

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 17, 2010

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

No. 10-1070 (and consolidated case)

NATIONAL PETROCHEMICAL AND REFINERS ASS'N,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

BRIEF FOR RESPONDENT

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August 9, 2010

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

_____)	
NATIONAL PETROCHEMICAL &)	
REFINERS ASSOCIATION,)	
)	
Petitioner,)	No. 10-1070
)	(consolidated with No. 10-1071)
v.)	
)	
ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	
_____)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties:

The Petitioner in No. 10-1070 is National Petrochemical and Refiners Association. The Petitioner in No. 10-1071 is American Petroleum Institute. The Respondent in both petitions is EPA. Intervenors for Respondent are Growth Energy and National Biodiesel Board.

B. Rulings Under Review: Petitioners seek review of a rule entitled “Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program,” 75 Fed. Reg. 14,670 (Mar. 26, 2010).

C. Related Cases: Other petitions filed in this Court challenging the same rule are *Pinnacle Ethanol, LLC v. EPA*, No. 10-1106; *National Chicken Council, et al. v. EPA*, No. 10-1107, and *Friends of the Earth, Inc. v. EPA*, No. 10-1108, all of which have been consolidated under the lead docket No. 10-1106.

Respectfully submitted,

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GLOSSARY

EISA	Energy Independence and Security Act of 2007
EPAct	Energy Policy Act of 2005
RFS1	Renewable Fuel Standard program under the Energy Policy Act of 2005
RFS2	Renewable Fuel Standard program under the Energy Independence and Security Act of 2007
RINs	Renewable Identification Numbers
RVO	Renewable Volume Obligation

STATEMENT OF JURISDICTION

EPA published a final rule in the Federal Register on March 26, 2010. *See* 75 Fed. Reg. 14,670 (Mar. 26, 2010) (JA 2045). The National Petrochemical and Refiners Association and the American Petroleum Institute (“Petitioners”) timely filed petitions for review on March 29, 2010. This Court has jurisdiction over the consolidated petitions for review under 42 U.S.C. § 7607(b)(1).

STATEMENT OF THE ISSUES PRESENTED

1. Whether EPA has the authority to ensure that transportation fuel sold or introduced into commerce by the end of 2010 contains the full volume of biomass-based diesel fuel specified by Congress for 2009 and 2010.

2. Whether a regulation published on March 26, 2010, requiring each regulated petroleum refiner and importer to calculate its renewable volume obligations for 2010 based on the amount of gasoline or diesel each such party produces or imports during the entire calendar year, is impermissibly retroactive.

3. Whether EPA provided regulated petroleum refiners and importers adequate advance notice of and time to comply with their 2010 renewable volume obligations, by: issuing a detailed proposal setting forth all proposed standards more than eight months prior to issuance of its final rule; allowing those regulated parties to count towards satisfying their 2010 renewable volume obligations all renewable fuels used in 2010 (including the period before publication of the final

rule on March 26, 2010), as well as some renewable fuels used in 2009 and 2008; and allowing those parties to carry forward portions of their 2010 renewable volume obligations into the 2011 compliance period.

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the Brief for Petitioners: 5 U.S.C. § 801; 42 U.S.C. § 7545(o) (2006); 40 C.F.R. § 80.1427.

STATEMENT OF THE CASE

Congress directed EPA to ensure that the Nation's transportation fuel supply contains specified volumes of renewable fuels in 2009 and 2010. Petitioners, two trade associations representing the petroleum industry, seek to frustrate Congress' clearly expressed goal. Congress gave EPA the authority to ensure that these volumes of renewable fuels are used, and although EPA's rule was issued and took effect later than Congress' deadline for action, EPA created a reasonable regulatory program that provides advance notice and multiple options for compliance while ensuring the use of the volumes of renewable fuel specified by statute. In contrast, Petitioners would have EPA ignore the controlling statutory provisions and require dramatically less renewable fuel than Congress mandated be used by the end of 2010.

STATEMENT OF FACTS

A. STATUTORY BACKGROUND

In section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o), Congress created a program “to increase the use of renewable fuels . . ., reduce dependence on foreign sources of petroleum, increase domestic sources of energy, and diversify [the United States’] energy portfolio to help transition to alternatives to petroleum in the transportation sector.” 72 Fed. Reg. 23,900, 23,902 col.3 – 903 col.1 (May 1, 2007) (JA 263-64). Congress originally enacted this renewable fuel program, also known as the Renewable Fuel Standard program, in the Energy Policy Act of 2005 (“EPAct” or the “2005 Act”), Pub. L. No. 109-58, 119 Stat. 1067. Congress significantly expanded the program in the Energy Independence and Security Act of 2007 (“EISA”), the purpose of which is to “increase the production of clean renewable fuels.” Pub. L. No. 110-140, 121 Stat. 1492. Among other changes made in 2007, Congress sought to reduce greenhouse gas emissions by requiring that each of the four defined types of qualifying renewable fuels achieve specified minimum levels of lifecycle greenhouse gas reductions as compared to the petroleum-based fuels that it replaces. 75 Fed. Reg. at 14,764 col.1 (JA 2140).

1. The Energy Policy Act of 2005.

As originally enacted in the 2005 Act, the Renewable Fuel Standard program required that gasoline sold in or imported into the United States for motor vehicle use include, on an average annual basis, increasing volumes of renewable fuel. To do so, Congress established a four-step process. First, EPA was to determine the “applicable volume” of renewable fuel for the upcoming year. 42 U.S.C. § 7545(o)(2)(B) (2006). For the years 2006 through 2012 Congress itself set the applicable volume by providing a table in the statute. *Id.* § 7545(o)(2)(B)(i) (2006). For the years 2013 and beyond, EPA would determine the applicable volume in consultation with the Secretaries of Energy and Agriculture, based on a list of statutory factors. *Id.* § 7545(o)(2)(B)(ii) (2006).

Second, for the years 2005 through 2011, the 2005 Act directed the Department of Energy’s Energy Information Administration annually to provide EPA with an estimate of the amount of gasoline expected to be sold or introduced into commerce in the upcoming year. *Id.* § 7545(o)(3)(A) (2006). Third, EPA was to derive an “applicable percentage” which, in simplified form, is the applicable volume of renewable fuel for a given year divided by the volume of gasoline estimated to be used in that year. *Id.* § 7545(o)(3)(B)(i) (2006). Fourth, individual “obligated parties,” which included “refineries, blenders, and importers, as [EPA deemed] appropriate,” would multiply the applicable percentage by the

actual volume of gasoline that party produced or imported during that year to derive their annual renewable volume obligation (“RVO”). *Id.* § 7545(o)(3)(B)(ii) (2006).

The 2005 Act also required EPA to establish a credit program allowing obligated parties who exceed their renewable volume obligation in a given year to generate credits for future use by that or another obligated party, so long as the credits are used within a 12-month period. *Id.* § 7545(o)(5) (2006). Two types of fuel -- waste-derived ethanol and cellulosic biomass ethanol -- were given extra value towards demonstrating compliance under the Renewable Fuel Standard program, *id.* § 7545(o)(4) (2006), and credits were also provided for the generation of biodiesel, even though that type of fuel was not blended into gasoline. *Id.* § 7545(o)(5)(A)(ii) (2006). *See also* 72 Fed. Reg. at 23,915 col.1 (JA 276). The 2005 Act authorized EPA to waive the Renewable Fuel Standard program’s requirements in whole or in part, on the basis of a finding of inadequate supply or severe harm to the environment or economy. 42 U.S.C. § 7545(o)(7) (2006).

Finally, the 2005 Act required EPA to establish regulations to ensure that the required volumes of renewable fuel were used, and to implement the other statutory provisions. *Id.* § 7545(o)(2)(A)(i) (2006). Congress instructed that EPA was to ensure the volume requirements were met “[r]egardless of the date” the regulations were promulgated. *Id.* § 7545(o)(2)(A)(iii) (2006).

2. The Energy Independence and Security Act of 2007.

The Energy Independence and Security Act of 2007 (“EISA”), enacted on December 19, 2007, expanded and modified the Renewable Fuel Standard program in five principal ways. First, the EISA increases the applicable volumes of renewable fuel, and the years for which volumes were specified, to 36 billion gallons by 2022. 42 U.S.C. § 7545(o)(2)(B)(i)(I). Second, the EISA creates three subcategories of renewable fuel (advanced biofuel, cellulosic biofuel, and biomass-based diesel), each with its own annual volume mandates. *Id.* §§ 7545(o)(1)(B), (D), (E); 7545(o)(2)(B)(i)(II), (III), (IV). Third, the EISA requires all types of renewable fuels to be derived from “renewable biomass,” defined to include items such as crops and trees (with some limitations), animal waste and byproducts, algae, separated yard waste, and separated food waste. *Id.* § 7545(o)(1)(I).

Fourth, in addition to other definitional criteria, the EISA specifies that renewable fuel, and each of its subcategories, achieve minimum reductions in lifecycle greenhouse gas emissions. *Id.* §§ 7545(o)(1)(B), (D), (E); 7545(o)(2)(A)(i). Each minimum reduction is a percentage reduction as compared to a baseline defined as the average lifecycle greenhouse gas emissions in 2005 for the conventional gasoline or diesel fuel being replaced. *Id.* § 7545(o)(1)(C). Lifecycle greenhouse gas emissions are the aggregate quantity of greenhouse gas emissions, including both direct emissions and significant indirect emissions from

land use changes, that are related to the fuel's full lifecycle including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery to the ultimate consumer and use of the finished fuel. *Id.* § 7545(o)(1)(H).

Fifth, the EISA expands the universe of fuels subject to the Renewable Fuel Standard program to include diesel fuel and fuel used in non-road applications. *Id.* §§ 7545(o)(1)(L) (definition of "transportation fuel"); 7545(o)(2)(A)(i) (transportation fuel must contain applicable volumes of renewable fuel, advanced biofuel, cellulosic biofuel and biomass-based diesel).

As it did in the 2005 Act, Congress in the EISA provides tables of volumes for renewable fuel and for each of its subcategories, directs EPA to determine the applicable volume for each type of fuel in accordance with the relevant statutory table, and specifies factors for EPA to consider when determining applicable volumes for unlisted years. *Id.* § 7545(o)(2)(B).

The broadest type of fuel, "renewable fuel," is any fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel. *Id.* § 7545(o)(1)(J). As was true under the 2005 Act, renewable fuel under the EISA includes ethanol derived from corn starch, which is currently the primary source of renewable fuel in the United States. *See* 74 Fed. Reg. at 24,977 (table V.A.1-1); 24,983-84 (JA 463, 469-470). However,

renewable fuel, as defined in the EISA, must achieve at least a 20% reduction in lifecycle greenhouse gas emissions compared to the 2005 petroleum baseline. 42 U.S.C. § 7545(o)(2)(A)(i).¹

The largest subset of renewable fuel is advanced biofuel, which is renewable fuel other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions that are least 50 percent less than the lifecycle greenhouse gas emissions of the 2005 petroleum baseline. 42 U.S.C. § 7545(o)(1)(B). Advanced biofuel includes two additional subsets, each with their own volume mandates. Biomass-based diesel is a diesel fuel substitute produced from nonpetroleum renewable resources that has lifecycle greenhouse gas emissions that are least 50 percent less than the baseline lifecycle greenhouse gas emissions. *Id.* § 7545(o)(1)(D).

Cellulosic biofuel is a renewable fuel derived from cellulose, hemicellulose, or lignin (*i.e.*, the principal compounds that make up the cell walls in plants), and that has lifecycle greenhouse gas emissions that are least 60 percent less than the baseline lifecycle greenhouse gas emissions. *Id.* § 7545(o)(1)(E). Cellulosic biofuel could include, for example, ethanol made from trees or cellulosic crop

¹ The 20-percent reduction applies only to renewable fuel from new facilities that commenced construction after December 19, 2007. *Id.* § 7545(o)(2)(A)(i). Ethanol facilities that commenced construction in 2008 or 2009 and are fired with natural gas, biomass, or any combination, are also exempt from the 20-percent reduction requirement. Pub. L. No. 110-140, § 210(a)(1), 121 Stat. 1532 (codified at 42 U.S.C. § 7545 Transition Rules); *see also* 75 Fed. Reg. at 14,687 col.3 (JA 2063).

waste such as corn stover. Biomass-based diesel and cellulosic biofuel are non-exclusive types of advanced biofuel; other types of fuels, such as ethanol produced from the sugar in sugarcane, can also be an advanced biofuel if they are produced in a way that meets the minimum 50% greenhouse gas reduction requirement.

