ORAL ARGUMENT NOT YET SCHEDULED

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

NO. 12-1139

AMERICAN PETROLEUM INSTITUTE,

PETITIONER,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

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

BRIEF FOR RESPONDENT

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AUGUST 20, 2012

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

A. Parties and *Amici*

All parties appearing in this Court are accurately identified in the Brief of Petitioner American Petroleum Institute.

B. Rulings Under Review

The agency action under review is EPA's final rule entitled *Regulation of Fuel and Fuel Additives: 2012 Renewable Fuel Standards*, published in the Federal Register at 77 Fed. Reg. 1320 (Jan. 9, 2012).

C. Related Cases

This case was not previously before this Court or any other court.

Respectfully submitted,

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August 20, 2012

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GLOSSARY

AFPM	American Fuel & Petrochemical Manufacturers
API	American Petroleum Institute
API. Br.	Brief of Petitioner American Petroleum Institute
CAA	Clean Air Act
EIA	Energy Information Administration
EISA	Energy Independence and Security Act of 2007
NPRA	National Petroleum Refiners Association
RFS	Renewable Fuel Standards

JURISDICTIONAL STATEMENT

On January 9, 2012, acting pursuant to the Clean Air Act ("CAA"), as amended by the Energy Independence and Security Act of 2007 ("EISA"), EPA published a final rule establishing Renewable Fuel Standards ("RFS") for 2012. 77 Fed. Reg. 1320 (Jan. 9, 2012) (JAxxxx). Petitioner American Petroleum Institute ("API") timely filed this petition for judicial review. The Court has jurisdiction under 42 U.S.C. § 7607(b).

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Petitioner API ("API Br.").

ISSUES PRESENTED

1. Whether EPA's determination of the volume of cellulosic biofuel that will be sold or introduced into commerce in 2012 was "based on" an estimate provided by the Energy Information Administration ("EIA"), and was reasonable.

2. Whether EPA reasonably determined not to decrease the volume of advanced biofuel that must be sold or introduced into commerce in 2012, because other sources of advanced biofuel would likely make up for the expected shortfall in cellulosic biofuel production.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Cellulosic biofuel holds great promise as a renewable source of clean transportation fuel that can reduce the United States' reliance on imported fuel. Unlike other types of renewable fuels that are made from edible feedstocks such as corn, cellulosic biofuel can be produced from non-edible feedstocks such as agricultural residues and yard wastes, as well as cellulose-rich crops such as switchgrass grown specifically for biofuel production. *See* 75 Fed. Reg. 14,670, 14,747/3-748/1 (Mar. 26, 2010) (JAxxxx-xxxx). The increased production and utilization of cellulosic biofuel, as well as other types of advanced biofuels, is also key to attaining the greenhouse gas reductions that Congress sought to achieve in enacting EISA. After full implementation in 2022, the RFS program is expected to reduce greenhouse gas emissions by an average of 138 million metric tons per year (averaged over 30 years). *Id*. at 14,683/1 (JAxxxx). That is the equivalent of removing 27 million cars from the road. *Id*.

The majority of these greenhouse gas reductions will come from advanced biofuels and, in particular, the cellulosic biofuel component of advanced biofuels: as of 2022, fifty-eight percent (21 of 36 billion gallons) of the renewable fuel that will be required to be sold or introduced into commerce under the RFS program will be advanced biofuel, and seventy-six percent of that advanced biofuel (16 of

21 billion gallons) must be cellulosic biofuel. By definition, advanced biofuels must reduce greenhouse gas emissions by fifty percent compared to 2005 baseline fuels, and cellulosic biofuels must achieve a sixty percent reduction. In contrast, other renewable fuels need only reduce greenhouse gas emissions by twenty percent, or may be exempt from any greenhouse gas reduction requirement based on the grandfathering provisions in the statute. Therefore, the increased production and use of advanced and cellulosic biofuels is expected to account for most of the anticipated reductions in greenhouse gas emissions under the RFS program.

Congress recognized that the advanced and cellulosic biofuel industry needs a governmental mandate in order to develop. According to a consortium of companies involved in the production of both conventional and advanced biofuels, the Renewable Fuel Standards program "is *the* fundamental policy driver for the continued development of U.S. biofuels, particularly advanced and cellulosic biofuels. It provides industry and investors with the confidence of knowing that if they can produce advanced and cellulosic biofuels in an economic manner, the RFS will ensure market access for advanced and cellulosic biofuels." *See* Letter from Brent Erickson, Executive Vice President, Industrial and Environmental Section, Biotechnology Industry Organization, to Air and Radiation Docket and Information Center (Aug. 5, 2011) at 1-2 (EPA-HQ-OAR-2010-0133-0170) (JAxxxx-xxxx).

EPA's action supports these congressional goals. When projecting expected cellulosic biofuel production in the context of setting the 2012 applicable volume of cellulosic biofuel, EPA reasonably considered the production capacity likely to be developed throughout the year, while API would have EPA rely narrowly and solely on proven past cellulosic biofuel production. Having determined the projected volume of cellulosic biofuel for 2012, EPA considered the production capacity and likely availability of other advanced biofuels and reasonably concluded that other types of advanced biofuels, apart from cellulosic biofuels, are likely to be available in sufficient volumes to meet the statutory volume for advanced biofuel. EPA reasoned that lowering the advanced biofuel volume in these circumstances would be inconsistent with EISA's energy security and greenhouse gas reduction goals, and decided to leave the statutory advanced biofuel volume unchanged. 77 Fed. Reg. at 1331/3 (JAxxxx). Notwithstanding these circumstances, API would have EPA dramatically reduce the volume of advanced biofuel that is required. EPA's actions were reasonable and should be upheld.

II. STATUTORY BACKGROUND

Congress enacted EISA to "move the United States toward greater energy independence and security," and to "increase the production of clean renewable fuels," among other purposes. Pub. L. No. 110-140, 121 Stat. 1492, 1492 (2007).

To do so, Congress significantly expanded the then-existing Renewable Fuel Standards program, and directed EPA to revise the original Renewable Fuel Standards regulations to

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

42 U.S.C. § 7545(o)(2)(A)(i). *See generally Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 147-50 (D.C. Cir. 2010), *cert. denied*, 132 S. Ct. 571 (2011). Among other changes, EISA increased the amount of renewable fuel to be used in the United States for transportation purposes from 7.5 billion gallons in 2012, as required by the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), to a new total of 36 billion gallons by 2022. In addition, EISA identified three subsets of renewable fuel, each with its own annual volumetric blending requirements.

The broadest type of fuel, "renewable fuel," is any fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel. 42 U.S.C. § 7545(o)(1)(J). Renewable fuel includes ethanol derived from corn starch, which is currently the primary source of renewable fuel in the United States. *See* 74 Fed. Reg. 24,904, 24,977 (table V.A.1-1); 24,983-84 (May 26, 2009) (JAxxxx, xxxx-xxxx). Renewable fuel must achieve

at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to the 2005 petroleum baseline, unless it is produced by a grandfathered facility that qualifies for an exemption from this requirement. 42 U.S.C. § 7545(o)(2)(A)(i).

