

No. 19-1139

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

POET BIOREFINING, LLC, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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

FINAL OPENING BRIEF FOR PETITIONERS

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March 24, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties and Amici. The Petitioners in this case are as follows:

POET Biorefining, LLC
POET Biorefining – Marion, LLC
POET Biorefining – Corning, LLC
POET Biorefining – Fostoria, LLC
POET Biorefining – Chancellor, LLC
POET Biorefining – Leipsic, LLC
POET Biorefining – Laddonia, LLC
POET Biorefining – Manchester, LLC
POET Biorefining – Mitchell, LLC
POET Biorefining – Alexandria, LLC
POET Biorefining – Portland, LLC

The Respondents are the United States Environmental Protection Agency (“EPA”) and its Administrator, Andrew Wheeler.

2. Rulings Under Review. The agency action at issue in this case is the EPA’s document entitled *Guidance on Qualifying an Analytical Method for Determining the Cellulosic Converted Fraction of Corn Kernel Fiber Co-Processed with Starch* (May 7, 2019).

3. Related Cases. The instant case has not previously been before this Court or any other court. A related case, *POET Biorefining – Hudson, LLC v. EPA, et al.* (No. 19-2429), is currently pending before the United States Court of Appeals for the Eighth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioners POET Biorefining – Marion, LLC; POET Biorefining – Corning, LLC; POET Biorefining – Fostoria, LLC; POET Biorefining – Chancellor, LLC; POET Biorefining – Leipsic, LLC; POET Biorefining – Laddonia, LLC; POET Biorefining – Manchester, LLC; POET Biorefining – Mitchell, LLC; POET Biorefining – Alexandria, LLC; POET Biorefining – Portland, LLC are wholly-owned subsidiaries of petitioner POET Biorefining, LLC, which is in turn majority-owned by POET Investments, Inc. and Ethanol Products, LLC. Ethanol Products, LLC is indirectly majority-owned by POET Investments, Inc. POET Investments, Inc. is wholly owned by POET Holdings, LLC. No publicly traded corporation owns 10% or more of the outstanding equity interests in POET Biorefining, LLC; POET Investments, Inc.; Ethanol Products, LLC; or POET Holdings, LLC.

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GLOSSARY

EPA	Environmental Protection Agency
FCC	Federal Communications Commission
NIST	National Institute of Standards and Technology
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number
VCSB	Voluntary Consensus-Based Standards Body

JURISDICTIONAL STATEMENT

Jurisdiction and venue are proper in this Court because the Environmental Protection Agency (“EPA”) action challenged in this case—the promulgation of a document entitled *Guidance on Qualifying an Analytical Method for Determining the Cellulosic Converted Fraction of Corn Kernel Fiber Co-Processed with Starch* (“Guidance”)¹—was a “nationally applicable” “final action” under Section 307(b)(1) of the Clean Air Act. 42 U.S.C. §7607(b)(1); *see infra* Part I. The petition is timely. EPA issued the Guidance on May 7, 2019, and the petition for review was filed fewer than 60 days later, on July 5, 2019. 42 U.S.C. §7607(b)(1).

STATEMENT OF THE ISSUE

1. Whether the *Guidance on Qualifying an Analytical Method for Determining the Cellulosic Converted Fraction of Corn Kernel Fiber Co-Processed with Starch* is final agency action reviewable by the Court.

2. Whether the *Guidance on Qualifying an Analytical Method for Determining the Cellulosic Converted Fraction of Corn Kernel Fiber Co-Processed with Starch* is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 42 U.S.C. §7607(d)(9).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum.

¹ JA81-93.

INTRODUCTION

In 2014, EPA promulgated a regulation entrusting to outside experts the task of assessing the validity of methods for measuring the content of certain types of biofuel. In a 2019 document styled “Guidance,” however, EPA established a host of new criteria that a measurement method must now satisfy to be declared valid, regardless of whether outside experts otherwise approve of it. Although an agency may offer non-binding guidance regarding its interpretation of a regulation, invoking the label “Guidance” does not permit an agency to alter the substance of a regulation without notice-and-comment rulemaking. But that is what EPA has attempted here, using its guidance document to void the regulation’s deference to the technical judgment of outside experts and impose a new test that leaves them with no meaningful role.

This case arises in connection with the Renewable Fuels Standard (“RFS”), a statutory program that mandates the use of specified quantities of different types of renewable fuels in the nation’s supply of gasoline (and diesel) for transportation purposes. Through the RFS program, Congress specifically sought to encourage the production of “cellulosic biofuel,” a renewable fuel made from the fibrous parts of corn and other plants that achieves the greatest reduction in greenhouse gas emissions from the baseline greenhouse gas emissions of gasoline. Cellulosic biofuel may be produced using enzymes to convert the fibrous outer shell of corn

kernels into cellulosic ethanol. This enzymatic process simultaneously converts the starch inside the corn kernel to conventional ethanol.

That a single production process generates both cellulosic and conventional ethanol is significant because these two types of ethanol are treated differently for purposes of the RFS program—they are assigned different credits and they are used to satisfy different program obligations. Consequently, in a regulation promulgated in 2014, EPA authorized producers to receive RFS credits for cellulosic ethanol generated through the enzymatic process, provided that producers could separately quantify the amount of cellulosic and conventional ethanol produced through the process.

Because cellulosic and conventional ethanol are chemically identical, the regulations specified that the amount of cellulosic ethanol produced through the enzymatic process would be calculated using the “cellulosic Converted Fraction,” i.e., the portion of the cellulose that was converted to ethanol.² Rather than trying to devise a method for measuring the amount of converted cellulose itself (which EPA did not claim the expertise to do), EPA decided to defer to the judgment of outside experts. Thus, the 2014 regulation allowed producers of cellulosic ethanol

² This brief uses “cellulose” to include cellulose, hemicellulose and lignin.

to use any measurement method that was approved either by a private standards-setting body or by peer reviewers. 40 C.F.R. §80.1450(b)(1)(xiii)(B)(3).

EPA now wants to change course and decide itself whether a measurement method is valid. But rather than engaging in rulemaking to amend its regulation, EPA instead skipped notice-and-comment and issued a “guidance” document that purports to “interpret” its existing regulation. That is not a plausible description of the Guidance. In reality, the Guidance erects an entirely new set of requirements reflecting *EPA’s* judgment about the characteristics of a valid measurement method: the method’s results must come within 20 percent of the “known” amount of cellulose in a naturally occurring “representative reference material,” the method must measure the cellulose directly, and the method must be shown to have already yielded results within the 20 percent threshold. The Guidance imposes these requirements *even if* an outside expert has otherwise found the method to be valid. The Guidance thus establishes EPA as the arbiter of method validity, displacing the outside experts and relegating them to the ministerial role of data reviewer. The Guidance, in other words, contradicts the regulation.

In addition to conflicting with the 2014 regulation, the new requirements in the Guidance are arbitrary and capricious. First, the type of “representative reference material” EPA requires does not exist, may never exist, and even if it did exist, would not be a reliable way to assess the validity of a measurement method.

Whereas the composition of a synthetic reference material (which is now commercially available) is known because it is constructed from known components, the composition of a “naturally occurring” reference material cannot be known without an accurate measurement method—which is the very problem that EPA wants to use a reference material to solve. EPA has no coherent basis for categorically barring the use of a synthetic reference material. Second, EPA previously spoke approvingly of methods that would measure cellulose indirectly. In issuing the Guidance, EPA failed to even acknowledge, let alone explain, its change in position. Moreover, in deciding to preclude indirect measurement of cellulose, EPA relied on baseless concerns and acted in a manner that is irrational in light of the other requirements set forth in the Guidance.

At bottom, there is no dispute that although petitioners and other producers are making cellulosic ethanol, they are receiving *zero* RFS credits because of the Guidance’s new requirements. Through the Guidance, EPA is thus thwarting Congress’s intent that the RFS program would spur significantly greater use of renewable fuel, including and especially cellulosic biofuel. EPA’s recalcitrance is harming consumers by depriving them of environmentally friendly transportation fuel, and harming producers by depriving them of tens of millions of dollars’ worth of RFS credits.

EPA evidently hopes to preserve its Guidance by blocking judicial review on the ground that the Guidance is not “final agency action.”³ That contention is meritless. The “Guidance” is EPA’s final word and has concrete legal consequences—preventing producers from obtaining the regulatory approval needed to generate RFS-qualified renewable fuel. Indeed, the Guidance has already done so, as EPA relied on its new requirements to deny a registration application submitted by a POET facility (thereby depriving POET of valuable RFS credits). In fact, the Guidance is effectively a legislative rule, which is per se final and reviewable.

This Court should grant the petition and set aside the Guidance.

STATEMENT OF THE CASE

A. The Renewable Fuel Standard Program

Congress created the RFS program “[t]o move the United States toward greater energy independence and security’ and ‘increase the production of clean renewable fuels.’” *American Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 568 (D.C. Cir. 2019) (per curiam) (quoting Energy Independence and Security Act of 2007, Pub. L. No. 110-140, preamble, 121 Stat. 1492, 1492). “To accomplish these goals,” Congress specified “‘applicable volume[s]’—mandatory and annually

³ See Joint Motion for Extension of Time and Proposal for Briefing Schedule, ECF #1801338, at 3 n.2.

increasing quantities of renewable fuels that must be ‘introduced into commerce in the United States’ each year.” *Id.* (quoting 42 U.S.C. §7545(o)(2)(A)(i)).

“Congress intended the Renewable Fuel Program to be a market forcing policy that would create demand pressure to increase consumption of renewable fuel.” *Id.* (quoting *Americans for Clean Energy v. EPA*, 864 F.3d 691, 705 (D.C. Cir. 2017) (quotation marks omitted)).

“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.’” *American Fuel & Petrochemical Mfrs.*, 937 F.3d at 568 (quoting 42 U.S.C. §7545(o)(1)(J)). To qualify as renewable fuel for purposes of the RFS, a fuel must “achieve[] at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions”—that is, the lifecycle greenhouse gas emissions for gasoline. 42 U.S.C. §7545(o)(1)(C), (o)(2)(A)(i). The volume requirements apply to four “nested” categories of renewable fuel: “[1] cellulosic biofuel and [2] biomass-based diesel are kinds of [3] advanced biofuel, and advanced biofuel in turn is a kind of renewable fuel that may be credited toward [4] the total renewable fuel obligation.” *Americans for Clean Energy*, 864 F.3d at 697-698; *see* 42 U.S.C. §7545(o)(2)(B)(i)(I)-(IV).

To facilitate tracking and compliance, EPA assigns a unique Renewable Identification Number (“RIN”) “to each batch of renewable fuel that is produced.” *Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 637 (D.C. Cir. 2019). RINs are assigned one of several “D-Codes” depending on the type of renewable fuel they represent. D-Codes indicate which volume standard the RIN may be used to meet. *See EPA, What is a Fuel Pathway?* RINs may be used to show compliance or sold as “credits” in an open market. *Id.*; *see* 40 C.F.R. §80.1429(b)(1)-(2).

To generate RINs, a fuel must be produced at a facility that has been “registered” with EPA. 40 C.F.R. §80.1450(b). The registration application must specify the EPA-approved “fuel pathway” that will be used for production. “A fuel pathway is a specific combination of three components: (1) feedstock, (2) production process and (3) fuel type.” EPA, *Fuel Pathways under Renewable Fuel Standard*; *see* 40 C.F.R. §80.1450(b)(1). Rather than have EPA technical staff evaluate the content of registration applications, the EPA regulations require an applicant to engage an “independent third-party” “professional engineer” to conduct an “engineering review” and prepare a “written report and verification of the [technical] information” in the application. 40 C.F.R. §80.1450(b)(2).

Conventional ethanol, derived from corn starch, is the most common type of renewable fuel and counts toward the total renewable fuel obligation but not the other standards nested within it. *See* §7545(o)(1)(F); 83 Fed. Reg. 63,704, 63,705

n.6, 63,706 (Dec. 11, 2018). To qualify under the RFS, conventional ethanol must reduce lifecycle greenhouse gas emissions by 20 percent from the baseline. 42 U.S.C. §7545(o)(2)(A)(i). RINs generated for conventional ethanol are assigned the “D6” code. *See EPA, What is a Fuel Pathway?*

Cellulosic biofuel is “derived from any cellulose, hemicellulose, or lignin” and has lifecycle greenhouse gas emissions at least 60 percent less than the baseline. 42 U.S.C. §7545(o)(1)(E). RINs generated for cellulosic ethanol and other cellulosic biofuel (except cellulosic diesel) are assigned the “D3” code. *See EPA, What is a Fuel Pathway?* Because the RINs generated by producing cellulosic biofuel may be used to satisfy not only the cellulosic obligation but also the advanced and total obligations under the RFS program, cellulosic RINs are particularly valuable. *See 40 C.F.R. §80.1426(a), (f).*

To date, the production of cellulosic biofuel has “fallen well short of the statutory volumes.” 84 Fed. Reg. 36,762, 36,763 (proposed July 29, 2019). For example, whereas the statutory goal for cellulosic biofuel for 2018 was 7 billion gallons, the actual production volume was only 314.4 million gallons. *Compare 42 U.S.C. §7545(o)(2)(B)(i)(III) with 84 Fed. Reg. at 36,770 tbl. III.B.1-1.* In the past, technological challenges hindered cellulosic ethanol production. In recent years, however, the industry has successfully developed a variety of technologies capable of generating greater volumes of cellulosic biofuel in efficient and cost-

effective ways. But despite these technological achievements, EPA continues to expect fairly low volumes of cellulosic production. For 2020, EPA projects that only 420 million gallons of RFS-qualified cellulosic biofuel will be available, 84 Fed. Reg. at 36,764 tbl. I-1, compared to the 10.50 billion gallons Congress envisioned when it created the RFS program, 42 U.S.C. §7545(o)(2)(B)(i)(III).

At this point, a significant impediment to increased cellulosic biofuel production is regulatory. Preventing producers like POET from receiving D3 RINs for generating cellulosic biofuel eliminates incentives for such production, contrary to Congress's aim to increase the production and use of cellulosic biofuel in the nation's supply of transportation fuel.

B. The Corn Kernel Fiber Pathway, The Converted Fraction, And EPA's Registration Requirements

1. EPA's approval of the corn kernel fiber pathway

Corn kernel fiber is the outer protective layer of the corn kernel. Unlike the starch inside the kernel, the outer fiber is composed of cellulose. The enzymes that convert corn starch to produce ethanol through traditional processes cannot digest kernel fiber. But producers have developed innovative processes to produce ethanol from the kernel fiber together with the non-cellulosic starch inside the kernel. Thermochemical processes superheat the kernel fiber to break down the cellulose so that it can be converted into ethanol. Biochemical processes, on the other hand, add specialized microorganisms and enzymes to break down the kernel

fiber cellulose without superheating. Fiber can be processed into ethanol either after the starch has been processed or simultaneously with the starch processing. The latter method is called co-processing or *in situ* processing. JA94-104.

In 2014, EPA promulgated an important new set of regulations approving a “pathway” that allows producers to generate both D6 RINs and D3 RINs from the same corn kernels: ethanol could be produced from the corn starch to generate D6 RINs, while ethanol could also be produced from the kernel fiber to generate D3 RINs. 79 Fed. Reg. 42,128, 42,147 (July 18, 2014). The approved pathway permits producers either to produce cellulosic ethanol from the kernel fiber separately when left over from traditional starch ethanol production or to process the kernel fiber and the starch simultaneously, *i.e.*, to co-process *in situ*. *Id.* at 42,147-42,148; 40 C.F.R. §80.1426, tbl. 1, row K.

As part of the same rulemaking, EPA also promulgated a regulation requiring producers to register to produce cellulosic and non-cellulosic ethanol simultaneously. 40 C.F.R. §80.1450(b)(1)(xiii). That regulation reflects the need to apportion RINs appropriately based on the amount of cellulosic (D3 RINs) and non-cellulosic (D6 RINs) ethanol produced from a feedstock that contains not only cellulose but also a significant amount of non-cellulosic material. *Id.* §80.1450(b)(1)(xiii)(B)(2). To apportion RINs properly, producers must calculate

the cellulosic Converted Fraction, which represents the portion of the cellulosic feedstock that is converted to ethanol. *Id.*; *see also id.* §80.1426(f)(3)(vi).

2. *Calculating the cellulosic Converted Fraction*

EPA discussed calculation of the cellulosic Converted Fraction at length in a memorandum issued contemporaneously with its 2014 regulations. JA94-104. EPA explained that this calculation is not “straight-forward” when the fiber is co-processed “biochemical[ly]” (as opposed to “thermochemical[ly]”). JA94-96. “Thermochemical processes typically convert all of the organic components of the feedstock into finished fuel,” so “the portion of the finished fuel derived from cellulosic material is proportional to the cellulosic content of the organic fraction of the feedstock.” JA95. But with a biochemical process, “[t]he amount of cellulosic material converted to fuel will depend on the details of the process, such as the types and combinations of enzymes used.” JA96; *see also* 79 Fed. Reg. at 42,134 (similar). This issue is particularly acute for “*in situ* processes, where cellulosic and non-cellulosic materials are *simultaneously* hydrolyzed or converted to fuel.” JA96 (emphasis added). In those circumstances, the cellulosic portion “will not necessarily be proportional to the cellulosic composition of” the corn kernel, JA96, and also “cannot be measured directly,” JA97. For this kind of process, “[t]here currently is no ready test to identify the portion of fuel produced

from [cellulosic and] non-cellulosic materials.” 78 Fed. Reg. 36,042, 36,046 (June 4, 2013) (proposed rule); *see also* 79 Fed. Reg. at 42,132 (similar in final rule).

During the comment period, however, EPA “received several comments that suggested there are methods available for this purpose.” 79 Fed. Reg. at 42,132. These “existing methods” included “approaches for performing a mass-balance accounting of feedstock components converted to fuel products.” *Id.* & n.12. Mass balance accounting involves comparing the composition of the input and output of the chemical process—the input here being the feedstock and the output being the fuel and “residue materials.” JA98. EPA’s final rule made clear that, “[a]s detailed in” the Docket Memorandum, a “mass balance approach” can be “an appropriate method for calculating the converted fraction.” 79 Fed. Reg. at 42,132 n.12. By measuring the amount of starch and the amount of cellulose in the feedstock and then measuring the amount of starch and cellulose remaining in the residual materials after the ethanol has been produced, it is possible to calculate the percentage of the fuel that was derived from the starch and the percentage that was derived from the cellulosic fiber.

In order to conduct a mass balance analysis, producers must be able to measure the amount of cellulosic material in the feedstock and in the resulting residue. In its Docket Memorandum, EPA identified several “examples of test methods that quantify the amount of cellulose, hemicellulose, and/or lignin in

biomass.” JA99. Among those examples, EPA stated that “[m]easurement of the starch content can be used to indirectly determine the cellulosic converted fraction Because both starch and cellulosic material can be converted to fuel, a measure of the starch content of the feedstock and residual material after conversion can give information about how much starch was converted to fuel, which would help determine the cellulosic converted fraction.” JA101.