Because the revised Renewable Fuel Standard program has four types of fuels instead of one, and four separate annual volume mandates, EPA must develop four renewable fuel standards each year and obligated parties must meet four annual renewable volume obligations, one for each type of fuel.

The renewable fuel standards and renewable volume obligations are generally calculated the same way they were under the 2005 Act: applicable volumes of each type of fuel are determined based on a table of volumes enacted by Congress or, for unlisted years, determined by EPA; the Energy Information Administration estimates the volume of transportation fuel (instead of just gasoline as in the 2005 Act) projected to be sold or introduced into commerce in a particular year; EPA divides the applicable volume for each type of renewable fuel by the Energy Information Administration's estimate of total transportation fuel use to derive percentage standards; and obligated parties apply those percentage standards to their own annual production or importation of gasoline and diesel in order to determine their individual renewable volume obligations for each type of fuel. However, for cellulosic biofuel the EISA also requires EPA to conduct an annual

evaluation of estimated production volumes and, in the event that such projection is lower than the applicable volume specified in the statute, to use that lower production volume in setting the cellulosic biofuel standard. *Id.* § 7545(o)(7)(D)(i).

The EISA retained the provisions from the 2005 Act allowing the use of credits from overcompliance in one year to be used towards compliance in a subsequent year, and broadened somewhat EPA's authority to waive the standards. *Id.* §§ 7545(o)(5), (7).

Like the 2005 Act, the EISA requires EPA to establish implementing regulations to ensure that the volumes of renewable fuel specified in the statute are used, and to implement the other statutory provisions. *Id.* § 7545(o)(2)(A)(i). Congress retained the provision directing EPA to ensure that the specified applicable volumes are used regardless of the date the implementing regulations are promulgated. *Id.* § 7545(o)(2)(A)(iii).

B. REGULATORY BACKGROUND

1. The Renewable Fuel Standard Program under the 2005 Act ("RFS1").
 - a. In general.

In the 2005 Act, Congress required EPA to issue regulations to implement the original Renewable Fuel Standard program by August 8, 2006, and specified an applicable volume of renewable fuel for 2006 of four billion gallons. *Id.* §§

7545(o)(2)(A)(i), (B)(i) (2006). Congress also provided that EPA's regulations "shall contain compliance provisions . . . to ensure that the requirements of this paragraph," *i.e.*, section 211(o)(2), 42 U.S.C. § 7545(o)(2), are met, "[r]egardless of the date of promulgation" of such regulations, and that a default standard of 2.78% would apply for the calendar year 2006 if EPA failed to issue those regulations on time. *Id.* § 7545(o)(2)(A)(iii), (iv) (2006). Recognizing that it would not be able to issue the RFS1 regulations in time to establish a 2006 standard, in December 2005 EPA issued a direct final rule announcing the applicability of the statutory default standard for 2006, together with a basic regulatory system to implement the default standard. 70 Fed. Reg. 77,325 (Dec. 30, 2005) (Supp. Appendix 1-12).

EPA issued the final RFS1 regulations in May 2007, with an effective date of September 1, 2007, and promulgated a renewable fuel standard of 4.02% for 2007. 72 Fed. Reg. at 23,900, 23,908 col.3 (JA 261, 269). EPA determined that for 2007 each obligated party's renewable volume obligation would be calculated by multiplying the 4.02% annual standard against the volume of gasoline the obligated party produced or imported from September 1 through December 31, 2007, rather than through the entire calendar year. 72 Fed. Reg. at 23,908 col.3 (JA 269). EPA reasoned that "the total volume of renewable fuel used in all of 2007 will still exceed the volume specified in the [2005 Act] due to expectations

that the demand for renewable fuel will exceed the RFS requirements.” *Id.* EPA essentially determined that, in light of market conditions leading to greater renewable fuel use than required by the statute, a standard that applied only to gasoline produced or imported after September 1 would nevertheless achieve the statutory directive that EPA ensure that the applicable volume for 2007 was attained. *Id.*

b. Renewable Identification Numbers.

Because renewable fuels (as defined in both the 2005 Act and the EISA) are not typically used for food, or chemicals, or as feedstocks to other production processes, virtually all renewable fuel produced or imported is blended into or used directly as motor vehicle fuel. 72 Fed. Reg. at 23,929 col.1 (JA 290). EPA reasoned that “if a refiner ensures that a certain volume of renewable fuel has been produced, in effect they have also ensured that this volume will be blended into gasoline or otherwise used as a motor vehicle fuel.” *Id.* EPA therefore developed a compliance system that did not require obligated parties to actually blend renewable fuel themselves. *Id.* Instead, the producers and importers of renewable fuels, such as ethanol or biodiesel, were required to generate renewable identification numbers, or “RINs,” for each gallon of fuel they produced or imported. EPA’s focus on the production of renewable fuel as a surrogate for the use of such fuel allows more accurate measurement of the volume of renewable

fuel, simplifies compliance, requires far few entities to generate RINs, and allows those entities to include more information about the fuel in the RIN. *Id.* at 23,929 col.2-3 (JA 290). Obligated parties complied with their renewable volume obligation by accumulating RINs, which effectively caused the renewable fuel represented by the RINs to be consumed as motor vehicle fuel. *Id.* at 23,932 col.3 (JA 293).

RINs allowed EPA to verify and track the production and importation of renewable fuel volumes. *Id.* at 23,929 col.2 (JA 290). RINs could be purchased as obligated parties produced or imported petroleum-based fuels, or immediately before the end-of-year compliance deadline, or at whatever time during the year the obligated party decided was most economical. In this manner, RINs served as the mechanism for obligated parties to demonstrate compliance with their renewable volume obligations. *Id.* at 23,933 col.2 (JA 294)

RINs also formed the basis for the statutorily-required credit program that allows overcompliance in one year to be used to satisfy an obligation in the next year. *Id.* If a RIN is not used to comply with an obligated party's renewable volume obligation in the year the RIN is generated, then by definition it will "be in excess of the RINs an obligated party needed in that year, making excess RINs equivalent" to credits. *Id.* at col.3 (JA 294). The required 12-month lifespan is met by allowing such excess RINs to be used to show compliance "in the year

following the one in which they initially came into existence.” *Id.* This “creates some flexibility in the market” to offset fluctuations in supply, demand, and price. *Id.* at col.3 (JA 294).²

While in general one gallon of renewable fuel led to the generation of one RIN, under RFS1 different renewable fuels were given different “equivalence values” based either on their energy content as compared to ethanol, or on specifications in the 2005 Act that the production of a gallon of certain types of renewable fuel should be considered as equal to 2.5 gallons of other types of renewable fuel. *Id.* at 23,918 col.3 (JA 279); *see also* 42 U.S.C. § 7545(o)(4)(2006). Thus, a producer of ethanol from corn starch generated one RIN for each gallon of that fuel; a producer of biodiesel generated 1.5 RINs in light of biodiesel’s 50% greater energy value per gallon as compared to ethanol;³

² Left unchecked during market conditions favoring the use of renewable fuels beyond levels specified in the statute, the accumulation of unused RINs for future use could effectively undermine the guaranteed market for renewable fuels that the 2005 Act was designed to provide in order to stimulate investment in renewable fuel production. 72 Fed. Reg. at 23,934 col.2-3 (JA 295). The RFS1 regulations therefore imposed a 20% limit on the number of RINs from prior years that could be rolled over and used to satisfy an obligated party’s renewable volume obligation. *Id.* at 23,934-35 (JA 295-96).

³ Biodiesel is “a diesel fuel substitute produced from nonpetroleum renewable resources that meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under section 7545 of this title.” 42 U.S.C. § 13220(f)(1); *see also* 72 Fed. Reg. at 23,917 col.2 (JA 278). The RFS1 regulations recognized two chemically distinct types of fuel that meet the statutory definition of biodiesel, and identified them as “biodiesel (mono-alkyl

and a producer of waste-derived ethanol or cellulosic biomass ethanol generated 2.5 RINs for every gallon of those fuels. 72 Fed. Reg. at 23,918 col.3 (JA 279).

2. The Renewable Fuel Standard Program under the EISA (“RFS2”)

In the EISA Congress directed EPA to revise the RFS1 regulations within one year, *i.e.*, by December 19, 2008, to

ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an average annual basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B)

42 U.S.C. § 7545(o)(2)(A)(i).

Congress included a transition provision specifying that the higher 2008 applicable volume for renewable fuel specified in the EISA would apply in 2008 rather than the volume specified in the 2005 Act, even though Congress did not anticipate that the new RFS2 regulations would be in place for 2008. Pub. L. No. 110-140, § 210(a)(2), 121 Stat. 1532 (codified at 42 U.S.C. § 7545 Transition Rules). EPA issued a revised 2008 renewable fuel standard of 7.76 % on February 14, 2008, under the RFS1 regulations, to reflect the 9.0 billion gallons specified for that year in the EISA (rather than the 5.4 billion gallons in the 2005 Act). 73 Fed. Reg. 8665 (Feb. 14, 2008) (Supp. Appendix 13-15). However, unlike in the 2005

esters)” and “non-ester renewable diesel.” 72 Fed. Reg. at 23,917 col.2-3 (JA 278).

Act, Congress in the EISA did not provide a default standard for 2009 in the event EPA failed to meet the December 2008 deadline to revise the RFS1 regulations.

In November of 2008, EPA published in the Federal Register a notice explaining that EPA was still developing a proposed rule to implement the major changes to the Renewable Fuel Standard Program required by the EISA. 73 Fed. Reg. 70,643 (Nov. 21, 2008) (JA 386). EPA explained that until new regulations could be promulgated, the RFS1 regulations would continue in effect, *id.* at 70,643 col.2 (JA 386), and EPA issued a 2009 renewable fuel standard under the RFS1 program regulations with one change: instead of basing the standard on the 6.1 billion gallons in the table enacted in 2005, EPA used the 11.1 billion gallon volume in the EISA table. *Id.* at 70,643 col.3; 70,644 col. 2-3 (JA 386, 387).⁴ EPA did not issue a 2009 standard for cellulosic biofuels because the EISA did not specify a minimum volume for that fuel for 2009. *See* 42 U.S.C. § 7545(o)(2)(B)(i)(III). The EISA did establish applicable volumes for 2009 for biomass-based diesel and for advanced biofuels, but EPA did not issue 2009 standards for those fuels because those fuel categories did not exist under the RFS1

⁴ Petitioners note that even though the RFS1 regulations were only envisioned to apply until January 1, 2009, EPA “asserted authority to implement” the EISA’s 2009 volume requirement for renewable fuels under the RFS1 program. Pet. Br. at 8, 22. Petitioners imply that EPA’s November 2008 rule violated an uncodified transition rule enacted as part of the EISA, but Petitioners did not challenge EPA’s use of the EISA’s volume in deriving the 2009 renewable fuel standard and do not purport to challenge it here.

program and “the existing RFS1 regulations did not provide a mechanism for requiring the use of 0.5 billion gallons of biomass-based diesel or 0.6 billion gallons of advanced biofuel mandated by EISA for 2009.” 75 Fed. Reg. at 14,718 col.2 (JA 2094); *see also* 73 Fed. Reg. at 70,643 col.3 (JA 386). Instead, EPA announced that it would propose options to address this issue, the primary option being a 2010 biomass-based diesel standard based on the combined 2009 and 2010 applicable volumes of biomass-based diesel, with a compliance demonstration for the combined volumes at the end of 2010. 73 Fed. Reg. at 70,643 col.3 (JA 386).

On May 26, 2009, EPA published its proposed RFS2 regulations. 74 Fed. Reg. 24,904 (May 26, 2009) (JA 390). EPA explained that the regulations took longer to develop than Congress had anticipated because, among other things, EPA had to undertake complex lifecycle greenhouse gas emissions analyses in order to determine which fuels would be eligible to generate RINs under the RFS2 program, analyze the impacts of the increased applicable volumes of renewable fuels, and prepare complex changes to the regulatory program that required close collaboration with stakeholders. *See* 74 Fed. Reg. at 24,913 col.3 (JA 399); *id.* at 24,908-09 (JA 394-395). For example, EPA had to address the new requirement that renewable fuels be made from “renewable biomass,” the major statutory categories of which required substantial evaluation and clarification through regulatory definitions, as well as a new program for verifying the origin of

feedstocks used in the production of qualifying renewable fuels both domestically and overseas. *Id.* at 24,930-41 (JA 416-427). And, in order to determine which fuels would meet the new greenhouse gas reduction requirements, EPA had to analyze multiple permutations of “production pathways” for different fuel types, including sugarcane ethanol, corn ethanol, soy biodiesel, waste-derived ethanol or diesel, and more, involving different choices of feedstock, process energy type (such as coal and natural gas) and fuel production process. *Id.* EPA also had to determine how to measure and attribute greenhouse gas emissions related to land use change due to the increased production of renewable fuel feedstocks. *Id.* at 24,912-13 (JA 398-399).

