November 20, 2019

Via certified mail and email

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Petition to Revise "Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019" and "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020"

Dear Administrator Wheeler:

Growth Energy, the National Biodiesel Board ("NBB"), and Producers of Renewables United for Integrity Truth and Transparency ("Producers United") respectfully petition EPA to commence a rulemaking to reconsider or revise the renewable fuel standards set in *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 58,486 (Dec. 12, 2017) ("2018 Rule"), and in *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704 (Dec. 11, 2018) ("2019 Rule").[1]

On August 9, 2019, the U.S. Environmental Protection Agency granted thirty-one "small refinery exemptions" from compliance with the 2018 Renewable Fuel Standard ("RFS"), covering approximately 1.43 billion Renewable Identification Numbers ("RINs"). The exemptions granted for 2018 fundamentally altered the standards that EPA set for 2018 and 2019. Because of the 2018 exemptions, the 2018 and 2019 standards will not require the level of renewable fuel usage that EPA envisioned when it set those standards. In fact, because of the 2018 exemptions, the 2018 and 2019 standards do not incentivize growth in renewable fuel

[1] On July 31, 2018, Producers United petitioned EPA to reconsider or revise the 2018 standards, which, among other things, challenged EPA's authority to grant retroactive exemptions. This petition is based on additional grounds for revision that were unknown at the time of Producers United's July 31 petition.

usage at all, contrary to Congress's intent. The 2018 and 2019 standards are unlawful and should be modified to account for the 2018 exemptions.

BACKGROUND

A. The Renewable Fuel Standard Program

"'Congress intended the Renewable Fuel Program to be a market forcing policy that would create demand pressure to increase consumption of renewable fuel.'" *American Fuel & Petrochemical Mfrs. v. EPA ("AFPM")*, 2019 WL 4229073, at *1 (D.C. Cir. 2019) (quoting *Americans for Clean Energy v. EPA ("ACE")*, 864 F.3d 691, 705 (D.C. Cir. 2017)). The program's core is the statutorily specified "'applicable volume[s]'—mandatory and annually increasing quantities of renewable fuels that must be 'introduced into commerce in the United States' each year," *id.*—which "are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year," *ACE*, 864 F.3d at 710.

EPA's overarching "'statutory mandate' [is] to 'ensure[]' that those [volume] requirements are met." *ACE*, 864 F.3d at 698-699 (quoting 42 U.S.C. §7545(*o*)(3)(B)(i)). EPA "fulfills that mandate by translating the annual volume requirements into percentage standards," which "represent the percentage of transportation fuel introduced into commerce that must consist of renewable fuel." *Id.* at 699; *see also* 42 U.S.C. §7545(*o*)(3)(B). Congress also provided EPA certain "waiver" authorities, which "allow[] EPA to reduce the statutory volume requirements," *ACE*, 864 F.3d at 698, but "only in limited circumstances," *National Petrochemical & Refiners Ass'n v. EPA ("NPRA")*, 630 F.3d 145, 149 (D.C. Cir. 2010); *see* 42 U.S.C. §7545(*o*)(7)(A)-(E).

Although all refineries are "obligated parties," Congress provided a "temporary exemption" for "small refineries" from their compliance obligations through 2010. 42 U.S.C.

§7545(*o*)(9)(A)(i), *see also id.* §7545(*o*)(1)(K) (defining "small refinery"). Congress directed EPA to "extend th[at] exemption" for any "small refinery that the Secretary of Energy determines … would be subject to a disproportionate economic hardship if required to comply with" the volume requirements. *Id.* §7545(*o*)(9)(A)(ii). Finally, Congress authorized EPA to grant individual "petition[s] … for an extension of the exemption … for the reason of disproportionate economic hardship." *Id.* §7545(*o*)(9)(B)(i). When setting a given year's percentage standards, EPA adjusts for any exemptions that have already been granted for that year, but EPA does not account for exemptions granted after the covered year's percentage standards are finalized, i.e., "retroactive exemptions." *AFPM*, 2019 WL 4229073, at *3. The refusal to account for retroactive exemptions results in a "shortfall." *Id.*[2]

B. The 2018 and 2019 Standards

EPA set the total volume requirement for 2018 to 19.29 billion gallons. 2018 Rule at 58,488. At that time, EPA had not yet granted any exemptions for 2018, and it "maintain[ed] its approach that any exemptions for 2018 that are granted after the final rule is released will not be reflected in the percentage standards that apply to all gasoline and diesel produced or imported in 2018." *Id.* at 58,523. A year later, EPA set the total volume requirement for 2019 to 19.92 billion gallons. 2019 Rule at 63,705. At that time, EPA still had not granted any exemptions for 2018, nor had it for 2019, but it held to its position that it would not set the standards to reflect any exemptions that it might in the future grant. *Id.* at 63,740.

[2] Petitioners use the term "exemption" to refer to EPA's decision to grant applications to extend a small refinery exemption. But Petitioners maintain that EPA may grant an "extension" only if the refinery was previously exempt and that many applications granted for 2018 were not "extensions" within the meaning of the statute and are therefore unlawful. *See, e.g.*, Growth Energy, Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, at 9-12 (Aug. 17, 2018), EPA-HQ-OAR-2018-0167-1292 (attached as Exhibit 1).

C. The 2018 Exemptions

On August 9, 2019—after EPA had finalized the standards for 2018 and 2019—EPA granted thirty-one retroactive exemptions for the 2018 compliance year. Memorandum from Anne Idsal to Sarah Dunham, *re Decision on 2018 Small Refinery Exemption Petitions* (Aug. 9, 2019) (attached as Exhibit 2). These exemptions covered about 1.43 billion gallons for 2018, *see* EPA, *RFS Small Refinery Exemptions* (attached as Exhibit 3), representing more than 7% of the total renewable fuel volume requirement for 2018.

Because the 2018 exemptions were granted retroactively and neither the 2018 standard nor the 2019 standard has been adjusted to account for them, they have substantially inflated the RIN bank to a size that severely harms the efficacy of the RFS program. As of July 29, 2019—less than two weeks before EPA granted the 2018 exemptions—there were "approximately 2.19 billion total carryover RINs" from 2018. EPA, *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes*, 84 Fed. Reg. 36,762, 36,767 (proposed July 29, 2019). Today, there are approximately 3.58 billion total carryover RINs from 2018, indicating that the 2018 exemptions have inflated the RIN bank nearly one-for-one. *See* EPA, *Available RINs* (attached as Exhibit 4).[3] At this size, the RIN bank constitutes 18% of the total volume requirement for 2019.

ARGUMENT

EPA's refusal to account for retroactive exemptions nullifies the minimum volume requirements EPA is supposed to ensure. This violates EPA's core statutory duty in setting the

[3] The number of 2018 exemptions and thus the size of the RIN bank may still increase in 2019 because EPA has yet to decide two applications for 2018 exemptions. *See RFS Small Refinery Exemptions*.

standards and effectively waives the volume requirements even though the statutorily prescribed conditions for waiver were not found. EPA's granting of the 2018 exemptions therefore rendered the 2018 and 2019 standards arbitrary and contrary to the Clean Air Act.

A. The 2018 Exemptions Undermine the 2018 and 2019 Standards

In light of EPA's refusal to account for retroactive exemptions in setting the 2018 and 2019 standards, the large volume of retroactive exemptions that EPA granted for 2018 has rendered those standards a fiction—they bear no relation to the volumes of renewable fuel that are *required* to be introduced into commerce and they do nothing to compel increased use of renewable fuel.

Given EPA's current position of not accounting for retroactive exemptions, the 2018 exemptions, as EPA recently acknowledged, "effectively reduce[d] the required volume of renewable fuel for that year" one-for-one. EPA, *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, and Response to the Remand of the 2016 Standards; Supplemental Notice of Proposed Rulemaking ("Supplemental 2020 NPRM")*, 84 Fed. Reg. 57,677, 57,679 (proposed Oct. 28, 2019); *see also* 84 Fed. Reg. at 36,797. Thus, the 2018 exemptions had the effect of reducing the 2018 total volume requirement from 19.29 billion gallons to about 17.86 billion gallons. *Supplemental 2020 NPRM* at 57,679. Because 2018 exemptions were granted after the deadline for demonstrating compliance with the 2018 standards and thus the associated RINs were unretired and banked for later compliance, the 2018 exemptions as a practical matter reduce the 2019 standards. As EPA recognizes, obligated parties will necessarily use the *entire* RIN bank to comply in 2019 (lest the banked RINs become worthless). 2019 Rule at 63,708 n.20. Consequently, the effective nationwide total volume requirement for 2019 (i.e., the volume EPA set minus the available carryover RINs) is about

16.34 billion gallons, not 19.92 billion gallons (the volume requirement EPA set and therefore must ensure is used).[4] That is less than the effective volume requirements for 2017 and 2016 (and barely higher than the effective volume requirement for 2018).[5] In fact, an effective 2019 volume requirement of 16.34 billion is less than the nominal volume requirement EPA set for 2013 (16.55 billion) and less than the number of net RINs generated in 2013 (16.43 billion). *See* Nick Parsons, "Carryover RIN Bank Calculations for 2019 Final Rule" at 7 (Nov. 7, 2018), EPA-HQ-OAR-2018-0167-1298. EPA's granting of the 2018 exemptions thus set the program back several years rather than pushing the market forward as Congress intended.

The 2018 exemptions also had the effect of significantly reducing the required volumes of advanced biofuel, biomass-based diesel, and cellulosic biofuel. The 2018 exemptions had a particularly large impact on the demand for biomass-based diesel, because biomass-based diesel fuel can be used to comply with the obligation under the biomass-based diesel, advanced biofuel, and total renewable fuel categories.

In sum, by declining to account for retroactive exemptions and then granting a high volume of them, EPA has undermined the intended power of the standards to compel greater use of renewable fuel. This effect is apparent in D6 RIN prices, which have cratered since EPA

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[4] EPA sometimes speaks of "maintaining" the RIN bank from one year to the next. *See, e.g.*, 2019 Rule at 63,710 & n.35. That is a misnomer because, as noted, all carryover RINs will necessarily be used to show compliance lest they expire. If there is a RIN bank in 2020, that will be the result of obligated parties' decisions to generate more RINs than needed to comply in 2019 based on economic considerations entirely independent of their 2019 RFS obligations.

[5] The effective total volume requirements were—

- 2018: 16.29 billion gallons (19.29 billion gallons per the 2018 Rule minus 3.0 billion carryover RINs).
- 2017: 16.78 billion gallons (19.28 billion gallons per the 2017 rule minus 2.5 billion carryover RINs).
- 2016: 16.51 billion gallons (18.11 billion gallons per the 2016 rule minus 1.6 billion carryover RINs).

For an explanation of the size of the RIN bank in 2016, 2017, and 2018, see Growth Energy, Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes ("Growth Energy 2020 Comment") at 6-7 (Aug. 30, 2018), EPA-HQ-OAR-2019-0136-0312 (attached as Exhibit 5).

began granting large volumes of retroactive exemptions in 2017. The price of D6 RINs has fallen from about $1.00 in late 2016 to about $0.40 in mid-2017, to about $0.20 in early 2019, and finally to about $0.10. Edgeworth Economics, *The Impact of EPA's Policies Regarding RVOs and SREs* at 3 (Aug. 30, 2019) (attached as Exhibit 6). When EPA announced the 2018 exemptions, D6 RIN prices experienced their largest 3-day drop (in percentage terms) in the history of the RFS program. *Id.* at 9. As EPA and the D.C. Circuit have recognized, "higher RIN prices" "incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote." *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919 (D.C. Cir. 2014); *see also, e.g.*, EPA, *Denial of Petitions for Rulemaking to Change the RFS Point of Obligation* at 19 (Nov. 2017), EPA-HQ-OAR-2018-0167-0065. By granting so many 2018 exemptions without making them up, however, EPA has undermined Congress's carefully crafted incentives to increase the country's use of renewable fuels. *See* Edgeworth Economics at 9 (finding that, by exempting billions of RINs for 2018 without requiring that they be made up, EPA "eliminate[d] any incentive to increase conventional biofuel production and consumption, leading to continued increases in the RIN bank and neutering the original policy mandate").

B. The 2018 Exemptions Render the 2018 and 2019 Standards Unlawful

In light of EPA's refusal to account for retroactive 2018 exemptions when setting the 2018 and 2019 standards, its granting of retroactive exemptions for 2018 covering 1.43 billion gallons renders the 2018 and 2019 standards arbitrary and contrary to the Clean Air Act in several ways.

First, as explained above, the 2018 exemptions have negated the central purpose of the RFS program and the 2018 and 2019 standards. Congress intended the RFS program—and

specifically the volume standards—"to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year." *ACE*, 864 F.3d at 710. But as explained above, because of the exemptions EPA granted for 2018, the 2018 and 2019 standards will not press the market to increase its use of renewable fuel above levels already achieved repeatedly.

Second, because of the 2018 exemptions, the 2018 and 2019 standards do not fulfill EPA's statutory duties. Paragraph 2 of Section 7545(*o*) specifies the minimum applicable volumes for each category of renewable fuel. *Id.* §7545(*o*)(2)(B). EPA has a duty to promulgate annual percentage standards that "ensure[] that the requirements of paragraph 2 are met." 42 U.S.C. §7545(*o*)(3)(B)(i). That is, EPA must "make certain" that those statutory volumes are met, unless and to the extent that certain waiver authorities apply. *NPRA*, 630 F.3d at 153; *see also* Merriam-Webster Dictionary (*Ensure*: "to make sure, certain, or safe"), https://www.merriam-webster.com/dictionary/ensure. By granting the 2018 exemptions, EPA abdicated these responsibilities. The reduction in the 2018 and 2019 standards caused by the 2018 exemptions means that EPA has chosen to allow obligated parties *not* to meet the volumes EPA had set. In its recent supplemental Notice of Proposed Rulemaking for the 2020 RFS standards, EPA acknowledged that adjusting standards for projected *future* retroactive exemptions "furthers Congressional intent to "ensure" the renewable fuel volumes are met." *Supplemental 2020 NPRM* at 57,680. The same statutory mandate and reasoning EPA recognized in the *Supplemental 2020 NPRM* requires that EPA make up retroactive exemptions granted for prior years insofar as they were not accounted for ex ante.

Third, given EPA's refusal to account for retroactive exemptions, the 2018 exemptions are impermissibly functioning as a *waiver* of the 2018 and 2019 volume requirements, contrary

to the statute's plain text and structure. Congress explicitly granted EPA the power to reduce the nationwide volume requirements, but labeled those powers "waivers" and permitted EPA to use them "only" in the "limited circumstances" specified in the statute. *NPRA*, 630 F.3d at 149; 42 U.S.C. §7545(*o*)(7), (8)(D). In contrast, the exemption provisions contain neither of those features: they do not say that EPA may reduce the nationwide volume requirements or use the label "waiver"; rather, they are labeled "exemption," and they authorize EPA to determine merely that the compliance obligation "shall not apply to" the specific applicant refinery because of special circumstances relating to that refinery. 42 U.S.C. §7545(*o*)(9). There is no reason here to depart from "the usual rule that when the legislature uses certain language in one part of the statute and different language in another, [courts and agencies must] assume[] different meanings were intended." *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011).

By granting exemptions for 2018 when they will not be accounted for in the 2018 or 2019 standards, EPA disregarded this principle of statutory interpretation and in effect treated the exemptions as a waiver of the volume requirements. That unlawfully expanded EPA's waiver power to situations where the statutorily specified waiver triggers were not met. As EPA has acknowledged, "small refinery exemptions are held to a different standard than a waiver," including a waiver for "severe economic harm." EPA, *Response to Comments* at 19 (Nov. 2018), EPA-HQ-OAR-2018-0167-1387. Repeating an error it committed in setting the 2016 volume requirements, "EPA has not explained why Congress would have established the severe-harm waiver standard only to allow waiver" under the small refinery exemption provision "based on lesser degrees of economic harm." *ACE*, 864 F.3d at 712; *see also* 42 U.S.C. §7545(*o*)(7)(A). If Congress intended to grant EPA a power to waive volume requirements based on findings that individual refineries will suffer "disproportionate economic hardship" if they must comply, it

would have said so—it certainly knew how to. EPA has no authority to rewrite the statute or create a new, non-textual waiver power. *See, e.g.*, *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017) (Congress's "expressi[on]" of certain types of waivers "excludes another [type of waiver] left unmentioned"); *In re Sealed Case*, 237 F.3d 657, 670 (D.C. Cir. 2001) ("Agencies are not empowered to carve out exceptions to statutory limits on their authority.").

C. EPA Should Revise the 2018 or 2019 Standards to Account for the 2018 Exemptions

To fulfill its statutory duties and avoid undermining the statute, EPA should revise the 2018 or 2019 standards to account for the 2018 exemptions it has granted. EPA has various tools to accomplish this. It could increase the 2019 standards in advance of the deadline for 2019 compliance demonstrations. It could add a supplemental obligation to the 2020 standards (or another future year's standards). It could also adjust the 2020 standards (or another future year's standards) by increasing the required volume of advanced and total renewable fuel for that compliance year by the amount of exemptions, by decreasing the gasoline and diesel fuel projected to be used in that year (to account for exempt small refineries' use of such fuel), or by using a "lesser" cellulosic waiver of the advanced and total volume requirements for that year to offset the 2018 exemptions. 42 U.S.C. § 7545(*o*)(7)(D)(i). On prior occasions, EPA has shifted one year's obligation to another year, and the D.C. Circuit has approved. *See, e.g.*, *NPRA*, 630 F.3d at 153 n.23, 155-158, 163; *Monroe Energy*, 750 F.3d at 916, 919-921; EPA, *Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program*, 75 Fed. Reg. 14,670, 14,718 (Mar. 26, 2010). Making up the 2018 exemptions would draw on the same authority. And in its supplemental 2020 NPRM, EPA correctly acknowledged its power to "adjust the standard as appropriate" to account for more exemptions than it anticipated when setting the standards initially. Supplemental 2020 NPRM at 57,682. Moreover, because EPA must "ensure

that transportation fuel sold or introduced into commerce in the United States … contains *at least* the applicable volume of" each category of renewable fuel, 42 U.S.C. §7545(*o*)(2)(A)(i) (emphasis added), EPA may increase the standards even if they go above the statutorily specified levels or even if the implied non-advanced volume exceeds 15 billion gallons.[6]

CONCLUSION

For the reasons stated above, EPA should commence a rulemaking to reconsider or revise the 2018 and 2019 standards to account for the 2018 exemptions.

Thank you for your consideration of this petition.

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cc: Anne Idsal, Acting Assistant Administrator, Office of Air and Radiation

[6] If obligated parties would need to use carryover RINs to meet heightened RFS standards, that is entirely appropriate given that the retroactive exemptions have created excess carryover RINs in the first place; the drawdown of the bank would simply restore the bank to the size it should have had but for the exemptions. Moreover, as EPA has previously recognized and the D.C. Circuit has agreed, it is proper for EPA to consider carryover RINs in assessing obligated parties' ability to meet a volume requirement, including when exercising its discretionary cellulosic waiver power. *See Monroe Energy*, 750 F.3d at 916-917.

EXHIBITS

EXHIBIT 1

Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020

Docket # EPA-HQ-OAR-2018-0167

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TABLE OF CONTENTS

I. INTRODUCTION AND EXECUTIVE SUMMARY 1

II. THE ADMINISTRATION'S ENERGY POLICY OBJECTIVES ARE PROMOTED BY AT LEAST MAINTAINING THE CURRENT VOLUME OF CONVENTIONAL RENEWABLE FUEL 3

- A. The Administration Seeks to Achieve U.S. Energy Independence, Security, and Dominance 3
- B. Reducing the Implied Volume for Conventional Renewable Fuel Would Impede the Achievement of These Policy Objectives 5
  - 1. Ethanol has helped rebalance energy trade in the United States' favor 5
  - 2. Ethanol has stimulated substantial economic development in rural Midwestern areas and provided various other economic benefits 6

III. EPA SHOULD CHANGE ITS APPROACH TO SMALL REFINERY EXEMPTIONS TO COMPLY WITH ITS STATUTORY MANDATE AND TO BRING MORE TRANSPARENCY TO THE RIN MARKET 7

- A. EPA Is Statutorily Permitted to Grant an Extension Petition Only If the Refinery Was Exempt for All Prior Years 9
- B. EPA Must Account for Retroactive Extensions 12
- C. EPA Should Not Issue Retroactive RINs to Remedy Any Incorrect Prior Denial of an Extension Petition 15
- D. EPA Should Carefully Consider DOE's Recommendations on Extension Petitions 16
- E. Improving EPA's Approach to Extension Petitions Would Improve the RIN Market's Functioning 17

IV. EPA SHOULD LESSEN THE CELLULOSIC WAIVER FLOW-THROUGH BY THE SIZE OF THE SMALL REFINERY EXEMPTION EXTENSIONS 22

V. EPA'S PROPOSED METHOD FOR PROJECTING LIQUID CELLULOSIC BIOFUEL FOR 2019 IS FLAWED 22

VI. EPA SHOULD REMOVE REGULATORY BARRIERS TO EXPANDED USE OF E15 25

VII. EPA CORRECTLY DID NOT PROPOSE TO ISSUE A GENERAL WAIVER FOR SEVERE ECONOMIC HARM 28

- A. EPA Has Consistently Interpreted the Severe Economic Harm Waiver to Apply Only in Very Narrow Circumstances and It Should Adhere to That Interpretation 29
  - 1. 2008 and 2012 Waiver Decisions 29
  - 2. 2017 and 2018 Waiver Decisions 31

3. These principles remain sound.....35

B. Implementation of the Proposed 2019 Volume Requirements Would Not Cause Severe Economic Harm.....36

1. EPA Should Simply Apply Its Reasoning from the 2018 RVO Rulemaking to Conclude That a 2019 Waiver Is Inappropriate 37

2. A Severe Economic Harm Waiver Could Not Be Exercised Without Accounting for the Available Compliance Flexibilities, Including the RIN Bank, Small Refinery Exemptions, and the Ability to Carry Deficits Forward, Which Prevent Severe Economic Harm 38

3. A Severe Economic Harm Waiver Could Not Be Exercised Without Accounting for the Significant Benefits of the RFS 41

4. EPA Continues to Understate Achievable Renewable Fuel Volumes 42

5. The Existence of Doubt About Whether the Requirements Could Be Met Is Not a Valid Basis for Exercising the Waiver 47

C. No Additional Modeling Would Be Necessary to *Deny* a Waiver, But a Comprehensive Model Subject to Notice-and-Comment Would Be Necessary to *Grant* a Waiver 48

VIII. EPA MUST IMMEDIATELY ADDRESS THE D.C. CIRCUIT'S VACATUR OF THE 2016 GENERAL WAIVER IN *AMERICANS FOR CLEAN ENERGY*.....49

IX. CONCLUSION.....50

I. INTRODUCTION AND EXECUTIVE SUMMARY

Growth Energy respectfully submits these comments on the Environmental Protection Agency's proposed rule entitled "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020."[1] Growth Energy is the leading association of ethanol producers in the country, with 100 producer members and 82 associate members who serve the nation's need for renewable fuel. Growth Energy has submitted comments on EPA's prior major rulemakings implementing the Renewable Fuel Standard ("RFS") program. For the reasons explained below, Growth Energy urges EPA to: (1) maintain an implied non-advanced volume of at least 15 billion; (2) change its approach to small refinery exemptions to deny extensions to refineries that have not been continuously exempt, to make up for all exempt volumes, and to bring more transparency to the RIN market; (3) revise its method for projecting liquid cellulosic biofuel volume for 2019; (4) remove regulatory barriers to expanded use of E15; (5) continue to decline to issue a general waiver of the total volume requirement based on severe harm to the economy; and (6) promptly remedy the vacated general waiver of the 2016 total volume requirement.

To date, the RFS program has been an overwhelming success. In 2007, Congress expanded the RFS program "to increase the production of clean renewable fuels" and "[t]o move the United States toward greater energy independence and security."[2] Over the ensuing decade, the program has done that, beyond what Congress even expected. Conventional renewable fuel—which has grown dramatically under the RFS program and which is by far the most prevalent renewable fuel—substantially reduces GHG emissions relative to fossil fuel. In fact, it does so far more than Congress originally expected and nearly as much as advanced biofuel. When Congress revised the RFS program in 2007, it expected conventional renewable fuel to reduce GHG emissions by 20% relative to fossil fuel.[3] According to the U.S. Department of Agriculture, however, conventional renewable fuel currently reduces GHG emissions by 43%—nearly the 50% reduction needed to qualify as advanced biofuel.[4] By increasing the use of conventional ethanol, the RFS program has therefore facilitated use of even cleaner fuel than Congress had conceived when it created the program. And as detailed below, the growth in conventional renewable fuel has also increased the country's energy independence and security by reducing our dependence on foreign oil and diversifying our energy sources, while creating American jobs, revitalizing rural economies, and introducing much-needed competition into a monopolized vehicle-fuels market. Consequently, EPA should certainly not reduce the implied non-advanced volume below 15 billion.

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[1] *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 32,024 (proposed July 10, 2018) ("NPRM").

[2] Energy Independence and Security Act of 2007, Pub. L. No. 110-140, preamble, 121 Stat. 1492, 1492 (Dec. 19, 2007).

[3] 42 U.S.C. § 7545(*o*)(2)(A)(i).

[4] *Compare* ICF, *A Life-Cycle Analysis of the Greenhouse Gas Emissions of Corn-Based Ethanol*, at 152 (Jan. 12, 2017), *with* 42 U.S.C. § 7545(*o*)(1)(B)(i).

Beyond that, however, EPA should adjust its proposal in several important respects. Foremost, EPA should revamp its handling of small refinery exemptions in several ways. First, EPA should cease granting petitions to "extend" exemptions to small refineries that have not been exempt in every prior compliance year. EPA's contrary practice is plainly foreclosed by the statute; once a refinery's exemption lapses, there is nothing to "extend" in the future.

Second, EPA should adjust volume requirements upward to fully account for extensions of small refinery exemptions granted after the volume requirements for the covered year were finalized. EPA reports that, because of such retroactive extensions, obligated parties have been relieved of the obligation to submit 2.25 billion RINs for 2016 and 2017. EPA's current policy—doing nothing to make up those volumes—violates its fundamental statutory duty to "ensure" through this rulemaking that the volume obligations are met. Doing nothing actually ensures the required volumes are *not* met, which jeopardizes the RFS program's efficacy, particularly when EPA grants extensions on a massive scale. Instead, EPA can and should, when finalizing RVOs for a given compliance year, raise the required volumes by (i) the projected volume of retroactive extensions for the upcoming year and (ii) the actual volume of any (unaccounted-for) retroactive extensions granted in prior years.

Third, EPA should mitigate the adverse effects of extending small refinery exemptions on the predictability and transparency of the RIN market. Not granting extensions to ineligible refineries, and adjusting volume requirements to fully make up for retroactive extensions, are good places to start. EPA should also stop issuing new RINs to refineries whose extension petitions are determined to have been denied erroneously, as well as systematically disregarding the Department of Energy's recommendations regarding extension petitions. Finally, EPA should conduct the exemption process in public view rather than in secret. EPA's exemption decision documents, as well as much information submitted by refineries that is integral to evaluating their extension petitions, may not be withheld under the Freedom of Information Act—as EPA itself concluded in 2016.

EPA should also revise its method for projecting the liquid cellulosic biofuel production for 2019. By setting projections based on past production, EPA incorrectly assumes that the industry's past determines its future. By failing to account for the fact that the industry is still in its early stages and likely to achieve rapid growth soon, EPA is systematically and impermissibly tilting its projections against growth instead of taking "'neutral aim at accuracy.'"[5] Using an average of the industry's production over the past two or three years does not remedy this problem. EPA should base its projections on a plant-by-plant evaluation of all relevant factors and should treat as a separate group facilities with proven technology for producing cellulosic ethanol from corn kernel fiber.

EPA should remove regulatory barriers to expanded use of E15. Consumers could use far more E15 than they currently do. More than 90% of vehicles on the road today can safely use E15, and the infrastructure to deliver it could be expanded quickly given the right RFS incentives. EPA could help unlock the potential for E15 growth by extending the 1psi Reid Vapor Pressure waiver to E15, recognizing that under the Clean Air Act, E15 is "substantially

[5] *Americans for Clean Energy v. EPA*, 864 F.3d 691, 727 (D.C. Cir. 2017) (quoting *American Petroleum Institute v. EPA*, 706 F.3d 474, 476 (D.C. Cir. 2013)).

similar" to certification fuels in all material respects, and finalizing its Guidance for E85 Flexible Fuel Vehicle Weighting Factor for Model Years 2016-2019 Vehicles Under the Light-Duty Greenhouse Gas Emissions Program (and in doing so revise the proposed treatment of E15).

Growth Energy appreciates that EPA has proposed to maintain an implied non-advanced volume of 15 billion rather than reduce it through a general waiver due to severe economic harm. EPA's longstanding interpretation of this general waiver provision is correct, and there is no evidence that adherence to the proposed volume requirements would cause widespread severe economic harm—indeed, the industry has been subject to the same 15-billion implied non-advanced requirement for several years and no severe economic harm has occurred. And the industry could actually achieve markedly higher volumes with the right RFS incentives. EPA should also be mindful that any risk of severe economic harm is eliminated by the availability of various compliance flexibilities, including the RIN bank, and that it could not exercise such a waiver without first accounting for the many significant benefits accruing because of the growth in renewable fuel use spurred by the RFS volume requirements.

Finally, EPA should immediately address the D.C. Circuit's vacatur of EPA's general waiver of the 2016 total volume requirement. That judicial decision was issued more than one year ago, and EPA has no justification for continued delay, particularly given the annual nature of RFS RVO-setting. EPA could easily remedy the vacatur by adding the 500 million RINs covered by the vacated general waiver to the total 2019 volume requirement it would otherwise impose.

II. THE ADMINISTRATION'S ENERGY POLICY OBJECTIVES ARE PROMOTED BY AT LEAST MAINTAINING THE CURRENT VOLUME OF CONVENTIONAL RENEWABLE FUEL

The proposed levels of conventional renewable fuel use *promote* U.S. energy independence and security, as well as this administration's goal of "American energy dominance." Here, we explain why that is so with respect to ethanol and the total volume requirement, but similar analysis could apply with respect to advanced renewable fuels and the advanced volume requirement.