3. *EPA’s 2014 registration regulation*

Recognizing that “[a]ssessment methods can be designed in a number of ways,” JA98, in its final registration regulation, EPA did not prescribe a particular method for calculating the cellulosic Converted Fraction for biochemically co-processed corn kernel fiber or obtaining the data necessary to do so, but rather delegated that responsibility to outside experts. EPA explained that it was “allowing producers to design analytical protocols specific to their process configuration as long as the mass balance accounting calculation method is verified by an independent third party engineer, these calculations can independently identify both a cellulosic and non-cellulosic [Converted Fraction], the data used to perform the calculations is regularly reported along with the calculated [Converted Fraction] values, and the data itself is collected and reported in a scientifically reasonable manner.” JA98.

Specifically, EPA's final 2014 regulations provide that a registration application for a producer seeking to generate D3 RINs for cellulosic ethanol derived through biochemical co-processing must include "[t]he cellulosic Converted Fraction (CF) that will be used for generating RINs." 40 C.F.R. §80.1450(b)(1)(xiii)(B)(2). The regulations provide that "[d]ata used to calculate the cellulosic [Converted Fraction] must be representative and obtained" in one of two ways:

- (i) "using an analytical method certified by a voluntary consensus standards body" ("VCSB"); or
- (ii) "using a method that would produce reasonably accurate results as demonstrated through peer reviewed references provided to the third party engineer performing the engineering review at registration."

Id. §80.1450(b)(1)(xiii)(B)(3); *see also* 79 Fed. Reg. at 42,135.

EPA elaborated on this regulation in the final rule and accompanying Docket Memorandum. For VCSB methods, EPA explained that if a method has been "adjudicated through the voluntary consensus standards body process," EPA is "confident in its use in practice." JA98. As to non-VCSB analytical methods, EPA explained that "[i]f a VCSB-approved method is not used to generate the data required to calculate the cellulosic [Converted Fraction] for a given process, then the producer will need to show that the method used is an adequate means of generating the data by providing peer reviewed references to the third party engineer performing the engineering review at registration." JA98; *see also* 79

Fed. Reg. at 42,135. The peer-reviewed references thus serve “to show that the non-VCSB method used is an adequate means of generating the data.” JA99; *see also* 79 Fed. Reg. at 42,135 (similar).

C. The Guidance

On May 7, 2019, EPA issued the Guidance. JA81-93 (“Guidance”). The Guidance was signed by then-Assistant Administrator for EPA’s Office of Air and Radiation William Wehrum, a Senate-confirmed appointee who was EPA’s top decisionmaker for air policy. The document purports to “provide guidance on how to demonstrate that an analytical method for determining the cellulosic converted fraction of corn kernel fiber co-processed with starch at a traditional ethanol facility satisfies the applicable regulatory requirements.” JA83 (Guidance at 1).

The introduction to the Guidance asserts that it “explain[s] [EPA’s] interpretation of [its] regulatory requirements” and “articulate[s] clear criteria for the type of analysis and demonstration that EPA believes would be an appropriate basis for registration under the program.” JA83 (Guidance at 1). The introduction also sets forth a number of standard-issue caveats—that EPA decides applications on a “case-by-case basis,” that the Guidance reflects only EPA’s “current view,” and that the document “does not create any new requirements and may not apply to a particular situation.” *Id.* But despite these disclaimers, rather than merely interpreting EPA’s existing requirements, the Guidance adds new requirements to

the registration process that are found nowhere in EPA's regulations and that directly contradict the regulation's reliance on outside experts to validate an applicant's methodology:

(1) The Reference Material Requirement: The Guidance imposes an entirely new "reference material" requirement. Whereas the regulation specifies that the reasonable accuracy of an applicant's non-VCSB method is to be "demonstrated through peer reviewed references," the Guidance mandates a specific test for determining accuracy irrespective of what peer reviewers determine. The Guidance announces that "it is not possible, as a technical matter, to assess whether a method is accurately measuring how much of a cellulosic feedstock is converted into fuel without comparing the performance of the method to a known, representative reference material." JA84-85, JA87 (Guidance at 2-3, 5). It further declares that "a reference material that is representative of the feedstocks actually being processed is necessary to accurately determine the cellulosic converted fraction" because the reference material will "provide a 'true value' against which to evaluate" the accuracy of the method. JA85, JA87 (Guidance at 3 n.8, 5). The Guidance then provides that a method is "reasonabl[y] accura[te]" only if it yields values that are "within 20 percent of the reported cellulosic component of representative reference material." JA87 (Guidance at 5). The Guidance does not explain what role is left for peer reviewers now that EPA

has dictated that a method can be deemed reasonably accurate only if it produces results within 20 percent of the “known value” of an EPA-approved reference material.

Notably, the Guidance does not point to any existing representative “reference material” *that is satisfactory to EPA*. Indeed, the only “reference material” the Guidance mentions as being even potentially adequate (in EPA’s judgment) is still under development by the National Institute of Standards and Technology (“NIST”), with no timetable for completing the task.⁴ Importantly, EPA does not permit use of a synthetic reference material—one that has been synthesized in a lab using known quantities of starch and cellulose—but instead requires use of a naturally occurring reference material. *See* JA115 (“synthetic reference materials ... should not be used to assess whether the analytical methods are able to accurately measure the conversion of cellulose to fuel or apportion RINs correctly”); JA85 (Guidance at 3 n.7) (“NIST ... is developing representative reference materials using ... dried, ground and blended corn grain biomass”). But the Guidance nowhere explains how the “known value” of a naturally

⁴ EPA notes that NIST is currently evaluating candidate materials developed from “samples taken from a corn ethanol facility,” and “recently distributed the candidate materials for intra-laboratory analysis.” JA85-86 (Guidance at 3-4 & n.7). But it is unclear when those candidate materials will meet with NIST or EPA’s approval, if ever.

occurring reference material can be determined, when the entire purpose of the reference material is to determine if any existing measurement method is reasonably accurate. The Guidance also makes no effort to reconcile its requirement to use an as-yet-nonexistent reference material with the final rule's endorsement of "existing methods" of calculating the Converted Fraction. 79 Fed. Reg. at 42,132.

(2) The Mass Closure Prohibition: The Guidance also sets forth a prohibition on certain methods of measuring cellulosic content that is nowhere found in the 2014 regulation. The Guidance asserts "that it is not possible for an analytical method that is designed to focus on starch or some other non-cellulosic component(s) ... to yield reasonably accurate calculations for cellulose." JA86 (Guidance at 4). That assertion forecloses the use of a method relying on mass closure, which does not measure cellulose directly but rather indirectly establishes the amount of cellulose from direct measurements of the remaining components. The Guidance does not square this position with EPA's unambiguous statement in its 2014 Docket Memorandum that "[m]easurement of the starch content can be used to indirectly determine the cellulosic converted fraction." JA101. The Guidance also raises "concerns that resistant and retrograde starch present in samples due to feedstock handling or processing could impact laboratory results and cellulosic calculations" if a mass-closure approach is used. JA86 (Guidance at

4). But the Guidance does not address record evidence demonstrating that some methods of producing cellulosic ethanol or measuring starch for purposes of a mass-closure analysis have been shown not to raise concerns regarding resistant or retrograded starch. JA1250; JA1383-1384.

(3) The Demonstration Requirement: The Guidance further requires that the method be shown to have actually yielded accurate results, with the peer reviewer simply checking the resulting data to confirm that it is within the specified 20 percent tolerance of a specified naturally occurring reference material. Whereas the regulation provides that peer reviewers are to determine whether the proposed analytical method “would produce reasonably accurate results,” the Guidance states that “peer reviewed references ... must demonstrate to EPA that not only is the analytical method theoretically capable of producing accurate results, but that *its application has, in fact,* yielded a calculation of the cellulosic converted fraction that is reasonably accurate.” JA85 (Guidance at 3) (emphasis added). That is, the “[p]eer reviews ... must ... review the data to ensure that the method has actually provided reasonably accurate results,” within 20 percent of the known values. JA89 (Guidance at 7).

(4) The Additional VCSB Requirements: Finally, the Guidance imposes the same new requirements on applicants who use a method certified by a VCSB. The regulation states simply that an applicant may “us[e] an analytical method

certified by” a VCSB. 40 C.F.R. §80.1450(b)(1)(xiii)(B)(3). But the Guidance provides that certification by a VCSB is not enough and requires that VCSB methods satisfy all of the new criteria set forth in the Guidance for *non*-VCSB methods. According to the Guidance, “the same considerations ... are also relevant for purposes of ... obtaining the data used to calculate the cellulosic converted fraction using a VCSB-certified analytical method.” JA88 (Guidance at 6). In articulating this new requirement, EPA singled out as deficient a method permitting mass closure that was then under consideration—and is now moving toward publication—by the American Society of Testing and Materials, a VCSB. The Guidance states: “Given our concerns as articulated in the previous section, EPA does not believe that such a method, based on direct measurements of non-cellulosic components only, can produce accurate results for cellulose, even if it has been deemed a ‘VCSB’ method.” *Id.* The Guidance makes no attempt to reconcile this position with either the text of EPA’s regulation or EPA’s statement in the 2014 Docket Memorandum that, “[s]ince [an American Society of Testing and Materials] method has been adjudicated through the voluntary consensus standards body process[,] we are confident in its use in practice.” JA98.

* * *

Taken together, the requirements set forth in the Guidance require an applicant to demonstrate that its method of measuring cellulosic and starch content

yields results within 20 percent of the “known” value of an EPA-approved, naturally occurring reference material and does not involve a “mass-closure” approach to measuring cellulosic content, regardless of whether the method is VCSB approved or validated by peer reviewers. The requirements therefore effectively supplant the role of peer reviewers and VCSBs under the 2014 regulation—eliminating any role for their professional judgment and limiting their role to verifying the test data demonstrating accuracy of the method against the “known” reference value. That is a complete change in EPA’s approach to determining the acceptability of a measurement method.

D. The May 7, 2019 Letter

The same day EPA issued the Guidance, it also relied on the new requirements set forth in the Guidance to deny a registration application by a POET affiliate. POET’s bioprocessing facilities include ones that use POET’s patented BPX In-Situ Kernel Fiber Pathway production process (“BPX process”) to produce ethanol from corn starch and corn kernel fiber simultaneously. JA1173. One POET subsidiary, POET Biorefining – Hudson LLC (“Hudson”), filed a registration application with EPA for the BPX process on March 6, 2018. JA1168.⁵ Hudson’s application relied on a proprietary analytical method for

⁵ Hudson is not a petitioner in this case.

measuring cellulose and starch content developed by its third-party laboratory partner, Soliton. JA1174-1175. Consistent with EPA's regulations, Hudson demonstrated the reasonable accuracy of Soliton's method by submitting five peer-reviewed references. JA1178-1207 (peer reviews from Gibbons, Topel, and Sluiter); JA1208-1211 (Narendranath); JA1212-1215 (Hanson). Hudson also submitted data comparing Soliton's method to reported values for a commercially available synthetic reference material formulated using known quantities of cellulose and starch. JA1176. The independent third-party engineer evaluated Hudson's information and concluded that the application met the applicable requirements. JA1172.

On May 7, 2019—the same day the Guidance issued—Assistant Administrator Wehrum also sent Hudson a letter stating that EPA was declining to approve Hudson's application. *See* JA107-119 (“Letter”). EPA explained that the Soliton method for determining the ethanol derived from the corn starch versus kernel fiber was inadequate. JA115. EPA did not raise any concerns about the qualifications or objectivity of Hudson's five peer reviewers. JA114. Instead, EPA raised objections to the Soliton method that closely track the Guidance—often verbatim. In particular:

First, EPA stated that it “believe[s] that reasonable accuracy should be demonstrated by validating that the results of a proprietary analytical method for

calculating the cellulosic converted fraction are within 20 percent of the reported cellulosic value of a representative reference material.” JA111; *cf.* JA 87 (Guidance at 5) (“[W]e believe that reasonable accuracy should be demonstrated by validating that the results of a non-VCSB analytical method for calculating the cellulosic converted fraction are within 20 percent of the reported cellulosic value of a representative reference material.”). EPA rejected Hudson’s use of a *synthetic* reference material because EPA “does not believe synthetic reference materials accurately replicate the way starch and cellulose are interwoven and present in the feedstock, and therefore should not be used to assess whether the analytical methods are able to accurately measure the conversion of cellulose to fuel or apportion RINs correctly.” JA115; *cf.* JA87 (Guidance at 5) (stating that a reference material must be “representative of the feedstocks actually being processed”). The Letter thus imposed the Reference Material Requirement from the Guidance. But like the Guidance, the May 7 Letter never addressed the inherent circularity in EPA’s requirement that applicants measure their methods against “known” values of a naturally occurring reference material when there is currently no universally accepted way to establish those values as “known.”

Second, the Letter rejected Soliton’s use of a “mass closure” approach to measuring cellulosic fiber content because EPA “believes it is not possible for an analytical method that is designed to focus on starch or some other non-cellulosic

component(s), where the accuracy is determined for various components and not for cellulose directly by comparison to a representative reference material, to yield reasonably accurate calculations for cellulose.” JA110; *accord* JA86 (Guidance at 4). The Letter therefore also applied the Mass Closure Prohibition from the Guidance.

Third, EPA rejected the Hudson application because some of the peer reviewers merely “believed the analytical method could theoretically yield acceptable results based on the steps involved but indicated that they had not evaluated the accuracy of those results.” JA114. EPA thus criticized the peer reviews as being “limited to the ‘paper methodology.’” *Id.* That reflected the Guidance’s new Demonstration Requirement.

In the cover email transmitting the Letter to POET, EPA provided an Internet link for the Guidance and noted the Guidance would be available on the agency’s web site the next day. JA105. The Letter is currently the subject of a separate pending petition for review by Hudson before the Eighth Circuit. *See* 42 U.S.C. §7607(b)(1) (conferring jurisdiction over final actions that are “locally or regionally applicable” in “the United States Court of Appeals for the appropriate circuit”).

SUMMARY OF THE ARGUMENT

Contrary to EPA's suggestion, the Guidance constitutes reviewable final agency action. It reflects the consummation of EPA's consideration, and it imposes legal obligations. It speaks with binding force, insisting that registration applicants comply with requirements that are not found in EPA's governing regulation and that are inconsistent with that regulation. The Guidance thus presents registration applicants with a clear choice between compliance with EPA's novel requirements and denial of their applications. The Guidance also binds EPA staff to apply its requirements, and EPA has, in fact, already applied them to deny the application of a POET affiliate (Hudson) even though that application otherwise satisfied the 2014 regulation's requirements.

On the merits, the Guidance's new requirements are contrary to law. The requirements of the Guidance are irreconcilable with the plain text of EPA's regulation and any reasonable interpretation of it. The Reference Material Requirement, the Mass Closure Prohibition, the Demonstration Requirement, and the Additional VCSB Requirements imposed by the Guidance are not contained in EPA's 2014 regulation, which provides that a method for determining cellulosic and starch content is acceptable if validated by peer reviewers or certified by a VCSB. Indeed, the new requirements in the Guidance contradict the regulation by inserting EPA into the role that the regulation had assigned to outside experts.

EPA's interpretation of the 2014 regulation is entitled to no deference because it conflicts with the plain text of the regulation, is unreasonable, and marks a sudden shift in policy that disrupts settled regulatory expectations.

EPA's principal new requirements are also arbitrary and capricious. The Reference Material Requirement is impossible to satisfy because no representative reference material acceptable to EPA exists, and EPA cannot confirm whether one will exist in the foreseeable future. Moreover, the requirement that applicants use a naturally occurring reference material with "known" amounts of cellulose and starch is circular given that some method must be used to measure the cellulose and starch in the reference material. Further, the requirement contradicts EPA's assertion in 2014 that there were acceptable "existing methods" for measuring cellulose and starch content.

The Mass Closure Prohibition is likewise arbitrary and capricious. This prohibition contradicts EPA's statements in 2014 that mass-closure methods were permissible. Additionally, the record does not support EPA's contention that a mass-closure approach is necessarily inaccurate because of concerns regarding resistant starch. Moreover, EPA's prohibition on mass-closure methods renders the Guidance internally irrational because, if a method is demonstrated to achieve results within the specified 20% threshold of the reference material, the method would meet EPA's standard for reasonable accuracy regardless of whether it used

mass-closure. This Court should accordingly grant the petition for review and vacate the Guidance.

STANDING

Petitioner POET Biorefining, LLC, owns and operates ethanol production facilities, including through operating subsidiaries, ten of which are the other petitioners in this case. *See* JA1000-1001; JA1225-1226. As noted, POET uses proprietary technology to produce cellulosic and conventional ethanol from corn kernels. JA1168. POET has applied, or intends to apply, to register more than twenty production facilities that would use such technology. JA113; JA1225. Because POET's technology biochemically co-processes the corn starch and the cellulosic corn kernel fiber, JA1173, its registration applications must include the cellulosic Converted Fraction for its process based on data obtained through an appropriate method. Consequently, POET must comply with the additional requirements imposed by the Guidance, which cannot presently be satisfied. EPA has already denied one POET facility's registration application based on the conclusions in the Guidance. *See* JA114-115.

POET is a direct object of the Guidance's new requirements and is injured by them. The new requirements adversely affect POET's ability to generate valuable D3 RINs for cellulosic ethanol, an injury that would be redressed by vacating the Guidance and restoring the regulatory status quo ante. POET

accordingly has standing. *See United States Telecom Ass’n v. FCC*, 825 F.3d 674, 739 (D.C. Cir. 2016).

ARGUMENT

I. THE GUIDANCE IS A REVIEWABLE FINAL AGENCY ACTION

This Court has jurisdiction to hear this challenge because the Guidance is a “final action taken” by EPA. 42 U.S.C. §7607(b)(1).⁶ As this Court recently held, “a legislative rule is ... necessarily final.” *California Communities Against Toxics v. EPA*, 934 F.3d 627, 635 (D.C. Cir. 2019). Yet, this Court also made clear in *California Communities* that the “finality analysis ... is distinct from the test for whether a rule is legislative,” and accordingly that agency actions may be final and reviewable even if not a legislative rule. *Id.* at 635-636. “[P]ermitt[ing] courts to review nonlegislative rules ... safeguards against agencies evading both judicial review and notice and comment by acting via nonlegislative rules.” *Id.* at 636.

Regardless of whether it is a legislative rule, the Guidance satisfies both elements of the Supreme Court’s general test for finality, which is “pragmatic and flexible.” *Safari Club Int’l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) (quotation marks omitted); *accord U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136

⁶ Although this case arises under the Clean Air Act, precedents interpreting the “final action” requirement in the Administrative Procedure Act apply because that “phrase ... bears the same meaning” in the two statutes. *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 478 (2001).

S. Ct. 1807, 1815 (2016) (noting that Supreme Court has “long take” a “pragmatic approach” to finality (quotation marks omitted)). In any event, the Guidance is also final because it is in fact a legislative rule.