A subset of renewable fuel is advanced biofuel, which is renewable fuel other than ethanol derived from corn starch, and that has lifecycle greenhouse gas emissions that are least 50 percent less than the lifecycle greenhouse gas emissions of the 2005 petroleum baseline. *Id*. § 7545(o)(1)(B). Advanced biofuel includes two additional subsets, each with their own volume mandates. Biomass-based diesel is a diesel fuel substitute produced from nonpetroleum renewable resources that has lifecycle greenhouse gas emissions that are least 50 percent less than the baseline lifecycle greenhouse gas emissions. *Id*. § 7545(o)(1)(D). Cellulosic biofuel is a renewable fuel derived from cellulose, hemicellulose, or lignin (*i.e.*, the principal compounds that make up the cell walls in plants), and that has lifecycle greenhouse gas emissions that are least 60 percent less than the baseline lifecycle greenhouse gas emissions. *Id*. § 7545(o)(1)(E). Cellulosic biofuel could include, for example, ethanol or diesel fuel that is made from cellulosic crop waste such as corn stover or tree residues. Biomass-based diesel and cellulosic biofuel are non-exclusive types of advanced biofuel; other types of fuels, such as ethanol produced from the sugar in sugarcane, can also be an advanced biofuel if they are produced

from renewable biomass and in a way that meets the minimum 50 percent greenhouse gas reduction requirement.

EISA specifies the applicable volumes for renewable fuel, advanced biofuel, and cellulosic biofuel for each year through 2022, with provisions for EPA to determine the applicable volumes for subsequent years. *Id*. § 7545(o)(2)(B)(i), (ii). For biomass-based diesel, the EISA specifies the applicable volumes only through 2012. *Id*. §7545(o)(2)(B)(i), (iv).

EISA contains general provisions that allow EPA to reduce the required volume of any type of renewable fuel below levels specified in the statute where there is inadequate domestic supply or where compliance with the mandate would cause severe economic or environmental harm. *Id*. § 7545(o)(7)(A). In addition, the statute contains more specific provisions providing for volume adjustments related to cellulosic biofuel and biomass-based diesel in specified circumstances. *Id*. § 7545(o)(7)(D), (E). Reflecting the nascent status of the cellulosic biofuel industry, EISA requires that EPA undertake an annual evaluation of anticipated cellulosic biofuel production, and that:

> [f]or any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel

> required under paragraph (2)(B) to the projected volume available during that calendar year.

Id. § 7545(o)(7)(D)(i). The "estimate provided under paragraph (3)(A)" refers to an estimate the Energy Information Administration ("EIA") provides to EPA by October 31 of each year, of "the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States" in the following calendar year. *Id*. § 7545(o)(3)(A).

Thus, for cellulosic biofuel, EPA must conduct an annual evaluation and determine the projected production volumes; if EPA's projection is lower than the applicable volume specified in the statute, then EPA must use its lower projected production volume in establishing the cellulosic biofuel requirements for the next calendar year. If EPA lowers the applicable volume for cellulosic biofuel, EPA is also authorized, but not required, to lower the applicable volumes for advanced biofuel and renewable fuel. *Id*. § 7545(o)(7)(D)(i).

EPA ensures that transportation fuel contains at least the applicable volume of each type of renewable fuel (after any adjustments) by establishing annual renewable fuel standards. The standard is a percentage for each type of fuel. Obligated parties such as refiners and blenders apply the percentage standards to their own annual production or importation of gasoline and diesel in order to calculate their individual renewable volume obligations for each type of fuel. EPA

must determine the standards for each calendar year by November 30 of the prior year. *Id*. § 7545(o)(3)(B). EPA does so by dividing the applicable national volume for each type of renewable fuel established in or determined pursuant to paragraph (2)(B) (or as modified pursuant to paragraphs (7)(A) or (7)(D)-(F)), by the EIA's estimate of the national volume of transportation fuel that will be sold or introduced into commerce in the following year. *Id*. § 7545(o)(3)(A).

EISA contains several provisions designed to ease the regulatory burden on obligated parties. Thus, EISA requires EPA to establish a credit trading program to allow obligated parties who overcomply in one year to either apply credits towards compliance in a subsequent year or to sell the credits to another obligated party, which can then use them to demonstrate its own compliance. *Id*. § 7545(o)(5)(A)-(C). The statute provides that obligated parties unable to purchase or generate sufficient credits to demonstrate compliance in any given year may also carry a compliance deficit forward to the next year, which can then be satisfied together with that next year's renewable volume obligation. *Id*. § 7545(o)(5)(D). Finally, in addition to these flexibilities, which are available for all types of biofuels, EISA includes another flexibility specifically for cellulosic biofuel. In any year in which EPA lowers the applicable volume of cellulosic biofuel because the anticipated production is less than the volume set forth in the statute, EPA is required to make available "cellulosic biofuel credits" that allow

obligated parties to demonstrate compliance with their cellulosic biofuel requirements through the purchase of credits directly from EPA. *Id*. § 7545(o)(7)(D)(ii)-(iii). The statute includes a formula for deriving the price of these credits for a given compliance year, which is tied to the price of oil at the time EPA sets the annual cellulosic biofuel standard. *Id.* § 7545(o)(7)(D)(ii). These credits are available at this fixed price regardless of either the extent of actual cellulosic biofuel production, or the cost of cellulosic biofuel. Thus, in years when EPA lowers the applicable volume of cellulosic biofuel below the level specified in the statute, obligated parties have the option of relying entirely or partially on the purchase of cellulosic biofuel credits to satisfy their cellulosic biofuel obligation.

III. REGULATORY BACKGROUND

A. Renewable Identification Numbers.

EPA uses a compliance system that does not require obligated parties to actually blend renewable fuel themselves. Instead, the producers and importers of renewable fuels generate renewable identification numbers, or "RINs," for each gallon of renewable fuel they import or produce for use in the United States. 40 C.F.R. § 80.1426(a). Obligated parties comply with their renewable volume obligation by accumulating RINs and then "retiring" them in an annual compliance demonstration. As a result of these and related regulatory provisions, the volumes

of renewable fuel represented by the RINs are actually consumed. *See* 72 Fed. Reg. 23,900, 23,908 (May 1, 2007) (JAxxxx).

RINs can be purchased at whatever time during the year the obligated party decides is most advantageous. At the end of each calendar year obligated parties calculate their renewable fuel volume obligations and then retire a number of RINs equal to their volume obligations for that year. In this manner, RINs serve as the primary mechanism by which obligated parties demonstrate compliance with their renewable volume obligations.

RINs also form the basis for the statutorily-required credit program that allows credits for overcompliance in one year to be used to satisfy the party's obligation in the next year or to be sold to another party. If a RIN is not used to comply with an obligated party's renewable volume obligation in the year the RIN is generated, then the excess RINs are equivalent to credits and can be used by any obligated party (with some limitations) to show compliance in the year following the one in which they initially came into existence. *See* 40 C.F.R. § 80.1427.

