or waived since they were not first raised before EPA. Others are based on misleading descriptions of the record. All of them lack merit.

First, in lowering the applicable volume of cellulosic biofuel, EPA appropriately applied the same methodology for projecting the liquid cellulosic biofuel volume that was upheld in *Americans for Clean Energy*, 864 F.3d at 727–30, while updating its analysis based on newly available compliance data. *Infra* Argument I.A.

Second, EPA permissibly considered, as an element of its "broad discretion," whether the costs to society of higher fuel volumes would outweigh the benefits of such volumes and reasonably decided to exercise the full scope of its authority under the cellulosic waiver to lower the volumes of advanced biofuel and total renewable fuel. *Infra* Argument I.B. Its consideration of how much ethanol could be supplied as part of that analysis was thorough and amply supported the 2018 Rule. *Infra* Argument I.C.

Third, EPA reasonably interpreted and declined to exercise its general waiver authority. Given that it had decided to reduce the statutory volumes of certain fuels under the cellulosic waiver, it appropriately looked to those post-reduction volumes—

rather than the no-longer-applicable statutory volumes—in deciding whether a further reduction under the general waiver was warranted. In conducting this inquiry, it reasonably found that there was no credible evidence of severe economic harm to a State, a region, or the United States due to the applicable volume requirements that would apply absent exercise of the general waiver authority. It also appropriately determined that it was unnecessary to reassess its interpretation of the phrase "inadequate domestic supply" because, even under the proposed alternative interpretation advanced by Petitioners, it would have reached the same result in the 2018 Rule. *See infra* Argument I.D.

Fourth, EPA set an appropriate 2019 biomass-based diesel volume. As the Act required, EPA conducted a review of the program and reasonably incorporated into its analysis of statutory factors what it learned from prior years—that advanced biofuel requirements are the primary driver of biomass-based diesel use. EPA set a biomass-based diesel volume of 2.1 billion gallons, striking a reasonable balance between supporting biomass-based diesel, with a volume requirement over twice the statutory minimum, and allowing the development of other advanced biofuels. *Infra* Argument I.E.

Fifth, in this annual rulemaking, EPA appropriately declined to reopen or revise its underlying implementing regulations. As to the point of obligation regulation, the Act unambiguously confers on EPA discretion whether, when, and how to reconsider the definition of obligated parties. Because EPA appropriately did

not reopen the point of obligation issue in the 2018 Rule, any challenge to EPA's 2010 Point of Obligation Regulation here is time-barred. *See Monroe,* 750 F.3d at 919. *Infra* Argument II.A. Likewise, Petitioners' challenge to EPA's treatment of exported renewable fuel is time-barred because EPA did not re-open this issue. *Infra* Argument II.B. NBB's attempt to overturn EPA's regulation governing how it accounts for small refinery exemptions fails both because NBB's objections were not raised in the comments before EPA, and because EPA's approach is reasonable and consistent with the CAA. *Infra* Argument II.C.

Sixth, Small Retailers Coalition's arguments are not properly before the Court because the Coalition is the only party with standing to raise this claim but, as an intervenor rather than a petitioner, the Coalition cannot raise issues other than those properly raised by the petitioners. Moreover, the Coalition's arguments that EPA did not comply with its obligations under the Small Business Regulatory Enforcement Fairness Act ("SBREFA") fail on their merits for a number of independent reasons, including that small retailers are not directly regulated by the 2018 Rule. *Infra* Argument III.

Finally, Environmental Petitioners' ESA challenge should be dismissed. They challenge an "RFS Program," but the CAA authorizes suit *only* over final agency actions taken within 60 days of a petition. The CAA thus precludes programmatic challenges to an RFS program. Environmental Petitioners also challenge the 2018 Rule, but they present arguments and evidence to this Court that they did not present

to EPA during the administrative process as required by the CAA. Nor have they established Article III standing to challenge the 2018 Rule, as they complain of harms not fairly traceable to the 2018 Rule. If reached, the ESA merits claim also lacks merit. When, as here, EPA "determines that its action does not affect listed species or critical habitat, . . . then it is not required to consult" with the wildlife agencies under ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2). *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 475 (D.C. Cir. 2009). Environmental Petitioners disregard EPA's determination and thus cannot show that EPA acted arbitrarily and capriciously in promulgating the 2018 Rule. *Infra* Argument IV.

STANDARD OF REVIEW

The Court may reverse EPA's action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(1)(E), (d)(9)(A), (C).[3]

This standard is narrow, and the Court does not substitute its judgment for EPA's. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Lead Indus. Ass'n v.*

[3] The CAA's review provision applies to all challenges to the 2018 Rule, including Environmental Petitioners' ESA challenge. *See Center for Biological Diversity v. EPA ("CBD v. EPA")*, 861 F.3d 174, 178 (D.C. Cir. 2017).

EPA, 647 F.2d 1130, 1160 (D.C. Cir. 1980) (courts defer to agencies even where the evidence in the record may also support other, inconsistent conclusions); *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013). This Court gives an "extreme degree of deference" to EPA's "evaluation of scientific data within its technical expertise," especially "EPA's administration of the complicated provisions of the Clean Air Act." *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 150 (D.C. Cir. 2015) (internal quotation marks omitted). In addition, the Court's review is "particularly deferential in matters implicating predictive judgments," requiring only that "the agency acknowledge factual uncertainties and identify the considerations it found persuasive." *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105, 1108 (D.C. Cir. 2009). "The task of the reviewing court is to apply [this] . . . standard of review to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co.*, 470 U.S. at 743–44 (internal citation omitted).

Questions of statutory interpretation are governed by the two-step test set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984). Under step one, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress' intent is clear, the inquiry ends. *Id.* at 842–43. If the statute is silent or ambiguous, step two requires the Court to decide whether the Agency's interpretation is based on a permissible construction of the statute. *Id.* at 843. To uphold EPA's interpretation, the Court need not find that EPA's interpretation is the only permissible construction,

or even the reading the Court would have reached, but only that EPA's interpretation is reasonable. *Id.* at 843 n.11; *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985).

ARGUMENT

I. The 2018 Rule Was Not Arbitrary and Capricious in Determining the Annual RFS Standards.

A. EPA's Determination of the Projected Volume of Liquid Cellulosic Biofuel Was Not Arbitrary and Capricious.

The Obligated Parties and Small Retailers argue that the 2018 Rule over-predicts liquid cellulosic biofuel production (which is just 5% of total cellulosic biofuel production). Their arguments are riddled with errors and so fail to overcome the extreme deference afforded to EPA's predictions. *See supra* at 18. Indeed, in the 2018 Rule, EPA updated its methodology based on its recognition that its previous projections were too high.

In a previous rule establishing RFS volumes for 2014–16, EPA developed a new methodology for projecting cellulosic biofuel production, 80 Fed. Reg. at 77,502–09, which it also applied in setting the volumes for 2017, 81 Fed. Reg. at 89,756 ("2017 RFS"). In *Americans for Clean Energy*, this Court approved this methodology. It

held that it reflects a neutral purpose that does not "tilt" projections toward over- or underestimation and is reasonable. 864 F.3d at 727–30. [4]

EPA again applied this same basic methodology in the 2018 Rule to project the anticipated volume of liquid cellulosic biofuel.[5] First, EPA reviewed several dozen liquid cellulosic biofuel production facilities and narrowed its analysis to those facilities most likely to generate RINs in 2018. 2018 Rule at 58,495. EPA next reviewed a range of data to develop facility-specific potential production ranges of liquid cellulosic biofuel; grouped facilities based on production history and risk; calculated aggregate low- and high-end production ranges for each group; and applied a "percentile" within the aggregate ranges that best represented likely production volumes for each group. *Id.* at 58,498-01.[6] The resulting volumes for each group were summed to derive the overall liquid cellulosic biofuel projection. *Id.* (14 million gallons); *see also Ams. for Clean Energy*, 864 F.3d at 725-26 (explaining EPA's method in more detail).

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[4] The Act also provides compliance safety valves that account for risk of overprediction. *See supra* at 8-9.

[5] EPA projected that 95% of cellulosic biofuel production in 2018 would derive from a different source: biogas. Petitioners do not challenge this aspect of EPA's projections.

[6] For example, EPA calculated that the range of likely production by consistent liquid cellulosic biofuel producers in the 2018 Rule was 7 to 24 million gallons. Applying a 12% "percentile" value to this range yields expected production of 2.04 million gallons (0.12 * (24 – 17)) more than the 7 million gallon low-end of the range, for a total of approximately 9 million gallons. 2018 Rule at 58,501.

However, EPA recognized that its estimates in previous years of liquid cellulosic biofuel exceeded actual production. 2018 Rule at 58,499-01; *see also* RTC at 52-54, 63, 65 (JA__). Thus, in the 2018 Rule EPA updated its approach by evaluating available data on actual production in 2016 and actual and anticipated production in 2017. Specifically, EPA calculated the average of the "percentile" values observed from this data that would have resulted in accurate predictions in those years—the 10th percentile for new producers and the 12th percentile for consistent producers. It then applied these to the production ranges in the 2018 Rule. 2018 Rule at 58,501; EPA-HQ-OAR-2017-0091-4929 (JA__).

Petitioners argue that EPA is still over-predicting cellulosic biofuel production. They claim that, in 2018, EPA projected that consistent producers and new producers would, respectively, produce at the 43rd percentile and 1st percentile of their "production capacity," but "actual production of liquid cellulosic biofuel . . . has never reached more than 2.1% of capacity." Obligated Parties and Small Retailers ("OPSR") Br. at 41. This assertion is wrong. The values EPA applied in the 2018 Rule were the 10th percentile (new facilities) and 12th percentile (consistent producers). 2018 Rule at 58,501. More importantly, these figures are misleading because EPA does not apply the percentile values it calculates to facilities' "production capacity" (*i.e.*, the facilities' *maximum* potential production). EPA applies them to a calculated range of the facilities' *likely* production in the particular year,

which can be far below maximum potential production. *See* RTC at 60 (JA__). Petitioners are thus comparing apples to oranges.

Petitioners also claim that EPA's projection methodology "results in a 450% increase in cellulosic biofuel production in 2018 compared with 2016." OPSR Br. at 42. Again, Petitioners are wrong. The increase in liquid cellulosic biofuel from production in 2016 (4.3 million gallons)[7] to EPA's prediction of production in 2018 (14 million gallons) is roughly 230%, not 450%.[8] *See* EPA-HQ-OAR-2017-0091-4947 (JA__); 2018 Rule at 58,501. Moreover, merely complaining that EPA is projecting a significant percentage increase does not show that EPA is arbitrarily overpredicting production. Indeed, EPA's projected increase in liquid cellulosic biofuel production is similar in magnitude to the percentage increases observed in previous years. Liquid cellulosic biofuel production increased by roughly 420% from 830,000 gallons in 2014 to 4.3 million gallons in 2016. EPA-HQ-OAR-2017-0091-4947 (JA__). Similarly, EPA estimated production in 2017 would be 8.9 million gallons, EPA-HQ-OAR-2017-0091-4929 tbl. 4 (JA__), more than doubling the 4.3 million gallons produced the year before. Here, EPA updated its approach in the 2018 Rule based on actual production data, namely the percentile values that would have accurately calculated

[7] The Petitioners incorrectly state that liquid cellulosic biofuel production in 2016 was 3.8 million gallons, apparently failing to include production of cellulosic heating oil. OPSR Br. at 41 n.15.

[8] EPA's projected production in 2018 is roughly 330% of observed production in 2016, which corresponds to a 230% increase in production.

production in 2016 and 2017. Notably, EPA's prediction of 14 million gallons is very close to the EIA's prediction of 13 million gallons. 2018 Rule at 58,498.

Petitioners' remaining arguments attack EPA's predictions in previous years as too high. *See* OPSR Br. at 42, 43 n.17, 44. They prove nothing about EPA's current approach. The methodology used in 2010-2013 has been abandoned. And EPA used different percentile values in the 2018 Rule than it used in 2017 in recognition that its 2016 and 2017 projections were too high. *See Ams. for Clean Energy*, 864 F.3d at 728 ("[T]his is not a situation in which EPA has arbitrarily refused to reconsider a projection methodology that has proven unsuccessful in the past."). Applying these new percentiles made a real difference: had EPA applied the percentiles it applied previously (25th percentile for new producers; 50th percentile for consistent producers), it would have resulted in a projection of 27 million gallons of liquid cellulosic biofuel. *See supra* at 20 n.6 (reflecting how the percentiles are applied); 2018 Rule at 58,500-01; *see also* RTC at 60 (JA__) (additional comparison illustrating that the percentiles made a real different). Although Petitioners baldly assert that EPA's methodology is flawed and claim that EPA is "rel[ying] on unreliable data,"[9] OPSR Br. at 43-44, they have failed to support, let alone prove, this claim.

ACE upheld this same basic method because it was reasonable and did not have a "'non-neutral purpose' to favor (or disfavor) growth in the cellulosic biofuel

[9] *Americans for Clean Energy* rejected claims that EPA was using unreliable data. 864 F.3d at 728.

industry." 864 F.3d at 727. Here, EPA has responded to the obligated parties' concerns that EPA had previously over-predicted cellulosic biofuel volumes, *see id.*, by updating this neutral method based on neutral production data.

B. EPA Properly Exercised Its Broad Discretion in Considering Costs in Applying the Cellulosic Waiver to Reduce Advanced Biofuel and Total Renewable Fuel Volumes.

Next, NBB argues that EPA's "sole rationale" for reducing advanced biofuel volumes under the cellulosic waiver to "reduce obligated parties' costs," and that EPA may not consider costs at all in making this decision. NBB Br. at 11, 21-22. EPA's decision here is amply supported by the record, which demonstrates that it considered a multitude of factors, and by the precedent of both this Court and the Supreme Court.

1. EPA Thoroughly Explained the Many Factors It Considered in Exercising the Cellulosic Waiver, Including Costs.

NBB's argument that EPA reduced "the advanced-biofuel volume solely to address obligated parties' concerns about costs," *id.* at 21, is wrong. When EPA considered "costs," it was considering overall costs to society of a higher advanced biofuel volume, and such costs were one of many factors it took into account in making its decision.

Specifically, EPA found that cellulosic biofuel production would fall short of the statutory amount by 6.71 billion gallons. Having done so, EPA considered whether and how to invoke its discretion under 42 U.S.C. § 7545(o)(7)(D)(i) to reduce

the applicable volumes of total renewable fuel and advanced biofuel by up to this amount. *Id.* at 58,504-16; *see Monroe*, 750 F.3d at 915–16 (noting EPA's broad discretion). Consistent with previous years, EPA examined many factors, including the costs of the renewable fuels to society relative to their marginal benefits. *See* 2018 Rule at 58,504-13 (discussing factors including reasonably attainable volumes; "availability of feedstocks;" "diminishing [greenhouse gas] benefits and higher per gallon costs;" redirection of feedstocks from competing uses; the biodiesel tax credit; and possible duties on biodiesel); RTC at 32, 34, 102 (JA__); *Ams. for Clean Energy*, 864 F.3d at 731. In assessing these factors, EPA placed a greater emphasis on cost considerations in comparison to previous years "as a result of a stronger policy focus on the economic impacts of the RFS program." 2018 Rule at 58,504 (citing *FCC v. Fox TV Stations*, 556 U.S. 502, 514-15 (2009)).[10] This was reasonable and supported by substantial evidence.

EPA decided, after considering *all* of these factors, that it would reduce the applicable volumes of advanced biofuel and total renewable fuel by the same amount as it lowered the applicable volume of cellulosic biofuel. *Id.* at 58,513. It did not, as NBB claims, seek to "reduce obligated parties' costs" or "save obligated parties money." NBB Br. at 21, 23. Rather, EPA considered the costs of such fuels *to society*. EPA has found that obligated parties fully pass their costs through to their customers.

[10] EPA notified interested parties of this likely approach in the proposed rule. *See* 82 Fed. Reg. at 34,228.

See EPA-HQ-OAR-2017-0091-4939 at 21-31 (JA__); EPA-HQ-OAR-2017-0091-4697 at 10-12 (JA__) (NBB comment agreeing with EPA's position). Thus, a lower standard would not primarily save obligated parties money, but rather reduce costs on the end customers in the aggregate.

EPA thoroughly explained how it considered the costs to society of the renewable fuels relative to their benefits in exercising the cellulosic waiver. For example, EPA explained that the anticipated cost in 2018 of producing "the two advanced biofuels that would be most likely to provide the marginal increase in volumes of advanced biofuel" were "high as compared to the petroleum fuels they displace." 2018 Rule at 58,513. In light of these high costs and considering all of the factors, EPA reasonably found that the "marginal benefit" of a higher advanced biofuel standard was not worth pursuing. *Id.* at 58,513; *see also id.* at 58,504-06 (noting that a higher advanced biofuel volume could cause feedstock switching, leading to disruptions and price increases, and would likely not lead to greenhouse gas benefits); RTC at 34 (JA__); Cost Impacts Memo EPA-HQ-OAR-2017-0091-4938 (JA__).[11]

An agency is not restricted to its previous policy choices, so long as in changing course it presents "good reasons" for doing so and its approach is "permissible under the statute." *Fox*, 556 U.S. at 515. Moreover, agencies "need not demonstrate . . . that

[11] These considerations were also analyzed in EPA's October 4, 2017, notice of supplemental data availability, 82 Fed. Reg. 46,174, 46,176-77, and in EPA's response to comments, RTC at 193-215 (JA__).

the reasons for the new policy are *better* than the reasons for the old one." *Id.*; *see also Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 377 (D.C. Cir. 2013) (noting that this is a "low bar"). "An agency's view of what is in the public interest may change, either with or without a change in circumstances." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1037 (D.C. Cir. 2012) (quotation marks omitted).