A. The Guidance Is Final Under The Supreme Court’s Two-Part Test For Finality

Under the Supreme Court’s general test for finality, agency action is “final” if it meets “two conditions”: (1) it “mark[s] the consummation of the agency’s decisionmaking process”; and (2) it is “one by which rights or obligations have been determined, or from which legal consequences will flow.” *Hawkes*, 136 S. Ct. at 1813 (quotation marks omitted). The Guidance meets both conditions. The Guidance marks the consummation of EPA’s decisionmaking process because it is a definitive rather than tentative directive issued by a high-ranking EPA official exercising authority delegated by the Administrator. In fact, it has already been used to deny a registration application. The Guidance also has legal consequences and affects private interests because it sets forth requirements that EPA staff must apply and applicants must meet to register a production facility and thereby receive valuable RFS credits for the resulting renewable fuel.

1. The Guidance marks the consummation of EPA’s decision-making process

The Guidance is a definitive EPA statement regarding the registration requirements under 40 C.F.R. §80.1450(b)(1)(xiii)(B)(3). The Guidance was

signed by the Senate-confirmed Assistant Administrator of EPA's Office Air and Radiation, the agency's top decisionmaker for air policy, who reports directly to the Administrator. Moreover, the Guidance repeatedly uses definitive language making clear that EPA staff will not approve applications that do not satisfy the Guidance's requirements. For example:

- “The intent of this guidance is to explain our interpretation of our regulatory requirements and to *articulate clear criteria*” JA83 (Guidance at 1) (emphasis added).
- “EPA interprets [the peer-reviewed reference requirement] as *requiring* that peer reviewed references ... demonstrate the accuracy of the results of that method.” JA85 (Guidance at 3) (emphasis added).
- “[T]he references *must demonstrate* [certain facts] to EPA” *Id.* (emphasis added).
- “Both criteria *must be* satisfied in order to demonstrate that the method used to calculate the cellulosic converted fraction would produce reasonably accurate results.” *Id.* (emphasis added).
- “[I]t is *critical* that the analytical method has been demonstrated to produce reasonably accurate results.” *Id.* (emphasis added).
- It is a “*fact* that it is *not possible*, as a technical matter, to assess whether a method is accurate[] ... without comparing the performance of the method to a known, representative sample.” *Id.* (emphases added).
- “Accurate calculations of cellulosic conversion *are necessary* to ... provide industry with a *path forward on RFS registrations.*” *Id.* (emphasis added).
- “EPA believes it is *not possible* for an analytical method that is designed to focus on starch or some other non-cellulosic component(s), where the accuracy is determined for various components and not for cellulose directly by comparison to a representative reference material, to yield reasonably

accurate calculations for cellulose.” JA86 (Guidance at 4) (emphasis added).

- “These results again *demonstrate* that calculations based on starch reference value alone *cannot ensure* that resulting estimates of cellulosic conversion are reasonably accurate.” *Id.* (emphases added).
- “In *our technical judgment*, a reference material that is representative of the feedstocks actually being processed *is necessary* to accurately determine the cellulosic converted fraction, which is in turn needed to accurately apportion RINs.” JA87 (Guidance at 5) (emphasis added).
- “The same considerations regarding the use of a non-VCSB method under this second option *are also relevant* for purposes of the first option” JA88 (Guidance at 6) (emphasis added).
- “EPA *does not believe* that such a method ... *can produce accurate results* for cellulose, even if it has been deemed a ‘VCSB’ method.” *Id.* (emphases added).
- “EPA *would not consider* such an outcome to be sufficiently accurate to inform RIN allocation” *Id.* (emphasis added).
- “Peer reviews ... *must also review the data* to ensure that the method has actually provided reasonably accurate results.” JA89 (Guidance at 7) (emphasis added).

This definitive language demonstrates that the Guidance is the consummation of the EPA’s consideration regarding the following key issues: (1) that comparison to a “known” and “representative” “reference material” satisfactory to EPA is required (the Reference Material Requirement), (2) that mass closure methods for measuring cellulosic content are unacceptable (the Mass Closure Prohibition), (3) that peer reviewers must validate not merely the proposed

analytical method but also the results of that method (the Demonstration Requirement), and (4) that the new requirements set forth in the Guidance for non-VCSB methods also apply to VCSB methods (the Additional VCSB Requirements). After the Guidance, these issues are all “closed question[s].” *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011).

The May 7 Letter confirms that the Guidance reflects the conclusion of EPA’s decisionmaking process on the subject. As explained above, in that Letter EPA applied the precise requirements set forth in the Guidance—issued the same day—to deny POET’s Hudson application. It did so, moreover, using the same concepts and similar, and sometimes identical, language. Against this context, the caveat that the Guidance reflects only EPA’s “current view,” JA83, JA88 (Guidance at 1, 6), is insufficient to render it non-final. “The ‘possibility’ that [EPA] ‘may revise [its decision] ... based on new information ... is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal.” *Safari Club*, 842 F.3d at 1289 (quoting *Hawkes*, 136 S. Ct. at 1814).

2. *The Guidance determines obligations and legal consequences flow from it*

The Guidance also satisfies the second requirement for finality because it imposes binding obligations on regulated parties and commits the agency to adhering to its requirements. When an agency action is “binding,” it is final. *Natural Res. Def. Council*, 643 F.3d at 319. “An agency pronouncement will be

considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding.” *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citation omitted). Both of these alternative tests are satisfied here.

First, the Guidance imposes four requirements on registration applicants—the Reference Material Requirement, the Mass Closure Prohibition, the Demonstration Requirement, and the Additional VCSB Requirements—that are binding on their face and tell producers of cellulosic ethanol (such as POET) that failure to follow them will result in rejection of their registration applications. “[T]he mandatory language of a document ... will have practical binding effect ... if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as ... denial of an application.” *General Electric*, 290 F.3d at 383 (quotation marks omitted) (third ellipses in original); *see Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

As demonstrated above, the language used in these directives is “unequivocal” and “certain.” *Appalachian Power*, 208 F.3d at 1022. In setting them out, the Guidance “reads like a ukase. It commands, it requires, it dictates.” *Id.* at 1023. For instance, comparison to a reference material is “*necessary*,” JA85 (Guidance at 3 n.8) (emphasis added), mass closure methods “*cannot*” demonstrate reasonably accurate results, JA86 (Guidance at 4) (emphasis added), “peer

reviewed references ... *must*” comply with the Demonstration Requirement, JA85 (Guidance at 3) (emphasis added), and “[t]he same considerations regarding the use of a non-VCSB method under this second option *are also relevant* for purposes of the first option,” JA88 (Guidance at 6) (emphasis added). These provisions of the Guidance carry “binding force.” *General Electric*, 290 F.3d at 384.

Before the Guidance, an applicant relying on a non-VCSB analytical method could demonstrate reasonable accuracy by presenting peer-reviewed references—evaluating the proposed methodology alone—to the third-party engineer. The applicant also did not need to provide data showing the performance of its method in measuring the content of cellulose in an EPA-approved representative reference material, and if it did, a *synthetic* reference could suffice. The applicant, moreover, could rely on a mass-closure method to measure cellulosic fiber indirectly. Finally, an applicant relying on a *VCSB-certified* analytical method could obtain registration without more.

After the Guidance, none of that remains true. The Agency will not approve an application that does not conform to the new requirements in the Guidance. And rejection of a registration application, which precludes the applicant from generating RINs, is a “legal consequence[] of enormous significance.” *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007).

This Court’s decision in *Natural Resources Defense Council* is instructive. There, the Court held that legal consequences flowed from a guidance document that “altered the legal regime” by removing a previously available ground on which a regional director could reject a National Ambient Air Quality Standards state implementation plan. 643 F.3d at 320. The Guidance here likewise “alter[s] the legal regime” by changing the grounds for rejection—establishing *new* grounds for rejection.

In short, “[t]o the applicant reading the Guidance Document the message is clear: in reviewing applications [EPA] will not be open to considering approaches other than those prescribed in” the Guidance. *General Electric*, 290 F.3d at 384. The Guidance also “provides firm guidance to [agency staff] about how to handle [registration] decisions.” *National Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1007 (D.C. Cir. 2014). Indeed, the Guidance leaves no doubt about what EPA staff should do if they receive an application that does not comport with the requirements set forth in it—they should reject the application without further review.

The Guidance thus has “concrete consequences ... as a result of the specific statutes and regulations that govern it.” *California Communities*, 934 F.3d at 635. The Guidance sets forth requirements that applicants must meet in order to obtain the EPA registration necessary to generate D3 and D6 RINs by producing ethanol

simultaneously from corn kernel fiber and starch. “EPA has uncontested authority to adopt and enforce policies regarding how [agency staff] must implement and enforce” the registration process. *National Env'tl. Dev.*, 752 F.3d at 1007. The Guidance does just that, announcing a “new ... regime” for registration applications. *Id.*

This conclusion is unaltered by boilerplate “disclaimer” language in the Guidance (mainly in its introduction) stating (at JA83) that the Guidance “provides EPA’s current view,” “does not create any new requirements,” and “may not apply to a particular situation based on the circumstances.” *See Appalachian Power*, 208 F.3d at 1023. These statements do not undermine the mandatory language throughout the body of the Guidance. As explained above, the portions of the Guidance setting forth the Reference Material Requirement, the Mass Closure Prohibition, the Demonstration Requirement, and the Additional VCSB Requirements are definitive. The Guidance does not acknowledge the possibility that peer reviewers might conclude that the requirements are unnecessary for a given methodology. The fact that EPA “might reconsider” the Guidance in particular future cases “does not suffice to make an otherwise final agency action nonfinal.” *Sackett v. EPA*, 566 U.S. 120, 127 (2012); *see also National Env'tl. Dev.*, 752 F.3d at 1006-1007.

Second, EPA has treated the conclusions in the Guidance as binding. This Court has held that, “[i]f an agency acts as if a document issued at headquarters is controlling in the field, ... if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties ... to believe that it will declare [applications] invalid unless they comply with the terms of the document,” then the document is final. *Appalachian Power*, 208 F.3d at 1021. That is the case here. As noted above, in the Letter issued in May 2019, EPA refused to approve Hudson’s registration application because Hudson failed to meet the Demonstration and Reference Material Requirements and ran afoul of the Mass Closure Prohibition. JA110, JA114-115. EPA’s simultaneous application of the conclusions in the Guidance to Hudson’s application confirm not only that the Guidance is the consummation of EPA’s decision-making process but also that the Guidance is binding. *Cf. McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988) (“later conduct applying” document “confirms its binding character”).

Further, EPA has indicated that it will continue to apply the requirements set forth in the Guidance to future applications. The denial Letter to Hudson stated that EPA will evaluate applications only “once a representative reference material with reportable starch and cellulosic values has been produced by NIST, and once

that reference material is available to industry to certify the proprietary analytical methods involved in such applications.” JA115.

B. The Guidance Is Final Because It Is A Legislative Rule

Although, as explained, an agency action may be final even if not a legislative rule, the Guidance is also final because it is, in fact, a legislative rule. “Agency action that ... imposes new obligations on regulated parties or narrowly limits administrative discretion constitutes a legislative rule.” *Association of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015). A classic example of a legislative rule is an agency action that “set[s] forth legally binding requirements for a private party to obtain a permit or license.” *Id.* at 716-717 (quotation marks omitted). Further, “if a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule ... must itself be legislative.” *Id.* at 718. The Guidance fits the bill.

As explained above, the Guidance does “more than simply clarify or explain a regulatory term, ... confirm a regulatory requirement, or maintain a consistent agency policy.” *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (quotation marks omitted). It imposes a new set of conditions that must be satisfied for EPA to approve a registration application enabling a producer to receive RFS credit for its cellulosic ethanol. And these new requirements contradict the 2014 regulation by replacing the judgment of outside experts in

assessing scientific validity with a simplistic yet dubious test established by EPA. As detailed above, the Guidance is written in the language of “an edict”: it is not “riddled with caveats” or ““precatory”” language (e.g., “may and should”) but rather is definitive and ““mandatory”” (e.g., “must”). *Huerta*, 785 F.3d at 717-718. “In other words,” the Guidance gives no hint that producers or EPA staff “are free to ignore” it in preparing or evaluating registration applications. *Id.* at 717. The Guidance, therefore, is a legislative rule, which is final and reviewable.

II. THE GUIDANCE IS CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS

On the merits, there is no question that the Guidance is contrary to EPA’s regulation. It imposes additional requirements that not only go beyond the requirements established by the regulation but also reverse the fundamental purpose of the regulation, which was to defer to the technical judgments of outside experts in evaluating the validity of a measurement method. The Guidance’s new requirements, moreover, are arbitrary and capricious in numerous respects.

A. The Guidance Is Contrary To The Regulation

Agencies are bound by their own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-268 (1954). They cannot ignore them or purport to revise them without following proper rulemaking procedures. There is “no distinction ... between initial agency action and subsequent agency action undoing or revising that action.” *FCC v. Fox Television Stations, Inc.*, 556 U.S.

502, 515 (2009). An agency must “use the same procedures when [it] amend[s] ... a rule as [it] used to issue the rule in the first instance.” *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015). EPA cannot evade notice-and-comment requirements “by calling a substantive regulatory change an interpretative rule.” *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005). Thus, the Guidance cannot stand if it is contrary to EPA’s duly promulgated regulations.

In some situations, agencies are entitled to so-called *Auer* deference for their interpretations of their own regulations. But deference is not warranted here. As the Supreme Court recently explained, “[t]he possibility of deference can arise only if a regulation is genuinely ambiguous” after a court “has resorted to all the standard tools of interpretation.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). It is equally settled that courts need defer only to “reasonable” agency readings of a regulation. *Id.* at 2415-2416. And a “court may not defer to a new interpretation ... that creates ‘unfair surprise’ to regulated parties.” *Id.* at 2417-2418. Under these well-established standards, the Guidance must be set aside.

1. *The Guidance conflicts with the plain meaning of the regulation*

EPA’s 2014 regulation provides that the data used to measure the cellulosic Converted Fraction must be obtained using an analytical method (1) “certified by a voluntary consensus standards body,” or (2) “that would produce reasonably

accurate results *as demonstrated through peer reviewed references* provided to the third party engineer performing the engineering review at registration.” 40 C.F.R. §80.1450(b)(1)(xiii)(B)(3) (emphasis added). In contrast, EPA’s Guidance states that “reasonable accuracy should be demonstrated” by something other than peer review—“by validating that the results of a non-VCSB analytical method for calculating the cellulosic converted fraction are within 20 percent of the reported cellulosic value of a representative reference material,” JA111 (Guidance at 5), and even extends this requirement to VCSB-approved analytical methods. In essence, the Guidance replaces peer review with a specific data requirement.

The regulation unambiguously delegates the task of determining the soundness of an analytical method to expert, independent third parties (a VCSB or peer reviewers), while the Guidance strips peer reviewers of that role and replaces them with a mathematical test. The regulation does not layer any additional standard determined by EPA on top of peer review. The regulation explicitly defines peer review as the complete means for determining reasonable accuracy. Under this structure, it would be absurd to suggest that peer reviewers are mere fact checkers of a mathematical test. For these reasons alone, EPA’s attempt to impose various new standards in the Guidance is contrary to the regulation.

EPA’s reliance on independent experts or expert bodies in the regulations is not unusual and in fact comports with congressional policy set forth in the National

Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (1996). That statute directs federal agencies to “consult with voluntary, private sector, consensus standards bodies” and to “use technical standards that are developed or adopted by voluntary consensus standards bodies,” unless doing so would be “inconsistent with applicable law or otherwise impractical.” *Id.* §12(d), 110 Stat. at 783; *see also* 79 Fed. Reg. at 42,158 (explaining why final rule is “consistent with the[se] requirements”).⁷ There is accordingly no reason to interpret the regulation at odds with its plain terms.

The particular standards EPA has imposed in the Guidance are also contrary to the regulation. By its plain terms, the regulation does not contemplate that a method for obtaining data may be used only if it meets the various requirements set forth in the Guidance—the Reference Material Requirement, the Mass Closure Prohibition, the Demonstration Requirement, and the Additional VCSB

⁷ EPA routinely delegates scientific details to third parties by accepting tests or methods that have been endorsed by technical bodies or industry experts. Sometimes, EPA does so by endorsing any method approved by certain bodies or experts. *E.g.*, 40 C.F.R. §80.585(a)(1) (allowing use of any VCSB-approved test method for determining sulfur content of diesel fuel); *id.* §98.33(a)(3)(iv) (allowing use of any VCSB method for measuring fuel density); *id.* §136.4(a)(3) (allowing alternative test procedures for wastewater discharges if submitted “together with references to published or other studies confirming the general applicability of the alternative test procedure for the analysis” at hand). Other times, EPA mandates use of particular VCSB-certified test methods. *E.g.*, *id.* §98.34(d)-(e) (specifying particular VCSB method to determine biogenic portion of carbon dioxide emissions from municipal solid waste combustor).

Requirements. None of these additional conditions finds support in the text of the regulation. The regulation neither says nor implies anything about a method having to determine the amount of cellulosic material in a “representative reference material” (with 20 percent or any other threshold of accuracy). The regulation says that, in the absence of a VSCB-approved method, reasonable accuracy is to be “demonstrated through peer reviewed references provided to the third party engineer performing the engineering review at registration.” 40 C.F.R. §80.1450(b)(1)(xiii)(B)(3). In the Guidance, however, EPA changes how reasonable accuracy is to “be demonstrated”: “by validating that the results of a non-VCSB analytical method ... are within 20 percent of the reported cellulosic value of a representative reference material.” JA87 (Guidance at 5). The Guidance completely erases the role of the peer reviewer and replaces it with a mathematical test.

Similarly, the regulation does not impose any explicit or implicit prohibition on calculating the amount of cellulosic fiber using a mass-closure method, i.e., a method that measures cellulosic materials indirectly. Indeed, the record indicates that, when EPA promulgated the regulation, it approved of mass-closure methods, having stated that “[m]easurement of the starch content *can be used to indirectly determine* the cellulosic converted fraction.” JA101 (emphasis added). The regulation also does not implicitly or explicitly require peer reviewers to review

results that the analytical method at issue “has, in fact, yielded.” JA85 (Guidance at 3). To the contrary, the regulation simply requires that peer reviewers consider whether a non-VCSB method “*would* produce reasonably accurate results,” if used in the future. 40 C.F.R. §80.1450(b)(1)(xiii)(B)(3) (emphasis added).

The broader effect of EPA’s new requirements is to arrogate to EPA itself the fundamental task its regulation delegated to peer reviewers, namely, deciding how to assess a method’s accuracy and then assessing a given method against those criteria. Unlike in other contexts, where EPA has specified in detail the procedures for taking measurements, *e.g.*, 40 C.F.R. §1065.145, EPA here tasked third parties with verifying the soundness of the methods used to gather data. The Guidance contravenes that considered and codified judgment. The directives in the Guidance effectively eliminate the concept of a peer review from the regulation. “Peer review” is a term of art, connoting “a documented process ... conducted by qualified individuals (or organizations) who are independent of those who performed the work and who are collectively equivalent in technical expertise to those who performed the original work.” EPA, *Peer Review Handbook* 20 (4th ed. 2015). Inherent in the concept of a peer review is the exercise of critical judgment based on the objective assessment of experts with relevant credentials. *See id.* at A-2.

