

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 13, 2012

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

No. 10-1107 (and consolidated cases)

NATIONAL CHICKEN COUNCIL, ET AL.,

PETITIONERS,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

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

FINAL BRIEF FOR RESPONDENT

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

A. Parties and *Amici*

All parties appearing in this Court are accurately identified in the Joint Opening Brief of Environmental Petitioners.

B. Rulings Under Review

Petitions Nos. 10-1107 and 10-1108 challenge the Environmental Protection Agency's final rule titled Regulation of Fuel and Fuel Additives: Changes to Renewable Fuel Standards, published in the Federal Register at 75 Fed. Reg. 14,670 (March 26, 2010).

Petition No. 11-1030 challenges the Environmental Protection Agency's final rule titled Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards, published in the Federal Register at 75 Fed. Reg. 76,790 (Dec. 9, 2010).

Petitions Nos. 11-1089 and 11-1110 challenge the Environmental Protection Agency's final action, titled Denial of Petitions for Reconsideration of Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, notice of which was published in the Federal Register at 76 Fed. Reg. 15,855 (March 22, 2011).

C. Related Cases

These consolidated cases were not previously before this Court or any other court. Besides these consolidated cases, two other consolidated cases, *National*

Petrochemical & Refiners Ass'n v. EPA, No. 10-1070, and *American Petroleum Institute v. EPA*, No. 10-1071, challenged the 2010 final rule at issue here. Those petitions for review were denied, as were petitions for rehearing *en banc*. A petition for *certiorari* was denied on November 7, 2011. 2011 WL 5299474 (U.S. Nov. 7, 2011) (No. 11-102).

Respectfully submitted,

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GLOSSARY

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| CAA | Clean Air Act |
| DGS | distillers grains and solubles |
| Draft RIA | Draft Regulatory Impact Analysis |
| EISA | Energy Independence and Security Act of 2007 |
| Envir. Br. | Joint Opening Brief of Environmental Petitioners |
| GHG | greenhouse gas |
| Recon. Dec. | Resp. to Clean Air Taskforce, World Wildlife Fund, National Wildlife Federation, and Friends of the Earth's Petitions for Reconsideration of the Renewable Fuel Standards (RFS2) |
| RFS | Renewable Fuel Standards |

JURISDICTIONAL STATEMENT

On March 26, 2010, acting pursuant to the Energy Independence and Security Act of 2007 (“EISA”), EPA published a final rule revising the Renewable Fuel Standards (“RFS”) program. 75 Fed. Reg. 14,670 (Mar. 26, 2010) (“RFS2 Rule”) (JA0372). The National Chicken Council, National Meat Association, and National Turkey Federation (“Food Petitioners”) timely filed petition for review No. 10-1107, and Friends of the Earth timely filed petition for review No. 10-1108. On December 9, 2010, EPA published a final rule establishing renewable fuel standards for 2011. 75 Fed. Reg. 76,790 (Dec. 9, 2010) (JA0607). Friends of the Earth timely filed petition for review No. 11-1030. On March 22, 2011, EPA published in the Federal Register notice of a final action denying petitions for administrative reconsideration of the RFS2 Rule. 76 Fed. Reg. 15,855 (Mar. 22, 2011) (JA0664). Friends of the Earth and National Wildlife Federation (“Environmental Petitioners”) timely filed petitions for review Nos. 11-1089 and 11-1110.

The Court lacks jurisdiction to consider the arguments the Environmental Petitioners raise in Parts 1.A, III, and IV.C of their Joint Opening Brief (“Envir. Br.”), and the arguments the Food Petitioners raise in their Brief (“Food Br.”). First, no commenter objected that EPA’s decision to base its evaluation of lifecycle greenhouse gas emissions (“GHG”) reductions on the maximum aggregate volume

of renewable fuels produced as of the year 2022 violates the EISA's plain text, nor did any party seek reconsideration on that ground. Environmental Petitioners cannot raise that argument for the first time here. 42 U.S.C. § 7607(d)(7)(B). Second, no one commented on EPA's treatment of the global rebound effect in the lifecycle greenhouse gas threshold determinations for biofuels. Therefore, Environmental Petitioners are precluded from raising that issue here. *Id.* Third, Environmental and Food Petitioners both lack standing to challenge EPA's interpretation of a provision exempting from the EISA's minimum greenhouse gas reduction requirement ethanol produced at plants that commenced construction prior to 2010, because their claimed injuries cannot be redressed by an order vacating EPA's challenged interpretation. Fourth, Environmental Petitioners' challenge to a process in which parties can petition EPA to adopt an "aggregate compliance" approach to verifying the source of renewable biomass from foreign countries is not ripe.

STATUTES AND REGULATIONS

Except for 42 U.S.C. § 7607(d), all applicable statutes and regulations are contained in the Brief for Environmental Petitioners.

ISSUES PRESENTED

1. Whether Environmental Petitioners may challenge as contrary to the EISA's plain language EPA's decision to model the lifecycle greenhouse gas

emissions of potential renewable fuels over a 30-year period, based on the maximum aggregate volume of those fuels that the EISA requires as of 2022, and if the Court reaches the merits, whether EPA's decision should be upheld because it is reasonable and based on a permissible reading of ambiguous statutory language.

2. Whether Environmental Petitioners may challenge EPA's decision not to incorporate the global rebound effect into its analysis of lifecycle greenhouse gas emissions when no party commented on the issue during the comment period, and if the Court reaches the merits, whether EPA's decision is reasonable.

3. Whether Environmental and Food Petitioners have standing to challenge EPA's interpretation of a provision exempting from the EISA's minimum greenhouse gas reduction requirement ethanol produced at plants that commenced construction prior to 2010 and that are fired by natural gas and/or biomass, and if the Court reaches the merits, whether EPA's interpretation is reasonable.

4. Whether Environmental Petitioners may challenge EPA's method for determining whether planted crops and crop residues produced from domestic agricultural land qualify as renewable biomass when no party commented on the issue during the comment period, and if the Court reaches the merits, whether EPA's decision is reasonable and consistent with the EISA.

5. Whether Environmental Petitioners have a ripe challenge to a petition process for EPA to determine that planted crops and crop residues produced from foreign agricultural land qualify as renewable biomass.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In developing the RFS2 regulations, EPA responded to the EISA's complex and difficult mandate to evaluate for the first time the greenhouse gas emissions attributable to the entire lifecycle of numerous biofuels, including emissions associated with feedstock production and transportation, fuel production, and combustion. EPA had to devise methods for measuring those lifecycle emissions, and for comparing them to a congressionally-established baseline of greenhouse gas emissions from petroleum fuels. The resulting RFS2 Rule represents the culmination of years of work and the input of numerous stakeholders.

EPA's method of assessing lifecycle greenhouse gas emissions is both scientifically sound and faithful to the EISA's requirements. Moreover, the Agency's interpretations of the relevant statutory provisions are reasonable and entitled to deference. Environmental Petitioners challenge EPA's decisions based on their flawed readings of the statutory text, but they never raised most of these arguments during the rulemaking and are precluded from doing so now. Similarly, Food Petitioners' single issue relies on their interpretation of an ambiguous

statutory provision that, even if interpreted as they urge, will not redress their claimed injury. Because the Court lacks jurisdiction as to some of the claims they raise, and because EPA's decisions are reasonable and consistent with the EISA, the RFS2 Rule should be upheld.

II. STATUTORY BACKGROUND

The EISA significantly expands the RFS program, to “move the United States toward greater energy independence and security,” and to “increase the production of clean renewable fuels,” among other purposes. Pub. L. No. 110-140, 121 Stat. 1492, 1492. To do so, Congress directed EPA to revise the original RFS 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). The EISA specifies the applicable volumes for renewable fuel and each of its subcategories for each year through 2022 or, in the case of biomass-based diesel, through 2012, and EPA determines the applicable volumes for subsequent years. *Id.* § 7545(o)(2)(B)(i), (ii). The maximum volume of all types of renewable fuel specified in the statute is 36 billion gallons, for use in 2022. *Id.* § 7545(o)(2)(B)(i)(I). *See generally Nat'l Petrochemical & Refiners*

Ass'n v. EPA, 630 F.3d 145, 147-50 (D.C. Cir. 2010), *petition for cert. filed*, 80 U.S.L.W. 3065 (U.S. July 21, 2011) (No. 11-102).

All types of renewable fuels must be derived from “renewable biomass,” *id.* § 7545(o)(1)(J), defined to include items such as crops and trees, animal waste and byproducts, algae, separated yard waste, and separated food waste. *Id.* § 7545(o)(1)(I). However, to qualify as renewable biomass, planted crops and crop residues can only be harvested from “agricultural land cleared or cultivated at any time prior to” the EISA’s enactment, and that is “either actively managed or fallow, and nonforested.” *Id.* § 7545(o)(1)(I)(i).

Renewable fuel, and each of its subcategories, must achieve specified minimum reductions in lifecycle greenhouse gas emissions, as determined by the Administrator. *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, as determined by the Administrator, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005. *Id.* § 7545(o)(1)(C). Lifecycle greenhouse gas emissions are

the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use

of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

Id. § 7545(o)(1)(H).

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). Renewable fuel includes ethanol derived from corn starch, which is currently the primary source of renewable fuel in the United States. *See* 74 Fed. Reg. 24,904, 24,977 (table V.A.1-1); 24,983-84 (May 26, 2009) (JA0202, 0208-0209). Renewable fuel must achieve at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to the 2005 petroleum baseline. 42 U.S.C. § 7545(o)(2)(A)(i).

However, the statute includes two separate exemptions from this requirement. First, under the “grandfather” exemption, fuel from facilities that commenced construction before the EISA’s enactment on December 19, 2007, are exempt from the 20-percent reduction requirement. *Id.* § 7545(o)(2)(A)(i).

Second, under the “deemed compliant” exemption in a Transition Rule,

[f]or calendar years 2008 and 2009, any ethanol plant that is fired with natural gas, biomass, or any combination thereof is deemed to be in compliance with such 20 percent reduction requirement and with the 20 percent reduction requirement of section 211(o)(1) of the Clean Air Act [subsection (o)(1) of this section].

Pub. L. No. 110-140, § 210(a)(1), 121 Stat. 1532 (2007) (codified at 42 U.S.C. § 7545 notes, Transition Rules).

The largest subset of renewable fuel is advanced biofuel, which is renewable fuel that is not ethanol derived from corn starch, and that has lifecycle greenhouse gas emissions that are at 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 its own volume mandates. Biomass-based diesel is a diesel fuel substitute produced from renewable biomass, that has lifecycle greenhouse gas emissions that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. *Id.* § 7545(o)(1)(D). Cellulosic biofuel is a renewable fuel that is derived from cellulose, hemicellulose, or lignin, and has lifecycle greenhouse gas emissions that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions. *Id.* § 7545(o)(1)(E). Ethanol can qualify as different types of renewable fuel depending upon how it is produced; for example, ethanol from the sugar in sugarcane can be an advanced biofuel if it is produced from renewable biomass in a way that meets the minimum 50-percent greenhouse gas reduction requirement.

III. REGULATORY BACKGROUND

A. EPA's Proposed RFS2 Rule.

In its proposal EPA addressed (among other things) which combinations of biofuel, biofuel feedstock, and biofuel production processes would meet the new greenhouse gas reduction requirements, how EPA would establish the lifecycle greenhouse gas emissions associated with the petroleum baseline, EPA's interpretation of the scope of the statutory exemptions from the greenhouse gas reduction requirements, and how EPA would address the requirement that renewable fuels be made from "renewable biomass."

1. Assessment of lifecycle greenhouse gas emissions reductions.

EPA analyzed multiple permutations of "production pathways" for different fuel types, including sugarcane ethanol, corn ethanol, soy biodiesel, waste-derived ethanol or diesel, and more, which involved different choices of feedstock, process energy type (such as coal or natural gas) and fuel production process. 74 Fed. Reg. at 25,041-55 (JA0266-0280). EPA noted that although lifecycle greenhouse gas emission methodologies were well established for petroleum-based fuels, the same was not the case for biofuels. *Id.* at 25,022/1 (JA0247). EPA set out to analyze "the incremental GHG emission impacts of increasing the volume of [each biofuel] to the total mix of biofuels needed to meet the EISA requirements." *Id.* at 25,022/2 (JA0247).

Because EPA had to account for all stages of the full fuel lifecycle for each potential renewable fuel, EPA examined greenhouse gas emissions from feedstock production, land use changes, feedstock transport, fuel processing, and fuel transport, as well as from tailpipe combustion. *Id.* at 25,027-40 (JA0252-0265). Among the more complex issues EPA addressed was the proper method for assessing greenhouse gas emissions that are related to clearing new land for agricultural production, and shifting uses of existing agricultural land that may result from new demands for biofuel feedstocks such as corn and soybeans. *Id.* at 25,028/3-39/1 (JA0253-0264). To measure greenhouse gas emissions related to land use changes due to the increased production of renewable fuel feedstocks, EPA considered the amount, location, and type of land (such as forest or savannah) that would likely be converted to cropland, as well as likely changes in cropping patterns on existing farmland (*e.g.*, from wheat or pasture to corn or soybeans). *Id.* at 25,029-32 (JA0254-0257). EPA also had to take into account the fact that greenhouse gases such as stored carbon in soils “could be released through time if new acres are needed to produce corn, soybeans or other crops as a replacement for crops that are directly used for biofuel production or displaced due to biofuels production.” *Id.* at 25,033/3 (JA0258).

The largest greenhouse gas emissions from land conversion would occur in the first few years after land clearing, with moderate amounts for approximately 20

years thereafter. *Id.* at 25,033-34 (JA0258-0259). In addition, there would be lost carbon sequestration associated with forest clearing that would have continued absent the clearing for 90 to 800 years. *Id.* at 25,034/1-2 (JA0259). While emissions increases from land conversion occur over time, there are also emissions reductions over time as the renewable fuel replaces the petroleum based fuel. EPA recognized that any lifecycle analysis has to address net emissions over a multi-year time period, and cannot look at any one year in isolation. EPA therefore proposed to model lifecycle greenhouse gas emissions over a 30-year timeframe, but sought comment on other timeframes, such as 100 years. *Id.* at 25,034-36 (JA0259-0261).

Rather than perform lifecycle analyses for every year in which each biofuel is used, EPA proposed to “adopt fixed assessments of the fuels meeting the GHG thresholds based on a 2022 performance assessment.” *Id.* at 25,022/3 (JA0247). In other words, for each potential renewable fuel, EPA would aggregate the land use impacts of all years of production up to and including 2022, the final year in which a specific volume is mandated by the EISA. EPA would assume that all of the increases in production occur in 2022. EPA would then model the greenhouse gas emissions from all stages of production and from the use of that aggregate volume, *i.e.*, the fuel’s entire lifecycle. In order to capture all land use emissions, the model would look ahead 30 years from 2022.

EPA would then measure the difference in greenhouse gas emissions between two scenarios as of 2022: the lifecycle emissions from the volume of each biofuel likely to be in the 2022 fuel pool *without* EISA's mandate, and the lifecycle emissions from the volume of each biofuel that EISA *actually* mandates. *Id.* at 25,022/2. EPA explained that tracking "how biofuel production might continuously change from month to month or year to year" would require an extremely complex assessment and administratively difficult implementation program. *Id.* at 25,022/3. Furthermore, 2022 is the most reasonable year to select because that is "the final year of ramp up in the required volumes of renewable fuel" and "allows the complete fuel volumes specified in [the] EISA to be incorporated." *Id.* at 25,022/3.

EPA noted that its analysis presumes that petroleum-based fuels would be replaced on an energy-equivalent basis by biofuels, and that many factors could affect this assumption including "the supply and cost of petroleum." *Id.* at 25,040/3 (JA0265). EPA also noted that reducing demand for petroleum-based fuel in the United States may reduce worldwide petroleum prices and affect petroleum usage in other countries, and invited comment on "how best to assess these potential impacts." *Id.* at 25,041/1 (JA0266).

2. Establishment of the petroleum baseline.

EPA also had to establish the lifecycle greenhouse gas emissions associated with the petroleum baseline, against which potential renewable fuels' lifecycle greenhouse gas emissions would be compared. *Id.* at 25,040/1 (JA0265). EPA identified the mix of crude oil types used in 2005 and determined the average greenhouse gas emissions. *Id.* at 25,040/2. EPA noted that different types of petroleum, such as crude from Canadian tar sand and light crude, might have higher or lower than average lifecycle greenhouse gas emissions. *Id.* at 25,040/2. Therefore, the greenhouse gas benefit of replacing any conventional fuel with biofuel could depend upon the type of crude being replaced. *Id.* EPA sought comment on whether, “strictly for purposes of assessing the benefits of the rule (and not for purposes of determining whether certain renewable fuel pathways meet the GHG reduction thresholds set forth in EISA) we should assess benefits based on a marginal displacement approach and, if so, what assumptions we should use for the marginal displacements.” *Id.* at 25,040/2-3.