B. 2011 Renewable Fuel Standards

On July 20, 2010, EPA issued proposed renewable fuel standards for 2011. 75 Fed. Reg. 42,238 (July 20, 2010) (JAxxxx). Instead of using the statutorily-specified cellulosic biofuel volume of 250 million gallons, acting pursuant to its express authority in 42 U.S.C. § 7545(o)(7)(D)(i), EPA proposed to base the 2011

standard for that fuel on a volume of between 6.5 and 25.5 million gallons. *Id*. at 42,241/2 (JAxxxx). After receiving and reviewing comments, EPA in December 2010 set the applicable volume for the 2011 cellulosic biofuel standard at 6.6 million gallons. 75 Fed. Reg. 76,790, 76,797/2-3 (Dec. 6, 2010) (JAxxxx). EPA did not reduce the applicable volume for either the advanced or the renewable fuel standards. *Id*. at 76,799/2 (JAxxxx).

API and the National Petroleum Refiners Association ("NPRA," now known as American Fuel & Petrochemical Manufacturers, or AFPM) sought administrative reconsideration of the 2011 standards and petitioned EPA to waive the 2011 cellulosic biofuel standard pursuant to 42 U.S.C. § 7545(o)(7)(A). However, neither group filed a petition for judicial review of the 2011 standards. EPA proposed to deny the administrative reconsideration petition and solicited comment on that proposal at the same time it solicited comment on the proposed *2012* standards. 76 Fed. Reg. 38,844, 38,879-883 (July 1, 2011) (JAxxxx-xxxx). On May 22, 2012, EPA denied both the administrative reconsideration petition and the petition for a waiver of the 2011 cellulosic biofuel standard. *Response to Petition of the American Petroleum Institute (API) and the National Petrochemical and Refiners Association (NPRA) for Reconsideration of Portions of the December 9, 2010 Rule Amending the Renewable Fuel Standard Program Regulations and Response to Petitions by API, NPRA, Western States Petroleum Association*

(WSPA) and Coffeyville Resources Refining & Marketing, LLC (Coffeyville) for a Waiver of the 2011 Cellulosic Biofuel Standard (JAxxxx). Two petitions for judicial review of that May 22 letter were subsequently filed in this Court. *See American Fuel & Petrochemical Mfrs. v. EPA*, No. 12-1249 (D.C. Cir., filed June 11, 2012); *American Petroleum Inst. v. EPA*, No. 12-1330 (D.C. Cir., filed July 24, 2012).[1]

C. EPA's Proposed 2012 Standards.

On July 1, 2011, EPA proposed renewable fuel standards for 2012. 76 Fed. Reg. at 38,844 (JAxxxx). As with the 2011 standards, EPA pursuant to 42 U.S.C. § 7545(o)(7)(D)(i) derived a proposed projection of cellulosic biofuel production for 2012 and proposed to base the 2012 applicable volume for cellulosic biofuel on EPA's projected production volume of between 3.55 and 15.7 million gallons, rather than on the 500 million gallon applicable volume set forth in the statute. *Id.* at 38,852 (JAxxxx). EPA explained that for purposes of its production projection

[1] API's petition for review No. 12-1330 purports to challenge the 2011 standards as well as the May 22 denial of API's petition for administrative reconsideration, but the challenge to the 2011 standards was filed too late as it comes more than 60 days after the date on which the 2011 standards were published in the Federal Register. *See* 42 U.S.C. 7607(b)(1) (filing a petition for reconsideration "shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action may be filed").

it had "tracked the progress of over 100 biofuel production facilities." *Id*. at 38,849/3 (JAxxxx). From that list EPA "used publicly available information, as well as information provided by DOE and USDA, to make a preliminary determination of which facilities are the most likely candidates to produce cellulosic biofuel and make it commercially available in 2012." *Id*. Each of those facilities was investigated further to determine its current status and likely production volumes. "Information such as the funding status of these facilities, announced construction and production ramp up periods, and annual fuel production targets were taken into account." *Id*. Individual company projections were then summed to derive an industry-wide projection for purposes of the proposal. *See id*. at 38,852 (Table II.B.4-1) (JAxxxx). EPA noted that its determination for the final rule would be "based on comments received in response to [the] proposal, the estimate of projected biofuel volumes that the EIA is required to provide to EPA by October 31, and other information that becomes available . . ." *Id*. at 38,846/2 (JAxxxx).

Because EPA's projected range of 2012 cellulosic biofuel production was below the statutorily-applicable volume, EPA requested comment on whether to lower either the advanced biofuel or the renewable fuel requirements as well. *Id*. at 38,847/2-3 (JAxxxx). EPA proposed not to do so, based on its estimate of the

volume of other advanced biofuels likely to be available for 2012. *Id.* at 38,847/3; *see also id*. at 38,853/2-3 (JAxxxx).

D. EPA's Final 2012 Standards.

API submitted comments on EPA's proposed range of cellulosic biofuel production, as did NPRA, individual obligated parties, and numerous biofuel producers and associations. The Renewable Fuels Association urged EPA to finalize its cellulosic biofuel projection at the top end of the proposed range. *See* Letter from Bob Dinneen, President, Renewable Fuels Association, to EPA Docket Center (August 11, 2011) at 2 (EPA-HQ-OAR-2010-0133-0163) (JAxxxx). However, API criticized EPA for setting cellulosic biofuel at an "aspirational" level of what "could be made available," in order to stimulate additional production, rather than at the projected volume available, and encouraged EPA to rely only on data from facilities in continuous operation for at least three months as of the November 30 deadline for final action. Letter from Patrick Kelly, Senior Policy Advisor, API, to Air and Radiation Docket and Information Center (Aug. 11, 2011) at 1-2 ("Kelly Letter") (EPA-HQ-OAR-2010-0133-0153) (JAxxxx). Marathon Oil and Chevron generally echoed API's sentiments. *See, e.g.*, Letter from Lisa B. Berry, Vice President and General Manager, Chevron Government Affairs, to Air and Radiation Docket and Information Center (Aug. 11, 2011) at 2 (EPA does a "credible job of gathering needed information" but EPA's cellulosic

projection "must be based on proven production at the time of issuance of the final rule") (EPA-HQ-OAR-2010-0133-0160) (JAxxxx). API also recommended an automatic waiver of the cellulosic, advanced, and renewable mandates to the extent actual cellulosic production falls short of the applicable volume. Kelly Letter at 2-3 (JAxxxx). *See generally* 77 Fed. Reg. at 1329/3-1330/3 (JAxxxx-xxxx).