Contrary to the Guidance's new requirements, therefore, a peer reviewer is entitled and expected to bring his or her own independent judgment to bear in concluding that an analytical method would produce reasonably accurate results. For example, a peer reviewer exercising appropriate judgment and relying on his or her experience in the field might determine that a method "would produce" reasonably accurate results without "demonstrat[ing]" to EPA that it "in fact" had done so in prior testing, or without demonstrating that it in fact had specifically yielded results within 20 percent of the "true value" of a particular naturally occurring reference material. JA85 (Guidance at 3). A peer reviewer might conclude, based upon independent and informed judgment, that it was appropriate to assess a method's accuracy against the known value of a *synthetic* reference material. Similarly, a peer reviewer might approve of a method that relies on mass closure, either because the peer reviewer finds the types of concerns EPA has raised are not present with a particular mass-closure method or that the method would yield sufficiently accurate results notwithstanding those concerns. The Guidance forecloses all of these possible outcomes.

As for VCSB-certified methods, the regulation plainly does not require that such a method must be deemed "reasonabl[y] accura[te]," much less that it must meet the particular standards EPA created from whole cloth for non-VCSB methods in the Guidance. The regulation provides that data to calculate the

Converted Fraction may be “obtained using an analytical method certified by a consensus standards body,” full stop. 40 C.F.R. §80.1450(b)(1)(xiii)(B)(3). There is no further requirement beyond certification by a VCSB. It is no answer for the Guidance to assert that the VCSB and non-VCSB options in the regulation are “functional equivalents”—“two different ways of ensuring results are of sufficient accuracy to inform RIN allocation.” JA88 (Guidance at 6 n.16). The VCSB and non-VCSB options go about “ensuring ... sufficient accuracy” in different ways. For the VCSB option, certification by a VCSB alone is enough under the regulation as written. As EPA explained in the 2014 Docket Memorandum, once a method “has been adjudicated through the voluntary consensus standards body process[,] we are confident in its use in practice.” JA98. In the Guidance, EPA simply abandoned that conclusion, without any acknowledgement.

The extent to which EPA is supplanting the role its regulation delegates to third parties is thus particularly clear with respect to the VCSB-certified option. Even though there is no “reasonable accuracy” requirement for applicants proceeding through a VCSB-certified method, EPA has nevertheless attempted to import the standards it has outlined for reasonable accuracy to dictate the parameters of VCSB-certified methods as well. EPA’s interpretation of this provision is entirely unmoored from the text of the regulation.

2. *The Guidance is not reasonable*

For the same reasons and others, the Guidance is not a “reasonable interpretation” of EPA’s regulation. *Kisor*, 139 S. Ct. at 2416. An “interpretation” that crafts new standards out of thin air and displaces the role of experts contemplated by the regulation cannot be reasonable. Indeed, for non-VCSB methods, the Guidance supplants outside experts’ scientific judgment and precludes the possibility of a true “peer review” in two particularly unreasonable ways:

First, the Guidance dictates the outcome of all peer reviews—for now and the foreseeable future—by defining “reasonably accurate” to require something that currently is literally impossible. The Guidance requires data generated by the method to be compared to the known value of an EPA-approved naturally occurring “representative reference material” that does not now, and may never, exist. *See supra* p. 18. And EPA has correspondingly foreclosed using a synthetic reference material constructed from known quantities of cellulose and starch. *See supra* p. 18.

Second, the Guidance regulates the specific manner in which a method can measure cellulosic fiber content, stating that mass-closure methods that measure fiber indirectly are *per se* unacceptable. But dictating the precise approach for measuring cellulosic content does not represent a reasonable gloss on the terms

“peer review”—or “reasonably accurate.” EPA cannot categorically prohibit mass-closure methods without arrogating to itself the scientific role that the regulation delegates to the peer reviewers. Indeed, after the Guidance, it is hard to see what purpose peer review plays at all, other than to check the applicant’s math. That is just data verification; it is not a “peer review” under any reasonable construction of that term.

As to VCSB methods, the reasonableness inquiry is even simpler. There simply is no range of reasonable interpretation that even conceivably encompasses the position set forth in the Guidance. Under EPA’s regulation, once a method is certified by a VCSB, the matter is at an end—the method is acceptable. But the Guidance requires a separate additional showing of “reasonable accuracy.” That is not a reasonable interpretation.

3. *The Guidance creates unfair surprise*

Auer deference does not apply here for yet another reason: The Guidance conflicts with EPA’s prior interpretation and upsets legitimate reliance interests. A “court may not defer to a new interpretation, whether or not introduced in litigation, that creates ‘unfair surprise’ to regulated parties.” *Kisor*, 139 S. Ct. at 2417-2418. “An agency construction ‘conflict[ing] with a prior’ one” is “therefore only rarely given *Auer* deference.” *Id.* at 2418 (quoting *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 515 (1994)).

When it promulgated the regulation at issue, EPA explained that applicants relying on a non-VCSB method need only “provide peer reviewed references to the third party engineer performing the engineering review at registration to show that the non-VCSB method used is an adequate means of generating the data.” JA99. EPA also explained that because a VCSB-certified method “has been adjudicated through the voluntary consensus standards body process[,] we are confident in its use in practice.” JA98. The Guidance constitutes a stark departure from these interpretations.

The departure also plainly upsets applicants’ legitimate reliance interests. Petitioners, other kernel fiber ethanol producers, and other stakeholders have spent considerable time and resources developing both VCSB- and non-VCSB-certified analytical methods that comply with the requirements set forth in EPA’s 2014 regulation, the preamble thereto, and the accompanying Docket Memorandum, all of which EPA released more than five years ago. This is certainly not a situation where EPA circulated its new interpretation “early and widely.” *Kisor*, 139 S. Ct. at 2421. To the contrary, EPA’s changed position came without warning years after promulgating the regulation. It would be unfair to grant deference to EPA’s disruptive reinterpretation of the 2014 regulation.

B. The Guidance Is Arbitrary And Capricious

The Guidance is also arbitrary and capricious in numerous respects. A rule is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. The Reference Material Requirement is arbitrary

It was arbitrary and capricious for EPA to require applicants to compare the results generated by their proposed methods against the reported true value of a reference material that is “representative of the feedstocks actually being processed.” JA87 (Guidance at 5).

First, the Reference Material Requirement effectively forecloses registration of facilities producing cellulosic ethanol from corn kernel fiber because there is no naturally occurring representative reference material that would satisfy EPA. EPA has given no indication that it will develop a reference material meeting its specifications within any timeframe or that development of such material is even possible. As the Guidance explains, EPA “approach[ed NIST] in August 2017”—over two years ago—to begin this process, and NIST only “recently distributed the

candidate materials for intra-laboratory analysis.” JA85-86 (Guidance at 3-4). Distribution appears to be just the first step, to be followed by two subsequent “round[s]” of testing at an indeterminate time. JA86 (Guidance at 4). As noted above (*supra* p. 23), there is now a commercially available synthetic reference material—one that is prepared from known quantities of starch, cellulose, and other materials—but EPA has rejected reliance on that reference material. *See supra* pp. 18, 23-24. Accordingly, it is currently impossible for applicants to comply with the Reference Material Requirement and will likely remain so indefinitely.

Second, requiring producers to use a naturally occurring representative reference material to validate the accuracy of their methods is hopelessly circular. The exact composition of a natural reference material can be determined only if there is a way to measure it that is known to be accurate. But identifying such a method is the reason why EPA wants to use a reference material in the first place. An example illuminates this problem. Suppose one wants to develop a method to measure the amount of sugar in a substance and wants to use the “known value” of sugar in another substance as the reference to test the method’s accuracy. If one uses a naturally occurring reference material—say, orange juice—one would first have to know the amount of sugar in orange juice, which in turn would require an accurate method to measure the amount of sugar in a substance. But that renews

the very problem that the reference material is supposed to help solve. *See* JA1349-1364.

Currently, the “true value” of a natural reference material for a corn kernel fiber feedstock can only be approximated by obtaining multiple analyses of the material from different laboratories applying their own methods, and then averaging those results. *See* JA85-86 (Guidance at 3-4) (noting that candidate materials have recently been distributed for “intra-laboratory analysis”); JA1352. Those laboratories, however, must themselves rely on test methods that have not been validated against a known reference material. The value derived by those laboratories therefore is no more “true” than the value obtained by any given applicant. If the applicant’s value differs from the so-called “true value,” that could just as easily reflect that the applicant’s method is *more* accurate than the laboratory average than that it is less accurate.

One solution to this circularity problem is using a *synthetic* reference material with known amounts of starch and other components. EPA categorically rejected using synthetic reference material, *see supra* pp. 18, 23-24, but that judgment is irrational, particularly when synthetic materials are considered in light of the fundamental flaw in using naturally occurring ones. Consider again the problem of assessing the accuracy of a method for measuring the amount of sugar in a substance. But instead of using orange juice as the reference material, use a

synthetic drink—say, orange Gatorade. Because Gatorade is made by combining specific amounts of ingredients, one need only look at the recipe for Gatorade to see how much sugar it contains; there is no need for an independent method to measure its sugar content. Similarly, one can test the accuracy of a method by using it to determine the composition of a synthetic reference material that is prepared from known amounts of cellulose and starch. JA1352. And as noted, there is a commercially available synthetic reference material, which POET has demonstrated is representative of naturally occurring materials. JA1239. And even if there were no suitable synthetic reference material yet, the industry can and does continue to refine these materials. EPA has no basis now to disqualify all synthetic reference materials in the future.

For these reasons, EPA’s insistence on the use of a naturally occurring known reference material is both “counter to the evidence before the agency” and “implausible.” *State Farm*, 463 U.S. at 43. Making it impossible for applicants to validate their methods is particularly arbitrary when everyone agrees that producers *are* producing ethanol from cellulosic corn kernel fiber and the only dispute is over exactly *how much*.

2. *The Mass Closure Prohibition is arbitrary*

Foreclosing all analytical methods that measure cellulose content indirectly, including mass-closure methods, is also arbitrary—on its own but especially if the

Reference Material and Demonstration Requirements stand. The 2014 Docket Memorandum expressly states that “[m]easurement of the starch content can be used to indirectly determine the cellulosic converted fraction.” JA101. Yet the Guidance states that “it is not possible for an analytical method that is designed to focus on starch or some other non-cellulosic component(s), where the accuracy is determined for various components and not for cellulose directly . . . , to yield reasonably accurate calculations.” JA86 (Guidance at 4). The Guidance does not even acknowledge EPA’s earlier contrary statement in the Docket Memorandum—another unacknowledged and thus arbitrary change in position.

The Guidance notes “concerns that resistant and retrograded starch present in samples due to feedstock handling or processing could impact laboratory results and cellulosic calculations” where the calculations are performed using a mass-closure approach. JA86 (Guidance at 4). “Resistant” starch is not susceptible to some of the chemical processes that are used to quantify starch. JA1274-1275 (attach. to email); *see also* JA1223 (email). “Retrograde” starch remains attached to (and is thus counted as) fiber. JA1275. In other words, EPA is concerned that there could be some starch in the feedstock that would not be measured, which would inflate the value of cellulose determined to be in the feedstock by a mass-closure method.

But this concern is unfounded. The cellulosic industry has developed production and mass-closure measurement methods that present no risk of resistant starch interfering with the cellulosic calculation.⁸ POET explained this to EPA before the Guidance's issuance, but EPA did not address this in the Guidance (or elsewhere). EPA's "fail[ure] to consider an important aspect of the problem" renders the Mass Closure Prohibition arbitrary and capricious. *State Farm*, 463 U.S. at 43.

The Guidance also attaches a "Monte Carlo" simulation analysis purporting to explain why starch-only methods are inadequate. JA90-93 (Guidance at 8-11). The analysis posits that methods of measuring cellulose indirectly by measuring starch will produce too much variation. JA92-93 (Guidance at 10-11). But this analysis was based exclusively on "preliminary data" obtained from unidentified "stakeholders." JA91 (Guidance at 9). That is not a sound basis to adopt a categorical ban in perpetuity, particularly given that, as EPA also recognizes, a method can be shown to be accurate despite some variability in its results simply by increasing the sample size (a basic strategy of statistical analysis). JA93

⁸ For instance, POET's BPX process (1) does not exceed temperatures that would cause retrograded starch to form, and (2) uses freeze dried samples, eliminating the risk of retrograded starch formation, and Soliton's method measures all forms of starch, including resistant and retrograded starch. JA1239, JA1244, JA1250, JA1383.

(Guidance at 11); NIST, *Engineering Statistics Handbook* §3.3.3.3 (“Selecting Sample Sizes”) (Apr. 2012). A producer should be permitted to use more robust data to demonstrate to peer reviewers that its method does not generate undue variation that undermines its ability to accurately measure fiber. Indeed, before EPA issued the Guidance, POET reported to EPA that the method it proposed to use would exhibit far less variation: whereas EPA’s Monte Carlo analysis assumes that the coefficient of variation would be 2% to 10%, JA91 (Guidance at 9), the coefficient of variation for the method proposed by POET was 1.1%, JA1177. But EPA again failed to address that information in the Guidance.

Regardless, variability is an invalid basis to reject registration applications *altogether* where there is no dispute that ethanol is indeed being produced from cellulosic corn kernel fiber. At most, variability would be grounds for EPA to direct producers to make conservative assumptions and to work to improve their methods in the future. The “all or nothing” approach taken in the Guidance is therefore arbitrary.

But even if any of the doubts EPA harbors about mass closure were reasonable, EPA’s blanket prohibition against mass closure would still be an irrational component of the Guidance, given the Guidance’s imposition of the Reference Material and Demonstration Requirements. If a method is shown to actually yield results within 20 percent of the reference material’s value—that is, if

it meets EPA's new standard for reasonable accuracy—then it should be irrelevant whether the method did so by mass closure or some other means. And further, it should be irrelevant whether mass closure is flawed in the ways EPA believes. If mass closure is too unreliable, it will not satisfy EPA's requirements for accuracy; if it satisfies those requirements, it is—by EPA's definition—accurate enough.

* * *

In sum, EPA has hastily decided that synthetic reference materials and indirect measurement of cellulose *cannot* be part of an accurate method. EPA had no basis to write off such techniques so abruptly. On the contrary, synthetic reference materials would support more accurate measurement than naturally occurring ones, and mass closure is already proving more accurate than EPA believed. EPA could have avoided these basic errors had it properly used the notice-and-comment process to test its views before overhauling a regulation it issued just five years ago.

CONCLUSION

This Court should grant the petition for review and vacate the Guidance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P.

32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), the brief contains 12,876 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Seth P. Waxman

ADDENDUM OF STATUTES AND REGULATIONS

ADDENDUM OF STATUTES AND REGULATIONS

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§ 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 disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a 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) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule

¹ See References in Text note below.

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

³ So in original.

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

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 (relating to control of acid deposition),

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(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

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

the “comment period”). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

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

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

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

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

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

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

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

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data,

or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

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

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

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

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

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

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

(9) In the case of review of any action of the Administrator to which this subsection applies,

the court may reverse any such action found to be—

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

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

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

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

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

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

(e) Other methods of judicial review not authorized

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

(f) Costs

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

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

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

(h) Public participation

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

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

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§ 80.1426 How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers?

(a) *General requirements.* (1) To the extent permitted under paragraphs (b) and (c) of this section, producers and importers of renewable fuel must generate RINs to represent that fuel if all of the following occur:

(i) The fuel qualifies for a D code pursuant to § 80.1426(f), or the EPA has approved a petition for use of a D code pursuant to § 80.1416.

(ii) The fuel is demonstrated to be produced from renewable biomass pursuant to the reporting requirements of § 80.1451 and the recordkeeping requirements of § 80.1454.

(A) Feedstocks meeting the requirements of renewable biomass through the aggregate compliance provision at § 80.1454(g) are deemed to be renewable biomass.

(B) [Reserved]

(iii) Was produced in compliance with the registration requirements of § 80.1450, the reporting requirements of § 80.1451, the recordkeeping requirements of § 80.1454, and all other applicable requirements of this subpart M.

(iv) The renewable fuel is designated on a product transfer document (PTD) for use as transportation fuel, heating oil, or jet fuel in accordance with § 80.1453(a)(12).

(2) To generate RINs for imported renewable fuel, including any renewable

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fuel contained in imported transportation fuel, heating oil, or jet fuel, importers must obtain information from a foreign producer that is registered pursuant to § 80.1450 sufficient to make the appropriate determination regarding the applicable D code and compliance with the renewable biomass definition for each imported batch for which RINs are generated.

(3) A party generating a RIN shall specify the appropriate numerical values for each component of the RIN in accordance with the provisions of § 80.1425(a) and paragraph (f) of this section.

(b) *Regional applicability.* (1) Except as provided in paragraph (c) of this section, a RIN must be generated by a renewable fuel producer or importer for a batch of renewable fuel that satisfies the requirements of paragraph (a)(1) of this section if it is produced or imported for use as transportation fuel, heating oil, or jet fuel in the 48 contiguous states or Hawaii.

(2) If the Administrator approves a petition of Alaska or a United States territory to opt-in to the renewable fuel program under the provisions in § 80.1443, then the requirements of paragraph (b)(1) of this section shall also apply to renewable fuel produced or imported for use as transportation fuel, heating oil, or jet fuel in that state or territory beginning in the next calendar year.

(c) *Cases in which RINs are not generated.* (1) Fuel producers and importers may not generate RINs for fuel that does not satisfy the requirements of paragraph (a)(1) of this section.

(2) *Small producer/importer threshold.* Pursuant to § 80.1455(a) and (b), renewable fuel producers that produce less than 10,000 gallons a year of renewable fuel, and importers that import less than 10,000 gallons a year of renewable fuel, are not required to generate and assign RINs to batches of renewable fuel that satisfy the requirements of paragraph (a)(1) of this section that they produce or import.

(3) *Temporary new producer threshold.* Pursuant to § 80.1455(c) and (d), new renewable fuel producers that produce less than 125,000 gallons of renewable fuel a year are not required to generate and assign RINs to batches of renew-

able fuel to satisfy the requirements of paragraph (a)(1) of this section.

(i) The provisions of this paragraph (c)(3) apply only to new facilities, for a maximum of three years beginning with the calendar year in which the production facility produces its first gallon of renewable fuel.

(ii) [Reserved]

(4) Importers shall not generate RINs for renewable fuel imported from a foreign renewable fuel producer, or for renewable fuel made with ethanol produced by a foreign ethanol producer, unless the foreign renewable fuel producer or foreign ethanol producer is registered with EPA as required in § 80.1450.

(5) Importers shall not generate RINs for renewable fuel that has already been assigned RINs by a registered foreign producer.