3. Interpreting the scope of the statutory exemptions.

EPA noted ambiguity in the exemption in the EISA's Transition Rule, described above, regarding ethanol plants that are “deemed compliant” with the EISA's greenhouse gas reduction requirements. EPA proposed to interpret that exemption to apply to all fuel produced at ethanol plants that are fired by natural

gas and/or biomass, and commenced construction between the date of EISA's enactment and December 31, 2009. *Id.* at 24,921 (JA0146).

4. Renewable biomass.

EPA solicited comment on several options for ensuring that domestic planted crops and crop residues used as feedstocks for renewable fuels are only harvested from permissible sources, as required by the EISA's definition of "renewable biomass." *Id.* at 24,930-41 (JA0155-0166). EPA suggested different approaches that would both ensure compliance and minimize administrative burdens, including options based on monitoring changes either in land acreage devoted to agricultural production, or in volumes of feedstock production. *Id.* at 24,938-41(JA0163-0166). EPA also sought comment on how to enforce the restrictions on renewable biomass for foreign-produced renewable fuel. *Id.* at 24,941/1 (JA0166).

B. The Final RFS2 Rule.

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 14,764/1-2 (JA0466). In the final RFS2 Rule, EPA adopted its proposed approach and determined the lifecycle greenhouse gas emissions reductions for various biofuels based on EPA's estimate of the volumes of those fuels that would

be produced as of 2022, when fuel volumes would be at their maximum levels pursuant to EISA's mandates. *Id.* at 14,780/1 (JA0482). EPA also adopted its proposed interpretation of the EISA's Transition Rule, concluding that ethanol produced at qualifying plants, *i.e.*, those that commenced construction prior to 2010 and are fired by natural gas and/or biomass, would be deemed compliant with the EISA's minimum 20-percent greenhouse gas reduction requirement for renewable fuel. *Id.* at 14,687/3 (JA0389). In addition, EPA adopted a method it called the "aggregate compliance approach" for ensuring compliance with the EISA's restrictions on what planted crops and crop residues from domestic agricultural land can qualify as renewable biomass. *Id.* at 14,701/2 (JA0403). EPA declined, however, to adopt the same approach for foreign producers of renewable fuel, citing a lack of sufficient data. *Id.* at 14,704/2 (JA0406).

Food Petitioners, Friends of the Earth, and others petitioned for judicial review of the RFS2 Rule. Nos. 10-1107, 10-1108. In December 2010, EPA amended the RFS2 Rule to correct technical errors and to clarify or modify certain aspects of it. 75 Fed. Reg. 79,964 (Dec. 21, 2010). As part of those amendments, EPA clarified its interpretation of the "deemed compliant" provisions of the Transition Rule.

Environmental Petitioners petitioned EPA to reconsider the RFS2 Rule, citing concerns with EPA's adoption of the aggregate compliance approach to

verifying that domestic crop and crop residues qualify as renewable biomass. The Clean Air Task Force, which is not a party to the present litigation, petitioned EPA to reconsider the aggregate compliance approach and EPA's decision not to factor the global rebound effect into the lifecycle analyses. EPA denied those requests, 76 Fed. Reg. 15,855 (Mar. 22, 2011), and Environmental Petitioners sought judicial review. Nos. 11-1089, 11-1110. While the petitions for judicial review and for administrative reconsideration were pending, EPA issued renewable fuel standards for 2011. 75 Fed. Reg. 76,790 (Dec. 9, 2010). As part of that rule, EPA established a process for parties to petition EPA to approve an aggregate compliance approach to verify that planted crops and crop residues grown in other countries qualify as renewable biomass. Friends of the Earth sought judicial review of that rule. No. 11-1030.

On April 26, 2011, the Court consolidated Nos. 10-1107, 10-1108, 11-1030, 11-1089, and 11-1110.

SUMMARY OF ARGUMENT

Although Environmental Petitioners generally agree with EPA's method of measuring the lifecycle greenhouse gas emissions from various biofuels, they challenge EPA's decision to base its model on the aggregate volume of those biofuels as of 2022 as the basis for modeling lifecycle greenhouse gas emissions over a 30-year period. Environmental Petitioners argue that EPA's choice is

foreclosed by unambiguous statutory text, but no party raised that argument during the rulemaking and Environmental Petitioners are precluded from doing so now. In any event, their argument fails on the merits. No provision in the EISA speaks directly to the specific year or volume that EPA must use in its analyses. To the extent any statutory provisions *could* be read to address it, those provisions are ambiguous. EPA's selection of aggregate biofuel volumes as of 2022 is a permissible interpretation of the EISA, and is a reasonable choice because it allows EPA to take into account the full fuel volumes, and their associated greenhouse gas impacts over time, as mandated by the statute.

Environmental Petitioners complain that EPA failed to include in its analysis a concept known as the global rebound effect, which posits that lower domestic demand for oil lowers the global price of oil, which in turn increases global demand. EPA reasonably decided not to factor this concept into its lifecycle greenhouse gas emissions analysis. Environmental Petitioners concede that neither they nor anyone else submitted any comments on this issue during the rulemaking; they now argue, incorrectly, that they were not adequately put on notice. However, EPA clearly invited comments and, upon receiving a petition to reconsider, correctly concluded that the issue of global rebound is not of central relevance to the outcome of the rule.

Both Environmental Petitioners and Food Petitioners challenge EPA's interpretation of the EISA's "deemed compliant" provision, one of the two statutory exemptions from the general rule that renewable fuels must meet a minimum greenhouse gas reduction threshold. These parties lack standing to challenge EPA's interpretation, because a second exemption, unchallenged by any party, independently grandfathers the full volume of exempt renewable fuel that is eligible for use in satisfying EISA's mandates. Therefore, even a favorable outcome on this argument would not redress either Environmental or Food Petitioners' claimed injury. Should the Court nonetheless decide to reach the merits, the "deemed compliant" exemption is ambiguous. EPA's interpretation, which focuses on Congress' decision to frame the exemption in terms of "plants" rather than "fuel," is reasonable and thus must be upheld.

Environmental Petitioners also challenge EPA's "aggregate compliance" method of ensuring that domestic planted crops and crop residues used as feedstocks for renewable fuels are only harvested from permissible sources. As with the global rebound effect, Environmental Petitioners concede that neither they nor anyone else submitted comments on this issue during the rulemaking. Environmental Petitioners could have done so, and their failure waives their argument. In any event, EPA correctly concluded that Environmental Petitioners' concerns do not raise an issue of central relevance to the outcome of the rule.

Finally, although the RFS2 rule limited the aggregate compliance approach to planted crops and crop residues from agricultural lands within the United States, an amendment to the rule allows interested parties to petition the Agency to adopt the aggregate compliance approach for foreign lands. Environmental Petitioners seek judicial review of EPA's adoption of this petition process, but their challenge is not ripe and must be dismissed.

STANDARD OF REVIEW

Under Clean Air Act section 307(d)(9), the Court may reverse EPA's action only 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). This standard is narrow, and a court is not to substitute its judgment for the agency's. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Although a court must apply the language of the statute where it reflects "the unambiguously expressed intent of Congress," if the statute is "silent or ambiguous with respect to the specific issue," the court must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

When an agency's action relies on scientific or technical information touching upon the agency's area of expertise, a reviewing court applies "an

extreme degree of deference.” *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009).

ARGUMENT

I. EPA’S METHOD OF ASSESSING LIFECYCLE GREENHOUSE GAS EMISSION REDUCTIONS BASED ON THE FULL VOLUME OF RENEWABLE FUELS REQUIRED TO BE USED AS OF 2022 SHOULD BE UPHELD.

To assess the lifecycle greenhouse gas emissions associated with various biofuels, EPA compared two scenarios: the “business as usual” volume of a fuel, based on what likely would have been in the fuel pool in 2022 *without* the EISA’s mandates, and the maximum volume of renewable fuels the EISA actually requires to be used in 2022. 74 Fed. Reg. at 25,022/1-2 (JA0247). EPA analyzed the greenhouse gas emissions impacts associated with the change in fuel volumes between the two scenarios, for each fuel pathway. These analyses were conducted in the context of contemporaneous increases in other biofuel volumes such that the total mix of biofuels would meet the maximum volumes specified in the EISA for 2022. *Id.* at 25,022/2.

Because some greenhouse gas emissions from the production of a biofuel occur over a long period of time, *id.* at 25,033/3 (JA0258), EPA needed to select a timeframe that would “captur[e] the full stream of GHG emissions and benefits over time.” 75 Fed. Reg. at 14,780/1 (JA0482). EPA chose a period of 30 years, because this, among other things, focuses on greenhouse gas emissions impacts

that are “more near term and, hence, more certain.” *Id.* at 14,780/3.

Environmental Petitioners do not object to the 30-year timeframe, but assert that the EISA’s plain text prohibits EPA from aggregating biofuel production as of 2022 and using that aggregate volume as the starting point for the 30-year timeframe. *Envir. Br.* 18-28. They also assert that the use of 2022 is arbitrary. *Id.* 29-32. Environmental Petitioners have waived the first of these arguments because they failed to raise it in their comments. Even if the Court were to reach its merits, however, the relevant portions of the EISA are ambiguous and EPA’s interpretation is permissible and entitled to deference. Furthermore, EPA’s use of the aggregate volume as of 2022, rather than a smaller volume from an earlier year, is reasonable and should be upheld.

A. Environmental Petitioners Waived Their Argument That EPA’s Method Of Assessing Lifecycle Greenhouse Gas Emission Reductions Violates The EISA’s Plain Text.

EPA sought comment on its proposal to evaluate greenhouse gas thresholds “based on a 2022 performance assessment.” 74 Fed. Reg. at 25,022/3 (JA0247).

A number of commenters stressed that EPA should consider as part of its greenhouse gas threshold determinations reasonably anticipated near-term improvements in agricultural yields and technology, as EPA’s proposal allows. *See, e.g.*, Comments of Governors’ Biofuel Coalition (Sept. 24, 2009) at 2 (EPA-HQ-OAR-2005-0161-2390) (corn and soybean yields will continue to increase

because of technological innovations) (JA1129); Comments of Brazilian Sugarcane Industry Association (Sept. 25, 2009) at 18-21 (EPA-HQ-OAR-2005-0161-2137) (discussing energy efficiency improvements and other industry trends that affect greenhouse gas emissions) (JA0713-0716). Several commenters argued that comparing the volume scenarios in 2022 with and without the EISA's mandates is *unreasonable* because use of the 2022 date increases the uncertainties associated with EPA's various assumptions. *See, e.g.*, Comments of Nat'l Petrochemical & Refiners Ass'n (September 25, 2009) at 44 (EPA-HQ-OAR-2005-0161-2124) (JA0693); Comments of American Petroleum Institute (September 25, 2009) at 49 (EPA-HQ-OAR-2005-0161-2393) (JA1131); *see generally* 75 Fed. Reg. at 14,768/3 (JA0470). Similarly, Environmental Petitioners commented that "it is *inappropriate* for EPA to set the starting point it uses for the period of the analysis of GHG emissions from biofuels in 2022," and instead suggested "that the EPA shift the baseline year for analysis from 2022 *to a year that better reflects the average performance* of the RFS, such as 2012" Environmental Community Comments on the Proposed Rule for the Expanded Renewable Fuel Standard (Sept. 25, 2009) ("Envir. Community Comments") at 6 (emphasis added) (EPA-HQ-OAR-2005-0161-2129.1) (JA0700). *See also id.* (characterizing EPA's "proposed general approach to analyzing the lifecycle GHG

emissions of biofuels” as “legally proper” but “recommend[ing] some improvements that should be made”).

However, no one suggested the statutory argument that Environmental Petitioners now advance: that the EISA’s plain language *prohibits* EPA from using 2022 as the initial year and *requires* EPA to conduct as many assessments as is necessary to ensure that qualified biofuels meet the greenhouse gas thresholds at all times. A petitioner’s failure to raise before the agency a particular question of statutory construction waives that argument. *See* 42 U.S.C. § 7607(d)(7)(B) (“[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review”); *Mossville Env’tl Action Now v. EPA*, 370 F.3d 1232, 1238 (D.C. Cir. 2004). *See also NRDC v. EPA*, 25 F.3d 1063, 1074 (D.C. Cir. 1994) (statutory argument not preserved by parties making other “technical, policy, or legal” arguments before the agency). Therefore it may not be advanced now.

B. EPA’s Method Of Assessing Lifecycle Greenhouse Gas Emissions Reductions Is Consistent With The EISA.

If the Court reaches the merits, it should reject Environmental Petitioners’ argument. They assert that the EISA’s plain language unambiguously requires that in order for a biofuel to qualify as “renewable fuel,” the fuel must meet the greenhouse gas reduction thresholds *at all times*. Envir. Br. 19 (EISA “directs that

qualifying biofuels must meet the specified reductions in GHG emissions in real time”); 22 (Congress intended biofuels “would achieve GHG reductions, regardless of when the biofuels were produced”). Under Environmental Petitioners’ reading, EPA must constantly reevaluate a biofuel’s lifecycle greenhouse gas emissions -- perhaps every year, or perhaps even more often. Nothing in the EISA imposes such an onerous burden. Instead, the EISA leaves to EPA’s discretion the method for determining a biofuel’s lifecycle greenhouse gas emissions. 42 U.S.C. § 7545(o)(1)(H) (lifecycle greenhouse gas emissions means the aggregate quantity of greenhouse gas emissions “as determined by the Administrator”); *id.* § 7545(o)(1)(B)(i), (C), (D), (E) (including the same phrase in the definitions of advanced biofuel, baseline lifecycle greenhouse gas emissions, biomass-based diesel, and cellulosic biofuel).

Environmental Petitioners respond that EPA’s method of assessing lifecycle greenhouse gas reductions ignores the EISA’s text, neglects to consider indirect emissions, is driven by cost considerations, and allows the use of fuels that Congress sought to prohibit. None of these arguments withstands scrutiny.

1. EISA’s text is ambiguous as to the method EPA must use to estimate lifecycle greenhouse gas emissions reductions.

Environmental Petitioners assert that Congress’ use of the word “achieves” in section 7545(o)(2)(A)(i) is an unambiguous requirement that biofuels must meet

the specified greenhouse gas reductions “in real time.” Envir. Br. 19. That section provides, in relevant part:

Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an 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) and, in the case of any such renewable fuel produced from new facilities that commence construction after the date of enactment of this sentence, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

42 U.S.C. § 7545(o)(2)(A)(i).

Contrary to Environmental Petitioners’ argument, the word “achieves” does not unambiguously denote any particular time period, and certainly not the continual reevaluation Environmental Petitioners seek. EPA reasoned that the EISA cannot reasonably be read to require EPA to estimate how biofuel production might change from year to year and month to month. 74 Fed. Reg. at 25,022/3 (tracking “how biofuel production might continuously change from month to month or year to year” would require “an extremely complex assessment and administratively difficult implementation program”) (JA0247); 75 Fed. Reg. at 14,768/3-69/1 (same) (JA0470). Instead, Congress left for EPA to determine how to account for the numerous changes in production levels and other factors that

influence a biofuel's lifecycle greenhouse gas emission reductions, over a multi-decade period, as compared to the petroleum baseline.

Environmental Petitioners next point to the word "any" in section 7545(o)(2)(A)(i)'s phrase, "in the case of any such renewable fuel produced from new facilities." Envir. Br. 20. They argue that "any" must mean all renewable fuel, regardless of when it is produced. *Id.* 20-21. However, the quoted phrase is immediately preceded by the EISA's list of the different categories of renewable fuel, *i.e.*, renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel. Rather than establishing a specific timeframe, the word "any" simply confirms that all types of renewable fuel must meet "at least" the 20-percent reduction requirement, at the appropriate point in time at which EPA determines that the greenhouse gas emissions assessment be made.

According to Environmental Petitioners, EPA's method of assessing lifecycle greenhouse reductions also contravenes the plain meaning of "annual basis" in section 7545(o)(2)(A)(i). Envir. Br. 21. However, the EISA uses the phrase "annual *average* basis," not "annual basis," and is far from unambiguous.

An "annual average" generally refers to a quantity that varies over time, with that variable quantity averaged over a consecutive 12-month period. The phrase "annual average basis" clearly modifies the clause that immediately follows that phrase in section 7545(o)(2)(A)(i), requiring EPA to ensure that transportation fuel

contains at least the volumes of biofuels required by the EISA. The EISA specifies either applicable volumes by biofuel type for each calendar year or, for years not specified, a process for EPA to set applicable volumes on an annual basis.