Because EPA had not been able to implement the EISA’s 2009 applicable volume for biomass-based diesel under the RFS1 regulations, EPA proposed adding the 0.50 billion gallon applicable volume mandated for 2009 to the 0.65 billion gallon applicable volume mandated for 2010 (as EPA had indicated in November 2008 that it would do). *Id.* at 24,957 (JA 443). EPA also proposed to allow obligated parties to demonstrate their compliance with all of the 2010 standards on February 28, 2011, *id.* at 24,959 col.1 (JA 445), and proposed to retain the RIN system developed in RFS1, with modifications to accommodate the additional types of renewable fuels and other changes made in the EISA. *Id.* at 24,910 col.1 (JA 396); *see also* 75 Fed. Reg. at 14,684 col.2 (JA 2060).

EPA received and considered voluminous comments on the proposed rule, and sponsored independent peer reviews of its approach to assessing lifecycle greenhouse gas emissions of renewable and baseline fuels. *See, e.g.*, 75 Fed. Reg. at 14,764 col.1-2 (JA 2140). EPA signed the final RFS2 rule on February 3, 2010, 75 Fed. Reg. at 14,863 col.2 (JA 2239), and immediately posted it on EPA's website. *See* EPA Regulatory Announcement: EPA Finalizes Regulations for the National Renewable Fuel Standard Program for 2010 and Beyond (Feb. 2010) <http://www.epa.gov/otaq/renewablefuels/420f10007.pdf> (posted with the RFS2 rule on the day the rule was signed) (Supp. Appendix 17-23). Both the rule and the reactions from Petitioners and from other interested parties received widespread press coverage. *See, e.g.*, Jim Tankersley, *White House Boosts Biofuels*, Chicago Tribune, Feb. 4, 2010, at C14, http://articles.chicagotribune.com/2010-02-04/news/1002030778_1_corn-ethanol-epa-scientists-fossil-fuels (last visited Aug. 2, 2010) (Supp. Appendix 24-25); Dave Michaels, *EPA's Ethanol Revision Won't Please Texas Refiners*, Dallas Morning News, Feb. 4, 2010, at D1, http://www.dallasnews.com/sharedcontent/dws/bus/stories/DN-ethanol_04bus.ART0.State.Edition1.3cf373a.html (last visited Aug. 2, 2010) (Supp. Appendix 26-27); Jim Tankersley, *Obama Urges Greater Use of Biofuels*, Los Angeles Times, Feb. 3, 2010, at B1, <http://articles.latimes.com/2010/feb/03/business/la-fi-biofuels4-2010feb04> (last

visited Aug. 2, 2010) (Supp. Appendix 28-29). *See also* API Statement on RFS2 Announcement, Feb. 3, 2010 (Supp. Appendix 30); NPRA Responds to New Renewable Fuel Standard Guidance for 2010 and Beyond, Feb. 3, 2010 (Supp. Appendix 31-32). The final rule was published in the Federal Register on March 26, 2010, with an effective date of July 1, 2010. 75 Fed. Reg. at 14,670 col.2 (JA 2046).

The 2010 standards for renewable fuel and for advanced biofuel are based on the statutory tables of applicable volumes for those fuels. 75 Fed. Reg. at 14,675 col.1 (JA 2051); *see also* Calculation of Renewable Fuel Standard for Gasoline and Diesel, EPA-HQ-OAR-2005-0161-0928 *and* EPA-HQ-OAR-2005-0161-0928.1 (Supp. Appendix 33-42). For cellulosic biofuel EPA conducted a detailed assessment of anticipated 2010 production, as required by the EISA, and concluded that because the fledgling industry was in flux, an estimate by the Energy Information Administration that only 5 million gallons could be produced in 2010 reflected a “reasonable yet achievable level.” 75 Fed. Reg. at 14,751 col.1 (JA 2127); *see also id.* at 14,718 col.1 (JA 2094). EPA therefore determined that the applicable volume of cellulosic biofuel for 2010 would be 0.005 billion gallons, or one twentieth of the 0.1 billion gallons set forth in the EISA table. *Id.* at 14,718 col.1 (JA 2094).

For biomass-based diesel, EPA determined that sufficient biomass-based diesel RINs from 2008, 2009, and 2010 would be available for obligated parties to meet the combined 2009 and 2010 applicable volume. 75 Fed. Reg. at 14,718 col.3 (JA 2094). Based on this and other considerations, EPA adopted its proposed approach, which most commenters supported, and used 1.15 billion gallons as the applicable volume to be achieved by obligated parties by the end of 2010. *Id.* at 14,718 col.2 (JA 2094). EPA reasoned that doing so “will ensure that these two year’s [*sic*] worth of biomass-based diesel will be used,” and stated that it considered this a “reasonable exercise of [its] authority under section 211(o)(2) to issue regulations that ensure that the volumes for 2009 are ultimately used.” *Id.* at 14,718 col.2-3 (JA 2094).

Based on these volumes, EPA promulgated four percentage standards for 2010: one each for renewable fuels, advanced biofuel, cellulosic biofuel and biomass-based diesel. 75 Fed. Reg. at 14,675 col.3 (JA 2051); *id.* at 14,867 (promulgating 40 C.F.R. § 80.1405(a)) (JA 2243). EPA determined that obligated parties must apply these standards to all of the obligated party’s 2010 calendar year production or importation of gasoline and diesel fuel in order to calculate their renewable volume obligation for 2010. *Id.* at 14,676 col.1 (JA 2052). As a transition measure, the RFS2 regulations allow obligated parties to use RINs generated under RFS1 in 2009 and in the first part of 2010 to meet the 2010 RFS2

renewable volume obligations, even though these RFS1 RINs may have been generated for fuel that did not meet the EISA's new greenhouse gas reduction and renewable biomass requirements. *Id.* at 14,723 col.2, 14,724 (JA 2099-2100).

Specifically, renewable fuel RINs from RFS1 can be used to comply with the 2010 RFS2 renewable fuel standard; cellulosic biomass RINs from RFS1 can be used to comply with the 2010 RFS2 renewable fuel, advanced biofuel and cellulosic biofuel standards; and biodiesel RINs from RFS1 can be used to comply with the 2010 RFS2 renewable fuel, advanced biofuel and biomass-based diesel standards. *Id.* The RFS2 regulations even allow, with certain limitations, obligated parties to use 2008 biodiesel and renewable diesel RINs to comply with the 2010 biomass-based diesel standard. *Id.* at 14,719 col.2-3 (JA 2095).

SUMMARY OF THE ARGUMENT

Petitioners argue that because the RFS2 regulations and the 2010 standards did not take effect until July 1, 2010, EPA loses the authority to ensure that the entire 2010 applicable volumes of renewable fuel, advanced biofuel, biomass-based diesel, and cellulosic biofuel, and the 2009 applicable volume of biomass-based diesel, are sold or introduced into commerce. Petitioners' argument is contrary to the statute and its structure.

First, EPA has the authority to ensure that the 2009 applicable volume of biomass-based diesel is used, even though EPA did not issue a standard for that

fuel and the necessary regulations to implement that standard until 2010. Congress directed EPA to “ensure” that transportation fuel contains “at least” the volumes specified in the statute, and adding the 2009 volume to the 2010 volume was a reasonable way for EPA to satisfy this directive in the context of its late regulations. *See* 42 U.S.C. § 7545(o)(2)(A)(i). Congress also specified that EPA’s regulations must ensure the use of applicable volumes of renewable fuel “regardless of the date of promulgation” of its implementing regulations. *Id.* § 7545(o)(2)(A)(iii). Petitioners ignore both the ambiguity (and the existence) of the phrase “at least,” and the statutory instruction that EPA’s regulations must ensure that the applicable volumes are met regardless of when EPA promulgates those implementing regulations. Petitioners also ignore long-standing precedent that an administrative agency does not lose all power to implement Congress’ intent simply because the agency’s action comes after a statutory deadline has passed. Rather than allowing the 2009 applicable volume to go completely unused, EPA reasonably combined that volume with the 2010 applicable volume, in order to effectuate Congress’ intent that both of these volumes of biomass-based diesel be used in the domestic supply of transportation fuel.

Second, although the effective date of the implementing regulations is July 1, 2010, Congress authorized EPA to apply those regulations to transactions that occurred during the entire calendar year. Congress expressly provided that the date

of promulgation does not override the mandate to ensure that the specified volumes of renewable fuels are sold or introduced into commerce, and the only way to ensure use of the specified volumes while still deriving the percentage standards in the manner required by the statute is to apply the standards to a full year's production of gasoline and diesel fuel. Congress also impliedly authorized such impacts by specifying that standards apply to the "calendar year," and by setting deadlines for EPA's issuance of implementing regulations that, even if adhered to, would have led to an effective date after the calendar year had begun. Petitioners would preclude EPA from ensuring that the full 2010 applicable volumes for each type of renewable fuel is used, based solely on the argument that EPA's late issuance of implementing regulations deprived EPA of the authority to establish 2010 standards. Because Petitioners had actual notice of the 2010 standards on February 3, 2010, had the opportunity to accumulate RINs to comply with those standards throughout 2010 (as well as to use some 2008 and 2009 RINs), are not required to demonstrate compliance until February 28, 2011, and can at their discretion defer most of their compliance demonstration for an additional year, EPA reasonably required Petitioners to apply the 2010 standards to Petitioners' entire 2010 output of gasoline and diesel.

Third, EPA provided reasonable advance notice of the 2010 standards and provided the required amount of time for obligated parties to comply with those

standards. As with Petitioners' other arguments, Petitioners rest on the argument that EPA is not authorized to establish standards once a statutory deadline passes. Although the statute requires EPA to issue standards by November 30 of the preceding year, and envisions that regulated parties would have a full 12-months during the calendar year to achieve compliance, Congress did not specify the consequence of EPA acting after that deadline. EPA did provide reasonable advance notice of the standards and more than twelve months for obligated parties to bring themselves into compliance.

STANDARD OF REVIEW

Under Clean Air Act section 307(d)(9), the Court may reverse EPA's action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 42 U.S.C. § 7607(d)(9)(A), (C).

ARGUMENT

I. EPA CAN ENSURE THAT OBLIGATED PARTIES MEET THE 2009 APPLICABLE VOLUME OF BIOMASS-BASED DIESEL.

Petitioners first challenge EPA's decision to use both the 2009 and the 2010 applicable volumes for biomass-based diesel in order to set the 2010 standard for that fuel. Pet. Br. at 21-22. Petitioners assert that EPA lacks the authority to combine these two applicable volumes and that EPA's action violates a clear and unambiguous statutory mandate. According to Petitioners, "Congress directed

EPA that it ‘shall’ set the applicable volume of biomass-based diesel for 2010 at 0.65 billion gallons.” Pet. Br. at 23. However, Petitioners misquote the statute and misconstrue EPA’s delegated authority.

A. EPA Has The Authority To Ensure That The 2009 Applicable Volume of Biomass-based Diesel Is Met.

As Petitioners note, any authority for EPA to act must be delegated by Congress. *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001), *citing Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (agency’s legislative rulemaking power is limited to the authority delegated to it by Congress); Pet. Br. at 23. However, in the EISA Congress directed EPA to promulgate regulations

to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an average annual basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, biomass-based diesel, determined in accordance with subparagraph (B) . . .

42 U.S.C. § 7545(o)(2)(A)(i). The plain meaning of “ensure” is “to make certain.” *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 852 n.10 (3^d Cir. 1999) (defining “assure”). Therefore, Congress did explicitly delegate to EPA the authority to make certain that the 2009 applicable volume of each type of renewable fuel is sold or introduced into commerce. *See, e.g.*, 75 Fed. Reg. at 14,718 col.3 (JA 2094).

Petitioners assert that this “general” authority cannot trump the “specific statutory directive” to calculate the 2010 biomass-based diesel standard using an

applicable volume of 0.650 billion gallons. Pet. Br. at 26. Petitioners' argument has three flaws.