(6) A party is prohibited from generating RINs for a volume of fuel that it produces if the fuel has been produced by a process that uses a renewable fuel as a feedstock, and the renewable fuel that is used as a feedstock was produced by another party, except that RINs may be generated for such fuel if allowed by the EPA in response to a petition submitted pursuant to § 80.1416 and the petition approval specifies a mechanism to prevent double counting of RINs.

(7) For renewable fuel oil that is heating oil as defined in paragraph (2) of the definition of heating oil in § 80.1401, renewable fuel producers and importers shall not generate RINs unless they have received affidavits from the final end user or users of the fuel oil as specified in § 80.1451(b)(1)(ii)(T)(2).

(d)(1) *Definition of batch.* For the purposes of this section and § 80.1425, a “batch of renewable fuel” is a volume of renewable fuel that has been assigned a unique identifier within a calendar year by the producer or importer of the renewable fuel in accordance with the provisions of this section and § 80.1425.

(i) The number of gallon-RINs generated for a batch of renewable fuel may not exceed 99,999,999.

(ii) A batch of renewable fuel cannot represent renewable fuel produced or imported in excess of one calendar month.

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(2) Multiple gallon-RINs generated to represent a given volume of renewable fuel can be represented by a single batch-RIN through the appropriate designation of the RIN volume codes SSSSSSSS and EEEEEEEE.

(i) The value of SSSSSSSS in the batch-RIN shall be 00000001 to represent the first gallon-RIN associated with the volume of renewable fuel.

(ii) The value of EEEEEEEE in the batch-RIN shall represent the last gallon-RIN associated with the volume of renewable fuel, based on the RIN volume V_{RIN} determined pursuant to paragraph (f) of this section.

(iii) Under §80.1452, RIN volumes will be managed by EMTS. RIN codes SSSSSSSS and EEEEEEEE do not have a role in EMTS.

(e) *Assignment of RINs to batches*—(1) Except as provided in paragraph (g) of this section for delayed RINs, the producer or importer of renewable fuel must assign all RINs generated to volumes of renewable fuel.

(2) A RIN is assigned to a volume of renewable fuel when ownership of the RIN is transferred along with the transfer of ownership of the volume of renewable fuel, pursuant to §80.1428(a).

(3) All assigned RINs shall have a K code value of 1.

(f) *Generation of RINs*—(1) *Applicable pathways*. D codes shall be used in RINs generated by producers or importers of renewable fuel according to the pathways listed in Table 1 to this section, paragraph (f)(6) of this section, or as approved by the Administrator. In choosing an appropriate D code, producers and importers may disregard any incidental, *de minimis* feedstock contaminants that are impractical to remove and are related to customary feedstock production and transport. Tables 1 and 2 to this section do not apply to, and impose no requirements with respect to, volumes of fuel for which RINs are generated pursuant to paragraph (f)(6) of this section.

TABLE 1 TO § 80.1426—APPLICABLE D CODES FOR EACH FUEL PATHWAY FOR USE IN GENERATING RINs

	Fuel type	Feedstock	Production process requirements	D-Code
A	Ethanol	Corn starch	All of the following: Dry mill process, using natural gas, biomass, or biogas for process energy and at least two advanced technologies from Table 2 to this section.	6
B	Ethanol	Corn starch	All of the following: Dry mill process, using natural gas, biomass, or biogas for process energy and at least one of the advanced technologies from Table 2 to this section plus drying no more than 65% of the distillers grains with solubles it markets annually.	6
C	Ethanol	Corn starch	All of the following: Dry mill process, using natural gas, biomass, or biogas for process energy and drying no more than 50% of the distillers grains with solubles it markets annually.	6
D	Ethanol	Corn starch	Wet mill process using biomass or biogas for process energy.	6
E	Ethanol	Starches from crop residue and annual covercrops.	Fermentation using natural gas, biomass, or biogas for process energy.	6
F	Biodiesel, renewable diesel, jet fuel and heating oil.	Soy bean oil; Oil from annual covercrops; Oil from algae grown photosynthetically; Biogenic waste oils/fats/greases; <i>Camelina sativa</i> oil; Distillers corn oil; Distillers sorghum oil; Commingled distillers corn oil and sorghum oil.	One of the following: Trans-Esterification Hydrotreating Excluding processes that co-process renewable biomass and petroleum.	4
G	Biodiesel, heating oil.	Canola/Rapeseed oil	Trans-Esterification using natural gas or biomass for process energy.	4

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TABLE 1 TO § 80.1426—APPLICABLE D CODES FOR EACH FUEL PATHWAY FOR USE IN GENERATING RINS—Continued

	Fuel type	Feedstock	Production process requirements	D-Code
H	Biodiesel, renewable diesel, jet fuel and heating oil.	Soy bean oil; Oil from annual covercrops; Oil from algae grown photosynthetically; Biogenic waste oils/fats/greases; <i>Camelina sativa</i> oil; Distillers corn oil; Distillers sorghum oil; Commingled distillers corn oil and sorghum oil.	One of the following: Trans-Esterification Hydrotreating Includes only processes that co-process renewable biomass and petroleum.	5
I	Naphtha, LPG ..	<i>Camelina sativa</i> oil; Distillers sorghum oil	Hydrotreating	5
J	Ethanol	Sugarcane	Fermentation	5
K	Ethanol	Crop residue, slash, pre-commercial thinnings and tree residue, switchgrass, miscanthus, energy cane, <i>Arundo donax</i> , <i>Pennisetum purpureum</i> , and separated yard waste; biogenic components of separated MSW; cellulosic components of separated food waste; and cellulosic components of annual cover crops.	Any process that converts cellulosic biomass to fuel.	3
L	Cellulosic diesel, jet fuel and heating oil.	Crop residue, slash, pre-commercial thinnings and tree residue, switchgrass, miscanthus, energy cane, <i>Arundo donax</i> , <i>Pennisetum purpureum</i> , and separated yard waste; biogenic components of separated MSW; cellulosic components of separated food waste; and cellulosic components of annual cover crops.	Any process that converts cellulosic biomass to fuel.	7
M	Renewable gasoline and renewable gasoline blendstock.	Crop residue, slash, pre-commercial thinnings, tree residue, and separated yard waste; biogenic components of separated MSW; cellulosic components of separated food waste; and cellulosic components of annual cover crops.	Catalytic Pyrolysis and Upgrading, Gasification and Upgrading, Thermo-Catalytic Hydrodeoxygenation and Upgrading, Direct Biological Conversion, Biological Conversion and Upgrading utilizing natural gas, biogas, and/or biomass as the only process energy sources providing that process used converts cellulosic biomass to fuel; any process utilizing biogas and/or biomass as the only process energy sources which converts cellulosic biomass to fuel.	3
N	Naphtha	Switchgrass, miscanthus, energy cane, <i>Arundo donax</i> , and <i>Pennisetum purpureum</i> .	Gasification and upgrading processes that converts cellulosic biomass to fuel.	3
O	Butanol	Corn starch	Fermentation; dry mill using natural gas, biomass, or biogas for process energy.	6
P	Ethanol, renewable diesel, jet fuel, heating oil, and naphtha.	The non-cellulosic portions of separated food waste and non-cellulosic components of annual cover crops.	Any	5
Q	Renewable Compressed Natural Gas, Renewable Liquefied Natural Gas, Renewable Electricity.	Biogas from landfills, municipal wastewater treatment facility digesters, agricultural digesters, and separated MSW digesters; and biogas from the cellulosic components of biomass processed in other waste digesters.	Any	3
R	Ethanol	Grain Sorghum	Dry mill process using biogas from landfills, waste treatment plants, and/or waste digesters, and/or natural gas, for process energy.	6
S	Ethanol	Grain Sorghum	Dry mill process, using only biogas from landfills, waste treatment plants, and/or waste digesters for process energy and for on-site production of all electricity used at the site other than up to 0.15 kWh of electricity from the grid per gallon of ethanol produced, calculated on a per batch basis.	5

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TABLE 1 TO § 80.1426—APPLICABLE D CODES FOR EACH FUEL PATHWAY FOR USE IN GENERATING RINS—Continued

	Fuel type	Feedstock	Production process requirements	D-Code
T	Renewable Compressed Natural Gas, Renewable Liquefied Natural Gas, and Renewable Electricity.	Biogas from waste digesters	Any	5

TABLE 2 TO § 80.1426—ADVANCED TECHNOLOGIES

- Corn oil fractionation that is applied to at least 90% of the corn used to produce ethanol on a calendar year basis.
- Corn oil extraction that is applied to the whole stillage and/or derivatives of whole stillage and results in recovery of corn oil at an annual average rate equal to or greater than 1.33 pounds oil per bushel of corn processed into ethanol.
- Membrane separation in which at least 90% of ethanol dehydration is carried out using a hydrophilic membrane on a calendar year basis.
- Raw starch hydrolysis that is used for at least 90% of starch hydrolysis used to produce ethanol instead of hydrolysis using a traditional high heat cooking process, calculated on a calendar year basis.
- Combined heat and power such that, on a calendar year basis, at least 90% of the thermal energy associated with ethanol production (including thermal energy produced at the facility and that which is derived from an off-site waste heat supplier), exclusive of any thermal energy used for the drying of distillers grains and solubles, is used to produce electricity prior to being used to meet the process heat requirements of the facility.

(2) *Renewable fuel that can be described by a single pathway.*

(i) The number of gallon-RINs that shall be generated for a batch of renewable fuel by a producer or importer for renewable fuel that can be described by a single pathway shall be equal to a volume calculated according to the following formula:

$$V_{RIN} = EV * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(ii) The D code that shall be used in the RINs generated shall be the D code specified in Table 1 to this section, or a D code as approved by the Administrator, which corresponds to the pathway that describes the producer's operations.

(3) *Renewable fuel that can be described by two or more pathways.*

(i) The D codes that shall be used in the RINs generated by a producer or importer whose renewable fuel can be described by two or more pathways shall be the D codes specified in Table 1 to this section, or D codes as approved by the Administrator, which correspond to the pathways that describe the renewable fuel throughout that calendar year.

(ii) If all the pathways describing the producer's operations have the same D code and each batch is of a single fuel type, then that D code shall be used in all the RINs generated and the number of gallon-RINs that shall be generated for a batch of renewable fuel shall be equal to a volume calculated according to the following formula:

$$V_{RIN} = EV * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

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(iii) If all the pathways describing the producer’s operations have the same D code but individual batches are comprised of a mixture of fuel types with different equivalence values, then that D code shall be used in all the RINs generated and the number of gallon-RINs that shall be generated for a batch of renewable fuel shall be equal to a volume calculated according to the following formula:

$$V_{RIN} = \Sigma(EV_i * V_{s,i})$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV_i = Equivalence value for fuel type i in the batch of renewable fuel per §80.1415.

$V_{s,i}$ = Standardized volume of fuel type i in the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(iv) If the pathway applicable to a producer changes on a specific date, such that one pathway applies before the date and another pathway applies on and after the date, and each batch is of a single fuel type, then the applicable D code and batch identifier used in generating RINs must change on the date that the change in pathway occurs and the number of gallon-RINs that shall be generated for a batch of renewable fuel shall be equal to a volume calculated according to the following formula:

$$V_{RIN} = EV * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch with a single applicable D code.

EV = Equivalence value for the batch of renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(v) If a producer produces batches that are comprised of a mixture of fuel types with different equivalence values and different applicable D codes, then separate values for V_{RIN} shall be calculated for each category of renewable fuel according to formulas in Table 3 to this section. All batch-RINs thus generated shall be assigned to unique

batch identifiers for each portion of the batch with a different D code.

TABLE 3 TO § 80.1426—NUMBER OF GALLON-RINs TO ASSIGN TO BATCH-RINs WITH D CODES DEPENDENT ON FUEL TYPE

D code to use in batch-RIN	Number of gallon-RINs
D = 3	$V_{RIN, CB} = EV_{CB} * V_{s, CB}$
D = 4	$V_{RIN, BBD} = EV_{BBD} * V_{s, BBD}$
D = 5	$V_{RIN, AB} = EV_{AB} * V_{s, AB}$
D = 6	$V_{RIN, RF} = EV_{RF} * V_{s, RF}$
D = 7	$V_{RIN, CD} = EV_{CD} * V_{s, CD}$

Where:

$V_{RIN, CB}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the cellulosic biofuel portion of the batch with a D code of 3.

$V_{RIN, BBD}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the biomass-based diesel portion of the batch with a D code of 4.

$V_{RIN, AB}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the advanced biofuel portion of the batch with a D code of 5.

$V_{RIN, RF}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the renewable fuel portion of the batch with a D code of 6.

$V_{RIN, CD}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the cellulosic diesel portion of the batch with a D code of 7.

EV_{CB} = Equivalence value for the cellulosic biofuel portion of the batch per §80.1415.

EV_{BBD} = Equivalence value for the biomass-based diesel portion of the batch per §80.1415.

EV_{AB} = Equivalence value for the advanced biofuel portion of the batch per §80.1415.

EV_{RF} = Equivalence value for the renewable fuel portion of the batch per §80.1415.

EV_{CD} = Equivalence value for the cellulosic diesel portion of the batch per §80.1415.

$V_{s, CB}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 3, in gallons, calculated in accordance with paragraph (f)(8) of this section.

$V_{s, BBD}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 4, in gallons, calculated in accordance with paragraph (f)(8) of this section.

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$V_{s,AB}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 5, in gallons, calculated in accordance with paragraph (f)(8) of this section.

$V_{s,RF}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 6, in gallons, calculated in accordance with paragraph (f)(8) of this section.

$V_{s,CD}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 7, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(vi) If a producer produces a single type of renewable fuel using two or more different feedstocks which are processed simultaneously, and each batch is comprised of a single type of fuel, then the number of gallon-RINs that shall be generated for a batch of renewable fuel and assigned a particular D code shall be determined according to the formulas in Table 4 to this section.

Table 4 to §80.1426
Number of gallon-RINs to assign to batch-RINs with D codes dependent on feedstock

D code to use in batch-RIN	Number of gallon-RINs
D = 3	$V_{RIN,CB} = EV * V_s * \frac{FE_3}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$
D = 4	$V_{RIN,BBD} = EV * V_s * \frac{FE_4}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$
D = 5	$V_{RIN,AB} = EV * V_s * \frac{FE_5}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$
D = 6	$V_{RIN,RF} = EV * V_s * \frac{FE_6}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$
D = 7	$V_{RIN,CD} = EV * V_s * \frac{FE_7}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$

Where:

$V_{RIN,CB}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch of cellulosic biofuel with a D code of 3.

$V_{RIN,BBD}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch of biomass-based diesel with a D code of 4.

$V_{RIN,AB}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch of advanced biofuel with a D code of 5.

$V_{RIN,RF}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch of renewable fuel with a D code of 6.

$V_{RIN,CD}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch of cellulosic diesel with a D code of 7.

EV = Equivalence value for the renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph

(f)(8) of this section.

FE_3 = Feedstock energy from all feedstocks whose pathways have been assigned a D code of 3 under Table 1 to this section, or a D code of 3 as approved by the Administrator, in Btu.

FE_4 = Feedstock energy from all feedstocks whose pathways have been assigned a D code of 4 under Table 1 to this section, or a D code of 4 as approved by the Administrator, in Btu.

FE_5 = Feedstock energy from all feedstocks whose pathways have been assigned a D code of 5 under Table 1 to this section, or a D code of 5 as approved by the Administrator, in Btu.

FE_6 = Feedstock energy from all feedstocks whose pathways have been assigned a D code of 6 under Table 1 to this section, or a D code of 6 as approved by the Administrator, in Btu.

FE_7 = Feedstock energy from all feedstocks whose pathways have been assigned a D code of 7 under Table 1 to this section, or

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a D code of 7 as approved by the Administrator, in Btu.

Feedstock energy values, FE, shall be calculated according to the following formula:

$$FE = M * (1 - m) * CF * E$$

Where:

FE = Feedstock energy, in Btu.

M = Mass of feedstock, in pounds, measured on a daily or per-batch basis.

m = Average moisture content of the feedstock, in mass percent.

CF = Converted Fraction in annual average mass percent, except as otherwise provided by § 80.1451(b)(1)(ii)(U), representing that portion of the feedstock that is converted into renewable fuel by the producer.

E = Energy content of the components of the feedstock that are converted to renewable fuel, in annual average Btu/lb, determined according to paragraph (f)(7) of this section.

(4) *Renewable fuel that is produced by co-processing renewable biomass and non-renewable feedstocks simultaneously to produce a fuel that is partially renewable.*(i) The number of gallon-RINs that shall be generated for a batch of partially renewable fuel shall be equal to a volume V_{RIN} calculated according to Method A or Method B.

(A) *Method A.* (1) V_{RIN} shall be calculated according to the following formula:

$$V_{RIN} = EV * V_s * FE_R / (FE_R + FE_{NR})$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per § 80.1415, subject to qualification in paragraph (f)(4)(iii) of this section.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

FE_R = Feedstock energy from renewable biomass used to make the transportation fuel, in Btu.

FE_{NR} = Feedstock energy from non-renewable feedstocks used to make the transportation fuel, heating oil, or jet fuel, in Btu.

(2) The value of FE for use in paragraph (f)(4)(i)(A)(1) of this section shall be calculated from the following formula:

$$FE = M * (1 - m) * CF * E$$

Where:

FE = Feedstock energy, in Btu.

M = Mass of feedstock, in pounds, measured on a daily or per-batch basis.

m = Average moisture content of the feedstock, in mass percent.

CF = Converted Fraction in annual average mass percent, except as otherwise provided by § 80.1451(b)(1)(ii)(U), representing that portion of the feedstock that is converted into transportation fuel, heating oil, or jet fuel by the producer.

E = Energy content of the components of the feedstock that are converted to fuel, in annual average Btu/lb, determined according to paragraph (f)(7) of this section.

(B) *Method B.* V_{RIN} shall be calculated according to the following formula:

$$V_{RIN} = EV * V_s * R$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per § 80.1415, subject to qualification in paragraph (f)(4)(iii) of this section.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

R = The renewable fraction of the fuel as measured by a carbon-14 dating test method as provided in paragraph (f)(9) of this section.

(ii) The D code that shall be used in the RINs generated to represent partially renewable transportation fuel, heating oil, or jet fuel shall be the D code specified in Table 1 to this section, or a D code as approved by the Administrator, which corresponds to the pathway that describes a producer's operations. In determining the appropriate pathway, the contribution of non-renewable feedstocks to the production of partially renewable fuel shall be ignored.

(iii) In determining the RIN volume V_{RIN} according to paragraph (f)(4)(i)(A) or (f)(4)(i)(B) of this section, the equivalence value used to determine V_{RIN} which is calculated according to § 80.1415 shall use a value of 1.0 to represent R, the renewable content of the renewable fuel.

(5) *Renewable fuel produced from separated yard and food waste.*(i) *Separated yard waste and food waste* means, for

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the purposes of this section, waste that is one of the following:

(A) *Separated yard waste*, which is a feedstock stream consisting of yard waste kept separate since generation from other waste materials. Separated yard waste is deemed to be composed entirely of cellulosic materials.