However, these applicable volumes are total annual volumes, not an annual average. For example, in 2011, transportation fuel must contain a total of 13.95 billion gallons of renewable fuel, 42 U.S.C. § 7545(o)(2)(B)(i)(I), achieved by adding up the daily volumes throughout the year to reach this total. It is not an annual average in which part of the year contains more than 13.95 billion gallons and part less. The reference to “annual average” must therefore refer to obligated parties’ ability to average their use of renewable fuel over the year to meet the annual percentage requirement that EPA establishes to ensure that applicable volumes for the year are met on an industry-wide basis. Even this “annual average” requirement is not absolute, as it is tempered by the ability of obligated parties to carry forward a deficit from any one calendar year into the next. 42 U.S.C. § 7545(o)(5)(D).

In contrast, the phrase “annual average basis” does *not* clearly modify the final clause in section 7545(o)(2)(A)(i), concerning the required 20-percent emissions reduction. Environmental Petitioners read the statute as a directive that EPA ensure that transportation fuel, on an average annual basis, both contains the required volumes of renewable fuels and achieves the required reduction in

lifecycle greenhouse gas emissions. Environmental Petitioners fail to acknowledge another, equally plausible reading of the statute: first, that EPA must ensure that transportation fuel, on an annual average basis, contains the required volumes of renewable fuels; and second, that EPA must ensure that renewable fuel achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions, as determined by the Administrator. Because the latter reading is equally permissible, the application of the phrase “annual average basis” is ambiguous.

Even if the phrase “annual average basis” did clearly modify both the volume clause and the emissions clause, the phrase is still ambiguous because, as applied to the emissions clause, it could have various meanings. Environmental Petitioners assert that the 20-percent reduction requirement must be accomplished each and every year that a particular fuel is used. However, this reading would have to be reconciled with the undisputed need to analyze lifecycle emissions over a 30-year production period, not just during a single year. Alternatively, the phrase could mean that, in any given year, the average of all renewable fuel types in use must achieve at least a 20 percent greenhouse gas reduction. And, it could mean that when EPA conducts the greenhouse gas assessments for various fuel production pathways, EPA must consider production variability over the course of a year in order to ascertain whether each pathway, “on an annual average basis,” achieves the 20-percent reduction. Environmental Petitioners err in suggesting that

both the phrase's meaning and its application to the clause requiring EPA to ensure that renewable fuels achieve a 20 percent reduction in lifecycle greenhouse gas emissions are unambiguous.

Environmental Petitioners also point to the definitions of the three subcategories of renewable fuel, each expressed in the present tense. *Envir. Br.* 21-22. For example, "advanced biofuel" is defined as "renewable fuel, other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions." 42 U.S.C. § 7545(o)(1)(B). Environmental Petitioners read this language to unambiguously require that advanced biofuel, as well as the other, similarly-defined subcategories of renewable fuels, constantly achieve the specified greenhouse gas reduction. *Envir. Br.* 22. However, each of these definitions is expressly limited by the phrase "as determined by the Administrator." 42 U.S.C. § 7545(o)(1)(B); *see also id.* §7545(o)(1)(C) and (H) (defining baseline lifecycle greenhouse gas emissions, and lifecycle greenhouse gas emissions, in reference to the phrase "as determined by the Administrator"). Inclusion of this phrase demonstrates that Congress intended to delegate to EPA the task of determining how to measure lifecycle greenhouse gas emissions, and how to measure whether any particular biofuel meets the greenhouse gas emission reduction requirements.

Nothing in these definitions, or elsewhere in the EISA, indicates that Congress excluded from this delegation the discretion to select a measurement timeframe and beginning point that, in EPA's view, best captures the biofuel's lifecycle greenhouse gas emissions.

Furthermore, Environmental Petitioners' argument is inconsistent with their comment during the rulemaking that EPA should model greenhouse gas reductions based on the year that best reflects "average performance." Envir. Community Comments at 6 ("We ask that the EPA shift the baseline year for analysis from 2022 to a year that better reflects the average performance of the RFS, such as 2012, with a commitment to update the analysis regularly to reflect documented changes in technologies and practices as well as better information on trends in land-use and associated emissions.") (JA0700). The EISA does not specify that EPA must measure lifecycle greenhouse gas emissions reductions based on an "average performance" year any more than the EISA specifies that the measurement must be based on the use of renewable fuel volumes produced in any particular year. The parties disagree on what the initial year in the multi-decade greenhouse gas emissions models should be, and therefore on what volume of fuel should be modeled. But Environmental Petitioners' comment indicates their agreement that a single year could be selected as the starting point of a multi-

decade analysis, and that the initial year is not unambiguously determined in the statute.

2. EPA's method of assessing lifecycle greenhouse gas emission reductions considers indirect emissions.

Environmental Petitioners assert that EPA's method of assessing lifecycle greenhouse gas reductions ignores most of the greenhouse gas emissions that come from land use changes. Envir. Br. 23-24. EPA, however, extensively considered the greenhouse gas emissions "associated with land use changes that occur domestically and internationally as a result of the increase in renewable fuel demands in the U.S." 74 Fed. Reg. at 25,028/3 (JA0253). Specifically, EPA examined how much land would be converted, where the land conversion would occur, what types of land would be converted, the greenhouse gas emissions impacts from the land conversion, and the variable timing of greenhouse gas releases from land conversion. *Id.* at 25,029-39 (JA0254-0264).

To estimate emissions associated with domestic land use changes resulting from the EISA's renewable fuel volume mandates, EPA used a model developed by Texas A&M University and others, which "tracks over 2,000 production possibilities for field crops, livestock, and biofuels." 75 Fed. Reg. at 14,769/3 (JA0471). The amount, location, and types of domestic land that would be converted were calculated based on the difference between biofuel scenarios in 2022. Contrary to Environmental Petitioners' assertion, EPA actually included in

its analysis “the annualized emission streams associated with all agricultural soil, forest soil, and forest product changes included in the mean cumulative emissions (2000-2022) for 30 years after 2022.” *Id.* Rather than ignoring land use changes that occur before 2022, EPA accounted for such changes by assuming that they all occur starting in 2022.

For emissions associated with international land use changes, EPA used different models to project changes in the amount of land used for crop production, and satellite data showing land use changes between 2001 and 2007 to estimate the types of land that would be cleared to make room for additional agricultural land, and the locations within each country or region that agricultural expansion would likely occur. Regulatory Impact Analysis: Changes to Renewable Fuel Standard Program (Jan. 29, 2010) at 354 (EPA-HQ-OAR-2005-0161-3187.2 (JA1175)). As with domestic land use changes, EPA annualized over 30 years the expected greenhouse gas impacts due to international land use changes from several years of increasing volumes of renewable fuels, assuming for the model that they all occurred starting in 2022. *Id.* at 310, 354 (JA1173, 1175).

EPA acknowledged Environmental Petitioners’ concern that “the upfront release of GHG emissions from land use change” initially can be large, especially if “feedstocks [are] grown each year on new cropland.” 74 Fed. Reg. at 25,034/2-3 (JA0259). In that situation, “it can take many years for the benefits of the biofuel

to make up for the large initial releases of carbon that result from land conversion.” *Id.* That period of time, called the “payback period,” can be decades. As noted above, however, Environmental Petitioners do not object to EPA’s selection of 30 years, a timeframe that captures both the initial spike in greenhouse gas emissions “as well as the benefits from using the biofuel.” *Id.* at 25,035/1 (JA0260).

Environmental Petitioners point out that if EPA had compared the two different volume scenarios as of 2010, rather than 2022, EPA would have found that corn ethanol has higher lifecycle greenhouse gas emissions. *Envir. Br.* 24-25. While it is certainly true that changing any parameter in a model will change the result, that observation sheds no light on what the EISA requires. Environmental Petitioners respond that the EISA’s “structure” proves that their preferred parameters are the correct ones, but again they merely point to the definitions of the three subcategories of renewable fuel as their “proof.” *Envir. Br.* 25. As explained above, *see supra* at 29-30, these definitions, whether analyzed on their own or as part of the EISA’s structure, do not unambiguously foreclose EPA’s approach. Environmental Petitioners also note that Congress specified a particular year for EPA to use in establishing the baseline petroleum lifecycle greenhouse emissions. *Envir. Br.* 26. Congress could similarly have specified a year or years for each biofuel’s lifecycle greenhouse gas emissions if it had intended to limit EPA’s discretion in this regard. Far from demonstrating that Congress therefore

intended EPA to model greenhouse gas emissions on a “real time” basis, *Envir. Br.* 19, Congressional silence typically indicates a gap for the regulatory agency to fill, as EPA did here.

Environmental Petitioners include a declaration from Stephen G. Brick, who provides his “expert opinion” that instead of using the year 2022, “EPA could have analyzed the lifecycle GHG emissions of corn ethanol using the year in which that fuel is produced as the starting year.” *Brick Decl.* ¶ 27 (attached as Ex. C to *Envir. Br.*). The Court should strike Mr. Brick’s declaration and all of the pages of Environmental Petitioners’ Brief that rely on it. *Envir. Br.* 20 n.12, 24-25, 31. Mr. Brick’s declaration is not part of the administrative record and Environmental Petitioners have not sought leave to supplement the record with it. Nor did they petition EPA to reconsider the rule with information they consider “new” and “of central relevance,” as allowed under the Clean Air Act. 42 U.S.C. § 7607(d)(7)(B). Courts review only those materials before the agency at the time of its decision. *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (citations omitted). The record may be supplemented if “the agency deliberately or negligently excluded documents that may have been adverse to its decision,” if “background information” is necessary “in order to determine whether the agency considered all of the relevant factors,” if the agency failed to explain the basis for

its action “so as to frustrate effective judicial review,” or if the agency “acted in bad faith.” *Id.*

The only possible basis on which Environmental Petitioners could use Mr. Brick’s declaration is background information to determine whether EPA considered all relevant factors. However, Mr. Brick is not providing background information, he is critiquing the merits of EPA’s decision. Brick Dec. ¶ 8 (the “purpose of this declaration is to respond to EPA’s analysis and conclusions”) (emphasis added); ¶ 17 (“EPA analysis . . . ignores the agency’s own projections”). Furthermore, he does not identify any relevant factors EPA failed to consider; instead, he stresses that his analysis is based “exclusively on the assumptions that EPA itself used.” *Id.* ¶ 13.

Because Mr. Brick’s declaration, and Environmental Petitioners’ arguments that are based on the declaration, are not properly before the Court, EPA does not and should not be required to provide a point-by-point refutation. The record demonstrates that EPA’s approach to modeling lifecycle greenhouse gas emissions is reasonable, considered expected near-term changes in crop yields and technology improvements, and allowed EPA to assess the impacts of the full volume of fuel that the EISA itself mandates through 2022.

3. EPA's method of assessing lifecycle greenhouse gas emission reductions does not consider costs.

Environmental Petitioners next claim that EPA considers costs despite the lack of any authorization to do so in the EISA. Envir. Br. 26-28. Although EPA did observe that its method provides more certainty to biofuel producers, EPA did not base its estimates of lifecycle greenhouse gas emissions on cost. Rather, EPA explained that the limits of the available statistical models and its well-established compliance system are unsuitable to “track how biofuel production might continuously change from month to month or year to year.” 75 Fed. Reg. at 14,768/3-69/1 (JA0470). EPA acknowledged that this rejection of a constantly changing assessment of each biofuel's greenhouse gas emissions would also serve biofuel producers' interests, by allowing them to make more-certain plans. *Id.* at 14,769/1 (JA0471). But merely acknowledging that EPA's approach would benefit biofuel producers more than some other possible approaches is a far cry from what Environmental Petitioners allege: that EPA somehow factored into its choice of assessment approach the monetary costs of producing biofuels. EPA did no such thing.

C. EPA's Method Of Assessing Lifecycle Greenhouse Gas Emission Reductions Is Reasonable.

Environmental Petitioners argue that EPA enunciated no rational connection between its use of 2022 as the starting point for the lifecycle analysis and the

EISA's requirement that biofuels reduce greenhouse gas emissions. Envir. Br. 31-32. However, the use of 2022 as the initial year for assessing lifecycle greenhouse gas emission reductions over a 30-year period allows EPA to consider the impacts of the full volume of renewable fuel that the EISA mandates be used. 75 Fed. Reg. at 14,769/1 (JA0471). If EPA had selected an earlier year or multiple years, as Environmental Petitioners urge, EPA would have had to base its analysis on the lower mandated biofuel volumes of the earlier years, which would have vastly increased the complexity of the analysis, would have failed to consider all of the land use implications associated with the full volumes required by the EISA, and would have failed to account for anticipated technology and yield improvements.

If EPA had chosen an earlier year as the starting point, then EPA would have had to conduct additional modeling to account for volume increases in later years. As noted above, a lifecycle analysis requires an assessment of a specified change in fuel volume that would result from increased biofuel demand that is assumed to occur in a specific year, and then projects over a 30-year timeframe the lifecycle emissions impacts of that single year's change in volume. In 2022, the EISA mandates the use of a total volume of 36.0 billion gallons of renewable fuel, but as of 2012, the required volume is only 15.2 billion gallons of renewable fuel, including 2.0 billion gallons of advanced biofuel, 0.5 billion gallons of cellulosic biofuel, and 1.0 billion gallons of biomass-based diesel. Beginning the analysis in

an early year such as 2012, as Environmental Petitioners urge, would only project emissions impacts from the volumes in use in 2012 out to 2042. It would not account for the impacts of the larger volumes of renewable fuels that the EISA requires be used in later years. In contrast, beginning the modeling with the year 2022 projects emissions impacts for the *full* volume of renewable fuel, out to 2052.

Second, if EPA had chosen an earlier initial year for its 30-year model, EPA would only have considered the lower demand for agricultural land for feedstocks and the lower expected indirect emissions related to indirect land use change, associated with the lower volumes that the EISA requires in earlier years. The land use change impact of biofuel production is largely a function of two factors – the volume of biofuel at issue (which is maximized by picking 2022 over earlier years) and the yield of feedstocks and technologies used to make biofuel (and therefore, the number of acres that must be devoted to feedstock production for any specific quantity of biofuel and the efficiency of the production processes). EPA's approach maximizes the volumes considered in the lifecycle greenhouse gas analysis by using the higher volumes of renewable fuel mandated in 2022.

Environmental Petitioners' approach would do the opposite by minimizing the volumes at issue. Environmental Petitioners stress the importance of capturing all land use change emissions in EPA's analyses, *Envir. Br.* 23-24, but by advocating an earlier year for analysis they actually urge an approach that necessarily does *not*

take into consideration all of the land use implications associated with the full volumes required by the EISA.

Third, if EPA had selected an earlier initial year for its modeling, EPA would not have been able to consider anticipated technology changes and updates through 2022. 75 Fed. Reg. at 14,769/1 (JA0471). As noted above, *see supra* at 21-22, numerous commenters urged EPA to account for this. For example, EPA noted that distillers grains and solubles (“DGS”), a byproduct of some types of ethanol production, can replace corn and soybean meal in animal feed. *Id.* at 14,772/3 (JA0474). Current research shows that “one pound of DGS replaces more than a pound of corn and/or soybean meal in beef and dairy rations, in part because cattle fed DGS show faster weight gain and increased milk production compared to those fed a traditional diet.” *Id.* Because of this replacement rate, “less land is needed to replace the amount of corn diverted to ethanol production,” which in turn affects the greenhouse gas emissions that would otherwise occur from new land being converted to biofuel production. *Id.* at 14,773/1 (JA0475). Based on this current research, EPA concluded that “it is reasonable to assume that improvements will be made in the use and efficiency of DGS over time as the DGS market matures, the quality and consistency of DGS improves, and as livestock producers learn to optimize DGS feed rations.” *Id.* at 14,773/1 (JA0475). The use of 2022 allows EPA to factor their near-term implementation into EPA’s

assessment of lifecycle greenhouse gas emissions of corn ethanol. In addition, EPA's approach reasonably models crop yields and production efficiencies over this long time period. While these would be expected to vary both prior to 2022 and through the decades after 2022, the 30 year analysis uses the crop yields and production efficiencies for the volume produced in 2022 as a reasonable modeling approach.

Environmental Petitioners next accuse EPA of ignoring the Agency's own data showing that corn ethanol produced in 2012 *increases* greenhouse gas emissions. Envir. Br. 29-31. However, the ethanol biofuels to which Environmental Petitioners refer are not subject to the 20-percent reduction requirement, but instead are exempted by the grandfather and deemed compliant provisions in section 7545(o)(2)(A)(i) and the EISA's Transition Rule. The EISA requires the use of a total of 15.2 billion gallons of renewable fuel in 2012, 42 U.S.C. § 7545(o)(2)(B)(i)(I), of which 2 billion gallons must be advanced biofuel. *Id.* § 7545(o)(2)(B)(i)(II). EPA determined in the RFS2 Rule that it was likely that up to *15 billion gallons* of corn ethanol could be exempt from the 20-percent greenhouse gas reduction requirement. 74 Fed. Reg. at 24,925/1 (JA0150); Draft Regulatory Impact Analysis: Changes to Renewable Fuel Standard Program (May 2009) ("Draft RIA") at 128 (EPA-HQ-OAR-2005-0161-3237 (JA1350)). Thus, all of the 13.2 billion gallons of renewable fuel other than advanced biofuel that is

required in 2012 will likely be exempt from the 20-percent greenhouse gas reduction requirement.