Ignoring EPA's analysis, NBB incorrectly claims that EPA based its decision "entirely on costs" and changed its approach "in only one sentence." NBB Br. at 21, 25. NBB disregards the record. EPA explained that it considered multiple factors and extensively details EPA's view of the cost considerations. Thus, NBB fails to prove that how EPA balanced the factors was arbitrary and capricious.

NBB claims that the Court should require a more detailed explanation because "[s]erious reliance interests are present here." NBB Br. at 24. But NBB fails to support this conclusory assertion. EPA has never suggested that its calculation of "reasonably attainable" volumes of fuel is dispositive of how it will exercise its broad discretion—if it had, there would be no need to consider any other factors. *See* RTC at 34 (JA__) (rejecting NBB's claims of reliance). Moreover, the biofuels industry cannot have meaningfully "relied" on any particular volumes of advanced biofuel or total renewable fuel for 2018. *Cf. Monroe Energy*, 750 F.3d at 920 (rejecting analogous claim that oil refiners had a "legally settled expectation" in EPA's exercise of its waiver authorities). These volumes were not set until the 2018 Rule and were always dependent on a variety of considerations, including (1) EPA's projection of the

volume of cellulosic biofuel, which triggers and constrains the cellulosic waiver; (2) EPA's calculation of reasonably attainable volumes, which varies from year to year; (3) EPA's assessment of other relevant factors under its broad discretion; and (4) whether EPA exercised its other waiver authorities.

2. EPA Permissibly Considered Costs in Exercising the Cellulosic Waiver.

NBB also claims that EPA may not consider costs at all under the cellulosic waiver. *See* NBB Br. at 21-22. But this Court has already underscored the scope of EPA's discretion in exercising this waiver in two prior decisions. *See Monroe Energy,* 750 F.3d at 915 (explaining that EPA has "broad discretion" and Congress had "refus[ed] to tie [EPA's] hands"); *Ams. for Clean Energy*, 864 F.3d at 733-34 (Congress did not "cabin EPA's discretion").

NBB attempts to evade these holdings by arguing that *Monroe* involved a decision not to invoke the cellulosic waiver, and arguing that neither *Monroe* nor *Americans for Clean Energy* specifically involved EPA considering costs. NBB Br. at 22-23. NBB is recycling failed arguments. This Court already rejected NBB's similar attempt to distinguish *Monroe*, holding in *Americans for Clean Energy* that *Monroe*'s determination of EPA's broad discretion "controls here." 864 F.3d at 734. By the same token, *Americans for Clean Energy* and *Monroe* control this case.

Moreover, NBB's view that EPA may not consider costs absent a textual direction to do so is wrong. That agencies may typically consider costs is the rule, not

the exception. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015); *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000). Contrary to NBB's argument, *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001), "establishes the modest principle that where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider cost anyway." *Michigan*, 135 S. Ct. at 2709; *see also Entergy Corp. v. Riverkeeper, Inc.* 556 U.S. 208, 222–23 (2009). Here, there is no such "express direct[ion]" to regulate on a factor that precludes considering costs.

NBB's argues that "Congress explicitly told EPA it could waive *the BBD volume* because of costs" but "the cellulosic waiver authority provision says nothing about costs." NBB Br. at 21-22. In *Michigan*, the Supreme Court has rejected this sort of strained contextual argument pertaining to when costs may be considered under the Act as "unreasonable." 135 S. Ct. at 2708-09.

There is also no merit to NBB's claim that "the cellulosic waiver authority would be unconstitutional under EPA's view" (actually, this Court's view). NBB Br. at 25. As NBB concedes, the nondelegation doctrine is "easy to satisfy," *id.* at 26, and requires only an "intelligible principle" guiding the agency. *American Trucking*, 531 U.S. at 474. Courts "have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474-75. This Court has "upheld delegations of effectively standardless discretion . . . precisely on the ground of the narrower scope within

which the agencies could deploy that discretion." *Michigan v. EPA*, 213 F.3d 663, 680-81 (D.C. Cir. 2000). For narrow delegations of authority, "Congress need not provide any direction to the EPA." *American Trucking*, 531 U.S. at 475.

Although EPA has broad discretion under the cellulosic waiver, the scope of that waiver is circumscribed. Invoking that waiver requires a threshold determination that there will be a shortfall in cellulosic biofuel production. 42 U.S.C. § 7545(o)(7)(D). EPA's discretionary authority is further limited to adjusting two statutory volumes of fuel, in only a single year, and by no more than the amount EPA reduced the volume of cellulosic biofuel. This Court's interpretation of the cellulosic waiver is, therefore, not unconstitutional. *See Michigan*, 213 F.3d at 680-81.[12]

Finally, even setting the foregoing aside, looking to the articulated purposes of the RFS Program for an "intelligible principle" reveals that EPA may permissibly consider costs. As NBB concedes, one purpose of the RFS program is "to protect consumers." NBB Br. at 27 (quoting Pub. L. No. 110-140); 42 U.S.C. § 7545(o)(2)(B)(ii)(V); 2018 Rule at 58,526. This would naturally include protecting them from the increased societal costs of fuel if EPA determines, as it did here, that the increased cost outweighs the benefits.

[12] *Tomac v. Norton*, 433 F.3d 852 (D.C. Cir. 2006), rejected a nondelegation argument because the agency's discretion was "cabined" by two "intelligible principles" by "delineating both the area in and the purpose for which the land should be purchased." *Id.* at 867. *Tomac* thus confirms that when an agency's authority is circumscribed in scope, there is no unconstitutional delegation.

C. EPA's Approach to Estimating Ethanol Volumes Does Not Render the 2018 Rule Arbitrary and Capricious.

EPA conducted a thorough analysis of whether the overall supply of ethanol in 2018 would be sufficient to play its part in satisfying the total renewable fuel and advanced biofuel[13] volumes. *See* EPA-HQ-OAR-2017-0091-4963 at 1-6 (JA__). Under the 2018 Rule, the volume of total renewable fuel was set at 19.29 billion gallons. To determine whether this volume was reasonably attainable, EPA calculated, among other things, the total amount of ethanol that would likely be used in 2018, based on numerous market and regulatory factors as well as historical data. EPA-HQ-OAR-HQ-2017-0091-4963 at 1-6 (JA__) (conservative estimate of 14.502 billion gallons). EPA determined that "this level of ethanol, along with other sources of renewable fuel, is indeed sufficient to permit the 19.29 billion gallon volume requirement for total renewable fuel to be consumed." EPA-HQ-OAR-HQ-2017-0091-4963 at 6 (JA__); *see also* RTC at 112-14 (JA__). Recognizing the difficulties in "precisely predict[ing] the mix of different fuel types that will result," EPA also illustrated how the total renewable fuel standard could be satisfied by a "reasonable

[13] Although Petitioners refer here to "advanced biofuel," none of their arguments address advanced ethanol volumes. OPSR Br. at 36-40. Regardless, EPA thoroughly analyzed advanced biofuel volumes. *See* 2018 Rule at 58,506-07, 58,512-13.

range of possibilities for each individual" fuel type. EPA-OAR-HQ-2017-0091-4963 at 11-12 (JA__).[14]

The Obligated Parties and Small Retailers argue that the 2018 Rule is nevertheless arbitrary and capricious because EPA did not evaluate "the reasonably attainable supply" of ***specific blends*** of ethanol. OPSR Br. at 37-38. Thus, these petitioners fault EPA for failing to specifically predict the different mix of fuels. Their argument fails.

First, Petitioners' argument fails because even if EPA had conducted the analysis Petitioners prefer, this could not have made a difference in the outcome of the 2018 Rule. EPA's authority to adjust the volumes of renewable fuel specified in the statutory tables, 42 U.S.C. § 7545(o)(2)(B), is based on the statutory waivers, which are subject to specific requirements and limitations. *See, e.g.*, *id.* §§ 7545(o)(7)(A), (D). EPA's authority to adjust the statutory volumes is, therefore, constrained by the terms of these waivers.

Petitioners' arguments that EPA failed to adequately calculate the "reasonably attainable" supply of specific blends of challenges EPA's invocation of its authority

[14] The foregoing reveals that Obligated Parties and Small Retailers are incorrect in claiming that EPA looked only to "production capacity" and not ethanol "supply." OPSR Br. at 37; *see also* EPA-OAR-HQ-2017-0091-4963 at 2 (JA__) (noting that ethanol consumption, not production, was the "primary constraint" on the market).

under the cellulosic waiver.[15] Necessarily, the premise of this argument is that if EPA had looked at specific blends, EPA would have to have granted an even broader waiver. However, these arguments fail because EPA already reasonably exercised the *maximum* scope of its cellulosic waiver authority. Specifically, EPA already reduced the required volumes of advanced biofuel and total renewable fuel by the *full* amount that it reduced the volume of cellulosic biofuel. 2018 Rule at 58,513-14. The statute allows no more. *See* 42 U.S.C. § 7545(o)(7)(D)(i). As a result, Petitioners' arguments that EPA should have "separately analyzed information regarding the use of E0, E10, E15, and E85 to project ethanol supply" is of no moment. OPSR Br. at 37-38. Petitioners suffered no injury from EPA declining to conduct the added analysis. And any error here would be, by definition, harmless.

Second, Petitioners' argument fails because there is no requirement that EPA individually calculate the likely usage of each blend of ethanol (E0, E10, E15, and E85). EPA's determination that the aggregate projected use of all of these ethanol blends will enable the total renewable fuel and advanced biofuel volumes to be met was sufficient under the statute to support the 2018 Rule. Indeed, this Court has

[15] Petitioners' arguments are based on demand-side considerations (ethanol sales to and use by the ultimate consumer). *See* OPSR Br. at 39-40. Therefore, EPA could not have considered these factors in assessing "inadequate domestic supply," as this Court has made clear. *See Americans for Clean Energy*, 864 F.3d at 710; OPSR Br. at 39-40. Moreover, nowhere in Petitioners' argument on this point do they mention criteria for applying the general waiver (*i.e.*, "inadequate domestic supply" or "severe economic harm").

already held that nothing in the CAA "requires EPA to support its decision not to reduce the applicable volume of advanced biofuels with specific numerical projections." *See API*, 706 F.3d at 481. Given that the RFS program does not mandate the use of particular volumes of particular blends of ethanol, there is no need for EPA to conduct such a minute analysis. *Cf.* 42 U.S.C. § 7545(o)(2)(A)(iii)(II)(bb) (precluding EPA from requiring any particular blend of ethanol by prohibiting "any per-gallon obligation for the use of renewable fuel").

Finally, Petitioners' arguments are also baseless when examined on their particulars. For example, they cherry-pick a quotation to suggest the false impression that EPA did not attempt to calculate ethanol availability and dismissed commenters' arguments. OPSR Br. at 38. As shown by the discussion above and EPA's lengthy (26 page) response to comments on ethanol volumes, EPA's analysis was thorough. *See* RTC at 109-35 (JA__). EPA also considered E0 consumption in Iowa and updated data on ethanol availability, addressed the use of E0 in the marketplace, *see id.* at 118-22 (JA__), and noted that no commenter provided alternative data regarding E15 sales at retail stations, *see id.* at 126. And EPA did not fail "to address . . . [the] expiration of favorable tax credits and pending duties" on biodiesel. OPSR Br. at 37. Rather, it analyzed them in depth as "primary considerations." 2018 Rule at 58,508, 58,512; *see also, e.g.*, *id.* at 58,491, 58,493 & n.28, 58,505 & n.78, 58,507-12 & n.104, 58,518 & n.143, 58,520 & n.145; EPA-HQ-OAR-2017-0091-4925 at 16-19 (JA__).

D. EPA's Determinations Not to Exercise Its General Waiver Authority Were Not Arbitrary and Capricious or Contrary to Law.

The Obligated Parties and Small Retailers argue that EPA misinterpreted the scope of its general waiver authority and was arbitrary and capricious in its determination not to exercise that authority. These arguments are unfounded.

1. EPA Correctly Assessed Whether to Exercise Its General Waiver Authority Based on the Volumes Resulting from the Cellulosic Waiver.

Having projected that 288 million gallons of cellulosic biofuel would be produced in 2018, EPA used its cellulosic waiver authority to reduce the applicable volumes of cellulosic biofuel, advanced biofuel, and total renewable fuel by 6.712 billion gallons. 2018 Rule at 58,487-88. When EPA then assessed whether to exercise the general waiver, it did so based on these post-reduction volumes because these were the volumes that obligated parties would have to comply with and that might hypothetically cause "severe[ ] harm [to] the environment or economy" or as to which there might be an "inadequate domestic supply." 42 U.S.C. § 7545(o)(7); 2018 Rule at 58,516-18. EPA found it would not be appropriate to exercise the general waiver to further reduce the applicable volumes. 2018 Rule at 58,516-18.

The Obligated Parties and Small Retailers argue that the statute requires that EPA assess the general waiver based on the superseded volumes in the statutory tables. OPSR Br. at 21-24. As to severe economic harm, the Court need not reach this issue. EPA explained that even if it had adopted this approach and found severe

economic harm at the statutory volumes, it would not have exercised its discretion under the general waiver to lower the applicable volumes below the levels set in the 2018 Rule. EPA-HQ-OAR-2017-0091-4925 at 6 (JA__); *see also* 42 U.S.C. § 7545(o)(7) (EPA "may" exercise the general waiver to reduce the volumes "in whole or in part"). Petitioners have not challenged this aspect of EPA's analysis. They, therefore, waived any such argument. *See N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007). Moreover, this conclusion was reasonable given that EPA determined that no severe economic harm would occur at the volumes set in the 2018 Rule. EPA-HQ-OAR-2017-0091-4925 at 6-7 (JA__). The statutory interpretation question is thus of no consequence.

Regardless, EPA reasonably interpreted the statute not to require that it first exercise its general waiver authority based on a hypothetical view that the applicable volumes were 6.71 billion gallons higher than the 2018 Rule would actually require. *See supra* at 18-19 (discussing *Chevron* deference).

It is consistent with the statute, and common sense, for EPA to first exercise its cellulosic waiver authority and then determine, from that basis, whether severe economic harm would still occur based on the resulting volumes. There is no logical reason why EPA should base its waiver decision on the possibility of severe economic harm due to volumes that will not actually be implemented (because they have been reduced under the cellulosic waiver). This is particularly so where—as here—EPA found that severe economic harm will not occur at the reduced volumes. Particularly

given that Petitioners' view would lead to an absurd result of EPA basing its waiver on facts that do not pertain, EPA's approach is plainly reasonable. *See In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991) (statutes are construed to avoid absurd results).

Petitioners argue that because "[t]he statute provides for whole or partial waiver of 'the requirements of paragraph (2),'" EPA must assess its waiver authorities based on the statutory volumes in paragraph (2). OPSR Br. at 22 (quoting 42 U.S.C. § 7545(o)(7)(A)). But this text simply specifies which requirements EPA may reduce when it exercises the waiver. It does not prescribe an order in which EPA must exercise its waivers. Nor does it mandate that EPA base its analysis of the general waiver on the statutory volumes of renewable fuel even when those volumes are no longer applicable. Put differently, even if EPA *had* found that severe economic harm would occur at these reduced (post-cellulosic waiver) volumes and further reduced thee volumes under the general waiver, it would still be exercising its authority to "waive the requirements of paragraph (2)" and "reduc[e] the national quantity of renewable fuel required under paragraph (2)," as the statutory text provides. 42 U.S.C. § 7545(o)(7)(A).

The better view of 42 U.S.C. § 7545(o)(7) is that the waivers "mean what [they] say," *Ams. for Clean Energy*, 864 F.3d at 734, and allow EPA to "reduce" the requirements in 42 U.S.C. § 7545(o)(2). After employing one waiver, EPA may then exercise another waiver based on the reduced "requirements of paragraph (2)," 42 U.S.C. § 7545(o)(7)(A), to further reduce those requirements.

2. EPA Properly Interpreted and Analyzed the Severe Economic Harm Prong of the General Waiver.

Petitioners claim that EPA dismissed evidence that the RFS requirements were causing severe economic harm, and misapplied this prong of the general waiver. The record reveals otherwise. EPA thoroughly assessed the evidence before it and correctly determined not to waive the RFS volumes due to severe economic harm.

EPA concluded in the 2018 Rule that the volume requirements it finalized would not cause severe economic harm to the nation, a State, or a region of the United States. 2018 Rule at 58,517-18. In support, EPA conducted a 16-page, single-spaced analysis in which it considered the possibility of severe economic harm, including to specific industries. EPA-HQ-OAR-2017-0091-4925 at 2-7 (JA__). EPA investigated a variety of broad economic indicators based on historical data, including refinery closures, *see id.* at 7-14 (JA__). Having found no severe economic harm to date, EPA further noted that the volumes in the 2018 Rule were very similar to those it had set for 2017, and that market conditions were not so different in 2018 that similar volumes would impose severe economic harm. *Id.* at 14-15 (JA__).