(B) *Separated food waste*, which is a feedstock stream consisting of food waste kept separate since generation from other waste materials, and which includes food and beverage production waste and post-consumer food and beverage waste. Separated food waste is deemed to be composed entirely of non-cellulosic materials, unless a party demonstrates that a portion of the feedstock is cellulosic through approval of their facility registration.

(C) *Separated municipal solid waste (separated MSW)*, which is material remaining after separation actions have been taken to remove recyclable paper, cardboard, plastics, rubber, textiles, metals, and glass from municipal solid waste, and which is composed of both cellulosic and non-cellulosic materials.

(ii) (A) A feedstock qualifies under paragraph (f)(5)(i)(A) or (f)(5)(i)(B) of this section only if it is collected according to a plan submitted to and accepted by U.S. EPA under the registration procedures specified in §80.1450(b)(1)(vii).

(B) A feedstock qualifies under paragraph (f)(5)(i)(C) of this section only if it is collected according to a plan submitted to and approved by U.S. EPA.

(iii) Separation and recycling actions specified in paragraph (f)(5)(i)(C) of this section are considered to occur if:

(A) Recyclable paper, cardboard, plastics, rubber, textiles, metals, and glass that can be recycled are separated and removed from the municipal solid waste stream to the extent reasonably practicable according to a plan submitted to and approved by U.S. EPA under the registration procedures specified in §80.1450(b)(1)(viii); and

(B) The fuel producer has evidence of all contracts relating to the disposition of paper, cardboard, plastics, rubber, textiles, metals, and glass that are recycled.

(iv)(A) The number of gallon-RINs that shall be generated for a batch of renewable fuel derived from separated

yard waste as defined in paragraph (f)(5)(i)(A) of this section shall be equal to a volume V_{RIN} and is calculated according to the following formula:

$$V_{RIN} = EV * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of cellulosic biofuel gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(B) The number of gallon-RINs that shall be generated for a batch of renewable fuel derived from separated food waste as defined in paragraph (f)(5)(i)(B) of this section shall be equal to a volume V_{RIN} and is calculated according to the following formula:

$$V_{RIN} = EV * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of cellulosic or advanced biofuel gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(v) The number of cellulosic biofuel gallon-RINs that shall be generated for the cellulosic portion of a batch of renewable fuel derived from separated MSW as defined in paragraph (f)(5)(i)(C) of this section shall be determined according to the following formula:

$$V_{RIN} = EV * V_s * R$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of cellulosic biofuel gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

R = The calculated non-fossil fraction of the fuel as measured by a carbon-14 dating test method as provided in paragraph (f)(9) of this section, except that for

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biogas-derived fuels made from separated MSW, no testing is required and R = 1.

(vi) The D code that shall be used in the RINs generated to represent separated yard waste, food waste, and MSW shall be the D code specified in Table 1 to this section, or a D code as approved by the Administrator, which corresponds to the pathway that describes the producer's operations and feedstocks.

(6) *Renewable fuel neither covered by the pathways in Table 1 to this section, nor given an approval by the Administrator for use of a specific D code.* If none of the pathways described in Table 1 to this section apply to a producer's operations, and the producer has not received approval for the use of a specific D code by the Administrator, the party may generate RINs if the fuel from its facility is made from renewable biomass and qualifies for an exemption under §80.1403 from the requirement that renewable fuel achieve at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(i) The number of gallon-RINs that shall be generated for a batch of renewable fuel that qualifies for an exemption from the 20 percent GHG reduction requirements under §80.1403 shall be equal to a volume calculated according to the following formula:

$$V_{RIN} = EV * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(ii) A D code of 6 shall be used in the RINs generated under this paragraph (f)(6).

(7) *Determination of feedstock energy content factors.* (i) For purposes of paragraphs (f)(3)(vi) and (f)(4)(i)(A)(2) of this section, producers must specify the value for E, the energy content of the components of the feedstock that are converted to renewable fuel, used in the calculation of the feedstock energy value FE.

(ii) The value for E shall represent the higher or gross calorific heating value for a feedstock on a zero moisture basis.

(iii) Producers must specify the value for E for each type of feedstock at least once per calendar year.

(iv) A producer must use default values for E as provided in paragraph (f)(7)(vi) of this section, or must determine alternative values for its own feedstocks according to paragraph (f)(7)(v) of this section.

(v) Producers that do not use a default value for E must use the following test methods, or alternative test methods as approved by EPA, to determine the value of E. The value of E shall be based upon the test results of a sample of feedstock that, based upon good engineering judgment, is representative of the feedstocks used to produce renewable fuel:

(A) ASTM E 870 or ASTM E 711 for gross calorific value (both incorporated by reference, see §80.1468).

(B) ASTM D 4442 or ASTM D 4444 for moisture content (both incorporated by reference, see §80.1468).

(vi) *Default values for E.*

(A) Starch: 7,600 Btu/lb.

(B) Sugar: 7,300 Btu/lb.

(C) Vegetable oil: 17,000 Btu/lb.

(D) Waste cooking oil or trap grease: 16,600 Btu/lb.

(E) Tallow or fat: 16,200 Btu/lb.

(F) Manure: 6,900 Btu/lb.

(G) Woody biomass: 8,400 Btu/lb.

(H) Herbaceous biomass: 7,300 Btu/lb.

(I) Yard wastes: 2,900 Btu/lb.

(J) Biogas: 11,000 Btu/lb.

(K) Food waste: 2,000 Btu/lb.

(L) Paper: 7,200 Btu/lb.

(M) Crude oil: 19,100 Btu/lb.

(N) Coal—bituminous: 12,200 Btu/lb.

(O) Coal—anthracite: 13,300 Btu/lb.

(P) Coal—lignite or sub-bituminous: 7,900 Btu/lb.

(Q) Natural gas: 19,700 Btu/lb.

(R) Tires or rubber: 16,000 Btu/lb.

(S) Plastic: 19,000 Btu/lb.

(8) *Standardization of volumes.* In determining the standardized volume of a batch of renewable fuel for purposes of generating RINs under this paragraph (f), the batch volumes shall be adjusted to a standard temperature of 60 °F.

(i) For ethanol, the following formula shall be used:

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$$V_{s,e} = V_{a,e} * (-0.0006301 * T + 1.0378)$$

Where:

$V_{s,e}$ = Standardized volume of ethanol at 60 °F, in gallons.

$V_{a,e}$ = Actual volume of ethanol, in gallons.

T = Actual temperature of the batch, in °F.

(ii) For biodiesel (mono-alkyl esters), one of the following two methods for biodiesel temperature standardization to 60 °Fahrenheit (°F) shall be used

$$(A) V_{s,b} = V_{a,b} * (-0.00045767 * T + 1.02746025)$$

Where

$V_{s,b}$ = Standardized volume of biodiesel at 60 °F, in gallons.

$V_{a,b}$ = Actual volume of biodiesel, in gallons.

T = Actual temperature of the batch, in °F.

(B) The standardized volume of biodiesel at 60 °F, in gallons, as calculated from the use of the American Petroleum Institute Refined Products Table 6B, as referenced in ASTM D 1250 (incorporated by reference, see §80.1468).

(iii) For other renewable fuels, an appropriate formula commonly accepted by the industry shall be used to standardize the actual volume to 60 °F. Formulas used must be reported to EPA, and may be determined to be inappropriate.

(9) *Use of radiocarbon dating test methods.*(i) Parties may use a radiocarbon dating test method for determination of the renewable fraction of a fuel R used to determine V_{RIN} as provided in paragraphs (f)(4) and (f)(5) of this section.

(ii) Parties must use Method B or Method C of ASTM D 6866 (incorporated by reference, see §80.1468), or an alternative test method as approved by EPA.

(iii) For each batch of fuel, the value of R must be based on:

(A) A radiocarbon dating test of the batch of fuel produced; or

(B) A radiocarbon dating test of a composite sample of previously produced fuel, if all of the following conditions are met:

(1) Based upon good engineering judgment, the renewable fraction of the composite sample must be representative of the batch of fuel produced.

(2) The composite sample is comprised of a volume weighted combination of samples from every batch of partially renewable transportation fuel

produced by the party over a period not to exceed one calendar month, or more frequently if necessary to ensure that the test results are representative of the renewable fraction of the partially renewable fuel.

(3) The composite sample must be well mixed prior to testing.

(4) A volume of each composite sample must be retained for a minimum of two years, and be of sufficient volume to permit two additional tests to be conducted.

(iv) If the party is using the composite sampling approach according to paragraph (f)(9)(iii)(B) of this section, the party may estimate the value of R for use in generating RINs in the first month if all of the following conditions are met:

(A) The estimate of R for the first month is based on information on the composition of the feedstock;

(B) The party calculates R in the second month based on the application of a radiocarbon dating test on a composite sample pursuant to (f)(9)(iii)(B) of this section; and

(C) The party adjusts the value of R used to generate RINs in the second month using the following formula

$$R_{i+1,adj} = 2 \times R_{i+1,calc} - R_{i,est}$$

Where

$R_{i+1,adj}$ = Adjusted value of R for use in generating RINs in month the second month $i+1$.

$R_{i+1,calc}$ = Calculated value of R in second month $i+1$ by applying a radiocarbon dating test method to a composite sample of fuel.

$R_{i,est}$ = Estimate of R for the first month i .

(10)(i) For purposes of this section, electricity that is only distributed via a closed, private, non-commercial system is considered renewable fuel and RINs may be generated if all of the following apply:

(A) The electricity is produced from renewable biomass and qualifies for a D code in Table 1 to this section or has received approval for use of a D code by the Administrator.

(B) The RIN generator has documentation for the sale, if applicable, and use of a specific quantity of renewable electricity as transportation fuel, or has obtained affidavits from all parties selling or using the electricity as transportation fuel.

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(C) The electricity is used as a transportation fuel and for no other purposes.

(ii) For purposes of this section, CNG or LNG produced from biogas that is only distributed via a closed, private, non-commercial system is considered renewable fuel for which RINs may be generated if all of the following apply:

(A) The CNG/LNG is produced from renewable biomass and qualifies for a D code in Table 1 to this section or has received approval for use of a D code by the Administrator.

(B) The RIN generator has entered into a written contract for the sale or use of a specific quantity of CNG/LNG to be used as transportation fuel, or obtained affidavits from all parties selling or using the CNG/LNG as transportation fuel.

(C) The CNG/LNG is used as a transportation fuel and for no other purposes.

(iii) A producer of electricity that is generated by co-firing a combination of renewable biomass and fossil fuel may generate RINs only for the portion attributable to the renewable biomass, using the procedure described in paragraph (f)(4) of this section.

(11)(i) For purposes of this section, electricity that is introduced into a commercial distribution system (transmission grid) is considered renewable fuel for which RINs may be generated if all of the following apply:

(A) The electricity is produced from renewable biomass and qualifies for a D code in Table 1 of this section or has received approval for use of a D code by the Administrator.

(B) The RIN generator has documentation for the sale and use of a specific quantity of renewable electricity as transportation fuel, or has obtained affidavits from all parties selling or using the electricity as transportation fuel.

(C) The quantity of electricity for which RINs were generated was sold for use as transportation fuel and for no other purpose.

(D) The renewable electricity was loaded onto and withdrawn from a physically connected transmission grid.

(E) The amount of electricity sold for use as transportation fuel corresponds

to the amount of electricity derived from biogas that was placed into the commercial distribution system.

(F) No other party relied upon the renewable electricity for the creation of RINs.

(ii) For purposes of this section, CNG or LNG produced from biogas that is introduced into a commercial distribution system is considered renewable fuel for which RINs may be generated if all the following apply:

(A) The fuel is produced from renewable biomass and qualifies for a D code in Table 1 to this section or has received approval for use of a D code by the Administrator.

(B) The RIN generator has entered into a written contract for the sale or use of a specific quantity of renewable CNG/LNG, taken from a commercial distribution system (e.g., physically connected pipeline, barge, truck, rail), for use as a transportation fuel, or has obtained affidavits from all parties selling or using the CNG/LNG taken from a commercial distribution system as a transportation fuel.

(C) The quantity of CNG/LNG for which RINs were generated was sold for use as transportation fuel and for no other purposes.

(D) The biogas/CNG/LNG was injected into and withdrawn from the same commercial distribution system.

(E) The biogas/CNG/LNG that is ultimately withdrawn from the commercial distribution system for use as transportation fuel is withdrawn in a manner and at a time consistent with the transport of the biogas/CNG/LNG between the injection and withdrawal points.

(F) The volume and heat content of biogas/CNG/LNG injected into a pipeline and the volume of biogas/CNG/LNG withdrawn to make a transportation fuel are measured by continuous metering.

(G) The amount of fuel sold for use as transportation fuel corresponds to the amount of fuel derived from biogas that was placed into the commercial distribution system.

(H) No other party relied upon the volume of biogas/CNG/LNG for the creation of RINs.

(iii) For renewable electricity that is generated by co-firing a combination of

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renewable biomass and fossil fuel, the producer may generate RINs only for the portion attributable to the renewable biomass, using the procedure described in paragraph (f)(4) of this section.

(12) For purposes of Table 1 of this section, process heat produced from combustion of gas at a renewable fuel facility is considered derived from biomass if the gas is biogas.

(i) For biogas directly transported to the facility without being placed in a commercial distribution system, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of a specific volume of biogas with a specific heat content.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume and heat content of biogas injected into the pipeline and the volume of gas used as process heat are measured by continuous metering.

(ii) For biogas that has been gathered, processed and injected into a common carrier pipeline, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of a specific volume of biogas with a specific heat content.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume of biogas that is withdrawn from the pipeline is withdrawn in a manner and at a time consistent with the transport of fuel between the injection and withdrawal points.

(D) The volume and heat content of biogas injected into the pipeline and the volume of gas used as process heat are measured by continuous metering.

(E) The common carrier pipeline into which the biogas is placed ultimately serves the producer's renewable fuel facility.

(iii) The process heat produced from combustion of gas at a renewable fuel facility described in paragraph (f)(12)(i) of this section shall not be considered derived from biomass if any other party relied upon the contracted volume of biogas for the creation of RINs.

(13) In order for facilities to satisfy the requirements of the advanced biofuel grain sorghum pathway all of the following conditions (in addition to other applicable requirements) apply.

(i) The quantity of electricity used at the site that is purchased from the grid must be measured and recorded by continuous metering.

(ii) All electricity used on-site that is not purchased from the grid must be produced on-site from biogas from landfills, waste treatment plants, and/or waste digesters.

(iii) For biogas directly transported to the facility without being placed in a commercial distribution system, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of biogas that specifies the volume of biogas, its heat content, and that the biogas must be derived from a landfill, waste treatment plant and/or waste digester.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume and heat content of biogas injected into the pipeline and the volume of gas used at the renewable fuel production facility are measured by continuous metering.

(iv) [Reserved]

(v) For biogas that has been gathered, processed and injected into a common carrier pipeline, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of biogas that specifies a specific volume of biogas, with a specific heat content, and that the biogas must be derived from a landfill, waste treatment plant and/or waste digester.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume of biogas that is withdrawn from the pipeline is withdrawn in a manner and at a time consistent with the transport of fuel between the injection and withdrawal points.

(D) The volume and heat content of biogas injected into the pipeline and

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the volume of gas used at the renewable fuel production facility are measured by continuous metering.

(E) The common carrier pipeline into which the biogas is placed ultimately serves the producer's renewable fuel facility.

(vi) No party relied upon the contracted volume of biogas for the creation of RINs.

(14) A producer or importer of renewable fuel using giant reed (*Arundo donax*) or napier grass (*Pennisetum purpureum*) as a feedstock may generate RINs for that renewable fuel if:

(i) The feedstock is produced, managed, transported, collected, monitored, and processed according to a Risk Mitigation Plan approved by EPA under the registration procedures specified in § 80.1450(b)(1)(x)(A); or,

(ii) EPA has determined that there is not a significant likelihood of spread beyond the planting area of the feedstock used for production of the renewable fuel. Any determination that *Arundo donax* or *Pennisetum purpureum* does not present a significant likelihood of spread beyond the planting area must be based upon clear and compelling evidence, including information and supporting data submitted by the producer. Such a determination must be made by EPA as specified in § 80.1450(b)(1)(x)(B).

(15) *Application of formulas in paragraph (f)(3)(vi) of this section to certain producers generating D3 or D7 RINs.*

(i) If a producer seeking to generate D code 3 or D code 7 RINs produces a single type of renewable fuel using two or more feedstocks converted simultaneously, and at least one of the feedstocks does not have a minimum 75% average adjusted cellulosic content, one of the following additional requirements apply:

(A) If the producer is using a thermochemical process to convert cellulosic biomass into cellulosic biofuel, the producer is subject to additional registration requirements under § 80.1450(b)(1)(xiii)(A).

(B) If the producer is using any process other than a thermochemical process, or is using a combination of processes, the producer is subject to additional registration requirements under

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§ 80.1450(b)(1)(xiii)(B) and reporting requirements under § 80.1451(b)(1)(ii)(U).

(ii) [Reserved]

(16) *Renewable fuel produced from crop residue.* Producers generating RINs for qualifying renewable fuel utilizing crop residue as feedstock under Pathway K or Pathway L must meet all of the following conditions (in addition to any other applicable requirements):

(i) Registration requirements under § 80.1450(b)(1)(xv).

(ii) Reporting requirements under § 80.1451(b)(1)(ii)(V).

(iii) Recordkeeping requirements under § 80.1454(s).

(17)(i) For purposes of this section, any renewable fuel other than ethanol, biodiesel, or renewable diesel that meets the ASTM D 975–13a Grade No. 1–D or No. 2–D specifications (incorporated by reference, see § 80.1468) is considered renewable fuel and the producer or importer may generate RINs for such fuel only if all of the following apply:

(A) The fuel is produced from renewable biomass and qualifies for a D code in Table 1 to this section or has been otherwise approved by the Administrator.

(B) The fuel producer or importer maintains records demonstrating that the fuel was produced for use as a transportation fuel, heating oil or jet fuel by any of the following:

(1) Blending the renewable fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards.

(2) Entering into a written contract for the sale of the renewable fuel, which specifies the purchasing party shall blend the fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards.

(3) Entering into a written contract for the sale of the renewable fuel, which specifies that the fuel shall be used in its neat form as a transportation fuel, heating oil or jet fuel that meets all applicable standards.

(C) The fuel was sold for use in or as a transportation fuel, heating oil, or jet fuel, and for no other purpose.

(ii) [Reserved]

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(g) *Delayed RIN generation*—(1) Parties who produce or import renewable fuel may elect to generate delayed RINs to represent renewable fuel volumes that have already been transferred to another party if those renewable fuel volumes meet all of the following requirements.

(i) The renewable fuel volumes can be described by a new pathway that has been added to Table 1 to §80.1426, or approved by petition pursuant to §80.1416, after July 1, 2010.

(A) For new pathways that EPA approves in response to petitions submitted pursuant to §80.1416, complete petitions must be received by EPA by January 31, 2011.