In the final rule, EPA responded to these comments. EPA announced the EIA's estimate of 6.9 million gallons of cellulosic biofuel for 2012, and described EPA's updated analysis of potential cellulosic biofuel producers and cellulosic biofuel imports. 77 Fed. Reg. at 1326-30 (JAxxxx-xxxx). EPA described how the EIA's estimate supported EPA's final volume determination and where the two estimates diverged, and explained the reasons for the variations. *Id*. at 1328-29 (JAxxxx-xxxx). Generally, EPA noted that the lists of companies that the EIA and EPA identified as expected to produce cellulosic biofuel in 2012 are the same, but that there were some differences in projected volumes resulting from the use of different methodologies. For example, while the EIA assumed that each commercial facility expected to begin production in 2012 would produce 25 percent of its capacity regardless of start date, EPA determined that it was more appropriate to factor into its projections the different anticipated start dates of the facilities within 2012. *Id.* at 1329/1. The result was volume projections equivalent to a somewhat higher utilization rate for certain facilities, and a higher projected

volume overall. *Id*. at 1329. EPA noted that EIA's projections of cellulosic biofuel production in 2012 were very similar to EPA's projections. *Id*. EPA explained that its consideration of EIA's information and resulting estimate in deriving EPA's projection satisfied the statutory requirement that its projection be "based on" the estimate provided by EIA. *Id*.

EPA concluded that 8.65 million gallons of cellulosic biofuel could be made available in 2012, and it used that figure (which equals 10.45 million ethanol equivalent gallons of fuel)[2] to set the 2012 standard. *Id*. at 1331/1 (JAxxxx). EPA also concluded that sufficient volumes of advanced biofuels would be available to satisfy the applicable volume requirements of advanced biofuel set forth in the statute, and it therefore declined to lower that volume and the statutory applicable volume of renewable fuel. *Id*. at 1331-1332 (JAxxxx-xxxx).

API timely filed this petition for judicial review on March 9, 2012.

SUMMARY OF ARGUMENT

API challenges EPA's projected volume of cellulosic biofuel for 2012 as not being "based on" the EIA estimate and as being unreasonably optimistic. API also

[2] While in general one gallon of renewable fuel leads to the generation of one RIN, different renewable fuels have different "equivalence values" based on their energy content. 40 C.F.R. § 80.1415. Thus, for example, a producer of ethanol from corn starch generates one RIN for each gallon of that fuel, while a producer of biodiesel generates 1.5 RINs for every gallon of that fuel. *Id*. § 80.1415(b).

challenges EPA's decision not to reduce the applicable volume of advanced biofuel for 2012. However, the phrase "based on" in the statute is ambiguous, as API concedes. EPA's projected cellulosic production volume for 2012 is "based on" the EIA's estimate because EPA considered the EIA's estimate, followed a very similar methodology, and explained the reasons for the few points of divergence.

EPA's projected volume of cellulosic biofuel is also reasonable and supported by the administrative record. EPA examined the most current sources of information regarding anticipated cellulosic biofuel production of each company with production potential, explained its reasoning, including why its estimates deviated from the EIA's, and reasonably concluded that 8.65 million gallons of cellulosic biofuel (or 10.45 million ethanol-equivalent gallons) would likely be available in 2012.

Although EPA's projected *cellulosic* biofuel production volume for 2012 is significantly less than the applicable volume of 500 million gallons of cellulosic biofuel that Congress anticipated would be available in 2012, EPA reasonably concluded that the *advanced* biofuel applicable volume should not be lowered. EPA reasonably explained that other sources of advanced biofuel besides cellulosic biofuel would likely be available in 2012 in sufficient quantities, and EPA's conclusion should be upheld.

STANDARD OF REVIEW

Under Clean Air Act section 307(d)(9), the Court may reverse EPA's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 42 U.S.C. § 7607(d)(9)(A), (C). This standard is narrow, and a court is not to substitute its judgment for the agency's. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1158 (D.C. Cir. 1980) ("[W]here there is evidence in the record which supports [the Administrator's] judgments, this court is not at liberty to substitute its judgment for the Administrator's."). It is not the court's "function to resolve disagreement among the experts or to judge the merits of competing expert views." *Lead Indus. Ass'n*, 647 F.2d at 1160. "That the evidence in the record may also support other conclusions, even those that are inconsistent with the [EPA] Administrator's, does not prevent [the court] from concluding that his decisions were rational and supported by the record." *Id.* (citations omitted).

Although a court must apply the language of the statute where it reflects "the unambiguously expressed intent of Congress," if the statute is "silent or ambiguous

with respect to the specific issue," the court must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

ARGUMENT

I. EPA'S DETERMINATION OF THE CELLULOSIC BIOFUEL APPLICABLE VOLUME FOR 2012 IS REASONABLE AND CONSISTENT WITH THE STATUTE.

A. EPA's Determination Of The Cellulosic Biofuel Applicable Volume For 2012 Is "Based On" The EIA Estimate, As Required By The Statute.

1. EPA reasonably interpreted the statutory "based on" requirement.

API first argues that EPA's interpretation of the phrase "based on" in section 7545(o)(7)(D)(i) is unreasonable, rendering the resulting 2012 cellulosic biofuel volume "in excess of statutory jurisdiction, authority or limitations." API Br. at 24-28. API concedes that the phrase "based on" is ambiguous, and that under *Chevron* step 2 EPA's interpretation must be upheld if it is reasonable. API Br. at 24-25. As discussed in section I.A.2. below, EPA's interpretation in the context of section 7545(o) is reasonable and must be upheld.

API's counter arguments and interpretation lack merit. API argues that the statutory reference to "based on" requires that EPA use the EIA estimate as the

"foundation," "principal element or ingredient," and "starting point or point of departure" for its projection. API Br. at 25.

API quotes case law and a dictionary to suggest that "based on" must be interpreted as API would prefer, and that any other meaning is unreasonable. However, the phrase "based on" has multiple meanings. For example, API cites *Environmental Def. Fund v. EPA*, 369 F.3d 193 (2nd Cir. 2004), in which the Second Circuit explained that "based on" means "to be used as a base or basis for," and "basis" in turn means, among other things, "principal component" or "fundamental ingredient." *EDF*, 369 F.3d at 203 (quoting Merriam-Webster's Third New International Dictionary 182 (1996)). The same dictionary the Second Circuit relied on in *EDF* goes on to give an alternative definition of "basis" as "something that supports or sustains" a position," such as "a basis of conjecture." Merriam-Webster's Third New International Dictionary 182 (2002 ed.), definition 3. This alternative definition of "basis" does not require that the EIA's estimate be the "fundamental ingredient" or the chronological starting point for EPA's analysis. Instead, it need only "support or sustain" EPA's determination, which EPA noted that it does. 77 Fed. Reg. at 1329 (JAxxxx).

Moreover, API's interpretation of "based on," requiring that the EIA estimate be the "point of departure" for EPA's analysis, is unreasonable in this particular statutory context. The EIA is not required to provide its estimate until

October 31, only 30 days before the November 30 statutory deadline for EPA to announce its *final* determination of required cellulosic biofuel volume for use in deriving the next year's percentage standard. 42 U.S.C. § 7545(o)(3)(B)(i). If EPA were required to use the EIA estimate as the point of departure, as API suggests, then EPA would not have time to issue, solicit comment on, or respond to comments on a proposed standard before the November 30 promulgation deadline. Nor would EPA have time to perform its own inquiry into biofuel producers' capacity. Yet, the statute clearly directs *EPA*, not the EIA, to "determine" the projected volume of cellulosic biofuel production. Furthermore, API concedes, as it must, that EPA need not simply adopt the EIA estimate. Given the statutory timeframe and these practical constraints, a literal application of API's interpretation would be unreasonable.