First, the specific directive for 2010 is not unambiguous, as Petitioners claim. Pet. Br. at 23, 24, 25, 27. According to Petitioners, Congress has not delegated to EPA the authority to use anything other than 0.65 billion gallons of biomass-based diesel in setting the 2010 standard for that fuel. Petitioners argue that the EISA says that the 2010 applicable volume for that fuel "shall" be 0.65 billion, and that the word "shall" is mandatory or imperative. Pet. Br. at 24, citing *Exportal Ltda v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990). But Petitioners do not accurately quote the statute. Section 211(o)(2)(A)(i) directs EPA to ensure that transportation fuel contains "*at least* the applicable volume . . . determined in accordance with subparagraph (B)" (emphasis added). 42 U.S.C. § 7545(o)(2)(A)(i). Petitioners read the phrase "at least" out of the statute, and ignore the ambiguity that phrase creates regarding EPA's determination of the 2010 standards for biomass-based diesel.

Second, even if Congress did unambiguously intend for EPA to set the 2010 standard using no more than the 2010 applicable volume of biomass-based diesel, Congress also explicitly instructed EPA to "ensure" that the 2009 applicable volume of biomass-based diesel is sold or introduced into commerce, and to include in the implementing regulations compliance provisions to "ensure" that

occurs, regardless of when those regulations are promulgated. 42 U.S.C. § 7545(o)(2)(A)(i), (iii). Petitioners would divest EPA of the ability to implement these statutory directives based on EPA's failure timely to promulgate the RFS2 regulations in December 2008, contrary to the statute's terms.

Third, even if sections 211(o)(2)(A)(i) and (A)(iii) do not by themselves provide sufficient authority for EPA to ensure that the 2009 applicable volume of biomass-based diesel is used, the statutory framework leaves a gap for EPA to fill. This Court has held that if there is "no indication of what Congress intended in the event of EPA's non-compliance with the statutory mandate," then EPA does not necessarily lose the power to act. *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1302-04 (D.C. Cir. 1991). *See also Brock v. Pierce County*, 476 U.S. 253, 259-60 (1986) (where there are "less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act"); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 161 (2003) ("a statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done").

In *Linemaster Switch*, owners of hazardous waste sites argued that EPA lacked the authority to add sites to the National Priorities List once a statutory deadline to amend the regulations used to evaluate such sites had passed. 938 F.2d

at 1301-02. The Court noted that while the statutory deadline was clear, Congress also directed EPA to revise the National Priorities List annually. *Id.* at 1302.

Thus, it was “plausible that Congress would have wanted EPA to continue” to list sites using a prior version of the regulations until amended regulations became effective. *Id.* As was the case in *Linemaster Switch*, here it is certainly “plausible” that Congress would have wanted EPA to ensure the use in commerce of the 2009 applicable volume of biomass-based diesel, despite EPA’s failure to meet a statutory deadline.

Although the Court in *Linemaster Switch* refused to defer to the Agency’s interpretation of the statutory ambiguity in that case, noting it would be “odd to conclude that Congress implicitly entrusted a laggard agency with the authority to devise a remedy for its own untimeliness,” *id.* at 1303, the Court made its own inquiry into Congress’ intent, and held that “Congress intended the agency to continue listing sites pursuant to the [prior regulations] until the amended [regulations] became effective, even if that effective date was later” than the statutory deadline. *Id.* at 1305. The Court relied on the “absence of any language in [the statute] revoking EPA’s listing authority for failure to amend the [regulations] by the statutory deadline”; indications in the legislative history that Congress’ primary concern with the prior regulations was addressed by a separate interim statutory provision; “congressional concerns about disrupting EPA’s

remedial efforts”; and the existence of a citizen suit cause of action as the remedy for agency inaction. *Id.* at 1304.

This Court’s analysis in *Linemaster Switch* demonstrates that EPA should be able to ensure that the 2009 applicable volume of biomass-based diesel is used in commerce, even though EPA missed the statutory deadline for issuing regulations implementing that requirement. Although Congress did not provide specific default standards in the event EPA did not timely issue standards for 2009, as Congress did for the 2006 standard, Congress did direct EPA to ensure that the provisions of section 211(o)(2) “are met,” “[r]egardless of the date of promulgation” of the implementing regulations. 42 U.S.C. § 7545(o)(2)(A)(iii). Furthermore, nothing in the EISA purports to revoke EPA’s authority to act in the event EPA misses a deadline for revising the Renewable Fuel Standard regulations. While there is no legislative history on this issue, the very purpose of the EISA, to “increase the production of renewable fuels,” Pub. L. No. 110-140, 121 Stat. 1492, is better served by EPA’s approach than it would be by entirely abandoning the 2009 applicable volume as Petitioners propose. And, similar to the APA provision noted in *Linemaster Switch*, 938 F.2d at 1304, section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2), allows citizens to bring suit to compel EPA to issue the RFS2 regulations after the statutory deadline has passed. Thus, it is highly unlikely that Congress intended that EPA’s failure timely to issue standards would

lead to the drastic result that Petitioners urge: precluding EPA from ensuring that both the 2009 and the 2010 applicable volumes of biomass-based diesel are eventually sold or introduced into commerce. Indeed, such a result seems flatly contrary to Congress' intent and would turn agency delay into a windfall for the regulated entities.

Petitioners assert that nothing in the EISA's structure indicates that EPA can increase the applicable volume of biomass-based diesel above 0.65 billion gallons for 2010, and that the grant of express authority to waive the applicable volumes pursuant to specific criteria indicates that EPA lacks authority to increase the applicable volume. Pet. Br. at 24-25. However, EPA does not rely on the general structure of the EISA; EPA based its action on its authority under section 211(o)(2)(A)(i), 42 U.S.C. § 7545(o)(2)(A)(i). *See* 75 Fed. Reg. at 14,718 col.2-3 (JA 2094). Furthermore, the existence of express authority to waive applicable volumes in specific situations does not suggest anything negative about EPA's authority to ensure that the 2009 applicable volume of biomass-based diesel is used even if EPA acts after the statutory deadline, a situation not addressed in the waiver provisions. *See* 42 U.S.C. § 7545(o)(7) (allowing EPA to waive the applicable volumes if implementing them would severely harm the economy or if there is an inadequate domestic supply, among other factors).

Similarly, Petitioners assert that by expressly delineating the years in which EPA *can* specify an applicable volume, Congress “reinforced the conclusion that EPA is *not* authorized to disregard Congress’s specific instruction that [EPA] ‘shall’ impose a 0.65 billion gallon biomass-based diesel mandate in 2010.” Pet. Br. at 25. Aside from again ignoring the statutory commands to ensure that transportation fuel contains “at least” the applicable volumes of renewable fuels, regardless of when EPA promulgates the necessary implementing regulations, 42 U.S.C. § 7545(o)(2)(A)(i), (iii), Petitioners’ argument is a straw man. EPA is not asserting the authority to establish *any* applicable volume the Agency considers appropriate, as EPA clearly can do for unlisted years (taking into account various statutory factors and limitations, *see* 42 U.S.C. § 7545(o)(2)(B)(ii)-(v)). Instead, EPA simply incorporated into the 2010 standard the specific 2009 applicable volume that otherwise would not be used.

Petitioners point out that EPA has recognized that it lacks authority to increase the applicable volumes in the statutory tables, Pet. Br. at 26, but Petitioners fail to note that EPA’s statement was in response to a request that EPA disregard altogether the volumes specified in the statute, and base the applicable volume on an independent analysis of the volume needed to “ensure that adequate supplies of renewable diesel are developed on a commercial scale.” *See* Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments,

Section 3.6.2 (JA 1770-1771). EPA did not attempt to independently calculate an applicable volume of biomass-based diesel for 2010, and EPA is *not* asserting an unfettered authority simply to increase any year's applicable volume to whatever level EPA selects. Instead, EPA is asserting its authority to "ensure" the introduction into commerce of the applicable volume of biomass-based diesel that Congress itself actually specified for 2009, as well as the applicable volume for 2010.

Petitioners argue that the deficit carryover provision, 42 U.S.C. § 7545(o)(5)(D), does not support the 2010 biomass-based diesel standard because a "conceptual mechanism" is not an express authorization to combine two years of applicable volumes. Pet. Br. at 27-28. However, EPA is not relying on the deficit carryover provision as legal authorization to combine the 2009 and 2010 applicable volumes. Rather, the legal authority is the statute's command to EPA to "ensure" that the congressionally-mandated volumes are in fact sold or introduced into commerce. The deficit carryover provision simply provided EPA with a useful model of how one year's applicable volume could be carried forward to the next year. EPA considered that deficit carryover model and determined that it supported by analogy the reasonableness of the method EPA adopted for satisfying the statutory directive that EPA "ensure" use of the 2009 biomass-based diesel volume in the situation where the RFS2 regulations were not issued until 2010. 75

Fed. Reg. at 14,718 col.2 (JA 2094). Petitioners observe that the deficit carryover applies to obligated parties, not to EPA, Pet. Br. at 28, but that is irrelevant; EPA looked to the provision only as a model for its action, not as authority for it. As noted, that authority is provided in section 211(o)(2)(A)(i), 42 U.S.C. § 7545(o)(2)(A)(i).

Petitioners also cite *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006), for the proposition that EPA may not avoid congressional intent clearly expressed in statutory text by asserting that the Agency's preferred approach would be better policy. Pet. Br. at 27. But EPA *is* implementing Congress' intent, using EPA's express statutory authority to "ensure" that congressionally-mandated applicable volumes are used, regardless of when EPA promulgates the implementing regulations. EPA is not asking the Court to "presume" that EPA has authority to require obligated parties to sell or introduce into commerce the 2009 applicable volume of biomass-based diesel. Congress gave EPA that authority. The only question is how EPA should exercise that authority in situations like the present one, in which EPA misses the statutory deadline for issuing the RFS2 regulations and standards.

B. EPA Reasonably Decided To Calculate the 2010 Standard for Biomass-based Diesel Based on the Applicable Volumes for Both 2009 and 2010.

Combining the 2009 and 2010 applicable volumes of biomass-based diesel specified by Congress is one reasonable way to effectuate Congress' intent that both of these volumes of biomass-based diesel be used in the domestic supply of transportation fuel. First, there are sufficient RINs available to satisfy the combined 2009/2010 biomass-based diesel volume mandate of 1.15 billion gallons. EPA analyzed past and anticipated biodiesel and renewable diesel production, and determined that approximately 300 million gallons of fuel that would qualify as biomass-based diesel had been used in 2009, and that the U.S. domestic production capacity is over 2.8 billion gallons, far more than the combined 2009 and 2010 applicable volumes. *See, e.g.*, 75 Fed. Reg. at 14,755 col.2-3 (JA 2131); Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments, Section 3.6.2 .2 (JA 1777-1779). Petitioners do not dispute that there was an adequate supply of RINs issued for fuel produced in 2009, and anticipated for production in 2010, to satisfy a combined 2009/2010 volume requirement by the end of 2010.

Second, EPA tailored its regulations to closely mirror the situation that would have existed if EPA had timely issued a 2009 standard for biomass-based diesel. Any 2008 biodiesel or renewable diesel RINs used in 2009 for compliance

under RFS1 could again be used to satisfy the 2010 RFS2 biomass-based diesel standard. 75 Fed. Reg. at 14,719 col.2-3 (JA 2095); *see also id.* at 14,877 (JA 2253) (promulgating 40 C.F.R. § 80.1427(a)(7)(i)). In addition, 2008 biodiesel or renewable diesel RINs that had never been used for compliance under RFS1 could be applied, with certain limitations, towards satisfying that standard. 75 Fed. Reg. at 14,719 col.3 (JA 2095); *see also id.* at 14,877 (JA 2253) (promulgating 40 C.F.R. § 80.1427(a)(7)(ii)-(iii)).