(B) [Reserved]

(ii) The renewable fuel volumes can be described by a pathway that:

(A) Is biodiesel that is made from canola oil through transesterification using natural gas or biomass for process energy; or

(B) EPA has determined was in use as of July 1, 2010, for the primary purpose of producing transportation fuel, heating oil, or jet fuel for commercial sale.

(iii) The renewable fuel volumes were not designated or intended for export from the 48 contiguous states plus Hawaii by the renewable fuel producer or importer, and the producer or importer of the renewable fuel volumes does not know or have reason to know that the volumes were exported from the 48 contiguous states plus Hawaii.

(2) When a new pathway is added to Table 1 to §80.1426 or approved by petition pursuant to §80.1416, EPA will specify in its approval action the effective date on which the new pathway becomes valid for the generation of RINs and whether the fuel in question meets the requirements of paragraph (g)(1)(ii) of this section.

(i) The effective date for the pathway describing biodiesel that is made from canola oil through transesterification using natural gas or biomass for process energy is September 28, 2010.

(ii) [Reserved]

(3) Delayed RINs can only be generated to represent renewable fuel volumes produced in the 48 contiguous states plus Hawaii or imported into the 48 contiguous states plus Hawaii be-

tween July 1, 2010, and the earlier of either of the following dates:

(i) The effective date (identified pursuant to paragraph (g)(2) of this section) of the new pathway through which the fuel in question was produced; or

(ii) December 31, 2011.

(4) Delayed RINs must be generated no later than 60 days after the effective date (identified pursuant to paragraph (g)(2) of this section) of the pathway by which the fuel in question was produced.

(5) A party authorized pursuant to paragraph (g)(1) of this section to generate delayed RINs, and electing to do so, who generated RINs pursuant to 80.1426(f)(6) for fuel produced through a pathway described in paragraph (g)(1) of this section, and transferred those RINs with renewable fuel volumes between July 1, 2010 and the effective date (identified pursuant to paragraph (g)(2) of this section) of that pathway, must retire a number of gallon-RINs prior to generating delayed RINs.

(i) The number of gallon-RINs retired by a party pursuant to this paragraph must not exceed the number of gallon-RINs originally generated by the party to represent fuel described in paragraph (g)(1) of this section that was produced in the 48 contiguous states plus Hawaii or imported into the 48 contiguous states plus Hawaii, and transferred to another party, between July 1, 2010 and the earlier of either of the following dates:

(A) The effective date (identified pursuant to paragraph (g)(2) of this section) of the new pathway through which the fuel in question was produced; or

(B) December 31, 2011.

(ii) Retired RINs must have a D code of 6.

(iii) Retired RINs must have a K code of 2.

(iv) Retired RINs must have been generated in the same year as the gallon-RINs originally generated by the party to represent fuel described in paragraph (g)(1) of this section.

(A) For gallon-RINs originally generated in 2010 to represent fuel described in paragraph (g)(1) of this section, the generation year of retired RINs shall be 2010.

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(B) For gallon-RINs originally generated in 2011 to represent fuel described in paragraph (g)(1) of this section, the generation year of retired RINs shall be 2011.

(6) For parties that retire RINs pursuant to paragraph (g)(5) of this section, the number of delayed gallon-RINs generated shall be equal to the number of gallon-RINs retired in accordance with paragraph (g)(5) of this section.

(7) A party authorized pursuant to paragraph (g)(1) of this section to generate delayed RINs, and electing to do so, who did not generate RINs pursuant to § 80.1426(f)(6) for renewable fuel produced in the 48 contiguous states plus Hawaii or imported into the 48 contiguous states plus Hawaii between July 1, 2010 and the effective date (identified pursuant to paragraph (g)(2) of this section) of a new pathway for the fuel in question, may generate a number of delayed gallon-RINs for that renewable fuel in accordance with paragraph (f) of this section.

(i) The standardized volume of fuel (V_s) used by a party to determine the RIN volume (V_{RIN}) under paragraph (f) of this section shall be the standardized volume of the fuel described in paragraph (g)(1)(i) of this section that was produced in the 48 contiguous states plus Hawaii or imported into the 48 contiguous states plus Hawaii by the party, and transferred to another party, between July 1, 2010 and the earlier of either of the following dates:

(A) The effective date (identified pursuant to paragraph (g)(2) of this section) of the new pathway through which the fuel in question was produced; or

(B) December 31, 2011.

(ii) [Reserved]

(8) The renewable fuel for which delayed RINs are generated must be described by a pathway that satisfies the requirements of paragraph (g)(1) of this section.

(9) All delayed RINs generated by a renewable fuel producer or importer must be generated within EMTS on the same date.

(10) The generation year of delayed RINs as designated in EMTS shall be the year that the renewable fuel volumes they represent were either pro-

duced or imported into the 48 contiguous states plus Hawaii.

(i) For renewable fuel volumes produced or imported in 2010, the generation year of delayed RINs shall be 2010 and the production date specified in EMTS shall be 07/01/2010.

(ii) For renewable fuel volumes produced or imported in 2011, the generation year of delayed RINs shall be 2011 and the production date specified in EMTS shall be 01/01/2011.

(11) Delayed RINs shall be generated as assigned RINs in EMTS with a batch number that begins with “DRN”, and then immediately separated by the RIN generator.

(12) The D code that shall be used in delayed RINs shall be the D code which corresponds to the new pathway.

(13) Except as provided in this paragraph (g), all other provisions in this Subpart M that pertain to the identification of fuels for which RINs may be generated, the generation and use of RINs, and recordkeeping and reporting, are also applicable to delayed RINs.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26038, May 10, 2010; 75 FR 37733, June 30, 2010; 75 FR 59632, Sept. 28, 2010; 75 FR 76828, Dec. 9, 2010; 75 FR 79977, Dec. 21, 2010; 77 FR 1355, Jan. 9, 2012; 77 FR 61294, Oct. 9, 2012; 77 FR 74605, Dec. 17, 2012; 78 FR 14216, Mar. 5, 2013; 78 FR 41714, July 11, 2013; 78 FR 62470, Oct. 22, 2013; 79 FR 42160, July 18, 2014; 79 FR 42113, July 18, 2014; 80 FR 9098, Feb. 19, 2015; 80 FR 18141, Apr. 3, 2015; 80 FR 77517, Dec. 14, 2015; 83 FR 37746, Aug. 2, 2018]

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producer that sells renewable fuel for RIN generation by a United States importer, or any foreign ethanol producer that produces ethanol used in renewable fuel for which RINs are generated by a United States importer, must provide EPA the information specified under §80.76 if such information has not already been provided under the provisions of this part, and must receive EPA-issued company and facility identification numbers prior to the generation of any RINs for their fuel or for fuel made with their ethanol. Unless otherwise specifically indicated, all the following registration information must be submitted and accepted by EPA by July 1, 2010, or 60 days prior to the generation of RINs, whichever date comes later, subject to this subpart:

(1) A description of the types of renewable fuels or ethanol that the producer intends to produce at the facility and that the facility is capable of producing without significant modifications to the existing facility. For each type of renewable fuel or ethanol, the renewable fuel producer or foreign ethanol producer shall also provide all the following:

(i) A list of all the feedstocks the facility is capable of utilizing without significant modification to the existing facility.

(ii) A description of the facility's renewable fuel or ethanol production processes.

(A) For registrations indicating production of cellulosic biofuel (D codes 3 or 7) from feedstocks other than biogas (including through pathways in rows K, L, M, and N of Table 1 to §80.1426), the producer must demonstrate the ability to convert cellulosic components of feedstock into fuel by providing all of the following:

(1) A process diagram with all relevant unit processes labeled and a designation of which unit process is capable of performing cellulosic treatment, including required inputs and outputs at each step.

(2) A description of the cellulosic biomass treatment process, including required inputs and outputs used at each step.

(3) A description of the mechanical, chemical and biochemical mechanisms

§ 80.1450 What are the registration requirements under the RFS program?

(a) *Obligated parties and exporters.* Any obligated party described in §80.1406, and any exporter of renewable fuel described in §80.1430, must provide EPA with the information specified for registration under §80.76, if such information has not already been provided under the provisions of this part. An obligated party or an exporter of renewable fuel must receive EPA-issued identification numbers prior to engaging in any transaction involving RINs. Registration information may be submitted to EPA at any time after publication of this rule in the FEDERAL REGISTER, but must be submitted and accepted by EPA by July 1, 2010, or 60 days prior to RIN ownership, whichever date comes later.

(b) *Producers.* Any RIN-generating foreign or domestic producer of renewable fuel, any foreign renewable fuel

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by which cellulosic materials can be converted to biofuel products.

(B) [Reserved]

(iii) The type of co-products produced with each type of renewable fuel or ethanol.

(iv) A process heat fuel supply plan that includes all of the following:

(A) For all process heat fuel, provide all the following information:

(1) Each type of process heat fuel used at the facility.

(2) Name and address of the company supplying each process heat fuel to the renewable fuel or foreign ethanol facility.

(B) For biogas used for process heat, provide all the following information:

(1) Locations from which the biogas was produced or extracted.

(2) Name of suppliers of all biogas the producer purchases for use for process heat in the facility.

(3) An affidavit from the biogas supplier stating its intent to supply biogas to the renewable fuel producer or foreign ethanol producer, and the quantity and energy content of the biogas that it intends to provide to the renewable fuel producer or foreign ethanol producer.

(v) The following records that support the facility's baseline volume as defined in §80.1401 or, for foreign ethanol facilities, their production volume:

(A) For all facilities except those described in paragraph (b)(1)(v)(B) of this section, copies of the most recent applicable air permits issued by the U.S. Environmental Protection Agency, state, local air pollution control agencies, or foreign governmental agencies and that govern the construction and/or operation of the renewable fuel or foreign ethanol facility.

(B) For facilities claiming the exemption described in §80.1403(c) or (d), applicable air permits issued by the U.S. Environmental Protection Agency, state, local air pollution control agencies, or foreign governmental agencies that govern the construction and/or operation of the renewable fuel facility that were:

(1) Issued or revised no later than December 19, 2007, for facilities described in §80.1403(c); or

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(2) Issued or revised no later than December 31, 2009, for facilities described in §80.1403(d).

(C)(1) For all facilities, copies of documents demonstrating each facility's actual peak capacity as defined in §80.1401 if the maximum rated annual volume output of renewable fuel is not specified in the air permits specified in paragraphs (b)(1)(v)(A) and (b)(1)(v)(B) of this section, as appropriate.

(2) For facilities not claiming the exemption described in §80.1403(c) or (d) which are exempt from air permit requirements and for which insufficient production records exist to establish actual peak capacity, copies of documents demonstrating the facility's nameplate capacity, as defined in §80.1401.

(D) For all facilities producing renewable electricity or other renewable fuel from biogas, submit all relevant information in §80.1426(f)(10) or (11), including:

(1) Copies of all contracts or affidavits, as applicable, that follow the track of the biogas/CNG/LNG or renewable electricity from its original source, to the producer that processes it into renewable fuel, and finally to the end user that will actually use the renewable electricity or the renewable CNG/LNG for transportation purposes.

(2) Specific quantity, heat content, and percent efficiency of transfer, as applicable, and any conversion factors, for the renewable fuel derived from biogas.

(E) Any other records as requested by the Administrator.

(vi) For facilities claiming the exemption described in §80.1403(c) or (d), evidence demonstrating the date that construction commenced (as defined in §80.1403(a)(1)) including all of the following:

(A) Contracts with construction and other companies.

(B) Applicable air permits issued by the U.S. Environmental Protection Agency, state, local air pollution control agencies, or foreign governmental agencies that governed the construction and/or operation of the renewable fuel facility during construction and when first operated.

(vii)(A) For a producer of renewable fuel or a foreign producer of ethanol

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made from separated yard waste per §80.1426(f)(5)(i)(A):

(1) The location of any municipal waste facility or other facility from which the waste stream consisting solely of separated yard waste is collected; and

(2) A plan documenting how the waste will be collected and how the renewable fuel producer or foreign ethanol producer will conduct ongoing verification that such waste consists only of yard waste (and incidental other components such as paper and plastics) that is kept separate since generation from other waste materials.

(B) For a producer of renewable fuel or a foreign producer of ethanol made from separated food waste per §80.1426(f)(5)(i)(B):

(1) The location of any municipal waste facility or other facility from which the waste stream consisting solely of separated food waste is collected; and

(2) A plan documenting how the waste will be collected, how the cellulosic and non-cellulosic portions of the waste will be quantified, and for ongoing verification that such waste consists only of food waste (and incidental other components such as paper and plastics) that is kept separate since generation from other waste materials.

(viii) For a producer of renewable fuel, or a foreign producer of ethanol, made from separated municipal solid waste per §80.1426(f)(5)(i)(C):

(A) The location of the municipal waste facility from which the separated municipal solid waste is collected or from which material is collected that will be processed to produce separated municipal solid waste.

(B) A plan providing ongoing verification that there is separation of recyclable paper, cardboard, plastics, rubber, textiles, metals, and glass wastes to the extent reasonably practicable and which documents the following:

(1) Extent and nature of recycling that occurred prior to receipt of the waste material by the renewable fuel producer or foreign ethanol producer;

(2) Identification of available recycling technology and practices that are appropriate for removing recycling materials from the waste stream by the

fuel producer or foreign ethanol producer; and

(3) Identification of the technology or practices selected for implementation by the fuel producer or foreign ethanol producer including an explanation for such selection, and reasons why other technologies or practices were not.

(C) Contracts relevant to materials recycled from municipal waste streams as described in §80.1426(f)(5)(iii).

(D) Certification by the producer that recycling is conducted in a manner consistent with goals and requirements of applicable State and local laws relating to recycling and waste management.

(ix)(A) For a producer of ethanol from grain sorghum or a foreign ethanol producer making product from grain sorghum and seeking to have it sold as renewable fuel after addition of denaturant, provide a plan that has been submitted and accepted by U.S. EPA that includes the following information:

(1) Locations from which the biogas used at the facility was produced or extracted.

(2) Name of suppliers of all biogas used at the facility.

(3) An affidavit from each biogas supplier stating its intent to supply biogas to the renewable fuel producer or foreign ethanol producer, the quantity and energy content of the biogas that it intends to provide to the renewable fuel producer or foreign ethanol producer, and that the biogas will be derived solely from landfills, waste treatment plants, and/or waste digesters.

(4) If the producer intends to generate advanced biofuel RINs, estimates of the total amount of electricity used from the grid, the total amount of ethanol produced, and a calculation of the amount of electricity used from the grid per gallon of ethanol produced.

(5) If the producer intends to generate advanced biofuel RINs, a description of how the facility intends to demonstrate and document that not more than 0.15 kWh of grid electricity is used per gallon of ethanol produced, calculated on a per batch basis, at the time of RIN generation.

(B) [Reserved]

(x)(A) For a producer of renewable fuel made from *Arundo donax* or

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Pennisetum purpureum per § 80.1426(f)(14)(i):

(1) A Risk Mitigation Plan (Plan) that demonstrates the growth of *Arundo donax* or *Pennisetum purpureum* will not pose a significant likelihood of spread beyond the planting area of the feedstock used for production of the renewable fuel. The Plan must identify and incorporate best management practices (BMPs) into the production, management, transport, collection, monitoring, and processing of the feedstock. To the extent practicable, the Risk Mitigation Plan should utilize a Hazard Analysis Critical Control Point (HACCP) approach to examine each phase of the pathway to identify spread reduction steps. BMPs should include the development of mitigation strategies and plans to minimize escape and other impacts (e.g., minimize soil disturbance), incorporate desirable traits (e.g., sterility or reduced seed production), develop and implement dispersal mitigation protocols prior to cultivation, develop multiple year eradication controls. Eradication controls should follow an approach of early detection and rapid response (EDRR) to unintended spread. EDRR efforts should demonstrate the likelihood that invasions will be halted while still localized and identify and employ cooperative networks, communication forums, and consultation processes with federal, state, and local agencies. The Risk Mitigation Plan must provide for the following:

(i) Monitoring and reporting data for a period prior to planting that is sufficient to establish a baseline, through crop production, and extending beyond crop production for a sufficient period after the field is no longer used for feedstock production to ensure no remnants of giant reed or napier grass survive or spread.

(ii) Monitoring must include the area encompassing the feedstock growing areas, the transportation corridor between the growing areas and the renewable fuel production facility, and the renewable fuel production facility, extending to the distance of potential propagation of the feedstock species, or further if necessary.

(iii) Monitoring must reflect the likelihood of spread specific to the feedstock.

(iv) A closure plan providing for the destruction and removal of feedstock from the growing area upon abandonment by the feedstock grower or end of production.

(v) A plan providing for an independent third party who will audit the monitoring and reporting conducted in accordance with the Plan on an annual basis, subject to approval of a different frequency by EPA.

(2) A letter from the United States Department of Agriculture (“USDA”) to the renewable fuel producer stating USDA’s conclusions and the bases therefore regarding whether the *Arundo donax* or *Pennisetum purpureum* does or does not present a significant likelihood of spread beyond the planting area of the feedstock used for production of the renewable fuel as proposed by the producer. This letter shall also include USDA’s recommendation of whether it is appropriate to require the use of a financial mechanism to ensure the availability of financial resources sufficient to cover reasonable potential remediation costs associated with the invasive spread of giant reed or napier grass beyond the intended planting areas. In coordination with USDA, EPA shall identify for the producer the appropriate USDA office from which the letter should originate.

(3) Identification of all federal, state, regional, and local requirements related to invasive species that are applicable for the feedstock at the growing site and at all points between the growing site and the fuel production site.

(4) A copy of all state and local growing permits held by the feedstock grower.

(5) A communication plan for notifying EPA’s Office of Transportation and Air Quality, USDA, adjacent federal land management agencies, and any relevant state, tribal, regional, and local authorities as soon as possible after identification of the issue if the feedstock is detected outside planted area.

(6) A copy of the agreement between the feedstock grower and fuel producer establishing all rights and duties of the parties related to the Risk Mitigation

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Plan and any other activities and liability associated with the prevention of the spread of *Arundo donax* and/or *Pennisetum purpureum* outside of the intended planting area.

(7) A copy of the agreement between the fuel producer and an independent third party describing how the third party will audit the monitoring and reporting conducted in accordance with the Risk Mitigation Plan on an annual basis, subject to approval of a different timeframe by EPA.

(8) Information on the financial resources or other financial mechanism (such as a state-administered fund, bond, or certificate of deposit) that would be available to finance reasonable remediation activities associated with the potential spread of giant reed or napier grass beyond the intended planting areas, and information on whether it is necessary to have any further such resources or mechanism. EPA may require a demonstration that there is an adequate financial mechanism (such as a state-administered fund, bond, or certificate of deposit) to ensure the availability of financial resources sufficient to cover reasonable potential remediation costs associated with the spread of giant reed or napier grass beyond the intended planting areas.

(9) EPA may require additional information as appropriate.