A. The Administration Seeks to Achieve U.S. Energy Independence, Security, and Dominance

As explained in a report prepared by Chupka, Hagerty and Verleger, U.S. energy independence and security are not realistically achieved by cutting off energy imports or otherwise isolating U.S. energy production and consumption from the rest of the world.[6] The United States unavoidably participates in global energy markets. Domestic prices for crude oil and petroleum products, for example, "will rise or fall as global market conditions dictate, including shifts in U.S. commodity futures markets that translate directly to movements in the

[6] Chupka, Hagerty & Verleger, *Blending In: The Role of Renewable Fuel in Achieving Energy Policy Goals – 2018 Updated Edition*, at 18 (Aug. 17, 2018) ("Chupka, Hagerty & Verleger Report") (attached as Exhibit 1).

price of crude, gasoline, and diesel."[7] Similarly, because "retail prices closely follow futures prices, disruptions in supply any place in the world will directly affect prices paid by U.S. consumers."[8]

In this environment, energy independence and security are primarily characterized by other circumstances. Among those are a decreased reliance on energy imports, robust energy exports, and greater balance between domestic energy production and domestic energy consumption.[9] U.S. energy markets should also exhibit a "resilience" against "the adverse economic effects of oil price shocks that will continue to occur periodically."[10] And domestic production of raw energy and "value-added products," i.e., refined and manufactured goods, should support domestic economic growth.[11]

Perhaps recognizing the United States' essential participation in global energy markets, the President has recently prioritized achieving not only energy independence and security, but also a broader policy of "American energy dominance."[12] He explained: "[M]y administration will seek not only American energy independence that we've been looking for so long, but American energy dominance. … We will export American energy all over the world, all around the globe. These energy exports will create countless jobs for our people, and provide true energy security to our friends, partners, and allies all across the globe."[13] To achieve energy dominance, President Trump proposed several actions, including "expand[ing]" sources of "renewable" energy (referring specifically to nuclear energy), "boost[ing] American energy exports," and "bring[ing] new opportunity to the heartland."[14]

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 19.

[11] *Id.* at 20.

[12] Unleashing American Energy. The White House Office of the Press Secretary, Remarks by President Trump at the Unleashing American Energy Event, U.S. Department of Energy, Washington, D.C. (June 29, 2017), https://www.whitehouse.gov/the-press-office/2017/06/29/remarks-president-trump-unleashing-american-energy-event.

[13] *Id.*

[14] *Id.*

B. Reducing the Implied Volume for Conventional Renewable Fuel Would Impede the Achievement of These Policy Objectives

1. Ethanol has helped rebalance energy trade in the United States' favor

Since 2000, domestic fuel ethanol production has increased dramatically and steadily (except for the bad-harvest year of 2012), from barely 100,000 barrels per day to over 1,000,000 barrels per day.[15] This expansion altered the energy trade balance in important ways.

More ethanol was consumed domestically, yet more ethanol was exported. The increase in ethanol production thus both "expanded the overall domestic supply of fuel" and helped the U.S. become a net exporter of ethanol.[16]

Rather than "crowd[ing] out some other sources of petroleum supply," this expansion also strengthened the country's position with respect to petroleum markets by supporting the reduction of imports and the increase of exports of petroleum products and crude oil.[17] For example, oil refinery capacity has increased by about 1 million barrels per day since 2007, while oil refinery utilization today is near its post-2000 peak (91% vs. 93% in 2004), corresponding to increased oil refinery production.[18] With U.S. consumption of transportation fuel holding relatively constant, the "overall trend in gasoline trade volumes … is a pronounced reduction in imports and a significant increase in exports"—whereas in 2007 gasoline imports were about six times as large as exports, in 2016 the United States "became a net exporter for the first time since 1961."[19] During the same period, the United States also became a net exporter of other petroleum products, by an even wider margin.[20] These developments have coincided with a period in which U.S. crude oil production has increased markedly, exports of crude oil have increased, and imports of crude oil have decreased.[21] Although these markets are complex and the causes of these changes are varied, it is significant that they occurred during this period of such substantial increase in U.S. ethanol production.

The availability of increased ethanol can also soften the economic blow to the United States of oil price spikes. For example, when global crude oil and petroleum product markets were tight a few years ago, the increased availability of ethanol "moderat[ed] the world crude oil price."[22] Even when the global petroleum supply is not as tight, high availability of ethanol can mitigate the effect of occasional oil price shocks: when consumers have greater access to higher-

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[15] Chupka, Hagerty & Verleger Report at 3-4.

[16] *Id.* at 4-5, 7-8.

[17] *Id.* at 4-5, 7.

[18] *Id.* at 5-6.

[19] *Id.* at 6.

[20] *Id.* at 8-9.

[21] *Id.* at 9-11.

[22] *Id.* at 18.

ethanol blends, they can "take advantage of relative prices between E10 and E15 or E85 … by purchasing more E15 or E85."[23]

2. Ethanol has stimulated substantial economic development in rural Midwestern areas and provided various other economic benefits

In addition to supporting the rebalancing of energy trade balance in the United States' favor, increased ethanol has spurred significant growth in domestic agriculture, which has facilitated broader economic growth especially in rural Midwestern areas.

Most directly, "increased demand for corn-based ethanol has significantly increased production of grain corn and increased energy-related jobs in the U.S."[24] Ninety-three percent of the increase in corn production since 2000 is the result of increased domestic ethanol demand.[25] Corn grown for ethanol production in 2017 accounted for about $18.6 billion in income for corn growers.[26] The increased agricultural income resulting from increased corn production has provided a buffer against some recent declines in corn prices.[27]

The process of producing ethanol from that corn enlarges the economic benefits of ethanol. More than 90% of ethanol production occurs in the Midwest.[28] According to the U.S. Department of Energy, the biofuels industry employs nearly 105,000 people, about 34,500 of whom work in the corn ethanol fuels sector, meaning that the ethanol industry supports slightly more jobs than the petroleum industry on a per-gallon-produced basis.[29] A study by the U.S. Department of Agriculture found that increasing an ethanol plant's annual production by 100 million gallons would generate $203 million in sales and add 39 full-time jobs.[30] Ethanol production also supports economic growth indirectly: according to the U.S. Department of Agriculture, each ethanol job creates 2.6 to 3.2 indirect jobs.[31] So significant is the impact of higher ethanol production that, according to another study by the U.S. Department of Agriculture, ethanol demand accounts for 32% of the total change in employment in areas where

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[23] *Id.* at 19.

[24] *Id.* at 12.

[25] *Id.* at 13.

[26] *Id.* at 14.

[27] *Id.*

[28] *Id.* at 14.

[29] *Id.* at 15-16.

[30] *Id.* at 16-17.

[31] *Id.* at 17 (citing John Pender, *et al*., U.S. Dep't of Agriculture, *Rural Wealth Creation: Concepts, Strategies, and Measures*, Economic Research Report No. 131, 12 (Mar. 2012), *available at* https://pdfs.semanticscholar.org/5219/21ce70f3ea7cb18d57d5f6d03c43ef0a22d4.pdf).

new ethanol facilities are established.[32] Given the significance of conventional renewable fuel to the Administration's goal of energy independence, EPA should not allow the implied non-advanced volume to fall below 15 billion.

III. EPA SHOULD CHANGE ITS APPROACH TO SMALL REFINERY EXEMPTIONS TO COMPLY WITH ITS STATUTORY MANDATE AND TO BRING MORE TRANSPARENCY TO THE RIN MARKET

In the proposed rule, EPA revealed the staggering volumes of renewable fuel that were waived for the 2016 and 2017 compliance years due to its grant of unprecedented numbers of petitions to extend small refinery exemptions.[33] Those exemptions were based on an apparent finding that compliance would impose a "disproportionate economic hardship" on the refinery.[34] EPA stated that "approximately 1,460 million RINs … were not required to be retired by small refineries that were granted hardship exemptions for 2017" and that "approximately 790 million RINs … were not required to be retired by small refineries that were granted hardship exemptions for 2016."[35] EPA subsequently disclosed that it granted 19 of 20 extension petitions for 2016 and all 29 extension petitions for 2017 that it has reviewed so far (it is still processing four 2017 petitions).[36]

EPA had granted no petitions for 2016 and 2017 by the time it finalized the percentage obligations for those compliance years.[37] All the petitions for those years were thus granted after the percentage obligations were finalized. When setting percentage obligations for a given year, EPA accounts for the petitions it has *already* granted *for that compliance year* by excluding the gasoline and diesel produced by exempt refineries, effectively reallocating the exempt obligations to non-exempt obligated parties.[38] But EPA never makes any adjustment or correction to account for petitions granted *after* the percentage obligations are set for the

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[32] *Id*. (citing Jason Brown, *et al*., U.S. Dep't of Agriculture, *Emerging Energy Industries and Rural Growth*, Economic Research Report No. 159 (Nov. 2013)).

[33] NPRM at 32,029.

[34] 42 U.S.C. § 7545(*o*)(9)(B)(i).

[35] NPRM at 32,029.

[36] Letter from Assistant Administrator of EPA, William L. Wehrum, to Senator Charles E. Grassley, at 1 (July 12, 2018) ("Wehrum Letter") (attached as Exhibit 2).

[37] *Renewable Fuel Standard Program: Standards for 2014, 2015, 2016 and Biomass-Based Diesel Volume for 2017*, 80 Fed. Reg. 77,420, 77,511 (Dec. 14, 2015) ("2014-16 RFS Rule"); *Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018*, 81 Fed. Reg. 89,746, 89,800 (Dec. 12, 2016) ("2017 RFS Rule"); *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 58,486, 58,523 (Dec. 12, 2017) ("2018 RFS Rule").

[38] 40 C.F.R. § 80.1405(c).

compliance year covered by the exemptions.[39] Consequently, under EPA's policy, the extensions EPA granted for 2016 and 2017 reduced the required volumes for those two years by a combined 2.25 billion RINs; absent a change to EPA's policy, those volumes will never be made up.

The evidence that EPA has revealed so far shows clearly that EPA has repeatedly purported to "extend" an exemption that had long since expired. And given the sheer number of extensions that EPA has granted in recent years, EPA appears to take the view that it can be typical for a refinery to suffer a "disproportionate" hardship, which makes no sense.[40]

EPA's newfound willingness to freely grant extensions, and its refusal to account for the ones it grants retroactively, threatens the efficacy of the RFS program. Yet, the NPRM states that EPA is "not soliciting comments on how small refinery exemptions are accounted for in the percentage standards formulas in 40 CFR 80.1405, and any such comments will be deemed beyond the scope of this rulemaking."[41] That is patently unreasonable given the effect that EPA's recent approvals of extension petitions have on the annual volume obligations and the RFS program overall.[42] It is also contrary to Assistant Administrator Wehrum's statement that EPA is "interested in ensuring the [exemption] program is implemented in a fair and effective manner,"[43] as well as EPA's solicitation of comment on "potential regulatory changes … to address perceived vulnerabilities in the RIN market."[44] Indeed, as EPA appears to recognize, "the impact of small refinery exemptions" has contributed significantly to such vulnerabilities in the market.[45] Given that EPA has refused to publicly disclose information about any specific extension and insisted that a recently filed petition for review of its standards for evaluating extension petitions must be dismissed for lack of a final agency action, EPA's refusal to solicit

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[39] NPRM at 32,057 ("any exemptions … that are granted after the final rule is released will not be reflected"); *see also Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards*, 75 Fed. Reg. 76,796, 76,804 (Dec. 9, 2010) ("2011 RFS Rule").

[40] *Cf. Sinclair Wyo. Refining Co. v. EPA*, 887 F.3d 986, 997 (10th Cir. 2017) ("The EPA must compare the effect of the RFS Program compliance costs on a given refinery with the economic state of other refineries.").

[41] NPRM at 32,057.

[42] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made"; agency acts arbitrarily by "entirely fail[ing] to consider an important aspect of the problem").

[43] Wehrum Letter at 2.

[44] NPRM at 32,027.

[45] *Id.*

comments on retroactive extensions also seems aimed at shielding its exemption practices from scrutiny.[46]

Consequently, Growth Energy addresses EPA's approach to retroactive extensions. Growth Energy explains that: (A) EPA is statutorily permitted to grant an extension petition for a given year only if the refinery was exempt for all prior years; (B) EPA is statutorily required to account for extensions granted after the percentage obligations for the covered year are finalized, by setting RVOs to reflect (i) the projected volume of extensions to be granted for that year after the RVOs are finalized based on the most recent experience and (ii) the actual volume of extensions that were granted during the prior year in excess of prior projections and thus not accounted for in the prior RVOs; (C) EPA lacks authority to grant retroactive RINs to small refineries whose extension application was incorrectly denied; and (D) EPA should carefully consider the Department of Energy's recommendation on extension petitions. These proposed changes would bring much-needed stability and clarity to the RIN market and the RFS program.

A. EPA Is Statutorily Permitted to Grant an Extension Petition Only If the Refinery Was Exempt for All Prior Years

The recent disclosure of 2016 and 2017 exemptions makes clear that EPA has been granting extension petitions to refineries that have not been continuously exempt under RFS2. For example, only about thirteen refineries were exempt for 2011 and 2012,[47] but nineteen have been granted an extension for 2016 and 29 have been granted an extension for 2017 (with several petitions pending).[48] Moreover, EPA said that as of 2017, "there are 38 refineries eligible for RFS small refinery hardship relief."[49] EPA's position violates the plain statutory text. The number of extensions can never rise from one year to the next because it is impossible to "extend" something that does not exist. Rather, EPA may grant extensions only to refineries that have been exempt continuously since 2010, when the initial "[t]emporary exemption" would otherwise have expired under subparagraph (A) of Section 7545(*o*)(9).[50]

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[46] Respondent's Motion to Dismiss 10-15, *Advanced Biofuels Association v. EPA*, No. 18-1115, Doc. 1740614 (D.C. Cir. July 13, 2018); *see also* 42 U.S.C. § 7607(b)(1) (petition for review challenging "any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter" must be filed in the United States Court of Appeals for the District of Columbia).

[47] U.S. Dep't of Energy, *Small Refinery Exemption Study*, at vii, 26, 37 (Mar. 2011) ("DOE Study"), https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf; *Regulation of Fuels and Fuel Additives, 2012 Renewable Fuel Standards*, 77 Fed. Reg. 1,320, 1,323 (Jan. 9, 2012) ("2012 RFS Rule"); *see* 42 U.S.C. § 7545(*o*)(9)(B)(i).

[48] Wehrum Letter at 1.

[49] EPA, *Periodic Reviews for the Renewable Fuel Standard Program*, at 11 n.33 (Nov. 2017) ("Periodic Reviews"), EPA-HQ-OAR-2017-0627-0003.

[50] 42 U.S.C. § 7545(*o*)(9)(A).

Congress authorized EPA to grant "petition[s] … for an *extension* of the exemption under subparagraph (A) for the reason of disproportionate economic hardship."[51] "Extend" means "to prolong in duration" or to "cause to last longer,"[52] and correspondingly "extension" means "enlargement in duration."[53] In other words, the inescapable meaning of this statutory provision is that EPA may grant a petition for an *extension* to cover a certain year only if "the exemption under subparagraph (A)" continues to exist up to that year. Otherwise, there is nothing to "prolong" or make last "longer." For example, EPA may grant a refinery's petition for 2016 only if the refinery was (validly) exempt for 2015, which in turn requires that the refinery have been (validly) exempt for 2014 and in prior years. EPA "must … give effect to th[is] unambiguously expressed intent of Congress."[54]

The foundational exemption that must continue to exist in order for EPA to grant a petition for an "extension"—the exemption under subparagraph (A)—encompasses two stages. Congress created the initial, blanket "[t]emporary exemption" for all small refineries through 2010.[55] Next, in the same subparagraph, Congress directed EPA to "extend th[at] exemption … for a period of not less than 2 additional years" for any "small refinery that the Secretary of Energy determines … would be subject to a disproportionate economic hardship if required to comply with" the volume requirements.[56] Fifty-nine refineries appear to have been covered by the initial, blanket exemption imposed by Congress through 2010.[57] Thirteen of those 59 refineries then received a 2-year extension based on a determination by the Department of Energy ("DOE") that compliance would subject them to disproportionate economic hardship.[58] Tellingly, the DOE-based "[e]xtension of [the] exemption[s]" was continuous with the initial,

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[51] *Id.* § 7545(*o*)(9)(B)(i) (emphasis added).

[52] *Extend*, Oxford English Dictionary, 4b, http://www.oed.com/view/Entry/66923?redirectedFrom=extend#eid; *Extend*, Oxford Living Dictionary, 1.1, https://en.oxforddictionaries.com/definition/extend.

[53] *Extension*, Oxford English Dictionary, 9d, http://www.oed.com/view/Entry/66936?redirectedFrom=extension#eid.

[54] *ACE*, 864 F.3d at 712 (quoting *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014)).

[55] 42 U.S.C. § 7545(*o*)(9)(A)(i) ("The requirements of paragraph (2) shall not apply to small refineries until calendar year 2011.").

[56] *Id.* § 7545(*o*)(9)(A)(ii).

[57] The 59 blanket exemptions are based on DOE's explanation that a survey was sent on September 27, 2010, to 59 refineries that, at that time, "h[e]ld a waiver from EPA under the RFS2 program." DOE Study at 26; *see also id.* at vii. Because all small refineries that met the statutory definition of "small refinery" would have been exempt through 2010 and the hardship petition would not have applied then, the necessary inference is that 59 refineries would have been exempt pursuant to the initial, blanket exemption.

[58] *Id.* at vii, 26, 37; 2012 RFS Rule at 1,323; *see* 42 U.S.C. § 7545(*o*)(9)(B)(i).

blanket exemption: the congressionally mandated exemption ran through the end of 2010, and the DOE-based extension covered 2011 and 2012.

Because an "extension of the exemption under subparagraph (A)" could be made for a given year only if the "[t]emporary exemption" specified in subparagraph (A)—the initial, blanket exemption followed by the extension based on DOE's hardship determination—was previously extended up to that year through an unbroken chain of extensions, the exemptions extended pursuant to DOE's study became the *ceiling* for any subsequent "extensions" that EPA could grant upon a petition by an individual refinery. In other words, the thirteen refineries that received the blanket exemption and the DOE-based exemption were the *only* ones eligible for an extension upon petition to EPA. Although EPA's secrecy prevents Growth Energy from determining the precise ceiling today, it is clearly no higher than *twelve*. That is because EPA has revealed that it *evaluated* only twelve extension petitions for 2014.[59] If EPA validly granted all twelve—an unlikely event—those twelve would have been the only refineries eligible for an extension in 2015 and beyond.

This is so regardless of when the extension petition is filed.[60] For example, if a refinery files its petition in 2018 to extend the exemption for the 2017 compliance year, EPA may grant the petition only if the refinery was continuously exempt through 2016 by virtue of the congressionally mandated blanket exemption, the DOE-based extension, and extension petitions granted for 2013-2016.

EPA has suggested that the DOE-based extension and individual extension exemptions provide two alternative paths to extensions. For example, EPA declared: "Congress provided that small refineries could receive a temporary extension of the exemption beyond 2010 based *either* on the results of a required DOE study, *or* based on an EPA determination of 'disproportionate economic hardship' on a case-by-case basis in response to small refinery petitions."[61] Accordingly, EPA apparently "approved a number of individual small refinery petitions" for years covered by the DOE-based extension.[62] That interpretation of the statute is wrong. As explained above, the statute says that individual petitions may be used to extend the "exemption under subparagraph (A)," which includes *both* the initial, blanket exemption *and* the DOE-based extensions. In other words, the two types of extensions provided by the statute work

[59] Periodic Reviews at 11 n.33.

[60] *See* 42 U.S.C. § 7545(*o*)(9)(B)(i) ("small refinery may at any time petition").

[61] 2017 RFS Rule at 89,800 (emphasis added); 2018 RFS Rule at 58,523; *accord* NPRM at 32,056; *see also* 40 C.F.R. § 80.1441(e)(1), (2).

[62] 2012 RFS Rule at 1,323.

serially—once DOE-based extensions have been made, the individual petitions may be used only to further extend the DOE-based extensions and then further extensions from there.[63]

Consequently, even if "extend" as used in the statute allowed a refinery to be eligible for an extension in one year when it had not received an extension for all prior years—that is, even if "extend" were consistent with a gap in the exemption extensions—EPA's current approach would still contradict the statute and many of the recently granted extensions would be unlawful. Because the statute specifies that the object of a petition to EPA is "an extension of the exemption under subparagraph (A),"[64] and subparagraph (A) provides for both the blanket exemption *and* the DOE-based extension,[65] only those refineries that had received *both* of those would be eligible to petition EPA later for an extension. And as noted above, only thirteen refineries received the DOE-based extension, so (even under this incorrect interpretation of "extend" that permits a gap), only those thirteen refineries could ever receive a further extension by petition to EPA.

B. EPA Must Account for Retroactive Extensions

Almost all of the extension petitions that EPA has granted so far were granted after the RVOs for the covered year were finalized. That, however, did not relieve EPA of the duty to ensure that the RVOs are met. EPA must adjust the RVOs to fully account for any retroactive extensions. Specifically, when setting RVOs for a given year, EPA should first raise the required volume by (i) the projected volume of extensions to be granted retroactively for that compliance year (i.e., expected to be granted after the RVOs are finalized) and (ii) the actual volume of any extensions granted during prior years that have not been accounted for in prior RVOs.

"After EPA determines the volume requirements for the various categories of renewable fuel, it has a statutory mandate to 'ensure[]' that those requirements are met."[66] EPA's current do-nothing policy regarding retroactive extensions ensures the opposite—that the specified volume requirements will never be met. So far, EPA has exempted refineries from producing 1.46 billion RINs in 2017 and 790 million RINs in 2016—7.5% and 4.3% of those years' total

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[63] Even if EPA's two-track view were valid, it would only (modestly) increase the ceiling for later extensions: thirteen (per DOE) *plus* however many refineries were granted extensions for *both* 2011 *and* 2012 by EPA upon individual extension petitions. The two-track view would not alter the rule that EPA may grant an extension petition for a given year only if the refinery was continuously exempt for all prior years under RFS2. Accordingly, at least some of EPA's recent grants of extension petitions would still be unlawful.

[64] 42 U.S.C. § 7545(*o*)(9)(B)(i).

[65] *Id.* § 7545(*o*)(9)(A)(ii).

[66] *ACE*, 864 F.3d at 698-699 (quoting 42 U.S.C. § 7545(*o*)(3)(B)(i)); *see also id.* § 7545(*o*)(2)(A)(i) (directing EPA to "ensure that transportation fuel sold or introduced into commerce … on an annual average basis, contains at least" the applicable volumes of renewable fuel).

volume requirements.[67] Because all of the petitions for those years were granted after EPA had finalized the applicable RVOs, those volumes will be lost under EPA's current policy. Especially in the face of the such large aggregate exemptions, EPA cannot plausibly claim to be *ensuring* that the volume requirements are met. Indeed, the Office of Management and Budget ("OMB") recently stated that "[c]urrent procedures ensure RVO isn't met."[68]

EPA recently recognized as much. In earlier drafts of the 2019 proposed rule, EPA proposed to take "a different approach" toward retroactive extensions in order to "implement" its statutory mandate to "ensure[]" the required volumes are met.[69] EPA admitted that its "grant of small refinery exemptions affects the amount of transportation fuel subject to the renewable fuel obligation for that year."[70] To "address this effect" and "facilitate the satisfaction of the RFS program [volume] requirements," EPA proposed in the earlier drafts that it would adjust its RVO formula to account prospectively for the "[p]roject[ed] … total exempted volume based on the most recent exemption data."[71]

Anticipatorily accounting for expected future extensions when setting RVOs for the covered year would reduce or eliminate the volumes lost because of retroactive extensions, thereby going a long way toward "ensur[ing]" that the required volumes are met. As EPA acknowledged, such an approach is also consistent with "a reasonable interpretation" of existing regulations because the regulations account for the gas and diesel volumes "'*projected* to be produced by exempt small refineries.'"[72] EPA, however, abandoned the proposal without explanation—even though OMB had approved of the proposal and concluded that EPA should "[i]nclude an estimate for 2019 small refinery waivers based on the waivers granted over the past two years."[73]

Further, when finalizing RVOs, EPA should increase volume requirements by the amount covered by any previously granted retroactive extensions that have not already been accounted for through other adjustments to RVOs, such as the projection just described. Because EPA

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[67] 2017 RFS Rule at 89,747; 2014-2016 RFS Rule at 77,422.

[68] Email from Tia Sutton to Chad Whiteman regarding RE EO 12866 Comments on EPA RFS RVO 2019/2020 BBD NPRM (2060-AT93), at 7, 15 (June 5, 2018) ("June 5 OMB Comments"), EPA-HQ-OAR-2018-0167-0103; *see also* Email from Chad Whiteman to Tia Sutton and Benjamin Hengst regarding EO 12866 Comments on EPA RFS RVO 2019/2010 BBD NPRM (2060-AT93), at 3-4, 12 (May 23, 2018), EPA-HQ-OAR-2018-0167-0103.

[69] Email from Tia Sutton to Chad Whiteman regarding Revised version of 2019 RVO NPRM, at 74 (June 19, 2018), EPA-HQ-OAR-2018-0167-0103; Email from Tia Sutton to Chad Whiteman regarding Updated version of 2019 RVO NPRM, at 74 (June 21, 2018), EPA-HQ-OAR-2018-0167-0103 ("June 21 Version").

[70] June 21 Version 74.

[71] *Id.*

[72] *Id.*

[73] June 5 OMB Comments 7.

would have perfect knowledge about the extent of extensions to that point (unlike when projecting), doing so would *fully* "ensure" that the volume requirements are met.[74] True, that would not ensure that the requirements are met *in the applicable year* to the extent that any extension petitions were granted during that year (after RVOs were set). But it would ensure that the volume requirements are met in the aggregate (i.e., over the arc of the RFS program), which would serve Congress's stated goal of introducing specified volumes of renewable fuel into the nation's transportation fuel supply far better than EPA's do-nothing policy. EPA in fact has repeatedly used the similar technique of "combin[ing]" two years' volume requirements in order to "ensure" that *both* years' requirements are met, and the courts have approved.[75]

Another mechanism available to EPA to account for retroactive extensions is the ability to flow a cellulosic waiver through to the advanced and total volume standards. As discussed further below, EPA should not use the cellulosic waiver to reduce those standards to the extent that it projects future retroactive exemption extensions or has granted such extensions in prior years without making up the exempt volumes.[76]

EPA's do-nothing policy has the effect of unlawfully creating a new waiver, contrary to Congress's intent. The statute specifies that an "exemption" merely relieves the exempt refinery of the compliance obligation—"The [volume] requirements … shall not apply to" the exempt refinery.[77] Congress provided a different mechanism to reduce national volume requirements: waivers. But EPA may do so under specific, limited circumstances, none of which involves the disproportionate economic hardship suffered by small refineries.[78] Yet, the acknowledged effect of EPA's do-nothing policy is precisely to reduce the volume requirements rather than to merely relieve certain refineries of their obligations, and thus it aggrandizes to EPA a new waiver authority. EPA has no power to do that. Congress's "expressi[on]" of certain types of waivers "excludes another [type of waiver] left unmentioned,"[79] and "the fact that EPA thinks a statute would work better if tweaked does not give EPA the right to amend the statute."[80]

EPA previously said that it would not account for retroactive extensions because "there is no [statutory] provision for changing the percentage standards once they are set" or for "ensuring that the percentage standards actually result in the specified volumes actually being

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[74] This ex post accounting should cover unaccounted-for RINs in *all* prior years, not just the most recent one.

[75] *National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 153, 156 (D.C. Cir. 2010) (the "combined" 2009-2010 rule fulfilled EPA's duty to "ensure" that volume requirements are met); *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919-921 (D.C. Cir. 2014).

[76] *See infra* Part IV.

[77] 42 U.S.C. § 7545(*o*)(9)(A)(i).

[78] *Id.* 7545(*o*)(7)(A) & (D)-(E), (8).

[79] *NLRB v. SW General Inc.*,137 S. Ct. 929, 940 (2017) (quotation marks omitted).

[80] *ACE*, 864 F.3d at 712.

consumed."[81] In support, EPA noted that in setting RVOs, the statute allows EPA to "use projections of gasoline and diesel volume for the next year which might turn out the be too high or too low."[82] Rather, EPA said, "the Act is best interpreted to require issuance of a single annual standard in November that is applicable in the following calendar year, thereby providing advance notice and certainty to obligated parties regarding their regulatory requirements."[83]

Although it is important to provide the market with notice and certainty, that does not justify EPA's do-nothing policy because retroactively revising RVOs is not the only way to account for retroactive extensions. The remedial actions proposed here would not undermine the predictability of the volume requirements. EPA should adopt these changes.

C. EPA Should Not Issue Retroactive RINs to Remedy Any Incorrect Prior Denial of an Extension Petition

While refusing to adjust RVOs to account for extension petitions it grants after it has finalized the RVOs for the covered year, EPA nonetheless appears willing to adjust refineries' balance sheets by granting them RINs when it approves their extension petition after the covered compliance year. In the past, EPA allowed refineries to "un-retire" RINs if their extension petition was granted after they had already complied with their RVOs for the covered year.[84] Recently, however, it has been reported that EPA has "allowed" some refineries in that position "to generate new 2018 vintage RINs to replace the RINs [they] previously submitted to meet" RVOs for the earlier compliance years covered by the extensions.[85]

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[81] 2012 RFS Rule at 1,340.

[82] *Id*.

[83] *See, e.g.*, 2011 RFS Rule at 76,804; 2012 RFS Rule at 1,340; *Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards*, 78 Fed. Reg. 49,794, 49,825 (Aug. 15, 2013).

[84] Carryover RIN Bank Calculations for 2019 NPRM, at 3 n.3 (June 11, 2018) ("While EPA has granted these additional small refinery exemptions since the 2017 compliance deadline, the RINs retired by these small refineries in the 2017 compliance year had not yet been un-retired at the time of the most recent update."), EPA-HQ-OAR-2018-0167-0043; Email to Chad Whiteman regarding E.O. 12866 Review 2019 RVO NPRM – memo requests, at 2 ("Carryover RIN Bank Calculations for 2018 Final Rule" from November 2017 discussing the "expected un-retirement of … RINs" based on EPA's grant of "additional small refinery hardship petitions for exemption from the 2016 RFS standards"), EPA-HQ-OAR-2018-0167-0103.