Environmental Petitioners also assert that EPA's failure to include greenhouse gas emissions from years prior to 2022 frustrates the EISA's purpose. *Envir. Br.* 33. But even though EPA chose to use 2022, its analysis still includes renewable fuel produced prior to 2022, because modeling starting with 2022 aggregates all of the prior volume increases and associated land use changes, and assumes they occur in one year for purposes of multi-decade modeling. This is a reasonable way to model the year-by-year real world situation, as it collects all of the separate annual renewable fuel volume increases from years prior to 2022, aggregates them into a single volume increase, and assigns them to one specific 30-year period of ongoing production. While this is a simplifying assumption for purposes of modeling, it does not ignore the renewable fuel produced prior to 2022; neither does it ignore the impact over time of these annual volume increases. Instead it models them using reasonable assumptions to address a process in which production of biofuels and their greenhouse gas impacts stretch over many decades and cannot be reasonably modeled otherwise.

II. EPA PROPERLY ADDRESSED THE GLOBAL REBOUND EFFECT

The "global rebound effect" is the extent to which global oil demand might change in response to the lower price for oil occasioned by lower domestic demand

for oil. Resp. to Clean Air Taskforce, World Wildlife Fund, National Wildlife Federation, and Friends of the Earth's Petitions for Reconsideration of the Renewable Fuel Standards (RFS2) ("Recon. Dec.") at 4 (JA1269). As domestic use of renewable fuels increases, petroleum imports decrease, which improves our Nation's energy security. 74 Fed. Reg. at 25,090/2 (JA0315). To monetize the benefit of this increase in energy security, EPA estimated the economic costs of importing petroleum and examined, among other factors, how the EISA's implementation could affect world oil prices. *Id.* at 25,092/3 (JA0317). EPA noted that foreign oil demand might increase (the "international oil take-back effect") as global oil demand drops in response to the EISA's implementation, and that domestic oil demand might decrease (the "rebound effect") due to higher transportation fuel prices resulting from the EISA's mandated use of renewable fuels. Draft RIA at 317 (JA1353). Together, these are called the "global rebound effect." *Id.*

Environmental Petitioners argue that the global rebound effect results in significant indirect greenhouse gas emissions that must be factored into EPA's lifecycle greenhouse gas emission reduction determinations. *Envir. Br.* 33. However, no one raised this argument during the rulemaking, and Environmental Petitioners cannot do so now. If the Court nevertheless reaches the merits, EPA

properly declined to reconsider the RFS2 Rule on this basis because the global rebound effect is not of central relevance to the outcome of the rule.

A. Environmental Petitioners Waived Their Argument That EPA's Method Of Assessing Lifecycle Greenhouse Gas Emission Reductions Fails to Consider the Global Rebound Effect.

EPA explained in the proposal that the global rebound effect may be relevant to assessing the overall benefits of the RFS2 Rule, and sought comment on how to estimate the global rebound effect for that purpose. 74 Fed. Reg. at 25,092/3-93/1; 25,040/2-3 (JA0317-0318, 0265). EPA also explained its proposed approach to conducting lifecycle greenhouse gas emissions threshold determinations for biofuels, and indicated that it had not factored into that analysis any potential impact that may result from a reduction in domestic petroleum demand, and consequent reduction in worldwide petroleum prices. 74 Fed. Reg. at 25,040-41 (JA0265-0266); *see also* Draft RIA at 316-18 (JA1352-1354). EPA solicited comment on how such impacts could be evaluated, *id.*, but no commenter suggested any method for estimating the global rebound effect, nor did any commenter object to EPA's proposed lifecycle greenhouse gas assessments as they related to this issue. Environmental Petitioners therefore cannot object now. 42 U.S.C. § 7607(d)(7)(B).

B. Environmental Petitioners Had A Meaningful Opportunity To Comment On The Global Rebound Effect.

Environmental Petitioners concede that they did not comment on the global rebound effect, *Envir. Br.* 40-41, but argue that they lacked a meaningful opportunity to comment because: (1) EPA's discussion of the global rebound effect was in the wrong portion of the preamble; (2) EPA only solicited comment on whether to consider the global rebound effect's impact on the *benefits* of the RFS2 Rule, as opposed to its impact on whether biofuels meet EISA's greenhouse gas reduction thresholds; and (3) there was no basis for comment due to EPA's incomplete analysis. *Envir. Br.* 39-40. None of these arguments is convincing.

Environmental Petitioners complain that in the proposal EPA discussed the global rebound effect in the context of energy security and in the context of the petroleum baseline lifecycle greenhouse gas emissions. *Envir. Br.* 39. However, the preamble to the proposed rule and the Draft Regulatory Impact Analysis were more than sufficient to alert Environmental Petitioners to EPA's position regarding the global rebound effect and to merit comments if Petitioners had any. 74 Fed. Reg. at 25,092/3-93/1, 25,040/2-3 (JA0317-0318, 0265); Draft RIA at 316-18 (JA1352-1354). EPA's discussions of the "petroleum baseline" and "energy sector impact" both appear in the section of the preamble describing EPA's methodology for analyzing lifecycle greenhouse gas emissions, and are located immediately before the specific sub-section (entitled "Fuel Specific GHG Emissions

Estimates”) which describes the results of EPA’s analyses of specific biofuel pathways. 74 Fed. Reg. at 25,040-41 (JA0265-0266). Although these discussions do not refer specifically to “the global rebound effect” by name, they do note that although the proposal assumed that a gallon of renewable fuel displaces an energy equivalent gallon of petroleum fuel, many factors could affect this assumption, including “the supply and cost of petroleum.” *Id.* at 25,040/3. EPA also noted that reducing domestic demand for petroleum-based fuel may reduce worldwide petroleum prices, and EPA specifically solicited comment on how to take that into account. *Id.* at 25,041/1 (JA0266). Later in the preamble, EPA also noted that “as the world price of oil falls in response to lower U.S. demand for oil, there is the potential for an increase in oil use outside the U.S.” *Id.* at 25,092/3 (JA0317). EPA explained that this “rebound” effect is “hard to estimate” and again solicited comment on how to do so. *Id.* at 25,092/3-93/1 (JA0317-0318). EPA could hardly have issued a clearer invitation for interested parties to submit comments.

Environmental Petitioners also complain that EPA solicited comments on whether and how EPA should consider the global rebound effect’s impact on the benefits of the RFS2 Rule, but did not specifically solicit comments on its impact on the lifecycle greenhouse gas emissions of any particular biofuel. *Envir. Br.* 39. But, as noted above, EPA did discuss the global rebound effect in the section of the preamble devoted to describing EPA’s lifecycle greenhouse gas methodology.

Moreover, the specific proposed lifecycle greenhouse gas threshold determinations gave Environmental Petitioners clear notice that EPA could finalize those determinations as proposed, without incorporating the global rebound effect. If Environmental Petitioners wished to comment on or challenge EPA's proposed lifecycle greenhouse gas emissions analyses, the rulemaking was the time to do so.

Environmental Petitioners assert that they could not have commented on the global rebound effect even if they had wanted to, because EPA's analysis was incomplete. *Envir. Br.* 39-40. EPA noted in the proposal that it “[was] examining methodologies for quantifying this effect,” and as noted above, solicited comments on how to do so. 74 Fed. Reg. at 25,093/1 (JA0318). The case law does not allow an interested party to ignore such an invitation and remain silent during the comment period, and then raise its concerns for the first time in a petition for judicial review. *Mossville*, 370 F.3d at 1238. Environmental Petitioners' failure to comment on the global rebound effect prevents them from raising that issue in Nos. 10-1107 and 1108, the challenges to the RFS2 Rule.

C. The Global Rebound Effect Is Not Of Central Relevance To the Outcome Of The Rule.

Even if Environmental Petitioners could not reasonably have commented on the global rebound effect based on the proposal, EPA is only required to grant a petition for reconsideration of the rule if the petition raises issues of “central relevance” to the rule's outcome. 42 U.S.C. § 7607(d)(7)(B). An issue is of

“central relevance” if it lends substantial support for an argument that the rule should be revised. Recon. Dec. at 2 (JA1267). Environmental Petitioners assert that the EISA’s plain language requires EPA to consider the global rebound effect in estimating a biofuel’s lifecycle greenhouse gas emissions, Envir. Br. 24-36, and that EPA’s failure to do so is arbitrary and capricious. *Id.* 36-38.

Although the EISA does require EPA to consider as part of its lifecycle greenhouse gas emissions analysis significant indirect greenhouse gas emissions, nowhere does the EISA indicate that the global rebound effect is such an indirect emission. Indirect emissions are those that “arise *because of a change in volume*, and [they] can only be calculated by analyzing the emissions impacts of a marginal fuel, based on comparing alternative fuel scenarios.” Recon. Dec. at 9 (JA1274) (emphasis added). In other words, a specified, *unchanging* volume of fuel has only direct effects, and not indirect effects. *Id.*

In contrast to the definition of lifecycle greenhouse emissions, *baseline* lifecycle greenhouse gas emissions refers to “the average lifecycle greenhouse gas emissions . . . for gasoline or diesel . . . sold or distributed as transportation fuel in 2005.” 42 U.S.C. § 7545(o)(1)(C). By defining the baseline lifecycle greenhouse gas emissions in terms of the average for a fixed volume of fuel (*i.e.*, gasoline or diesel produced in 2005), and by requiring EPA to compare the lifecycle greenhouse gas emissions of biofuels to that baseline, Congress effectively

precluded EPA from conducting the kind of analysis that would have allowed EPA to consider indirect petroleum and energy sector effects such as global rebound. Recon. Dec. at 9, 11-16 (JA1274, 1276-1281). As EPA explained, any attempt to take the global rebound effect into account for the greenhouse gas threshold determinations would be analytically flawed and unworkable. *Id.* at 11-16 (JA1276-1281). Environmental Petitioners thus miss this point by asserting that the 2005 baseline “has no bearing” on the “existence or size of the global rebound effect.” Envir. Br. 37. By defining the baseline against which a biofuel’s greenhouse gas emissions reductions must be measured, Congress precluded EPA from incorporating petroleum and energy sector indirect impacts, such as the global rebound effect, in its lifecycle greenhouse gas assessments. Recon. Dec. at 9 (JA1274).

Furthermore, the global rebound effect is only one potential indirect impact of renewable fuels on the petroleum and energy sector. Even if EPA could incorporate this effect into its lifecycle greenhouse gas threshold determinations, as Environmental Petitioners urge, Envir. Br. 37, it would be inappropriate for EPA to “cherry pick” just that impact while ignoring all other potential indirect energy sector effects. For example, if EPA included the global rebound effect in its analyses, it would also have to consider such complex issues as whether increased oil use occasioned by a drop in oil price would reduce the usage of either coal

(thereby having a beneficial greenhouse gas impact) or natural gas (thereby worsening greenhouse gas emissions). EPA would also have to consider whether OPEC would likely reduce the supply of oil in response to a drop in oil prices. Recon. Dec. at 11-12 (JA1276-1277). Environmental Petitioners completely ignore these complexities, and instead simplistically reiterate that the global rebound effect is the result of shifts in supply and demand. Envir. Br. 37-38. EPA has never disputed that the global rebound effect exists. Instead, EPA has explained why it reasonably chose not to incorporate the global rebound effect into its analyses, and Environmental Petitioners do not address those reasons.

III. EPA REASONABLY CONSTRUED THE STATUTORY EXEMPTION FOR ETHANOL PLANTS DEEMED COMPLIANT WITH THE EISA'S GREENHOUSE GAS THRESHOLD.

The EISA contains two exemptions to the general requirement that renewable fuels achieve at least a 20 percent reduction in lifecycle greenhouse gas emissions as compared to baseline fuels. The first exemption applies to facilities that commenced construction prior to the EISA's enactment (the "grandfather" exemption). The second deems certain ethanol plants that are fired with natural gas or biomass to be in compliance with the greenhouse gas reduction threshold (the "deemed compliant" exemption). Environmental and Food Petitioners both assert that EPA expanded the scope of the "deemed compliant" exemption in violation of the EISA's plain language, Envir. Br. 42-44, Food Br. 10-20, and Food

Petitioners further assert that EPA's interpretation is unreasonable. Food Br. 20-22. However, neither set of petitioners has standing to make this argument, because an order vacating EPA's interpretation will not redress their claimed injuries. Even if the Court reaches the merits of EPA's interpretation, the relevant portion of the EISA is ambiguous, and EPA's interpretation is reasonable and should be upheld.

A. Environmental and Food Petitioners Lack Standing To Challenge EPA's Interpretation of the "Deemed Compliant" Exemption.

Environmental and Food Petitioners have the burden of establishing standing, *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002), and must establish standing for each of their claims. *Davis v. FEC*, 554 U.S. 724, 733 (2008). The constitutionally minimal requirements for standing are an injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Environmental Petitioners claim they are injured by EPA's interpretation of the "deemed compliant" exemption because it allows the EISA's volume mandates to be satisfied with ethanol that does not meet the EISA's minimum greenhouse gas reduction requirement, rather than with biofuel that does. Envir. Br. 15 ("RFS2 permits the use of biofuels that do not achieve EISA's required emissions reductions"). Food Petitioners claim they are injured because EPA's interpretation will increase the number of deemed compliant ethanol plants, resulting in increased prices for animal feed. Food Br. 8.

To establish standing, Petitioners must show, among other things, that an order vacating EPA's interpretation of the deemed compliant exemption will actually remedy their specific alleged injuries. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (“Relief that does not remedy *the injury suffered* cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.”) (emphasis added). Neither set of Petitioners can do so. The grandfather exemption, which is not challenged by either set of Petitioners, covers the *entire* volume of renewable fuel that does not qualify as advanced biofuel, irrespective of EPA's interpretation of the “deemed compliant” exemption. Neither Petitioners' nor EPA's interpretation of the “deemed compliant” provision will have any impact on the amount of exempt fuel that is produced for purposes of complying with the EISA. Thus, Petitioners have failed to establish that their injuries are redressable and lack standing to challenge EPA's interpretation of the “deemed compliant” provision.

As explained above, the maximum volume of renewable fuel mandated by the EISA in 2022 is 36 billion gallons. Of that total, 21 billion gallons must be some type of advanced biofuel, which requires a 50 percent reduction in lifecycle greenhouse gas emissions as compared to the baseline fuel, 42 U.S.C. § 7545(o)(1)(B)(i). Nothing in the EISA exempts any of the required 21 billion gallons of advanced biofuel from this 50-percent greenhouse gas reduction

threshold. Thus, regardless of how much renewable fuel is produced, it is only possible for 15 billion gallons of renewable fuel that does not qualify as advanced biofuel to be used to comply with the volume mandates. Put another way, the maximum amount of exempt fuel that can be used to satisfy the EISA's volume mandates, under either the grandfather or the deemed compliant exemption or both, is 15 billion gallons (36 billion gallons total renewable fuel, minus 21 billion gallons that must be advanced biofuel).

According to EPA's assessment of information in its database, at least 15 billion gallons of ethanol production capacity is *already* registered with EPA from facilities that are grandfathered, *i.e.*, that commenced construction prior to the EISA's enactment. Decl. of Karl Simon ¶ 8f (attached as Ex. 1).¹ No one disputes that ethanol from grandfathered facilities, as opposed to "deemed compliant" facilities, is exempt from the EISA's 20-percent greenhouse gas reduction requirement and therefore can be used to satisfy the EISA's mandate for renewable fuel other than advanced biofuel.