(B) For a producer of renewable fuel made from *Arundo donax* or *Pennisetum purpureum* per § 80.1426(f)(14)(ii):

(I) Clear and compelling evidence, including information and supporting data, demonstrating that *Arundo donax* or *Pennisetum purpureum* does not present a significant likelihood of spread beyond the planting area of the feedstock used for production of the renewable fuel. Evidence must include data collected from similar environments (soils, temperatures, precipitation, USDA Hardiness Zones) as the proposed feedstock production project site and accepted by the scientific community. Such a demonstration should include consideration of the elements of a Risk Mitigation Plan set forth in paragraph (b)(1)(x)(A) of this section, fully disclose the potential invasiveness of the feedstock, provide a closure plan for the destruction and re-

moval of feedstock from the growing area upon abandonment by the feedstock grower or end of production, and explain why a Risk Mitigation Plan is not needed to make the required determination.

(2) A letter from the United States Department of Agriculture (“USDA”) to the renewable fuel producer stating USDA’s conclusions and the bases therefore regarding whether the *Arundo donax* or *Pennisetum purpureum* does or does not present a significant likelihood of spread beyond the planting area of the feedstock used for production of the renewable fuel as proposed by the producer or importer. In coordination with USDA, EPA shall identify for the producer the appropriate USDA office from which the letter should originate.

(C) EPA may suspend a producer’s registration for purposes of generating RINs for renewable fuel using *Arundo donax* or *Pennisetum purpureum* as a feedstock if such feedstock has spread beyond the intended planting area.

(xi) For a producer of fuel oil meeting paragraph (2) of the definition of heating oil in § 80.1401:

(A) An affidavit from the producer of the fuel oil stating that the fuel oil for which RINs have been generated will be sold for the purposes of heating interior spaces of homes or buildings to control ambient climate for human comfort, and no other purpose.

(B) Affidavits from the final end user or users of the fuel oil stating that the fuel oil is being used or will be used for purposes of heating interior spaces of homes or buildings to control ambient climate for human comfort, and no other purpose, and acknowledging that any other use of the fuel oil would violate EPA regulations and subject the user to civil penalties under the Clean Air Act.

(xii) For a producer or importer of any renewable fuel other than ethanol, biodiesel, renewable gasoline, renewable diesel that meets the ASTM 975-13a Grade No. 1-D or No. 2-D specifications (incorporated by reference, see § 80.1468), biogas or renewable electricity all the following:

(A) A description of the renewable fuel and how it will be blended to into gasoline or diesel fuel to produce a

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transportation fuel, heating oil or jet fuel that meets all applicable standards.

(B) A statement regarding whether the renewable fuel producer or importer will blend the renewable fuel into gasoline or diesel fuel or enter into a written contract for the sale and use of a specific quantity of the renewable fuel with a party who blends the fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards.

(C) If the renewable fuel producer or importer enters into a written contract for the sale and use of a specific quantity of the renewable fuel with a party who blends the fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel, provide all the following:

(1) The name, location and contact information for the party that will blend the renewable fuel.

(2) A copy of the contract that requires the party to blend the renewable fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards.

(xiii) (A) A producer of renewable fuel seeking to generate D code 3 or D code 7 RINs, or a foreign ethanol producer seeking to have its product sold as cellulosic biofuel after it is denatured, who intends to produce a single type of fuel using two or more feedstocks converted simultaneously, where at least one of the feedstocks does not have a minimum 75% average adjusted cellulosic content, and who uses only a thermochemical process to convert feedstock into renewable fuel, must provide all the following:

(1) Data showing the average adjusted cellulosic content of the feedstock(s) to be used to produce fuel, based on the average of at least three representative samples. Cellulosic content data must come from an analytical method certified by a voluntary consensus standards body or using a method that would produce reasonably accurate results as demonstrated through peer reviewed references provided to the third party engineer performing the engineering review at registration. Samples must be of rep-

resentative feedstock from the primary feedstock supplier that will provide the fuel producer with feedstock subsequent to registration.

(2) For producers who want to use a new feedstock(s) after initial registration, updates to their registration under paragraph (d) of this section indicating the average adjusted cellulosic content of the new feedstock.

(3) For producers already registered as of August 18, 2014, to produce a single type of fuel that qualifies for D code 3 or D code 7 RINs (or would do so after denaturing) using two or more feedstocks converted simultaneously using only a thermochemical process, the information specified in this paragraph (b)(1)(xiii)(A) shall be provided at the next required registration update under paragraph (d) of this section.

(B) A producer of renewable fuel seeking to generate D code 3 or D code 7 RINs, or a foreign ethanol producer seeking to have its product sold as cellulosic biofuel after it is denatured, who intends to produce a single type of fuel using two or more feedstocks converted simultaneously, where at least one of the feedstocks does not have a minimum 75% adjusted cellulosic content, and who uses a process other than a thermochemical process or a combination of processes to convert feedstock into renewable fuel, must provide all the following:

(1) The expected overall fuel yield, calculated as the total volume of fuel produced per batch (e.g., cellulosic biofuel plus all other fuel) divided by the total feedstock mass per batch on a dry weight basis (e.g., cellulosic feedstock plus all other feedstocks).

(2) The cellulosic Converted Fraction (CF) that will be used for generating RINs under § 80.1426(f)(3)(vi).

(3) Chemical analysis data supporting the calculated cellulosic Converted Fraction and a discussion of the possible variability that could be expected between reporting periods per § 80.1451(b)(1)(ii)(U)(1). Data used to calculate the cellulosic CF must be representative and obtained using an analytical method certified by a voluntary consensus standards body, or using a method that would produce reasonably accurate results as demonstrated

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through peer reviewed references provided to the third party engineer performing the engineering review at registration.

(4) A description and calculations showing how the data were used to determine the cellulosic Converted Fraction.

(5) For producers already registered as of August 18, 2014, to produce a single type of fuel that qualifies for D code 3 or D code 7 RINs (or would do so after denaturing) using two or more feedstocks converted simultaneously using a combination of processes or a process other than a thermochemical process, the information specified in this paragraph (b)(1)(xiii)(B) shall be provided at the next required registration update under paragraph (d) of this section.

(xiv) For a producer of cellulosic biofuel made from energy cane, or a foreign renewable fuel producer making ethanol from energy cane and seeking to have it sold after denaturing as cellulosic biofuel, provide all of the following:

(A) Data showing that the average adjusted cellulosic content of each cane cultivar they intend to use is at least 75%, based on the average of at least three representative samples of each cultivar. Cultivars must be grown under normal growing conditions and consistent with acceptable farming practices. Samples must be of feedstock from a feedstock supplier that the fuel producer intends to use to supply feedstock for their production process and must represent the feedstock supplier's range of growing conditions and locations. Cellulosic content data must come from an analytical method certified by a voluntary consensus standards body or using a method that would produce reasonably accurate results as demonstrated through peer reviewed references provided to the third party engineer performing the engineering review at registration.

(B) Producers that want to change or add new cultivar(s) after initial registration must update their registration and provide EPA with data in accordance with paragraph (d) of this section demonstrating that the average adjusted cellulosic content for any new cultivar is at least 75%. Cultivars that

do not meet this requirement are considered sugarcane for purposes of Table 1 to §80.1426.

(xv) For a producer of cellulosic biofuel made from crop residue or a foreign renewable fuel producer making ethanol from crop residue and seeking to have it sold after denaturing as cellulosic biofuel, provide all the following information:

(A) A list of all feedstocks the producer intends to utilize as crop residue.

(B) A written justification which explains why each feedstock a producer lists according to paragraph (b)(1)(xv)(A) of this section meets the definition of "crop residue" per §80.1401.

(C) For producers already registered as of August 18, 2014 to produce a renewable fuel using crop residue, the information specified in this paragraph (b)(1)(xv) shall be provided at the next required registration update under paragraph (d) of this section.

(2) An independent third-party engineering review and written report and verification of the information provided pursuant to paragraph (b)(1) of this section. The report and verification shall be based upon a site visit and review of relevant documents and shall separately identify each item required by paragraph (b)(1) of this section, describe how the independent third-party evaluated the accuracy of the information provided, state whether the independent third-party agrees with the information provided, and identify any exceptions between the independent third-party's findings and the information provided.

(i) The verifications required under this section must be conducted by a professional engineer, as specified in paragraphs (b)(2)(i)(A) and (b)(2)(i)(B) of this section, who is an independent third-party. The verifying engineer must be:

(A) For a domestic renewable fuel production facility or a foreign ethanol production facility, a professional engineer who is licensed by an appropriate state agency in the United States, with professional work experience in the chemical engineering field or related to renewable fuel production.

(B) For a foreign renewable fuel production facility, an engineer who is a

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foreign equivalent to a professional engineer licensed in the United States with professional work experience in the chemical engineering field or related to renewable fuel production.

(ii) To be considered an independent third-party under this paragraph (b)(2):

(A) The third-party shall not be operated by the renewable fuel producer or foreign ethanol producer, or any subsidiary or employee of the renewable fuel producer or foreign ethanol producer.

(B) The third-party shall be free from any interest in the renewable fuel producer or foreign ethanol producer's business.

(C) The renewable fuel producer or foreign ethanol producer shall be free from any interest in the third-party's business.

(D) Use of a third-party that is debarred, suspended, or proposed for debarment pursuant to the Government-wide Debarment and Suspension regulations, 40 CFR part 32, or the Debarment, Suspension and Ineligibility provisions of the Federal Acquisition Regulations, 48 CFR, part 9, subpart 9.4, shall be deemed noncompliance with the requirements of this section.

(iii) The independent third-party shall retain all records pertaining to the verification required under this section for a period of five years from the date of creation and shall deliver such records to the Administrator upon request.

(iv) The renewable fuel producer or foreign ethanol producer must retain records of the review and verification, as required in § 80.1454(b)(6).

(v) The third-party must provide to EPA documentation of his or her qualifications as part of the engineering review, including proof of appropriate professional license or foreign equivalent.

(vi) Owners and operators of facilities described in § 80.1403(c) and (d) must submit the engineering review no later than December 31, 2010.

(c) *Importers.* Importers of renewable fuel must provide EPA the information specified under § 80.76, if such information has not already been provided under the provisions of this part and must receive an EPA-issued company identification number prior to gener-

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ating or owning RINs. Registration information must be submitted and accepted by EPA by July 1, 2010, or 60 days prior to an importer importing any renewable fuel with assigned RINs or generating any RINs for renewable fuel, whichever dates comes later.

(d) *Registration updates.* (1) Any producer of renewable fuel, and any foreign ethanol producer who makes changes to his facility that will allow him to produce renewable fuel, as defined in § 80.1401 that is not reflected in the producer's registration information on file with EPA must update his registration information and submit a copy of an updated independent third-party engineering review on file with EPA at least 60 days prior to producing the new type of renewable fuel. The producer may also submit an addendum to the independent third-party engineering review on file with EPA provided the addendum meets all the requirements in paragraph (b)(2) of this section and verifies for EPA the most up-to-date information at the producer's existing facility.

(2) Any producer of renewable fuel and any foreign ethanol producer who makes any other changes to a facility that will affect the producer's registration information but will not affect the renewable fuel category for which the producer is registered per paragraph (b) of this section must update his registration information 7 days prior to the change.

(3) All producers of renewable fuel and foreign ethanol producers must update registration information and submit an updated independent third-party engineering review according to the schedule in paragraph (d)(3)(i) or (d)(3)(ii) of this section, and including the information specified in paragraph (d)(3)(iii) of this section:

(i) For all producers of renewable fuel and foreign ethanol producers registered in calendar year 2010, the updated registration information and independent third-party engineering review shall be submitted to EPA by January 31, 2013, and by January 31 of every third calendar year thereafter; or

(ii) For all producers of renewable fuel and foreign ethanol producers registered in any calendar year after 2010, the updated registration information

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and independent third-party engineering review shall be submitted to EPA by January 31 of every third calendar year after the first year of registration.

(iii) In addition to conducting the engineering review and written report and verification required by paragraph (b)(2) of this section, the updated independent third-party engineering review shall include a detailed review of the renewable fuel producer's calculations used to determine V_{RIN} of a representative sample of batches of each type of renewable fuel produced since the last registration. The representative sample shall be selected in accordance with the sample size guidelines set forth at § 80.127.

(e) Any party who owns RINs, intends to own RINs, or intends to allow another party to separate RINs as per § 80.1440, but who is not covered by paragraph (a), (b), or (c) of this section, must provide EPA the information specified under § 80.76, if such information has not already been provided under the provisions of this part and must receive an EPA-issued company identification number prior to owning any RINs. Registration information must be submitted at least 30 days prior to RIN ownership.

(f) Registration for any facility claiming an exemption under § 80.1403(c) or (d), must be submitted by July 1, 2013. EPA may in its sole discretion waive this requirement if it determines that the information submitted in any later registration can be verified by EPA in the same manner as would have been possible with a timely submission.

(g) Any independent third-party auditor described in § 80.1471 must register with the EPA as an independent third-party auditor and receive an EPA issued company identification number prior to conducting quality assurance audits pursuant to § 80.1472. Registration information must be submitted at least 30 days prior to conducting audits of renewable fuel production facilities. The independent third-party auditor must provide to the EPA all the following:

(1) The information specified under § 80.76, if such information has not already been provided under the provisions of this part.

(2) Documentation of professional qualifications as follows:

(i) For a professional engineer as described in § 80.1450(b)(2)(i)(A) and (b)(2)(i)(B).

(ii) For a domestic independent third-party auditor or a foreign independent third-party auditor, a certified public accountant who is licensed by an appropriate state agency in the United States.

(iii) For a foreign independent third-party auditor, an accountant who is a foreign equivalent to a certified public accountant licensed in the United States.

(3) Documentation of professional liability insurance as described in § 80.1471(c).

(4) Any quality assurance plans as described in § 80.1469.

(5) Name, address, and company and facility identification numbers of all renewable fuel production facilities that the independent third-party auditor intends to audit under § 80.1472.

(6) An affidavit, or electronic consent, from each renewable fuel producer or foreign renewable fuel producer stating its intent to have the independent third-party auditor conduct a quality assurance audit of any of the renewable fuel producer's or foreign renewable fuel producer's facilities.

(7) An affidavit stating that an independent third-party auditor and its contractors and subcontractors are independent, as described in § 80.1471(b), of any renewable fuel producer or foreign renewable fuel producer.

(8) The name and contact information for each person employed (or under contract or subcontract) by the independent third-party auditor to conduct audits or verify RINs, as well as the name and contact information for any professional engineer and certified public accountant performing the review.

(9) *Registration updates*—(i) Any independent third-party auditor who makes changes to its quality assurance plan(s) that will allow it to audit new renewable fuel production facilities, as defined in § 80.1401 that is not reflected in the producer's registration information on file with the EPA must update its registration information and submit a

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copy of an updated QAP on file with the EPA at least 60 days prior to producing the new type of renewable fuel.

(ii) Any independent third-party auditor who makes any other changes to a QAP that will affect the third-party auditor's registration information but will not affect the renewable fuel category for which the producer is registered per paragraph (b) of this section must update its registration information 7 days prior to the change.

(iii) Independent third-party auditors must update their QAPs at least 60 days prior to verifying RINs generated by a renewable fuel facility uses a new pathway.

(iv) Independent third-party auditors must update their QAPs at least 60 days prior to verifying RINs generated by any renewable fuel facility not identified in their existing registration.

(10) *Registration renewal.* Registrations for independent third-party auditors expire December 31 of each calendar year. Previously approved registrations will renew automatically if all the following conditions are met:

(i) The independent third-party auditor resubmits all information, updated as necessary, described in §80.1450(g)(1) through (g)(7) no later than October 31 before the next calendar year.

(ii) The independent third-party auditor submits an affidavit affirming that he or she has only verified RINs using a QAP approved under §80.1469, notified all appropriate parties of all potentially invalid RINs as described in §80.1471(d), and fulfilled all of his or her RIN replacement obligations under §80.1474.

(iii) The auditor has not received a notice of deficiency from the EPA regarding its registration renewal materials.

(11) *Revocation of registration.* (i) The Administrator may issue a notice of intent to revoke the registration of a third-party auditor if the Administrator determines that the auditor has failed to fulfill any requirement of this subpart. The notice of intent shall include an explanation of the reasons for the proposed revocation.

(ii) Within 60 days of receipt of the notice of intent to revoke, the independent third-party auditor may submit written comments concerning the

notice, including but not limited to a demonstration of compliance with the requirements which provide the basis for the proposed revocation. Communications should be sent to the EMTS support line (*support@epamts-support.com*). The Administrator shall review and consider any such submission before taking final action concerning the proposed revocation.

(iii) If the auditor fails to respond in writing within 60 days to the notice of intent to revoke, the revocation shall become final by operation of law and the Administrator shall notify the independent third-party auditor of such revocation.

(h) *Deactivation of company registration.* (1) EPA may deactivate a company's registration, using the process in paragraph (h)(2) of this section, if any of the following criteria are met:

(i) The company has reported no activity in EMTS for twenty-four consecutive months.

(ii) The company has failed to comply with the registration requirements of this section.

(iii) The company has failed to submit any required report within thirty days of the required submission date under §80.1451.

(iv) The attest engagement required under §80.1454 has not been received within thirty days of the required submission date.

(2) EPA will use the following process whenever it decides to deactivate the registration of a company:

(i) EPA will provide written notification to the responsible corporate officer identifying the reasons or deficiencies of why EPA intends to deactivate the company's registration. The company will have fourteen calendar days from the date of the notification to correct the deficiencies identified or explain why there is no need for corrective action.

(ii) If the basis for EPA's notice of intent to deactivate registration is the absence of EMTS activity, a stated intent to engage in activity reported through EMTS will be sufficient to avoid deactivation of registration.

(iii) If the company does not respond, does not correct identified deficiencies, or does not provide an adequate explanation regarding why such correction

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is not necessary within the time allotted for response, EPA may deactivate the company's registration without further notice to the party.

(3) Impact of registration deactivation:

(i) A company whose registration is deactivated shall still be liable for violation of any requirements of this subpart.

(ii) A company whose registration is deactivated will not be listed on any public list of actively registered companies that is maintained by EPA.

(iii) A company whose registration is deactivated will not have access to any of the electronic reporting systems associated with the renewable fuel standard program, including the EPA Moderated Transaction System (EMTS).

(iv) A company whose registration is deactivated must submit any corrections of deficiencies to EPA on forms, and following policies, established by EPA.

(v) If a company whose registration has been deactivated wishes to re-register, they may initiate that process by submitting a new registration, consistent with paragraphs (a) through (c) of this section.

(i) *Registration procedures.* (1) Registration shall be on forms, and following policies, established by the Administrator.

(2) English language registrations— Any document submitted to EPA under this section must be submitted in English, or shall include an English translation.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26043, May 10, 2010; 77 FR 1356, Jan. 9, 2012; 77 FR 74606, Dec. 17, 2012; 78 FR 41714, July 11, 2013; 78 FR 62471, Oct. 22, 2013; 79 FR 42163, July 18, 2014; 79 FR 42115, July 18, 2014]

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that I have this 24th day of March 2020, caused the foregoing to be served upon parties on the Court's official service list via email through the Court's CM/ECF system.

/s/ Seth P. Waxman