EPA also considered its exhaustive study of the impact of imposing RFS obligations on refineries and importers, which concluded, *inter alia*, that the RFS program was not causing refineries economic harm because they were passing their compliance costs through the fuel supply chain. *See* EPA-HQ-OAR-2017-0091-4939 at 21-31 (JA__) (cited in EPA-HQ-OAR-2017-0091-4925 at 5 n.8 (JA__)). And EPA

responded at length to comments on the severe economic harm prong of the general waiver, RTC at 21-24 (JA__), and the economic impacts of the RFS program, *id.* at 193-206 (JA__).

a. EPA's Interpretation of the Severe Economic Harm Prong as Requiring that the Harm Be Due to the RFS Requirements Is Reasonable.

Prior to the 2018 Rule, EPA had concluded that the severe economic harm prong of the general waiver required demonstrating that the implementation of the RFS program itself would cause severe economic harm. 82 Fed. Reg. at 46,178-79. The Obligated Parties and Small Retailers argue that, under this interpretation, EPA has "unduly restricted" the severe economic harm prong of the general waiver "to require proof that a single market factor—RFS volume requirements—is *the sole* cause of the harm." OPSR Br. at 24-25. But in the 2018 Rule, EPA found it unnecessary to revisit and expand its interpretation. In particular, EPA concluded that regardless of the interpretation adopted—that which it had previously applied or a more relaxed standard urged by some commenters—the record would not support a finding of severe economic harm. 2018 Rule at 58,518 n.139; *see also* EPA-HQ-OAR-2017-0091-4925 at 15-16 (JA__). Thus, there is no harm to petitioners from this alleged error.[16]

[16] The Court need not reach this statutory interpretation argument if it concludes that EPA was not arbitrary and capricious in determining that severe economic harm would not occur under either standard.

In the event that the Court addresses this question, EPA's interpretation is not only reasonable and should be afforded deference under *Chevron*, it is the best reading of the statute. In pertinent part, Section 7545 provides that EPA may exercise the general waiver if EPA finds that the RFS volume requirements "would severely harm the economy" of "a State, a region, or the United States." 42 U.S.C. § 7545(o)(7)(A). This statutory text refers to a single, direct causal link ("would") between the severe harm and volume requirements. *Id.*; *see also* 73 Fed. Reg. 47168, 47170-71. If Congress intended a less restrictive standard, it knew how to create one. *See, e.g.*, 42 U.S.C. § 7545(c)(1) ("causes, or contributes"); *id.* § 7545(f)(4) (waiver based on "cause or contribute" standard); *id.* § 7545(h)(5) ("contribute to air pollution"); *cf. id.* § 7545(k)(2)(B), (m)(3)(A) ("prevent or interfere"). It did not do so.

Petitioners do not explain what less-stringent standard they believe should take the place of the statutory text or, in fact, engage with the statutory text at all. Instead, they offer only policy arguments that EPA's interpretation of the statute is difficult to satisfy. But courts are "will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says . . . what it means and means . . . what it says.'" *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (quoting *Dodd* v. *United States*, 545 U.S. 353, 357 (2005)). The statutory text thus demonstrates that it was Congress's design to set a high threshold, requiring a direct causation and a high degree of confidence ("would" rather than, *e.g.*, "might cause" or

"would likely contribute to"), and that the harm be "severe[ ]." 42 U.S.C. § 7545(o)(7)(A).

Petitioners attempt to bolster their policy-based argument by pointing to recent developments with Philadelphia Energy Solutions ("PES"). OPSR Br. at 25-26. The Court should reject this attempt both because the facts Petitioners point to occurred after EPA promulgated the final rule and because these facts do not undermine EPA's conclusions.

It is axiomatic that the judicial review proceeds based on the record before the agency at the time of its decision. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 554-55 (1978); *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973). Therefore, Petitioner's one-sided account of PES's bankruptcy is extra-record, post-2018 Rule evidence that is not properly before the Court.[17] *See* 42 U.S.C. § 7607(d)(7)(A).

Moreover, EPA considered whether refinery closures were likely as a result of the 2018 rule. EPA-HQ-OAR-2017-0091-4925 at 13 (JA__). EPA determined that

[17] The Court should not consider this extra-record evidence, but if it does it should know that the PES refinery never closed, has emerged from bankruptcy, and is continuing to comply with the RFS program. *See In re: PES Holdings, LLC,* 18-10122, Dkt. No. 510 (Bankr. D. Del. July 25, 2018) (JA__); *id.*, Dkt. No. 521 (Bankr. D. Del. Aug. 7, 2018) (JA__). Moreover, reporting based on PES's bankruptcy filings observed that its investor-owners had recently extracted roughly $594 million in distributions from the company and suggested that it was these payouts, together with poor business decisions, that "left PES unable to cover its obligations under the [RFS program]." *See* https://www.reuters.com/article/us-usa-biofuels-pes-bankruptcy-insight/refiner-goes-belly-up-after-big-payouts-to-carlyle-group-idUSKCN1G40I1.

"no refineries have closed in 2017 as of this writing," that an investigation of refinery closures in previous years "failed to identify the RFS program as the cause or even primary contributor to those events," and that the RFS program was not inhibiting expansion of production. *Id.* PES's self-serving statements do not demonstrate that the RFS program was the cause of its reorganization, rather than other issues such as its corporate distributions or the fact that it was formed in 2012 from refineries that were already closing or on the verge of closure. EPA-HQ-OAR-2017-0091-3887 at 1-3 (JA__) (PES comments on the proposed rule). EPA's conclusion that there was not "credible evidence that compliance with the RFS program is leading to refinery closures" was supported by substantial evidence in the record and is also entirely consistent with the post-Rule facts presented by petitioners. RTC at 22; (JA__); *see also* 2018 Rule at 58,517-18.

b. EPA's Determination That No Severe Economic Harm Would Occur Was Not Arbitrary and Capricious.

The Obligated Parties and Small Retailers also argues that EPA's finding that no severe economic harm would occur as a result of the 2018 Rule was arbitrary and capricious. OPSR Br. at 27-31. This does not have merit.

First, EPA reasonably conducted a "high level" analysis of "broad economic indicators to consider if they . . . justify further EPA investigation" of the possibility of severe economic harm. EPA-HQ-OAR-2017-0091-4925 at 7 (JA__); *see supra* at 37-38 (summarizing EPA's conclusion that a more detailed investigation was not

warranted). There is no requirement that every year EPA must use its limited resources to conduct in-depth, independent investigations of every single State or region for some unspecified economic harm, particularly where conditions have not changed and EPA has not been provided credible evidence suggesting such harm. *See, e.g.*, *Chamber of Commerce of U.S. v. SEC,* 412 F.3d 133, 142 (D.C. Cir. 2005) ("nature of the problem" informs the degree of scrutiny); *Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1580 (D.C. Cir. 1992); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 370 (D.C. Cir. 1998). Indeed, even now the only purported evidence of State or regional harm that Petitioners point to is an argument that a shutdown of the PES refinery would cause severe economic harm. *See* OPSR Br. at 25-26. As just discussed, EPA considered this argument and found RFS program was unlikely to cause the PES refinery (or any refinery) to shut down.[18] *See supra* at 41-42. EPA's approach—an overarching analysis to determine if further inquiry was warranted and consideration of the particular evidence brought to its attention—was both sufficient and reasonable.

Petitioners claim that EPA "disregard[ed] specific evidence of actual harm," OPSR Br. at 28 (citing EPA-HQ-OAR-2017-0091-4925 at 9 n.20 (JA__)), and

[18] Petitioners suggest that EPA's approach "contrasted sharply with EPA's past determinations under the same standard," but the material they cite is an EPA decision on a waiver request from a specific State (Texas), which directed EPA's attention to particular claims of harm in that State. OPSR Br. at 27 & n.10 (citing 73 Fed. Reg. 47,168, 47,169 (Aug. 13, 2008)).

"ignored actual data regarding state and regional economic jeopardy and dramatically skyrocketing costs," *id.* at 29. But Petitioners' only attempt to show that EPA "ignored" such "actual data" is to cite purported refinery operating costs related to RFS compliance. *See* OPSR Br. at 29.[19] Such costs, in a vacuum, do not establish that obligated parties face "severe economic harm." First, obligated parties pass on RFS compliance costs to their customers. *See, e.g.*, EPA-HQ-OAR-2017-0091-4925 at 5, 9 (JA__); EPA-HQ-OAR-2017-0091-4939 at 21-31 (JA__). In this sense, the RFS is analogous to a sales tax levied on businesses. Second, even if this were not the case, a refinery may have high RFS compliance costs without being in financial distress—indeed it may even be wildly profitable. Third, even if a refinery were in financial distress, other factors might be the cause. *See supra* at 39-42. Finally, even assuming that high compliance costs at a particular refinery did show "severe economic harm" to that refinery, the statute requires "severe[ ] harm [to] the economy . . . of a State, a region, or the United States," 42 U.S.C. § 7545(o)(7)(A), not just a particular refinery or industry.[20]

[19] Valero and Monroe Energy also speculated that refinery closures could occur and might be economically disruptive, but provided no evidence that their refineries (or any refinery) are actually likely to close. *See, e.g.*, EPA-HQ-OAR-2017-0091-4885 at 10-11 (JA__); EPA-HQ-OAR-2017-0091-4645 at 18-21 (JA__).

[20] Nor would this metric consider the benefits to the economy of the RFS program. *See* EPA-HQ-OAR-2017-0091-4925 at 2-3 (JA__).

Ergon-West Virginia Inc. v. EPA, 896 F.3d 600 (4th Cir. 2018), is irrelevant. In that case, according to the court, when EPA denied a specific refinery's request for an exemption from the RFS requirements, EPA did not appropriately engage with the evidence the petitioner presented "of hardship *particular to its refinery*." *Id.* at 613. Here, EPA did not ignore "actual data" of severe economic harm. Pet. Br. at 29. Instead, it reasonably determined that no credible evidence of such harm to a State, region, or the United States was presented.

Petitioners also take a handful of quotations out of context to argue, incorrectly, that EPA's analysis was inconsistent. OPSR Br. at 29-30. First, Petitioners confuse a discussion about whether obligated parties can "recoup the *cost* of RINs through higher prices" charged to their customers for petroleum products, 2018 Rule at 58,517 (emphasis added), with EPA separately noting that, for certain renewable fuel blends that occupy a minute share of the market, "the *value* of the RIN is not fully passed on to consumers" for certain niche fuel blends. RTC at 125 (JA__) (emphasis added). EPA has observed that while obligated parties (*i.e.*, petroleum refiners and importers) typically recover the full costs of *purchasing* RINs, fuel retailers (*e.g.*, gas stations) are not always passing along to consumers the full value (potential discount) available from *selling* a RIN. *See, e.g.*, *id.* at 125, 194-95, 199 (JA__); EPA-HQ-OAR-2017-0091-4939 at 23, 51 (JA__). Petitioners are again comparing apples to oranges.

Likewise, Petitioners mischaracterize EPA's statements that while obligated parties can "shift the costs of complying with the RFS" program by recovering them through higher wholesale fuel prices, higher fuel prices may also indicate severe economic harm. OPSB at 30. The former statement explains that obligated parties do not suffer economic harm from the RFS as they recover compliance costs from their customers. *See* EPA-HQ-OAR-2017-0091-4925 at 9. The latter statement notes that if fuel prices rose as the RFS standard increased, that could possibly indicate that the RFS is imposing severe economic harm on consumers of fuel (not obligated parties).[21] *Id.* There is no inconsistency here.

Finally, Petitioners claim that EPA disregarded harm to small retailers caused by excluding blenders from the point of obligation.[22] OPSR Br. at 30. Untrue. *See* RTC at 22 (JA__); EPA-HQ-OAR-2017-0091-4939 at 31-32 (JA__) (explaining EPA's view that the current point of obligation regulations does not negatively impact small retailers); EPA-HQ-OAR-2017-0091-4925 at 6 (JA__).

3. The Proper Interpretation of "Inadequate Domestic Supply" Is Irrelevant to the 2018 Rule.

The Obligated Parties and Small Retailers argue that EPA improperly construed "inadequate domestic supply" by considering the supply of renewable fuel

[21] EPA found no severe economic harm on this basis as fuel prices have gone down since 2012. EPA-HQ-OAR-2017-0091-4925 at 9-11 (JA__).

[22] As explained below, this challenge is also not properly before the Court. *See infra* at 78-79.

imported into the United States as part of the "domestic supply." Petitioners' argument fails because it does not meaningfully engage with EPA's actual decision.

Historically, EPA has construed "domestic supply" to include the supply of renewable fuel made available domestically through imports. *See, e.g.*, 81 Fed. Reg. at 89,751, 89,773-74, 89,790. This Court adopted that interpretation in *Americans for Clean Energy*, 864 F.3d at 710 ("[T]he 'inadequate domestic supply' provision authorizes EPA to consider only supply-side factors — such as production *and import capacity* . . . ." (emphasis added)); *id.* at 711 (EPA may consider "the amount of renewable fuel available through import").[23] In issuing the 2018 Rule, EPA considered whether to reinterpret "'inadequate domestic supply' to account for only volumes of renewable fuel that are produced domestically." 82 Fed. Reg. at 46,177. EPA received comments that both favored and opposed adopting this interpretation. *See* RTC at 17 (JA__).

Ultimately, EPA decided not to resolve this interpretive issue. Even if EPA adopted Petitioners' preferred interpretation, EPA found this would not change the outcome of the 2018 Rule. 2018 Rule at 58,517. As to conventional renewable fuel, EPA found that this aspect of the total renewable fuel volume requirement could be

[23] The statute is ambiguous on whether "domestic supply" means supply *available* domestically or the supply *produced* domestically. *See* RTC at 17 (JA__). Particularly given that the statutory text is "inadequate domestic supply" not "inadequate domestic production," EPA's historic interpretation was reasonable. *See* OPSR Br. at 37 (distinguishing between production and supply).

entirely satisfied without reliance on imports. *Id.* For cellulosic biofuel, EPA projected imports to constitute less than 1% of total supply in 2018, and further determined that compliance without any reliance on imports was feasible using cellulosic waiver credits and carryover cellulosic biofuel RINs. *Id.* Given these reasons and the emphasis on growth in cellulosic volumes that is apparent in the statutory tables, EPA therefore decided that it would not exercise its discretion to further reduce this volume. *Id.*; 42 U.S.C. § 7545(o)(7)(A) (EPA "may" waive the volume requirements); *see also* 2018 Rule at 58,503, 58,517 (JA__). For advanced biofuel, EPA similarly decided that even under Petitioners' interpretation, it would not exercise its discretion to reduce this volume. In reaching this conclusion, it relied on "the distinct possibility that the domestic industry could compensate for exclusion of imports,"[24] and "the availability of imported volumes and carryover RINs" that could make up for any shortfall in domestic production. 2018 Rule at 58,517 (taking "uncertainty into account"); *see also Ams. for Clean Energy*, 864 F.3d at 709, 715 (holding that EPA may consider renewable fuel available from imports in assessing

[24] Of the 4.29 billion RIN advanced biofuel standard, EPA projected that roughly 0.35 billion RINs would be generated from domestic cellulosic biofuel and "other advanced" biofuels. 2018 Rule at 58,512 & n.107, 58,517. The record supports EPA's conclusion that the remaining 3.94 billion RINs potentially could be generated through domestic biomass-based diesel production. *See, e.g.*, EPA-HQ-OAR-2017-0091-4963 at 9-10 (JA__); EPA-HQ-OAR-2017-0091-4697 at 5 (JA__); 2018 Rule at 58,519 (biomass-based diesel has an "equivalence value" of 1.5, meaning that—for example—2.6 billion gallons of biomass-diesel would correspond to 3.9 billion RINs). Moreover, EPA's prediction is owed extreme deference. *See supra* at 18.

"inadequate domestic supply" and may consider carryover RINs in determining whether to exercise its discretion under this waiver).

As a result, there was no need for EPA to resolve this interpretive question. Although Petitioners acknowledge EPA's conclusion that it "would not choose to grant a waiver" even under their preferred interpretation, OPSR Br. at 34 (quotation marks omitted), they do not even attempt to show that this conclusion was arbitrary and capricious. Petitioners' argument that EPA was required to resolve this interpretive question, even though it would not have affected the outcome, contradicts the fundamental precept that agencies like courts need only resolve what is necessary to reach their decision.[25]

E. EPA's Determination of the 2019 Biomass-Based Volume Diesel Was Not Arbitrary and Capricious.

After a "review of the implementation of the program" and an analysis of the six statutory factors, EPA reasonably set the 2019 biomass-based diesel volume at 2.1 billion gallons. 2018 Rule at 58,518-22; 42 U.S.C. § 7545(o)(2)(B)(ii)(I)–(VI). Considering the nested nature of the standards, EPA's factors analysis appropriately

[25] Petitioners claim that "imported advanced biofuel and biomass-based diesel contributed 2.298 billion RINs to total supply in 2016." OPSR Br. at 34-35. This number is misleadingly inflated: 1.177 billion RINs of advanced biofuel were imported in 2016, *of which* 1.121 billion RINs were biomass-based diesel. *See* 82 Fed. Reg. at 46,177. It is also irrelevant because (1) merely arguing that substantial amounts of renewable fuel is imported does not show that domestic production will be inadequate, and (2) this argument fails to address EPA's discretion not to waive the volumes, even where inadequate domestic supply exists.

accounted for the interaction between the biomass-based diesel standard and the advanced biofuel and total renewable fuel standards. *See* 42 U.S.C. § 7545(o)(1)(B), (D), (E), (J), (o)(2)(B)(i)(I)–(IV). As part of its review, EPA considered historical applicable biomass-based diesel volumes from 2011 through 2018 compared to compliance data, which showed that, except for anomalous years,[26] biomass-based diesel use has been higher in practice than annual biomass-based diesel requirements. *See* 2018 Rule at 58,519-20.