[85] *See* Jarrett Renshaw & Chris Prentice, *Exclusive: U.S. EPA grants refiners biofuel credits to remedy Obama-era waiver denials*, Reuters, May 31, 2018 ("Reuters Retroactive Credits Article"), https://www.reuters.com/article/us-usa-biofuels-waivers-exclusive/exclusive-epa-grants-refiners-biofuel-credits-to-remedy-obama-era-waiver-denials-idUSKCN1IW1DW; Timothy Puko & Christopher M. Matthews, *EPA Gives $30 Million-Plus in Ethanol Credits to Oil Refiners, Angers Corn Growers*, Wall St. J., May 31, 2018, https://www.wsj.com/articles /epa-gives-30-million-plus-in-ethanol-credits-to-oil-refiners-angers-corn-growers-1527802062.

Presumably, this supposed RIN generation does not mean that the refinery is producing or importing new gallons of renewable fuel. That is not typically what refineries do, and anyway that would not be an effective way to implement an exemption extension because, even if the refinery could recoup the cost of generating the new RIN by selling it, that revenue would not offset the cost of generating (or acquiring) the RIN previously used to show compliance unnecessarily. Rather, we suspect that EPA has simply been issuing new RINs to these refineries. If that is true, it is unlawful. EPA regulations specify the ways that a RIN can be generated, and generating a new RIN that either is not associated with a newly produced or imported gallon of renewable fuel or is associated with a gallon of renewable fuel that already generated another RIN (a two-for-one) is not among them.[86]

D. EPA Should Carefully Consider DOE's Recommendations on Extension Petitions

It has been reported that, in deciding to grant 19 extension petitions for 2016 and 29 for 2017, EPA repeatedly disregarded DOE's contrary or more limited recommendations.[87] Although EPA is statutorily charged with deciding whether to grant or deny an extension petition, Congress intended that EPA should carefully consider DOE's views on each petition.[88] EPA's apparent systematic departure in fully extending exemptions where DOE had recommended no extension or only a partial extension is inconsistent with that duty.[89] EPA should ensure that it consistently and carefully considers DOE's recommendations.

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[86] *See* 40 C.F.R. §§ 80.1425-80.1429.

[87] Jarrett Renshaw & Chris Prentice, *Exclusive: Trump's EPA ignored Energy Department calls to limit biofuel waivers*, Reuters (June 26, 2018) ("Reuters DOE Article") (EPA "consistently granted full waivers in cases where the energy department recommended only partial exemptions, and, at least once, granted a full approval when the energy department advised an outright rejection."), https://www.reuters.com/article/us-usa-epa-biofuels-exclusive/exclusive-trumps-epa-ignored-energy-department-calls-to-limit-biofuel-waivers-idUSKBN1JM17T.

[88] *See* 42 U.S.C. § 7545(*o*)(9)(B)(ii) ("In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors."); *accord* EPA, *Financial and Other Information to be Submitted with 2016 RFS Small Refinery Hardship Exemption Requests*, at 2-3 (Dec. 6, 2016) ("Evaluation Criteria Guidance") ("The EPA will consult with DOE during its evaluation of each petition …."), https://www.epa.gov/sites/production/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf.

[89] *Cf. Ergon-W. Va., Inc. v. EPA*, 2018 WL 3483282, at *8 (4th Cir. July 20, 2018) ("Although the EPA is statutorily required to consider the DOE's recommendation, it may not turn a blind eye to errors and omissions apparent on the face of the report ….").

E. Improving EPA's Approach to Extension Petitions Would Improve the RIN Market's Functioning

In the NPRM, EPA requested comment on "regulatory changes … to address perceived vulnerabilities in the RIN market."[90] In general, Growth Energy urges EPA to develop better methods for gathering accurate, complete, and timely data regarding RIN transactions, and to increase transparency into the current state of the RIN market to mitigate the risk of market manipulation. A specific and essential way in which EPA could improve functioning of the RIN market is to reform its handling of small refinery exemptions—including in the ways discussed above.

The substantive flaws in EPA's treatment of extension petitions discussed above harm the RIN market. EPA's practice of granting extension petitions to refineries that have not been continuously exempt since 2010 undermines the predictability that would come with the number of extensions available for one year not being permitted to exceed the number of extensions granted in the prior year. EPA's refusal to adjust volume requirements for retroactive extensions deprives the market of the confidence Congress intended it to have that, ultimately, the required annual volumes of renewable fuel would be used. EPA's apparent practice of allowing refineries to generate new RINs when it grants an extension petition after the refinery has already complied for the covered year disrupts the market by unexpectedly introducing new RINs into the market that do not reflect the actual production of renewable fuel, which in turn artificially depresses RIN prices or interferes with the market's ability to accurately value RINs. And EPA's apparent systematic disregard of DOE's recommendations on extension petitions denies the market of the stabilizing check that respectful consideration of those recommendations could provide.

Additionally, EPA's approach to extension petitions unnecessarily poses a serious threat to the functioning of the RIN market because EPA conducts nearly the entire process in secret. Even in the face of numerous FOIA requests,[91] EPA refuses to disclose promptly or *at all* the basic information regarding exemption extensions, including:

- The fact that EPA has granted an extension;
- The identity of the exempt refinery and its owner;
- The volume exempted, whether individually or in the aggregate[92];

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[90] NPRM at 32,027.

[91] Growth Energy has submitted three FOIA requests seeking records relating to extension petitions. *See* EPA-HQ-2018-006398 (submitted Apr. 9, 2018); EPA-HQ-2018-006524 (submitted Apr. 12, 2018); EPA-HQ-2018-009898 (submitted July 23, 2018). Other entities have submitted many similar requests.

[92] Not until EPA issued the 2019 NPRM did it reveal the number of exempt RINs for 2016 and 2017. *See* NPRM at 32,029.

- The year covered by the extension;
- The standards EPA applied to decide whether to grant or deny the extension petitions;
- EPA's analysis relating to whether the refinery qualifies as a "small refinery";
- EPA's analysis relating to whether compliance would subject the refinery to a "disproportionate hardship"; or
- Whether and to what extent EPA has allowed a refinery to "un-retire" RINs or has allowed a refinery to generate new RINs in connection with a retroactive extension.[93]

EPA has no authority to withhold this information, whether as confidential business information ("CBI") under Exemption 4 or deliberative process information under Exemption 5—as EPA has already recognized.

This information is not CBI, for several reasons. First, this information was not "obtained from a person"[94] but rather was "'generated within the Government.'"[95] As EPA itself has noted, "data generated within the government" and "basic facts related to government decisions are … not entitled to CBI treatment under FOIA Exemption 4" because, plainly, they are not obtained from outside the government.[96] That is true even for EPA's analyses, notwithstanding that they presumably are based on data obtained from a refinery[97] or might

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[93] *See, e.g.*, Wehrum Letter at 1 ("EPA is unable to provide information that is fully responsive to your request, as we treat both the names of individual petitioners and EPA's decision on those petitions as Confidential Business In formation (CBI) ….").

[94] *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974); *see* 5 U.S.C. § 522(b)(4).

[95] *Center for Auto Safety v. U.S. Dep't of Treasury*, 133 F. Supp. 3d 109, 119 (D.D.C. 2015) (quoting *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C.Cir.1980), *abrogated on other grounds by U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982)).

[96] *Renewable Enhancement and Growth Support Rule*, 81 Fed. Reg. 80,828, 80,909 (Nov. 16, 2016).

[97] *Philadelphia Newspapers, Inc. v. Department of Health & Human Servs.*, 69 F. Supp. 2d 63, 66-67 (D.D.C. 1999) (Argument that agency "audit of [company's] records was based on raw data obtained from [company] … does not work. … An audit is not simply a summary or reformulation of information supplied by a source outside the government. It also involves analysis, and the analysis was prepared by the government. The [agency] charts were not 'obtained from a person,' and they may not be withheld under Exemption 4."); *see also Center for Auto Safety*, 133 F. Supp. 3d at 123.

"allow[] one to back into information about" the refinery.[98] Consequently, EPA has already concluded that, with respect to extension petitions, "the petitioner's name, the name and location of the facility for which relief was requested, the general nature of the relief requested, the time period for which relief was requested, and the extent to which the EPA granted or denied the requested relief" are "not entitled to treatment as CBI."[99] Yet, EPA continues to treat this information as CBI and its proposal to publicly release such information is moribund.[100]

Second, even if any of the information were "obtained from a person," it would not be CBI because it is not "confidential."[101] This information, to the extent it is obtained from a non-government person, is submitted involuntarily under EPA's regulations governing exemption petitions.[102] Accordingly, the information would qualify as confidential only if its disclosure would either "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained."[103] Neither is the case. EPA could continue to obtain the same information in the future under the regulations that require it.[104] Nor would refineries suffer substantial competitive harm from disclosure. Indeed, HollyFrontier—one of the few exempt refineries whose identity was reported—routinely discloses basic facts about its extension exemptions in its securities filings.[105] And in litigation, refineries and EPA have publicly disclosed basic facts regarding EPA's decisions on extension petitions, including the name and location of the refinery that sought the extension, the years for which it sought the extension, the fact that the refinery

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[98] *Bloomberg, L.P. v. Board of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 148 (2d Cir. 2010) ("[D]ocuments that show what loans the Federal Reserve Banks actually made" are not covered by Exemption 4 because "[t]he fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA.").

[99] *Renewable Enhancement and Growth Support Rule*, 81 Fed. Reg. at 80,909.

[100] *Id.*

[101] *National Parks*, 498 F.2d at 766; *see* 5 U.S.C. § 522(b)(4).

[102] *See* 40 C.F.R. §§ 2.201(h)(i)(2), 80.1441(e)(2)(i), (iii); Evaluation Criteria Guidance at 2-3; *see also Forest Cty. Potawatomi Cmty. v. Zinke*, 278 F. Supp. 3d 181, 202 (D.D.C. 2017) (even though a "tribe's "decision to apply for a license to operate an off-reservation casino is plainly voluntary," the tribe submitted the documents at issue to the government "as required by the gaming application process, and so [the documents] were submitted involuntarily").

[103] *National Parks*, 498 F.2d at 770; *see also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878-879 (D.C. Cir. 1992) (en banc).

[104] *See National Parks*, 498 F.2d at 770; *Forest Cty.*, 278 F. Supp. 3d at 203; 40 C.F.R. § 2.208(e) (information is not entitled to confidential treatment if was not voluntarily submitted and its disclosure would not cause competitive harm).

[105] *See, e.g.*, Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, HollyFrontier Corporation (Feb. 21, 2018), at 76.

received the initial, blanket exemption, and the fact that the refinery was exempt in other prior years.[106]

Moreover, this information is not protected by the deliberative process privilege. That privilege protects an agency's documents only if they are "both 'predecisional' and 'deliberative.'"[107] A "document [is] predecisional if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process."[108] Records setting forth EPA's decision on any extension petition and the basic facts inherent in that decision are obviously neither predecisional nor deliberative. The standards EPA applies does not meet those conditions, either.[109] Even EPA's analyses of whether the refinery meets the requirements for an extension, including whether the refinery would be subject to disproportionate economic hardship, are not predecisional and deliberative to the extent they are "adopted … as the agency position on" the petitions rather than the "personal opinions of the writer" that "reflect internal deliberations on the advisability of any particular course of action."[110]

Instead, EPA's refusal to release this information impermissibly creates a body of "secret law" regarding both EPA's process for evaluating extension petitions and the volume requirements that actually apply in the covered compliance year.[111] An agency is not "permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties …, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'"[112] Thus, agencies "must disclose their 'working law,' i.e., the 'reasons which [supplied] the basis for an agency policy actually adopted'" or "'binding agency opinions and interpretations' that the agency 'actually applies in cases before it.'"[113] The standards and process that EPA used to evaluate the extension petitions are precisely such "reasons," "opinions or interpretations" that

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[106] Petition for Review, *Ergon-West Virginia, Inc. v. EPA*, No. 17-1839, Doc. 3-3 (4th Cir. July 17, 2017); Petition for Review 8, 10, *Sinclair Wyoming Refining Co. v. EPA*, No. 16-9532, Doc. 01019636438 (10th Cir. June 10, 2016); Petition for Review 4, *Lion Oil Co. v. EPA*, No. 14-3405, Entry ID 4209931 (8th Cir. Oct. 24, 2014); Petition for Review 4, *Hermes Consol., LLC v. EPA*, No. 14-1016, Doc. 1478886 (D.C. Cir. Feb. 3, 2014).

[107] *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010); *see also Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975); *NLRB v. Sears, Robuck & Co.*, 421 U.S. 132, 150 (1975); *see* 5 U.S.C. § 522(b)(5).

[108] *Public Citizen*, 598 F.3d at 874.

[109] *Id.* at 875 ("an agency's application of a policy to guide further decision-making does not render the policy itself predecisional").

[110] *Id.* at 874-875.

[111] *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

[112] *Id.*

[113] *Electronic Frontier Found. v. DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014); *see Coastal States*, 617 F.2d at 867-868.

constitute EPA's working law. So are exemptions from nationally applicable volume requirements. EPA must therefore disclose the standards, as well as the final decisions themselves, irrespective of whether the documents containing those standards are formal, binding, or final.

Despite the clear *and acknowledged* lack of justification for withholding the requested information, EPA appears to be treating as presumptively confidential whatever the submitting refinery requests to be treated as confidential. That violates EPA's own FOIA regulations. Under those regulations, EPA is to make an "initial" or "preliminary determination" regarding whether the information "may be entitled to confidential treatment" or, instead, "clearly is not entitled to confidential treatment."[114] If the information may be entitled to confidential treatment, EPA is to refer the matter to the appropriate EPA legal office for final determination.[115] But if the information clearly is not entitled to confidential treatment, EPA *must* disclose it.[116] Insofar as EPA previously concluded that information relating to small refinery exemption petitions is "not entitled to treatment as CBI,"[117] EPA cannot reasonably conclude now that it "may be entitled to confidential treatment." That information most certainly is not. The mere fact, then, that the refinery requested confidential treatment is not enough; EPA must disclose it forthwith, without proceeding to a "final administrative determination" by the "appropriate EPA legal office."[118]

Finally, whatever the legality of EPA's secrecy, its practice of withholding this information is highly detrimental to RIN markets. It is fundamental that markets cannot work effectively when the supply of the good—here, RINs—cannot be ascertained; markets require transparency, as EPA has repeatedly recognized.[119] For example, as a commenter observed during last year's rulemaking on the 2018 RVOs, secretly granting retroactive exemptions can cause RIN prices to rise artificially as demand for RINs exceeds the supply that will actually be needed,[120] only to plummet once EPA eventually discloses the size of exemption extensions for a given compliance year, as happened recently when the market learned that EPA had granted 48 retroactive extension petitions for 2016 and 2017.[121] Former Administrator Pruitt recently acknowledged the imperative for transparency in the RIN market, testifying to Congress that it is

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[114] 40 C.F.R. § 2.204(d)(1), (2).

[115] *Id.* §§ 2.204(d)(1)(iii), 2.205(a)(1).

[116] *Id.* § 2.204(d)(2); *see id.* § 2.205(f)(5).

[117] *Renewable Enhancement and Growth Support Rule*, 81 Fed. Reg. at 80,909.

[118] 40 C.F.R. §§ 2.204(d), 2.205(a)(1).

[119] NPRM at 32,027; 2017 RFS Rule at 58,525; EPA, Renewable Fuel Standards for 2018 and Biomass-Based Diesel Volume for 2019, Response to Comments, at 14 (Dec. 2017) ("Response to Comments on 2018 RFS Rule"), EPA-HQ-OAR-2017-0091-4990.

[120] BP Products North America Comments, at 7 (Aug. 31, 2017), EPA-HQ-OAR-2017-0091-3953.

[121] Reuters Retroactive Credits Article.

in "everyone's best interest to get more clarity and confidence in how this RIN trading platform and relief needs to occur."[122] The 2019 NPRM also acknowledges this when it notes that EPA is considering providing periodic updates on "the impact of small refinery exemptions" in order to mitigate the "lack of transparency and potential manipulation in the RIN market."[123] EPA should heed its own observations and open its exemption extension decisions to the public.

IV. EPA SHOULD LESSEN THE CELLULOSIC WAIVER FLOW-THROUGH BY THE SIZE OF THE SMALL REFINERY EXEMPTION EXTENSIONS

When there is a shortfall in projected cellulosic production, EPA should lessen the flow-through of the cellulosic waiver it would otherwise implement by an amount equal to any past and future small-refinery exemption extensions that would not otherwise be accounted for through RVO adjustments. Doing so would be an available mechanism for EPA to fulfill its fundamental statutory duty to "ensure" that the volume requirements are met.[124]

It is true that doing so may result in the implied non-advanced volume exceeding 15 billion. But EPA's view that the cellulosic waiver for the advanced and total standards must be lockstep and that the 15 billion implied non-advanced volume is a cap is wrong.[125] The statute permits EPA to "reduce" the advanced standard "by the same *or a lesser volume*" than it reduces the cellulosic standard.[126] Congress used the same language with respect to the total standard, specifying that EPA may "reduce the applicable volume of renewable fuel … by the same or a lesser volume."[127] Nothing in the statute requires EPA to maintain a constant cellulosic waiver for both the advanced and total standards. And nothing in the statute indicates that Congress intended for the implied non-advanced volume of 15 billion to be a cap.

V. EPA'S PROPOSED METHOD FOR PROJECTING LIQUID CELLULOSIC BIOFUEL FOR 2019 IS FLAWED

Developing the commercial production of cellulosic biofuel is "central to the [RFS] program's objective of reducing greenhouse gas emissions."[128] Although cellulosic production has not increased as quickly as Congress expected, it has—as EPA has observed—"continued to

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[122] *The Fiscal Year 2019 EPA Budget: Hearing Before the H. Subcomm. on Environment Comm. on Energy and Commerce*, 115th Cong. 50-51, 62-63 (2018), https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/20180426-EE%20The%20FY%2019%20Environmental%20Protection%20Agency%20Budget.pdf.

[123] NPRM at 32,027.

[124] *Supra* Part III.

[125] *See, e.g.*, NPRM at 32,039 (proposing to "apply the same reduction to the statutory volume target for total renewable fuel" as for the advanced standard).

[126] 42 U.S.C. § 7545(*o*)(7)(D)(i) (emphasis added); *see Monroe Energy*, 750 F.3d at 915.

[127] 42 U.S.C. § 7545(*o*)(7)(D)(i).

[128] *API*, 706 F.3d at 476.

increase" in "the past several years," reaching "record levels in 2017" and "continu[ing] to increase in 2018."[129] Having accurate cellulosic projections is imperative for the industry and the success of the RFS program that Congress created. If cellulosic projections are too low, D3 RIN prices could fall precipitously, undermining the very incentive Congress intended to create to spur growth.[130]

When determining cellulosic biofuel projections, EPA must "take 'neutral aim at accuracy.'"[131] That means, the D.C. Circuit declared recently, that "EPA's methodology [may] not reflect a 'non-neutral purpose' to favor *or disfavor* growth in the cellulosic biofuel industry," i.e., "systematically err[] on the side of overestimation" or underestimation.[132] EPA's proposed method for projecting 2019 cellulosic production violates this standard.

"Consistent with" the method EPA used to project the 2018 production of liquid cellulosic biofuel, EPA proposes to group producers based on whether they have previously achieved consistent commercial-scale production, determine an aggregate range of likely production for each group, and then apply a percentage (or a "percentile value," as EPA calls it) to each group's range to project aggregate production."[133] And, like the 2018 method, EPA would set the percentiles based on the actual past production volumes in each group.[134]

As Growth Energy explained in its comment on last year's proposal, this method, by necessarily tying cellulosic projections to the industry's past performance, incorrectly assumes that the industry's past determines its future.[135] EPA actually recognizes the inherent inaccuracy of its historical method, noting that it is "especially true" that "actual production will differ from [its] projections" because "liquid cellulosic biofuel industry … is currently in the early stages of commercialization."[136] Yet, EPA believes its method is "neutral" because it uses "historical data that is free of any subjective bias."[137] But "neutral aim" requires the absence of *objective* or *systematic* bias, not just *subjective* bias. EPA fails to understand that its method's inability to account for the cellulosic industry's nascence means that it *systematically* '"tilt[s]'" the

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[129] NPRM at 32,030.

[130] *ACE*, 864 F.3d at 710.

[131] *Id*. at 727 (quoting *API*, 706 F.3d at 476).

[132] *Id.* (citing *API*, 706 F.3d at 478 (emphasis added)).

[133] NPRM at 32,034.

[134] *Id.* at 32,035.

[135] Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, at 4, 6-12 (Aug. 31, 2017) ("2018 Growth Energy Comment") (attached as Exhibit 3), EPA-HQ-OAR-2017-0091-3681; *see also* Argus Consulting Services, *Reviewing EPA methodology for potential cellulosic biofuels production for 2018*, at 14-23 (Aug. 2017) ("2018 Argus Report") (attached as Exhibit 4) .

[136] NPRM at 32,036.

[137] *Id.* at 32,032.

projections against growth,[138] undercutting the significant investments made in the cellulosic industry and Congress's goals.

This flaw is not remedied by EPA's proposed adjustment to the 2018 method, whereby EPA would now set the percentile values equal to the *average* (i.e., mean) of past production volumes in each group.[139] EPA does this in the name of "improv[ing] the accuracy of the production projection," based on its belief that "[u]sing data from multiple years is likely more representative of the future performance of these groups of companies than data from any single year."[140] Moving from one data point to two (or three) data points, however, does not make the resulting forecast statistically significant—either way, the sample is surely too small. Nor does it account for the industry's potential for rapid growth. As EPA noted, liquid cellulosic production has "increased in recent years,"[141] for example, growing by 172% from 2016 to 2017.[142]

EPA should instead base its projection on a plant-by-plant evaluation of *all* relevant factors (or at least a more finely tuned set of groupings) in order to fully account for the technological, financial, managerial, political, and legal factors determining each plant's production. Growth Energy stands ready and willing to assist EPA in collecting any needed data and to provide technical assistance to perform such assessments. Short of that, EPA should return to the earlier method of applying the 25th percentile for the new facilities and the 50th percentile for the consistent facilities.

EPA should also create a new group for liquid cellulosic producers that are currently producing cellulosic ethanol from corn kernel fiber at existing plants and apply the 50th percentile to project their production.[143] In last year's rulemaking, EPA declined to do so because, EPA said, it lacked "sufficient data" to determine whether the lower risk associated with producing cellulosic ethanol from corn kernel fiber at a facility currently producing ethanol from starch "justif[ied] the use of different projection methodologies."[144] EPA noted, however, that it "may include projected production from these sources in the future as appropriate."[145]

Now is the time to start accounting for these sources. EPA's concern about insufficient data, if ever warranted, is not warranted today. EPA itself acknowledged that "technologies that convert corn kernel fiber require little to no additional processing equipment and can theoretically ramp-up production more quickly than stand-alone cellulosic biofuel production

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[138] *ACE*, 864 F.3d at 727.

[139] NPRM at 32,035-32,036.

[140] *Id.* at 32,036.

[141] *Id.* at 32,030.

[142] Calculating the Percentile Values Used to Project Liquid Cellulosic Biofuel Production for 2019, at 1-2 (May 2018), EPA-HQ-OAR-2018-0167-0012.

[143] 2018 Growth Energy Comment at 11-12; 2018 Argus Report at 19-23.

[144] Response to Comments on 2018 RFS Rule at 57.

[145] *Id.* at 47.

facilities."[146] Edeniq and POET, for example, have consistently produced liquid cellulosic biofuel for several years. Although EPA cited the "uncertainty with respect to the number of facilities that will pursue the use of this technology,"[147] that uncertainty readily can be mitigated by soliciting input from the likely facilities. Indeed, EPA has already committed to "continue to work with all companies interested in generating cellulosic RINs to address any outstanding technical and regulatory issues."[148] Relatedly, several notable producers have not yet received the requisite regulatory approval to generate RINs based on their corn kernel fiber technology. There is no good reason for EPA's foot dragging; EPA should promptly grant the approvals and take into account the additional volumes that would be generated from those producers in its 2019 projections—which industry sources estimate to be 300 million gallons immediately.[149]

Finally, EPA proposes to use the same method to project CNG/LNG derived from biogas ("RNG" or "biogas") as in 2018: a straight-line extrapolation of the actual industry-wide year-over-year growth rate.[150] But as Growth Energy explained in its comment on the 2018 NPRM, that method also "turn[s] the task of projecting future production volumes of [RNG] into little more than extending the past," and therefore does not reflect neutral aim at an accurate projection for an industry poised to grow rapidly.[151] EPA should instead return to the method it used to project RNG for 2017.[152]

VI. EPA SHOULD REMOVE REGULATORY BARRIERS TO EXPANDED USE OF E15

Aside from setting high volume requirements, EPA should remove regulatory barriers to expanded E15 use. Growth Energy discusses two actions EPA should take.

First, EPA should extend the 1 pound per square inch (psi) Reid Vapor Pressure (RVP) allowance under the waiver provisions of 42 U.S.C. § 7545(h)(4) to blends of gasoline and 15 percent ethanol (E15). The 9.0 psi RVP limit under 42 U.S.C. § 7545(h)(1) applies from May to September. Unless made using low-RVP gasoline blendstock, E15's volatility will exceed 9.0 psi. Because low-RVP blendstock is scarce, EPA's denial of a 1-pound waiver effectively prevents the sale of E15 during the summer months.

Section 7545(h)(4) permits EPA to waive the 9.0 psi limit by one pound, setting a maximum RVP limit of 10 psi for "fuel blends containing gasoline and 10 percent denatured anhydrous ethanol." EPA has previously interpreted that phrase to cover "blends of 9-10%

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[146] *Id.* at 57.

[147] *Id.*

[148] *Id.* at 47.

[149] Edeniq, *Produce Cellulosic Ethanol in Existing Plants with Edeniq's Pathway Platform*, at 1 (Aug. 9, 2016), https://ethanol.org/Edeniq%20Kacmar%20ACE%202016%20final.pdf.

[150] NPRM at 32,036-32,037.

[151] Growth Energy 2018 Comment at 5-6.

[152] *Id.* at 12.

ethanol."[153] Although there is no scientific basis for having different RVP limits for E15, as E15 has a similar volatility to E10 and would behave similarly in terms of evaporative emissions and effects on emissions-control devices,[154] EPA has interpreted section 7545(h)(4) not to permit a one-pound RVP waiver for E15.[155]

EPA's interpretation is clearly unreasonable. In light of the statutory structure and purpose of Section 7545(h), the language of Section 7545(h)(4) plainly should be read to apply to *all* blends containing 10 percent ethanol, including blends containing more than that concentration. E15 contains 10 percent ethanol, just as the statute requires, plus an additional five percent. It therefore meets the 10 percent requirement. By analogy, consider a traffic regulation stating that "you must have four people in your car to use the high-occupancy-vehicle lane." Just as it would be unreasonable to prohibit cars with five or more passengers from using the HOV lane, it is unreasonable to interpret Section 7545(h)(4) to prohibit ethanol blends containing more than 10 percent ethanol from eligibility for a 1-pound RVP waiver. The purpose of Section 7545(h)(4) is to promote higher concentrations of ethanol in gasoline, like the purpose of HOV lanes is to promote higher concentrations of people in cars. Thus, it is clear that Congress intended for Section 7545(h)(4) to establish a minimum rather than a maximum ethanol concentration threshold for the RVP waiver.

Alternatively, and consistent with the purpose of Section 7545(h)(4), EPA could invoke Section 7545(h)(4)'s "deeming compliant" clause to extend the one-pound RVP waiver to E15.[156] In the E15 misfueling rule, EPA wrote that this clause "is not written as a free standing RVP limit that acts separate and apart from the 1 psi waiver for 9-10% blends of ethanol."[157] That interpretation would nullify the "deeming" clause, whose obvious purpose is to bring within the statute behavior that otherwise would not qualify. Thus, by its terms this clause encompasses *any* fuel that complies with the terms of paragraphs (A)-(C). In particular, paragraph (B) contemplates a separate potential ceiling that Section 7545(f) may impose on ethanol content—a ceiling that exceeded 10 percent when EPA granted the waiver for E15.

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[153] *Regulations To Mitigate the Misfueling of Vehicles and Engines with Gasoline Containing Greater Than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs*, 76 Fed. Reg. 44,406, 44,435 (July 25, 2011) ("Misfueling Regulation").

[154] *See* Growth Energy Comments on E15 Misfueling Regulation, at 15 (posted Jan. 4, 2011), EPA-HQ-OAR-2010-0448-0083.

[155] Misfueling Regulation at 44,434-44,435.

[156] That clause provides that a party "shall be deemed to be in full compliance with the provisions of the subsection and the regulations promulgated thereunder if it can demonstrate that—(A) the gasoline portion of the blend complies with the Reid vapor pressure limitations promulgated pursuant to this subsection; (B) the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4) of this section; and (C) no additional alcohol or other additive has been added to increase the Reid Vapor Pressure of the ethanol portion of the blend." 42 U.S.C. § 7545(h)(4).

[157] Misfueling Regulation at 44,433.

Congress thus contemplated that the RVP allowance would extend to blends containing more than 10 percent ethanol.

Second, EPA must update its interpretation of "substantially similar" under Section 7545(f)(1) of the Clean Air Act to reflect current certification fuels. Done properly, such an interpretation would allow for the introduction of E15 year-round without the need for a waiver under Section 7545(f)(4).

EPA has not issued a new interpretive rule since 2008, despite mandating use of E15 as a mileage accumulation fuel for evaporative durability testing and changing the certification standardized test fuel from Indole (E0) to E10.[158] Whether a proposed fuel meets the definition of "substantially similar" requires identifying the relevant comparator fuel, which, under the plain language of Section 7545(f)(1), must include "any" fuel or fuel additive used in the certification of "any" model-year 1975 or later vehicle or engine under Section 7525. EPA's current interpretation fails to meet this requirement because it fails to account for the fact E15 is currently used as a test fuel. Indeed, EPA's current interpretation also fails to account for the fact that E10 is used as a standardized test fuel.