If instead API's position is that EPA may issue a proposed rule reflecting its own analysis, but that EPA must initially set its work and public comment aside and use the EIA estimate as a point of departure for the final rule, then API's interpretation simply reads too much into an ambiguous statutory phrase. Had Congress intended such an unusual rulemaking procedure it would surely have used clearer statutory language to accomplish it.

Further, API fails to explain what difference it could possibly make whether EPA starts with or considers the EIA's estimate mid-way through its analysis. In

the end EPA must weigh all relevant information, including the EIA's estimate, in deriving a reasonable projection. This is what EPA has done.

API in it's comments on the 2012 cellulosic biofuel proposal argued that EPA's projection was too high, *i.e.*, that EPA was setting an "aspirational goal" rather than a realistic goal based on what was actually likely to be produced, and that EPA should instead base its projections on actual production rates from facilities that had been in operation for at least three months. API comments at 2-3 (JAxxxx-xxxx). The approach suggested by API in its comments is flatly contrary to the EIA's approach; like EPA, the EIA included in its projection the anticipated increased future production of facilities that had not yet operated or had operated only to a limited extent. *See* Letter from Howard K. Gruenspecht, Acting Administrator, U.S. Energy Information Administration, to Lisa P. Jackson, U.S. EPA (October 19, 2011) ("EIA Letter") (EPA-HQ-OAR-2010-0133-0214) (JAxxxx). The EIA had taken the exact same approach with respect to its earlier 2010 and 2011 cellulosic biofuel projections. *See, e.g.*, 75 Fed. Reg. at 14,749 Table IV.B.3-1 *and id*. at n.2 (EIA projecting 2 million gallons of cellulosic biofuel from Cello Energy for 2010, though Cello produced no significant amounts of fuel in 2009) (JAxxxx); 75 Fed. Reg. at 76,795-97, *including* Tables II.A.3-1 and II.A.4-1 (describing company start dates, and lists of companies used for EIA and EPA estimates) (JAxxxx-xxxx). Thus, API's comments suggested that EPA

should reject the EIA's projection (at least to the extent it may include biofuel projections from facilities with no history of production) in favor of an approach that would lead to a lower cellulosic biofuel obligation, while API now argues that EPA's approach, close as it is to the EIA's, deviates too much from the EIA's.

EPA's reasonable interpretation of an admittedly ambiguous phrase is entitled to deference and should be upheld.

2. EPA's determination of the cellulosic biofuel applicable volume for 2012 is based on the EIA estimate.

API next argues that EPA's determination is not actually based on the EIA estimate because, according to API, EPA supplanted the EIA estimate with information EPA developed itself and with EPA's own assessment of production capabilities. API Br. at 27-28. API relies on *Sierra Club v. EPA*, 356 F.3d 296, 306 (D.C. Cir. 2004), but *Sierra Club* does not support API's argument; in fact, it supports EPA's. In that case, the relevant statute said that an attainment demonstration (*i.e.*, a showing that an area will achieve a National Ambient Air Quality Standard under section 111(a) of the CAA, 42 U.S.C. § 7511a(c), by a certain date) "*must be based on photochemical grid modeling* or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective." 356 F.3d at 304 (quoting 42 U.S.C. § 7511a(c)(2)(A)) (emphasis in original). The court in *Sierra Club* held the phrase

"based on" is ambiguous, and "does not necessarily require that attainment demonstrations rest *solely* on grid modeling." 356 F.3d at 306 (emphasis in original). The court went on to note that the phrase "based on" would "not permit an attainment demonstration that wholly abandoned the results of a model by using a supplemental analysis that effectively supplanted the model's calculations." *Id.*

That is not what EPA did here. EPA did not abandon the EIA estimate, either in whole or in part. EPA and the EIA considered precisely the same list of facilities in making their projections. 77 Fed. Reg. at 1329/1 (JAxxxx). Further, EPA and the EIA both considered anticipated production start dates and the plants' overall capacities in deriving production estimates. *See id.* (noting different approaches to projecting future increased production). EPA considered the EIA's approach of applying uniform utilization factors of 25 percent for commercial facilities and 10 percent for demonstration plants, but determined that a better approach would be to make facility-specific estimates of production based on actual start dates within 2012 and facility production plans. *Id.* at 1329/1-2 (JAxxxx). Thus, EPA did not abandon the EIA's projection. Instead, it largely used the EIA's approach to individual facility projections, but made some improvements. EPA did not make a projection that "sharply differs" from the EIA's. *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1273 (D.C. Cir. 2004). Instead, EPA conducted a "supplemental analysis," *Sierra Club*, 356 F.3d at 306,

and took the EIA's projections "into account and then tailored" EPA's projected volumes. *Nuclear Energy Inst., Inc.*, 373 F.3d at 1270. Therefore EPA's final volume is "based on" the EIA projection.

B. EPA's Determination Of The Cellulosic Biofuel Applicable Volume For 2012 Is Reasonable.

1. EPA's projection is realistic.

API asserts that instead of projecting the volume of cellulosic biofuel that will actually be produced, EPA set the applicable volume at a level that will promote growth in the cellulosic biofuel industry. API Br. at 30-31. API's argument is that EPA set the applicable volume at a level higher than what realistically can be produced. API Br. at 30-31 (EPA's projection is "unrealistically high"). However, EPA clearly articulated that it was basing its projection on "reasonably attainable" production levels. *See* 77 Fed. Reg. at 1331/1 (EPA determined the volume that is "reasonably attainable") (JAxxxx). EPA explained how it arrived at reasonably attainable production levels, as discussed above in sections III.C and D (Regulatory Background) and I.A.2 (Argument). Although EPA noted that promoting growth of the biofuels industry is consistent with congressional intent in establishing EISA, *see, e.g.*, 77 Fed. Reg. at 1331/1 (Congress' intent "was to provide a reliable market for [cellulosic biofuel] and in so doing to spur growth in the cellulosic biofuels industry")

(JAxxxx), EPA correctly explained that the applicable volume must be set within the range that can actually be attained based on domestic production and import potential. *Id*. at 1325/3 (JAxxxx). EPA's statement that the standard it sets "helps drive the production of volumes that will be made available," *id*., is simply a straightforward acknowledgment that the RFS program has an impact on fuel production.