EPA determined that these higher volumes have been driven by factors other than the biomass-based diesel volumes, principally the advanced biofuel requirements, which can also be satisfied with biomass-based diesel RINs. *Id.* EPA principally concluded that the 2019 applicable volume for biomass-based diesel was not likely to materially change production rates or concomitant renewable fuel impacts considered under the six factors. *Id.* at 58,522. Instead, as in past years, the 2019 advanced biofuel volume, when later finalized, would continue to drive overall biomass-based diesel production. *Id.* EPA also considered the potential impacts of selecting an applicable volume of biomass-based diesel other than 2.1 billion gallons in 2019, and found that any impact would occur, if at all, "on the margin" and would not provide a

[26] For 2014 and 2015, EPA retroactively set applicable volumes equal to the actual volumes. For 2012, the relatively low level of ethanol use at that time made it more cost effective for parties to use advanced ethanol, instead of biomass-based diesel, to satisfy the advanced biofuel requirement. *See* 2018 Rule at 58,520.

reasonable basis for setting a higher or lower volume requirement. *Id.* Specifically, EPA found that "[s]etting a higher or lower BBD volume requirement . . . would only be expected to impact BBD volumes on the margin, protecting to varying degrees this advanced biofuel from being outcompeted by other advanced biofuels." EPA-HQ-OAR-2017-0091-4953 at 6 (JA__). It did not find, as NBB claims, that a higher volume would be "'marginally' better" under the statutory factors. NBB Br. at 29.

NBB has already presented its arguments that EPA's approach relies on a non-statutory factor in *Coffeyville Res. Ref. & Mktg. v. EPA*, No. 17-1044 (D.C. Cir. argued on Oct. 5, 2018). If the court in *Coffeyville* reaches this issue, its disposition may control here. EPA briefly responds to NBB's reiteration of its argument.

NBB argues that in setting biomass-based diesel volumes under 42 U.S.C. § 7545(o)(2)(B)(ii), EPA cannot consider the yet-to-be finalized 2019 advanced biofuel volume. *See* NBB Br. at 28-29. NBB is wrong. Under the statute, EPA must consider "implementation of the program," not simply implementation of biomass-based diesel volumes. 42 U.S.C. § 7545(o)(2)(B)(ii). "[T]he program" in the context of 42 U.S.C. § 7545(o) means "the renewable fuel program," a phrase which itself is used several times. *E.g.*, *id.* § 7545(o)(2)(A)(ii); *see also Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) (statutory terms should be interpreted in light of their context). The nested nature of the fuel types also indicates that Congress did not intend for EPA to somehow analyze "implementation" of the biomass-based diesel requirements, a subset of the advanced biofuel requirements, in isolation.

Nor is EPA required to exclude consideration of these interactions in the year 2019. EPA sets the biomass-based diesel volumes for a period 14 months *in the future* based on its review of the "implementation of the program" and the six statutory factors. 42 U.S.C. § 7545(o)(2)(B)(ii). Section 7545(o)(2)(B)(ii) directs EPA to review implementation of the RFS program in "calendar years specified in the [statutory] tables," which specify volumes through 2022. *See* 42 U.S.C. § 7545(o)(2)(B)(i)(I)–(III), (ii). Moreover, the six statutory factors require that EPA look to how the renewable fuel program as a whole will be implemented, including in the future. *See id.* § 7545(o)(2)(B)(ii)(III) (requiring consideration of the "expected annual rate of *future* commercial production of *renewable fuels*, including advanced biofuels in each category" (emphasis added); *see also id.* § 7545(o)(2)(B)(i)(I)–(II), (IV)-(VI) (calling for consideration of impacts of "renewable fuels," not solely one particular fuel); *id.* § 7545(o)(2)(B)(i)(VI)). In short, the plain text supports EPA's holistic analysis, not NBB's microscopic focus on biomass-based diesel alone.

NBB's claim that EPA misapplied the six statutory factors is unfounded. *See* NBB Br. at 29-30. EPA determined the biomass-base diesel volume based on an extensive analysis, including consideration of the six statutory factors. 2018 Rule at 58,518-22; EPA-HQ-OAR-2017-0091-4953 (JA__). This analysis—the substance of which NBB does not challenge—demonstrated that a higher volume requirement would have minimal or no effect on the impacts described in the statutory factors for 2018, but could have adverse impacts on the statutory factors in the future. The Act

requires EPA to consider these impacts in selecting a volume, not conclude that there *will be* different impacts at different volumes for the year in question. 42 U.S.C. § 7545(o)(2)(B)(ii). Having found that a range of volumes would all carry essentially the same impacts under the six factors for 2018, EPA appropriately balanced competing policies to set the volume in a way that would promote development of biomass-based diesel while leaving room for other types of advanced biofuels that could have beneficial impacts on the six factors in the future. 2018 Rule at 58,522.

Indeed, EPA explained that, over time, allowing for the development of "a variety of different types of advanced biofuels, rather than a single type such as BBD, would positively impact energy security and increase the likelihood of the development of lower cost advanced biofuels that meet the same [greenhouse gas] reduction threshold as BBD." EPA-HQ-OAR-2017-0091-4953 at 7. This result supports the goals of the RFS program to incentivize growth of both biomass-based diesel and other kinds of advanced biofuel, including lower cost fuels, and to enhance energy security. 2018 Rule at 58,522.[27]

NBB argues that EPA must "force the market" and that the biomass-based diesel volume is a "concrete floor" that provides certainty for investors. NBB Br. at 29-31. The Act indeed creates a floor for biomass-based diesel volumes, giving those

[27] NBB proposes that EPA should instead set a higher biomass-based diesel volume and then later also increase the advanced biofuel volumes in 2019. *See* NBB Br. at 30. This is at root a policy disagreement and not a basis to invalidate the Rule as arbitrary and capricious.

investors some degree of certainty. But that floor is 1.0 billion gallons, 42 U.S.C. § 7545(o)(2)(B)(v), a threshold that the 2019 biomass-based diesel volumes exceeded by more than two-fold. Nothing in the Act obligates EPA to create a higher "floor" or promote maximum or continuous growth of the biomass-based diesel market to the exclusion of promoting growth of other kinds of advanced biofuel. *See* 42 U.S.C. § 7545(o)(2)(B)(i), (ii), (v); *see also API*, 706 F.3d at 479 (holding that not "every constitutive element of the RFS program should be understood to individually advance a technology-forcing agenda" (internal citation omitted)). Above 2.1 billion gallons, biomass-based diesel will have to compete with other types of advanced biofuel, which EPA appropriately determined would continue "the incentive for the development of other types of advanced biofuel." 2018 Rule at 58,489. Historically, biomass-based diesel has flourished in this competition, as it has been used, over and above the biomass-based diesel requirement, to satisfy the increasing advanced biofuel requirements. 2018 Rule at 58,519-20. But EPA needed not mandate a higher volume.

II. EPA Properly Declined to Revise the Basic Regulatory Framework of the RFS Program in Setting the Annual RFS Standards.

Every year, by November 30, EPA is required to determine the applicable volumes of renewable fuel and set the annual percentage standards for the following year. *See* 42 U.S.C. § 7545(o)(3)(B)(i). Congress specified three required elements to

such rulemakings. None requires EPA to revisit the regulations implementing the RFS program. *Id.* § 7545(o)(3)(B)(ii).

Despite the narrow focus of EPA's annual rulemakings, the NBB and the Obligated Parties and Small Retailers inappropriately attempt to use the 2018 Rule as a vehicle to contrive challenges to long-settled aspects of the underlying RFS regulations. They do so by scouring the proposed rule and comments for stray statements they can use to claim these issues belong before the Court. In formulating a final rule, EPA does analyze a vast amount of information, including by reviewing thousands of comments, and respond appropriately in a short time frame. *See, e.g.*, Certified Index, Dkt. 1725094. Thus, although EPA could (and sometimes does) revise the underlying regulatory provisions of the RFS program at the same time it issues its annual rule, it has typically declined to do so. *See, e.g.*, EPA-HQ-OAR-2017-0091-4939 at 7 n.10 (JA__) (discussing this time pressure). EPA did not do so here. There are other avenues for relief that petitioners can pursue and, in some instances, are already pursuing to change these implementing regulations and seek judicial review.

A. EPA Properly Found that Revision of the Underlying RFS Regulations' Determination of the Point of Obligation Was Beyond the Scope of Its Annual Rulemaking.

EPA was not required to reconsider in the 2018 Rule its longstanding point of compliance obligation regulation. These arguments have been raised, including by some of the petitioners in this case, in *Coffeyville Res. Ref. & Mktg., LLC v. EPA*, No.

17-1044 (D.C. Cir., argued on October 5, 2018). In the event they are not resolved in *Coffeyville*, EPA again addresses these arguments.

1. EPA Did Not Reopen the Preexisting Point of Obligation Regulation in the 2018 Rule, and *Monroe* Controls.

EPA first designated refiners and importers as the obligated parties under the RFS program in 2007 as part of its RFS implementing regulations, and reaffirmed these obligated parties in 2010 revisions. *See* 75 Fed. Reg. at 14,722; 72 Fed. Reg. at 23,924. But the 60-day statutory time limit for judicial review, 42 U.S.C. § 7607(b)(1), may be deemed "reopened" for purposes of judicial review if EPA "either explicitly or implicitly reconsidered" the issue in a subsequent rulemaking. *West Virginia v. EPA*, 362 F.3d 861, 872 (D.C. Cir. 2004). Thus Petitioners contend that EPA erred by not reconsidering the well-settled Point of Obligation Regulation eight years later, 40 C.F.R. § 80.1406(a)(1), or asserts that these regulations were "reopened" by EPA in the 2018 Proposed Rule. EPA did neither.

Instead, EPA has addressed requests to change the Point of Obligation Regulations in separate administrative proceedings, as this court allowed in *Americans for Clean Energy*, 864 F.3d at 737. After receiving over 18,000 comments, EPA denied the administrative petitions in November 2017, accompanied by an 85-page analysis. 82 Fed. Reg. 56,779, 56,779–80 (Nov. 30, 2017); EPA-HQ-OAR-2017-0091-4939 (JA__). Petitioners have sought judicial review of the 2010 implementing regulations

and the petition denial in *Alon Refining Krotz Springs, Inc. v. EPA*, Case No. 16-1052 (D.C. Cir., argued on October 5, 2018).

By contrast, the 2018 Proposed Rule stated that "EPA is not reopening for public comment in this rulemaking the current definition of 'obligated party.'" 82 Fed. Reg. at 34,211. Consistent with this approach, the 2018 Proposed Rule mentioned obligated parties only in the context that the percentage standards apply to them. *See* 82 Fed. Reg. at 34,207-09. As a result, EPA explained that "[c]omments on changes to the point of obligation" were "beyond the scope of this rulemaking." RTC at 13; *id.* at 222 (JA__). Petitioners' argument is, therefore, controlled by *Monroe*'s holding that a similar challenge to EPA's placement of the point of obligation in a petition to review EPA's 2013 RFS rule was time-barred, "not at issue in th[e] rulemaking," and "not properly before the court." 750 F.3d at 919; *see also* 42 U.S.C. § 7607(b)(1).

EPA did not reopen its point of obligation implementing regulations by generically noting that there are "[r]eal-world challenges . . . [that] have slowed progress towards meeting Congressional goals for renewable fuels" or by seeking information on "whether and how the current [RIN] trading structure provides an opportunity for market manipulation."[28] 2018 Proposed Rule at 34,207, 34,211; *Massachusetts v. ICC*, 893 F.2d 1368, 1370–71 (D.C. Cir. 1990) (Commission's call for

[28] This quotation is immediately followed by EPA stating that it is not re-opening the point of obligation.

comments on "any possible problems" with the cost of capital was not a broad solicitation for comments on opportunity cost); *NRDC v. EPA*, 25 F.3d 1063, 1073 n.6 (D.C. Cir. 1994). Neither did EPA's explanation that its determination was "'based on a consideration of all types of renewable fuels and factors that could either constrain its use or impact the benefits of requiring it.'" OPSR Br. at 54 (quoting RTC at 111 (JA__)). Construing generalized observations like these as re-opening EPA's implementing regulations would render the time limit in 42 U.S.C. § 7607(b)(1) meaningless—the whole RFS program would be up-for-grabs every single year. That Petitioners argue that EPA's statement about "real world challenges" *also* re-opened the separate issue of how EPA treats renewable fuel exports, *see* OPSR Br. at 45-49, demonstrates this point.

Petitioners' argument that, by not reconsidering the point of obligation, EPA failed to consider an important aspect of the problem, *see* OPSR Br. at 54, is unfounded for similar reasons. *See, e.g.*, *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997) (agency does not have to make progress on every issue to make progress on one). The point of obligation has long been set by regulation, and EPA's annual rulemakings setting the volume standards are not the appropriate vehicle to challenge that regulation. Rather, EPA appropriately addressed the challenges to that regulation when it denied administrative petition on that subject.

Nor are Petitioners allowed to change the scope of EPA's rulemaking through their comments. The re-opener doctrine "is not a license for bootstrap procedures by

which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue." *West Virginia*, 362 F.3d at 872. Petitioners' challenge to the point of obligation is beyond the scope of the 2018 Rule and is time-barred.

2. The Act Does Not Require EPA to Reconsider the Point of Obligation When Setting Annual Percentage Standards.

Petitioners argue that 42 U.S.C. § 7545(o)(3)(B)(ii) requires EPA to reconsider the point of obligation when setting annual percentage standards. OPSR Br. at 52-53. Even if the Court considers the merits of this untimely challenge, the statutory text and purpose of 42 U.S.C. § 7545(o)(2)–(3) demonstrate that this is wrong.[29]

Indeed, the Obligated Parties and Small Retailers' arguments fail at *Chevron* step one because the statute unambiguously supports EPA's approach. In particular, 42 U.S.C. §§ 7545(o)(2)(A)(ii) and (A)(iii)(I) require that EPA promulgate implementing regulations for the RFS program that "shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met." It was under these statutory provisions that

[29] Presented with the same issue by Petitioner Valero, the Northern District of Texas held that 42 U.S.C. § 7545(o)(3)(B) "does not require the EPA to annually evaluate and adjust what entities are 'appropriate[ly]' subject to the implementing regulations and the annual percentage obligation." *See* Order, *Valero Energy Corp. v. EPA*, Civ. Action No. 7:17-cv-00004, Dkt. No. 39 at 3, 8-10 (N.D. Dist. Tex. Nov. 28, 2017) (JA__).

EPA defined "obligated party" to mean refiners and importers. *See supra* at 8, 56 (discussing EPA's regulations).

This definition was prospective and understood by all to apply to future annual renewable fuel standards. *See, e.g.*, EPA-HQ-OAR-2017-0091-4939 at 6-7 & n. 11 (JA__). No commenter on either the 2007 or 2010 rules establishing the definition disagreed with EPA's authority to prospectively designate obligated parties in a codified implementing regulation rather than through annual rulemakings. Nor did anyone judicially challenge EPA's decision or statutory interpretation. *See Nat. Res. Def. Council*, 25 F.3d at 1073 ("An agency seldom acts arbitrarily when it acts in conformity with its unchallenged rules."). And no language in 42 U.S.C. § 7545(o)(2)(A)(iii)(I) requires EPA to reconsider the point of obligation at any time.

Separately, 42 U.S.C. § 7545(o)(3)(B) does require that EPA set annual percentage standards for renewable fuel volumes by November 30 of each year. The Act specifies certain "required elements" that must be present in EPA's annual rule setting volume obligations, including that the annual percentages shall, among other things, "be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. § 7545(o)(3)(B)(ii)(I). It does not, however, require the reconsideration of "appropriate" obligated parties to occur at all, much less at any particular time—in contrast to the annual percentage standards, which must be promulgated every year. *Compare id.* § 7545(o)(3)(B)(i), *with id.* § 7545(o)(3)(B)(ii)(I); *see also Catawba Cty. v. EPA*, 571 F.3d 20, 35, 36 (D.C. Cir. 2009) (a congressional mandate in one section and

silence in another often suggests "a decision . . . to leave the question to agency discretion" in the second section (internal quotation marks omitted)). Tellingly, Congress knows how to require EPA to review and, if appropriate, revise its CAA regulations by a date certain. *See, e.g.*, 42 U.S.C. §§ 7409(d)(1), 7412(d)(6). But it did not do so here. *See Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotations omitted)). EPA was, therefore, free to select the "appropriate" parties through its implementing regulations governing compliance and need not revisit them annually.

The inclusion of the phrase "shall contain compliance provisions" in 42 U.S.C. § 7545(o)(2)(A)(iii)(I), which is absent from subsection (o)(3)(B)(ii)(I), further indicates that Congress required EPA to address the point of obligation as a compliance mechanism rather than reconsider it in establishing the annual percentage standards. *Id.* Likewise, the phrase "shall be applicable" in Section 7545(o)(3)(B)(ii)(I) uses a *passive* verb phrase (in contrast to the active phrase "shall contain compliance provisions" in Section 7545(o)(2)(A)(iii)(I)), reflecting EPA's discretion to maintain the status quo. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 146 (1995) (discussing the distinction between "used" and "intended to be used"). Petitioners' view would render these differences meaningless.