To remedy this failure, EPA should revise its "substantially similar" definition to reflect that E15 is substantially similar to certification fuels in all material respects. E15 is substantially similar to E10 certification fuel with respect to its physical and chemical properties. The ethanol additive is identical, and both E10 and E15 meet the current ASTM standard. E15 is also substantially similar to E10 certification fuel with respect to evaporative and exhaust emissions. In fact, it produces lower evaporative emissions than E10 when using the same base gasoline, and available data indicate that compared with E10, E15 has lower exhaust emissions of carbon monoxide (CO) and hydrocarbons (HC), among other pollutants, particularly for current motor vehicle fleet technology.[159] Finally, service accumulation for

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[158] *See Regulation of Fuels and Fuel Additives: Revised Definition of Substantially Similar Rule for Alaska*, 73 Fed. Reg. 22,277 (Apr. 25, 2008).

[159] *See* Stefan Unnasch and Ashley Henderson, Life Cycle Associates, *Change in Air Quality Impacts Associated with the Use of E15 Blends Instead of E10*, LCA.6091.94.2014 (July 2014), http://cleartheairchicago.com/files/2014/09/E15-Clean-Air-Benefits-Study.pdf (literature review examining emissions of NOx; CO; PM; non-methane HC; ozone potential; and cancer risk from air toxics); *see also id.* at 6 ("The most significant changes from a change from E10 to E15 include a reduction in cancer risk from vehicle exhaust and evaporative emissions, a reduction in the potential to form ozone or photochemical smog, and a reduction in greenhouse gas (GHG) emissions."); Robert L. McCormick, *et al.*, Nat'l Renewable Energy Lab (NREL), *Review and Evaluation of Studies on the Use of E15 in Light-Duty Vehicles*, 32-34, 39-41 (Oct. 2013), https://ethanolrfa.org/wp-content/uploads/2015/09/RFA-NREL-Review-and-Evaluation-of-E15-Studies-Pages-17-to-29.pdf; Letter from Robert L. McCormick, NREL, and Janet Yanowitz to Kristy Moore, "Effect of Ethanol Blending on Gasoline RVP Memo" (March 2012), https://ethanolrfa.org/wp-content/uploads/2015/09/RVP-Effects-Memo_03_26_12_Final.pdf.

evaporative emissions durability is evaluated in the certification process using fuel that contains the highest ethanol concentration currently available in any state, i.e., E15.

Finally, EPA should finalize its Guidance for E85 Flexible Fuel Vehicle Weighting Factor for Model Years 2016-2019 Vehicles Under the Light-Duty Greenhouse Gas Emissions Program, which it proposed in March 2013, and in doing so revise the proposed treatment of E15.[160] The draft guidance would in effect penalize FFVs for using E15 by not treating it as an alternative fuel (unlike E85). When E15 consumption is high, those volumes of E15 would be considered as having been blended into the base gasoline pool and the amount of alternative fuel is reduced significantly. More importantly, automobile manufacturers receive no greenhouse gas emissions credit for using E15 (or higher blends). Ethanol's greenhouse-gas emissions performance is substantially better than baseline gasoline (i.e., E0) on a life-cycle basis,[161] so moving from E10 to E15 or higher blends would yield additional greenhouse-gas benefits for light-duty vehicles. Issuing revised guidance to count E15 and medium-blend fuels as alternative fuel for purpose of calculating the "F" factor would more accurately reflect these blends' environmental benefits and would encourage car makers to produce more FFVs.

VII. EPA CORRECTLY DID NOT PROPOSE TO ISSUE A GENERAL WAIVER FOR SEVERE ECONOMIC HARM

EPA did not propose to issue a general waiver based on severe economic harm. That is the right decision; such a waiver is not warranted. EPA has consistently rejected requests for severe economic harm waivers—including most recently in the 2018 Rule—because it correctly recognized that this waiver provision is meant for very narrow circumstances that have never been met. In fact, in 2018 EPA determined that it did not even need to reconsider its prior interpretation of the general waiver provision because the circumstances did not demonstrate severe economic harm under *any* reasonable interpretation of the term. EPA's longstanding interpretation is correct, and the circumstances have only further strengthened the determination that a severe economic harm waiver is not appropriate for 2019.

If EPA *were* inclined to issue such a general waiver, however, it would be required first to present an actual "comprehensive and robust analytical basis" for that decision—not the passing invitation for comment included in the current NPRM—and provide an opportunity for public comment on *that* analysis.[162] Only then could EPA have a lawful basis for exercising this authority.

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[160] *Draft Guidance for E85 Flexible Fuel Vehicle Weighting Factor for Model Years 2016- 2019 Vehicles Under the Light-Duty Greenhouse Gas Emissions Program*, 78 Fed. Reg. 17,660 (Mar. 22, 2013).

[161] *See supra* at 1.

[162] *Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard*, 73 Fed. Reg. 47,168, 47,183-47,184 (Aug. 13, 2008) ("Texas Waiver Decision").

A. EPA Has Consistently Interpreted the Severe Economic Harm Waiver to Apply Only in Very Narrow Circumstances and It Should Adhere to That Interpretation

1. 2008 and 2012 Waiver Decisions

Under the RFS statute, EPA may waive an RFS volume requirement if it determines "after public notice and opportunity for comment, that implementation of the requirement *would severely harm* the economy or environment of a State, a region, or the United States."[163] EPA considered the severe harm standard at length in 2008, under the George W. Bush administration when it denied the State of Texas's request for such a waiver of the 2008/2009 standards.[164] Then, in 2012, EPA revisited and reaffirmed that interpretation under the Obama administration, again denying a severe harm waiver.[165] Those well-reasoned decisions set forth several longstanding principles that continue to control the determination of whether EPA may—and should—issue a waiver:

First, "implementation of the RFS program *itself* must be the cause of the severe harm."[166] It is not sufficient to show even that "implementation of the program would *significantly contribute* to severe harm" in combination with other factors unrelated to the RFS's implementation.[167] Thus, as EPA explained, if the market were experiencing a certain kind of severe harm (e.g., prohibitively high crop prices), and the RFS program was a significant contributor to that harm but there were other contributing factors, too (e.g., drought or insufficient farmland), that would *not* suffice to make the waiver available.[168]

Second, the statute sets a "high threshold" for issuance of a waiver: "'severe' indicates a level of harm that is greater than marginal, moderate, or serious, though less than extreme."[169] In fact, "severe[] harm" is "clearly a much higher threshold than [the] 'significant adverse impacts'" standard applied by EPA in the ozone nonattainment context.[170] As EPA previously determined, for example, even "the substantial negative economic impacts suffered as a result of [2011's] historic drought," which had "taken a large toll on many States and sectors of the

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[163] 42 U.S.C. § 7545(*o*)(7)(A)(i) (emphasis added).

[164] Texas Waiver Decision.

[165] *Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard*, 77 Fed. Reg. 70,752 (Nov. 27, 2012) ("2012 Waiver Decision").

[166] Texas Waiver Decision at 47,171 (emphasis added).

[167] *Id.* (emphasis added).

[168] *Id.*

[169] *Id.* at 47,172.

[170] *Id.*

economy," including raising the price of U.S. corn and other feedstocks, did not qualify as severe harm to the economy.[171]

Third, it is not enough that severe harm *might* result, or even that severe harm is *likely* to result. Rather, EPA must have a "high degree of confidence" that severe harm *would* result but for a waiver.[172] As EPA has explained, "in situations where there is not such a high degree of confidence, a waiver might disrupt the expected growth in use of renewable fuels but there would be no clear expectation that a waiver would provide a benefit by reducing any harm."[173]

Fourth, the statute's use of the word "economy" means that the harm must be considered in light of the economy as a whole, not any one sector of it (e.g., the oil industry, or the poultry industry). EPA has explained: "[I]t would be unreasonable to base a waiver determination solely on consideration of impacts of the RFS program to one sector of the economy, without also considering the impacts of the RFS program on other sectors of the economy or on other kinds of impact. It is possible that one sector of the economy could be severely harmed, and another greatly benefited from the RFS program; or the sector that is harmed may make up a quite small part of the overall economy."[174]

Fifth, EPA has "discretion in determining whether to grant or deny a waiver request, even in instances where EPA finds that implementation of the program would severely harm the economy or environment of a State, region or the United States."[175] Because a waiver "will always … be national in character," EPA has decided that even if the qualifying "severe harm" is limited to a certain state or region, EPA should not as a matter of policy exercise that discretion without "look[ing] broadly at all of the impacts of implementation of the program, and all of the impacts of a waiver," including "the nationwide effects" of a waiver.[176]

Sixth, although EPA recognized that it may be appropriate to *deny* a severe harm waiver summarily, it is not proper to *grant* one without a "comprehensive and robust analytical basis for any claim that the RFS itself is causing harm, and the nature and degree of that harm," and without the public having notice of and an opportunity to comment on the details of that analysis.[177]

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[171] 2012 Waiver Decision at 70,753, 70,775.

[172] Texas Waiver Decision at 47,172.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.* at 47,183-47,184.

2. 2017 and 2018 Waiver Decisions

EPA next considered the severe harm waiver in the course of the 2017 and 2018 RVO rulemakings. Both times, EPA correctly concluded that the standard for a general waiver due to severe economic harm was not met.

In the 2017 RVO rulemaking, EPA set the total renewable fuel volume requirement to 19.28bg, and set the implied volume for conventional renewable fuels—most of which would be starch ethanol—to 15.00bg.[178] EPA judged those volumes "reasonably attainable,"[179] taking into account all factors potentially affecting the ability of the market to produce, dispense, and consume renewable fuel, including the potential for market disruptions and price effects as well as "factors related to the likely constraints on imports, distribution and use, and global GHG impacts of incremental growth."[180] The analysis underlying the final 2017 volume requirements, therefore, left no room to conclude that implementing those requirements would severely harm the economy, as EPA recognized: "In light of our finding that the volume requirements and associated standards being finalized are reasonably attainable, it follows that the final requirements will not cause severe economic harm, so further reductions on that basis are not necessary."[181]

EPA reached the same conclusion in setting the 2018 total requirement at 19.29bg and the implied conventional requirement at 15.00bg.[182] After providing commenters two opportunities to present a basis to conclude that a severe economic harm waiver was warranted—in the notice of proposed rulemaking and a subsequent request for further comment[183]—EPA found that no commenter "provided compelling evidence that the proposed RFS volume

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[178] 2017 RFS Rule at 89,747, 89,773, 89,780-89,781.

[179] *Id.* at 89,774, 89,780-89,782. Although under EPA's now-vacated approach to the general waiver, it assessed the "maximum achievable" volume of renewable fuel, EPA assessed the "reasonably attainable" volume of renewable fuel—a potentially lesser amount—in deciding how much of the cellulosic waiver to flow through to the advanced and total volume requirements. *See id.* at 89,774 n.103, 89,777-89,779 n.119.

[180] *Id.* at 89,763, 89,773-89,775; 2014-2016 RFS Rule at 77,435, 77,440-77,452.

[181] EPA, Renewable Fuel Standards for 2017 and Biomass-Based Diesel Volume for 2018, Response to Comments, at 53 (Dec. 2016), EPA-HQ-OAR-2016-0004-3753.

[182] 2018 RFS Rule at 58,487-88, 58,517-18.

[183] 82 Fed. Reg. 34,206, 34,229 (July 1, 2017) ("2018 NPRM"); 82 Fed. Reg. 46,174, 46,179 (Oct. 4, 2017) ("2018 Request for Further Comment"). Growth Energy provided comments in response to both requests. Those comments are attached and incorporated into this comment. *See* 2018 Growth Energy Comment; Supplemental Comments of Growth Energy, Archer Daniel Midlands Company and Biotechnology Innovation Organization (Oct. 19, 2017) ("2018 Growth Energy Supplemental Comment") (attached as Exhibit 5), EPA-HQ-OAR-2017-0091-4886.

requirements would be likely to cause severe economic harm to a region, State, or the U.S." and the arguments presented in support for a waiver were "unconvincing."[184]

EPA divided its analysis into several parts. First, as in 2017, EPA concluded that the finalized 2018 requirements were "reasonably attainable."[185] It determined that it was reasonable to assume the market could reach a poolwide ethanol concentration of 10.13% in 2018, the same concentration that EPA had determined was reasonable to attain in the 2017 final rule.[186] EPA noted that "the national average ethanol content of gasoline rose from 9.91% in 2015 to 10.02% in 2016" and that an "increase to 10.13% in 2017, as projected in the 2017 final rule, would be a smaller increment than that which occurred between 2015 and 2016," let alone what might occur from 2017 to 2018.[187] EPA then determined that, at that level of ethanol consumption, the market could reach the finalized requirements by simply increasing use of biomass-based diesel consistent with its historical average growth (which increase would not be subject to any production, feedstock, distribution, or consumption constraints) and otherwise sustaining past levels of use of other non-ethanol renewable fuels.[188]

Second, EPA explained that refineries that claimed that RIN costs were creating significant economic burdens and distress "did not provide sufficient evidence that the purchase of RINs, as opposed to other market factors, is responsible for the compan[ies'] difficult economic circumstances, or why they cannot recoup the cost of RINs through higher prices of their products."[189] In reaching this conclusion, EPA relied in part on several of its prior analyses showing that refiners are able to recover their RIN costs by charging blenders higher blendstock prices.[190] For instance, in its November 2017 denial of the petition to change the point of obligation, EPA carefully reviewed available literature and found that independent studies by

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[184] 2018 RFS Rule at 58,517-58,518.

[185] *See generally* David Korotney, U.S. EPA, Office of Transportation and Air Quality, *Market impacts of biofuels* (Nov. 27, 2017) ("2018 Market Impacts Memorandum"), EPA-HQ-OAR-2017-0091-4963.

[186] *Id.* at 5-6.

[187] *Id.* at 5-6.

[188] *Id.* at 6-11.

[189] 2018 RFS Rule at 58,517.

[190] David Korotney, U.S. EPA, Office of Transportation and Air Quality, *Assessment of waivers for severe economic harm or BBD prices for 2018*, 5-6 (Nov. 30, 2017) ("2018 Severe Economic Harm Memorandum"), EPA-HQ-OAR-2017-0091-4925 (citing Dallas Burkholder, Office of Transportation and Air Quality, EPA, *A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects* (May 14, 2015) ("May 2015 Burkholder Memorandum"), EPA-HQ-OAR-2017-0091-0008, and EPA, *Denial of Petitions for Rulemaking to Change the RFS Point of Obligation* (Nov. 22, 2017) ("Denial"), EPA-HQ-OAR-2016-0544-0525). EPA also has reiterated this point in other places. *See, e.g.*, Dallas Burkholder, et al., *Screening Analysis for the Renewable Fuel Standard Program Renewable Volume Obligations for 2018* (June 28, 2017), EPA-HQ-OAR-2017-0091-0097.

Knittel et al. and Argus Consulting Services presented "compelling evidence" of this conclusion.[191] EPA's determination was consistent with other papers that were in the record.[192] It also found that refineries' submissions to the contrary were unpersuasive.[193] EPA further noted that "refining margins in the United States have decreased significantly in recent years due to an excess supply" and thus EPA believed that "it is most likely these lower refining margins, rather than any cost associated with the RFS program, that are currently negatively impacting the domestic refining industry."[194] In fact, "total refining capacity has significantly increased since 2013 when D6 RIN prices first rose above a few cents per RIN," which is "notable because aggregate U.S. refining production would be expected to decline as the RFS program displaces petroleum fuels with renewable fuels."[195] Outside expert analysis supports this determination: as

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[191] Denial at 25-26 (citing Christopher R. Knittel, Ben S. Meiselman, and James H. Stock, *The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard* (Nov. 2016) (attached as Exhibit 6); Christopher R. Knittel, Ben S. Meiselman, and James H. Stock, *The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard, Analysis of Post-March 2015 Data* (Nov. 23, 2016); Argus Consulting Services, *Do Obligated Parties Include RIN Costs in Product Prices?* (Feb. 2017) (attached as Exhibit 7)). EPA carefully rebuffed the oil industry's attempts to undermine these analyses. *Id.*

[192] *See, e.g.*, Bruce A. Babcock, Gabriel E. Lade, and Sebastien Pouliot, *Impact on Merchant Refiners and Blenders from Changing the RFS Point of Obligation*, CARD Policy Brief 16-PB 20 (Dec. 2016) (attached as Exhibit 8), http://www.card.iastate.edu/products/publications/pdf/16pb20.pdf; Edgeworth Economics, *Economic Issues Associated with a Change of the RFS Point of Obligation* (Feb. 22, 2017) (attached as Exhibit 9), EPA-HQ-OAR-2016-0544-0193.

[193] Denial at 24-25. EPA explained that some oil industry comments simply assumed that RIN costs were not passed through to blenders at all. *Id.* at 24. Another oil industry comment purported to show that blenders were retaining a portion of the RIN value by examining correlations between RIN prices and estimated blender margins, but EPA found that "there are many other factors that impact blender margins other than RIN prices that were changing simultaneously," none of which were "addressed in the study." *Id.* And yet another such comment suffered from "fundamental flaws," such as using gasoline prices from South Dakota but ethanol data from Chicago. *Id.* at 24 n.66.

[194] 2018 Severe Economic Harm Memorandum at 5 & n.10 (additionally stating that "individual refiners may have been impacted by factors such as unusually high price spreads between varying types of crude oil from 2011-2014 and the recent legislative changes allowing crude oil exports [from] the United States").

[195] 2018 Severe Economic Harm Memorandum at 6. EPA also explained why this decision is fully consistent with its decision to grant small refinery exemptions: "The granting of hardship exemptions to small refineries has focused on the disproportionate hardship conditions of an individual refinery, and therefore the granting of such exemptions does not indicate that the RFS program is causing severe harm to 'the economy of a State, a region, or the United States.'" Response to Comments on 2018 RFS Rule at 24. Indeed, concluding otherwise would read the term "severe" out of the statute, and would ignore the nationwide analysis of costs and benefits that is required for the severe economic harm provision.

explained above, a recent study found that the RFS program has not taken away from domestic refining capacity but rather freed up that capacity to expand U.S. exports.[196]

Third, EPA similarly rejected claims of harm by small retailers.[197] As EPA explained in its denial of the petition to change the point of obligation, these claims were rooted in the faulty assumption that large retailers with blending operations have been experiencing "windfall profits" due to RIN sales that have allowed them to outcompete small retailers.[198] That assumption failed for the same reason noted above—it ignored the fact that refineries are passing RIN costs to blenders through higher blendstock prices. EPA supported this conclusion not only with the studies cited above but also with its analysis of reported income by blenders such as MurphyUSA.[199] EPA explained that "we believe that the significant challenges faced by many small retailers are rather the result of challenges in the retail fuels market such as a declining demand for refined transportation fuels (particularly gasoline), increased competition from large retailers and high-volume retail outlets, a lack of flexibility in fuel purchasing options relative to larger (often unbranded) retailers, and many others."[200]

Fourth, EPA found that consumers of transportation fuel are not being harmed by the RFS program because EPA has long found that "higher RIN prices do not result in higher prices for transportation fuel."[201] As EPA found in a 2015 docket memorandum and then reiterated in 2017, RIN prices generally decrease the effective price of renewable fuel, while increasing the effective price of fossil fuel.[202] "[T]hese two price impacts generally offset one another for fuel blends such as E10 with a renewable content approximately equal to the required renewable fuel percentage standard."[203]

Fifth, EPA rejected the frivolous argument advanced by the oil industry that simply exceeding a poolwide concentration of 9.7% ethanol in gasoline causes severe economic harm.[204] As EPA explained, "the market exceeded 9.7% in 2013 and every year since," reaching 10.02% in 2016, yet "[t]here were no claims by commenters, and EPA is not aware of any other persuasive indicators in the record, to suggest that severe economic harm was occurring to a State, a region or the United States in 2013 through 2016."[205]

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[196] *See supra* Part I.

[197] 2018 Severe Economic Harm Memorandum at 6.

[198] Denial at 31-32.

[199] *Id.* at 27-31.

[200] *Id.* at 32.

[201] Response to Comments on 2018 RFS Rule at 23.

[202] May 2015 Burkholder Memorandum at 14-21; Denial at 20-21.

[203] Denial at 21.

[204] 2018 Severe Economic Harm Memorandum at 3-4.

[205] *Id.* at 3-4.

Sixth, EPA conducted a high-level investigation of a number broad economic indicators in 2017—fuel prices, fuel supply, crop prices, and refinery closures—and found that all were more favorable in 2017 than in prior years, such as 2012, when EPA had concluded that no severe harm was occurring.[206] Moreover, EPA found that even if these indicators were to have worsened, that could not be determined to be caused by the RFS program.[207] EPA also looked at crop-based feedstock futures prices and projected gasoline demand, and found no basis to conclude that conditions in 2018 would be any different than 2017.[208]

Finally, EPA declined to reconsider its prior interpretation of the severe harm waiver set forth in the 2008 and 2012 waiver decisions. Although EPA had solicited comment on whether that interpretation should be reconsidered,[209] EPA stated that no reconsideration was necessary: "we believe the evidence in the record would be insufficient to support a finding of severe economic harm under *any* reasonable interpretation of the phrase advanced by commenters, so do not find it necessary to assess changes to our interpretation of the phrase at this time."[210]

3. These principles remain sound

Unlike in 2018 when it requested further comment on the issue, EPA has not signaled in this NPRM that it is considering departing from these principles (and so EPA cannot do so in this rulemaking). In any event, the principles are correct, and EPA cannot and should not depart from them. They resulted from EPA's careful and extensive analysis of the statute's language, context, purpose, and history.[211] Indeed, they are not only textually required; they are critical to the functioning of the RFS program. The program depends on market participants having the long-term certainty that EPA will adhere to the statutorily prescribed volume requirements, so that they can make investments in the necessary infrastructure with an expectation that the investment will pay off.[212] Thus, EPA recognized that Congress did not intend to provide in the severe harm provision an "open-ended and wide ranging waiver."[213] Rather, EPA found that "implementing a more limited waiver provision … will better implement Congress's overall desire to promote the use of renewable fuels, reflected in enacting the expanded RFS program and mandating the increased utilization of renewable fuels over a number of years."[214] The D.C. Circuit has since reinforced these points when it pointedly rejected the notion that Congress

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[206] 2018 RFS Rule at 58,518; 2018 Severe Economic Harm Memorandum at 7-13.

[207] 2018 Severe Economic Harm Memorandum at 10-11, 13.

[208] 2018 RFS Rule at 58,518; 2018 Severe Economic Harm Memorandum at 14-15.

[209] 2018 Request for Further Comment at 46,179.

[210] 2018 RFS Rule at 58,518 n.139 (emphasis added); 2018 Severe Economic Harm Memorandum at 15-16.

[211] Texas Waiver Decision at 47,170-47,172; 2012 Waiver Decision at 70,756, 70,773-70,775.

[212] *See* 2014-2016 RFS Rule at 77,433, 77,456, 77,459-77,460; *Monroe Energy*, 750 F.3d at 917.

[213] Texas Waiver Decision at 47,171.

[214] *Id.*

provided a "boundless general waiver authority."[215] Such a broad waiver authority would interfere with "how the Renewable Fuel Program is supposed to work" through "increasing requirements [that] are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year."[216]

There are additional reasons to adhere to EPA's longstanding principles. For example, the principle that implementation of the RFS program *itself* must be the cause of the severe harm simply reflects the common notion of "but for" causation: if the severe harm would not result *but for* the implementation of the program, it cannot be said that implementation "would … harm" the economy (or the environment).[217] Put another way, if a general waiver would not prevent the harm, EPA may not issue the waiver. That makes eminent sense; Congress would not have set up volume requirements to force the market to increase renewable fuel use only to allow EPA to negate the requirements unnecessarily. As both the D.C. Circuit and EPA have observed repeatedly, Congress did not enact "a very open-ended and wide ranging waiver provision."[218] And the D.C. Circuit further confirmed that the statute sets a high threshold for issuance of a waiver when it recognized that "lesser degrees of economic harm," such as heightened RIN prices and other compliance costs, do not satisfy the "severely harm" prong of the general waiver provision (or the "inadequate domestic supply" prong, for that matter).[219]

B. Implementation of the Proposed 2019 Volume Requirements Would Not Cause Severe Economic Harm

The principles described above regarding the proper interpretation of the severe economic harm waiver provision ensure that the severe harm waiver may be invoked only if EPA is *highly confident* that without a waiver, the RFS program would cause *severe* and *widespread* harm. Under that interpretation—which, as just explained, was correct—it is clear that such a waiver is unavailable for 2019. Nonetheless, in setting the 2018 RVOs EPA declined to issue a severe economic harm waiver without even applying these principles because it found

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[215] *ACE*, 864 F.3d at 711; *see also National Petrochemical & Refiners Ass'n*, 630 F.3d at 149 ("The EISA authorized the waiver of the volume requirements only in limited circumstances.").

[216] *ACE*, 864 F.3d at 710.

[217] *See, e.g.*, *Burrage v. United States*, 571 U.S. 204, 209-216 (2014) (holding that "ordinary meaning" of phrases like "results from," "because of," and "based on" "requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct," not merely that the harm resulted "from a combination of factors to which [defendant's conduct] merely contributed," and noting "no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it" (quotation marks and citations omitted)).

[218] Texas Waiver Decision at 47,171; *see ACE*, 864 F.3d at 711 (rejecting interpretation that would accord EPA "boundless general waiver authority").

[219] *ACE*, 864 F.3d at 712 (quotation marks omitted).

that there was no basis for a waiver under *any* interpretation of the statutory language.[220] EPA could take the same approach, and reach the same conclusion, for 2019.

1. EPA Should Simply Apply Its Reasoning from the 2018 RVO Rulemaking to Conclude That a 2019 Waiver Is Inappropriate

EPA is clearly correct when it concludes in the 2019 NPRM that the proposed requirements of 19.88bg of total renewable fuel, and 15.00bg of implied conventional renewable fuel, are "reasonably attainable."[221] EPA reaches this conclusion by assuming that the poolwide ethanol concentration can be 10.11% in 2019, and then assuming that BBD volumes can reach 3.2bg in 2019.[222] These assumptions are reasonable. As EPA notes, a 10.11% poolwide ethanol concentration is the same level that the market *actually* achieved in 2017.[223] And the 3.2bg BBD calculation is based on simply assuming that historical growth rates continue on top of the volume EPA determined was achievable for 2018 (which was the same level EPA determined was achievable for 2017).[224]

Moreover, EPA's well-supported reasoning and conclusions in the 2018 Rule and the denial of the petition to the change the point of obligation—that refiners, small retailers, and consumers are not experiencing economic harm, let alone severe harm—all apply with equal force today.[225] These are now long settled determinations by the agency and there is no material change in circumstances that would justify revisiting them.

Insofar as EPA found it useful to examine several broad economic indicators in concluding that there would be no severe economic harm in finalizing the 2018 RVOs, those same indicators support the same conclusion today. Just as EPA found in setting the 2018 RVOs,[226] retail gasoline, retail diesel, corn, corn futures, soybean, and soybean futures prices

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[220] 2018 Severe Economic Harm Memorandum at 15-16.

[221] *See generally* David Korotney, U.S. EPA, Office of Transportation and Air Quality, *Market impacts of biofuels in 2019* (June 26, 2018) ("2019 Market Impacts Memorandum"), EPA-HQ-OAR-2018-0167-0025.

[222] *Id.* at 3, 6-7.

[223] *Id.* at 3.

[224] *Id.* at 7-8.

[225] *Supra* Part VII.A.2.

[226] 2018 Severe Economic Harm Memorandum at 8-14.

today remain well lower than they were in 2012 when EPA found no severe economic harm.[227] Similarly, U.S. supplies of finished gasoline and diesel are comparable to the amounts from a year ago,[228] and total operating refinery crude oil distillation capacity is comparable to last year's (and above where it was in any prior year).[229] Finally, projected gasoline demand has increased yet again,[230] meaning that "we would expect the market to be able to consume more ethanol as E10, and at least the same volume of ethanol overall, in [2019] as compared to" 2018.[231]

For these reasons, the logic that compelled EPA to deny a severe economic harm waiver in the 2018 Rule is only stronger today and thus compels the same conclusion for 2019.

2. A Severe Economic Harm Waiver Could Not Be Exercised Without Accounting for the Available Compliance Flexibilities, Including the RIN Bank, Small Refinery Exemptions, and the Ability to Carry Deficits Forward, Which Prevent Severe Economic Harm

Another strong reason that implementation of the proposed total volume requirement would not cause severe harm to the economy is the availability of important compliance flexibilities for obligated parties to mitigate such harm, including a large bank of carryover RINs, the ability to carry over RIN deficits, and small refinery exemptions. EPA would have to account for these flexibilities in evaluating whether the waiver can and should be exercised.

That EPA must assess the potential for severe harm in light of all compliance circumstances follows from both the text and purpose of the statute. Use of other waiver authorities and compliance flexibilities is part of the "implementation" of the volume

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[227] *See* USDA, National Agricultural Statistics Service, *Charts and Maps*, https://www.nass.usda.gov/Charts_and_Maps/Agricultural_Prices/ (last visited Aug. 17, 2018); U.S. Energy Information Administration, *Gasoline and Diesel Fuel Update*, https://www.eia.gov/petroleum/gasdiesel/ (last visited Aug. 17, 2018); CME Group, *Corn Futures Quotes*, https://www.cmegroup.com/trading/agricultural/grain-and-oilseed/corn.html (last visited Aug. 17, 2018); CME Group, *Soybean Futures Quotes*, https://www.cmegroup.com/trading/agricultural/grain-and-oilseed/soybean.html (last visited Aug. 17, 2018).

[228] *See* U.S. Energy Information Administration, *Petroleum & Other Liquids: Product Suppled*, https://www.eia.gov/dnav/pet/pet_cons_psup_dc_nus_mbbl_m.htm (last visited Aug. 17, 2018).

[229] *See* U.S. Energy Information Administration, *Petroleum & Other Liquids: Number and Capacity of Petroleum Refineries*, https://www.eia.gov/dnav/pet/pet_pnp_cap1_dcu_nus_a.htm (last visited Aug. 17, 2018).

[230] *Compare* 2019 Market Impacts Memorandum at 5 (showing that 14.36bg of ethanol could be consumed as E10 in 2019 according to April Short-Term Energy Outlook) *with* 2018 Market Impacts Memorandum at 5 (showing that 14.31bg of ethanol could be consumed as E10 in 2018 according to October Short-Term Energy Outlook).