Environmental Petitioners' alleged injuries are based on the notion that the fuel that may be produced at "deemed compliant" facilities will be used to meet the EISA's volume requirements for renewable fuel that does not qualify as advanced

¹ Although this Declaration is not in the Administrative Record, the Court can consider it regarding standing. *Mass. v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd on other grounds*, 549 U.S. 497 (2007).

biofuel. They assume, without any evidence, that this deemed complaint fuel will replace fuel that otherwise would meet the greenhouse gas reductions. But there is already production capacity for more than 15 billion gallons of ethanol, from grandfathered plants that are undeniably exempt from the 20-percent reduction requirement. Those facilities can produce ethanol that can be used to meet the *entire* volume requirement that the EISA allows for renewable fuel other than advanced biofuel. Food Petitioners assume, without any evidence, that this deemed compliant fuel will replace fuel that is not made from corn. But the grandfathered volume of fuel is likely to be made overwhelmingly with corn. 75 Fed. Reg. at 14,744/1 (91.5% of ethanol production is from facilities that exclusively use corn; 8.3% use a mixture of corn and other grains) (JA0446). Even if Environmental and Food Petitioners were correct in their legal argument, they have ignored these circumstances and have not shown that their injuries would be redressed by a favorable Court ruling: the amount of fuel that is exempt from the greenhouse gas reductions requirements and that is likely to be produced to meet the EISA's volume mandates would not decrease at all. Nor is there any evidence to suggest that less corn would be used in making fuel for that purpose. Any potential production from these plants above and beyond that needed for compliance with the RFS regulations would not be an injury "fairly traceable" to

EPA's action, but the result of decisions by third-parties. Environmental and Food Petitioners have failed to carry their burden to demonstrate standing.

B. The EISA's Transition Rule Is Ambiguous.

Even if the Court determines that it has jurisdiction to address Petitioners' claim, the EISA's Transition Rule is ambiguous and EPA's interpretation is reasonable and entitled to deference. The EISA was enacted in late December 2007, and the implementing regulations for RFS2 were due one year later, in late December 2008. Those regulations were required to ensure that fuel from new facilities that commence construction after the EISA's enactment achieves a 20 percent decrease in greenhouse gas emissions. 42 U.S.C. § 7545(o)(2)(A)(i). In the Transition Rule, Congress directed EPA to continue to implement the original RFS program until January 1, 2009. 42 U.S.C. § 7545 notes (Transition Rules). The original program required the use of minimum volumes of renewable fuel, but it did not mandate any greenhouse gas reductions from those volumes. The Transition Rule provides that for calendar year 2008, *fuel* from facilities that commence construction after the EISA's enactment could qualify as renewable fuel only if it achieved a 20 percent reduction. But, for calendar years 2008 and 2009, *ethanol plants* fired with natural gas or biomass or a combination thereof are deemed to be in compliance with this 20-percent reduction requirement, whether or not the fuel they produce actually achieves this level of reduction. *Id.*

Courts must generally give effect to every word in a statute. *New York v. EPA*, 413 F.3d 3, 39 (D.C. Cir. 2005) (“a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant”) (internal citations omitted). Here, Congress distinguished between “fuel” in the first sentence of the Transition Rule, and “plants” in the second sentence. This different choice of words creates an ambiguity, because deeming a “plant” rather than a “fuel” to be compliant with the statute’s greenhouse gas reduction requirement could be broader than deeming specific batches of fuel produced at that plant to be compliant. *See, e.g.*, 75 Fed. Reg. at 79,966/3 (promulgating amendments to RFS2 Rule) (JA0650). If, as both Petitioners assert, Congress meant to exempt only certain *fuel* produced at exempt plants, it could easily have said that for 2008 and 2009, “fuel” produced at ethanol plants fired with natural gas or biomass is deemed compliant with the greenhouse gas reduction requirement. Instead, it chose to refer to the “plants” as being deemed compliant. Congress’ decision to employ such very different terminology creates an ambiguity that EPA must interpret.

Other aspects of the second sentence in the Transition Rule are likewise ambiguous. The phrase “[f]or calendar years 2008 and 2009” is itself ambiguous, and arguably could exempt only qualifying plants *during* 2008 and 2009, or it could exempt ethanol plants that *commence construction* during 2008 or 2009.

EPA described these two possible interpretations in the proposal, and it solicited comment on which interpretation EPA should adopt. 74 Fed. Reg. at 24,925/1 (JA0150).

In addition, the second sentence of the Transition Rule ambiguously refers to compliance with “such 20 percent reduction requirement and with the 20 percent reduction requirement of section 211(o)(1) of the CAA.” The “such 20 percent reduction requirement” is the 20-percent reduction requirement “for calendar year 2008” imposed in the first sentence of the Transition Rule. However, section 211(o)(1), 42 U.S.C. § 7545(o)(1), does not impose a 20 percent reduction requirement. That section, which contains definitions, imposes a 50 percent reduction requirement on advanced biofuel and biomass-based diesel, and a 60 percent greenhouse gas reduction requirement on cellulosic biofuel, but it does not define the term “renewable fuel” in terms of greenhouse gas reductions. That limitation is found in section 211(o)(2), 42 U.S.C. § 7545(o)(2), in the instructions commanding that EPA issue implementing regulations.

The Food Petitioners assert that EPA’s interpretation is contrary to the EISA’s plain language because EPA unlawfully creates an administrative exception to a statutory requirement. Food Br. 19. Food Petitioners cite *Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997), in which the Court explained that the Clean Air Act creates an “unqualified requirement” that EPA “not approve

a transportation activity unless that activity has complied with the conformity rules,” and thus bans “nonconforming activities in all nonattainment areas.” In that case, the Court struck down EPA’s administrative grace period, which delayed that prohibition for one year in areas redesignated from “attainment” to “nonattainment” status, and faulted EPA for its “administrative narrowing of clear statutory mandates.” 129 F.3d at 140. Here, in contrast, Congress itself provided the exemptions, and EPA is simply interpreting ambiguities regarding the duration of those exemptions. Similarly, in *Environmental Defense Fund v. EPA*, 167 F.3d 641, 649 (D.C. Cir. 1999), the Court found that the Clean Air Act unambiguously requires transportation projects to have a currently conforming plan and program in order to receive federal funding. The Court therefore struck down a regulation in which EPA allowed funding for projects that once conformed but no longer do so. Because, as shown above, the duration of the “deemed compliant” exemption is ambiguous under the statute, Food Petitioners’ cases are not on point.

C. EPA’s Interpretation of the Transition Rule Is Reasonable.

EPA reasonably decided that the “deemed compliant” exemption should apply indefinitely for up to a baseline volume of ethanol produced at qualifying plants, rather than to two years of production, *i.e.*, 2008-2009. As EPA explained, it “would be a harsh result for investors in these new facilities” if ethanol plants fired with natural gas or biomass were guaranteed only “two years participation in

the RFS2 program.” 74 Fed. Reg. at 24,925/1 (JA0150). EPA’s interpretation is consistent with the purpose of grandfathering provisions, which in general exist to protect prior investments. *See, e.g., Nat’l Ass’n of Cas. & Sur. Agents v. Bd. of Governors of Fed. Reserve*, 856 F.2d 282, 286 (D.C. Cir. 1988) (“the basic purpose of the grandfather clause, which is to provide stability to established business relationships”); *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1275 (D.C. Cir. 2004) (grandfather provisions “operate principally as a means to constrain litigation”); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 959 (D.C. Cir. 2007) (grandfather provision are “intended to insulate pre-existing rates from attack”). *See also Wilson v. Heckler*, 761 F.2d 1383, 1385 (9th Cir. 1985) (grandfather provisions prevent harsh consequences).

EPA also concluded that limiting the “deemed compliant” exemption to two years of ethanol production would be “inconsistent with the energy independence goals of EISA.” 74 Fed. Reg. at 24,925/1 (JA0150). By honoring Congress’ decision to base the “deemed compliant” exemption on the characteristics of the *plant*, rather than the fuel, EPA’s interpretation allows facilities that commenced construction during the timeframe between the EISA’s enactment and EPA’s final rule to continue to operate.

EPA also reasoned that the grandfather exemption and the “deemed compliant” exemption should be interpreted to have the same duration. 74 Fed.

Reg. at 24,925/1, 3 (JA0150). EPA sought comment on that approach, and most commenters generally agreed. 75 Fed. Reg. at 14,688/2 (JA0390). EPA reasonably concluded that the two exemptions should apply consistently with each other, and selected the interpretation that, for a baseline volume from qualifying plants, neither the grandfather exemption nor the “deemed compliant” exemption should expire. *Id.*

Food Petitioners argue that EPA’s interpretation is unreasonable because it transforms the statutory exemption for facilities that commenced construction prior to the EISA’s enactment into an exemption for facilities that commenced construction prior to 2010. Food Br. 21. But that clearly is wrong. EPA’s regulations exempt up to a baseline volume of fuel from *any type* of renewable fuel facility, including coal-fired ethanol plants and biodiesel plants, that commenced construction prior to enactment. But EPA’s “deemed compliant” regulations exempt up to a baseline volume of fuel from facilities that commenced construction between the EISA’s enactment and 2010 *only if* those facilities are ethanol plants fired by biomass, natural gas or a combination thereof, as specified by Congress in the Transition Rule.

Food Petitioners also point to a gap between the EISA’s enactment on December 19, 2007, and December 31, 2007, during which, under EPA’s interpretation, the deemed compliant exemptions should not apply. Food Br. 21-

22. Food Petitioners do not assert that any ethanol plants actually commenced construction during that very short window, and EPA is aware of none, so Food Petitioners' concern about a theoretical gap is of no moment.

Finally, Food Petitioners assert that EPA's approach is contrary to the idea of a "transition" rule, which according to Food Petitioners implies that the exemption it created should be temporary. Food Br. 22. But EPA's approach *is* transitional, in that it applies to plants that commenced construction during the transitional time period between the EISA's enactment and the end of 2009. To describe an exemption as transitional says nothing about whether, once the transition period has ended, the facilities covered by the exemption remain exempt or must comply with the greenhouse gas reduction requirements.

IV. EPA'S METHOD OF ENSURING COMPLIANCE WITH LAND RESTRICTIONS ON RENEWABLE BIOMASS SHOULD BE UPHELD.

The EISA specifies that renewable fuels must be produced from "renewable biomass," which in turn is defined to include seven categories of biomass feedstock. 42 U.S.C. § 7545(o)(1)(J). Among those categories are "[p]lanted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to the enactment of [the EISA] that is either actively managed or fallow, and nonforested." *Id.* § 7545(o)(1)(I). EPA solicited comment on several means of ensuring compliance with these requirements, and decided that for domestic

crops and crop residue, it would establish an “aggregate compliance approach” to renewable biomass verification. Under this approach, EPA determined the total number of acres of qualifying agricultural land available in the United States in 2007 for the production of crops and crop residue that would comply with the EISA’s definition of renewable biomass. EPA reasoned that as long as that national aggregate baseline is not exceeded, feedstocks derived from planted crops and crop residue can be considered renewable biomass. 75 Fed. Reg. at 14,701/3 (JA0403). EPA will annually review the total number of domestic acres devoted to agriculture, and if EPA determines that the baseline acreage is exceeded, then biofuel producers will have to comply with the various reporting and recordkeeping requirements that apply to renewable fuel producers using crops or crop residue grown in foreign countries. 75 Fed. Reg. at 14,701/2 (JA0403). Environmental Petitioners have waived any challenges to this approach because they failed to raise their concerns during the public comment period. Even if the Court reaches the merits of EPA’s aggregate compliance approach, however, EPA’s interpretation is reasonable and should be upheld.

A. Environmental Petitioners Failed to Comment on EPA’s Method Of Ensuring Compliance with the EISA’s Restrictions on Renewable Biomass.

Environmental Petitioners assert that EPA’s aggregate compliance approach fails to ensure that renewable fuels are produced without converting new land into

agricultural production, but they concede that they failed to object to EPA's approach during the comment period. Envir. Br. 45-46.

Instead, Environmental Petitioners assert that they could not have commented because the aggregate compliance approach was "not even hinted at until the publication of the final RFS2," and was not a logical outgrowth of the proposal. Envir. Br. 46-47. However, as Environmental Petitioners acknowledge, Envir. Br. 47, EPA sought comment on several different options for ensuring compliance with the restrictions on renewable biomass, including a baseline aggregate level of biofuel production, with reporting and recordkeeping requirements triggered if the baseline is exceeded. 74 Fed. Reg. at 24,940/3 (JA0165). EPA also noted the possibility, as part of an alternative approach focused on requiring documentation from feedstock suppliers, that EPA might work "with publicly available USDA data to keep track of significant land use changes in the U.S. and around the world and to note general increases in feedstock supplier productivity that might signal cultivation of new agricultural land for renewable fuel feedstock production." *Id.* at 24,939/2 (JA0164).

As the Court has explained, "an agency may issue rules that do not exactly coincide with the proposed rule as long as the final rule is the 'logical outgrowth' of the proposed rule." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991). EPA's final aggregate compliance approach is "a blend of two of the

concepts identified” in the proposal, Recon. Dec. at 19-20 (JA1284-1285), and it is therefore a logical outgrowth of the proposal. “Under the logical outgrowth test . . . , the key question is whether commenters should have anticipated that EPA might issue the final rule it did.” *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (citations and internal quotations omitted). *See also CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (“A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”) (citations and internal quotations omitted). Environmental Petitioners cannot reasonably assert they were unaware of the possibility that EPA might combine elements of the proposed alternatives.

Further, in the proposal EPA specifically noted its preference for identifying a means of ensuring compliance with the definition of renewable biomass that would not be unduly burdensome. 74 Fed. Reg. at 24,939/2 (expressing concern that compliance mechanism “minimize the number of regulated parties” and “any additional cost and administrative burden”) (JA0164). In the preamble to the final rule, EPA explained that the aggregate compliance approach EPA adopted not only ensures that the renewable biomass restrictions are met, it also eases “the burden for certain renewable fuel producers and their feedstock suppliers vis-à-vis verification that their feedstock qualifies as renewable biomass.” 75 Fed. Reg. at

14,701/3 (JA0403). Environmental Petitioners thus were on notice that EPA might craft a compliance mechanism that balanced certainty with ease of implementation better than any single proposed mechanism. *See, e.g., NRDC v. Thomas*, 838 F.2d 1224, 1242-43 (D.C. Cir. 1988) (finding a logical outgrowth where, among other factors, the “primary concern” that motivated EPA to select its final alternative “was obvious at an early stage”).

Similarly, Environmental Petitioners claim that EPA’s proposal offered only a “minor invitation to comment.” *Envir. Br.* 47. However, EPA solicited comment not just on the specific alternatives in the proposal, but also “on how they might be combined to create the most appropriate, practical, and enforceable implementation scheme for renewable biomass under RFS2.” 74 Fed. Reg. at 24,938/2 (JA0163). *See also id.* at 24,940/3 (“We seek comment on all of these approaches and what combination of these approaches would be the most appropriate, enforceable, and practical for ensuring that the land restrictions on renewable biomass contained in EISA are implemented under RFS2.”) (JA0165). Because Environmental Petitioners failed to submit comments, their arguments are waived.

B. Environmental Petitioners’ Arguments Regarding the Aggregate Compliance Approach Are Not of Central Relevance.

Even if Environmental Petitioners could not have commented on the aggregate compliance approach, EPA correctly found that their arguments are not

of central relevance to the rulemaking and thus that reconsideration was not required. As noted above, an issue is of “central relevance” and requires reconsideration only if it lends substantial support for an argument that the rule should be revised. Recon. Dec. at 2 (JA1267). Environmental Petitioners assert that EPA’s aggregate compliance approach is unreasonable because it is merely a ceiling on the total acres of domestic agricultural land, and does not prevent virgin land from being converted to crop production for biofuel feedstock, so long as the total acreage of agricultural land does not change. Envir. Br. 49-51.

EPA adopted the aggregate compliance approach based in part on the “overall trend of agricultural land contraction” in the United States. 75 Fed. Reg. at 14,701/3 (JA0403). EPA found that despite increases in demand due to population increases and expanding export markets such as China, domestic agricultural acreage *decreased* from 1997 to 2007 by 41 million acres. Recon. Dec. at 23 (JA1288). Although the EISA represents an additional demand on agricultural commodities, EPA reasonably concluded that it is no more likely to reverse the historical trend of decreasing domestic agricultural acreage than have these other demands. *Id.* In addition, EPA noted that although a substantial portion of the 41 million acres taken out of agricultural service in the decade prior to the EISA’s enactment could be returned to production of biofuel feedstocks, the statute’s definition of renewable biomass allows the usage of lands “cleared or

cultivated” prior to the EISA’s passage, so crops or crop residue planted in the future on many of those 41 million acres could meet that definition. *Id.* at n.30 (JA1288).²

EPA’s adoption of the aggregate compliance approach is also reasonable because economic incentives “favor more efficient utilization practices of existing agricultural land rather than converting non-agricultural lands to crop production.” 75 Fed. Reg. at 14,701/3 (JA0403). For example, neither USDA price supports nor crop insurance programs should significantly affect farmers’ decisions whether to develop previously uncropped land, because both programs are generally limited to land on which crops were grown in the preceding three years. Recon. Dec. at 25 (JA1290). Although market forces may create incentives for farmers to change the crops being grown, for example by switching from wheat to corn, or to convert existing agricultural land such as pastureland into crop production, these types of land use shifts are consistent with the definition of renewable biomass in the EISA, which only requires land to have been cleared or cultivated prior to the EISA’s enactment and be actively managed or fallow and non-forested on the date of the EISA’s enactment. 42 U.S.C. § 7545(o)(1)(I)(i).