Annual reconsideration of the definition of obligated parties would also reduce the regulatory certainty required for renewable fuel producers to plan for growth, undermining the purpose of the Act to "increase the production of clean renewable fuels." EISA, 121 Stat. 1492; *see Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) (statutes are interpreted in the context of their purpose, structure, and history); *Petit v. Dep't of Education*, 675 F.3d 769, 781 (D.C. Cir. 2012). Similarly, the compliance flexibility mechanisms in the act, such as the provisions allowing obligated parties to carry forward excess RIN credits and RIN deficits from year to year, 42 U.S.C. § 7545(o)(5)(A), (D), would make little sense if the identity of the obligated parties were at risk of changing every year.

EPA fully satisfied 42 U.S.C. § 7545(o)(3)(B) by setting percentage standards and noting that those standards would be applicable to "producers and importers of gasoline and diesel," 82 Fed. Reg. at 58,523, consistent with the preexisting Point of Obligation Regulation. The statute unambiguously requires no more, and EPA's interpretation should be upheld under *Chevron* step one. *Nat. Res. Def. Council v. Browner*, 57 F.3d 1122, 1127, 1129 (D.C. Cir. 1995).[30]

Even if 42 U.S.C. § 7545(o)(2)–(3) were ambiguous on whether EPA must annually reconsider who are the appropriate obligated parties, EPA's reading of these

[30] Petitioners' argument also conflicts with *Monroe*. Under Petitioners' theory, a challenge to the point of obligation could never be deemed "not properly before the court." *Monroe*, 750 F.3d at 919.

provisions should be upheld under *Chevron* step two. 467 U.S. at 843. Unlike in other CAA provisions requiring review and revision, the Act is silent on whether, when, and how EPA might reconsider the appropriate obligated parties after the initial compliance regulations, which indicates that Congress intended to confer broad discretion on EPA. *See, e.g.*, *Entergy*, 556 U.S. at 222–23; *see also Envtl. Def. Fund v. EPA*, 210 F.3d 396, 397 (D.C. Cir. 2000) (deferring to EPA on the scope of its regulatory action in the face of silence). EPA's interpretation is reasonable, consistent with the statute, and should be upheld.

3. EPA Addressed Petitioners' Arguments Contemporaneously with the 2018 Rule.

EPA issued the 2018 Rule on November 30, 2017. 2018 Rule at 58,527. EPA denied the administrative petitions seeking to change the point of obligation on November 22, 2017. EPA-HQ-OAR-2017-0091-4939 (JA__). Thus, even if EPA should have revisited the point of obligation in the 2018 Rule, any failure to do so would be harmless because EPA plainly would have reached the same result. *See PDK Labs. Inc. v. United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004)

B. EPA Properly Found that Revision of the RFS Regulations' Treatment of Exported Renewable Fuel Was Beyond the Scope of Its Annual Rulemaking.

EPA's implementing regulations provide that RINs generated from renewable fuel that is exported from the United States cannot be used to satisfy the annual volume requirements of the RFS program. *See* 40 C.F.R. § 80.1430. Specifically,

when renewable fuel that has generated RINs is exported from the United States, the exporter must calculate its "Exporter Renewable Volume Obligations" associated with that fuel and acquire an equivalent number of RINs, *id.*, thereby offsetting the RINs that had been generated by the exported fuel.

The Obligated Parties and Small Retailers argue that EPA was required to revisit this regulation, but EPA properly concluded that this issue was "beyond the scope" of the 2018 Rule. RTC at 223 (JA__) (explaining that it "did not propose any changes to the overall structure of the RFS program or otherwise seek comment on these issues"). As a result, Petitioners' challenge to an eight-year old regulation governing how EPA treats exported renewable fuel is untimely. *See* 42 U.S.C. § 7607(b)(1); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 132 F.3d 71, 76 (D.C. Cir. 1998); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1226 (D.C. Cir. 1996).

EPA neither "explicitly or implicitly reconsidered" its treatment of exports in 40 C.F.R. § 80.1430 in the 2018 Rule. *West Virginia*, 362 F.3d at 872. Nothing in the 2018 Proposed Rule or the notice of supplemental data availability addressed changing—or not changing, for that matter—how EPA treats exported renewable fuel. *See* 2018 Proposed Rule at 34,209-12 ("Summary of Major Provisions in this Action"); 82 Fed. Reg. 46,174. To the contrary, EPA explained that it was generally "not soliciting comment on any aspect of the current RFS regulatory program." 2018 Proposed Rule at 34,211. In the handful of exceptions where EPA solicited such

comments, it did so explicitly and only as to discrete issues. *See id.* 34,211, 34,242. Revisiting 40 C.F.R. § 80.1430 was not one of them.

Because EPA did not, in fact, reopen 40 C.F.R. § 80.1430, Petitioners resort to exactly the sort of "bootstrapping" this Court has held is impermissible. *See West Virginia*, 362 F.3d at 872. Although Petitioners suggest that their comments on changing 40 C.F.R. § 80.1430 addressed certain issues on which EPA expressed concern, OPSR Br. at 45-48, this misses the point. The purpose of the 2018 Rule was to set the annual volume requirements, not to broadly revisit or improve on the RFS implementing regulations. The reopener doctrine only applies "where the entire context demonstrates that the agency has undertaken a serious, substantive reconsideration of the existing rule." *ASECTT v. Fed. Motor Carrier Safety Admin.*, 755 F.3d 946, 954 (D.C. Cir. 2014). Petitioners cannot use their comments to seize the wheel of EPA's rulemaking process and drive it off the map. *See, e.g.*, *Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.C. Cir. 2007).

In this vein, EPA's observation that there are "real-world challenges" to attaining the annual statutory volumes, OPSR Br. at 45 (citing 82 Fed. Reg. at 34,207), in the context of a proposed rule to adjust those volumes, did not reopen the underlying regulatory program. Likewise, there are many things EPA might consider to address "energy independence and security" and RIN scarcity. *Id.* at 45, 47. But even if revising 40 C.F.R. § 80.1430 is one of them, EPA was not proposing to take that step in the 2018 Rule, which focused on the volume requirements alone. *See, e.g.*,

82 Fed. Reg. 46,177 (requesting comment "insofar as [imports of biofuel] impact those factors that we are permitted to consider and evaluate *under the available waiver authorities, and/or the standard-setting authority for BBD*" (emphasis added)). And it cannot be the case that any time EPA asks for comments on "whether to invoke general waiver authority" or discusses the price effects of importing and exporting renewable fuel, *id.* at 45, EPA is inviting revisitation of its implementing regulations. In short, while EPA sought comment on "all aspects of [its] proposal" and "any aspect of this rulemaking," 2018 Proposed Rule at 34,242, its "proposal" was to set the annual volume standards, not to reconsider its regulations generally or 40 C.F.R. § 80.1430 in particular. *See NARPO v. Surface Transp. Bd.*, 158 F.3d 135, 144 (D.C. Cir. 1998) (finding that agency did not reopen rule despite broadly worded solicitation for comment where "it did not focus attention in any way on the settled [issue]"); *Nat'l Mining Ass'n*, 116 F.3d at 549; *Massachusetts*, 893 F.2d at 1370-71.[31]

Petitioners cite no case that allows them to expand the scope of EPA's rulemaking through their comments in order to bring time-barred challenges to EPA's implementing regulations. *West Virginia*, 362 F.3d at 872. Accepting Petitioners argument would strip the 60-day jurisdictional time limit in 42 U.S.C. § 7607(b)(1) of substance—under Petitioners' view, any time EPA promulgates a rule that relies on its

[31] EPA's October 19, 2017, letter is in accord, explaining that while EPA had been "discussing a range of ideas intended to stabilize RFS compliance costs, " including changing its treatment of ethanol exports, "EPA has not taken any formal action to propose this idea." EPA-HQ-OAR-2017-0091-4913 at 2 (JA__).

prior regulations, petitioners could attempt to re-open those regulations through their comments.

As it has previously, the Court should reject Petitioners' efforts to vacate an EPA rule setting RFS volumes based on issues that were beyond the scope of the rulemaking. *See Monroe*, 750 F.3d at 919. The proper avenue to seek a change to 40 C.F.R. § 80.1430 is in a petition for rulemaking to EPA, not through challenges outside the scope of the Rule.

C. EPA Reasonably Chose Not to Revise the Underlying RFS Regulations' Treatment of Small Refinery Exemptions.

Under the formula found in 40 C.F.R. § 80.1405(c), EPA ensures that the applicable volumes are used each year by establishing percentage standards that apply to obligated parties. The percentage standards are calculated by dividing the applicable volume for each renewable fuel type by an estimate of the national volume of gasoline and diesel that will be used that year, with certain adjustments. One of those adjustments is to reduce the denominator by "[t]he amount of [gasoline and diesel] projected to be to be produced by exempt small refineries and small refiners . . . in any year they are exempt." *Id.* (definitions of GE^i and DE^i). This results in a higher percentage standard, thereby requiring the remaining obligated parties (those not granted exemptions) to acquire more RINs. *See, e.g.*, 80 Fed. Reg. 77,420, 77,511. Consequently, all exemptions granted prior to the issuance of the annual rule are accounted for by the formula.

EPA adjudicates small refinery exemption petitions based upon the financial circumstances of the refinery during the calendar year, *see* 42 U.S.C. § 7545(o)(9)(B)(i)-(ii); Small Refinery Guidance.[32] As a result, EPA may issue exemption decisions for a given compliance year after the annual standards for that year have been promulgated. The formula in § 80.1405(c) does not account for such after-the-fact exemptions. EPA has also consistently explained that altering the standards after they have been set to account for such exemptions would not be consistent with the statutory requirement that EPA set the standards "not later than November 30," and that doing so would inappropriately render the standards a moving target. *See, e.g.*, 75 Fed. Reg. 76,790, 76,804; *see also* 78 Fed. Reg. 49,794, 49,825.

NBB argues that EPA has failed to "ensure" that the percentage standards set under its annual rulemakings achieve the RFS volume requirements. *See* NBB Br. at 13-20. According to NBB, EPA must revise its formula to incorporate EPA's attempt to guess at the exemptions it may grant in a given year and, if EPA fails to achieve perfection, account for any error when setting the next year's standards. *See* NBB Br. at 17. NBB's argument is neither properly before the Court nor is it meritorious.

[32] Available at https://www.epa.gov/sites/production/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf.

1. EPA's Decision Not to Change How It Accounts for Small Refinery Exemptions Is Not Subject to Judicial Review in This Case.

NBB's arguments are not properly before the Court because they were not raised in comments to EPA. Judicial review of a regulation under 42 U.S.C. § 7545 is limited to those objections "raised with reasonable specificity during the period for public comment." 42 U.S.C. § 7607(d)(7)(B); *see also* 42 U.S.C. § 7607(b)(1), (d)(1)(E); *EPA v. EME Homer City Generation L.P.*, 134 S. Ct. 1584, 1602-03 (2014). This Court "enforce[s] this provision strictly." *NRDC v. EPA*, 571 F.3d 1245, 1259-60 (D.C. Cir. 2009) (refusing to consider argument regarding suspension of certain contingency measures because although NRDC "did object to the Clean Data Policy," it objected only to the suspension of other requirements); *see also NRDC v. EPA*, 559 F.3d 561, 563-64 (2009) (refusing to consider argument relating to the definition of "natural event" because NRDC did not object to EPA's definition of that term with sufficient specificity); *Mossville Envtl. Action Now v. E.P.A.*, 370 F.3d 1232, 1238–40 (D.C. Cir. 2004).

None of the comments that EPA received raised NBB's objections with reasonable specificity. *See* RTC at 216-17 (JA__). The only comment NBB cites is that of BP Products North America, NBB Br. at 16, but BP Products primarily suggested that EPA should not grant any small refinery exemptions *at all* after EPA has finalized its annual rule, EPA-HQ-OAR-2017-0091-3953 at 6-7 (JA__). Alternatively, BP Products suggested that if EPA grants small refinery exemptions

after EPA publishes the applicable annual rule "EPA should . . . reconsider RVO volumes and obligated volume projections" set by that rule. *Id.* at 7. EPA has consistently rejected that approach as inconsistent with its obligation to set the standards by November 30 of the preceding year. *See, e.g.*, 77 Fed. Reg. 1320, 1340; *supra* at 68.

NBB's arguments are entirely different. First, it argues that *before* promulgating an annual rule EPA must attempt to guess at how many small refinery exemptions it might later grant, even though it has no information before it on those hypothetical exemptions. NBB Br. at 17-18. Second, it suggests that EPA should, after-the-fact, attempt to remedy any errors in such guesswork by increasing compliance requirements in an annual rule applicable to a *subsequent* year. *Id.* These objections are far afield from BP Products' suggestion that EPA should retroactively revise its published rule for a given year in the middle of the compliance period for that rule. Indeed, the BP Products proposal did not address the matters on which EPA solicited comment. *See* RTC at 216-17 (JA__) (explaining that such comments were not responsive because "EPA was seeking information on whether changes were needed *to how the percentage standards are calculated*" (emphasis added)). No commenter raised NBB's position with reasonable specificity.

NBB suggests in passing that the Court may consider its argument because it relates to a "vital assumption" of the 2018 Rule. NBB Br. at 16-17 n.1. But in cases in which this Court has reviewed aspects of a rule that were not commented on, it has

done so narrowly, reviewing foundational assumptions of that particular rule. *See, e.g.*, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534-35 (D.C. Cir. 1983) ("[A]ggregate analysis is a vital assumption underlying the Sobotka model" on which the rule relied). The basis of this doctrine is that, as part of EPA's "affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule," it cannot simply select the core assumptions of that rule without examination. *Id.* at 534.

Here, in contrast, NBB is not asking the Court to review an "assumption" of the 2018 Rule. Rather, it is seeking review and vacatur of an aspect of the underlying regulatory regime that was established years ago in a separate rulemaking. *Small Refiner Lead Phase-Down Task Force* does not, as NBB would have it, reflect a wide-ranging exception to the comment requirement of Section 7607(d)(7)(B) that allows petitioners to bring challenges to the pre-existing regulatory structure where they have failed to articulate their position to EPA.[33] *Cf. Hispanic Affairs Project v. Acosta*, No. 17-5202, 2018 U.S. App. LEXIS 23201, at *19-20 (D.C. Cir. Aug. 17, 2018) (finding this "key assumption" doctrine applied because "there is no prior regulatory source for the foundational elements of the rule to which one could turn").

Because NBB's objection to EPA's treatment of small refinery exemptions was never raised before EPA, it is not subject to judicial review under the plain language

[33] NBB suggests it was unaware of the number of small refinery exemptions EPA might grant, NBB Br. at 6-8, but this does not excuse its failure to comment, *see, e.g.*, *EME Homer City Generation, L.P v. EPA*, 795 F.3d 118, 137 (D.C. Cir. 2015), particularly given that EPA solicited comments on this issue.

of 42 U.S.C. § 7607(d)(7)(B). Moreover, NBB's argument is the subject of a pending administrative petition before EPA and, in fact, a pending petition for review in this Court by NBB, among others. *See Renewable Fuels Ass'n v. EPA*, No. 18-1154, Dkt. No. 1735386 (D.C. Cir., filed June 4, 2018).

2. EPA Was Not Required to Change How It Accounts for Small Refinery Exemptions.

Even if EPA was required to consider objections that no one offered in the comments to the 2018 Rule, EPA reasonably decided not to change its long-standing treatment of small refinery exemptions. Section 7545(o) has only one requirement for how EPA is to account in the percentage standards for small refinery exemptions that it grants: EPA is to make adjustments "to account for the use of renewable fuel during the previous calendar year" by exempt small refineries. 42 U.S.C. § 7545(o)(3)(C)(ii); *see also* 75 Fed. Reg. 14,670, 14,717. Beyond this, the statute is silent on how EPA should treat such exemptions, affording EPA discretion to settle on a reasonable approach. *See Catawba Cty.*, 571 F.3d at 35-36.

EPA permissibly adopted 40 C.F.R. § 80.1405 in order to be able to "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." 42 U.S.C. § 7545(o)(3)(B). Far from ignoring small refinery exemptions, 40 C.F.R. § 80.1405 accounts for the exemptions that EPA has actually granted but reflects EPA's considered judgment not to speculate on hypothetical future exemptions. It further

reflects the need Congress recognized in 42 U.S.C. § 7545(o)(3)(B) to have forward-looking standards issued by a statutory deadline. EPA's decision to draw a line between exemptions granted before the rule is issued and those that are not, and only include the former in calculating the standards is at least permissible, *see supra* at 18 (discussing *Chevron*), if not required by the statute.

NBB's argument is a variant of one the Court rejected in *Americans for Clean Energy*. There, Americans for Clean Energy advanced a similar argument that "EPA's statutory duty to 'ensure[ ]' that the mandated volume requirements are met" required that EPA "consider carryover RINs as a supply source of renewable fuel." *Ams. for Clean Energy*, 864 F.3d at 714. The Court disagreed, explaining that Congress did not "pursue its purposes of increased renewable fuel generation at all costs." *Id.* (quotation and alterations marks omitted). NBB now attempts to claim that "ensure" means that EPA must "ex ante" guess at the post-Rule exemptions it might grant and then correct any inaccurate guess "ex post." NBB Br. at 17-18. This argument rests on the same logic that the Court rejected in *Americans for Clean Energy*, and, here too, the Court should reject this approach. NBB's view would require EPA to pile prejudgment and speculation on the one hand and amount to a re-write of the RFS statute on the other.[34]

[34] The number of exemptions EPA has granted recently, NBB Br. at 7-8, 17-19, is extra-record evidence that post-dates the 2018 Rule, and therefore not properly before the Court. Moreover, the year-to-year variance in the number of exemptions sought and granted confirms that EPA cannot accurately predict future exemptions.