[231] 2018 Severe Economic Harm Memorandum at 14.

requirements.[232] Because the statute's various waiver authorities and compliance flexibilities could mitigate or eliminate harm, it cannot be said with any degree of confidence—let alone the requisite "high degree of confidence"—that implementation of a volume requirement "would" result in harm without accounting for the full range of those waiver authorities and compliance flexibilities. Were it otherwise, EPA could use the severe harm waiver to undermine the RFS program's ability to force market growth in renewable fuels by reducing volume requirements unnecessarily—something, again, the D.C. Circuit recently made clear the statute should not be interpreted to permit.[233]

EPA recognized this point in 2012, when it concluded that it was necessary to consider carryover RINs (also called "rollover RINs") as part of the analysis of whether severe economic harm would result. EPA explained: "the availability of rollover RINs can significantly affect the potential impact of implementation of the RFS volume requirements."[234] Accordingly, EPA modeled the availability of "one rollover RIN [as] equivalent to one liquid gallon of ethanol: both equally satisfy the RFS requirements, and thus both are sources of ethanol to draw upon in the model."[235] EPA noted that "if significant numbers of rollover RINs (i.e., 2.0 billion or more) are available [academic] studies suggest that the effect of a waiver [in potentially reducing purported harm] is significantly smaller."[236]

EPA underscored this general point in the 2018 Rule as well, when it rejected the arguments of the oil industry that it should assess the severe harm condition against the *statutory* volumes, noting that it would be "reasonable" to assess the severe harm waiver only after

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[232] 42 U.S.C. §7545(*o*)(7)(A)(i).

[233] That the D.C. Circuit concluded that carryover RINs need not be considered for purposes of the "inadequate domestic supply" prong of the general waiver does not alter this conclusion. *See ACE*, 864 F.3d at 714 (noting that the text "inadequate domestic supply" was controlling in its analysis of carryover RINs). The D.C. Circuit's analysis turned on the ambiguity of the word "supply" in a different statutory provision; there is no ambiguity that EPA must conclude that implementation of the RFS (which necessarily includes its flexibilities) would cause severe economic harm.

[234] 2012 Waiver Decision at 70,759.

[235] *Id.* at 70,758.

[236] *Id.* at 70,759.

reducing the volumes pursuant to the cellulosic waiver authority.[237] In so doing, EPA properly characterized the question as whether volumes lower than the finalized requirements would be "*necessary* to prevent causing severe economic harm."[238] That could not be true if existing RFS flexibilities would allow the market to address any purported harms that may arise.

Accordingly, to apply the severe economic harm waiver, EPA would have to take into account other waiver authorities like the cellulosic waiver, the market's ability to use existing carryover RINs, its opportunity to use carryover deficits, and the availability of other relief such as small refinery exemptions, and *still* conclude that, nonetheless, implementation of the statutory requirements would cause severe harm to the economy.

No such conclusion is possible today. According to EPA, the market generated 18.7 billion net RINs in 2017,[239] and EPA estimates that there are currently approximately 3.06 billion carryover RINs (far more than the 2 billion RINs EPA considered significant in 2012).[240] Thus, even if the market simply maintained its 2017 level of net RIN generation—a level that plainly did not cause severe economic harm—the market could achieve the proposed volume of 19.88 billion RINs in 2019 and still have more than 1.89 billion RINs in the carryover bank. And that does not even consider the possibility of carryover deficits.

Nor can there be any argument that reducing the bank—by that amount or more—somehow "would" cause severe economic harm. EPA has said that the purpose of the bank is to create a buffer to address unforeseen circumstances such as natural disaster.[241] EPA's concern is that such circumstances *might* occur, which in turn *might* result in a RIN shortfall that (EPA erroneously claims) *might not* be adequately addressed through carryover deficits.[242] The layers and layers of speculation required before the reduction or elimination of the bank could lead to

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[237] This interpretation is not just reasonable but required. Although the statute authorizes EPA to waive a volume requirement "in whole or in part," that language does not vest EPA with discretion to reduce the volume requirement to whatever level it sees fit or to any point other than the one necessary to avoid the triggering *severe* harm, any more than it permits EPA to reduce a volume requirement due to "inadequate domestic supply" past the point of "domestic supply." Such power would contravene the D.C. Circuit's conclusion that the statute cannot be interpreted to accord EPA "boundless general waiver authority." *ACE*, 864 F.3d at 711. On the contrary, the phrase "in whole or in part" emphasizes that EPA must calibrate the size of the waiver to go no further than necessary to avoid the condition that triggered the waiver (whether that be a partial or complete waiver).

[238] 2018 Severe Economic Harm Memorandum at 6-7 (emphasis added).

[239] EPA, 2017 Supply (Mar. 13, 2018), EPA-HQ-OAR-2018-0167-0003.

[240] NPRM at 32,029.

[241] 2014-2016 RFS Rule at 77,483.

[242] *Id.* at 77,483-77,484.

tangible severe economic harm is far below the required "high degree of confidence" that severe harm "would" result.[243]

Finally, as explained above, EPA has recently been using small refinery exemptions to effectively lower volume requirements by hundreds of millions or even billions of RINs. As also explained above (and elsewhere[244]), EPA's approach to evaluating petitions to extend small refinery exemptions is impermissible for various reasons. But if EPA were to (impermissibly) persist in granting petitions without accounting for all exempt volumes, then that practice would be another factor indicating that the proposed requirements would not cause severe economic harm.[245]

3. A Severe Economic Harm Waiver Could Not Be Exercised Without Accounting for the Significant Benefits of the RFS

As noted above, EPA has correctly concluded that merchant refiners, small retailers, and consumers are not being harmed by the RFS program. But even if any of these groups were experiencing some economic harm, that would not rise to the level of "severe" harm required by the statute.[246] Any government policy encouraging certain market outcomes is likely to benefit some industry participants at the expense of others. Congress of course knew this when it made the policy judgment that rapid expansion of renewable fuel usage across the country was in the nation's economic, environmental, and security interests. The severe harm waiver applies only in the event of overall catastrophic economic circumstances, not the very economic transfers that Congress expected and intended to occur between discrete groups as part of the RFS program.

Thus, consistent with the fourth principle described above, *supra* at 30, EPA has properly concluded that in applying the severe economic harm waiver, it cannot look to harms purportedly suffered by some groups while ignoring the economic benefits provided by the RFS program overall.[247] EPA further underscored that point in the 2018 Rule, when it reasoned that, before exercising a waiver, it would need to "take into account any negative economic impacts to farmers and biofuel producers from a waiver."[248]

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[243] Texas Waiver Decision at 47,172.

[244] *See Petition for Review of 40 C.F.R. §80.1405(c), EPA Docket No, EPA-HQ-OAR-2005-0161, promulgated in 75 Fed. Reg. 14,670 (Mar. 26, 2010); Petition for Reconsideration of Periodic Reviews for the Renewable Fuel Standard Program, 82 Fed. Reg. 58,364 (Dec. 12, 2017)*, June 4, 2018 (attached as Exhibit 10); *Advanced Biofuels Assoc. v. EPA*, No. 18-1115 (D.C. Cir.); *Renewable Fuel Assoc. v. EPA*, No. 18-9533 (10th Cir.).

[245] That is so even if EPA were to reallocate all exempt volumes to the subsequent year's volume requirements, as argued above. *Supra* Part III.B. A system of small refinery exemptions with reallocation would function much like RIN deficit carryovers.

[246] 2018 Growth Energy Comment at 24.

[247] Texas Waiver Decision at 47,172.

[248] 2018 RFS Rule at 58,517-58,518 n.138.

In Part II, *supra*, we describe the substantial benefits of the RFS: increased renewable fuel production and use in the United States helps achieve balanced energy trade, provides a cushion against oil price spikes, and spurs significant growth in domestic agriculture and rural economies, especially in the Midwest.[249] Prior comments by Growth Energy have also marshaled numerous studies showing how implementation of the RFS program has minimal or no adverse effect on feed and retail food prices: corn ethanol uses only the starch of the corn and thus has co-products that *add* to the feed supply, and retail food prices are driven more by crude oil prices than the price of individual crops like corn.[250]

These benefits outweigh any purported harms being borne by obligated parties or other market participants due to existing RIN prices or compliance obligations.

4. EPA Continues to Understate Achievable Renewable Fuel Volumes

By assuming that the market could reach in 2019 the same poolwide ethanol concentration that it achieved in 2017, EPA's analysis assumes that the market could reasonably attain just 163 million gallons of ethanol incremental usage over E10 in 2019.[251] Growth Energy recognizes that EPA set at least this level of attainable consumption mindful that it did not need to justify more consumption to conclude that no severe economic harm would occur.[252] Nevertheless, we comment to underscore that substantially more consumption of ethanol is in fact reasonably attainable.

a. E85 distribution and consumption capacity

As Growth Energy explained in its 2017 and 2018 comments, and as Americans for Clean Energy, Growth Energy, and others explained in the litigation challenging the 2014-2016 RFS rule, E85 has rarely—and never consistently—been priced below E10 on an energy-parity

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[249] *See also* 2018 Growth Energy Comment at 38-42; 2018 Growth Energy Supplemental Comment at 15-16; Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, at 75-77 (July 27, 2015) ("2014-2016 Growth Energy Comment") (attached as Exhibit 11), EPA-HQ-OAR-2015-0111-2604.

[250] 2014-2016 Growth Energy Comment at 77-78.

[251] *See* 2019 Market Impacts Memorandum at 5-6 (assuming that the market would consume 14.527bg of ethanol in 2019 after recognizing that the market could consume 14.364bg if all consumption was E10).

[252] *See id.* at 4 (stating that "there was not a need to precisely estimate the growth in the use of ethanol that can occur between 2018 and 2019" because the amount of ethanol use in 2018 was itself "sufficient to allow attainment of the 2019 total renewable fuel volume requirement under the proposal").

basis.[253] That is because the RFS has never been set at levels requiring substantial use of E85,[254] and so E85 retailers have found that their profit-maximizing strategy has been to treat E85 as a premium product, targeting price-insensitive consumers such as government fleets and individuals willing to pay more for E85 in view of its environmental, economic, and security benefits.[255] This in turn means that price reductions in E85 have not historically generated substantial observed consumer response; all that happened, at most, is E85 went from *much more expensive* than E10 to merely *more expensive* than E10.[256]

Although the market thus has not had occasion to test the upper bounds of E85 potential, Growth Energy submitted, in connection with its comment on the proposed RFS rule for 2017, expert reports by Stillwater Associates and the Brattle Group, as well as rigorous prior academic research by several economics professors, demonstrating through data and economic modeling how the market can be expected to react *if and when* the standards are set high enough that substantial E85 usage is necessary for the market to reach equilibrium.[257] First, consistent with EPA's recognition that price is the most important factor for consumers when buying transportation fuel, and consistent with EPA's recognition of what economic theory would predict,[258] those reports and papers showed, through data and rigorous modeling, how the consumer demand curve would exhibit accelerating consumer response as E85 prices fell below energy parity with E10.[259] Indeed, any other demand curve would lead to implausible results as the E85 discount approaches 100%.[260] Second, the Stillwater and Brattle reports explained how, if the RFS standards are set high enough, E85 stations will find that rather than competing monopolistically with other E85 stations for the small portion of price-insensitive E85 consumers, they will be far better off discounting E85 below E10 and thus competing directly with E10 in order to capture traffic from the substantially larger, price-sensitive E10 customer base.[261]

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[253] 2018 Growth Energy Comment at 19-21; Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, at 12 (July 11, 2016) ("2017 Growth Energy Comment") (attached as Exhibit 12), EPA-HQ-OAR-2016-0004-3499; Final Petitioner-Intervenors Br. 7, *Americans for Clean Energy, Inc. v. EPA*, No. 16-1005, Doc. 1661227 (D.C. Cir. Feb. 14, 2017).

[254] 2017 Growth Energy Comment at 9, 11-14, 23-25.

[255] *Id.* at 8.

[256] *Id.* at 6.

[257] *See id.* at 14-16, 22-28.

[258] *2014 Standards for the Renewable Fuel Standard Program*, 78 Fed. Reg. 71,732, 71,760 (Nov. 29, 2013); David Korotney, *Correlating E85 consumption volumes with E85 price*, at 4 ("2016 Korotney Memorandum"), EPA-HQ-OAR-2015-0111-3666.

[259] 2017 Growth Energy Comment at 14-16.

[260] *Id.* at 6-8.

[261] *Id.* at 22-28.

EPA declined to follow this commonsense logic supported by data, for no other reason than EPA's evident risk aversion. Without coherent explanation, EPA decided that, where a linear or weakly nonlinear relationship explains the data as well as a more strongly nonlinear relationship, then the linear or weakly nonlinear model should be selected to project E85 demand.[262] But there is no reason to believe that is the right choice when EPA's analysis lacks data from consistent pricing below parity, and particularly when that choice contravenes economic theory, rigorous research, and common sense.

EPA also previously has insisted, in the absence of data from a time when substantial E85 volume was necessary to meet the RFS mandate, on a 22% cap on the E85 discount to E10, refusing to heed economic theory and expert conclusions that E85 prices will decline until the market finds an equilibrium that matches the requisite constraints. Instead, EPA has treated these prices as external "constraints" that must be "achieved." As Brattle explained, basic economic theory teaches that "[n]either the E85 price discount nor the RIN price that would be necessary to achieve a particular E85 price discount are exogenous constraints but instead are endogenous results of policy choices, namely the RVO level EPA sets and the volume of E85 sales necessary to meet that RVO level."[263]

Because EPA has not attempted to quantify the amount of E85 it actually believes is reasonably attainable in the 2019 NPRM, it is unclear whether EPA continues to maintain this approach. It would be wrong to do so. EPA's prior view essentially created a Catch-22 at odds with congressional intent, as EPA declined to push the market to reach higher volumes because they have not been historically achieved. Higher volumes will be achieved when EPA allows the RFS to actually push the market as Congress intended.

EPA's assessment of E85 infrastructure is similarly flawed. EPA continues to claim that the number of retail stations offering E85 and the number of vehicles that can use E85 are limits on E85 consumption.[264] This unexplained assertion is wrong: EPA itself has found that there were sufficient E85 stations and flex-fuel vehicles ("FFVs") with reasonable access to those

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[262] *See* David Korotney, *Updated correlation of E85 sales volumes with E85 price discount*, at 6-8 (Nov. 18, 2016) ("2017 Korotney Memorandum") (rejecting nonlinear forms simply because they do not appear to *add* to the explanatory power of the original dataset, while not explaining why the default linear or weakly nonlinear assumption should be treated as the default), EPA-HQ-OAR-2016-0004-3752; 2016 Korotney Memorandum at 13-16 (similarly rejecting nonlinear form simply because it purportedly did no better than the linear form, while not explaining why the linear form is thus the better choice).

In fact, EPA's use of a weakly nonlinear form in 2017 made even less sense than the linear form EPA chose in 2016. As EPA conceded, the weakly nonlinear form "demonstrates a weaker consumer response to price" than the original form at large E85 discounts. 2017 Korotney Memorandum at 5.

[263] *See* Brattle Group, *Peeking Over the Blendwall: An Analysis of the Proposed 2017 Renewable Volume Obligations*, 3 (July 11, 2016) (attached as Exhibit 13).

[264] 2019 Market Impacts Memorandum at 2-3.

stations to deliver 1.3bg gallons of E85, or 860mg of incremental ethanol in E85.[265] And EPA has never rebutted the analysis Growth Energy submitted in prior RFS rulemakings showing that there is sufficient E85 station infrastructure to deliver more than 1bg of ethanol in E85 to nearby FFVs.[266] That analysis has recently been updated and reaches the same conclusions.[267] Of course since those analyses, the number of E85 stations has increased markedly due to the BIP and Prime the Pump programs, as EPA acknowledges,[268] and the number of FFVs on the road has continued to increase.[269] Insofar as EPA were to base a severe economic harm waiver on inadequate infrastructure, it would need to explain how, notwithstanding this record evidence and its prior reasoning, it has a high degree of confidence that severe harm would result.

b. E15 distribution and consumption capacity

Likewise, EPA's prior assessments of E15 consumption are wrong (even without the regulatory relief for E15 described above, *supra* Part VI). In both its 2014-2016 and 2017 comments, Growth Energy set forth extensive analysis showing that E15 infrastructure is capable of rapid expansion once EPA sets the standards at levels that actually require substantial E15 growth.[270] That analysis is still valid. In fact, with the addition of new opportunities for terminal-blended E15, the potential for E15 growth is even larger today.[271] Yet EPA has consistently downplayed the potential for E15 expansion based on EPA's improper adherence to what has historically been achieved.[272] EPA has further cramped its estimates of potential E15 growth by indulging baseless concerns about retailer misfueling.[273]

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[265] David Korotney, *Application of one-in-four E85 access methodology to 2014* (Nov. 21, 2013), EPA-HQ-OAR-2013-0479-0026.

[266] 2017 Growth Energy Comment at 28-33; 2014-2016 Growth Energy Comment at 33-37.

[267] Stillwater Associates LLC, *Potential Increased Ethanol Sales through E85 for the 2019 RFS*, at 5-6 (Aug. 17, 2018) ("2019 Stillwater Report") (attached as Exhibit 14).

[268] 2019 Market Impacts Memorandum at 3-4; 2019 Stillwater Report at 4.

[269] Air Improvement Resource, Inc., *Analysis of Ethanol-Compatible Fleet for Calendar Year 2019* (Aug. 16, 2018) (attached as Exhibit 15).

[270] 2017 Growth Energy Comment at 33-37; 2014-2016 Growth Energy Comment at 41-52.

[271] *See* 2018 NPRM at 34,236.

[272] *Id.*

[273] 2018 NPRM at 34,232; *see* 2017 Growth Energy Comment at 17 (citing Stillwater Associates LLC, *Infrastructure Changes and Cost to Increase RFS Ethanol Volumes Through Increased E15 and E85 Sales in 2017*, at 24 (July 11, 2016) (attached as Exhibit 16)).

c. Ethanol production capacity

The industry could also produce substantial additional volumes of ethanol to support increased consumption. In 2017, 15.845bg of ethanol were produced domestically.[274] To meet the total volume requirement, only about 14.466bg of that production were consumed domestically, while the remaining 1.379bg were exported.[275] Thus, even without any growth in production capacity in 2018 or 2019, the market could support roughly an additional 1.379bg of domestic ethanol usage in 2019 simply by consuming ethanol domestically rather than exporting it to foreign markets.[276] Setting a higher total standard would create the economic incentive to do so. And that is not even accounting for the availability of foreign ethanol for importation.

Or the market could increase its production capacity to generate hundreds of millions of additional volumes of ethanol. It would not be difficult to do so. Production capacity can be increased rapidly in response to demand. And feedstock supplies would not be a meaningful limitation: it is projected that the industry could produce at least an additional 400mg of ethanol in 2019 (over the 2018 production) *without increasing corn acres or diverting corn from non-ethanol uses*.[277] That is possible because of expected improvements in average corn yields and corn conversion rates. Despite the demand for ethanol under the RFS program, fewer corn acres were planted and harvested in the United States in 2017 (90.200 mil and 82.700 mil) than in 2007, when RFS2 was enacted (93.527 mil and 86.520 mil).[278] The first reason that the number of farmed corn acres has declined while ethanol production has increased during the RFS program is that the average corn yield per acre has increased by a significant margin over that period "due to new higher-yield varieties of corn with improved drought- and pest-resistance."[279] The growth rate for corn yield per acre over the past 10 years (17.19%) is nearly identical to the rate over the prior 10 years (18.94%),[280] and there is no reason to conclude that that trend will taper off, given continuing economic pressure on the agriculture industry to improve crop yields. The second reason is that the efficiency with which ethanol plants convert corn to ethanol has also increased—indeed, the annual rate of improvement in conversion efficiency has been nearly perfectly constant at 0.01 gal etoh/bushel corn for the past 35 years, and again economic pressures are likely to encourage the industry to continue to develop and implement new

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[274] USDA, Bioenergy Statistics, Table 2, Fuel ethanol supply and disappearance calendar year, https://www.ers.usda.gov/data-products/us-bioenergy-statistics/.

[275] *Id.*

[276] EPA expects the net supply of ethanol RINs to remain constant between 2017 and 2019. *See* 2017 Supply; 2018 Market Impacts Memorandum at 7; 2019 Market Impacts Memorandum at 6.

[277] Stillwater Associates LLC, *The Corn Ethanol Production Impacts for 2019 RFS*, at 8 (August 17, 2018) (attached as Exhibit 17).

[278] *Id.* at 5.

[279] *Id.* at 6.

[280] *See id.*

technologies that maintain at least this rate of improvement in the near future.[281] If those trends in corn yields and corn conversion continue in 2019, and if the amount of corn used for food and other *non*-ethanol purposes in 2019 grows at the same rate as the population grows, the industry could produce an additional 400mg of ethanol in 2019.[282] Because that growth would account for increased demand for food and other non-ethanol uses, it would not be expected to raise prices for food or other corn-based goods.

5. The Existence of Doubt About Whether the Requirements Could Be Met Is Not a Valid Basis for Exercising the Waiver

Even if EPA were to conclude that sufficient volumes of E85 and E15 are not reasonably attainable under its method of analyzing the reasonably attainable volumes to decide how to exercise the cellulosic waiver flow-through authority, that conclusion would not amount to a finding of severe economic harm. EPA could reach such a conclusion only if harbored *no doubt* that the shortage of E85 and E15 *will* cause severe economic harm absent a waiver.

For purposes of the cellulosic waiver flow-through, EPA's position has been that reasonable doubt about achievable volumes may justify reducing volume requirements. In that context, EPA has described its burden as determining what volumes it has "*confidence*" the market could reasonably reach.[283] Thus, EPA has started with baseline volumes that it knows are achievable, e.g., the amounts achieved historically, and then asked what it confidently can say the market could achieve above that threshold in the next year. EPA has relied upon (misplaced) doubts such as those discussed above regarding the shape of the E85 demand curve, achievable relative pricing between E85 and E10, and E15 distribution infrastructure to justify lowering the volume requirement.

Regardless of whether that approach is sound under EPA's cellulosic waiver flow-through authority, it would be wholly improper to use doubt about the achievability of a volume requirement as the basis to reduce that volume requirement under the severe economic harm waiver power. In the severe harm waiver context, EPA bears a different burden.[284] As discussed above, the severe harm waiver may be invoked only if EPA has a "high degree of confidence" that severe harm *would* result; even confidence that severe harm would *likely* result is insufficient.[285] In other words, even if EPA may use the cellulosic waiver to reduce a volume requirement until it eliminates any doubt about its achievability, the presence of doubt cuts

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[281] *Id.* at 6-7

[282] *Id.* at 8.

[283] 2018 NPRM at 34,235 (emphasis added); 2017 RFS Rule at 89,791; 2014-2016 RFS Rule at 77,481; *see also* 2014-2016 RFS Rule at 77,472 (limiting expected biodiesel volumes based on what EPA thinks it would be "prudent" to assume).

[284] To be clear, Growth Energy does not believe that EPA would even need to consider potential growth of E85 to *reject* outright use of a severe economic harm waiver. But certainly EPA could not decide to *apply* this waiver without fundamentally changing its analysis as described here.

[285] Texas Waiver Decision at 47,171.

decisively in the opposite direction in the context of the severe harm waiver: EPA may *not* reduce a volume requirement *unless* it eliminates any doubt that compliance would cause severe harm. Accordingly, inadequate data about whether there would be severe harm militates *against* waiving a volume. EPA seemed to recognize that in the 2018 Rule, when it said that the requisite finding was that setting volumes lower than proposed "would be *necessary* to prevent causing severe economic harm."[286]

C. No Additional Modeling Would Be Necessary to *Deny* a Waiver, But a Comprehensive Model Subject to Notice-and-Comment Would Be Necessary to *Grant* a Waiver

There are thus many independent reasons that EPA can and must reject the severe economic harm waiver out of hand, based on its prior legal analysis and the economic analysis it applied in the 2018 Rule, which remains sound for 2019. Yet in the NPRM, EPA appears to suggest that it may be considering attempting to apply an econometric model similar to what it used in 2008 and 2012 from Iowa State University to develop "quantitative estimates of the impact of a waiver on: Food expenditures for average and lowest quintile households; feeds costs for cattle, pigs, poultry and dairy; and gasoline prices and gasoline expenditures for average and lowest quintile households."[287]

There is no basis for EPA to undertake any such modeling enterprise. No model can change the underlying market realities discussed above: EPA's well-established findings that refiners, small retailers, and consumers are not experiencing harm, and the realities that all relevant economic indicators today are comparable to or more favorable than in 2012, when EPA concluded that no severe harm was occurring. Nor can any econometric model alter the legal realities that the severe economic harm waiver is reserved for the narrowest of circumstances, which are not, and have never been, present.

In any event, any such model would be highly sensitive to the many assumptions that would necessarily go into it. EPA would need to modify the model in various ways to account for various developments in the RFS program since 2008 and 2012. As noted above, EPA has recognized that it is not proper to *grant* a severe economic harm waiver without a "comprehensive and robust analytical basis for any claim that the RFS itself is causing harm, and the nature and degree of that harm," and without the public having notice of and an opportunity to comment on the details of that analysis.[288] Indeed, EPA repeatedly justified its 2008 and 2012 decisions on the basis that the model it used had been "subjected to external scrutiny independent of [its] own analysis."[289] If EPA is considering granting a waiver based on an econometric model, it must first publish the details and assumptions of that model so that interested parties can comment on them. Instead of incurring the substantial administrative burdens of what would

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[286] 2018 Severe Economic Harm Memorandum at 7.

[287] NPRM at 32,048.

[288] Texas Waiver Decision at 47,183-47,184.

[289] 2012 Waiver Decision at 70,756.

inevitably prove to be a fruitless endeavor, EPA should and must simply reject the severe economic harm waiver altogether, as it did in 2017 and 2018.

VIII. EPA MUST IMMEDIATELY ADDRESS THE D.C. CIRCUIT'S VACATUR OF THE 2016 GENERAL WAIVER IN *AMERICANS FOR CLEAN ENERGY*

In July 2017—more than one year ago—the U.S. Court of Appeals for the D.C. Circuit granted the petitions for review filed by Growth Energy and others, vacated EPA's decision to reduce the 2016 requirements via a general waiver due to "inadequate domestic supply," and remanded the rule setting 2014-2016 RVOs to EPA for further consideration in light of its decision.[290] The D.C. Circuit took these steps after concluding that EPA's prior interpretation of that general waiver provision was "strained," "ma[de] little sense," "flout[ed] the statutory design," and "turn[ed] the Renewable Fuel Program's 'market forcing' provisions on their head."[291]

Despite this strong judicial rebuke, EPA still has taken *no* action to rectify the error that the D.C. Circuit identified and directed the agency to fix. Thus, since that judicial decision, EPA has finalized the 2018 RFS requirements and proposed RFS requirements for 2019, while failing to address its statutory duty to "ensure" that the *2016* requirements are met (now nearly three years after the statutory deadline).[292]

Nor has EPA provided any indication for how or when it plans to comply with the court's order. All EPA has done is to vaguely allude to this obligation on several occasions, as if acknowledging the existence of the obligation were equivalent to complying with it.[293] In the 2019 NPRM, EPA continues that practice, stating only that it is "considering a number of issues" raised by the remand and that it "understands that there is a compelling need to respond to the remand and intends to expeditiously move ahead with a separate rule to resolve this matter."[294]

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[290] *ACE*, 864 F.3d at 696-97.

[291] *Id.* at 708, 710, 712.

[292] *Id.* at 698-699 (quoting 42 U.S.C. § 7545(*o*)(3)(B)(i)).

[293] *See, e.g.*, 2018 RFS Rule at 58,494 (noting "possible impact of an action to address the remand in *ACE*"); EPA, EnviroFlash Announcements about EPA Fuel Programs, (Jan. 12, 2018) (recognizing uncertainty "and the fact that the EPA has not yet indicated its intentions with respect to the remand" in *ACE*) ("January 2018 EnviroFlash Announcement"), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/enviroflash-announcements-about-epa-fuel-programs#compliance-deadline.

[294] NPRM at 32,027.

That is not enough. EPA must take action to address its clear legal duty to remedy its prior error and comply with the D.C. Circuit's order without any further delay.[295] There is no excuse for delay because EPA could easily remedy its prior error. As EPA itself has explained, "it would be appropriate for the EPA to allow use of current-year RINs (including carryover-RINs) to satisfy further obligations, if any, for a past compliance year that may result from the *ACE* remand."[296] Thus, EPA can and must simply add the 500 million RINs covered by the vacated general waiver to the total 2019 volume requirement it would otherwise impose. If EPA deems it necessary to provide an opportunity for notice-and-comment on the remedy, it should issue its proposal promptly so that the 2019 RVOs can reflect the remedy yet still be finalized by the statutory deadline of November 30, 2018.

IX. CONCLUSION

For the reasons set forth above, EPA should: (1) maintain an implied non-advanced volume of at least 15 billion; (2) change its approach to small refinery exemptions to deny extensions to refineries that have not been continuously exempt, to make up for all exempt volumes, and to bring more transparency to the RIN market; (3) revise its method for projecting liquid cellulosic biofuel volume for 2019; (4) remove regulatory barriers to expanded use of E15; (5) continue to decline to issue a general waiver of the total volume requirement based on severe harm to the economy; and (6) promptly remedy the vacated general waiver of the 2016 total volume requirement.

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[295] *See, e.g.*, *In re People's Mojahedin Organization Org. of Iran*, 680 F.3d 832, 837-838 (D.C. Cir. 2012) (ordering agency to act after it failed to meet original statutory deadline and then "failed to heed [court's] remand," which "effect[ively] … nullif[ied] [the court's prior] decision").

[296] January 2018 EnviroFlash Announcement.