API accuses EPA of confusing the "certainty" of EPA's volume determination with the accuracy of that determination. API Br. at 31. But EPA actually addressed both issues, and clearly did not confuse the two. In the cited passage, 77 Fed. Reg. at 1325/1-2 (JAxxxx), EPA responded to a comment regarding an Executive Order that generally requires that regulations "promote predictability and reduce uncertainty." EPA explained that, by establishing a fixed standard, obligated parties know what their obligations will be, and biofuel producers know what baseline demand for their product will be, so they can secure financing and ramp up production with confidence. EPA also explained that, contrary to comments by some obligated parties, certainty for obligated parties does not require establishing a low applicable volume based on demonstrated (as opposed to reasonably anticipated) production, since the availability of waiver credits means that obligated parties *always* have the means to comply with the cellulosic standard, and at a cost that is predictable. EPA went on, however, to

make the separate point that any standard it sets should be within the range of what can be attained, and that the precise value it picks involves a balance between uncertainty in terms of actual attainment, and setting an applicable volume that promotes growth in the cellulosic industry as envisioned by Congress. *See id*. at 1325/2-3. Thus any confusion is on API's part, not EPA's. API's concern regarding the likely accuracy of EPA's projection, API Br. at 31, is addressed elsewhere in the preamble, where EPA explained its methodology and data sources for deriving its projection. 77 Fed. Reg. at 1325/3 - 1326/1, 1330/1-2 (JAxxxx-xxxx, xxxx).

API also points out that none of the facilities that EPA projected would produce cellulosic biofuel in 2010 and 2011 actually did so. API Br. at 32. According to API, these past shortfalls demonstrate that cellulosic biofuel production will not rise to the level that EPA sets. *Id*. at 33. However, EPA considered each company's history of meeting milestone targets and production goals in setting the 2012 cellulosic biofuel volume, 77 Fed. Reg. at 1325/3 (JAxxxx), and as noted above, EPA did not set the applicable volume at a level higher than what realistically can be produced. Instead, EPA set the volume at a level EPA determined would be reasonably attainable. *See id.* at 1331/1 (JAxxxx).

2. EPA's methodology is reasonable.

API faults EPA as a general matter for relying on cellulosic biofuel producers' production plans and projections, arguing that by doing so EPA deviates from the EIA's methodology. API Br. at 33-34. However, the EIA and EPA both used the same general approach, and both agencies rely on similar information sources. As to approach, both agencies started by determining which companies were likely to produce cellulosic biofuel in 2012, and both agencies compiled the same list of companies. 77 Fed. Reg. at 1329 (JAxxxx). Both agencies derived facility-specific projections based on projected start date and nameplate capacity. *Id*. at 1329/1-2. Both agencies projected lower rates of commercial production for facilities that are considered pilot plants as opposed to commercial-scale facilities. *Id*. As detailed in section 3, below, the differences in the two agencies' estimates mainly arise from different conclusions that flow from some facilities' start dates, as well as different views on whether particular facilities should be treated as commercial versus pilot-scale plants. *Id*. These minor differences in methodology do not amount to significantly different approaches to estimating cellulosic biofuel production.

As to sources of information, the EIA explained in its October 19, 2011, letter to EPA forwarding its 2012 cellulosic biofuel projection that the EIA's projection was "based on EIA analysis of publicly available information (news

reports, trade publications and company websites) including information . . . shared in discussions among our respective staff." EIA Letter at 1-2 (JAxxxx-xxxx). The ultimate source of much "publicly available information" is likely the companies themselves, and the EIA specifically notes that it relies on information on "company websites." Furthermore, as indicated by the EIA, the EIA and EPA staffs share information in deriving their respective projections. Thus, API errs in suggesting that EPA's reliance on company information in making its projection deviates from the EIA's approach. Both agencies rely heavily on information provided by the companies, as is logical, because variables such as facility start-up date are affected by other variables, such as company financing, hiring plans, feedstock purchases, contracts for product purchases, etc., which are best understood by the companies themselves.

API also argues that because EPA's projection of 6.6 million gallons of cellulosic biofuel production for 2011 proved to be inaccurate, there is a "demonstrated inaccuracy" in EPA's reliance on facility owners' predictions, and EPA is arbitrary to continue to rely on such information. API Br. at 34-35. However, the EIA *also* overestimated cellulosic biofuel production for 2011, projecting production of almost 4 million gallons. *Id*. at 8. Just because events do not turn out as predicted does not mean that there is something fundamentally wrong with EPA's approach, any more than it means there is something

fundamentally wrong with the EIA's approach. In addition, API fails to specify what information it expects EPA to use in projecting future production (as compared to tabulating past production) if EPA is precluded from using company-provided information. Even if EPA were to conduct exhaustive site visits and business record audits, it would still need to rely on company planning information to project future start-up dates and production levels. There may be human, physical, or strategic variables influencing production that even the most rigorous independent agency investigations would fail to discover, but that are likely reflected in the company's own plans.

API next notes that EPA dramatically revised its projections downward, between the July 2011 proposal and the January 2012 final rule. API Br. at 35-37. However, EPA proposed that the cellulosic biofuel applicable volume be set within a range of 3.55 to 15.7 million ethanol-equivalent gallons. 76 Fed. Reg. at 38,852/2 (JAxxxx). The volume finalized in the January 2012 rule was 10.45 million ethanol-equivalent gallons, well within the proposed range. 77 Fed. Reg. at 1331/1 (JAxxxx). Therefore, EPA's final volume determination does not represent a downward revision from the proposed volume, but merely selection of a volume within the range that EPA proposed. API's criticism is also puzzling, as it presumes that EPA should have ignored the most current and accurate information in EPA's possession. If EPA had ignored such information API would

surely have challenged that as arbitrary as well. EPA's use of updated information in deriving a final estimate is not an indication that EPA's methodology is inherently unreasonable. To the contrary, EPA's consideration of the most current information available shows that EPA's approach is reasonable.

3. EPA's projections are supported by the administrative record.

a. Fiberight.

EPA estimated that the Fiberight facility in Blairstown, Iowa, would produce 2.0 million gallons of cellulosic biofuel in 2012. API criticizes this estimate, arguing that it represents 100% of that facility's annual capacity despite the fact that the facility will not begin production until sometime in early 2012. API Br. at 38. However, the facility's actual capacity is 6.0 million gallons, not 2.0. 77 Fed. Reg. at 1330, Table II-B.6-1 (JAxxxx). An estimated volume of 2.0 million gallons represents 33 percent of this facility's 6.0 million gallon annual capacity, which is entirely reasonable in light of Fiberight's plan to begin production early in 2012 and ramp up production over the year. *Id*. at 1326/2 (JAxxxx). As EPA explained, its projection for Fiberight is somewhat higher than the EIA's because the EIA simply assumed a 25% utilization rate for the facility, as it did for all facilities starting up in 2012, without factoring into its projection, as EPA did, Fiberight's early 2012 anticipated start date. *Id*. at 1329/1 (JAxxxx). The EIA

assumed a larger, 6.4 million gallon, nameplate capacity for the Fiberight plant. *Id.*; *see also* EIA Letter at 2 (JAxxxx). EPA's projection is 31% of that larger capacity, rather than the 25 percent assumed by the EIA. API has not attempted to explain why the EIA's approach is inherently more accurate than EPA's approach.

b. INEOS Bio.