Focusing first on NBB's "ex ante" argument, NBB relies on a homey metaphor to claim that it asks only that EPA take "precautions in light of foreseeable risks." NBB Br. at 14. The reality is that NBB is asking the Court to require that EPA guess as to which entities will petition for an exemption at all. Then, EPA would have to prejudge those hypothetical petitions and further speculate whether those entities qualify for the exemption on the basis of "disproportionate economic hardship." 42 U.S.C. § 7545(o)(9). EPA would have no record before it, let alone the detailed information it has required on the small refinery's financial circumstances during the compliance year, making this task nigh impossible.[35] And, of course, if EPA gets this task wrong, it could end up setting compliance standards that are unachievable for obligated parties. Particularly given uncertainties inherent in the predictive, forward-looking approach Congress mandated, Congress cannot have believed that EPA would be able to "ensure" that the applicable volumes were met with exacting accuracy.

Where Congress had not specified a particular methodology that an agency is to follow, the agency has discretion in selecting its approach. *See George E. Warren Corp. v. EPA*, 159 F.3d 616, 624-26 (D.C. Cir. 1998). Courts also defer to an agency's technical assessments, including whether the data before the agency allows the agency

[35] Moreover, between the time of the annual rule and the small refinery exemption decision, the adjudicatory process for exemptions may be affected by intervening judicial decisions or legislative actions. *See, e.g., Sinclair Wyo. Ref. Co. v. EPA*, 874 F.3d 1159, 1167, 1172 (10th Cir. 2017).

to draw meaningful conclusions. *See, e.g.*, *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989); *Nat'l Ass'n for Surface Finishing v. EPA*, 795 F.3d 1, 17-18 (D.C. Cir. 2015). Indeed, even where a statute mandates that EPA consider a certain kind of data, EPA has no obligation to base its decisions on data that it considers unsound. *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 154-55 (D.C. Cir. 2015). Here, EPA decided in 40 C.F.R. § 80.1405 not to codify speculation and prejudgment of hypothetical future petitions for small refinery exemptions. This approach was reasonable.

NBB's argument that EPA should act "ex post" by increasing the requirements of future annual rulemakings fares no better because adopting it would effectively re-write the RFS statute. Congress specified that EPA "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" and, in the same sentence of statutory text, provided that EPA must do so by November 30 of each calendar year. 42 U.S.C. § 7545(o)(3)(B) (emphasis added). It did not direct that EPA should set or adjust that obligation in a rule for some subsequent year.

The rest of the RFS statute confirms this conclusion. Congress enacted statutory tables that specify the "applicable volume[s] of renewable fuel" broken down by "calendar years." 42 U.S.C. § 7545(o)(2)(B)(i); *see also id.* § 7545(o)(2)(B)(ii). When EPA exercises its waiver authorities to reduce those statutory volumes, it does so as to the calendar year to which the rule will apply, and its approach is based on

projections for that year. *See, e.g.*, *supra* at 6. And when EPA uses the final applicable volume to calculate the applicable percentages, it does so based on a yearly estimate from the EIA of the volumes of certain fuels projected to be sold or introduced into commerce in the United States "with respect to the following calendar year." *Id.* § 7545(o)(3)(B); *see also* 77 Fed. Reg. 1320, 1340.

Thus, the CAA provides that EPA's task is to prospectively set applicable percentages for the specific "following calendar year," based on the statutory tables and EPA's projections *for that year*. NBB's approach would turn the statute on its head: the rules "ensur[ing]" that the volumes are met would be promulgated *after* that calendar year, based on hindsight. Moreover, as a result, the standards set in that later year's rule would *also* not be based on the renewable fuel volumes achievable in the year to which the rule would apply, further departing from the congressional design.

NBB's "post-hoc" approach also conflicts with other provisions of Section 7545. For example, in adjusting the applicable volumes for cellulosic biofuels each year, EPA *must* lower the required volume of cellulosic biofuel "to the projected volume available during that calendar year." 42 U.S.C. § 7545(o)(7)(D). But on NBB's approach, if cellulosic biofuel volumes were not attained the prior year, EPA would have to set percentage standards at a level that would require cellulosic volumes *above* the amount EPA projects will be available that year. This would undermine this mandatory waiver and potentially require obligated parties to do the impossible. Similarly, in years where actual production of a renewable fuel is at or near the

statutory targets, NBB's approach would require EPA to raise the applicable volumes in those years to *above* the levels specified by the statute. But EPA has only *waiver* authorities, not authority to effectively *increase* the statutory volumes in a given year.

Moreover, NBB's argument is subject to no limiting principle. As just one example, if the price of gasoline rises, causing consumers to use less transportation fuel in a given year than EPA projected, this will also result in a shortfall in meeting that year's volume requirement. Under NBB's logic, here too EPA would have to use later rules to "true-up" the applicable volumes from a previous rule, contrary to the statutory design.

NBB's argument that EPA's approach amounts to a "de facto waiver," NBB Br. at 18-20, has no substance. Unlike the waiver authorities Congress enacted, EPA's current approach to accounting for small refinery exemptions does not reduce the volumes in the statutory tables. Rather, to the extent there is any shortfall in a given year, this is because EPA must set the percentage standards well in advance of the conclusion of the compliance period. EPA has reasonably decided not to attempt to use speculation and prejudgment in setting these standards or attempt to administratively re-write the CAA. EPA's approach to these constraints does not amount a de facto "waiver" as NBB contends.[36]

[36] EPA also has other means of addressing these constraints, such as adjusting the exercise of its waiver authorities to draw down the size of the RIN bank. *See* 2018 Rule at 58,494-95; 78 Fed. Reg. 49,820-22.

III. Small Retailers Coalition's Challenge to the 2018 Rule Is Meritless.

A. Small Retailers Coalition's Arguments Are Not Properly Before the Court.

Small Retailers Coalition argues that the Court must vacate the 2018 Rule because EPA purportedly failed to comply with the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). OPSR Br. at 57-64. The Coalition is the only party that claims it has standing to assert arguments under SBREFA. OPSR Br. at 18-19. And, in fact, none of the other petitioners is a small fuel retailer to whom The Coalition's arguments would apply. *See id.* at 57-64. Thus, in the Coalition's absence, no petitioner could properly raise these arguments.

The Coalition is an intervenor, not a petitioner. It is not, therefore, permitted to raise issues distinct from those properly raised by the petitioners. *E.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 729-30 (D.C. Cir. 1994). Allowing intervenors to raise new issues would circumvent the jurisdictional limitations for filing a timely petition for review. *Ill. Bell Tel. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). This is exactly what would happen if the Court were to consider the Coalition's arguments. The deadline to file a petition for review was 60 days from December 12, 2017, when EPA published 2018 Rule in the Federal Register. 42 U.S.C. § 7607(b)(1); *see also NRDC v. EPA*, 571 F.3d 1245, 1265 (2009) (this deadline is jurisdictional). The Coalition never filed a petition for review and, in fact, did not even seek to intervene until March 12, 2018, a month after that deadline had passed.

The Coalition's arguments regarding small retailers are, therefore, not properly before the Court.

B. The Coalition's SBREFA and Regulatory Flexibility Act Arguments Are Unfounded.

Even were the Court to consider the Coalition's arguments, it should reject them for several independent reasons. First, agencies need conduct Regulatory Flexibility Act analyses and certifications only with regard to small entities that are directly "*subject to the proposed regulation*—that is, those 'small entities *to which the proposed rule will apply*." *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 867-69 (D.C. Cir. 2001) (emphasis original); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998). The only entities obligated to comply with annual RFS standards are refiners and importers. *See supra* at 8; 42 U.S.C. § 7545(o)(3)(B)(ii)(I) (excluding "distributors" from the list of entities to whom "[t]he renewable fuel obligation determined for a calendar year . . . shall be applicable"); *Ams. for Clean Energy*, 864 F.3d at 704 ("Congress chose not to place any compliance burdens on the fueling stations or consumers of transportation fuel."). The Coalition does not and cannot identify any provision of the 2018 Rule that regulates small fuel retailers.[37]

Second, EPA need not conduct either an initial or final regulatory flexibility analysis where the agency certifies that the rule will not "have a significant economic

[37] EPA's statement that "other fuel dealers" could be "*examples* of *potentially* regulated entities" under the 2018 Rule does not establish that small fuel retailers are, in fact, regulated by that rule. 2018 Rule at 58,486 (emphasis added).

impact on a substantial number of small entities." 5 U.S.C. § 605(b). Although EPA focused on small refineries in its discussion in the proposed and final rules, it broadly made this certification as to all "small entities." 2018 Fed. Reg. at 58,525-26; 2018 Proposed Rule at 34,243. Moreover, in its memorandum discussing impacts of the 2018 standard on small entities, EPA observed that it had, in its denial of requests to change the point of obligation, rejected the Coalition's arguments that the RFS program negatively affects small retailers. *See* EPA-HQ-OAR-2017-0091-4974 at 3-4 (JA__). This denial is part of the record for the 2018 Rule and is well supported, *see* Certified Index at 222; EPA-HQ-OAR-2017-0091-4939 at 31-32 (JA__), such that the certification is also supported as to small retailers.

Third, *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000), holds that the Court is "without jurisdiction" to consider "challenges to EPA's compliance with the initial regulatory flexibility analysis requirements." 215 F.3d at 79. The Coalition's suggestion that *Allied Local* allows vacatur merely because "EPA made no such [initial regulatory flexibility] analysis," OPSR Br. at 60, is directly contrary to this holding. The Coalition cannot show that EPA's final rule, particularly its conclusion that the RFS program is not harming small retailers, was arbitrary and capricious. *Cf. Allied Local*, 215 F.3d at 79 (noting that the Court would consider impacts on small entities in determining whether EPA met this "overall requirement" that the rule not be arbitrary and capricious).

Fourth, the Coalition's bald assertion that the periodic review provision of the RFS statute "creates a duty to complete periodic reviews regarding whether the point of obligation standard remains appropriate," OPSR Br. at 60, was not raised with reasonable specificity in the comments and, therefore, is not properly before the Court. *See supra* at 68. Although the Coalition vaguely contended that EPA had not fulfilled its obligations under Section 7545(o)(11), its comments did not suggest any duty to review the point of obligation under this provision. *See* EPA-HQ-OAR-2017-0091-3572 Ex. 3 at 8 (JA__).

Moreover, whether EPA has fulfilled its "periodic review" obligations under Section 7545(o)(11) was not at issue in the 2018 Rule and this is not the appropriate vehicle to litigate that question. Indeed, the Coalition is well aware that this is the wrong forum and that its argument is invalid, as it has already litigated and lost this argument in another forum.[38] *See* Order, *Small Retailers Coalition v. EPA*, 17-cv-00121, Dkt. No. 29 at 4-5 (N.D. Tex. May 21, 2018) (JA__). It chose not to appeal and the time to do so has expired. The Court should reject the Coalition's argument based on Section 7454(o)(11) as yet another attempt by Petitioners to shoehorn a challenge to the point of obligation into every litigation that relates to the RFS program. Such

[38] In addition, EPA has expressed its interpretation of the periodic review provision in a nonbinding commentary that is the subject of separate litigation brought by Petitioner Valero, but which the Coalition chose not to join. *Valero Energy Corp. v. EPA*, 18-1028 (D.C. Cir.).

challenges to EPA's long-standing implementing regulations are untimely and beyond the scope of the 2018 Rule. *See supra* at 56-59.

Regardless, Section 7545(o)(11) creates no such duty to review the point of obligation. It provides that EPA is to conduct periodic reviews of certain matters—none of which is the point of obligation—for the specific purpose of informing the "appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2)." 42 U.S.C. § 7545(o)(11). The statutory cross-reference is to 42 U.S.C. § 7545(o)(2)(B), the annual *volume* requirements, not anything to do with setting the point of obligation. Small Retailers Coalition is thus wrong on the merits.

IV. The Court Lacks Jurisdiction over Environmental Petitioners' Challenge, Which Also Is Meritless.

Environmental Petitioners approach their case from a different angle than the other Petitioners. Relying on post-decisional evidence and argument, they labor to connect a long causal chain between an "RFS Program," shifting agricultural practices in the United States, and site-specific impacts to particular ESA-listed species and critical habitat. Based on this speculative chain, they argue RFS actions affect ESA-listed species and EPA must consult with the wildlife agencies under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). *See* Environmental Petitioners' Brief ("EP Br.") (Case No. 18-1040, ECF No. 1743798). This challenge is misguided, and the Court should reject it for four reasons.

First, Environmental Petitioners attack EPA's administration of an "RFS Program," but the CAA does not authorize programmatic challenges to an "RFS Program" (Section IV.A.). Second, Environmental Petitioners object to the 2018 Rule based on post-decisional evidence and arguments, which flouts the CAA's requirement that objections must be raised with reasonable specificity to the agency during the public comment process (Section IV.B.). Third, Environmental Petitioners have not established Article III standing to challenge the 2018 Rule (Section IV.C.). Finally, even if these hurdles are cleared, EPA complied with the ESA by rationally determining that the 2018 Rule does not affect ESA-listed species or critical habitat. In this instance, the ESA consultation obligation does not apply (Section IV.D.).

For these reasons, as discussed below, the Court should dismiss Environmental Petitioners' ESA challenge to the 2018 Rule.

A. The Court Has Jurisdiction, If at All, Only over the 2018 Rule.

Environmental Petitioners direct most of their ESA claim at an "RFS Program." EP Br. at 2 (seeking declaratory relief on "the RFS program"); *id.* at 11-16 (entire "background" and associated evidence directed at an "RFS Program"); *id.* at 22 (basing standing on "the ten-year life of the Program"); *id.* at 27-28 (alleging EPA must consult on "this nationwide program"). The CAA, however, does not provide the Court with jurisdiction over challenges to an "RFS Program."

Section 7607(b)(1) of the CAA grants the Court with jurisdiction over "final action" taken by EPA, where a petition is filed "within sixty days from the date notice

of such … action appears in the Federal Register." 42 U.S.C. § 7607(b)(1). The "final action" term is "synonymous with the 'final agency action'" requirement of the Administrative Procedure Act, 5 U.S.C. § 704. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004). In accord, the CAA allows challenges only to "discrete agency action"; it does not allow for "programmatic attack[s]" on agency "programs." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004); *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("While a single step or measure is reviewable, an on-going program or policy is not, in itself, a 'final agency action.'").

Environmental Petitioners invoked Section 7607(b)(1) and identified the 2018 Rule in their petition. *See* Petition, Case No. 18-1040, Doc. 1717797 (Feb. 9, 2018). Yet they now pivot to presenting *post hoc* evidence and arguments challenging an "RFS Program," EP Br. at 26-27, 29-30. An RFS Program is not a discrete final agency action challengeable under the CAA. Nor can Environmental Petitioners recast an RFS Program as a series of independently reviewable final actions. The CAA precludes challenges to agency actions taken more than 60 days before a petition is filed, which bars any attempt to shoehorn past RFS actions into the present challenge to the 2018 Rule. 42 U.S.C. § 7607(b)(1).

Environmental Petitioners reference the ESA's citizen-suit provision, EP Br. at 3, 7-8, but this provision does not govern in this case. By petitioning this Court under Section 7607(b)(1), Environmental Petitioners admit, as they must, that the CAA's special statutory review provision applies. And where a special statutory review

provision applies, like that contained in the CAA, the provision supplants other citizen-suit provisions and constitutes "the exclusive means of obtaining judicial review." *CBD v. EPA*, 861 F.3d at 186-187; *see also Sierra Club v. EPA*, 353 F.3d 976, 992 (D.C. Cir. 2004) (reviewing ESA failure to consult challenge in the context of a CAA petition for review).

Environmental Petitioners cannot circumvent the CAA's limitations on judicial review, and the Court should reject their attempt to "seek wholesale improvement of" a broadly defined RFS Program under the guise of a petition filed over the 2018 Rule. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

B. Environmental Petitioners Failed to Preserve Their ESA Claims.

The Court also should reject Environmental Petitioners' petition because they failed to raise their ESA objections and evidence to the agency during the administrative process.

"[I]t is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review." *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1231 (D.C. Cir. 2007) (citation omitted). The CAA explicitly adopts this rule. "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B). The CAA's requirement "extends both to substantive and procedural challenges and applies even if the objections could not have been raised during the comment

period." *Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 553 (D.C. Cir. 2015). In the latter instance, where comments could not have been provided during the comment period, the "objecting party must 'petition EPA for administrative reconsideration *before* raising the issue' in this court." *Masias v. EPA*, No. 16-1314, ---F.3d ---, 2018 WL 5091589, at *4 (D.C. Cir. Oct. 19, 2018) (citation omitted).