EXHIBIT 2

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

MEMORANDUM

OFFICE OF
AIR AND RADIATION

SUBJECT: Decision on 2018 Small Refinery Exemption Petitions

FROM: Anne Idsal, Acting Assistant Administrator
Office of Air and Radiation

TO: Sarah Dunham, Director
Office of Transportation and Air Quality

Section 211(*o*)(9)(B) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the RFS program "for the reason of disproportionate economic hardship" (DEH). The Act instructs EPA, in consultation with the Department of Energy (DOE), to consider the DOE Small Refinery Study[1] and "other economic factors" in evaluating small refinery exemption (SRE) petitions. The statute does not define "disproportionate economic hardship," leaving for EPA's discretion how it implements this exemption provision.[2]

As part of EPA's process for evaluating SRE petitions, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from its RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately impact the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA considered that DEH exists only when a small refinery experiences *both* disproportionate impacts *and* viability impairment. In response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress clarified to DOE that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment. If so, Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in language included in an explanatory statement accompanying the

[1] "Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship," Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).
[2] *Hermes v. Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015).

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2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."[3] Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.[4]

Based on DOE's recommendations for the 2018 petitions, I am today granting full exemptions for those 2018 small refinery petitions where DOE recommended 100 percent relief because these refineries will face a DEH. I am denying exemptions for those 2018 small refinery petitions where DOE recommended no relief because they will not face a DEH.

I am also granting full exemptions for those 2018 small refinery petitions where DOE recommended 50 percent relief. This decision is appropriate under the Act and is consistent with the case law recognizing EPA's independent authority in deciding whether to grant or deny RFS small refinery petitions.[5] DOE's recommendations recognize an economic impact on these small refineries, and I conclude these small refineries will face a DEH meriting relief. I have concluded that the best interpretation of Section 211(*o*)(9)(B) is that EPA shall either grant or deny petitions for small refinery hardship relief in full, and not grant partial relief. The exemption available under Section 211(*o*)(9)(B) is explicitly described as an "extension of the exemption under subparagraph (A)." In turn, subparagraph (A) provides that the requirements of the RFS program "shall not apply to small refineries until calendar year 2011." It is evident that the original exemption under subparagraph (A) was a full exemption, and therefore I conclude that when Congress authorized the Administrator to provide an "extension" of that exemption for the reason of DEH, Congress intended that extension to be a full, and not partial, exemption. This approach is also consistent with congressional direction since enactment of the provision, which states: "The Agency is reminded that, regardless of the Department of Energy's recommendation, additional relief may be granted if the Agency believes it is warranted."[6]

Dated: 8/9/2019

Anne Idsal
Acting Assistant Administrator
Office of Air and Radiation

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[3] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: https://rules.house.gov/bill/114/hr-2029-sa.

[4] Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

[5] *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.* 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

[6] Consolidated Appropriations Act, 2019, Pub. L. No. 116-6 (2019), *see* H.Rept. 116-9 at 741 (February 13, 2019).

EXHIBIT 3

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We've made some changes to EPA.gov. If the information you are looking for is not here, you may be able to find it on the EPA Web Archive or the January 19, 2017 Web Snapshot.

RFS Small Refinery Exemptions

About Data

RINs Generated

Available RINs

RIN Trades and Price

RIN Use

Small Refinery Exemptions

Renewable Volume Obligations

Section 211(o)(9)(A)(i) of the Clean Air Act (CAA) and 40 CFR 80.1441(a)(1) exempted small refineries from the Renewable Fuel Standard (RFS) program through compliance year 2010. CAA section 211(o)(9)(A)(ii) authorized EPA to extend the exemption for two years. For 2011 and 2012, 24 small refineries were granted an exemption under this provision. Beginning with the 2013 compliance year, small refineries may petition EPA annually for an exemption from their RFS obligations. EPA may grant the extension if it determines that the small refinery has demonstrated disproportionate economic hardship per CAA section 211(o)(9)(B) and 40 CFR 80.1441(e)(2). EPA's decision to grant an exemption has the effect of exempting the gasoline and diesel produced at the refinery from the percentage standards of 40 CFR 80.1405. The exempted refinery is not subject to the requirements of an obligated party for fuel produced during the compliance year for which the exemption has been granted.

EPA intends to coordinate the timing of future small refinery exemption decisions and updates to this RFS data website such that refineries receiving exemptions and other interested parties receive the same RIN market information at the same time.

Last updated date: Sep, 19, 2019

Table 1: Exempted Volume of Gasoline and Diesel Each Compliance Year*

Compliance Year	Estimated Volumes of Gasoline and Diesel Exempted (million gallons)	Estimated Renewable Volume Obligations (RVO) Exempted (million RINs)
2013	1,980	190
2014	2,300	210
2015	3,070	290
2016	7,840	790
2017	17,050	1,820
2018	13,420	1,430

Export Table

*All numbers in Table 1 are rounded to the nearest 10 million gallons or RINs

Table 2: Summary of Small Refinery Exemption Decisions Each Compliance Year

Compliance Year	Number of Petitions Received	Number of Grants Issued	Number of Denials Issued	Number of Petitions Declared Ineligible or Withdrawn	Number of Pending Petitions
2013	16	8	7	1	0
2014	13	8	5	0	0
2015	14	7	6	1	0
2016	20	19	1	0	0
2017	37	35	1	1	0
2018	42	31	6	3	2

Export Table

LAST UPDATED ON SEPTEMBER 20, 2018

EXHIBIT 4

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Available RINs

About Data

RINs Generated

Available RINs

RIN Trades and Price

RIN Use

Small Refinery Exemptions

Renewable Volume Obligations

Total Available RINs to Date Report

(Click on the "Data Sets" dropdown box to change displayed report)

- This table displays the total number of RINs generated, retired, locked, and available for all captured months, broken out by assignment:

Total Generated = Total Retired (Assigned and Separated) + Total Available (Locked and Unlocked)
Total Available = Total Locked (Assigned and Separated) + Total Unlocked (Assigned and Separated)

- RINs may be retired for compliance purposes or other reasons (e.g., reported spills, delayed RIN retirement).
- Available RINs may be unlocked/locked by registered company submitters at any time. Locked RINs are "available"; however, they may not be used in EMTS transactions until unlocked.
- RINs may only be separated (no longer assigned to a batch of renewable fuel) under specific conditions . For more information on RIN separation, see the RFS regulations at 40 CFR 80.1429. RINs must be separated before they can be used for compliance purposes.

RIN Holdings Report

(Click on the "Data Sets" dropdown box to change displayed report)

The RIN Holdings dataset provides a summary of the total RINs being held by balance year and balance quarters starting from RIN year 2010. For a given compliance year, the total number of prior year RINs available is the number of RINs generated in that year that are not yet retired, expired or otherwise used by obligated parties for compliance purposes . Not all prior year RINs may be available for meeting obligated parties' renewable volume obligations for a given compliance year. For more information, see 40 CFR 80.1427.

This dataset inventories information on the types of parties that are holding RINs, and the volume of RINs by fuel codes. The table displays holdings of RINs grouped by year of RIN generation, RIN type (D-code), and category of RIN holder for specified dates. The RIN holdings summary shows the relative distribution of RIN ownership at specific points in time.

To create a report:

- Select the report you would like to see from the drop-down menu in the "Data Sets" box, found at the top of the sidebar on the left side of the Qlik window, which is located just below these instructions. Report option descriptions can be found at the bottom of this page.
- Select or deselect the dimensions and measures you wish to add to or remove from your report.
    - Select 'dimensions' to determine how you wish to group data from the measure. Select a 'measure' to determine which data elements will be displayed in the report.
- From the custom report bar, you can remove a dimension or measure by clicking the 'X' and you can change the order of the columns by dragging and dropping the dimensions and measures into the order you would like them to appear in the report.

You can download the selected dataset to an Excel file by right-clicking the mouse inside a table and selecting the "Export data" option.

Available_RIN Y...
2018

Selections

Years

2010	2011	2012	2013	2014	2015	2016	2017	2018	2019

Last updated date: Oct, 10, 2019 (Updated monthly)

Data Sets

Total Available RINs to Date

Dimensions

RIN Year

Fuel (D Code)

Assignments

Measures

Total Retired

Total Available-Locke...

Total Available-Unloc...

Total Available RINs to Date

RIN Year | Fuel (D Code) | Assignments | Total Generated | Total Retired | Total Availabl... | Total Availabl...

RIN Year	Fuel (D Code)	Assignmen...	Total Generated	Total Retired	Total Available-Locked	Total Available-Unlocked
Totals			-	-	**19,746,344**	**3,566,720,306**
2018	D3	Assigned	312,710,478	223,639	0	81,517
2018	D3	Separated	0	259,917,968	473,684	52,013,670
2018	D4	Assigned	3,881,363,6...	56,259,516	41,790	6,329,431
2018	D4	Separated	0	3,202,181,...	13,575,332	602,976,008
2018	D5	Assigned	179,304,816	614,829	0	26,569
2018	D5	Separated	0	162,907,198	0	15,756,220
2018	D6	Assigned	15,190,276,...	191,044,4...	72,060	38,151,591
2018	D6	Separated	0	12,104,79...	5,583,478	2,850,628,522
2018	D7	Assigned	2,451,256	0	0	0
2018	D7	Separated	0	1,694,478	0	756,778

Regulatory Categories

Each entity in EMTS is grouped into one of the following five categories. To prevent double counting, entities with activity under two or more categories are aggregated under only one category from the list below, starting with “Refiner.” As an example, if an entity had activity that was both an “Exporter” and a “RIN Originator,” the entity would only be grouped under “Exporter.”

1. Refiner - Refiner of gasoline or diesel (an Obligated Party under the RFS program). This category groups together any company that retired any amount of RINs during a compliance year using the “demonstrate annual compliance” retirement with a compliance level of “aggregated refiner” or “refinery by refinery” in EMTS.
2. Importer - Importer of gasoline or diesel (an Obligated Party under the RFS program). This category groups together any company that retired any amount of RINs during a compliance year using the “demonstrate annual compliance” retirement with a compliance level of “aggregated importer” in EMTS.
3. Exporter - Exporter of renewable fuel. This category groups together any company that retired any amount of RINs during a compliance year using the “demonstrate annual compliance” retirement with a compliance level of “aggregated exporter” in EMTS.
4. RIN Originator – Domestic renewable fuel producer or renewable fuel importer. This category groups together any company that generated any amount of RINs during a compliance year in EMTS.
5. RIN Owner – Any company that owned or transacted any amount of RINs during a compliance year in EMTS but did not retire RINs for compliance or generate any RINs.

The aggregated RIN sales transactions and holding aggregated data are from EMTS and are specific to RINs generated starting from year 2010. Year 2010 was a transition year from RFS1 to RFS2. The Year 2010 RINs in these tables include only RFS2 RINs generated in EMTS after July 1, 2010.

LAST UPDATED ON SEPTEMBER 20, 2018

EXHIBIT 5

Growth Energy Comments on EPA's Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes

Docket # EPA-HQ-OAR-2019-0136-0021

Emily Skor
Chief Executive Officer
Growth Energy
701 8th Street NW
Suite 450
Washington, DC 20001
(202) 545-4000

August 30, 2019

TABLE OF CONTENTS

I. INTRODUCTION 1

II. EPA'S PRACTICES REGARDING SMALL REFINERY EXEMPTIONS AND THE CARRYOVER RIN BANK HAVE NULLIFIED THE RFS PROGRAM 3

- A. EPA Has Radically and Unlawfully Expanded Small Refinery Exemptions 3
- B. EPA's Refusal to Require That the Massive Volumes of Exemptions Granted Recently Ever Be Made Up Has Undermined the RFS Program's Ability to Compel Growth 6

III. EPA SHOULD INCREASE THE 2020 VOLUME REQUIREMENTS TO MAKE UP FOR ALL RETROACTIVE SMALL REFINERY EXEMPTION EXTENSIONS 9

- A. EPA's Refusal to Account for Retroactive Extensions Violates the Statute 10
- B. EPA Has Readily Available Ways to Account for Retroactive Extensions 12
- C. EPA Cannot Plausibly Claim That This Issue Is Outside the Scope of This Rulemaking 15

IV. EPA SHOULD USE ITS CELLULOSIC WAIVER AUTHORITY TO BACKFILL THE PROJECTED CELLULOSIC SHORTFALL WITH CONVENTIONAL RENEWABLE FUEL 16

- A. EPA Can and Should Use a Lesser Cellulosic Waiver of the Total Volume Requirement to Backfill the Cellulosic Shortfall with Conventional Renewable Fuel 16
- B. Additional Conventional Renewable Fuel Volumes Are Reasonably Attainable 18
- C. EPA Must Address This Issue in This Rulemaking 21

V. ON REMAND FROM *AMERICANS FOR CLEAN ENERGY*, EPA MUST REQUIRE OBLIGATED PARTIES TO SUBMIT ADDITIONAL RINS AS IF EPA HAD NOT ERRONEOUSLY WAIVED THE 2016 TOTAL VOLUME REQUIREMENT 22

- A. On Remand, EPA Must Remedy the Error Found in *ACE* by Requiring Obligated Parties to Make Up the Erroneously Waived Volume 22
- B. EPA Should Remedy Its Erroneous 2016 Waiver by Increasing Future Total Volume Requirements by a Commensurate Amount 23
  - 1. Supplementing the 2020 volume requirement to remedy the erroneous waiver would not entail retroactive rulemaking 23
  - 2. The standard for retroactive rulemaking does not constrain curative actions on remand 25
  - 3. A supplemental volume requirement would be appropriate under the standard for retroactive rulemaking 26

VI. EPA'S METHODS FOR PROJECTING CELLULOSIC BIOFUEL PRODUCTION ARE IMPERMISSIBLY BIASED AGAINST GROWTH 29

VII. EPA CORRECTLY PROPOSES NOT TO EXERCISE THE GENERAL WAIVER 33

VIII. EPA SHOULD FINALIZE THE PUBLIC ACCESS PROVISION OF THE PROPOSED REGS RULE AND DISCLOSE ADDITIONAL INFORMATION RELATING TO EPA'S SMALL REFINERY EXEMPTION DECISIONS 33

A. The Information Covered by the Proposal Is Not Plausibly Exempt from Mandatory Disclosure Under FOIA.....35

1. The Information Covered by the Proposal Is Not Confidential Business Information 36

2. The Information Covered by the Proposal Is Not Protected by the Deliberative Process Privilege 39

B. Additional Categories of Information Connected to Decisions on Small Refinery Exemption Extensions Are Also Not Plausibly Exempt from Mandatory Disclosure Under FOIA.....40

1. These Additional Categories of Information Are Not Confidential Business Information 40

2. These Additional Categories of Information Are Not Protected by the Deliberative Process Privilege 41

3. Failure to Disclose These Additional Categories of Information Illegally Creates a Body of Secret Law 42

IX. CONCLUSION.....43

I. INTRODUCTION

Growth Energy respectfully submits these comments on the Environmental Protection Agency's proposed rule entitled *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes*.[1] Growth Energy is the leading association of ethanol producers in the country, with 100 producer members and 94 associate members who serve the nation's need for renewable fuel.

Congress intended the RFS program to compel the transportation fuel industry to use increasing volumes of renewable fuel each year. Although EPA correctly proposes not to issue a general waiver and to nominally increase the total volume requirement in 2020, a closer examination of the program shows that EPA's proposal actively encourages blending less, not more biofuel. By maintaining the status quo of an unaccounted number of exemptions, EPA would permit the oil industry to revert to its 2013 level of usage and still achieve compliance. That is entirely illogical and unlawful. At this point, it is fair to say that EPA is destroying the RFS program.

The overwhelming problem is EPA's misguided and unlawful handling of compliance exemptions for small refineries. After initially allowing, through 2015, the number of exemptions granted each year to naturally dwindle as intended, EPA has completely reversed course and suddenly begun granting dozens of exemptions covering billions of RINs, while providing no acceptable explanation as to why: 790 million for 2016, 1.82 billion for 2017, and 1.43 billion for 2018. Most of these exemptions are plainly illegal because (among other reasons) they do not actually "extend" a preexisting exemption, as required by the express language of the Clean Air Act.

Regardless of whether these exemptions are lawful, they are destructive because EPA refuses to require that the exempt volumes ever be made up when the exemptions are granted retroactively, i.e., after the volume requirements for the covered year are finalized—as is the case for almost all of the recent exemptions. Consequently, EPA has converted what Congress envisioned as a mechanism to relieve particularly burdened refineries from their compliance obligations into an atextual and unauthorized waiver that reduces the volume requirements gallon for gallon.

The combination of EPA's massive increase in granted exemptions and its refusal to require that retroactively granted exemptions be made up has rapidly inflated the bank of carryover RINs, from 1.6 billion in 2016, to 2.5 billion in 2017, to 3.0 billion in 2018, and finally to about 3.5 billion in 2019—17.5% of the 2019 total volume requirement. Because obligated parties will necessarily use all carryover RINs for compliance, they will need to actually use only 16.54 bil gal of renewable fuel in 2020 to meet EPA's proposed total volume requirement—an amount that is virtually identical to the 16.55 billion total volume requirement that EPA set for 2013. D6 RIN prices have correspondingly collapsed, from $1.00 in late 2016 to $0.10 today.

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[1] *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes* ("2020 NPRM"), 84 Fed. Reg. 36,762 (July 29, 2019) (proposed July 29, 2019).

This decline reflects the market's understanding that the RFS program as currently being administered by EPA is highly unlikely to exert any pressure to expand usage of renewable fuel.

The statute's text, structure, and purpose command EPA to ensure that all exempt volume obligations are eventually met, even if by other obligated parties in other years. EPA cannot properly set the 2020 volume requirements without heeding this command. Thus, EPA should increase the proposed volume requirements by the amount of retroactive exemptions EPA reasonably anticipates granting for 2019 and 2020, as well as for all retroactive exemptions EPA granted for prior years.

EPA is also undermining Congress's goals for the RFS program by declining to backfill the projected shortfall in cellulosic biofuel projection with conventional renewable fuel. In exercising its cellulosic waiver power, EPA appropriately considers whether to backfill the cellulosic shortage with non-cellulosic advanced biofuels. But once EPA determines how much to reduce the advanced volume requirement, it insists on reducing the total volume requirement by the same amount. That is neither statutorily required nor reasonable. Through increased usage of conventional ethanol and carryover RINs, there is ample capacity to backfill at least a substantial portion of the cellulosic shortfall. And doing so would serve the statutory objective of reducing greenhouse gas emissions by replacing fossil fuel with the statutorily specified amount of renewable fuel, including conventional ethanol. EPA, therefore, should use a lesser cellulosic waiver to increase the implied non-advanced requirement and thus the total volume requirement above what it has proposed.

It is enormously frustrating and disappointing that EPA not only proposes to take these unlawful and unreasonable actions, but also proposes not to remedy a serious defect in a prior RFS rule that the U.S. Court of Appeals for the D.C. Circuit has now held to be unlawful: EPA's 500-million RIN general waiver of the 2016 total volume requirement. To comply with the decision in *Americans for Clean Energy v. EPA ("ACE")*[2] and to fulfill its statutory mandate to ensure that the volume requirements are met and the required volume of renewable fuel is used, EPA should set a supplemental total volume requirement of 500 million RINs. That would not be a "retroactive" obligation at all, but even if it were, it would be necessary and proper.

EPA should also overhaul its methods for projecting cellulosic biofuel. EPA's methods rely heavily on the industry's past production performance. Because EPA's approach to small refinery exemptions and the RIN bank are substantially suppressing demand for renewable fuel, EPA's historically based projection methods lock in that suppression and create a vicious circle, undermining Congress's effort to incentivize the growth of the type of renewable fuel that Congress saw as central to the RFS program's long-term success. In other words, under the current circumstances, EPA's projection methods are impermissibly biased against growth. Instead, EPA should seek to identify the amount of cellulosic biofuel that could likely be produced in response to volume requirements that are set high enough to mitigate EPA's demand-suppressing practices and to incentivize additional investment and production.

Finally, EPA should adopt the public access provision of the proposed REGS rule. But it should also disclose substantially more information relating to small refinery exemption

[2] 864 F.3d 691 (D.C. Cir. 2017).

decisions. Specifically, EPA should no longer withhold under FOIA: (i) the specific standards EPA actually applied to decide whether to grant or deny the extension; (ii) EPA's final analysis of whether to grant or deny the extension; and (iii) if an extension is granted, the means by which EPA effectuated the extension, such as allowing the refinery to unretire RINs. Like the categories of information addressed by the proposed REGS rule, these categories of information are not plausibly covered by a FOIA exemption. EPA's withholding of this information illegally creates secret law and is detrimental to the well-functioning of the RFS program.

II. EPA'S PRACTICES REGARDING SMALL REFINERY EXEMPTIONS AND THE CARRYOVER RIN BANK HAVE NULLIFIED THE RFS PROGRAM

"Congress intended the Renewable Fuel Program to be a market forcing policy that would create demand pressure to increase consumption of renewable fuel."[3] The D.C. Circuit previously held that EPA had "flout[ed] that statutory design" through its interpretation of the "inadequate domestic supply" general waiver provision.[4] EPA is doing it again, now through its policies regarding compliance exemptions for small refineries and small refiners (together, "small refineries"). EPA's radical escalation of small refinery exemptions, coupled with its refusal to require that exempt volumes be made up, have thwarted Congress's intent and effectively exempted the RFS program out of existence.

A. EPA Has Radically and Unlawfully Expanded Small Refinery Exemptions

In recognition of the particular difficulties that small refineries could face in trying to come into compliance with the new RFS2 program, Congress granted all fifty-nine extant small refineries a "[t]emporary exemption" from "compliance with the [volume] requirements" through 2010.[5] EPA then "extend[ed] the exemption" for twenty-four of those small refineries through 2012.[6] Over the next three years, EPA further "exten[ded]" the exemption to eight, eight, and then seven of refineries based on its determination that each would suffer "disproportionate economic hardship" absent exemption.[7] At that point, EPA appeared to be gradually winding down the exemptions, as expected.

But then EPA's approach to small refinery exemptions changed radically. EPA granted exemptions to nineteen refineries for 2016, thirty-five for 2017, and thirty-one for 2018.[8] Whereas the *combined* exemptions for 2013 to 2015 covered 690 million RINs, the exemptions for 2016, 2017, and 2018 covered 790 million RINs, 1.82 billion RINs, and 1.43 billion RINs—

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[3] *ACE*, 864 F.3d at 705.

[4] *Id.* at 710.

[5] 42 U.S.C. § 7545(*o*)(9)(A); EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions.

[6] § 7545(*o*)(9)(A)(ii); *RFS Small Refinery Exemptions*.

[7] § 7545(*o*)(9)(B); *RFS Small Refinery Exemptions*.

[8] *RFS Small Refinery Exemptions*.

4.04 billion RINs combined.[9] Whereas exemptions represented 1-2% of the annual total volume requirements between 2013 and 2015, they have represented 4%, 9%, and 7% between 2016 and 2018.[10] Concurrently, D6 RIN prices—presumably the basis for claims of "hardship"—dropped constantly and now stand at just a few cents.[11]

EPA's massive expansion of small refinery exemptions rests on three fundamental flaws. First, EPA has been granting exemptions to refineries that were not exempt in the prior year, in contravention of the plain meaning of the word "extension"—the word used repeatedly in the section of the statute covering small refinery exemptions.[12] Put simply, if there was no exemption in the prior year, there is nothing to "extend." Due respect for Congress's chosen language would mean that EPA could have granted *at most* seven refineries' exemption petitions after 2015.[13] Second, EPA appears to have been granting exemptions to refineries that are owned and operated by some of the largest companies in the world, including ExxonMobil and Chevron—companies that can hardly claim to be "small."[14] And third, EPA substantially relaxed its interpretation of "disproportionate economic hardship." In 2017, the Tenth Circuit held that "disproportionate economic hardship" does not "require a threat to a refinery's survival as an ongoing operation."[15] But EPA appears to have further relaxed the standard beyond simply no longer requiring that compliance threaten the refinery's viability: EPA's publicly stated position is that "compliance with RFS obligations may impose a disproportionate economic hardship when it is disproportionately difficult for a refinery to comply with its RFS obligations—even if the refinery's operations are not significantly impaired."[16] Under that approach, showing an actual *hardship* appears unnecessary. But however EPA now articulates the standard, the evidence is clear and indisputable that EPA has practically gutted the standard. During a period when D6 RINs have become nearly free and thus the cost of compliance has

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[9] *RFS Small Refinery Exemptions*.

[10] Edgeworth Economics, *The Impact of EPA's Policies Regarding RVOs and SREs* at 7 (Aug. 30, 2019) (attached as Exhibit 1).

[11] *See infra* p.8.

[12] § 7545(*o*)(9).

[13] For convenience, this comment uses the term "extension" throughout to refer to EPA's decisions to grant applications for extensions of small refinery exemptions, but for reasons explained in text, Growth Energy maintains that most of the applications granted in the past few years are not actually "extensions" as intended by Congress.

[14] *See* Pamuk & Prentice, *Exclusive: Exxon Mobil secured U.S. hardship waiver from biofuels laws—sources*, Reuters (Dec. 9, 2018) (attached as Exhibit 2), https://www.reuters.com /article/us-usa-biofuels-exxon-mobil-exclusive/exclusive-exxon-mobil-secured-u-s-hardship-waiver-from-biofuels-laws-sources-idUSKCN1OI292.

[15] *Sinclair Wyo. Refining Co. v. EPA*, 887 F.3d 986, 988, 998 (10th Cir. 2017).

[16] *Ergon-West Va., Inc. v. EPA*, 896 F.3d 600, 614 (4th Cir. 2018) (quoting the joint appendix in the case).

become negligible, compliance should be a genuine "hardship" for few if any obligated parties, and yet EPA has granted many times more exemption extensions than it ever had.[17]

Despite EPA's unlawful and destructive insistence on administering the exemption program in secret, some information has recently come to light confirming that EPA's application of the exemption standard is unfaithful to the statute. For example, according to a former senior EPA official, the Administrator stated in 2017 that several exemption petitions that the staff judged "clearly without merit" should nonetheless be granted on the basis of "*Chevron* deference" and could safely be granted because the Administrator believed EPA would be immune from lawsuit as a practical matter (asking the official rhetorically, "who is going to sue me?").[18] Another former senior EPA official stated publicly that EPA had loosened the standard to "put downward pressure on the price of RINs,"[19] even though that is not a relevant factor in assessing "disproportionate economic hardship" and indeed is contrary to the intent and function of the RFS program overall, which envisions using higher RIN prices to compel growth.[20] And, according to a Reuters article, a 2018 White House memorandum recommended that EPA "grant future small refinery exemptions based only on *true* disproportionate economic hardship," implying that EPA was granting them even absent a genuine showing of disproportionate

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[17] In fact, as EPA has recognized, RIN costs are not "a valid indicator of the economic impact of the RFS program on [obligated parties], since a narrow focus on RIN price ignores the fact that these parties are recovering the cost of RINs from the sale of their petroleum products." EPA, *Response to Comments, Renewable Fuel Standard Program—Standards for 2019 and Biomass-Based Diesel Volume for 2020* ("*2019 Response to Comments*"), at 19 (Nov. 2018), EPA-420-R-18-019; *see also* Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2019 and Biomass-based Diesel Volume for 2020 ("Growth Energy 2019 Comment"), at 32-34 (Aug. 17, 2018) (attached as Exhibit 3), EPA-HQ-OAR-2018-0167-1292; Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2018 and Biomass-based Diesel Volume for 2019 ("Growth Energy 2018 Comment "), at 23-24 (Aug. 31, 2017) (attached as Exhibit 4), EPA-HQ-OAR-2017-0091-3681.

[18] Email from Liz Bowman to Ryan Jackson and Samantha Dravis Re: Schnare again (July 31, 2017) (attached as Exhibit 5), ED_002308_00075786-00001-00003, https://foiaonline .gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-HQ-2018-006291&type=request (ED-002038_20190528_Production_06-19-2019).

[19] Renshaw, *Exclusive: Trump EPA did not await court ruling to loosen biofuel rules for refiners – documents*, Reuters (May 16, 2019) (attached as Exhibit 6), https://www.reuters.com/article /us-usa-epa-biofuels-exclusive/exclusive-trump-epa-did-not-await-court-ruling-to-loosen-biofuel-rules-for-refiners-documents-idUSKCN1SM13Z.

[20] EPA, *Denial of Petitions for Rulemaking to Change the RFS Point of Obligation* 19 (Nov. 2017) ("higher RIN prices reflect the greater degree of difficulty (and cost) of getting ever-greater volumes of renewable fuel into the transportation fuel pool—the explicit goal or the RFS program"), EPA-HQ-OAR-2019-0136-0029; *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919 (D.C. Cir. 2014) ("higher RIN prices should, in theory, incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote").

economic hardship.[21] Because the proposal recommended in the White House memorandum was not adopted, EPA may well still be granting exemption petitions without finding "true" disproportionate economic hardship.

B. EPA's Refusal to Require That the Massive Volumes of Exemptions Granted Recently Ever Be Made Up Has Undermined the RFS Program's Ability to Compel Growth

Because EPA does not require that exempt volumes ever be made up, small refinery exemptions "effectively reduce the RVOs one-for-one," having "the same impact on the overall marketplace as a reduction of the industry-wide obligation."[22] Consequently, EPA's approach to evaluating petitions for small refinery exemptions beginning in 2016 has had a devastating effect on the RFS program.

The combination of the massive increase in exempt volumes since 2016 and EPA's refusal to require that those volumes be made up has caused the carryover RIN bank to balloon. EPA says that the RIN bank stands at 2.19 billion, down 400 million from last year, and that this decline occurred "despite the fact that [the calculation] includes the millions of RINs that were not required to be retired by small refineries that were granted hardship exemptions in recent years."[23] EPA's suggestion that the bank exemptions have not caused the bank to grow is completely false. That suggestion ignores what occurred between 2016 and 2017. It also ignores exemptions granted for 2017 after EPA finalized the 2019 volume requirements, as well as exemptions recently granted for 2018.

A more complete and accurate examination of the data shows that the carryover RIN bank has increased by at least 500 million RINs every year in which EPA has applied its lax approach to granting applications for small refinery exemption extensions:

- In 2016, the bank contained about 1.6 billion RINs carried over from 2015.[24]
- In 2017, the bank swelled to about 2.5 billion RINs carried over from 2016.[25] This 900-million RIN increase in the bank was the predictable result of two actions by

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[21] Renshaw, *Trump mulled plan in 2018 to scale back U.S. biofuel waivers: documents*, Reuters (June 14, 2019) (attached as Exhibit 7) (emphasis added), https://www.reuters.com/article/us-usa-biofuels/trump-mulled-plan-in-2018-to-scale-back-u-s-biofuel-waivers-documents-idUSKCN1TF290.