Third, EPA crafted a specific deficit carry-over provision for the 2010 biomass-based diesel mandate, allowing obligated parties to carry into 2011 a deficit equal to the percentage of its combined 2009/2010 renewable volume obligation that reflected implementation of the 0.65 billion gallon volume for 2010. 75 Fed. Reg. at 14,719 col.2 (JA 2095). In other words, obligated parties can carry over into 2011 57% (0.65/1.15) of their 2010 renewable volume obligation for biomass-based diesel. *Id.*

Fourth, EPA provided obligated parties with advance notice of EPA's plan to combine the 2009 and 2010 applicable volumes of biomass-based diesel. EPA expressly identified the issue and EPA's proposed resolution in its November 21, 2008 Federal Register notice announcing the RFS1 renewable fuel standard for 2009, and again in its May 26, 2009 proposed RFS2 rule. 73 Fed. Reg. at 70,643 col.3 (JA 386); 74 Fed. Reg. at 24,914 col.1-3 (JA 400). In both instances EPA

urged industry to plan for the possibility that EPA would require obligated parties to introduce the 2009 applicable volume into commerce by the end of 2010, and thus to purchase biodiesel and renewable diesel RINs in 2009 in anticipation of this action. *See, e.g.*, 73 Fed. Reg. at 70,643 col.3 (JA 386). Doing so would not be a significant hardship, nor would it be a wasted effort if EPA ultimately decided not to combine the two years' applicable volumes because obligated parties could still use these 2009 RINs to meet the RFS1 renewable fuel standard in 2009.

Petitioners counter that EPA's views are entitled to no weight under *Chevron* Step 1, because the statutory requirement for the 2010 applicable volume is clear and unambiguous. Pet. Br. at 25. As explained above, that statutory requirement is ambiguous, Petitioners' interpretation of it conflicts with other statutory requirements, and taken together the statutory framework leaves a gap to fill. Even if the Court does not defer to EPA's view, *see Linemaster*, the Court itself must still determine whether EPA's solution is reasonable and should be upheld. *See, e.g., NRDC v. EPA*, 22 F.3d 1125, 1135 (D.C. Cir. 1994) (court must "attempt to discern on [its] own what Congress would have intended" if the agency misses a statutory deadline to issue guidance and Congress does not specify the consequences of such a failure).

Petitioners do not argue that EPA's solution is unreasonable; they simply rest on their argument that EPA lacks any statutory authority to act once a deadline

has passed. Pet. Br. at 27. Nor do Petitioners assert that any of their members expect to have difficulty complying with their 2010 renewable volume obligation for biomass-based diesel. Petitioners do complain that combining two years' of applicable volumes decreases the industry's flexibility, contrary to the purpose of the deficit carryover provision. Pet. Br. at 28. Although obligated parties will have to obtain more RINs than if EPA had set the 2010 standard for biomass-based diesel using just the 2010 applicable volume, the system remains a very flexible one. As described above, obligated parties may use RINs generated in 2009 for biodiesel and renewable diesel, as well as many RINs generated in 2008, to satisfy the 2010 biomass-based diesel renewable volume obligation. They may also defer most of their compliance demonstration until February 28, 2011.

In light of the advance notice provided to industry, the flexibilities provided in the regulation for using RINs generated in 2008, 2009, and 2010 to demonstrate compliance with the 2010 biomass-based diesel mandate, the opportunity for parties to carry over much of their 2010 biomass-based diesel obligation into 2011, and the expected availability of sufficient biomass-based diesel RINs in 2009 and 2010 to satisfy the entire 2010 renewable volume obligation by the end of 2010, EPA's decision to combine the 2009 and 2010 biomass-based diesel applicable volumes in setting the 2010 standard is a reasonable means of ensuring that the 2009 biomass-based diesel volume will be used.

II. THE 2010 STANDARDS ARE NOT IMPERMISSIBLY RETROACTIVE.

Petitioners next argue that the 2010 standards are impermissibly retroactive because they impose new legal obligations on transactions that occurred in the first half of 2010, before the standards took effect. Pet. Br. at 29. Specifically, Petitioners are concerned that all of their production and importation of gasoline and diesel fuel is included when calculating their 2010 renewable volume obligations, rather than just the production and importation that occurred after the effective date of the rule. *Id.* EPA took the position in the preamble to the RFS2 rule that the rule would not have retroactive impacts because even though the rule is based in part on prior conduct, the requirements on obligated parties are forward-looking and obligated parties are not required to demonstrate compliance with their renewable volume obligations until well after the rule's effective date, so that there is no change in the past legal obligations that applied before the rule was issued. *See* 75 Fed. Reg. at 14,676 col.3 (JA 2052). However, even assuming the rule has retroactive impacts, Congress both expressly and impliedly authorized this result by directing EPA to ensure that the specified applicable volumes of renewable fuels be sold or introduced into commerce on an average annual basis and by also requiring EPA to ensure the use of the specified volumes "regardless of the date of promulgation" of the necessary implementing regulations.

A. Congress Expressly Authorized Retroactive Impacts When Implementing Regulations Are Issued After the Statutory Deadline.

Petitioners claim that neither the EISA nor the broader Clean Air Act includes language suggesting that Congress intended to allow EPA to implement rules retroactively, Pet. Br. at 30, but Petitioners overlook the express authorization to do just that in section 211(o)(2)(A)(iii), 42 U.S.C. § 7545(o)(2)(A)(iii). As noted above, this clause, enacted in 2005, states that:

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

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

42 U.S.C. § 7454(o)(2)(A)(iii). By its terms, this clause requires that the implementing regulations issued under subparagraph (A) must ensure that the full amount of the applicable volumes determined under subparagraph (B) are sold or introduced into commerce, regardless of when EPA issues those regulations.

In the EISA Congress imposed a deadline of December 2008 for EPA to issue new RFS2 regulations, and left section 211(o)(2)(A)(iii) intact. This provision therefore remains an express Congressional recognition that, at least in the first year of a new Renewable Fuel Standard program, when EPA is developing implementing regulations, the goal of ensuring that the entire year's applicable volume is sold or introduced into commerce must be satisfied, regardless of the

date the implementing regulations are issued. In other words, to the extent a retroactive impact is necessary to ensure the use of the specified volumes for the year in which the new rules are implemented, some reasonable retroactive impact is expressly authorized.

Here, some retroactive impact is necessary. The EISA specifies that the renewable fuel standards apply with respect to a “calendar year” and that they must be based on the estimate provided by the Energy Information Administration, which is for the “following calendar year.” 42 U.S.C. § 7545(o)(3)(A), (B)(i). The 2010 standards, based on the estimated full year of production and import of gasoline and diesel fuel in 2010, can only “ensure” that transportation fuel “on an annual average basis, contains at least” the applicable volumes of renewable fuels if those standards are applied to obligated parties’ full year’s production of gasoline and diesel fuel. *Id.* § 7545(o)(2)(A)(i). Application of the standards to any shorter time period would result in a decrease in the amount of renewable fuel used, contrary to Congress’ clear intent.

B. Congress Impliedly Authorized Retroactive Impacts When Implementing Regulations Are Issued After the Statutory Deadline.

Even if section 211(o)(2)(A)(iii) did not expressly authorize retroactive impacts, the EISA implies such authority when necessary to effectuate the statute’s requirements. As Justice Scalia has observed,

[i]t may even be that implicit authorization of particular retroactive rulemaking can be found in existing legislation. If, for example, a statute prescribes a deadline by which particular rules must be in effect, and if the agency misses that deadline, the statute may be interpreted to authorize a reasonable retroactive rule despite the limitation of the APA.

Bowen, 488 U.S. at 224-25 (Scalia, J., concurring).

That is the case here. As described above, EPA published the RFS2 regulations in March 2010, after the statutory deadline of December 2008. Congress did not specify the consequences for EPA's late promulgation of the RFS2 regulations. Congress did, however, expressly direct EPA to ensure that transportation fuel sold or introduced into commerce in 2010, on an average annual basis, contains "at least" the applicable volumes of the four categories of renewable fuels set forth in the statute. 42 U.S.C. § 7545(o)(2)(A)(i). To implement that requirement, the EISA should be interpreted to impliedly authorize a reasonable retroactive application when EPA is unable to meet the statutory deadlines.

The EISA's structure demonstrates that Congress anticipated some retroactive impacts in the first year of the program. Petitioners argue that any volume requirement for periods before the RFS2 regulations' effective date is invalid, *i.e.*, that the 2010 standard cannot be applied to any gasoline or diesel produced or imported before July 1, 2010. Pet. Br. at 37. Congress, however, anticipated that the initial RFS2 standards would apply to an entire calendar year's

production or importation, even though the standard would not be effective by the first of the year. The Congressional Review Act, 5 U.S.C. § 801, provides that a major rule cannot take effect until 60 days after it is published in the Federal Register. 75 Fed. Reg. at 14,863 col.2 (JA 2239). Even if the 2009 RFS2 standard had been in place by November 30, 2008, and even if the RFS2 regulations had been published on December 18, 2008, those regulations (and therefore the 2009 standard) could not have been effective until 60 days later *at the very earliest*, or February 18, 2009. Yet, the 2009 standards would have applied to *all* of an obligated party's 2009 production or importation of gasoline or diesel fuel, just as the 2010 standards in EPA's rule apply to all of an obligated party's 2010 production or importation. In short, Congress structured the EISA as it did, knowing that, at least in its first year, the standards would have at least two and a half months of retroactive effect.

Congress also authorized retroactive rulemaking in the first year of the original renewable fuel standard program under the 2005 Act. The statute established a deadline of August 2006 for EPA regulations, but directed that those rules would apply to the entire year. If EPA did not adopt rules by that date, the default renewable fuel standard applied for *all* of calendar year 2006. 42 U.S.C. § 7545(o)(2)(A)(iv) (2006).

This Court's opinion in *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002), is not to the contrary. Petitioners cite *Whitman* for the proposition that the Clean Air Act does not include language suggesting that Congress intended to give EPA the unusual ability to implement rules retroactively. Pet. Br. at 30. The Court in that case actually stated that "[t]he *relevant* provisions of the Clean Air Act," *i.e.*, the provisions addressing attainment designations, lack such authorization. *Whitman*, 285 F.3d at 68 (emphasis added). *Whitman* did not address, and predates by several years, the relevant provisions in the EISA. And although *Whitman* affirmed a district court's refusal to order EPA to back-date an attainment determination by almost four years, the *Whitman* Court, like Justice Scalia in *Bowen*, recognized that there "may be an exception" for situations such as this case, where the agency misses a statutory deadline by which regulations must be issued. *Id.* at 68. The Court in *Whitman* went on to hold that Sierra Club's proposed solution in that case would not be reasonably retroactive because it "only makes the situation worse" by imposing large costs and potential liability on two States that had no notice that they needed to implement air pollution prevention plans. *Id.* Here, in contrast, the retroactive impacts of EPA's decision are limited and reasonable.

C. The 2010 Standards Have Limited and Reasonable Retroactive Impacts on Obligated Parties.

Instead of the two and a half months of retroactive impacts that Congress anticipated based on the deadlines for EPA action and the operation of the Congressional Review Act, the first RFS2 standards became effective six months after the beginning of the year. Petitioners give no reason to think six months is any more or less reasonable than two and a half months, and rest solely on their argument that *any* retroactive impact is invalid. Pet. Br. at 37.

In this case, six months of retroactive impact does not make “the situation worse.” *Whitman*, 285 F.3d at 68. Unlike the States of Missouri and Illinois in *Whitman*, obligated parties had ample notice that they would need to accumulate RINs to meet 2010 standards. Notwithstanding Petitioners’ statements in their brief, *see, e.g.*, Pet. Br. at 32 (“Prior to promulgation of the final rule, obligated parties lacked certainty regarding what renewable fuels EPA would consider to be compliant with RFS2 requirements . . .”), Petitioners had actual notice of the 2010 standards as soon as the RFS2 rule was signed on February 3, 2010, only one month after the year began. *See* API Statement on RFS2 Announcement, Feb. 3, 2010 (Supp. Appendix 30); NPRA Responds to New Renewable Fuel Standard Guidance for 2010 and Beyond, Feb. 3, 2010 (Supp. Appendix 31-32).

Furthermore, renewable fuel producers and importers continued to generate RINs between January 1 and July 1, 2010, for fuels qualifying as renewable fuel

under the RFS1 program. *See* 75 Fed. Reg. at 14,676 col. 2-3 (JA 2052). These RINs were and continue to be available for purchase by obligated parties such as Petitioners' members, and can be used to demonstrate compliance with the 2010 standards. *Id.* Thus, obligated parties are able to purchase RINs towards compliance with their 2010 RINs during the entire calendar year. And, with one limited exception, obligated parties can carry over a deficit and defer their 2010 compliance demonstration until February 28, 2012. 40 C.F.R. § 80.1427(b).⁵

Petitioners' alternative, presented in comments on EPA's proposed rule, is that EPA should delay the RFS2 program until January 1, 2011. They urged EPA simply to ignore the applicable volumes of renewable fuels that EPA must, per the express language of the EISA, ensure are sold or introduced into commerce in 2009 and 2010. *See* NPRA Comments, EPA-HQ-OAR-2005-2124.1 at 2 (JA 682). Petitioners would unreasonably compound EPA's failure to issue regulations by the statutory deadline with the greater error of ignoring the statutory directives to ensure the use of specified volumes of renewable fuels, regardless of the date of the regulations' promulgation. EPA chose a different course, and the extent (if any) of the retroactive impact of the 2010 standards was both limited and

⁵ As noted above, Br. at 36, obligated parties can carry over into 2011 57% of their 2010 biomass-based diesel renewable volume obligation. The remaining 43%, which represents the portion of that obligation necessary to ensure the use of the 2009 applicable volume, must be satisfied in 2010. 75 Fed. Reg. at 14,719 col. 2 (JA 2095).

reasonable. Petitioners' do not claim the 2010 standards are unreasonable; their only claim – which is not supported by the statute – is that they are unauthorized.