² The text in the preamble erroneously refers to 44 million acres. According to Table II.B.4-2, total agricultural land decreased from 445 million acres to 404 million acres, a difference of 41 million acres. 75 Fed. Reg. at 14,703/1-2 (JA0405).

EPA did acknowledge that it is possible that some virgin land could be converted to biofuel feedstock production. 75 Fed. Reg. at 14,703/3 (JA0405). Environmental Petitioners seize on this as an admission that the aggregate compliance approach will not ensure compliance with the limitations on renewable biomass. Envir. Br. 50. However, nothing in the EISA indicates that Congress required EPA to create a system that guarantees *perfect* compliance.

Environmental Petitioners cite *New York v. EPA*, 413 F.3d 3, 34-35 (D.C. Cir. 2005), Envir. Br. 52-53, but in that case EPA's regulation did not require sources to keep records if there was no reasonable possibility of significant emissions increase. This Court faulted EPA for failing to explain how the Agency would be able to determine whether or not sources accurately concluded they have no reasonable possibility of significantly increased emissions – without records, enforcement authorities have no means of discovering whether the exercise of such judgment was indeed reasonable. 413 F.3d at 30. Here, in contrast, EPA has explained how the aggregate compliance approach reasonably meets the EISA's substantive requirements and why it is a readily enforceable compliance mechanism.

Thus, EPA reasonably concluded that Environmental Petitioners' arguments were not of central relevance and did not require reconsideration proceedings.

C. Environmental Petitioners' Arguments Regarding the Aggregate Compliance Approach For Foreign Agricultural Lands Are Not Ripe.

In the 2010 RFS2 Rule, EPA considered but elected not to adopt at that time the aggregate compliance approach for planted crops and crop residues from foreign agricultural lands. 75 Fed. Reg. at 14,704/2 (JA0406). In the rule establishing renewable fuel standards for 2011, EPA revisited this issue and adopted a process through which interested parties can petition EPA to approve the aggregate compliance approach for planted crops and crop residues from a foreign country. 75 Fed. Reg. at 76,819/3 (JA0636). Because EPA did not, as Environmental Petitioners assert, Envir. Br. 52, adopt or approve in either action the aggregate compliance approach for any particular foreign lands, Environmental Petitioners' challenge to the aggregate compliance approach as applied to foreign agricultural lands is not ripe.

Courts cannot entertain the claims of a litigant unless they are "constitutionally and prudentially ripe." *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999) (citations and internal quotations omitted). Constitutional ripeness requires litigants to demonstrate a "present injury," or an injury that is "certainly impending." *Id.* (citations and internal quotations omitted); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (a "regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under

the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation *in a fashion that harms or threatens to harm him*") (emphasis added).

Prudential ripeness examines the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Wyo. Outdoor Council*, 165 F.3d at 48 (citations and internal quotations omitted). When considering whether an issue is fit for judicial review, a court examines whether the issue "is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Utility Air Regulatory Group v. EPA*, 320 F.3d 272, 279 (D.C. Cir. 2003) (citations and internal quotations omitted).

Environmental Petitioners' challenge is neither constitutionally nor prudentially ripe. They have not, and cannot, allege an injury that is either present or "certainly impending." *Wyo. Outdoor Council*, 165 F.3d at 48. At most, Environmental Petitioners have alleged the possibility that if EPA approves a subsequent rulemaking petition, then EPA's action will allow the use of biofuel feedstock that is contrary to the EISA's renewable biomass restrictions. But Environmental Petitioners can challenge EPA's action at that time, and they have not alleged, and cannot show, any harm in withholding judicial review until EPA

takes such an action.³ Moreover, a challenge to a particular approval will further develop important factual issues such as the basis upon which EPA concludes that the acreage of agricultural lands in a particular foreign area will not likely increase. The challenge, therefore, is also unfit for judicial review, and the Court should dismiss this aspect of the petition as unripe.

CONCLUSION

The Court should deny the petitions for review.

Respectfully submitted,

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Assistant Attorney General

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December 19, 2011

³ On September 29, 2011, EPA approved a petition seeking application of the aggregate approach to renewable biomass verification in Canada. *See* Ex. 2, attached.

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

Pursuant to Fed. R. App. P. 37(a)(7)(C), and exclusive of the components of the brief excluded from the word limit pursuant to Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32 (a)(1), I certify that the foregoing Brief for Respondent EPA contains 15,952 words, as counted by the “word count” feature of my Microsoft Office Word software.

/s/ Daniel R. Dertke

DANIEL R. DERTKE

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of the foregoing Final Brief for Respondents via the Court's CM/ECF system on this 19th day of December, 2011.

/s/ Daniel R. Dertke

DANIEL R. DERTKE

APPENDIX A

EXHIBITS

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EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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|---|--|---|--------------------------------|
| <hr/> | |) | |
| NATIONAL CHICKEN COUNCIL, <i>et al.</i> , | |) | |
| | |) | |
| <i>Petitioners,</i> | |) | |
| | |) | |
| v. | |) | No.: 10-1107 (and consolidated |
| | |) | cases 10-1108, 11-1030, |
| U.S. ENVIRONMENTAL PROTECTION AGENCY, | |) | 11-1089, 11-1110) |
| | |) | |
| <i>Respondent.</i> | |) | |
| <hr/> | |) | |

DECLARATION OF KARL SIMON

1. I, Karl Simon, Director, Compliance and Innovative Strategies Division (“CISD”) of the Office of Transportation and Air Quality (“OTAQ”), within the Office of Air and Radiation of the United States Environmental Protection Agency (“EPA”) declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge or on information supplied to me by employees under my supervision.

2. I have served as either the Acting Director or the Director of CISD since April 30, 2006. CISD is one of six divisions that comprise OTAQ. As CISD Director, I manage several groups of employees who implement a variety of regulatory compliance programs. One of the regulatory compliance programs that I manage is the second generation of the National Renewable Fuel Standard Program (the “RFS2 Program”).

3. The RFS Program implements requirements of the Energy Independence and Security Act of 2007 (“EISA”), which made significant changes to the original renewable fuel program (RFS1) created by the Energy Policy Act of 2005 (“EPAct”). EISA identifies four

types of renewable fuels, each with its own required level of lifecycle greenhouse gas (“GHG”) emissions reduction as compared to baseline petroleum fuel. The minimum lifecycle GHG reduction required for qualifying renewable fuels is 20 percent, as compared to baseline conventional fuels. However, EISA also contains two exemptions from the minimum 20 percent GHG reduction requirement. The first exemption is for renewable fuel that is produced from facilities that commenced construction on or before December 19, 2007. 42 U.S.C.

§7545(o)(2)(A)(i). I refer to this renewable fuel as “grandfathered” under the Act. In addition, the statute provides that “[f]or calendar years 2008 and 2009, any ethanol plant that is fired with natural gas, biomass, or any combination thereof is deemed to be in compliance with” the 20 percent GHG reduction requirement.” EPA has interpreted this second exemption to apply to a baseline volume of fuel produced by ethanol facilities that commenced construction between December 19, 2007 and December 31, 2009, if they are fired with natural gas, biomass, or a combination thereof, 40 C.F.R. § 1403(d). I refer to such exempt fuel as “deemed compliant.”

4. The RFS2 Program regulations require renewable fuel production facilities to register with EPA and to submit detailed information including: the volume they claim to be exempt from the 20 percent GHG reduction requirement of the Act, commenced construction date, the type of fuel that they will produce, and the feedstocks and process energy they will use. Facilities must input this information into an electronic database and also submit supporting documents and independent third party engineering review reports to EPA. Facilities claiming an exemption from the 20 percent GHG reduction requirement must submit additional supporting documents to verify that they meet the exemption requirements. The database used to collect and hold the electronically-submitted information is called the Office of Transportation and Air Quality Company and Facility Registration (“OTAQREG”), which is hosted on EPA’s Central

Data Exchange (“CDX”) portal. To register with the RFS2 Program, the responsible corporate officer (“RCO”) of a renewable fuel company enters the above-described information into the OTAQREG database. The RCO then submits to EPA the completed OTAQREG forms with his/her original signature. The information in the OTAQREG database is solely the responsibility of the RCO; each company must maintain its own information in the OTAQREG database to ensure that it is current and accurate. CISD employees under my supervision review the information in the OTAQREG database, as well as documents and third party engineering reviews submitted by each facility as part of its registration in the RFS2 Program. However, CISD does not change or edit any of the facility information in the OTAQREG database, unless it has obtained written agreement and consent of the RCO of the company.

5. As part of their registration in the RFS2 program, companies are required to conduct an independent third party engineering review by a professional engineer and submit a written report to provide verification and identification of any exceptions to the registration information the company submitted to EPA in the OTAGREG database. During my staff’s review of engineering review reports, they flagged notations in the report that identified any exceptions to the registration information and when certain information in the report did not match up with the facility’s registration information in OTAQREG. After reviewing approximately the first 100 engineering review reports, my staff identified additional questions regarding the calculation of the baseline volume that companies claimed as exempt from the 20 percent GHG threshold requirement, particularly whether part of the facility baseline volume could properly be claimed under the “deemed compliant” or “grandfathered” exemption. For the subsequent review of an additional approximately 400 engineering review reports, my staff added additional flags when there were questions regarding calculation of the baseline exempt volume and whether claims for

exempt volume were based on either the “grandfathered” or “deemed compliant” provisions. The RFS2 program regulations specify that exempt volumes are 105 percent of either permitted capacity or actual peak capacity of qualifying facilities, and that ethanol that is renewable fuel contains a volume of denaturant. Registrant calculations of exempt volumes may take these factors into account.

6. I was asked by Roland Dubois, an attorney from the EPA Office of General Counsel who is assigned to work on the above-captioned matter, to search the OTAQREG database and other RFS2 registration files to determine the volume of ethanol that has been claimed by RFS2 registrants as exempt from the EISA 20 percent GHG reduction requirement, as either “grandfathered” or “deemed compliant” fuel. I delegated this task to a member of my staff who works directly with all aspects of the RFS2 Program, Ms. Madison Le

7. Ms. Le identified a total of 199 registered ethanol facilities that claimed exemption from the 20 percent GHG reduction requirement for a total of approximately 16.5 billion gallons. She compiled pertinent information regarding these facilities, such as commenced construction date, process fuel type, and volumes for which an exemption was claimed into a worksheet for further analysis. In this worksheet, Ms. Le initially identified, principally by reference to the date on which the registrant claimed that construction had commenced, those facilities that were clearly claiming their fuel exempt from the 20 percent GHG reduction requirement based on the “deemed compliant” exemption. There were five such facilities, with a total claimed exempt volume of approximately 300 million gallons. The remaining 194 facilities had indicated a commenced construction date prior to enactment of EISA, with claimed exempt volume of approximately 16.2 billion gallons. Although such a commenced construction date could indicate that all exempt fuel would be appropriately considered “grandfathered,” Ms. Le

conducted an additional review to ascertain if these facilities had expanded their volume capacity after enactment of EISA but prior to 2010. That expanded volume capacity could possibly be claimed under the “deemed compliant” exemption. For such facilities, a portion of the volume for which they claim an exemption could be “grandfathered,” and a portion “deemed compliant.”

To conduct this additional analysis, Ms. Le reviewed the flagged notes in my staff’s evaluations of the engineering review reports for the 194 facilities, and identified 73 of those facilities for which my staff had questions regarding the facility’s claimed exempted baseline volume. Ms. Le, with two other members of my staff, pulled the hard-copy files for each of these 73 registrants and conducted a more in-depth file review of the claimed exempted baseline volume. Ms. Le identified 14 of the 73 facilities as likely having some volume that was “grandfathered” and some that was “deemed compliant” based on the date of issuance of applicable revised air quality permits. Ms. Le determined that the volume of ethanol from these fourteen facilities claimed to be exempt from the 20 percent GHG reduction requirement that was likely “deemed compliant” fuel was approximately 200 million gallons.

8. I believe that Ms. Le’s research can be reasonably used to estimate that at least 15 billion gallons of ethanol is claimed by RFS2 registrants to be “grandfathered.” The derivation and rationale for this estimate is as follows (for a conservative approach, volumes claimed under the “deemed compliant” exemption are rounded up to the nearest hundred million):

a. There are total of 199 facilities for which registrants have claimed a total of approximately 16.5 billion gallons as exempt from the 20 percent GHG reduction requirement.

b. Of the 199 facilities, the claims of five facilities for a total of approximately 300 million gallons, were identified as based on the “deemed compliant” exemption.

c. From among the remaining 194 facilities with a total volume of approximately 16.2 billion gallons claimed as exempt, Ms. Le conducted an in-depth review of 73 facilities that had been flagged during my staff's initial review of the engineering review reports as having questions regarding the volume claimed to be exempt. For the 73 facilities for which Ms. Le conducted an in-depth analysis, 200 million gallons was determined likely to be "deemed compliant."

d. I believe that the 73 facilities for which Ms. Le conducted an in-depth analysis can provide a conservative estimation of the subset of the 16.2 billion gallons claimed as exempt that could be portioned out and claimed as "deemed compliant" because the 73 facilities are more likely to have volume falling into the "deemed compliant" category based on my staff's review of their engineering review reports. If we assume a similar proportion of deemed compliant and grandfathered fuel for the 121 facilities as was found to apply to the 73 facilities analyzed by my staff, this would yield a conservative estimate of 650 million of deemed compliant fuel.

e. By adding the conservative estimate of 650 million gallons of deemed compliant production volume described in paragraph 8.d. to the 300 million gallons of "deemed compliant" volume described in paragraph 8.b., one could estimate that of the 16.5 billion gallons of ethanol for which registrants claim an exemption from the 20 percent GHG reduction requirement, that approximately 950 million gallons is "deemed compliant" and approximately 15.55 billion gallons is "grandfathered."

f. I acknowledge that these estimates contain some degree of uncertainty, since they are based in part on extrapolation from a sample of information in registration files. Nevertheless, I believe the information can reasonably be used to estimate that RFS2

registrants have claimed at least 15 billion gallons of ethanol production capacity as grandfathered under the Act.

I declare under penalty of perjury that the foregoing is true and correct.



KARL SIMON

Executed this 4th day of October, 2011.

EXHIBIT 2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

The Honorable Gerry Ritz
Agriculture and Agri-Food Canada
1341 Baseline Road
Ottawa, Ontario K1A 0C5

Dear Mr. Ritz:

Thank you for your submission of the Government of Canada's petition under the US Renewable Fuel Standard (RFS) program. The petition requested that the U.S. Environmental Protection Agency approve a renewable biomass aggregate compliance approach for planted crops and crop residue grown in Canada authorized under the renewable fuel standard regulations petition process for aggregate compliance approach for foreign countries (PART 80, Regulation of Fuels and Fuel Additives §80.1457). We published notice of this petition in the Federal Register on March 15, 2011 and solicited comments from the public on all aspects of the petition. We received comments largely in favor of approving the aggregate compliance approach for Canada. After thorough consideration of the petition, all supporting documentation provided and the public comments received, the EPA has determined that the criteria for approval of the petition have been satisfied and, effective immediately, approves the use of an aggregate compliance approach to renewable biomass verification for planted crops and crop residue grown in Canada.

Enclosed is a copy of our decision document. In the document we provide a discussion of our analysis of the petition and comments as well as a description of the conditions under which the aggregate compliance approach will apply in Canada.

Again, thank you for the petition. We look forward to future collaboration with Canada on renewable fuels issues. Please let my staff know if you have any questions on this document.

Sincerely,

A handwritten signature in blue ink, appearing to read "Gina McCarthy", is written over a light blue circular background.

Gina McCarthy
Assistant Administrator

Enclosure

**Determination on Government of Canada Petition for an Aggregate Compliance Approach
for Canadian Planted Crops and Crop Residues**

I. Summary

On December 9, 2010, EPA finalized new regulatory provisions as part of the Renewable Fuel Standard (RFS2) program regulations to establish procedures for petitions to request EPA authorization of an aggregate compliance approach for renewable biomass verification for crops and crop residues grown in foreign countries. EPA subsequently received a petition from the Government of Canada requesting that EPA approve an aggregate compliance approach for planted crops and crop residue from Canada. EPA published notice of this petition in the Federal Register on March 15, 2011 (76 FR 14007, March 15, 2011) and solicited comments from the public on all aspects of the petition. The petition and all comments received are available at Docket ID No. EPA-HQ-OAR- 2011-0199, found at www.regulations.gov. EPA has determined that the criteria for approval of the petition have been satisfied and, effective immediately, approves the use of an aggregate compliance approach to renewable biomass verification for planted crops and crop residue grown in Canada.