[22] Edgeworth Economics at 8; *see* 2020 NPRM at 36,797.

[23] 2020 NPRM at 36,767.

[24] Edgeworth Economics at 4, 10; Nick Parsons, "Carryover RIN Bank Calculations for 2019 Final Rule" ("2019 Bank Calculation"), at 7 (Nov. 7, 2018), EPA-HQ-OAR-2018-0167-1298. These and other calculations of the bank in this section include the RINs carried from one year to the next, minus deficits carried from that year to the next.

[25] Edgeworth Economics at 4, 10; 2019 Bank Calculation at 7.

EPA: its unlawful 500-million RIN general waiver of the total volume requirement, and its new approach to small refinery exemption extensions—for 2016, EPA exempted 500 million RINs more than it had for 2015 (790 million compared to 290 million).[26]

- In 2018, the volume of exemptions increased by 1.03 billion RINs (to 1.82 billion),[27] and the RIN bank increased by roughly 500 million RINs, to about 3.0 billion.[28] EPA says that the bank in 2018 contained only about 2.6 billion RINs carried over from 2017,[29] but that is incorrect. That was the size of the bank EPA estimated in November 2018. An EPA memorandum from May 2019, however, shows that about 3.0 billion RINs carried over from 2017 were retired for compliance (net of the carried deficit), and so the bank in 2018 must have contained at least that many carryover RINs.[30] This discrepancy is likely due in large part to the fact that EPA calculated the 2.6 billion figure in November 2018 and later appears to have exempted about 360 million more RINs for 2017.[31]

- Finally, although the 2020 NPRM states that the bank contains about 2.2 billion RINs carried over from 2018, that statement does not account for the 1.43 billion RINs covered by exemptions that EPA has since granted for 2018.[32] Because at least 80%—and likely more than 90%—of those RINs will be unretired and thus added to the RIN bank, it is reasonable to estimate that the bank in 2019 contains about 3.5 billion RINs carried over from 2018, representing a 500-million RIN increase from last year.[33]

The bank has increased for each of the past three years not only in its absolute size, but also as a percentage of the total volume requirement. The bank equaled 9.1% of the 2016 total

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[26] *RFS Small Refinery Exemptions*.

[27] *Id.*

[28] Edgeworth Economics at 4, 10.

[29] 2020 NPRM at 36,767.

[30] Nick Parsons, "Carryover RIN Bank Calculations for 2020 NPRM" ("2020 Bank Calculation"), at 1 (May 20, 2019) (showing about 3.7 billion 2017 RINs were retired in 2018), EPA-HQ-OAR-2019-0136-0003; 2019 Bank Calculation at 3 (showing 2017 compliance deficit of about 700 million).

[31] *Compare* Nick Parsons, "Carryover RIN Bank Calculations for 2019 NPRM," at 3, 7 (June 11, 2018) (accounting for approximately 1.46 billion in exemptions for 2017), EPA-HQ-OAR-2018-0167-0043, and 2019 Bank Calculation at 3, 6 (not indicating any accounting of additional exemptions beyond those counted in the June 11, 2018 calculation), with *RFS Small Refinery Exemptions* (1.82 billion in exemptions for 2017).

[32] *RFS Small Refinery Exemptions*.

[33] Edgeworth Economics at 4, 10-11.

volume requirement, and then increased to 12.9% of the 2017 requirement, 15.5% of the 2018 requirement, and now 17.5% of the 2019 requirement.[34] As the law of supply and demand dictates, D6 RIN prices have cratered, falling from about $1.00 in late 2016 to about $0.40 in mid-2017, to about $0.20 in early 2019, and finally to about $0.10.[35] When EPA announced recently that it had exempted 1.43 billion RINs for 2018, D6 RIN prices experienced their largest 3-day drop (in percentage terms) in the history of the RFS program.[36] A recent study by Edgeworth Economics concludes that by exempting billions of RINs without requiring that they be made up, EPA has "eliminate[d] any incentive to increase conventional biofuel production and consumption, leading to continued increases in the RIN bank and neutering the original policy mandate.[37]

Consider how EPA's proposed 2020 total volume requirement will be met. EPA proposes to set that requirement at 20.04 bil gal. If we assume (as EPA assumes) that the number of carryover RINs available in 2019—3.5 billion—continues to be available in 2020, then the effective total volume requirement for 2020 will be just 16.54 billion.[38] If we then assume that the net amount of (ethanol-equivalent) RINs from the use of BBD, renewable diesel, and biogas in 2020 will equal the 2018 amount—about 4 billion[39]—the market would need to use just 12.54 bil gal of ethanol in 2020 to achieve full compliance with EPA's proposed total volume requirement. But projected ethanol use in 2020 will exceed that by nearly 2 bil gal even without any demand pressure from the RFS program simply because of the inherently favorable economics of ethanol: as EPA recognizes, "even in the absence of the RFS standards refiners and blenders [a]re likely to continue to blend ethanol into gasoline at a 10% rate due to the favorable

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[34] *Id.* at 4.

[35] *Id.* at 3.

[36] *Id.* at 9.

[37] *Id.*

[38] EPA often takes the metaphor of the RIN bank literally, as if it there were a trove of RINs being reserved for a "cost spike" or some other supposed emergency. 2020 NPRM at 36,768. That idea is a fiction. Carryover RINs must be used within the year after their generation lest they expire. Accordingly, all carryover RINs will necessarily be used for compliance each year. *See* 2020 NPRM at 36,767 n.15 (discussing how the bank will be consumed in each year). What EPA characterizes as the industry "maintaining inventories" of carryover RINs is actually the industry annually deciding the extent to which it makes economic sense to generate excess RINs and thus to regenerate the RIN bank. When assessing the "forcing" effect of the RFS program, therefore, the RIN bank must be subtracted from the applicable volume requirement.

[39] 2018 Supply, EPA-HQ-OAR-2019-0136-0005.

economics of ethanol as a gasoline blending component and octane enhancer."[40] Consequently, EPA's proposed 2020 total volume requirement will not compel the market to increase its use of renewable fuel at all—stagnant use of non-ethanol renewable fuels plus demand for ethanol as an octane enhancer plus the inflated RIN bank will more than suffice to achieve compliance. Although the market may nonetheless choose to regenerate some portion of the RIN bank in 2020, that excess usage will be dictated by economic factors independent of the 2020 total volume requirement; it will not be required by EPA through the RFS program. And this analysis does not account for future small refinery exemption extensions EPA may grant, which will exacerbate the problem. Recent history suggests that EPA will grant exemptions covering at least an additional 1 billion RINs for 2019, further lowering the effective volume obligations or correspondingly enlarging the RIN bank.

Thus, EPA's policies have rolled back the RFS program nearly to its inception and rendered the program practically a nullity for 2020. An effective 2020 volume obligation of 16.54 billion is nearly the same as the volume obligation EPA set for 2013 (16.55 billion), as well as the net RINs generated that year (16.43 billion).[41] At this point, as Edgeworth Economics puts it, "the only reason D6 RIN prices are not literally zero … is that there remains some uncertainty about EPA's decisions with respect to RVOs and SREs going forward."[42]

III. EPA SHOULD INCREASE THE 2020 VOLUME REQUIREMENTS TO MAKE UP FOR ALL RETROACTIVE SMALL REFINERY EXEMPTION EXTENSIONS

In setting the 2020 volume requirements, EPA must account for all extensions of small refinery exemptions. Currently, EPA does so only for extensions that are granted before the volume requirements for the covered year are finalized, i.e., "prospective" extensions, and not for extensions that are granted after the requirements are finalized, i.e., "retroactive" extensions. That practice is pointless because nearly all extensions are granted retroactively; refineries almost always wait until after the volume requirements are finalized to submit their extension applications. Consistent with that history, EPA has not yet granted any extensions for 2020 and therefore it proposes not to adjust the 2020 volume requirements to account for small refinery

[40] EPA staff, "Endangered Species Act No Effect Finding and Determination on Severe Environmental Harm under the General Waiver Authority for the 2019 Final Rule," at 4 (Nov. 2018), EPA-HQ-OAR-2018-0167-1404. EPA projects that 143.49 bil gal of gasoline will be used in 2020. 2020 NPRM at 36,798. Ten percent of that volume is 14.35 billion. *See also* David Korotney, "Market impacts of biofuels in 2020" ("2020 Market Impacts Memo"), at 5 (July 3, 2019), EPA-HQ-OAR-2019-0136-0067.

[41] 2019 Bank Calculation at A-4.

[42] Edgeworth Economics at 9.

exemptions at all.[43] EPA's refusal to make up retroactive exemptions impermissibly undermines the RFS program and violates its statutory duties.

EPA should increase the proposed 2020 volume requirements to make up any retroactive extensions granted in the past and to make up any retroactive extensions that are reasonably expected to be granted for 2020. Edgeworth Economics finds that increasing the 2020 required implied non-advanced volume by about 1 billion RINs, from 15 billion to 16 billion, "would ameliorate the impacts of the SREs and would be unlikely to cause RIN prices to return even to 2016 levels."[44]

A. EPA's Refusal to Account for Retroactive Extensions Violates the Statute

EPA's refusal to require that small refinery exemptions be made up violates the statute in several ways.

First, Congress designed the RFS program "to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year."[45] But as explained above, given the sheer magnitude of volumes EPA is now exempting, EPA's refusal to make up those volumes means that the RFS program is not exerting any pressure on the market to increase its use of renewable fuel above past levels and above levels that are driven by factors independent of the RFS program.[46]

Second, in setting annual volume requirements EPA has a "statutory mandate to 'ensure[]' that … volume requirements are met,"[47] as well as a statutory mandate to promulgate general rules for the RFS program that "ensure that transportation fuel sold or introduced into commerce in the United States … contains at least the applicable volume of renewable fuel."[48] Granting exemptions without requiring that they be made up, however, "effectively reduce[s] the RVOs one-for-one," having "the same impact on the overall marketplace as a reduction of the industry-wide obligation."[49] By refusing to require exemption makeup, therefore, EPA is shirking its duty to ensure that the volume requirements are met and that the requisite volume of

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[43] *See Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 58,486, 58,523 (Dec. 12, 2017) (to be codified at 40 C.F.R. pt. 80) (no exemptions for 2018 granted at time of 2018 rulemaking); *Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017*, 80 Fed. Reg. 77,420, 77,511 (Dec. 14, 2015) (to be codified at 40 C.F.R. pt. 80) (no exemptions approved for 2016 at time of 2016 rulemaking).

[44] Edgeworth Economics at 2, 12-14.

[45] *ACE*, 864 F.3d at 710.

[46] *Supra* Part II.

[47] *ACE*, 864 F.3d at 698-699 (quoting § 7545(*o*)(3)(B)(i)).

[48] § 7545(*o*)(2)(A)(i); *see also* § 7545(*o*)(2)(A)(iii)(I).

[49] Edgeworth Economics at 8; *see* 2020 NPRM at 36,797.

fuel is used. In fact, EPA's refusal ensures the opposite: that the volume requirements will *not* be met. Another federal agency said as much in commenting on EPA's draft proposed rule through the interagency review process: EPA's policy "ensur[es] [its] projected totals are not met and all actual outcomes or resulting biofuel requirements are biased to one side, lower."[50]

And third, EPA's refusal to account for retroactive extensions impermissibly converts its exemption power into a *waiver* power, in contradiction of the statute's plain text and structure. In several provisions of the statute, Congress explicitly granted EPA the power to reduce the required nationwide volumes, and labeled those powers "waivers."[51] These "waiver" powers may be exercised "only in *limited* circumstances," namely, the circumstances specified in the statute.[52] In contrast, the provisions allowing EPA to exempt small refineries contain neither of those features: they do not say that EPA may reduce the nationwide volume requirements or use the label "waiver"; rather, they are labeled "exemption," and they authorize EPA to determine merely that the *compliance obligation* "shall not apply to" the specific applicant refinery because of special circumstances relating to that refinery.[53] There is no reason here to depart from "the usual rule that when the legislature uses certain language in one part of the statute and different language in another, [courts and agencies must] assume[] different meanings were intended."[54] EPA's approach disregards this principle and in effect treats small refinery exemptions as waivers of the nationwide volume requirements. That is pernicious because it effectively expands EPA's waiver power to situations that would not meet the statutorily specified triggers for a waiver. As EPA has acknowledged, "small refinery exemptions are held to a different standard than a waiver," including a waiver for "severe economic harm."[55] "EPA has not explained why Congress would have established the severe-harm waiver standard only to allow waiver" under the small refinery exemption provision "based on lesser degrees of economic harm."[56] If Congress had intended to grant EPA a power to waive nationwide volume requirements based on findings that individual refineries will suffer "disproportionate economic hardship" if they must comply, it would have said so—it certainly knew how to. EPA has no authority to rewrite the statute or create a new, non-textual waiver power.[57]

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[50] Summary of Interagency Working Comments on Draft Language under EO 12866 and EO 13563 Interagency Review ("Interagency Comments"), at 1 (PDF at p.4), attached to Email from Jessica Mroz to Chad Whitman (May 22, 2019), EPA-HQ-OAR-2019-0136-0098.

[51] *See* § 7545(*o*)(7)(A) & (D)-(E), (8)(D).

[52] *National Petrochemical & Refiners Ass'n v. EPA ("NPRA")*, 630 F.3d 145, 149 (D.C. Cir. 2010) (emphasis added).

[53] § 7545(*o*)(9).

[54] *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011).

[55] *2019 Response to Comments* at 19.

[56] *ACE*, 864 F.3d at 712.

[57] *See, e.g.*, *In re Sealed Case*, 237 F.3d 657, 670 (D.C. Cir. 2001) ("Agencies are not empowered to carve out exceptions to statutory limits on their authority.").

B. EPA Has Readily Available Ways to Account for Retroactive Extensions

There are several simple and appropriate ways through which EPA could adequately account for retroactive extensions in setting the volume requirements.

First, EPA should increase the 2020 volume requirements by the amount it reasonably expects to exempt for 2020. The interagency commenter suggested this "ex ante" approach, noting that EPA's "percentages should be adjusted to incorporate projected gasoline and diesel exempted through small refinery waivers."[58] For example, the interagency commenter suggested that EPA "conduct[] an analysis based on expected conditions at small refineries and the historic issuance of exemption," and further recommended using 7.5 billion for the variable "GE" (projected volume of gasoline for exempt small refineries) and 5 billion for the variable "DE" (projected volume of diesel for exempt small refineries).[59] Without such adjustment, the interagency commenter concluded, EPA's volume requirements are less "accurate," and also internally inconsistent because EPA projects other variables used in calculating the percentage standards.[60] Indeed, last year, EPA initially adopted this projection approach in a draft proposed rule setting the 2019 volume requirements, before abandoning it without explanation. In that draft, EPA recognized that its "grant of small refinery exemptions affects the amount of transportation fuel subject to the renewable fuel obligation for that year."[61] To "address this effect" and to "ensure[]" the required volumes are met, EPA proposed accounting prospectively for the "[p]roject[ed] … total exempted volume based on the most recent exemption data" in setting the annual percentage standards.[62] EPA should do so in this rulemaking (and all future RFS rulemakings).

Second, EPA should also increase the 2020 volume requirements by the amount of previously granted retroactive extensions that have not otherwise been made up. Because EPA has never accounted for retroactive extensions, in setting the 2020 volume requirements EPA would need to make this "ex post" adjustment for all prior years' retroactive extensions. Or EPA could spread this supplemental requirement across two or three upcoming compliance years. Once EPA has done that, EPA would need to use the same ex post approach in future years only to the extent an extension had not already been accounted for (whether through a prior ex post adjustment or an ex ante adjustment).

EPA's reasons for refusing to adopt either of these approaches are meritless.

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[58] Interagency Comments at 2-3 (PDF at pp.5-6).

[59] *Id.* at 7-8 (PDF at pp.10-11).

[60] *Id.* at 7 (PDF at p.10).

[61] Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020 at 73 (PDF at p.74), attached to Email from Tia Sutton to Chad Whiteman regarding Updated version of 2019 RVO NPRM (June 21, 2018), EPA-HQ-OAR-2018-0167-0103.

[62] *Id.*

- EPA has suggested that the statute precludes any makeup of retroactive exemptions by pointing to the statutory requirement that EPA adjust the volume obligations "to account for the use of renewable fuel during the previous calendar year" by exempt small refineries.[63] That has nothing to do with dealing with exempt volumes; it relates only to the situation in which an exempt refinery nonetheless used renewable fuel. Its inclusion in the statute, therefore, does not imply that Congress did not want EPA to make up exempt volumes.

- EPA has argued that the ex ante approach would require it to prejudge hypothetical petitions to project likely retroactive extensions. But EPA would not need to reach a firm conclusion about any extension, nor would its projection be pure speculation. Rather, the projection could be based on the prior aggregate history of exemption extensions and whatever expertise the agency has accumulated over the years of evaluating petitions for extensions. And an accounting based on a reasonable (even if somewhat conservative) estimate would make the resulting volume requirements far more accurate and far better for the efficacy of the RFS program than EPA's current policy of doing nothing. EPA has claimed deference to its technical judgments, but a blanket rule not to project exemptions does not reflect any technical judgment about the quality of data before EPA on which it would rely in forming a projection for a given year. In any event, the ex post approach Growth Energy proposes here would not require any prejudgment or guesswork, and it could be used as the sole mechanism to address retroactive exemptions.

- EPA has claimed that the ex post approach contradicts the statute, which requires that in setting volume requirements, EPA "ensure[]" that the requirements are met with respect to *that* "calendar year."[64] That argument disregards the statute and precedent. The ex post approach is much like the "combined" obligation EPA set for 2009 and 2010 to remedy its tardiness in promulgating the 2009 volume obligations (discussed further below).[65] In that context, EPA argued, and the D.C. Circuit agreed, that increasing a later year's volume requirement to make up for a prior year's deficiency serves not only EPA's statutory duty to "ensure" that the *prior year's* requirement "is met,"[66] but also its statutory duty to "'ensure' the specified renewable fuel volume requirements are sold or introduced into commerce on an average basis … regardless of the date of promulgation of the necessary implementing regulations."[67] Moreover, as a time-shifting mechanism, the ex post approach also functions like a carryover deficit and the carryover RIN bank that EPA has read into the statute and that EPA describes as "extremely important" to the RFS program.[68] It is the height of

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[63] § 7545(*o*)(3)(C)(ii).

[64] § 7545(*o*)(3)(B).

[65] *See infra* pp.26-27.

[66] *NPRA*, 630 F.3d at 163, 166.

[67] *Id*. at 158.

[68] 2020 NPRM at 36,767.

irrationality for EPA to say that it will credit excess generation of prior-year RINs to *reduce* the volumes of actual renewable fuel required to be used in the current year, while simultaneously claiming that it is powerless to do anything about prior-year exemptions because that would *increase* actual consumption only in the current year but not the prior.

- EPA has said that adjusting one year's volume requirements to make up for prior years' exemptions would also mean that the volume requirements being set would not reflect achievable volumes in that year, contrary to congressional intent. That is not the pertinent question because EPA has no general power to set volume requirements equal to what it deems achievable and because, as just noted, EPA has the power to supplement one year's requirement even if the market is unlikely to use that much renewable fuel in that year, as EPA did when it combined the 2009 and 2010 requirements. In any event, compliance with the increased requirement would be "achievable," as explained below, through increased usage of renewable fuel, a drawdown of the RIN bank, or a combination thereof.[69] Moreover, adjusting the requirements would certainly not contradict the terms of the cellulosic waiver provision because it would not *require* the market to generate additional cellulosic biofuel; rather, the market could use the additional carryover RINs available because of the retroactive exemptions to meet the heightened volume requirements. Nor would the adjustment be impermissible just because it might result in a volume requirement above the statutorily specified amount. Those amounts are minimum requirements, as Congress specified that "at least" those amounts be used,[70] and again EPA has already set prior volume requirements well above the statutorily specified amount, with the D.C. Circuit's approval (e.g., when it combined the 2009 and 2010 requirements).

- EPA has said that if it must make up retroactive exemptions, then it would also have to adjust volume requirements to account for a situation in which the total gasoline used in a given year ended up being less than projected. That is incorrect. A lower-than-projected use of gasoline does not cause the volume requirement to be missed because the obligation imposed is stated as a percentage of the amount of gasoline actually used.

- Finally, EPA has argued that making up for retroactive extensions would make RFS volume requirements a moving target, contrary to Congress's directive to publish the standards by November 30 of the preceding year. That complaint is misguided. That would occur only if EPA were to adjust the RVOs during the compliance year, but neither the ex ante adjustment nor the ex post adjustment proposed by Growth Energy would entail mid-year adjustment. Rather, Growth Energy proposes that EPA account for extensions only at the time that it is setting volume requirements.

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[69] *See infra* Part IV.B.

[70] § 7545(*o*)(2)(A)(i).

C. EPA Cannot Plausibly Claim That This Issue Is Outside the Scope of This Rulemaking

Last year's was the first RFS rulemaking since EPA's grants of unprecedented numbers of retroactive extensions came to light. But EPA refused to solicit comments on the subject and noted in the final rule that it was "maintaining [its] approach that any exemptions for 2019 that are granted after the final rule is released will not be reflected in the percentage standards that apply to all gasoline and diesel produced or imported in 2019."[71] The only change EPA adopted was making "additional information available through [its] public website" on the "number of small refinery exemption petitions received, granted, denied by year" and the aggregate "fuel volume exempted by year."[72] EPA insists again in the2020 NPRM that it is not "reopening" its policy of not accounting for retroactive extensions and that no adjustment for the retroactive extensions will be made to the 2020 volume requirements[73]—despite the acknowledged "possibility of additional small refinery exemptions" after the final rule.[74] Notwithstanding the discretion EPA generally enjoys in defining the scope of a rulemaking, it may not exclude this issue now.

As explained above, EPA cannot, consistent with its statutory duties, properly set the 2020 volume requirements without accounting for retroactive extensions. That means that, whatever discretion EPA may enjoy regarding how it addresses retroactive extensions, taking some remedial action is necessarily within the scope of this rulemaking.[75] EPA says that the issue is "under review at Agency leadership levels" and that it "anticipate[s] discussing it further while this action is under review."[76] But that cannot deflect EPA's responsibility to address the issue now, in this rulemaking. Given the urgency and significance of making up for lost volumes

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[71] *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020* ("2019 Rule"), 83 Fed. Reg. 63,704, 63,740 (Dec. 11, 2018) (to be codified at 40 C.F.R. pt. 80); *accord 2019 Response to Comments* at 183, 185 ("In this rulemaking, we did not propose changes to, take comment on, or otherwise reexamine (collectively 'reopen') these issues relating to the reallocation of exempt small refinery volumes" or "the manner in which small refinery hardship petitions are evaluated.").

[72] 2019 Rule at 63,707.

[73] 2020 NPRM at 36,797 n.165.

[74] *Id.* at 36,768.

[75] EPA recently noted in a court filing that it "typically does not revisit its framework regulations in the[] annual RFS standard-setting rules, a choice well within the agency's 'broad discretion.'" EPA's Opposition to Petitioners' Motion to Lift Stay of Proceedings, *Renewable Fuels Ass'n v. EPA*, No. 18-1154, ECF #1803451, at 12 (D.C. Cir. Aug. 23, 2019) (quoting *Taylor v. FAA*, 895 F.3d 56, 68 (D.C. Cir. 2018)). But for the reasons explained above, making up for retroactive extensions is not a "'related, yet discrete, issue[]'" that EPA could set aside for future action, *Taylor*, 895 F.3d at 68; it goes to the heart of EPA's duty to set annual percentage standards that will ensure the volume requirements are met.

[76] Interagency Comments at 1 (PDF at p.4).

(totaling up to 4.04 billion RINs for 2016, 2017, and 2018 alone), Growth Energy urges EPA not to hide behind supposed procedural barriers to avoid reviewing this issue, which as explained is singlehandedly negating the effect of the entire RFS program. EPA should and must take this opportunity to consider comments on the subject and account for retroactive extensions in setting the 2020 volume requirements.

IV. EPA SHOULD USE ITS CELLULOSIC WAIVER AUTHORITY TO BACKFILL THE PROJECTED CELLULOSIC SHORTFALL WITH CONVENTIONAL RENEWABLE FUEL

In setting the 2020 total volume requirement, EPA has proposed to reduce the statutory volume by the full amount of the proposed cellulosic waiver. It should not. Instead, EPA should use a lesser amount of the cellulosic waiver, to allow the market to backfill the shortfall in cellulosic biofuel with conventional renewable fuel. That will better serve the goals of the RFS program and also mitigate the adverse effects of EPA's policies regarding small refinery exemptions.

A. EPA Can and Should Use a Lesser Cellulosic Waiver of the Total Volume Requirement to Backfill the Cellulosic Shortfall with Conventional Renewable Fuel

In assessing where to set the 2020 advanced volume requirement, EPA analyzes whether to backfill the projected cellulosic shortfall with non-cellulosic advanced renewable fuel based on the "reasonably attainable" volume of such fuel.[77] It is entirely appropriate for EPA to do that. "Congress enacted [the RFS volume] requirements in order to move the United States toward greater energy independence and security and increase the production of clean renewable fuels," thereby "reduc[ing] greenhouse gas emissions."[78] If the expected production of cellulosic biofuel will be less than what Congress expected when it established the statutory volumes for cellulosic biofuel, then EPA should replace that fuel with the next best fuels for accomplishing Congress's objectives. By definition, non-cellulosic advanced biofuels serve that purpose because such fuels reduce greenhouse gas emissions relative to fossil fuel to nearly the same degree as cellulosic biofuel: 50% versus 60%.[79]

Yet, after determining whether there is reasonably attainable non-cellulosic advanced biofuel with which to backfill the advanced volume requirement—and concluding that for 2020, there is none and thus the advanced requirement should be reduced by the full cellulosic waiver—EPA reflexively proposes to reduce the total volume requirement by the same amount.[80] EPA does not ask the obvious next question: can it backfill the cellulosic shortfall with

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[77] 2020 NPRM at 36,776.

[78] *ACE*, 864 F.3d at 696-697; *accord* 2020 NPRM at 36,763.

[79] *See* § 7545(*o*)(1)(B), (E).

[80] 2020 NPRM at 36,766-36,767, 36,776-36,777. In this comment, Growth Energy takes no position on EPA's factual determination that no further non-cellulosic advanced fuel volumes are reasonably attainable.

reasonably attainable *conventional* renewable fuel? EPA does not ask this question because of its insistence that the cellulosic waiver of the advanced and total volume requirements must always be the same.[81]

EPA's approach, and its explanation for it, make no sense. EPA states that its approach "considers the Congressional objectives reflected in the volume tables in the statute, and the environmental objectives that generally favor the use of advanced biofuels over non-advanced biofuels."[82] That is true, but for the very same reasons, non-advanced renewable fuel should be favored over fossil fuel. EPA's position, however, means that it prefers the cellulosic shortfall to be backfilled with *fossil fuel*, regardless of whether additional volumes of conventional renewable fuel are reasonably attainable.

That cannot be squared with Congress's intent. Through the RFS program, Congress specifically mandated that fossil fuel be "replace[d]" with "renewable fuel," which includes "conventional" renewable fuel, "at least" to the statutorily specified amounts.[83] Conventional renewable fuel counts toward the total volume requirement like any other type, and so backfilling the cellulosic shortfall with conventional renewable fuel allows EPA to get closer to the total amount Congress specified; backfilling with fossil fuel does nothing to move toward that goal. That was true at RFS2's enactment, when Congress envisioned that conventional ethanol would reduce greenhouse gas emissions by 20% relative to the fossil fuel it would replace.[84] And it is especially true today because the reduction in greenhouse gas emissions from conventional ethanol now is at least 40%, nearly the 50% reduction required of advanced biofuel.[85] Further, as Growth Energy has explained previously, a robust commitment to ethanol promotes energy independence and security (as well as economic development, particularly in rural areas).[86] In other words, the question of whether to backfill a cellulosic shortfall with non-cellulosic advanced biofuels is parallel to the question of whether to backfill with conventional renewable fuel when non-cellulosic advanced biofuel is unavailable to backfill. EPA's willingness to consider the former question but not the latter is arbitrary.

Certainly, nothing in the statute requires EPA to use the cellulosic waiver to reduce the advanced and total volume requirements by the same amount. The statute says that if EPA

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[81] *Id.* at 36,787.

[82] *Id.* at 36,766.

[83] § 7545(*o*)(1)(F), (J), (2)(A)(i).

[84] *See* § 7545(*o*)(1)(C), (F), (2)(A)(i).

[85] USDA/ICF Study, *A Life-Cycle Analysis of the Greenhouse Gas Emission from Corn-Based Ethanol* 98 (Sep. 2018), https://www.usda.gov/oce/climate_change/mitigation_technologies/LCA_of_Corn_Ethanol_2018_Report.pdf; *see* Steffen Mueller, Energy Resources Center, *Updated Life Cycle Greenhouse Gas Data for Corn Ethanol Production*, at 2 (Mar. 2016) (calculating that ethanol achieves "50% reduction over gasoline") (attached as Exhibit 8), https://illinoisrfa.org/wp-content/uploads/2017/06/UIC-OIG-3_16_v2-1.pdf.

[86] Growth Energy 2019 Comment at 3-7.

reduces the cellulosic standard, it "may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume."[87] In the past, EPA has stressed the word "and," and asserted that the statutorily implied non-advanced volume of 15 bil gal is a hard cap on the RFS requirements. Neither contention is correct. The total volume requirement could be reduced by a lesser amount "*and*" the advanced volume requirement could be reduced by a lesser amount, even if those amounts are different. And nothing in the text of the statute says that the implied volume cannot exceed 15 bil gal after the application of waivers. But, for the reasons just discussed, congressional intent and statutory structure require that this provision be interpreted to permit different reductions for the advanced and total volume requirements. Indeed, the statute directs EPA to "ensure" that "at least" the specified amount of each category of renewable fuel is used.[88] Using the cellulosic waiver to reduce the advanced and total volume requirements by different amounts, so as to require the use of the reasonably attainable volume of each of those categories of fuel, accords with that directive.