EPA estimated that the INEOS Bio facility in Vero Beach, Florida, would produce 3.0 million gallons of cellulosic biofuel in 2012, which is approximately 37% of that facility's 8.0 million gallon annual capacity. API criticizes this estimate as well, arguing that it is 50 percent higher than the EIA's projection of 2.0 million gallons. API Br. at 39. The EIA's methodology "reflect[s] mechanical completion in the first or second quarter [of 2012] followed by a 6-month startup period during which limited production rates are achieved." EIA Letter at 2 (JAxxxx). Thus, the EIA treats all commercial plants that commence construction in the first two quarters the same (projecting 25 percent of total capacity), regardless of actual startup date. But as EPA explained, the facility's expected startup date is May 1, 2012, *i.e.*, "soon after" construction was estimated to be complete in April. 77 Fed. Reg. at 1327/2 (JAxxxx). The facility was therefore expected to produce fuel for eight months, or two months beyond the 6-month

startup period during which the EIA assumed limited production.[3] Taking the actual projected start date into account, EPA derived an estimate that was equivalent to use of a "slightly higher" utilization rate than used by the EIA. *Id*. at 1329/1 (JAxxxx). EPA reasonably assumed the plant would produce on an annual basis 37.5 percent of the plant's nameplate capacity rather than the 25 percent assumed by the EIA. EPA fully explained the basis for its approach, and its projection is reasonable.

c. ZeaChem.

EPA estimated that the ZeaChem facility in Boardman, Oregon, would produce 50,000 gallons of cellulosic biofuel in 2012. API's main criticism of this estimate is that "facility owners' projections tend to be overly optimistic." API Br. at 40. However, there is no history of this facility failing to meet its target, and no reason to doubt the information ZeaChem provided to EPA.

API also asserts that EPA did "not provide any analysis of why it believes ZeaChem's new projection is accurate." API Br. at 40. However, EPA in the preamble to the final rule explicitly cited this facility's nameplate capacity, expected start date, and intention to market its product and generate RINs as the

[3] Assuming a six-month start-up period during which a facility can produce 25 percent of its annual capacity, followed by two months at or near full production, results in a total production volume of 3.33 million gallons, slightly higher than the 3.0 million gallons projected by EPA based in part on INEOS Bio's estimate.

basis for EPA's projection. 77 Fed. Reg. at 1327/2-3, 1330/2-3 (JAxxxx, xxxx). API's challenge thus lacks merit.

d. American Process.

EPA estimated that the American Process facility in Alpena, Michigan, would produce 500,000 gallons of cellulosic biofuel in 2012. API asserts that EPA simply adopted the facility's estimate, failed to explain the divergence from the EIA's estimate, and failed to explain why the facility is not a demonstration-scale or pilot plant. API Br. at 41-42. This facility originally estimated that it would produce fuel in the range of 500,000 to 900,000 gallons in 2012. *See* Letter from Susan Parker Bodine, Barnes and Thornburg, to Air and Radiation Docket and Information Center (Aug. 11, 2011) at 1 (EPA-HQ-OAR-2010-0133-149) (JAxxxx). EPA reasoned that the higher figure was unlikely due to the challenges of starting up a facility utilizing technology that has not yet been proven at a commercial scale. 77 Fed. Reg. at 1329/2 (JAxxxx). EPA also noted that because this facility would produce cellulosic biofuel on a commercial scale, rather than a pilot scale, it was also appropriate to project a volume higher than the 90,000 gallons the EIA would estimate, based on the EIA's standard 10% utilization rate for pilot-scale facilities. *Id*. at 1329/1-2 (JAxxxx). Because there are no definitive criteria for classifying a facility as pilot or commercial scale, EPA adopted an estimate at the low end of the facility's target but higher than the EIA estimate. *Id*.

at 1329/2. Accordingly, EPA projected 500,000 gallons of cellulosic biofuel production in 2012 from this facility, which the company ultimately agreed was appropriate. *Id.* at 1330/3 (JAxxxx). Thus, EPA did not simply adopt the company's suggestion without independent analysis, and EPA fully explained the reason why its projection differed from the EIA's.

API also questions whether the American Process facility's fuel will be eligible to generate RINs. API Br. at 43. EPA explained that this facility will likely be eligible for cellulosic RINs, 77 Fed. Reg. at 1328/1 (JAxxxx), and API cites nothing to question that conclusion.

Because EPA's estimate of cellulosic biofuel for 2012 is "based on" the EIA's estimate, using a reasonable construction of that statutory phrase, and because EPA's estimate is reasonable and supported by the administrative record, EPA's final cellulosic biofuel applicable volume for 2012, and associated percentage standard, should be upheld.

II. EPA'S DECISION NOT TO REDUCE THE ADVANCED BIOFUEL APPLICABLE VOLUME FOR 2012 IS REASONABLE.

The EISA established 2.0 billion gallons as the applicable volume of advanced biofuel for 2012. Because EPA reduced the applicable volume for cellulosic biofuel for 2012, EPA *may*, but need not, also reduce the applicable

volume of advanced biofuel by the same or a lesser amount. 42 U.S.C. § 7545(o)(7)(D)(i). Here, EPA reasonably chose not to do so.

A. EPA Reasonably Concluded There Will Be Sufficient Advanced Biofuel Available In 2012 To Meet The Statutory Applicable Volume.

EPA reduced the applicable volume of cellulosic biofuel for 2012 from 500 million gallons to 8.65 million gallons (or 10.45 million ethanol-equivalent gallons), based on EPA's projection of production of cellulosic biofuel in 2012. As EPA explained, a reduction in the applicable volume of cellulosic biofuel affects "the means through which obligated parties comply with the advanced biofuel standard and the total renewable fuel standard." 77 Fed. Reg. at 1331/3 (JAxxxx). In other words, because EPA estimates that *one type* of advanced biofuel will not be available in the quantity that Congress anticipated when setting the advanced biofuel applicable volume, EPA must determine whether *other types* of advanced biofuel will be available to satisfy that shortfall. For 2012, EPA lowered the cellulosic biofuel applicable volume by 490 million ethanol-equivalent gallons, but concluded that other advanced biofuels are likely to be available in sufficient volumes to meet the overall advanced biofuel requirements of the statute. *Id*. at 1333/2 (JAxxxx).

API asserts that EPA failed to provide a reasoned explanation for its conclusion because EPA did not list specific numerical projections for each type of

advanced biofuel EPA expects to be available in 2012. API Br. at 44-45. API does not point to any requirement for such mathematical precision, and none exists. As shown below, EPA analyzed each potential source of advanced biofuel in detail, and explained why sufficient volume is likely to be available. 77 Fed. Reg. at 1332-1333 (JAxxxx-xxxx). Nothing more is required.