III. EPA'S LEADTIME AND COMPLIANCE PERIODS ARE REASONABLE AND CONSISTENT WITH THE STATUTE.

Petitioners next argue that EPA failed to provide the necessary advance notice of the 2010 standards and failed to provide regulated parties the required amount of time specified in the statute to fulfill their 2010 renewable volume obligations. Pet. Br. at 38-39. However, Petitioners misinterpret the statutory requirements, and EPA provided legally sufficient and reasonable advance notice and time for obligated parties to comply with their 2010 obligations.

A. EPA Provided the Required Compliance Period.

Petitioners argue that they are entitled to a period of 12 months to comply with their renewable volume obligation, based on the 12-month lifespan of a credit and on the deficit carryover provision. Pet. Br. at 39. These arguments ring hollow because Petitioners do have all twelve months in 2010 to accumulate the necessary RINs. RINs that met the requirements of the RFS1 regulations were being generated, purchased, and traded from January 1 until July 1, 2010, and obligated parties can use those RINs to satisfy their 2010 renewable volume obligations under RFS2. 40 C.F.R. § 80.1427(a)(4); 75 Fed. Reg. at 14,676 col.2 (JA 2052). In addition, obligated parties can continue to accumulate RINs during the first two months of 2011, because compliance with the 2010 renewable volume

obligations need not be demonstrated until February 28, 2011, *see, e.g.*, 75 Fed. Reg. at 14,676 col.1, 14, 718 col.1 (JA 2052, 2094), over a year after Petitioners had actual notice of them. API Statement on RFS2 Announcement, Feb. 3, 2010 (Supp. Appendix 30); NPRA Responds to New Renewable Fuel Standard Guidance for 2010 and Beyond, Feb. 3, 2010 (Supp. Appendix 31-32). Even assuming Petitioners needed to know the final 2010 standards before beginning to accumulate RINs, Petitioners still have *more than* twelve months to do so.

B. EPA Provided Reasonable Advance Notice.

Petitioners argue that Congress required the RFS2 regulations to be promulgated by December 19, 2008, so that obligated parties could begin implementing the RFS2 program on January 1, 2009. Pet. Br. at 38. Similarly, Petitioners point to the requirement that EPA publish each year's standards by November 30 of the preceding year to argue that the 2010 standards could only have been lawfully issued if released by November 30, 2009. Pet. Br. at 39. Petitioners correctly note that courts cannot ignore such explicit leadtime requirements. Pet. Br. at 38, *citing NRDC v. Thomas*, 805 F.2d 410, 435-46 (D.C. Cir. 1986); *NRDC v. EPA*, 22 F.3d at 1135. However, Petitioners seek a perverse result: under their theory, even a single day's delay by EPA would affirmatively excuse the obligated parties of *any* duty to use or introduce into commerce that year's applicable volumes. Pet. Br. at 43 (the EISA's requirements "can only be

satisfied by promulgating final rules that afford the time mandated by Congress”). Petitioners would utterly frustrate Congress’ intent that all of the applicable volumes of renewable fuels are used, and its command to EPA that EPA “ensure” the use of such volumes of fuels regardless of when EPA promulgates the necessary implementing regulations.

As noted above, if there is “no indication of what Congress intended in the event of EPA’s non-compliance with the statutory mandate,” then EPA does not necessarily lose the power to act if EPA fails to act on time. *Linemaster Switch*, 938 F.2d at 1302-04. *See also Brock*, 476 U.S. at 259-60 (where there are “less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act”); *Barhart*, 537 U.S. at 157 (“[i]t misses the point simply to argue that [a statutory date by which an agency must act] was ‘mandatory,’ ‘imperative,’ or a ‘deadline,’ as of course it was . . . the real question . . . is what the consequences of tardiness should be”). Instead, the Court must address the reasonableness of EPA’s solution.

Petitioners do not claim that they will have difficulty meeting their 2010 renewable volume obligations, or that EPA’s delay in issuing the 2010 standards actually harmed them. Instead, Petitioners simply assert that they did not receive the required advance notice because the final standards differ from what EPA proposed. Pet. Br. at 43-45.

Petitioners fail to demonstrate any harm or unfair surprise. First, Petitioners claim that they had insufficient notice of the final 2010 standards. Pet. Br. at 44. Although the final standard for cellulosic biofuel did differ significantly from the proposed standard, the final standard requires 95% *less* cellulosic biofuel than EPA had proposed. *Id.* See also 75 Fed. Reg. at 14,718 col.1 (JA 2094). It is difficult to see how such a dramatic change in Petitioners' favor could prejudice them. The standard for total renewable fuel was 8.25% in the final rule, as compared to 8.01% in the proposed rule; the final advanced biofuel standard was 0.61% as compared to 0.59% in the proposal. See 74 Fed. Reg. at 24,915 (JA 401); 75 Fed. Reg. at 14,718 (JA 2094). These minor differences reflect a change in the Energy Information Administration's estimate of the total amount of gasoline and diesel fuel to be produced and imported in 2010. *Compare* Calculation of Renewable Fuel Standard for Gasoline and Diesel, EPA-HQ-OAR-2005-0161-0928 *and* EPA-HQ-OAR-2005-0161-0928.1 (Supp. Appendix 33-42) *with* Calculation of the Renewable Fuel Standard for Gasoline and Diesel – Revised, EPA-HQ-OAR-2005-0161-3190 *and* EPA-HQ-OAR-2005-0161-3191 (Supp. Appendix 43-44). Because these estimates went down between EPA's issuance of the proposed and the final rules, the percentage standards were slightly higher in order to ensure that the applicable volumes of these fuels specified in the EISA were consumed in 2010.

The final biomass-based diesel standard does appear on its face to be significantly different from what EPA proposed (1.10% final as compared to 0.71% proposed). *Id.* However, the difference is attributable almost entirely to a different RIN valuation scheme designed to take into account the higher energy content of biomass-based diesel as compared to other renewable fuels. The effect on obligated parties would have been virtually identical for the proposed standard, with its proposed RIN valuation approach, as compared to the different final standard, with its different RIN valuation approach. EPA's proposed biomass-based diesel standard was based on the assumption that the production or import of each gallon of biomass-based diesel would result in the generation of one RIN, as for other renewable fuels such as ethanol. 74 Fed. Reg. at 24,944 col.3 (JA 430); *id.* at 25,115 (JA 601) (proposed 40 C.F.R. § 80.1405(d) with formula for biomass-based diesel standard). In the final rule EPA decided that each gallon of biomass-based diesel would qualify for 1.5 RINs as a result of its higher energy value as compared to ethanol. 75 Fed. Reg. at 14,716 col.3 (JA 2092); *id.* at 14,867 (JA 2243) (final 40 C.F.R. § 80.1405(c) with formula for biomass-based diesel standard). Because RINs are the currency for demonstrating compliance with the annual standards, the final rule includes an adjustment in the formula for deriving the annual biomass-based diesel standard to provide that 1.5 RINs must be acquired for each required gallon of biomass-based diesel. *Id.* The result is that

the final rule has the same volume requirement for the use of biomass-based diesel in 2010 as did the proposed rule, even though the numerical standard appears to be larger.

Second, Petitioners claim that they had insufficient notice of which fuels would meet the lifecycle greenhouse gas emission requirements and thus qualify to generate RINs. Pet. Br. at 44-45. Petitioners gloss over the fact that EPA's revised analysis allows *more* renewable fuels to qualify. Again, it is difficult to see how Petitioners are harmed by having a greater volume and variety of qualifying renewable fuel in the marketplace for them to purchase to achieve compliance than EPA had proposed.⁶

Petitioners cite *In re Center for Auto Safety*, 793 F.2d 1346, 1353-54 (D.C. Cir. 1986), for the proposition that any agency delay that reduces industry's

⁶ Petitioners note, Pet. Br. at 45 n.9, that a recent amendment to the RFS2 regulations clarifies that a particular form of renewable diesel RIN that was generated pursuant to the RFS1 regulations can also be used to satisfy RFS2 requirements. 75 Fed. Reg. 26,026, 26,032 col.2-3 (May 10, 2010) (JA 2282, 2288) (modifying 40 C.F.R. § 80.1427(a)(4)(i)). This amendment should make compliance with the 2010 biomass-based diesel standard easier for obligated parties such as Petitioners' members. The amendment was issued as a direct final rule, and would not have been finalized if any party had submitted adverse comments on it during a 30-day comment period. *Id.* at 26,026 col.1 (JA 2282). Neither Petitioners or any other party submitted a comment on this change to the regulations. *See* 75 Fed. Reg. 37,733, 37,733 col.2-3 (June 30, 2010) (Supp. Appendix 16). Therefore, the amendment to 40 C.F.R. § 1427(a)(4)(i) became final on July 1, 2010, at the same time that the other RFS2 regulations became effective. *Id.* By failing to comment on the rule change, Petitioners waived whatever complaint they may have regarding an amendment that could only make their compliance with the 2010 biomass-based diesel standard easier.

leadtime is detrimental because industry cannot plan ahead and ensure compliance. Pet. Br. at 38. The administrative record shows that Petitioners were fully able to plan ahead and ensure compliance. As EPA explained in the preamble to the final rule, most obligated parties under RFS2 were also obligated parties under RFS1, and therefore fully familiar with the program and with the new requirements to be implemented through the RFS2 regulations. *See* 75 Fed. Reg. at 14,676 col.2 (JA 2052); *see also* 74 Fed Reg. at 24,914 col.1 (JA 400). EPA proposed in 2009 that the RFS2 program begin on January 1, 2010, *id.* at 24914 col.1, and the final rule maintained that date with respect to calculating gasoline and diesel production and import for purposes of individual compliance obligations. 75 Fed. Reg. at 14,676 col.1-2 (JA 2052). Petitioners, and many of their members, commented extensively on the proposed rule, *see, e.g.*, Comments of ExxonMobil (Sept. 24, 2009) (JA 649-674); Comments of Chevron (Sept. 24, 2009) (JA 675-680); Comments of NPRA (Sept. 25, 2009) (JA 681-728); Comments of API (Sept. 25, 2009) (JA 729-806), and were apparently fully familiar with its terms. As described above, Br. at 49-51, the 2010 standards did not significantly differ from the 2009 proposal (with the exception of the final cellulosic biofuel standard, which is much less stringent than EPA proposed). Unlike the manufacturers in the *Auto Safety* case, who needed significant leadtime to adjust their products to meet fuel economy standards, 793 F.2d at 1349 n.10, 1350, obligated parties comply

with their renewable volume obligations simply by accumulating RINs from parties who produce and distribute renewable fuels. 75 Fed. Reg. at 14,721 col.2 (JA 2097). Obligated parties need not make any compliance demonstration at all until February 28, 2011, *id.* at 14,728 col.3 (JA 2104), and have the discretion to defer a demonstration of compliance of virtually all of their 2010 renewable volume obligations to the 2011 compliance demonstration on February 28, 2012. 40 C.F.R. § 80.1427(b). The sole limitation on their ability to carry a deficit forward is that they must include in their 2010 compliance demonstration sufficient RINs to demonstrate compliance with that portion of the biomass-based diesel standard that reflects the 2009 applicable volume for that fuel. *Id.*; 75 Fed. Reg. at 14,719 col.2 (JA 2095).

EPA therefore provided reasonable advance notice of the 2010 standards, and the full amount of time to comply with those standards that Petitioners claim they are entitled to under the statute.

CONCLUSION

For the foregoing reasons, the petitions for judicial review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,984 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced type face using Microsoft Word 2007 in Times New Roman and 14 point font.