Environmental Petitioners did not lodge a "reasonably specific" objection that EPA must consult *on the 2018 Rule*. In July 2017, they submitted a "notice" letter asserting that EPA must consult on the "RFS program" and, *potentially*, in "setting annual renewable fuel volumes, determining whether to exercise its [waiver] authority . . . , *and/or* reviewing and approving fuel pathways . . . ." EPA-HQ-OAR-2017-0091-5030 at 20 (JA__) (emphasis added). Environmental Petitioners then followed this equivocal notice with two comment letters on the 2018 Rule. EPA-HQ-OAR-2017-0091-3306 (JA__); EPA-HQ-OAR-2017-0091-4498 (JA__). Those letters raised ESA comments concerning an "RFS Program;" they did not argue that EPA must consult *on the 2018 Rule* because of the post-decisional evidence and arguments they advance in this case. *Id.*[39] (JA__).

[39] Environmental Petitioners point to other documents submitted to EPA *after* EPA finalized the 2018 Rule, including a second notice letter. *See* EPA Response to Motion, Case No. 17-1258, ECF No. 1735214 at 4; *see also id.* at ECF No. 1733158; EPA-HQ-OAR-2017-0091-4498 (JA__); EPA-HQ-OAR-2017-0091-4689 (JA__). None of these documents preserves ESA objections, as the CAA requires petitioners to comment during the comment period or, alternatively, seek reconsideration. *Mexichem Specialty Resins*, 787 F.3d at 553; *Masias*, 2018 WL 5091589, at *4-*5. The

Equally problematic is Environmental Petitioners' reliance on post-decisional evidence. They proffer the Lark Declaration (EP Br., Exhibit A) and a post-decisional EPA report (EP Br., Exhibit B) to argue that EPA allegedly violated the ESA. But Environmental Petitioners bore an obligation to submit this evidence to the agency for consideration in the first instance. *Appalachian Power Co. v. EPA,* 135 F.3d 791, 799 n.14 (D.C. Cir. 1998) (exhibits "never submitted to EPA … are excluded from the record for judicial review) (citing 42 U.S.C. § 7607(d)(7)(A)). Indeed, arbitrary and capricious review occurs on "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. at 142; *cf. CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) ("It is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'") (citation omitted).

Environmental Petitioners failed to provide a specific objection to EPA during the administrative process that it must consult individually on the 2018 Rule. Other commenters likewise avoided this issue; they addressed an RFS or other "programs" and environmental impacts, but they did not address with any specificity whether EPA must consult on the 2018 Rule. *See* EP Br. at 18 n.10 (citing comments, like Mr. Steitz's at EPA-HQ-OAR-2017-0091-4087 (JA__), which contended in one sentence

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ESA's notice provision does not alter this law, as that provision does not apply. The CAA's review provision applies and provides the exclusive means of obtaining judicial review of the 2018 Rule. *See CBD v. EPA*, 861 F.3d 186-87.

that an "ethanol program" jeopardizes species and violates the ESA). The Court recently held that similarly vague one-sentence objections do not suffice. In *Masias*, the Court explained that "a mere reference to 'available information' plainly cannot quality as posing with 'reasonable specificity' Sierra Club's present [detailed and specific] contention … at least not if Congress's regulatory structure is to be preserved." *Masias*, 2018 WL 5091589, *5; *see also Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1171 (D.C. Cir. 2007) ("petitioners' one-sentence cry of protest" is not a reasonably specific "objection").

The CAA's requirements are not mere bureaucratic niceties that petitioners can ignore. They "serve[] the important function of assuring that the agency has had an opportunity to explicate and evaluate objections before [the courts] review them." *Mexichem Specialty Resins*, 787 F.3d at 553; *Masias*, 2018 WL 5091589, *5. Because Environmental Petitioners failed to present their ESA arguments and evidence to EPA, the Court should disregard them.

C. Environmental Petitioners Lack Standing to Challenge the Rule.

The Court should dismiss Environmental Petitioners' petition for an additional reason—they lack standing to challenge the 2018 Rule. On a petition for review of final action, a petitioner "must support each element of its claim to standing 'by affidavit or other evidence … Its burden of proof is to show a 'substantial probability' that it has been injured, that the defendant caused its injury, and that the court could

redress that injury." *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (citation omitted).

Environmental Petitioners rely on five standing declarations that assert fundamentally the same theories: (1) agricultural activities throughout the United States, particularly those involving corn and soybean production, increased in scale and intensity over the past decade; (2) agricultural practices collectively cause detrimental effects to the environment; and (3) agricultural activities injure petitioners' members because the members visit, use, and enjoy areas in the vicinity of agricultural operations. EP Br. at 21 (citing and relying on allegations in the members' declarations).[40] Environmental Petitioners and the declarants then assert that the RFS program caused some (unidentified) portion of the changed agricultural practices and associated environmental harms. *Id.* at 21-22.

These allegations do not suffice. Even in cases alleging procedural violations, a petitioner must "demonstrate a causal connection between the agency action and the alleged injury." *CBD v. EPA*, 861 F.3d at 184-85 (citation omitted); *see also Fla.*

[40] Some members also assert a slightly different standing theory—that third-party researchers may not have animals to study in the future and may not produce educational materials, which would harm the members' interest in learning about animals. *See, e.g.,* Viles Decl. ¶ 15, Fontenot Dec. ¶ 18; Whitehurst Decl. ¶ 13. These allegations are wildly speculative; no evidence exists that this feared scenario is imminent, much less caused by the 2018 Rule. These theories also are functionally the same as the "animal nexus" and "vocational nexus" theories the Supreme Court rejected as inadequate in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-67 (1992).

Audubon Soc'y v. Bentsen, 94 F.3d 658, 669 (D.C. Cir. 1996) (*en banc*).[41] Here, Environmental Petitioners must causally link the 2018 Rule—the only challengeable action—to the members' alleged injuries. They failed to do so.

First, Environmental Petitioners address harms allegedly arising from a ten-year "RFS Program." EP Br. at 22. To the extent those injuries exist, they pre-dated the 2018 Rule and already occurred. Petitioners thus cannot link these past injuries and harms to the 2018 Rule,[42] and the Court cannot redress these alleged injuries through a favorable decision on the 2018 Rule. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

Second, "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), and generalized concerns with RFS statutory provisions and past RFS actions do not provide "evidence" that the 2018 Rule causes the same alleged injuries.

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[41] Environmental Petitioners misstate the law by arguing they must show *only* that the "procedural step was connected to the substantive result." EP Br. at 22 (quoting *CBD v. EPA*, 861 F.3d at 184). This discussion omits the "second link" in the causation inquiry—the need to establish a causal connection between the action and the asserted injuries. *CBD v. EPA*, 861 F.3d at 184-185.

[42] Environmental Petitioners' reliance on EPA's post-decisional report (EP Br., Exhibit B) fails for the same reasons. EP Br. at 28-29 (arguing the report "concedes" the RFS standards cause environmental harms). That report and prior ones address cumulative RFS actions over a ten-year period; they do not address the effects of the 2018 Rule under current market and other conditions. *See* EPA-HQ-OAR-2017-0091-4990 (RTC) at 26-27, 177, 214 (JA__) (addressing differences between prior RFS actions and the effects expected from the 2018 Rule).

Specific evidence on the effects of the 2018 Rule is required, as standing "cannot be inferred argumentatively from averments in the pleadings" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citation omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013) (speculation cannot "satisfy the 'fairly traceable' requirement").

Third, the record refutes any speculation that the 2018 Rule causes Environmental Petitioners' alleged injuries. To link their injuries from agricultural practices to the 2018 Rule, Environmental Petitioners argue the 2018 Rule requires "regulated parties to produce specified volumes of ethanol fuels derived from specific feedstocks." EP Br. at 22. But the 2018 Rule only requires obligated parties to *use* certain volumes of renewable fuels in the United States. *See* RTC at 26 (JA__). The 2018 Rule does not regulate the production of biofuels or feedstocks or require they be produced domestically. 82 Fed. Reg. at 58,506-08 (discussing imports of biofuels). Nor does the 2018 Rule mandate the use of corn- or soybean-based fuels. RTC at 26-27 (JA__). Independent third parties determine the domestic production of biofuels and feedstocks based on "worldwide agricultural sector market" and other factors, RTC at 29 (JA__), which severs any connection between the 2018 Rule and the Environmental Petitioners' alleged injuries. *See Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 205 (D.C. Cir. 2011) (alleged injury was insufficient as it could be attributable to the regulated party's business practices, instead of EPA's action).

Other record evidence belies Environmental Petitioners' speculation that the 2018 Rule injures them. Current fuel markets, for example, support ethanol production and use regardless of any RFS volumes set by EPA. *See, e.g.*, RTC at 27 (JA__) (virtually "all gasoline in the U.S. now contains ethanol," and blending ethanol into gasoline "is now firmly entrenched" in the industry); *id.* at 28 (JA__) ("even if a complete RFS waiver were granted in 2018, the market would continue to demand essentially the same volumes of ethanol in 2018 for use as a gasoline octane enhancer and source of fuel supply"). Likewise, corn ethanol and biodiesel are exported in large quantities. *Id.* at 29-30 (JA__). With the market for exports and the industry's long-term investment in biofuel production, altering the 2018 Rule's volumes likely would not alter production, but merely "shift sales to overseas markets." *Id.* at 29 (JA__).

On a more foundational level, farmers grow corn and soybeans in the United States for many reasons other than to produce feedstock for renewable fuels. Nearly two-thirds of the 2016 domestic production of corn, for example, went to uses other than ethanol production. *Id.* at 27 (JA__). Soybeans likewise are planted for many purposes, including to use as animal feed in the United States and abroad and as a primary rotational crop for corn. *Id.* at 29-30 (JA__). The market conditions and factors supporting the production of corn and soybeans are myriad, *id.* at 29-30

(JA__), which undercuts Environmental Petitioners' simplistic assumption that 2018 renewable fuel volumes affect domestic agricultural practices in the United States.[43]

Finally, Environmental Petitioners alleged harms hinge on farmers converting lands, using pesticides, depleting groundwater resources, and engaging in other allegedly harmful actions. EP Br. at 21-22. To the extent these agricultural practices are occurring, the 2018 Rule does not dictate or otherwise influence *how* farmers and third parties chose to grow crops on private lands. Nor can a decision on the 2018 Rule remediate farming practices in the United States. *See Lujan*, 504 U.S. at 571 (rejecting standing where it is "entirely conjectural [on] whether the nonagency activity that affect[ed]" plaintiffs would have been "altered or affected by the agency activity").

These facts confirm that the alleged environmental harms stemming from agricultural practices are not fairly traceable to the 2018 Rule. They also show why Environmental Petitioners err in relying on *CBD v. EPA,* 861 F.3d 174. EP Br. at 22-23. That case involved a much closer causal connection between the agency action (registering pesticides, a necessary precondition to their use) and the alleged injuries (applying pesticides in areas used by petitioners' members). *CBD v. EPA*, 861 F.3d at

[43] The 2018 RFS volumes also are materially the same as prior levels, 82 Fed. Reg. at 58487-88, 81 Fed. Reg. 89,746-47 (Dec. 12, 2016), which also refutes speculation that the 2018 Rule causes altered agricultural practices in the United States. *See, e.g.*, RTC at 214 (JA__) (2018 volumes "can readily be satisfied based on current agricultural output, without additional expansion of agricultural production").

177-79. Here, by contrast, Environmental Petitioners rely on a convoluted causal chain to get from point A—a rule requiring obligated parties to use specified volumes of renewable fuels in the United States—to point B—a specific environmental impact in a particular, defined geographic area. As was the case in *Florida Audubon*, this "protracted chain of causation" precludes standing because the links in the chain are shrouded in "uncertainty" and "inescapably presume certain 'independent action[s] of some third party not before th[is] court." 94 F.3d at 670 (citation omitted).[44]

In short, "the [Supreme] Court has never freed a plaintiff alleging a procedural violation from showing a causal connection between the government action … and some reasonably increased risk of injury to its particularized interest." *Fla. Audubon*, 94 F.3d at 664. Environmental Petitioners failed to support a causal link between their declarants' alleged harms and the 2018 Rule. The Court therefore lacks jurisdiction over the ESA challenges to the 2018 Rule.

[44] Mr. Whitehurst's allegations about an unidentified proposed new ethanol plant in Mississippi underscore the speculative causal chain. Whitehurst Decl. ¶ 16. He fails to identify the plant and whether its construction is imminent. *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1383 (D.C. Cir. 1996) (injury based on contingent actions is not "imminent"). He also fails to wrestle with any conflicting facts, like reported closures of ethanol plants in the same area. *See* http://ergon.com/news/79-ergon-biofuels-plans-to-close-ethanol-plant (last visited Oct. 19, 2018). The opening and closing of plants depends on a host of factors that cannot factually or logically be tied to the 2018 Rule.

D. EPA Rationally Determined that Its 2018 Rule Does Not Affect ESA-Listed Species or Critical Habitat.

Even if the ESA challenge could proceed, it would fail on the merits. Environmental Petitioners allege that, under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), EPA must consult with the wildlife agencies (the U.S. Fish and Wildlife Service or the National Marine Fisheries Service) before issuing the 2018 Rule. EP Br. at 24-30. Under the ESA, a consultation is required where the agency determines that its affirmative, discretionary actions may affect listed species or critical habitat. 50 C.F.R. § 402.14(a). When the agency "determines that its action will not affect any listed species or critical habitat, . . . it is not required to consult." *Ctr. for Biological Diversity*, 563 F.3d at 475. EPA determined that none of the regulatory actions taken in the 2018 Rule affect ESA-listed species or critical habitat. RTC at 26-30 (JA__). The ESA consultation obligation does not apply, and Environmental Petitioners' ESA challenge fails on the merits.

1. The ESA's Consultation Obligation.

To trigger the ESA's consultation obligation under Section 7(a)(2), 16 U.S.C. 1536(a)(2), three factors must be satisfied.

First, Section 7(a)(2) requires an affirmative agency action, like constructing a road or building a dam. 16 U.S.C. § 1536(a)(2) (provisions apply to actions affirmatively "authorized, funded, or carried out" by an agency); *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012) (*en banc*) ("An agency

must consult under Section 7 only when it makes an 'affirmative' act or authorization."). Section 7(a)(2) is not concerned with regulating inaction or retroactively addressing prior actions. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 186 n.32 (1978) ("§ 7 affects all projects *which remain to be authorized, funded, or carried out*;" it does not have retroactive application to prior actions) (emphasis added).

Second, EPA must have "discretionary Federal involvement or control" over the affirmative agency action. 50 C.F.R. § 402.03. If the "agency is *required* by statute to undertake [the action] once certain specified triggering events have occurred," the ESA consultation obligations do not apply. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007). In that situation, the agency "cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take" and, as such, cannot be the cause of any effects to the species. *Id.* at 667-68; *cf. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 712 (1995) (O'Connor, J., concurring) (finding "no indication that Congress, in enacting that section [of the ESA], intended to dispense with ordinary principles of proximate causation").

Third, and related, the discretionary action must be the *cause* of an effect to listed species or critical habitat to trigger the consultation obligation. Section 7(a)(2)'s prohibition expressly includes an "element of causation," *Oceana, Inc. v. Pritzker*, 75 F. Supp. 3d 469, 486 (D.D.C. 2014), by prohibiting only actions that cause jeopardy, 16 U.S.C. § 1536(a)(2); *id.* § 1536(b)(3)(A) (requiring assessment of "how the agency action affects the species or its critical habitat"); *see also* 50 C.F.R. § 402.02 ("effects of

the action" includes direct effects and "indirect effects … that are *caused by* the proposed action …") (emphasis added). The triggering mechanism for a consultation likewise requires causation—that "the action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a); *Ctr. for Biological Diversity*, 563 F.3d at 475. When the action does not affect listed species or critical habitat, it cannot violate Section 7(a)(2) and no consultation is required.

Environmental Petitioners disregard these principles by arguing generically that an ESA consultation is required on "RFS" actions. EPA took discrete and defined agency actions in the 2018 Rule, and EPA examined these specific actions to determine whether they may affect ESA-listed species. Unlike Environmental Petitioners, EPA performed the appropriate inquiry and rationally concluded that its actions do not affect ESA listed species or critical habitat, as discussed below.

2. EPA's Discrete Actions in the 2018 Rule Do Not Affect ESA-Listed Species or Critical Habitat.

EPA's regulatory actions in the 2018 Rule established renewable fuel obligations for four fuel categories: cellulosic biofuel, advanced biofuel, total renewable fuel, and biomass-based diesel. 82 Fed. Reg. at 58,527 (discussing regulatory changes made to 40 C.F.R. § 80.1405(a)(9)(i)-(iv)).[45] None of these regulatory actions trigger the ESA's consultation obligation.

[45] Environmental Petitioners err in referencing and discussing an RFS Program, approval of fuel pathways, issuance of reports, or other actions. EP Br. at 26-27. EPA

For cellulosic biofuel, Congress directed that EPA "shall reduce" the statutory table volumes "to the projected volume available" in 2018. 42 U.S.C. § 7545(o)(7)(D)(i). By instructing EPA to establish volumes based on projected production, Congress did not provide EPA with discretion to consider impacts on species or critical habitat. *Id.*; *see also API*, 706 F.3d at 479 (requiring EPA to predict "what will *actually* happen"). This statutory command removes agency discretion, and the ESA consultation obligation does not apply to this nondiscretionary action. *See Home Builders*, 551 U.S. at 666-67. Thus, EPA's action on cellulosic biofuel does not trigger an ESA consultation.