B. EPA Reasonably Analyzed Other Sources Of Advanced Biofuel.

EPA determined that the most likely sources of additional advanced biofuel that could make up for the expected shortfall in cellulosic biofuel production in 2012 would be imported sugarcane ethanol and additional biomass-based diesel. 77 Fed. Reg. at 1332/1 (JAxxxx). EPA examined historical trends, projections by various entities, including the EIA, and other available information regarding the potential for these biofuels to be produced in sufficient quantities to satisfy the unmodified advanced biofuel applicable volume, and concluded that a change in the advanced biofuel applicable volume was not necessary. *Id*. at 1331-1337 (JAxxxx-xxxx). API faults EPA's analysis of the volumes of other types of advanced biofuels likely to be available in 2012, API Br. at 45-53, but none of API's criticisms are convincing.

1. Sugarcane ethanol.

EPA explained that the most current information available at the time of the rulemaking indicated that a significant volume of Brazilian sugarcane ethanol

would be imported in 2012. For example, according to the most recent estimate from the EIA prior to EPA's final rule, approximately 300 million gallons were expected to be imported. 77 Fed. Reg. at 1332 (JAxxxx). In marked contrast to API's unquestioning fealty to the EIA's cellulosic biofuel projections, API now criticizes EPA for crediting the EIA's sugarcane ethanol projection. API notes that the EIA's initial projection for 2012 was 400 million gallons, not 300 million gallons, but as with most of API's complaints, this amounts to little more than an argument that EPA should ignore the most current information available.

Other sources of information supported EPA's conclusion that a significant volume of Brazilian sugarcane ethanol would be imported in 2012. The average annual volume of such imports over the past five years had been 380 million gallons, and there had been a sharp increase in the two most recently available months, June and July 2011, as compared with the prior 16 months. *Id*. Moreover, FAPRI, a university-based consortium, estimated in 2011 that 728 million gallons will be imported in 2012. *Id*. at 1332/3. API attempts to undercut the reliability of this estimate by noting that FAPRI's estimate in 2010 was 317 million gallons for 2012, and API points out that the average of imports over the past 10 years is only 200 million gallons. API Br. at 46, 49. But API's argument misses the point: EPA should not be faulted for relying on the most current information available.

Although EPA did not, and need not, make a precise estimate of the volume of Brazilian sugarcane ethanol likely to be imported in 2012, EPA reasonably relied on estimates ranging from 300 million to 728 million gallons, and on a five-year average of 380 million gallons, to conclude that this fuel is likely to cover a "large portion" of the 490 million gallon shortfall in cellulosic biofuel. 77 Fed. Reg. at 1332/3 (JAxxxx).

API argues that a more realistic estimate of Brazilian sugarcane ethanol imports is either 100 or 156 million gallons, but API's calculations assume no growth at all in the volume of imported fuel. API bases its 156 million gallon figure on the assumption that the volume imported in July 2011 will stay constant, and bases its 100 million gallon figure on an assumption that the volume of sugarcane ethanol imported to date will also remain constant. API Br. at 47-48. API's view ignores the increasing trend lines from June 2011 to July 2011 and, as noted above, the increased volume in those months as compared to the previous 16 months. 77 Fed. Reg. at 1332 (JAxxxx).

API also argues that EPA's projections that supply will increase to meet increased demand have been proven to be unreliable, because EPA in 2010 made similar predictions about Brazilian sugarcane ethanol imports in 2011, and those predictions did not materialize. API Br. at 47. However, sufficient advanced biofuel RINs were in fact generated in 2011 to satisfy the unmodified advanced

biofuel mandate in that year. Although the demand was largely met in 2011 by advanced biofuels other than sugarcane ethanol, the situation could be expected to differ in future years as the advanced biofuel mandate increases.

2. Excess biodiesel.

API next challenges EPA's conclusion that in addition to Brazilian sugarcane ethanol imports, biodiesel can also be used to meet the need for additional advanced biofuel because biodiesel will likely be produced in excess of the 1.0 billion gallons of applicable volume for that fuel. 77 Fed. Reg. at 1333/1-2 (JAxxxx). API claims that EPA's conclusion is in "tension" with EPA's proposed applicable volume of biomass-based diesel for 2013. As API notes, EPA proposed a biomass-based diesel volume of 1.28 billion gallons for 2013. According to API, if only 1.28 billion gallons is likely to be available in 2013, something less than 280 million gallons of excess biodiesel is likely to be available in 2012. API Br. at 51-52. But the one does not follow from the other.

Contrary to API's suggestion, EPA's proposed 2013 applicable volume for biomass-based diesel was not established at the maximum level that the industry could be expected to produce assuming an unmodified advanced biofuel applicable volume. Nothing in the statute or in EPA's analysis supporting its 2013 biomass-based diesel proposal requires or suggests such an approach. Therefore, there is no

"tension" between that proposal and EPA's assessment of the industry's ability to help satisfy the unmodified advanced biofuel applicable volume for 2012.

In addition, EPA explained that the 2011 applicable volume of 800 million gallons of biomass-based diesel, and the 2012 applicable volume of 1.0 billion gallons, can both be met with only modest increases in monthly production volumes. 77 Fed. Reg. at 1335/1 (JAxxxx). Given the significant amount of underutilized capacity – 2.4 billion gallons in total – monthly production volumes will likely continue to increase "at a rate that is more than needed to meet the [2012] statutory biomass-based diesel volume requirements, providing additional volumes that can be used to meet the [2012] advanced biofuel standard." *Id*. at 1335/2.

Further, EPA estimates that 80 million gallons of other types of advanced biofuel, *i.e.*, ethanol, renewable diesel, and/or heating oil, are likely to be available in 2012. *Id*. at 1333/1 (JAxxxx). These types of advanced biofuel are in addition to whatever excess volume of biodiesel are available in 2012, yet API does not account for them. Far from being internally inconsistent, EPA's analysis of other sources of advanced biofuels supports EPA's conclusion that sufficient volumes are likely to be available to satisfy the unmodified 2 billion million gallon applicable volume set forth in the statute.

3. Electricity generated from renewable biomass.

Finally, API argues that EPA should not rely on the possibility that electricity generated from renewable biomass may become a source of advanced biofuel RINs. API Br. at 52-53. Whether or not API is correct that this possibility is speculative, EPA did not rely on it. Although EPA did discuss the possibility, EPA also discussed the many obstacles associated with RIN generation for renewable electricity in 2012, and concluded these that uncertainties precluded a quantitative projection for its use in 2012. 77 Fed. Reg. at 1333/1-2 (JAxxxx). EPA did not refer to renewable electricity in its conclusion that "sufficient volumes of imported sugarcane ethanol, excess biodiesel, and other sources of advanced biofuel are likely to be available in 2012," *id.*, and gave RINs from electricity little or no weight in its determination.

CONCLUSION

For the foregoing reasons, API's petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

Pursuant to Fed. R. App. P. 37(a)(7)(C), and exclusive of the components of the brief excluded from the word limit pursuant to Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32 (a)(1), I certify that the foregoing Brief for Respondent EPA contains 9,834 words, as counted by the "word count" feature of my Microsoft Office Word software.

/s/ Daniel R. Dertke
DANIEL R. DERTKE

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of the foregoing Final Brief for Respondents via the Court's CM/ECF system on this 20th day of August, 2012.

/s/ Daniel R. Dertke
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