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August 9, 2010

CERTIFICATE OF SERVICE

I certify that on this 9th day of August, 2010, I caused copies of the foregoing Brief for Respondent to be sent by first-class mail, postage prepaid, to:

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HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

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

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

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

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

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

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

- Sec. 801. Congressional review.
- 802. Congressional disapproval procedure.
- 803. Special rule on statutory, regulatory, and judicial deadlines.
- 804. Definitions.
- 805. Judicial review.
- 806. Applicability; severability.
- 807. Exemption for monetary policy.
- 808. Effective date of certain rules.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;
- (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section

802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

- (i) the Congress receives the report submitted under paragraph (1); or
- (ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

- (i) on which either House of Congress votes and fails to override the veto of the President; or
- (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

- (A) necessary because of an imminent threat to health or safety or other emergency;
- (B) necessary for the enforcement of criminal laws;
- (C) necessary for national security; or
- (D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on

the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

- (A) in the case of the Senate, 60 session days, or
- (B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

(2)(A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

- (i) such rule were published in the Federal Register (as a rule that shall take effect) on—
 - (I) in the case of the Senate, the 15th session day, or
 - (II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

(e)(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter.

(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though—

- (A) such rule were published in the Federal Register on the date of enactment of this chapter; and
- (B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

(Added Pub. L. 104-121, title II, §251, Mar. 29, 1996, 110 Stat. 868.)

REFERENCES IN TEXT

Sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995, referred to in subsec.

(a)(1)(B)(iii), are classified to sections 1532, 1533, 1534, and 1535, respectively, of Title 2, The Congress.

The date of the enactment of this chapter, referred to in subsec. (e)(1), (2), is the date of the enactment of Pub. L. 104-121, which was approved Mar. 29, 1996.

EFFECTIVE DATE

Section 252 of Pub. L. 104-121 provided that: "The amendment made by section 351 [probably means section 251, enacting this chapter] shall take effect on the date of enactment of this Act [Mar. 29, 1996]."

TRUTH IN REGULATING

Pub. L. 106-312, Oct. 17, 2000, 114 Stat. 1248, as amended by Pub. L. 108-271, §8(b), July 7, 2004, 118 Stat. 814, provided that:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Truth in Regulating Act of 2000'.

"SEC. 2. PURPOSES.

"The purposes of this Act are to—

"(1) increase the transparency of important regulatory decisions;

"(2) promote effective congressional oversight to ensure that agency rules fulfill statutory requirements in an efficient, effective, and fair manner; and

"(3) increase the accountability of Congress and the agencies to the people they serve.

"SEC. 3. DEFINITIONS.

"In this Act, the term—

"(1) 'agency' has the meaning given such term under section 551(1) of title 5, United States Code;

"(2) 'economically significant rule' means any proposed or final rule, including an interim or direct final rule, that may have an annual effect on the economy of \$100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; and

"(3) 'independent evaluation' means a substantive evaluation of the agency's data, methodology, and assumptions used in developing the economically significant rule, including—

"(A) an explanation of how any strengths or weaknesses in those data, methodology, and assumptions support or detract from conclusions reached by the agency; and

"(B) the implications, if any, of those strengths or weaknesses for the rulemaking.

"SEC. 4. PILOT PROJECT FOR REPORT ON RULES.

"(a) IN GENERAL.—

"(1) REQUEST FOR REVIEW.—When an agency publishes an economically significant rule, a chairman or ranking member of a committee of jurisdiction of either House of Congress may request the Comptroller General of the United States to review the rule.

"(2) REPORT.—The Comptroller General shall submit a report on each economically significant rule selected under paragraph (4) to the committees of jurisdiction in each House of Congress not later than 180 calendar days after a committee request is received. The report shall include an independent evaluation of the economically significant rule by the Comptroller General.

"(3) INDEPENDENT EVALUATION.—The independent evaluation of the economically significant rule by the Comptroller General under paragraph (2) shall include—

"(A) an evaluation of the agency's analysis of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms and the identification of the persons or entities likely to receive the benefits;

"(B) an evaluation of the agency's analysis of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms

and the identification of the persons or entities likely to bear the costs;

"(C) an evaluation of the agency's analysis of alternative approaches set forth in the notice of proposed rulemaking and in the rulemaking record, as well as of any regulatory impact analysis, federalism assessment, or other analysis or assessment prepared by the agency or required for the economically significant rule; and

"(D) a summary of the results of the evaluation of the Comptroller General and the implications of those results.

"(4) PROCEDURES FOR PRIORITIES OF REQUESTS.—The Comptroller General shall have discretion to develop procedures for determining the priority and number of requests for review under paragraph (1) for which a report will be submitted under paragraph (2).

"(b) AUTHORITY OF COMPTROLLER GENERAL.—Each agency shall promptly cooperate with the Comptroller General in carrying out this Act. Nothing in this Act is intended to expand or limit the authority of the Government Accountability Office.

"SEC. 5. AUTHORIZATION OF APPROPRIATIONS.

"There are authorized to be appropriated to the Government Accountability Office to carry out this Act \$5,200,000 for each of fiscal years 2000 through 2002.

"SEC. 6. EFFECTIVE DATE AND DURATION OF PILOT PROJECT.

"(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect 90 days after the date of enactment of this Act [Oct. 17, 2000].

"(b) DURATION OF PILOT PROJECT.—The pilot project under this Act shall continue for a period of 3 years, if in each fiscal year, or portion thereof included in that period, a specific annual appropriation not less than \$5,200,000 or the pro-rated equivalent thereof shall have been made for the pilot project.

"(c) REPORT.—Before the conclusion of the 3-year period, the Comptroller General shall submit to Congress a report reviewing the effectiveness of the pilot project and recommending whether or not Congress should permanently authorize the pilot project."

§ 802. Congressional disapproval procedure

(a) For purposes of this section, the term "joint resolution" means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: "That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect." (The blank spaces being appropriately filled in).

(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

(2) For purposes of this section, the term "submission or publication date" means the later of the date on which—

(A) the Congress receives the report submitted under section 801(a)(1); or

(B) the rule is published in the Federal Register, if so published.

(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further

(o) Renewable fuel program**(1) Definitions**

In this section:

(A) Cellulosic biomass ethanol

The term “cellulosic biomass ethanol” means ethanol derived from any lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis, including—

- (i) dedicated energy crops and trees;
- (ii) wood and wood residues;
- (iii) plants;
- (iv) grasses;
- (v) agricultural residues;
- (vi) fibers;
- (vii) animal wastes and other waste materials; and
- (viii) municipal solid waste.

The term also includes any ethanol produced in facilities where animal wastes or other waste materials are digested or otherwise used to displace 90 percent or more of the fossil fuel normally used in the production of ethanol.

(B) Waste derived ethanol

The term “waste derived ethanol” means ethanol derived from—

- (i) animal wastes, including poultry fats and poultry wastes, and other waste materials; or
- (ii) municipal solid waste.

(C) Renewable fuel**(i) In general**

The term “renewable fuel” means motor vehicle fuel that—

(I)(aa) is produced from grain, starch, oilseeds, vegetable, animal, or fish materials including fats, greases, and oils, sugarcane, sugar beets, sugar components, tobacco, potatoes, or other biomass; or

(bb) is natural gas produced from a biogas source, including a landfill, sewage waste treatment plant, feedlot, or other place where decaying organic material is found; and

(II) is used to replace or reduce the quantity of fossil fuel present in a fuel mixture used to operate a motor vehicle.

(ii) Inclusion

The term “renewable fuel” includes—

(I) cellulosic biomass ethanol and “waste derived ethanol”; and

(II) biodiesel (as defined in section 13220(f) of this title) and any blending components derived from renewable fuel (provided that only the renewable fuel portion of any such blending component shall be considered part of the applicable volume under the renewable fuel program established by this subsection).

(D) Small refinery

The term “small refinery” means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate

throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(2) Renewable fuel program**(A) Regulations****(i) In general**

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B).

(ii) Noncontiguous State opt-in**(I) In general**

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

(II) Other actions

In carrying out this clause, the Administrator may—

- (aa) issue or revise regulations under this paragraph;
- (bb) establish applicable percentages under paragraph (3);
- (cc) provide for the generation of credits under paragraph (5); and
- (dd) take such other actions as are necessary to allow for the application of the renewable fuels program in a noncontiguous State or territory.

(iii) Provisions of regulations

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

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

(II) shall not—

- (aa) restrict geographic areas in which renewable fuel may be used; or
- (bb) impose any per-gallon obligation for the use of renewable fuel.

(iv) Requirement in case of failure to promulgate regulations

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

(B) Applicable volume**(i) Calendar years 2006 through 2012**

For the purpose of subparagraph (A), the applicable volume for any of calendar years 2006 through 2012 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of renewable fuel (in billions of gallons):
2006	4.0
2007	4.7
2008	5.4
2009	6.1
2010	6.8
2011	7.4
2012	7.5.

(ii) Calendar year 2013 and thereafter

Subject to clauses (iii) and (iv), for the purposes of subparagraph (A), the applicable volume for calendar year 2013 and each calendar year thereafter shall be determined by the Administrator, in coordination with the Secretary of Agriculture and the Secretary of Energy, based on a review of the implementation of the program during calendar years 2006 through 2012, including a review of—

- (I) the impact of the use of renewable fuels on the environment, air quality, energy security, job creation, and rural economic development; and
- (II) the expected annual rate of future production of renewable fuels, including cellulosic ethanol.

(iii) Minimum quantity derived from cellulosic biomass

For calendar year 2013 and each calendar year thereafter—

- (I) the applicable volume referred to in clause (ii) shall contain a minimum of 250,000,000 gallons that are derived from cellulosic biomass; and
- (II) the 2.5-to-1 ratio referred to in paragraph (4) shall not apply.

(iv) Minimum applicable volume

For the purpose of subparagraph (A), the applicable volume for calendar year 2013 and each calendar year thereafter shall be equal to the product obtained by multiplying—

- (I) the number of gallons of gasoline that the Administrator estimates will be sold or introduced into commerce in the calendar year; and
- (II) the ratio that—
 - (aa) 7,500,000,000 gallons of renewable fuel; bears to
 - (bb) the number of gallons of gasoline sold or introduced into commerce in calendar year 2012.

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

Not later than October 31 of each of calendar years 2005 through 2011, the Administrator of the Energy Information Administration shall provide to the Administrator of the Environmental Protection Agency an estimate, with respect to the following calendar year, of the volumes of gasoline projected to be sold or introduced into commerce in the United States.

(B) Determination of applicable percentages

(i) In general

Not later than November 30 of each of calendar years 2005 through 2012, based on the estimate provided under subparagraph (A), the Administrator of the Environmental Protection Agency shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.

(ii) Required elements

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

- (I) be applicable to refineries, blenders, and importers, as appropriate;
- (II) be expressed in terms of a volume percentage of gasoline sold or introduced into commerce in the United States; and
- (III) subject to subparagraph (C)(i), consist of a single applicable percentage that applies to all categories of persons specified in subclause (I).

(C) Adjustments

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

- (i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and
- (ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

(4) Cellulosic biomass ethanol or waste derived ethanol

For the purpose of paragraph (2), 1 gallon of cellulosic biomass ethanol or waste derived ethanol shall be considered to be the equivalent of 2.5 gallons of renewable fuel.

(5) Credit program

(A) In general

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

- (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2);
- (ii) for the generation of an appropriate amount of credits for biodiesel; and
- (iii) for the generation of credits by small refineries in accordance with paragraph (9)(C).

(B) Use of credits

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

(C) Duration of credits

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

(D) Inability to generate or purchase sufficient credits

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

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

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

(6) Seasonal variations in renewable fuel use**(A) Study**

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

(B) Regulation of excessive seasonal variations

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

(C) Determinations

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

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

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

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

(D) Periods

The 2 periods referred to in this paragraph are—

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

Renewable fuel blended or consumed in calendar year 2006 in a State that has received a waiver under section 7543(b) of this

title shall not be included in the study under subparagraph (A).

(F) State exemption from seasonality requirements

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

(7) Waivers**(A) In general**

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

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

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

(B) Petitions for waivers

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

(C) Termination of waivers

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

(8) Study and waiver for initial year of program**(A) In general**

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

(B) Required evaluations

The study shall evaluate renewable fuel—

(i) supplies and prices;

(ii) blendstock supplies; and

(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

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

(D) Waiver

(i) In general

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

(ii) No effect on waiver authority

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

(9) Small refineries

(A) Temporary exemption

(i) In general

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

(ii) Extension of exemption

(I) Study by Secretary of Energy

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

(II) Extension of exemption

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

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

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

(ii) Evaluation of petitions

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

(iii) Deadline for action on petitions

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

(C) Credit program

If a small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A), the regula-

tions promulgated under paragraph (2)(A) shall provide for the generation of credits by the small refinery under paragraph (5) beginning in the calendar year following the date of notification.