This document contains information summarizing the petition requirements and process, the petition submitted by the Government of Canada, the factors that EPA considers in evaluating a petition, EPA's analysis of the Canadian petition, EPA's response to public comments received, and EPA's final determination that an aggregate compliance approach will provide reasonable assurance that planted crops and crop residue from Canada meet the definition of renewable biomass and will continue to meet the definition of renewable biomass, based on credible, reliable and verifiable data.

II. Factors that EPA considers in evaluating petitions

EPA regulations at 40 CFR 80.1457(a) describe several factors that EPA will consider as part of its evaluation of any petition submitted. These factors include:

- a. Whether there has been a reasonable identification of the “2007 baseline area of land,” defined as the total amount of cropland, pastureland, and land that is equivalent to U.S. Conservation Reserve Program land in the country in question that was actively managed or fallow and nonforested on December 19, 2007, taking into account the definitions of terms such as “cropland,” “pastureland,” “planted crop,” and “crop residue” included in the final RFS2 regulations.
- b. Whether information on the total amount of cropland, pastureland, and land that is equivalent to U.S. Conservation Reserve Program land in the country in question for years preceding and following calendar year 2007 shows that the 2007 baseline area of land is not likely to be exceeded in the future.
- c. Whether economic considerations, legal constraints, historical land use and agricultural practices and other factors show that it is likely that producers of planted crops and crop residue will continue to use agricultural land within the 2007 baseline area of land identified into the future, as opposed to clearing and cultivating land not included in the 2007 baseline area of land.
- d. Whether there is a reliable method to evaluate, on an annual basis, if the 2007 baseline area of land is being or has been exceeded.

- e. Whether a credible and reliable entity has been identified to conduct data gathering and analysis, including annual identification of the aggregate amount of cropland, pastureland, and land that is equivalent to U.S. Conservation Reserve Program land, that is needed for an annual EPA determination under 40 CFR 80.1454(g)(1) of whether the 2007 baseline area of land has been exceeded, and whether the data, analyses, and methodologies are publicly available.

In addition, EPA will consider whether all petition submission requirements specified in 40 CFR 80.1457(b) have been satisfied.

III. Petition Requirements

The regulations at 40 CFR 80.1457(b) require certain information to be submitted to EPA as part of a petition to request EPA authorization of an aggregate compliance approach for renewable biomass verification for planted crops and crop residue grown in foreign countries. These requirements are reproduced below:

- (b) Any petition and all supporting materials submitted under . . . this section must be submitted both in English and its original language (if other than English), and must include all of the following or an explanation of why it is not needed for EPA to consider the petition:

- (1) Maps or electronic data identifying the boundaries of the land for which the petitioner seeks approval of an aggregate compliance approach.
- (2) The total amount of land that is cropland, pastureland, or land equivalent to U.S. Conservation Reserve Program land within the geographic boundaries specified in paragraph (b)(1) of this section that was cleared or cultivated prior to December 19, 2007 and that was actively managed or fallow and nonforested on that date.
- (3) Land use data that demonstrates that the land identified in paragraph (b)(1) of this section is cropland, pastureland or land equivalent to U.S. Conservation Reserve Program land that was cleared or cultivated prior to December 19, 2007, and that was actively managed or fallow and nonforested on that date, which may include any of the following:
 - i. Satellite imagery or data.
 - ii. Aerial photography.
 - iii. Census data.
 - iv. Agricultural survey data.
 - v. Agricultural economic modeling data.
- (4) Historical land use data for the land within the geographic boundaries specified in paragraph (b)(1) of this section to the current year, which may include any of the following:
 - i. Satellite imagery or data.
 - ii. Aerial photography.

- iii. Census data.
 - iv. Agricultural surveys.
 - v. Agricultural economic modeling data.
- (5) A description of any applicable laws, agricultural practices, economic considerations, or other relevant factors that had or may have an effect on the use of agricultural land within the geographic boundaries specified in paragraph (b)(1) of this section, including information regarding the efficacy and enforcement of relevant laws and regulations.
- (6) A plan describing how the petitioner will identify a credible and reliable entity who will, on a continuing basis, conduct data gathering, analysis, and submittal to assist EPA in making an annual determination of whether the criteria specified in paragraph (a) of this section (i.e., that an aggregate compliance approach provides reasonable assurance that planted crops and crop residue meet the definition of renewable biomass and will continue to do so) remains satisfied.
- (7) A letter, signed by a national government representative at the ministerial level or equivalent, confirming that the petition and all supporting data have been reviewed and verified by the ministry (or ministries) or department(s) of the national government with primary expertise in agricultural land use patterns, practices, data, and statistics, that the data support a finding that planted crops and crop residue from the specified country meet the definition of renewable biomass and will continue to meet the definition of renewable biomass, and that the responsible national government ministry (or ministries) or department(s) will

review and verify the data submitted on an annual basis to facilitate EPA's annual evaluation of the 2007 baseline area of land specified in §80.1454(g)(1) for the country in question.

(8) Any additional information the Administrator may require.

IV. Compliance by the Government of Canada with the petition requirements

A. Identification of boundaries.

In Section 5.0 of their petition, the Government of Canada defines the boundaries of the land for which they seek approval of an aggregate compliance approach, noting that their petition and supporting analysis applies for the whole of Canada. They note that the geographical regions that produce crop and crop residues are concentrated in the southern part of the country, and, as required, have provided maps of Canada that identify the agricultural land within Canada in 2007 (see Appendix 1, Figure 1). EPA finds that the Government of Canada has satisfied the petition submission requirement at 40 CFR 80.1457(b)(1).

B. Calculation of 2007 baseline acreage

The Government of Canada has identified the total amount of land that is cropland, pastureland or land equivalent to U.S. CRP land that is within Canada and that was cleared or cultivated prior to December 19, 2007 and was actively managed or fallow and nonforested on that date. In Appendix 1, Table 2, the Government of Canada cross-referenced the land use categories they used in determining their baseline acreage of land with those categories used in

defining “existing agricultural land” for purposes of RFS2, to ensure that their calculations are consistent with the RFS2 regulations. The Government of Canada has calculated that the baseline amount of agricultural land in Canada that it believes is consistent with the RFS2 definition of “existing agricultural land” as 124 million acres. EPA finds that the Government of Canada has satisfied the petition submission requirement at 40 CFR 80.1457(b)(2).

C. Land use data supporting calculation of baseline acreage.

The Government of Canada utilized several types of land use data to demonstrate that the land included in their proposed 124 million acre baseline is cropland, pastureland or land equivalent to U.S. Conservation Reserve Program land that was cleared or cultivated prior to December 19, 2007, and was actively managed or fallow and nonforested on that date (and is therefore RFS2 qualifying land). To identify the amount of qualifying cropland, the petition refers to data collected through Statistics Canada’s annual crop survey for all annual, perennial and horticultural crops (minus Christmas tree, sod and nursery crops, which are taken from the Censuses of Agriculture). To define the amount of pastureland, the petition cites to data from the 2006 Census of Agriculture on tame or seeded pasture, which is the Canada Census of Agriculture equivalent to the US Census of Agriculture category of cropland used only for pasture or grazing (a subsection of pastureland). Finally, to estimate the amount of land equivalent to U.S. Conservation Reserve Program land, the petitioner used data collected through Statistics Canada’s Farm Environmental Management Survey (FEMS) in 2006. This survey collects data on seasonal wetlands, which are equivalent to US farmable wetlands, and riparian buffer zones, field shelterbelts, and grassed waterways, which are lands used by farmers for conservation purposes, similar to those lands comprising U.S. CRP lands. EPA finds that the

Government of Canada has satisfied the petition submission requirement at 40 CFR 80.1457(b)(3).

D. Historical data

The Government of Canada has provided annual agricultural land use trends for Canada since 1995 using Statistics Canada's annual surveys and the Censuses of Agriculture from 1996, 2001 and 2006. The data show that crop and pastureland use in Canada has been generally stable since 1991, with a slight negative trend. Table 3 in Appendix 1 of the petition shows that total crop and pastureland in Canada was 114.6 million acres in 1995, 113.4 million acres in 2007 and finally 112.7 million acres in 2010. Additionally, the amount of land in conservation practices is fairly stable at 9.8 million acres. EPA finds that the Government of Canada has satisfied the petition submission requirement at 40 CFR 80.1457(b)(4).

E. Laws, practices, economic considerations and other factors that may have an effect on use of agricultural lands.

Canada identifies a number of laws, practices, considerations and other factors in support of their petition. First, the petition cites that EPA's RFS2 modeling as showing little to no harvested crop area changes in Canada as a result of RFS2 and little contribution of biofuels made in Canada to the RFS2 program. Second, Canada's Regulatory Impact Analysis for its own biofuels mandate, which requires an average renewable fuel content of five percent in gasoline and two percent in diesel and heating oil,¹ reveals no significant changes in agricultural land use to support the mandate. Since Canada's federal renewable fuel requirements are

¹ <http://www.ecoaction.gc.ca/ECOENERGY-ECOENERGIE/renewablefuels-carburantsrenouvelables-eng.cfm#a1>

expected to have negligible impact on crop prices, Canada's RIA anticipates that there will be little impact on crop intensification at the national level and that changes in cropping activities are expected to take place within the existing crop land base.² Third, the petition describes a long term trend in agricultural land use in Canada that involves decreasing acres of land left fallow in the summer in favor of continuous cropping. This more efficient use of existing land allows increased in crop production without conversion of non-agricultural land. The Government of Canada notes that, as in the U.S., increasing crop yields and other technological advances such as genetically engineered crops have also diminished the need for farmers to increase the amount of agricultural land in use. Additionally, the petition states that, due to weather, geographic and geological factors such as short growing seasons, there is virtually no incentive to convert non-agricultural and forest lands to agricultural land.

Finally, the petition and supporting materials submitted by the Government of Canada describe the national and provincial land use policies that influence land use and would or could restrict expansion of agricultural land. The Government of Canada notes that over 41 percent of all land in Canada is federal Crown land governed by the federal government, 48 percent is provincial Crown land governed by the provincial government, and only 11 percent is privately owned (see page 2 of the Government of Canada's submission entitled "Supplemental Information on Canada's Aggregate Compliance Approach Petition stating that the majority of the land base in Canada is subject to governmental control.)

The Government of Canada states that much of the land base in the northern part of the country is undesirable for crop production because of geographic conditions such as cold

² <http://www.gazette.gc.ca/rp-pr/p1/2010/2010-04-10/html/reg1-eng.html>

climate, scarce water resources and poor soil conditions. Furthermore, the majority of these lands are restricted from agricultural use by the federal government under laws such as the Territorial Lands Act, R.S.C. 1985 and the Yukon Act, S.C. 2002. The Government of Canada argues that the limited amount of land in the north that is available for agricultural purposes is currently under production for local, non-renewable fuel purposes. Furthermore, in the other provinces in which most agricultural land resides, provincial laws such as Manitoba's Crown Lands Act and Saskatchewan's Provincial Lands Act govern the management and use of provincial Crown land, limiting uses based on various criteria, including, in some cases, environmental and habitat concerns.

Additionally, the Government of Canada states that Canada has strong national and provincial policies against deforestation, and that the amount of forestland in Canada has not significantly changed since 1990. Canada's has recently adopted a forest policy, A Vision for Canada's Forests: 2008 and Beyond, that includes climate change considerations. Canada is also an active participant in numerous international forestry initiatives and a signatory on several legally binding international frameworks that affect forest policy in Canada. Canada also has national forest policies that regulate forest resources on public lands, and each province has its own forest policies that include monitoring and compliance regimes such as timber permits, quotas and significant penalties for violators. Canada has also implemented on the national level many sustainable development and conservation policies into its land management regime, including the establishment of protected areas, a national park system, endangered species protections, grassland protection, and soil conservation. Provincial governments have also implemented similar protections that govern public lands and provide economic incentives for

private lands to be donated for conservation purposes, prohibiting those lands to be converted for agricultural purposes.

EPA finds that the Government of Canada has satisfied the petition submission requirement at 40 CFR 80.1457(b)(5).

F. Plan for entity to assist in annual data collection.

In its petition, the Government of Canada identifies the Agricultural Division of Statistics Canada, in collaboration with Agriculture and Agri-Food Canada, as the entity that will conduct annual data compilation and analysis to determine whether the baseline level of agricultural land has been exceeded. The petition states that Statistics Canada will provide EPA with preliminary data, analysis of the data and a report each October in time for EPA's November determination. EPA finds that the Government of Canada has satisfied the petition submission requirement at 40 CFR 80.1457(b)(6).

G. Letter from national government representative.

The Government of Canada has submitted a letter from the Minister of Agriculture and Agri-food confirming that the petition and all supporting data have been reviewed and verified by experts in the organization, and stating that the data support a finding that planted crops and crop residue from Canada meet the definition of renewable biomass and will continue to do so. Additionally, the petition includes a certificate from Statistics Canada stating that all supporting data, analyses and justifications provided in the petition have been reviewed and verified by the relevant subject matter experts and senior officials in the Agriculture Division of Statistics Canada. These letters confirm that these entities will also review and verify the data submitted

by Canada on an annual basis to facilitate EPA's annual evaluation of the 2007 baseline. EPA finds that the Government of Canada has satisfied the petition submission requirement at 40 CFR 80.1457(b)(7).

V. Analysis and discussion

As described in Section II, in determining whether to grant a petition for the application of the aggregate compliance approach to a foreign country, EPA will consider several factors specified in 40 CFR 80.1457.

EPA believes that while the Government of Canada has appropriately calculated the total amount of existing agricultural land in 2007 Canada to be 123.2 million acres (see Section 5.8 of the petition). This is the total amount of “cropland,” “pastureland,” (as these terms are defined in the RFS2 regulations) and land equivalent to U.S. CRP land in Canada that was actively managed or fallow and nonforested on December 19, 2007. EPA believes that Canada appropriately took into account the RFS2 regulatory definitions of the terms “cropland,” “pastureland,” “planted crop,” and “crop residue” in identifying which Canadian land types from Canadian databases to include in their 2007 baseline amount of land. Canada has provided, in Tables 1 and 2 in Appendix 1 in their petition, a table comparing each land type and data sources used in setting the U.S. 2007 baseline amount of agricultural land with those used for purposes of defining the Canadian baseline amount of agricultural land. However, EPA believes that in setting the 2007 baseline amount of agricultural land eligible for RFS2, the amount of agricultural land should be rounded down to 123 million acres rather than up to 124

million, as proposed in the petition. We believe this is proper rounding technique and is comparable to the methodology used in setting the 2007 U.S. agricultural land baseline for the aggregate compliance approach.

To calculate the amount of existing cropland and pastureland in 2007, the Government of Canada relied on the Census of Agriculture, which collects agricultural data every five years. The Census data is the leading source of agricultural information in Canada and is thoroughly analyzed by Statistics Canada, the country's national statistics agency. The Census methodology and data are all publicly available on Statistics Canada's website. Additionally, the Government of Canada supplemented the Census of Agriculture with Statistics Canada's Farm Update Surveys which are conducted several times a year estimate the area of land actually seeded each year. The methodology for and results of these surveys are also available to the public on Statistics Canada's website. Using these data sources, the Government of Canada determined that the total cropland area in Canada in 2007 was 99.0 million acres, and that the total pastureland was 14.4 million acres in 2007.

Since Canada does not have a federal program comparable to the U.S. Conservation Reserve Program (CRP), in order to calculate the amount of land equivalent to U.S. CRP land, the Government of Canada used data on agricultural land under conservation practices through the Farm Environmental Management Survey (FEMS), which is a survey conducted every five years to collect information on wetlands, riparian buffers, field shelterbelts/windbreaks and grasses waterways. The FEMS questionnaires and results are publicly available on the Statistics Canada website. In order to ensure that the FEMS data used was equivalent to the U.S. CRP land data used, the Government of Canada excluded the data on permanent wetlands since they were

comparable to those lands in the U.S. Wetlands Reserve Program, which was excluded from the U.S. 2007 amount of CRP land. Using the FEMS date, the Government of Canada determined that the amount of agricultural lands under conservation practice in 2007 was 9.8 million acres.

EPA believes that Canada has done a thorough assessment of the land types and amounts, and that the land categories identified and quantified by Canada in their petition are equivalent to those used by the U.S. in setting the 2007 baseline amount of agricultural land in the U.S. Furthermore, EPA believes that the data used, including the Canadian Census of Agriculture, annual crop surveys, and FEMS, are credible and reliable since they are conducted by Statistics Canada, Canada's national statistics agency with primary expertise in collection, analysis and dissemination of data and statistics on agricultural land use patterns and practices in Canada. The data quality is thoroughly checked by Statistics Canada as well as provincial agricultural statistics departments and can be publicly viewed and verified on Statistics Canada's website.