Unlike with cellulosic biofuel, EPA exercised discretionary authority in establishing the volumes and obligations for total renewable fuel, advanced biofuel, and biomass-based diesel. 82 Fed. Reg. at 58,487. For total renewable fuel and advanced biofuel, Congress provided EPA with discretionary authority to reduce the statutorily identified total renewable fuel and advanced biofuel volumes "by the same or a lesser volume" as any mandatory cellulosic biofuel reduction. 42 U.S.C. § 7545(o)(7)(D)(i). As Environmental Petitioners expressly requested, EPA-HQ-OAR-2017-0091-3306 at 2 (JA__), *EPA used the full scope of this authority* to lower the relevant volumes of total renewable fuel and advanced biofuel, 82 Fed. Reg. at 58,487,

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did not take those actions in the 2018 Rule. 82 Fed. Reg. at 58,527 (identifying the specific regulatory actions taken in the 2018 Rule). These other actions therefore cannot support an ESA challenge to the 2018 Rule.

58,491.[46] For biomass-based diesel, EPA set the volume after considering past implementation of the RFS provisions and six statutory factors. 42 U.S.C. § 7545(o)(2)(B)(i)(IV), (2)(B)(ii), (2)(B)(v).

Environmental Petitioners argue that EPA failed to determine whether these discretionary actions may affect ESA-listed species or critical habitat. EP Br. at 29-30. The record shows otherwise. EPA expressly determined that its actions do not affect ESA-listed species, explaining that "any harm to threatened or endangered species or their critical habitat that may be associated with crop cultivation in 2018 could not be attributed with reasonable certainty to EPA's action in setting the 2018 renewable fuel standards and 2019 biomass-based diesel applicable volume." RTC at 26 (JA__); 82 Fed. Reg. at 58493, 58518 (incorporating RTCs).

The record supports EPA's determination. As discussed above (Section IV.C., *supra*), the 2018 Rule does not regulate the production of biofuels or feedstocks, which are produced for many reasons other than to meet the RFS requirements. RTC at 26-30 (JA__). Market conditions, moreover, support production of biofuels independent of the 2018 Rule's requirements. *Id.* (JA__). And the cause of the environmental impacts Petitioners complain about—those stemming from conversion of lands to agriculture, application of pesticides and runoff, withdrawing groundwater

[46] At least for EPA's exercise of authority under 42 U.S.C. § 7545(o)(7)(D)(i), Environmental Petitioners have not been harmed, nor can they claim EPA acted improperly given that EPA acted as the Environmental Petitioners requested. EPA in fact lacks any discretion under this authority to reduce volumes further.

resources, and other land-use practices—rests with those taking these actions and not with EPA in issuing the 2018 Rule. *Id.* at 26-30, 177, 214 (JA__); *cf. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) ("where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.").

EPA addressed the likely effects of the 2018 Rule, and its determinations on the effects of the 2018 Rule are entitled to deference. *See Miss. Comm'n on Envtl. Quality*, 790 F.3d at 150 (this Court gives an "extreme degree of deference" to EPA's "evaluation of scientific data within its technical expertise," especially in "EPA's administration of the complicated provisions of the Clean Air Act"). Environmental Petitioners fail to confront EPA's findings, let alone show that EPA acted arbitrarily and capriciously in issuing the 2018 Rule. Because EPA rationally found that the 2018 Rule does not affect ESA-listed species, the ESA's consultation obligation does not apply and the Court should reject Environmental Petitioners' challenge to the 2018 Rule.

3. EPA's Decision Not to Exercise Waiver Authority is Not "Action" that Can Trigger an ESA Consultation.

As a last resort, Environmental Petitioners reframe the legal question as concerning EPA's "decision not to exercise its general waiver authority." EP Br. at 29. The CAA provides EPA with discretionary authority to waive Congress' requirements where specified conditions are met. 42 U.S.C. § 7545(o)(7)(A). Environmental

Petitioners contend that EPA must consult on *not* exercising this discretionary authority (*i.e.*, by not acting to waive Congress' requirements). They are wrong.

As noted above, Section 7(a)(2) of the ESA is concerned with ensuring that, when an agency chooses to act affirmatively, it does not cause jeopardy to species or destroy critical habitat. 16 U.S.C. § 1536(a)(2). Section 7(a)(2)'s plain language reflects this mandate, as Congress centered the obligations on "any action authorized, funded, or carried out" by the agency. *Id.* Congress placed the mandate on an "action," not a "decision" and certainly not a decision to refrain from acting. *Id.*; *see also* 50 C.F.R. § 402.02 (similarly defining "action" as affirmative actions).

The Ninth Circuit addressed this issue in *Western Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006). There, the agency could have imposed conditions on private irrigation diversions but decided not to do so. The lower court held that the agency violated the ESA in making a "decision" not to act. *Id.* at 1106-07. The Ninth Circuit reversed, holding that the ESA's plain language regulates affirmative acts, not a "failure to act." *Id.* at 1107-08. The court further rooted this finding in basic principles of legal causation; an agency cannot be the legal cause of any effects on the species where it does not act. *Id.* at 1109. Thus, "'inaction' is not 'action' for section 7(a)(2) purposes." *Id.* at 1107-08; *see also, e.g., Fund for Animals v. Thomas*, 127 F.3d 80, 84 n.6 (D.C. Cir. 1997) (noting the general need for an "'agency action' to trigger the ESA consultation requirement," not agency "inaction").

The Tenth Circuit later applied these principles in an analogous situation under the CAA. In *WildEarth Guardians v. EPA*, 759 F.3d 1196 (10th Cir. 2014), EPA issued a regulation addressing certain pollutants, but not mercury and selenium. *Id.* at 1207-08. The petitioners argued that EPA violated the ESA by failing to regulate these pollutants as part of the action. *Id.* The Tenth Circuit disagreed, explaining "the duty to consult is bounded by the agency action." *Id.* at 1208. When the agency does not propose to regulate mercury and selenium, the petitioners cannot "piggyback [that] nonaction on an agency action by claiming that the nonaction is really part of some broader action." *Id.* at 1209. "When an agency action has clearly defined boundaries, we must respect those boundaries and not describe inaction outside those boundaries as merely a component of the agency action." *Id.*

As applied here, the actions in the 2018 Rule are specific and defined—the volumes and obligations set for the four fuel categories in 40 C.F.R. § 80.1405(a)(9)(i)-(iv) pursuant to EPA's authorities under 42 U.S.C. §§ 7545(o)(7)(D)(i), (o)(2)(B)(ii). Those affirmative actions do not affect listed species as discussed above. And EPA's decision not to take a different action—waiving requirements Congress imposed in the CAA under 42 U.S.C. § 7545(o)(7)(A)—cannot transform EPA's nonaction into an action that triggers the ESA's consultation requirements. Congress simply did not frame Section 7(a)(2)'s obligations in this way. *Cf. Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 927 (D.C. Cir. 2008) ("The simple fact that an agency possesses statutory

authority is not a basis for finding final agency action if no evidence exists that the agency used it.").

Nonetheless, even if the issue centered on the effects of EPA's nonaction, Environmental Petitioners' arguments would still fail. EPA addressed whether the 2018 Rule would affect ESA-listed species or critical habitat in the situation where all 2018 RFS volume requirements are waived. EPA determined that market conditions and other factors would continue to support the production of renewable fuels, corn, soybeans, and other feedstocks at the same or similar levels, even without the 2018 RFS volumes. RTC at 27-28 (JA__); *see also* Section IV.C. *supra*. Environmental Petitioners produce no contrary evidence, as they ignored EPA's findings. Nor did any commenter provide alternative studies or evidence to EPA during the administrative process. RTC at 26 (JA__). Environmental Petitioners cannot overcome EPA's findings, and the Court should reject their ESA challenge to the 2018 Rule.

CONCLUSION

For these reasons, the Court should deny the petitions for review.

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA

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Dated: October 25, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 25,998 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing 25th day of October 2018, through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

s/ Benjamin R. Carlisle
BENJAMIN R. CARLISLE

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 17-1258 AND CONSOLIDATED CASES

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

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,

Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF AN ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

STATUTORY AND REGULATORY ADDENDUM FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATUTES

REGULATIONS

5 U.S.C. § 704. Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

16 U.S.C. § 1536. Interagency Cooperation

(a) Federal agency actions and consultations

***

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

***

(b) Opinion of Secretary

***

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

42 U.S.C. § 7545(c)(1), (f)(4), (h)(5), (k)(2), (m)(3)(A). Regulation of fuels

(c) Offending fuels and fuel additives; control; prohibition.

(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle [(A)] if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

***

(f) New fuels and fuel additives.

(4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this subsection or the limitation specified in paragraph (2) of this subsection, if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or fuel additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified pursuant to sections 206 and 213(a) [42 USCS §§ 7525 and 7547(a)]. The Administrator shall take final action to grant or deny an application submitted under this paragraph, after public notice and comment, within 270 days of the receipt of such an application.

***

(h) Reid Vapor Pressure requirements.

(5) Exclusion from ethanol waiver.

(A) Promulgation of regulations. Upon notification, accompanied by supporting documentation, from the Governor of a State that the Reid vapor pressure limitation established by paragraph (4) will increase emissions that contribute to air pollution in any area in the State, the Administrator shall, by regulation, apply, in lieu of the Reid vapor pressure limitation established by paragraph (4), the Reid vapor pressure limitation established by paragraph (1) to all fuel blends containing gasoline and 10 percent denatured anhydrous ethanol that are sold, offered for sale, dispensed, supplied, offered for supply, transported, or introduced into commerce in the area during the high ozone season.

(B) Deadline for promulgation. The Administrator shall promulgate regulations under subparagraph (A) not later than 90 days after the date of receipt of a notification from a Governor under that subparagraph.

(C) Effective date.

(i) In general. With respect to an area in a State for which the Governor submits a notification under subparagraph (A), the regulations under that subparagraph shall take effect on the later of--

(I) the first day of the first high ozone season for the area that begins after the date of receipt of the notification; or

(II) 1 year after the date of receipt of the notification.

(ii) Extension of effective date based on determination of insufficient supply.

(I) In general. If, after receipt of a notification with respect to an area from a Governor of a State under subparagraph (A), the Administrator determines, on the Administrator's own motion or on petition of any person and after consultation with the Secretary of Energy, that the promulgation of regulations described in subparagraph (A) would result in an insufficient supply of gasoline in the State, the Administrator, by regulation--

(aa) shall extend the effective date of the regulations under clause (i) with respect to the area for not more than 1 year; and

(bb) may renew the extension under item (aa) for two additional periods, each of which shall not exceed 1 year.

(II) Deadline for action on petitions. The Administrator shall act on any petition submitted under subclause (I) not later than 180 days after the date of receipt of the petition.

***

(k) Reformulated gasoline for conventional vehicles.

(2) General requirements. The regulations referred to in paragraph (1) shall require that reformulated gasoline comply with paragraph (3) and with each of the following requirements (subject to paragraph (7)):

(A) NO[X] emissions. The emissions of oxides of nitrogen (NO[X]) from baseline vehicles when using the reformulated gasoline shall be no greater than the level of such emissions from such vehicles when using baseline gasoline. If the Administrator determines that compliance with the limitation on emissions of oxides of nitrogen under the preceding sentence is technically infeasible, considering the other requirements applicable under this subsection to such gasoline, the Administrator may, as appropriate to ensure compliance with this subparagraph, adjust (or waive entirely), any other requirements of this paragraph or any requirements applicable under paragraph (3)(A).

(B) Benzene content. The benzene content of the gasoline shall not exceed 1.0 percent by volume.

(C) Heavy metals. The gasoline shall have no heavy metals, including lead or manganese. The Administrator may waive the prohibition contained in this subparagraph for a heavy metal (other than lead) if the Administrator determines that addition of the heavy metal to the gasoline will not increase, on an aggregate mass or cancer-risk basis, toxic air pollutant emissions from motor vehicles.

***

(m) Oxygenated fuels.

(3) Waivers.

(A) The Administrator shall waive, in whole or in part, the requirements of paragraph (2) upon a demonstration by the State to the satisfaction of the Administrator that the use of oxygenated gasoline would prevent or interfere with the attainment by the area of a national primary ambient air quality standard (or a State or local ambient air quality standard) for any air pollutant other than carbon monoxide.

42 U.S.C. § 7607(b)(1), (d)(1), (d)(6), (d)(7). . Administrative proceedings and judicial review

(b) Judicial review.

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112 [42 USCS § 7412], any standard of performance or requirement under section 111 [42 USCS § 7411][,], any standard under section 202 [42 USCS § 7521] (other than a standard required to be prescribed under section 202(b)(1) [42 USCS § 7521(b)(1)]), any determination under section 202(b)(5) [42 USCS § 7521(b)(5)], any control or prohibition under section 211 [42 USCS § 7545], any standard under section 231 [42 USCS § 7571] any rule issued under section 113, 119, or under section 120 [42 USCS § 7413, 7419, or 7420], or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) [42 USCS § 7410 or 7411(d)], any order under section 111(j) [42 USCS § 7411(j)], under section 112 [42 USCS § 7412],[,] under section 119 [42 USCS § 7419], or under section 120 [42 USCS § 7420], or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 114(a)(3) of this Act, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I [42 USCS §§ 7401 et seq.]) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall

not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

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

***

(d) Rulemaking.

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 109 [42 USCS § 7409],

(B) the promulgation or revision of an implementation plan by the Administrator under section 110(c) [42 USCS § 7410(c)],

(C) the promulgation or revision of any standard of performance under section 111 [42 USCS § 7411], or emission standard or limitation under section 112(d) [42 USCS § 7412(d)], any standard under section 112(f) [42 USCS § 7412(f)], or any regulation under section 112(g)(1)(D) and (F) [42 USCS § 7412(g)(1)(D),(F)], or any regulation under section 112(m) or (n) [42 USCS § 7412(m) or (n)],

(D) the promulgation of any requirement for solid waste combustion under section 129 [42 USCS § 7429],

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 211 [42 USCS § 7545],

(F) the promulgation or revision of any aircraft emission standard under section 231 [42 USCS § 7571],

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

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 119 [42 USCS § 7419] (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under title VI [42 USCS §§ 7671 et seq.] (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under subtitle C of title I [42 USCS §§ 7470 et seq.] (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 202 [42 USCS § 7521] and test procedures for new motor vehicles or engines under section 206 [42 USCS § 7525], and the revision of a standard under section 202(a)(3) [42 USCS § 7521(a)(3)],

(L) promulgation or revision of regulations for noncompliance penalties under section 120 [42 USCS § 7420],

(M) promulgation or revision of any regulations promulgated under section 207 [42 USCS § 7541] (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 126 [42 USCS § 7426] (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 183(e) [42 USCS § 7511b(e)],

(P) the promulgation or revision of any regulation pertaining to field citations under section 113(d)(3) [42 USCS § 7413(d)(3)],

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of title II [42 USCS §§ 7581 et seq.],

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 213 [42 USCS § 7547],

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 217 [42 USCS § 7552],

(T) the promulgation or revision of any regulation under title IV [42 USCS §§ 7641 et seq.] (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 183(f) [42 USCS § 7511b(f)] pertaining to marine vessels, and

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

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

***

(6)

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

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

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

(7)

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

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

40 C.F.R. § 80.1430. Requirements for exporters of renewable fuels.

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

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

(1) Cellulosic biofuel.

ERVO[CB,k] = VOL[k] * EV[k]

Where:

ERVO[CB,k] = The Exporter Renewable Volume Obligation for cellulosic biofuel for discrete volume k in gallons.

k = A discrete volume of renewable fuel that the exporter knows or has reason to know is cellulosic biofuel that is exported in a single shipment.

VOL[k] = The standardized volume of discrete volume k, in gallons, calculated in accordance with § 80.1426(f)(8).

EV[k] = The equivalence value associated with discrete volume k.

(2) Biomass-based diesel.

ERVO[BBD,k] = VOL[k] * EV[k]

Where:

ERVO[BBDI,k] = The Exporter Renewable Volume Obligation for biomass-based diesel for discrete volume k, in gallons.

k = A discrete volume of renewable fuel that is biodiesel or renewable diesel and is exported in a single shipment.

VOL[k] = The standardized volume of discrete volume k calculated in accordance with § 80.1426(f)(8).

EV[k] = The equivalence value associated with discrete volume k.

(3) Advanced biofuel.

ERVO[AB,k] = VOL[k] * EV[k]

Where:

ERVO[AB,k] = The Exporter Renewable Volume Obligation for advanced biofuel for discrete volume k, in gallons.

k = A discrete volume of renewable fuel that is advanced biofuel (including biomass-based diesel, renewable diesel, cellulosic biofuel and other advanced biofuel) and is exported in a single shipment.

VOL[k] = The standardized volume of discrete volume k, in gallons, calculated in accordance with § 80.1426(f)(8).

EV[k] = The equivalence value associated with discrete volume k.

(4) Renewable fuel.

ERVO[RF,i] = VOL[k] * EV[k]

Where:

ERVO[RF,i] = The Renewable Volume Obligation for renewable fuel for discrete volume k, in gallons.

k = A discrete volume of exported renewable fuel that is exported in a single shipment.

VOL[k] = The standardized volume of discrete volume k, in gallons, calculated in accordance with § 80.1426(f)(8).

EV[k] = The equivalence value associated with discrete volume k.

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

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

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

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

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

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

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

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

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

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

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

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

50 C.F.R. § 402.02. Definitions

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

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Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

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Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

50 C.F.R. § 402.03. Applicability

Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.

50 C.F.R. § 402.14. Formal Consultation

Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.