(D) Opt-in for small refineries

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

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

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

(ii) Scoring

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

(B) Report

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

(q)⁸ Analyses of motor vehicle fuel changes and emissions model

(1) Anti-backsliding analysis

(A) Draft analysis

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

(B) Final analysis

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

(2) Emissions model

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

(3) Permeation effects study

(A) In general

Not later than 1 year after August 8, 2005, the Administrator shall conduct a study,

⁸ So in original. No subsec. (p) has been enacted.

C

Effective: July 1, 2010

Code of Federal Regulations Currentness

Title 40. Protection of Environment

Chapter I. Environmental Protection Agency
(Refs & Annos)

Subchapter C. Air Programs

Part 80. Regulation of Fuels and Fuel
Additives (Refs & Annos)

Subpart M. Renewable Fuel Standard
(Refs & Annos)

→ § 80.1427 How are RINs used to
demonstrate compliance?

(a) Renewable Volume Obligations.

(1) Except as specified in paragraph (b) of this section or § 80.1456, each party that is an obligated party under § 80.1406 and is obligated to meet the Renewable Volume Obligations under § 80.1407, or is an exporter of renewable fuels that is obligated to meet Renewable Volume Obligations under § 80.1430, must demonstrate pursuant to § 80.1451(a)(1) that it is retiring for compliance purposes a sufficient number of RINs to satisfy the following equations:

(i) Cellulosic biofuel.

$$\begin{aligned} & \langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{CB},i} + \\ & \langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{CB},i-1} = \text{RVO}_{\text{CB},i} \end{aligned}$$

Where:

$\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{CB},i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the cellulosic biofuel RVO, were generated in

year i, and are being applied towards the $\text{RVO}_{\text{CB},i}$ in gallons.

$\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{CB},i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the cellulosic biofuel RVO, were generated in year i-1, and are being applied towards the $\text{RVO}_{\text{CB},i}$ in gallons.

$\text{RVO}_{\text{CB},i}$ = The Renewable Volume Obligation for cellulosic biofuel for the obligated party or renewable fuel exporter for calendar year i, in gallons, pursuant to § 80.1407 or § 80.1430.

(ii) Biomass-based diesel. Use the equation in this paragraph, except as provided in paragraph (a)(7) of this section.

$$\begin{aligned} & \langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{BDD},i} + \\ & \langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{BDD},i-1} = \text{RVO}_{\text{BDD},i} \end{aligned}$$

Where:

$\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{BDD},i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year i, and are being applied towards the $\text{RVO}_{\text{BDD},i}$ in gallons.

$\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{BDD},i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year i-1, and are being applied towards the $\text{RVO}_{\text{BDD},i}$ in gallons.

$\text{RVO}_{\text{BDD},i}$ = The Renewable Volume Obligation for biomass-based diesel for the obligated party or renewable fuel exporter for calendar year i after 2010, in gallons, pursuant to § 80.1407 or §

80.1430.

(iii) Advanced biofuel.

$$\begin{aligned} & \langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{AB},i} \\ & \langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{AB},i-1} = \text{RVO}_{\text{AB},i} \end{aligned} +$$

Where:

$\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{AB},i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the advanced biofuel RVO, were generated in year i , and are being applied towards the $\text{RVO}_{\text{AB},i}$ in gallons.

$\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{AB},i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the advanced biofuel RVO, were generated in year $i-1$, and are being applied towards the $\text{RVO}_{\text{AB},i}$ in gallons.

$\text{RVO}_{\text{AB},i}$ = The Renewable Volume Obligation for advanced biofuel for the obligated party or renewable fuel exporter for calendar year i , in gallons, pursuant to § 80.1407 or § 80.1430.

(iv) Renewable fuel.

$$\begin{aligned} & \langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{RF},i} \\ & \langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{RF},i-1} = \text{RVO}_{\text{RF},i} \end{aligned} +$$

Where:

$\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{RF},i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the renewable fuel RVO, were generated in year i , and are being applied towards the $\text{RVO}_{\text{RF},i}$ in gallons.

$\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM}_{\text{RF},i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the renewable fuel RVO, were generated in year $i-1$, and are being applied towards the $\text{RVO}_{\text{RF},i}$ in gallons.

$\text{RVO}_{\text{RF},i}$ = The Renewable Volume Obligation for renewable fuel for the obligated party or renewable fuel exporter for calendar year i , in gallons, pursuant to § 80.1407 or § 80.1430.

(2) Except as described in paragraph (a)(4) of this section, RINs that are valid for use in complying with each Renewable Volume Obligation are determined by their D codes.

(i) RINs with a D code of 3 or 7 are valid for compliance with the cellulosic biofuel RVO.

(ii) RINs with a D code of 4 or 7 are valid for compliance with the biomass-based diesel RVO.

(iii) RINs with a D code of 3, 4, 5, or 7 are valid for compliance with the advanced biofuel RVO.

(iv) RINs with a D code of 3, 4, 5, 6, or 7 are valid for compliance with the renewable fuel RVO.

(3)(i) Except as provided in paragraph (a)(3)(ii) of this section, a party may use the same RIN to demonstrate compliance with more than one RVO so long as it is valid for compliance with all RVOs to which it is applied.

(ii) A cellulosic diesel RIN with a D code of 7 cannot be used to demonstrate compliance with both a cellulosic biofuel RVO and a biomass-based diesel RVO.

(4) Notwithstanding the requirements of § 80.1428(c) or paragraph (a)(6)(i) of this section, for purposes of demonstrating compliance for calendar years 2010 or 2011, RINs generated pursuant to § 80.1126 that have not been used for compliance purposes may be used for compliance in 2010 or 2011, as follows, insofar as permissible pursuant to paragraphs (a)(5) and (a)(7)(iii) of this section:

(i) A RIN generated pursuant to § 80.1126 with a D code of 2 and an RR code of 15, 16, or 17 is deemed equivalent to a RIN generated pursuant to § 80.1426 having a D code of 4.

(ii) A RIN generated pursuant to § 80.1126 with a D code of 1 is deemed equivalent to a RIN generated pursuant to § 80.1426 having a D code of 3.

(iii) All other RINs generated pursuant to § 80.1126 are deemed equivalent to RINs generated pursuant to § 80.1426 having D codes of 6.

(iv) A RIN generated pursuant to § 80.1126 that was retired pursuant to § 80.1129(e) because the associated volume of fuel was not used as motor vehicle fuel may be reinstated for use in complying with a 2010 RVO pursuant to § 80.1429(g).

(5) The value of $(\llcorner\SIGMA\gg RINNUM)_{i-1}$ may not exceed values determined by the following inequalities except as provided in paragraph (a)(7)(iii) of this section and § 80.1442(d):

$$(\llcorner\SIGMA\gg RINNUM)_{CB,i-1} \leq 0.20 * RVO_{CB,i}$$

$$(\llcorner\SIGMA\gg RINNUM)_{BDD,i-1} \leq 0.20 * RVO_{BDD,i}$$

$$(\llcorner\SIGMA\gg RINNUM)_{AB,i-1} \leq 0.20 * RVO_{AB,i}$$

$$(\llcorner\SIGMA\gg RINNUM)_{RF,i-1} \leq 0.20 * RVO_{RF,i}$$

(6) Except as provided in paragraph (a)(7) of this section:

(i) RINs may only be used to demonstrate compliance with the RVOs for the calendar year in which they were generated or the following calendar year.

(ii) RINs used to demonstrate compliance in one year cannot be used to demonstrate compliance in any other year.

(7) Biomass-based diesel in 2010.

(i) Prior to determining compliance with the 2010 biomass-based diesel RVO, obligated parties may reduce the value of $RVO_{BDD,2010}$ by an amount equal to the sum of all 2008 and 2009 RINs that they used for compliance purposes for calendar year 2009 which have a D code of 2 and an RR code of 15, 16, or 17.

(ii) For calendar year 2010 only, the following equation shall be used to determine compliance with the biomass-based diesel RVO instead of the equation in paragraph (a)(1)(ii) of this section:

$$\begin{aligned} &(\llcorner\SIGMA\gg RINNUM)_{BDD,2010} && + \\ &(\llcorner\SIGMA\gg RINNUM)_{BDD,2009} && + \\ &(\llcorner\SIGMA\gg RINNUM)_{BDD,2008} &= & RVO \end{aligned}$$

BBD,2010

Where:

((<<SIGMA>>RINNUM)_{BBD,2010} = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2010, and are being applied towards the RVO_{BBD,2010}, in gallons.

((<<SIGMA>>RINNUM)_{BBD,2009} = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2009, have not previously been used for compliance purposes, and are being applied towards the RVO_{BBD,2010}, in gallons.

((<<SIGMA>>RINNUM)_{BBD,2008} = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2008, have not previously been used for compliance purposes, and are being applied towards the RVO_{BBD,2010}, in gallons.

RVO_{BBD,2010} = The Renewable Volume Obligation for biomass-based diesel for the obligated party for calendar year 2010, in gallons, pursuant to § 80.1407 or § 80.1430, as adjusted by paragraph (a)(7)(i) of this section.

(iii) The values of ((<<SIGMA>>RINNUM)₂₀₀₈ and ((<<SIGMA>>RINNUM)₂₀₀₉ may not exceed values determined by both of the following inequalities:

$$\frac{((\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM})_{\text{BBD},2008})}{\text{RVO}_{\text{BBD},2010}} \leq 0.087 *$$

$$\frac{((\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM})_{\text{BBD},2008})}{((\langle\langle \text{SIGMA} \rangle\rangle \text{RINNUM})_{\text{BBD},2009})} \leq 0.20 * \text{RVO}_{\text{BBD},2010}$$

BBD,2010

(8) A party may only use a RIN for purposes of meeting the requirements of paragraph (a)(1) or (a)(7) of this section if that RIN is a separated RIN with a K code of 2 obtained in accordance with §§ 80.1428 and 80.1429.

(9) The number of gallon-RINs associated with a given batch-RIN that can be used for compliance with the RVOs shall be calculated from the following formula:

$$\text{RINNUM} = \text{EEEEEEEE} - \text{SSSSSSSS} + 1$$

Where:

RINNUM = Number of gallon-RINs associated with a batch-RIN, where each gallon-RIN represents one gallon of renewable fuel for compliance purposes.

EEEEEEEE = Batch-RIN component identifying the last gallon-RIN associated with the batch-RIN.

SSSSSSSS = Batch-RIN component identifying the first gallon-RIN associated with the batch-RIN.

(b) Deficit carryovers.

(1) An obligated party or an exporter of renewable fuel that fails to meet the requirements of paragraph (a)(1) or (a)(7) of this section for calendar year i is permitted to carry a deficit into year i+1 under the following conditions:

(i) The party did not carry a deficit into calendar year i from calendar year i-1 for the same RVO.

(ii) The party subsequently meets the requirements of paragraph (a)(1) of this section for

calendar year $i+1$ and carries no deficit into year $i+2$ for the same RVO.

(iii) For compliance with the biomass-based diesel RVO in calendar year 2011, the deficit which is carried over from 2010 is no larger than 57% of the party's 2010 biomass-based diesel RVO as determined prior to any adjustment applied pursuant to paragraph (a)(7)(i) of this section.

(iv) The party uses the same compliance approach in year $i+1$ as it did in year i , as provided in § 80.1406(c)(2).

(2) A deficit is calculated according to the following formula:

$$D_i = RVO_i - [(\ll\SIGMA\gg RINNUM)_i + (\ll\SIGMA\gg RINNUM)_{i-1}]$$

Where:

D_i = The deficit, in gallons, generated in calendar year i that must be carried over to year $i+1$ if allowed pursuant to paragraph (b)(1) of this section.

RVO_i = The Renewable Volume Obligation for the obligated party or renewable fuel exporter for calendar year i , in gallons.

$(\ll\SIGMA\gg RINNUM)_i$ = Sum of all acquired gallon-RINs that were generated in year i and are being applied towards the RVO_i , in gallons.

$(\ll\SIGMA\gg RINNUM)_{i-1}$ = Sum of all acquired gallon-RINs that were generated in year $i-1$ and are being applied towards the RVO_i , in gallons.

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40 C. F. R. § 80.1427, 40 CFR § 80.1427

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