EPA believes that the Canadian petition provides ample information demonstrating that the total amount of cropland, pastureland, and CRP equivalent land in Canada in calendar year 2007 is not likely to be exceeded in the future. The historical data provided in the petition shows that the amount of crop and pastureland in Canada has been generally stable with a slight negative trend since 1991. Considering the other factors contemplated in the petition, it is reasonable to believe that the market forces maintaining the stability in the amount of Canadian agricultural land will continue to contribute to that stability into the future. We believe that the determination by the Government of Canada that the historical trends indicate that the amount of agricultural land in Canada is not likely to increase in the future has merit.

Furthermore, the petition provides an analysis of economic considerations, legal constraints, and agricultural practices, and other factors that show that it is likely that producers of planted crops and crop residue will continue to use agricultural land within the 2007 baseline area of land identified into the future, as opposed to clearing and cultivating land not included in the 2007 baseline area of land. EPA finds the Government of Canada's references to the more efficient use of land due to increasing crop yields and growing use of genetically engineered crops to be persuasive to support their argument that new lands are unlikely to be cleared because farmers are increasingly able to grow larger amounts of crops on existing agricultural land. Furthermore, EPA agrees that the evidence of increasing use of crop rotation and continuous cropping of existing cropland provided in the data (shown in the decrease in summer fallow area while overall agricultural land remains steady) supports the conclusion that the amount of Canadian agricultural land will likely remain steady in future years. Additionally, the petition references studies conducted by the US and Canadian governments in the context of analyzing both the U.S. and Canadian renewable fuels mandates showing that these laws are not likely to incentivize the clearing of new land to comply with the mandates. We recognize that while the RFS2 mandates will in part be met by feedstock grown in Canada, continued trends in increasing yields as anticipated in the US and the demand for feedstock relative to the amount of land already in crop production in Canada suggest fulfilling the RFS2 mandates will not drive significant changes in the amount of agricultural land in Canada. Finally, EPA agrees with Canada's assessment of the restrictive effect of factors such as climate, weather, and land use policies on growing crops in Canada on lands that are not already captured in the 2007 baseline

area of land. Taken together, we believe that this information relevant to the factors specified in 40 CFR 1457(a)(1)-(3) weigh in favor of approval of the Canadian petition.

The Government of Canada has also identified a reliable method to evaluate, on an annual basis, if the 2007 baseline area of land is being or has been exceeded. The petition states that the Agricultural Division of Statistics Canada, in collaboration with Agriculture and Agri-Food Canada, will be the entity that will conduct annual data compilation and analysis to provide EPA with data, analysis of the data and a report each October in time for EPA's November determination of whether the Canadian baseline acreage has been exceeded. The petition states that the Government of Canada will use a combination of annual crop surveys for field crops, summer fallow land, hay and forage, and greenhouse, sod and nurseries. They will add to the total acreage garnered from the annual surveys estimates of land in tame and seeded pasture and Christmas tree farms, based on trends calculated from the Census of Agriculture data. Finally, the annual amount of CRP equivalent land will be derived from an analysis of FEMS data trends. The Government of Canada has noted that all of the data used in setting the 2007 baseline amount of agricultural land in Canada is available in the public domain and that the same publicly available data will be used in their annual data collection efforts. We believe that this information, relevant to the factors specified in 40 CFR 1457(a)(4)-(5) also weigh in favor of approval of the Canadian petition.

Finally, the Government of Canada has proposed that if the total agricultural land acreage in Canada is found to be greater than 122 million acres (within 2 million acres of their proposed 124 million acres baseline), then Statistics Canada will conduct further investigations to assist EPA in evaluating whether the presumption built into the aggregate compliance approach

remains valid. EPA agrees that including this investigatory trigger would help to ensure that the Canadian agricultural land baseline would not be exceeded. However, in light of EPA's determination that the baseline will be set at 123 million acres rather than the 124 million acres proposed by the Government of Canada, we believe that the trigger for additional investigation should be a determination that the total agricultural land in Canada exceeds 121 million acres. Accordingly, our approval is conditioned on this amendment of Canada's proposal.

In sum, EPA finds that the Government of Canada has satisfied the petition submission requirements in 40 CFR 1457(b), and that an evaluation of the factors specified in 40 CFR 1457(a)(1), which essentially mirror the factors that EPA considered in adopting the aggregate compliance approach for domestic planted crops and crop residue, (see 75 F.R. 14701 col. 3, March 26, 2010), support EPA approval of the Canadian petition.

VI. Public participation

Pursuant to 40 CFR 80.1457, EPA published a notice in the Federal Register of receipt of the petition from the Government of Canada and solicited comments from the public on all aspects of that petition. 76 FR 14007 (March 15, 2011). EPA placed the petition and all supporting documentation and data supplied by Canada in the public docket, and provided a 60-day comment period. EPA received and took into consideration the public comments on the Canadian petition.

All comments supported the petition submitted by the Government of Canada and urged EPA to approve the petition to apply the aggregate compliance approach to planted crops and crop residue grown on Canadian agricultural land. The commenters state that they believe the

Canadian petition meets all of the regulatory requirements, that it relies on credible, reliable data that is publically available, and that Canada has proposed an adequate plan for making the annual determination. Furthermore, those commenters argue that Canada's proposed baseline amount of agricultural land in 2007 is a conservative estimate, that the amount of agricultural land in Canada has remained constant for decades, and that the RFS2 program will not contribute to the clearing of new lands in Canada. EPA agrees with the commenters that it is appropriate to approve an aggregate compliance approach for Canada.

VII. Conclusion

After a thorough assessment of the petition and supporting information submitted by the Government of Canada, and consideration of all public comments received, EPA has determined, based on credible, reliable and verifiable data provided by the Government of Canada, that an aggregate compliance approach will provide reasonable assurance that planted crops and crop residue from Canada meet the definition of renewable biomass and will continue to meet the definition of renewable biomass. Therefore, effective immediately, any producer or RIN-generating importer of renewable fuel made from planted crops or crop residue from existing Canadian agricultural land will be covered by the aggregate compliance approach and will not be subject to the recordkeeping requirements for planted crops and crop residue at §80.1454(g)(2) unless EPA publishes a finding that the 2007 baseline amount of agricultural land in Canada (123 million acres) has been exceeded or that the withdrawal of EPA approval of the aggregate compliance approach is warranted pursuant to §80.1457(e).

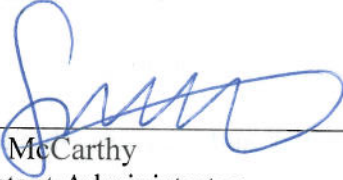
VIII. Implementation

The aggregate compliance approach for planted crops and crop residues grown in Canada is effective immediately. RINs may be generated by renewable fuel producers and importers in reliance on the aggregate compliance approach for renewable biomass verification to represent renewable fuel produced from Canadian crops and crop residue feedstocks from today forward, regardless of when the Canadian crops and crop residue were harvested, and providing that the fuel had not already been sold by the renewable fuel producer or importer to another party. Biofuel derived from Canadian crop or crop residue that was sold by a producer or importer prior to today was eligible for RIN generation only if the RIN generator was in possession of the relevant renewable biomass records as required in 40 CFR 80.1454. Renewable fuel producers and RIN-generating importers must comply with all RFS program regulations in 40 CFR Part 80, Subpart M, including the requirements of sections 80.1426 and 80.1452.

As described in its petition and supporting information, the Government of Canada will provide EPA with information on an annual basis to assist EPA in determining if the 2007 baseline acreage of agricultural land (123 million acres) has been exceeded, and if EPA determines that the acreage exceeds 121 million acres, Statistics Canada will conduct further investigate to assist EPA in evaluating whether the presumption built into the aggregate compliance approach remains valid.

EPA's approval of the aggregate compliance approach for Canada may be revoked for any of the reasons specified in 40 CFR 80.1457(e)(1), including: (1) EPA determination that the

acreage of cropland, pastureland and land equivalent to U.S. Conservation Reserve Program land exceeds the 2007 baseline area of land, (2) EPA determination that the criteria specified in 40 CFR 80.1457(a) is no longer satisfied, or (3) EPA determination that the data needed for its annual evaluation has not been collected and submitted in a timely and appropriate manner.



Gina McCarthy
Assistant Administrator
Office of Air and Radiation
United States Environmental Protection Agency

Date 9/27/11

APPENDIX B

STATUTORY ADDENDUM

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42 U.S.C. §7607(d) Add-1

emption shall (A) promptly notify the Administrator of such exemption and the justification therefor; (B) review the necessity for each such exemption annually; and (C) report to the Administrator annually all such exemptions in effect. Exemptions granted pursuant to this section shall be for a period not to exceed one year. Additional exemptions may be granted for periods not to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

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

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

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

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

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

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

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

RICHARD NIXON.

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpoenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)¹ or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the² chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),³ the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be dis-

¹ See References in Text note below.

² So in original. Probably should be "this".

³ So in original.

closed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subparagraph,⁴ the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

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

⁴ So in original. Probably should be "subsection,".

lishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

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

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to⁵ the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵ So in original. The word "to" probably should not appear.

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

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

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

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

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

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

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

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

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management

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

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

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

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

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

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

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

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

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

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

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

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

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

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

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

(e) Other methods of judicial review not authorized

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

(f) Costs

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

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

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

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of

title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section⁶ 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

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

REFERENCES IN TEXT

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

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

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

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

CODIFICATION

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

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

PRIOR PROVISIONS

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

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

⁶So in original. Probably should be "sections".

AMENDMENTS

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

Subsec. (b)(1). Pub. L. 101-549, § 706(2), which directed amendment of second sentence by striking “under section 7413(d) of this title” immediately before “under section 7419 of this title”, was executed by striking “under section 7413(d) of this title,” before “under section 7419 of this title”, to reflect the probable intent of Congress.

Pub. L. 101-549, § 706(1), inserted at end: “The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.”

Pub. L. 101-549, § 702(c), inserted “or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title,” before “or any other final action of the Administrator”.

Pub. L. 101-549, § 302(g), substituted “section 7412” for “section 7412(c)”.

Subsec. (b)(2). Pub. L. 101-549, § 707(h), inserted sentence at end authorizing challenge to deferrals of performance of nondiscretionary statutory actions.

Subsec. (d)(1)(C). Pub. L. 101-549, § 110(5)(A), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: “the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title.”

Subsec. (d)(1)(D), (E). Pub. L. 101-549, § 302(h), added subpar. (D) and redesignated former subpar. (D) as (E). Former subpar. (E) redesignated (F).

Subsec. (d)(1)(F). Pub. L. 101-549, § 302(h), redesignated subpar. (E) as (F). Former subpar. (F) redesignated (G).

Pub. L. 101-549, § 110(5)(B), amended subpar. (F) generally. Prior to amendment, subpar. (F) read as follows: “promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders).”

Subsec. (d)(1)(G), (H). Pub. L. 101-549, § 302(h), redesignated subpars. (F) and (G) as (G) and (H), respectively. Former subpar. (H) redesignated (I).

Subsec. (d)(1)(I). Pub. L. 101-549, § 710(b), which directed that subpar. (H) be amended by substituting “subchapter VI of this chapter” for “part B of subchapter I of this chapter”, was executed by making the substitution in subpar. (I), to reflect the probable intent of Congress and the intervening redesignation of subpar. (H) as (I) by Pub. L. 101-549, § 302(h), see below.

Pub. L. 101-549, § 302(h), redesignated subpar. (H) as (I). Former subpar. (I) redesignated (J).

Subsec. (d)(1)(J) to (M). Pub. L. 101-549, § 302(h), redesignated subpars. (I) to (L) as (J) to (M), respectively. Former subpar. (M) redesignated (N).

Subsec. (d)(1)(N). Pub. L. 101-549, § 302(h), redesignated subpar. (M) as (N). Former subpar. (N) redesignated (O).

Pub. L. 101-549, § 110(5)(C), added subpar. (N) and redesignated former subpar. (N) as (U).

Subsec. (d)(1)(O) to (T). Pub. L. 101-549, § 302(h), redesignated subpars. (N) to (S) as (O) to (T), respectively. Former subpar. (T) redesignated (U).

Pub. L. 101-549, § 110(5)(C), added subpars. (O) to (T).

Subsec. (d)(1)(U). Pub. L. 101-549, § 302(h), redesignated subpar. (T) as (U). Former subpar. (U) redesignated (V).

Pub. L. 101-549, § 110(5)(C), redesignated former subpar. (N) as (U).

Subsec. (d)(1)(V). Pub. L. 101-549, § 302(h), redesignated subpar. (U) as (V).

Subsec. (h). Pub. L. 101-549, § 108(p), added subsec. (h).

1977—Subsec. (b)(1). Pub. L. 95-190 in text relating to filing of petitions for review in the United States Court of Appeals for the District of Columbia inserted provision respecting requirements under sections 7411 and 7412 of this title, and substituted provisions authorizing review of any rule issued under section 7413, 7419, or 7420 of this title, for provisions authorizing review of any rule or order issued under section 7420 of this title, relating to noncompliance penalties, and in text relating to filing of petitions for review in the United States Court of Appeals for the appropriate circuit inserted provision respecting review under section 7411(j), 7412(c), 7413(d), or 7419 of this title, provision authorizing review under section 1857c-10(c)(2)(A), (B), or (C) to the period prior to Aug. 7, 1977, and provisions authorizing review of denials or disapprovals by the Administrator under subchapter I of this chapter.

Pub. L. 95-95, § 305(c), (h), inserted rules or orders issued under section 7420 of this title (relating to non-compliance penalties) and any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter to the enumeration of actions of the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the District of Columbia, added the approval or promulgation by the Administrator of orders under section 7420 of this title, or any other final action of the Administrator under this chapter which is locally or regionally applicable to the enumeration of actions by the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the appropriate circuit, inserted provision that petitions otherwise capable of being filed in the Court of Appeals for the appropriate circuit may be filed only in the Court of Appeals for the District of Columbia if the action is based on a determination of nationwide scope, and increased from 30 days to 60 days the period during which the petition must be filed.

Subsec. (d). Pub. L. 95-95, § 305(a), added subsec. (d).

Subsec. (e). Pub. L. 95-95, § 303(d), added subsec. (e).

Subsec. (f). Pub. L. 95-95, § 305(f), added subsec. (f).

Subsec. (g). Pub. L. 95-95, § 305(g), added subsec. (g).

1974—Subsec. (b)(1). Pub. L. 93-319 inserted reference to the Administrator's action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder and substituted reference to the filing of a petition within 30 days from the date of promulgation, approval, or action for reference to the filing of a petition within 30 days from the date of promulgation or approval.

1971—Subsec. (a)(1). Pub. L. 92-157 substituted reference to section “7545(c)(3)” for “7545(c)(4)” of this title.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other

officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7608. Mandatory licensing

Whenever the Attorney General determines, upon application of the Administrator—

(1) that—

(A) in the implementation of the requirements of section 7411, 7412, or 7521 of this title, a right under any United States letters patent, which is being used or intended for public or commercial use and not otherwise reasonably available, is necessary to enable any person required to comply with such limitation to so comply, and

(B) there are no reasonable alternative methods to accomplish such purpose, and

(2) that the unavailability of such right may result in a substantial lessening of competition or tendency to create a monopoly in any line of commerce in any section of the country,

the Attorney General may so certify to a district court of the United States, which may issue an order requiring the person who owns such patent to license it on such reasonable terms and conditions as the court, after hearing, may determine. Such certification may be made to the district court for the district in which the person owning the patent resides, does business, or is found.

(July 14, 1955, ch. 360, title III, §308, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1708.)

CODIFICATION

Section was formerly classified to section 1857h-6 of this title.

PRIOR PROVISIONS

A prior section 308 of act July 14, 1955, was renumbered section 315 by Pub. L. 91-604 and is classified to section 7615 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect

immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7609. Policy review

(a) Environmental impact

The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which section 4332(2)(C) of this title applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.

(b) Unsatisfactory legislation, action, or regulation

In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

(July 14, 1955, ch. 360, title III, §309, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1709.)

CODIFICATION

Section was formerly classified to section 1857h-7 of this title.

PRIOR PROVISIONS

A prior section 309 of act July 14, 1955, ch. 360, title III, formerly §13, as added Dec. 17, 1963, Pub. L. 88-206, §1, 77 Stat. 401; renumbered §306, Oct. 20, 1965, Pub. L. 89-272, title I, §101(4), 79 Stat. 992; renumbered §309, Nov. 21, 1967, Pub. L. 90-148, §2, 81 Stat. 506; renumbered §316, Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1705, related to appropriations and was classified to section 1857i of this title, prior to repeal by section 306 of Pub. L. 95-95. See section 7626 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7610. Other authority

(a) Authority and responsibilities under other laws not affected

Except as provided in subsection (b) of this section, this chapter shall not be construed as