B. Additional Conventional Renewable Fuel Volumes Are Reasonably Attainable

Were EPA to consider the issue, it would find that significant additional volumes of conventional renewable fuel are reasonably attainable in 2020. In a docket memorandum, EPA assumes that the industry could achieve the same poolwide ethanol concentration it achieved in 2017: 10.13%.[89] This amounts to roughly 200 mil gal of incremental ethanol beyond what would occur if the market sold solely E10 (which would happen even without an RFS program).[90] Simply assuming that the market would reach what it happened to reach three years before fails to account for significant changes in the market since then, as well as the potential for further growth occurring both for reasons independent of the RFS program and potentially as a result of adequate price signals sent through a higher total volume requirement.

In 2017, there were only about 1,050 E15 stations and 3,300 E85 stations.[91] Yet in assessing the reasonably attainable volume of ethanol in 2020, EPA ignores its own assumption that there are 1,289 E15 stations and 3,711 E85 stations,[92] as well as more current data Growth Energy has provided indicating that there are actually about 1,800 E15 stations and 4,300 E85 stations.[93] EPA also ignores that these stations have enormous untapped distribution capacity,

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[87] § 7545(*o*)(7)(D)(i).

[88] § 7545(*o*)(2)(A)(i).

[89] 2020 Market Impacts Memo at 5.

[90] *Id.*

[91] David Korotney, "Market impacts of biofuels" ("2018 Market Impacts Memo"), at 3-4 (Nov. 27, 2017), EPA-HQ-OAR-2017-0091-0024.

[92] 2020 Market Impacts Memo at 3.

[93] *See Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations* ("RVP Rule"), 84 Fed. Reg. 26,980, 26,986 n.31 (June 10, 2019).

though EPA previously recognized that.[94] If EPA were to set an appropriately higher total volume requirement, it could incentivize the delivery and consumption of substantial additional volumes of E85 and E15 through that capacity.[95] Higher volume requirements could also incentivize further expansion of E85 and E15 delivery capacity and attendant consumption; this expansion could occur quickly and for relatively low cost through the ordinary infrastructure replacement cycle.[96] Further, EPA ignores the strong incentive to expand the use of E15 created by its recent decision to allow E15 to be sold year-round.[97]

Alternatively, the market could comply with a higher total volume requirement by drawing down the bank of carryover RINs. As noted above, that bank likely contains approximately 3.5 billion RINs after accounting for the recently issued 2018 small refinery exemption extensions.[98] And that does not account for the additional exemption extensions likely to be granted for 2019, which are likely to enlarge the RIN bank.

EPA asserts, however, that in "setting the 2020 volume requirements," it should not "envision an intentional drawdown in the bank of carryover RINs."[99] Because, as just explained, there is a substantial amount of reasonably attainable additional volumes of ethanol, reducing the

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[94] Growth Energy 2019 Comment at 42-45; Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2017 and Biomass-based Diesel Volume for 2018 ("Growth Energy 2017 Comment"), at 28-37 (July 11, 2016) (attached as Exhibit 9), EPA-HQ-OAR-2016-0004-3499.

[95] Growth Energy 2019 Comment at 42-45; Growth Energy 2017 Comment at 6-16, 22-37; *Monroe Energy*, 750 F.3d at 917 ("The volume[requirements] provide an incentive for continued investment and innovation."). As Growth Energy has explained, the RFS has never been set at levels that require substantial use of E85 or E15. Growth Energy has submitted several expert analyses showing how the market can be expected to react if and when standards are set high enough. Growth Energy 2019 Comment at 42-43.

[96] Growth Energy 2019 Comment at 42-45; Growth Energy 2017 Comment at 28-37.

[97] RVP Rule. Nor is there a meaningful limitation on the supply of ethanol. More than 1 bil gal of conventional ethanol have been exported in each of the past few years—1.7 bil gal last year. *See* Energy Information Administration, "Petroleum & Other Liquids," "Exports by Destination," https://www.eia.gov/dnav/pet/pet_move_expc_a_EPOOXE_EEX_mbbl_a.htm. Given better incentives through a higher total volume requirement, some or all of those gallons could be redirected back into the domestic market for use in the RFS program. And, as a recent and thorough analysis by Stillwater Associates finds, conventional ethanol production in 2020 is expected to be able to exceed 2017 production by about 3.4 bil gal (or about 0.4 bil gal above the 2019 level) without increasing corn acreage beyond what it was in 2007 or disproportionately diverting corn away from food and other non-ethanol uses. Stillwater Associates LLC, *The RFS Reset: A Look at Corn Land Use and Conventional Ethanol Production* 26-27 & Table 4 (Aug. 30, 2019) (attached as Exhibit 10).

[98] *Supra* pp.7-8.

[99] 2020 NPRM at 36,768.

cellulosic waiver of the total volume requirement does not necessarily envision a drawdown of the bank. In any event, EPA's conservationist position toward the RIN bank is seriously misguided.

EPA asserts that maintaining the bank "provid[es] obligated parties compliance flexibility" and "provid[es] a liquid and well-functioning RIN market upon which success of the entire program depends."[100] EPA explains: "Just as the economy as a whole functions best when individuals and businesses prudently plan for unforeseen events by maintaining inventories and reserve money accounts, we believe that the RFS program functions best when sufficient carryover RINs are held in reserve for potential use by the RIN holders themselves, or for possible sale to others that may not have established their own carryover RIN reserves."[101]

EPA's homespun economic reasoning disregards Congress's intent and the statute's structure. EPA's reasoning ignores the fact that Congress designed the RFS program for the specific purpose of forcing the market to use more renewable fuel. Having a reserve may be useful or prudent in some contexts, but as explained above, given the size of the bank relative to the total volume requirements that EPA has been setting or proposing recently, it is a significant drag on growth.[102] Congress gave EPA no power to decide what a reasonable or stable transportation fuel market looks like or to manage the market to reflect EPA's policy preferences. EPA's reasoning fails to account for the fact that Congress provided a variety of compliance flexibilities: a waiver due to "inadequate domestic supply"; a waiver due to "severe[]" economic or environmental harm; a waiver due to a shortfall in projected production of cellulosic biofuel; the option to carry a deficit forward; extending exemptions due to "disproportionate economic hardship" (properly understood); and tradeable credits.[103]

True, *ACE* upheld EPA's refusal to adjust the 2016 volume requirements to account for the carryover RINs available then. But *ACE* did not give EPA carte blanche to maintain the bank at any size. First, the "key question" resolved in *ACE* was confined to the general waiver: "When evaluating the available 'supply' of renewable fuel for purposes of the 'inadequate domestic supply' waiver provision, must EPA consider carryover RINs as a supply source of renewable fuel?"[104] The D.C. Circuit concluded that "the text of the 'inadequate domestic supply' waiver provision … control[led its] analysis … [a]nd that text does not reference carryover RINs as a source of supply of renewable fuel."[105] The court's resolution of that

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[100] *Id.* at 36,767.

[101] *Id.*

[102] *See supra* Part II; Edgeworth Economics at 10-11.

[103] § 7545(*o*).

[104] *ACE*, 864 F.3d at 714.

[105] *Id.*

narrow question does not bear on how EPA should account for the RIN bank when exercising a distinct waiver power, namely, the cellulosic waiver.

Second, "[b]road as [EPA's] discretion is, [it] may not act arbitrarily or irrationally."[106] Nor may it "entirely fail[] to consider an important aspect of the problem" or "offer[] an explanation for its decision that runs counter to the evidence."[107] The 2020 NPRM does not meet this standard. Not only does EPA fail to offer a cogent explanation for why it cannot use a lesser cellulosic waiver for the total volume requirement than for the advanced volume requirement, but also the 2020 NPRM contains no explanation or justification whatsoever for why the RIN bank should be maintained *in full* or at any particular size. EPA does not even consider whether to set the volume requirements so as to *partially* draw down the bank. That is particularly deficient given the outsize effect that EPA's small refinery exemption policies are having on the RIN bank, RIN prices, and the efficacy of the RFS program.[108] With D6 RIN prices at about $0.10, there is clearly ample room to reduce the size of the bank without raising RIN prices to historically high levels.

EPA has repeatedly said that in assessing how much to flow a cellulosic waiver through to the advanced and total volume requirements, it "would evaluate the issue on a case-by-case basis considering the facts in future years."[109] Yet every year EPA simply claims, with little discussion and no meaningful evidence, that all the carryover RINs should be preserved, without recognizing the demand that the bank is destroying and without even hinting at what size bank is needed for it to adequately serve as a "buffer" in light of the other available compliance flexibilities.[110] If EPA will not provide a more careful and cogent analysis of the appropriate size of the bank under the current circumstances, it will be clear that its promise to undertake a case-by-case analysis of the bank is empty and that it has impermissibly adopted a policy of refusing to exercise its discretion.

C. EPA Must Address This Issue in This Rulemaking

Because EPA in this rule is proposing to exercise its cellulosic waiver authority—and proposing to use that waiver to also reduce the total renewable fuel volume requirement—EPA's refusal to even consider backfilling with conventional renewable fuel falls squarely within the scope of this rulemaking.

To whatever extent EPA may have believed it appropriate not to backfill with conventional renewable fuel in the past, circumstances have changed considerably: the bank is at historic highs because of EPA's inappropriate practices regarding small refinery exemptions,

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[106] *Sang Seup Shin v. INS*, 750 F.2d 122, 125 (D.C. Cir. 1984).

[107] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[108] *See supra* Part II.

[109] 2020 NPRM at 36,767.

[110] Edgeworth Economics at 10-11 (explaining how the bank has thereby become a "ratchet").

which have undermined the RFS program's ability to serve its statutory purpose. It is therefore untenable for EPA to continue its prior approach without careful consideration of the issue.

V. ON REMAND FROM *AMERICANS FOR CLEAN ENERGY*, EPA MUST REQUIRE OBLIGATED PARTIES TO SUBMIT ADDITIONAL RINS AS IF EPA HAD NOT ERRONEOUSLY WAIVED THE 2016 TOTAL VOLUME REQUIREMENT

The 2020 NPRM offers EPA's first response to the decision in *ACE*: "retain the original 2016 total renewable fuel standard."[111] That is, EPA proposes to *do nothing*, as if the D.C. Circuit had not vacated the 500-million RIN general waiver on which EPA originally based that standard. It should go without saying—but apparently must be said—that EPA is required to comply with the decision in *ACE* and remedy its adjudicated legal error. Specifically, EPA must increase one or more future total volume requirements, including the 2020 total volume requirement addressed by the 2020 NPRM, by 500 million to make up for the erroneous waiver. That would fulfill EPA's legal duties while avoiding any supposed retroactive burden. EPA's proffered reasons for rejecting any remedy are hand-waving.

A. On Remand, EPA Must Remedy the Error Found in *ACE* by Requiring Obligated Parties to Make Up the Erroneously Waived Volume

On remand, EPA must require obligated parties to make up the erroneously waived volume by submitting the number of RINs they would have had to submit absent the erroneous general waiver. That would fulfill EPA's twin duties to comply with *ACE* and to "ensure[]" that the *valid* volume requirements "are met."[112]

First, EPA must comply with *ACE*. The D.C. Circuit's decision in *ACE* clearly rejected EPA's initial decision to use the general waiver to reduce the 2016 total volume requirement by 500 million RINs. The court "vacate[d] EPA's decision to reduce the total renewable fuel volume requirements for 2016 through use of its 'inadequate domestic supply' waiver authority, and remand[ed] the rule to EPA for further consideration in light of [its] decision."[113] EPA is now "without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion" rendered in *ACE*.[114]

Second, as always, EPA must fulfill its "'statutory mandate' to 'ensure[]' that [the] volume requirements are met."[115] Consistent with *ACE*, the relevant volume requirements are *legally valid* ones, not the now-invalid total volume requirement that EPA originally set for 2016. The only legally valid total volume requirement for 2016 is the original volume

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[111] 2020 NPRM at 36,788.

[112] § 7545(*o*)(3)(B)(i).

[113] *ACE*, 864 F.3d at 696-697.

[114] *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977); *accord U.S. Postal Serv. v. Postal Regulatory Comm'n* ("*PRC*"), 747 F.3d 906, 910 (D.C. Cir. 2014).

[115] *ACE*, 834 F.3d at 698-699 (quoting § 7545(*o*)(3)(B)(i)).

requirement EPA set plus 500 million RINs—the amount covered by the erroneous general waiver.

Together, these two obligations mean that, on remand, EPA must ensure that the obligated parties submit for compliance the number of RINs they would have been required to submit had EPA not invalidly used its general waiver to reduce the 2016 total volume requirement.

B. EPA Should Remedy Its Erroneous 2016 Waiver by Increasing Future Total Volume Requirements by a Commensurate Amount

An appropriate way for EPA to remedy its erroneous 2016 500-million RIN general waiver is to supplement one or more future total volume requirements with an additional 500-million RIN requirement, which obligated parties could meet using the same RINs they could use to meet the regular requirement—current-year RINs, RINs carried over from the prior year, and subsequent-year RINs (via a deficit carryover). Another federal agency agrees, having told EPA that it "should incorporate the *ACE* remand over three years."[116] For purposes of this comment, it is generally assumed that only the 2020 volume requirement would be supplemented, but a similar analysis would apply if EPA were to spread the supplementation across two or more years.

In the 2020 NPRM, EPA considers but rejects this supplementation remedy (as well as two other possible remedies, which are not addressed in this comment).[117] EPA characterizes this remedy as a "[r]etroactive [s]tandard,"[118] which EPA may promulgate if it "reasonably balance[s] its statutory duties with the rights of the entities it regulates."[119] Purportedly "balanc[ing] the burden on obligated parties of a retroactive standard with the broader goal of the RFS program to increase renewable fuel use," EPA concludes that "imposing an additional obligation as a supplement to the 2020 standards and allowing compliance with 2019 and 2020 RINs" "would impose a significant burden on obligated parties, without any corresponding benefit."[120] EPA's analysis is meritless.

1. Supplementing the 2020 volume requirement to remedy the erroneous waiver would not entail retroactive rulemaking

To determine whether a law operates retroactively, "court[s] must ask whether the new provision attaches new legal consequences to events completed before its enactment."[121] A law "does not operate 'retrospectively' merely because it is applied in a case arising from conduct

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[116] Interagency Comments at 8 (PDF at p. 11).

[117] 2020 NPRM at 36,788-36,789.

[118] *Id.* at 36,788.

[119] *ACE*, 864 F.3d at 719.

[120] 2020 NPRM at 36,788-36,789.

[121] *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269-270 (1994).

antedating the statute's enactment or upsets expectations based in prior law."[122] Indeed, a law may be "prospective" even though it "may unsettle expectations and impose burdens on past conduct," e.g., "a new property tax."[123]

Increasing the 2020 total volume requirement to remedy the erroneous 2016 waiver would not be an instance of a retroactive rule. It would not impose any obligation on an entity for actions it took in 2016. Instead, it would increase RFS obligations based on future actions, namely, the conduct of entities *in 2020* that qualified them as obligated parties *in 2020*.

This approach would not unsettle expectations held by entities that qualify as obligated parties in 2020. Because the supplemental volume requirement would be finalized before 2020, potentially affected entities would be able to predict their 2020 compliance obligations in advance of 2020 and therefore could plan and structure their 2020 conduct accordingly. Moreover, obligated parties have had plenty of time to get ready. As soon as *ACE* issued two years ago, every obligated party was on notice that it might be required to make up the erroneously waived volume. EPA itself reinforced that notice in January 2018, when it announced that, in remedying its error on remand from *ACE*, "it would be appropriate" for EPA to allow obligated parties to "use … current-year RINs (including carryover-RINs) to satisfy further obligations … for a past compliance year that may result from the … remand," thereby obviating the need for entities "to retain 2016 RINs that they would otherwise retire for 2017 compliance."[124] That announcement made clear that obligated parties might face a supplemental RIN requirement in the future to remedy EPA's 2016 error.

In sum, as an interagency commenter put it, remedying the 2016 error by supplementing the 2020 volume requirement would "deal[] with the remand in a prospective fashion;"[125] it would not be a retroactive standard.[126]

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[122] *Id.* at 269 (citation omitted).

[123] *Id.* at 269 n.24.

[124] EPA, EnviroFlash Announcements about EPA Fuel Programs (Jan. 12, 2018) ("RFS 2017 Annual Compliance deadline") (attached as Exhibit 11), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/enviroflash-announcements-about-epa-fuel-programs#compliance-deadline.

[125] Interagency Comments at 8 (PDF at p.11).

[126] *See Monroe Energy*, 750 F.3d at 920 (expressing skepticism at applying "the 'retroactivity' label" to an increased volume requirement intended to make up for prior year's rulemaking delay where "EPA finalized its standards during the compliance year, well before the compliance demonstration deadline, so the rule did not change the legal effect of a completed course of conduct").

2. The standard for retroactive rulemaking does not constrain curative actions on remand

Even if the supplementation remedy would operate retroactively, EPA would have no authority to consider the resulting "burden" of compliance because the standard governing retroactive rulemaking does not apply where the need for retroactivity arises solely because the agency is acting on remand to cure an adjudicated substantive error it committed in a previously issued rule.

True, the D.C. Circuit has applied the standard for retroactive rulemaking when EPA has imposed an RFS volume requirement for an already-past year.[127] But those occasions for retroactivity arose solely "by reason of *the lateness*" of EPA's rulemaking.[128] That is irrelevant here.

When a court holds that an agency action was "substantively unreasonable" or otherwise substantively invalid, as the D.C. Circuit did in *ACE*, it "generally means that, on remand, the agency must exercise its discretion differently and reach a different bottom-line result" from the invalidated decision.[129] *This* discretion is far narrower than the discretion EPA may ordinarily enjoy in deciding whether to promulgate a retroactive rule due to its own lateness.[130] The only reason there is even occasion to issue a retroactive rule here is that EPA's original rule was substantively invalid. An agency should not be able to acquire discretionary power by initially taking an illegal action.

Indeed, because of the short-term duration of any RFS volume requirement—one year—it is certain that *anytime* a court invalidates a volume requirement, EPA will be in the position of remedying its adjudicated error after the covered compliance year is over. If EPA could decline to remedy the adjudicated error because of concern about the burden of compliance, EPA would *never* remedy an erroneous reduction in an RFS volume requirement and thus EPA could "effectively nullif[y]" any judicial decision that a regulation is "invalid"—something EPA clearly lacks authority to do.[131]

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[127] *ACE*, 864 F.3d at 718.

[128] *Id.* (emphasis added).

[129] *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 936 (D.C. Cir. 2017).

[130] *See American Petroleum Inst. v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990) (per curiam) ("[T]he scope of the agency's interpretative discretion on remand is far from unbounded.").

[131] *In re Core Commc'ns, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008); *accord In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 837-838 (D.C. Cir. 2012).

3. A supplemental volume requirement would be appropriate under the standard for retroactive rulemaking

EPA may promulgate a retroactive rule if it "reasonably balance[s] its statutory duties with the rights of the entities it regulates" and, if needed, "mitigate[s] any hardship caused to obligated parties."[132] Under this standard, it would be reasonable and appropriate for EPA to supplement the 2020 total volume requirement on remand from *ACE*. EPA's rejection of this approach is based on an unreasonable assessment of this approach's effects.

As discussed above, supplementing the 2020 volume requirement would serve EPA's statutory duty to "ensure" that the volume requirements "are met."[133] It would also serve the RFS program's fundamental goal to promote growth in the production and use of renewable fuel. Through the RFS program, Congress "require[d] that increasing volumes of renewable fuel be introduced into the Nation's supply of transportation fuel each year … [to] increase the production of clean renewable fuels."[134] Even though raising the 2020 volume requirement cannot lead to additional production and use of renewable fuel in 2016, it can lead to additional production and use in 2020 or later years. That Congress conceived the RFS program as an integrated, multi-year undertaking rather than a series of discrete annual requirements is evident in various features of the program, including that the statutorily specified volume requirements increase annually and that RIN surpluses and deficits can be "carried" into the next year. Over the entire arc of the program, making up the erroneously waived volumes in a later year is better than not making them up at all because delayed makeup still promotes higher overall use of renewable fuels.

Indeed, both EPA and the D.C. Circuit have recognized that making up one year's required volumes by adding them to a later year's volume requirement best fulfills what "Congress expected and intended."[135] EPA did not issue the 2009 volume requirements on schedule, but because Congress was "focus[ed] on ensuring the annual volume requirement[s are] met regardless of EPA's delay,"[136] EPA "combined" the 2009 and 2010 volume requirements "into a single requirement" to "ensure that … two years' worth of [biofuel] will be used."[137] The D.C. Circuit upheld that approach (without according EPA any *Chevron* deference), finding that it satisfied EPA's statutory duty to "ensure" that the volume requirements "are met."[138] Indeed, the court declared that *not* requiring that the 2009 volume of

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[132] *ACE*, 864 F.3d at 718-719.

[133] *Supra* pp.22-23.

[134] *ACE*, 864 F.3d at 697.

[135] RFS2 Summary and Analysis of Comments 3-186-188 (PDF pp.238-240) (Feb. 2010), https://nepis.epa.gov/Exe/ZyPDF.cgi/P1007GC4.PDF?Dockey=P1007GC4.PDF.

[136] *NPRA*, 630 F.3d at 163.

[137] *Regulation of Fuels and Fuel Additives: Changes to the Renewable Fuel Standard Program*, 75 Fed. Reg. 14,670, 14,718 (Mar. 26, 2010) (to be codified at 40 C.F.R. pt. 80).

[138] *NPRA*, 630 F.3d at 153 n.23, 155-156, 158.

renewable fuel be "eventually" used would have been "'flatly contrary to Congress' intent and would turn agency delay into a windfall for the regulated entities.'"[139] EPA used the same approach in belatedly issuing 2013 volume requirements, and the D.C. Circuit again affirmed, stressing "Congress' focus on ensuring the annual volume requirement was met regardless of EPA delay."[140]

Furthermore, this approach would not cause any hardship to obligated parties because, as discussed above, they have had ample notice that EPA could adopt such a remedy.[141] In any event, compliance hardship would be mitigated by the sizeable carryover RIN bank. EPA acknowledges that "there would likely be sufficient RINs to comply with an additional 500 mil gal standard."[142] That is likely an understatement, given that the bank currently stands at about 3.5 billion RINs and could well increase after EPA grants small refinery exemption extensions for 2019.[143] Obligated parties would need less than 15% of these carryover RINs to comply with a supplemental 500-million RIN requirement. Because "obligated parties [would have] adequate lead time and access to a sufficient number of RINs to comply with the delayed requirement," it would be, as the D.C. Circuit has said, entirely "reasonable" for EPA to remedy the *ACE* error by imposing a supplemental requirement.[144]

In EPA's view, however, a supplemental obligation "is unlikely to incent significant new biofuel generation in 2020"; "[i]nstead, it would likely lead to a significant draw-down of the carryover RIN bank," which, according to EPA, is "not … appropriate."[145] That reasoning is flawed in several ways.

a. Whether a supplemental requirement in 2020 would incentivize new biofuel generation *in 2020* is not the essential question. As just explained, the RFS program is an accumulative program spanning many years. Even if obligated parties complied with a supplemental requirement in 2020 by drawing down the bank, that would still promote additional biofuel generation in future years by reducing the carryover RINs available for compliance.

In any event, it is not necessarily correct that raising the 2020 total volume requirement would lead to a 500-million RIN drawdown from the bank. As explained above, the market has ample ability in response to adequate RFS signals to generate an additional 500 million RINs in 2020, whether by redirecting some renewable fuel into the domestic market that would otherwise be exported, increasing the use of renewable fuel, or a combination of the two.[146] Moreover,

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[139] *Id*. at 156-157 (quoting EPA brief).

[140] *Monroe Energy*, 750 F.3d at 916, 919-921.

[141] *Supra* p.24.

[142] NPRM at 36,789.

[143] *Supra* pp.7-8.

[144] *ACE*, 864 F.3d at 718.

[145] 2020 NPRM at 36,789.

[146] *Supra* pp.18-19 & n.97.

EPA concedes that its basis for limiting its calculation of reasonably attainable BBD is its concerns about feedstock switching and costs,[147] but to whatever extent EPA may have discretion to consider those factors under its cellulosic waiver authority, it has no such discretion when complying with a court mandate to correct a prior legal error. (If EPA were still concerned about the market's ability to increase RIN generation by 500 million in 2020, EPA could spread the 500 million supplemental requirement over a few years, as proposed by an interagency commenter.)

b. If the supplemental requirement did result in a drawdown of the RIN bank, that would also be appropriate. EPA's refusal to countenance a drawdown contravenes *ACE*, where, as just noted, the court deemed the potential for a bank drawdown an appropriate cushion for any hardship stemming from compliance with a retroactive standard, not, as EPA now suggests, the source of a compliance hardship.[148]

EPA's insistence on maintaining the bank is also unfounded, for multiple reasons. First, EPA has no discretion to manage the size of the RIN bank in this context. In the 2020 NPRM, EPA's view that it would be inappropriate to plan for a bank drawdown is developed not in the context of how to respond to *ACE* on remand, but rather in the context of determining "how or whether EPA should consider the availability of carryover RINs in exercising [its] statutory authorities," particularly, "in exercising [its] cellulosic waiver authority."[149] Whatever discretion EPA may have to manage the size of the bank when exercising its cellulosic waiver authority is irrelevant in this context. Here, EPA would not be using its cellulosic waiver power. Rather, EPA is called upon to remedy the erroneous 2016 general waiver on remand from *ACE*.[150]

Second, in any event, EPA has not provided a valid or coherent basis to refuse to draw down the RIN bank in order to remedy its erroneous 2016 general waiver. As explained above, EPA's insistence on maintaining the bank under current conditions is irrational and unjustified.[151] And that is even more true in the context of the remand: EPA has not shown how drawing down the carryover RIN bank by up to 500 million RINs (depending on how many new RINs are generated) would inflict a cognizable "hardship" or "burden" on any obligated party so as to allow it to evade its obligation under *ACE* and the statute to ensure the 2016 requirement is met. According to EPA, the reason for maintaining the bank as-is is to provide a "programmatic buffer that both facilitate[s] individual compliance and provide[s] for smooth overall functioning of the program."[152] Thus, the bank's value, as EPA describes it, is generalized and speculative.

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[147] 2020 NPRM at 36,787.

[148] *ACE*, 864 F.3d at 718.

[149] 2020 NPRM at 36,767-36,768; *see id.* at 36,789.

[150] For the same reason, it is also irrelevant that EPA may have discretion not to "consider carryover RINs as a supply source of renewable fuel" for purposes of the "inadequate domestic supply" general waiver. *ACE*, 864 F.3d at 713.

[151] *Supra* pp.19-21.

[152] 2020 NPRM at 36,768.

EPA cites no evidence that reducing this theoretical cushion designed to protect the entire market against an event that has never occurred and is highly unlikely to occur in 2020 would actually hurt any obligated party in 2020.[153] And even if a bank drawdown could theoretically cause a hardship, it is exceedingly unlikely to do so as part of remedying the *ACE* error because, again, a 500-million RIN drawdown would, at most, reduce the bank by less than 15%.

VI. EPA'S METHODS FOR PROJECTING CELLULOSIC BIOFUEL PRODUCTION ARE IMPERMISSIBLY BIASED AGAINST GROWTH

EPA projects that liquid cellulosic biofuel production in 2020 will not grow at all compared to its projection for 2019—both 20 mil gal.[154] EPA's own misguided actions have played a significant role in hindering the industry's growth.

One principal impediment to greater growth is EPA's obstruction of the regulatory approval process. EPA has effectively ceased granting applications to register plants to generate D3 RINs. EPA's recently issued and substantively unreasonable guidance for determining the converted fraction of co-processed corn kernel fiber greatly exacerbates the problem.[155] EPA has refused to approve not only new pathways—such as POET's BPX process and D3Max's wetcake monomeric process—but also registrations of plants that propose to use already-approved pathways—such as the many unregistered Edeniq plants seeking to use its already-approved "in situ" pathway. Once approved, these pathways could rapidly ramp up production and generate dozens of millions of additional D3 RINs from cellulosic ethanol in 2020—and hundreds of millions of additional D3 RINs in subsequent years.

The other principal impediment is extremely low D3 RIN prices reflecting cellulosic biofuel volume requirements that are too low. Between late 2017 and today, D3 RIN prices have fallen steadily from about $3.00 to about $0.50, decimating the incentive to make necessary investments in greater production of cellulosic biofuel.[156] To a significant degree, low D3 RIN prices are the result of the same EPA practices that have undermined the total renewable fuel volume requirement and the RFS program as a whole: low volume requirements and extremely high volumes of unremedied small refinery exemptions, which have inflated the RIN bank and substantially reduced the pressure on the industry to produce and use cellulosic biofuel.[157] The precipitous decline in D3 RIN prices since late 2017 coincides with EPA's radical increase in

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[153] *See Natural Res. Def. Council v. Thomas*, 838 F.2d 1224, 1250-1251 (D.C. Cir. 1988) (asserted retroactive burden was too speculative).

[154] 2020 NPRM at 36,774; 2019 Rule at 63,717.

[155] EPA, *Guidance on Qualifying an Analytical Method for Determining the Cellulosic Converted Fraction of Corn Kernel Fiber Co-Processed with Starch* (May 2019), EPA-HQ-OAR-2019-0136-0055.

[156] *See, e.g.*, Comment of POET-DSM on 2020 NPRM (Aug. 2019).

[157] *See supra* Part II.

extending small refinery exemptions and its 9% under-projection of cellulosic biofuel production for 2018.[158]

Particularly in this environment, EPA's methods for projecting cellulosic biofuel production are fundamentally flawed because of two mutually reinforcing features: they tie projections to past performance and they ignore the dynamic nature of the exercise—the volume requirement that EPA sets affect the production. For example, EPA's method for projecting the production of liquid cellulosic biofuel has three explicit components: low and high ends of a range of possible production and a percentile applied to that range.[159] Two of these components are entirely historical: the low end of the range is the prior year's actual production and the percentile is the average of the prior years' actual percentiles.[160] The fourth component of EPA's method is implicit but no less integral: the assumption that the production will occur independent of the volume requirement that EPA sets. The result is an inescapably conservative and history-bound projection.

EPA's historically focused method creates a vicious circle: Because EPA grants many small refinery exemptions without requiring that they ever be made up, the volume requirement it sets for that year is not the one that is actually enforced and production is correspondingly lower than it could and should have been. Then that artificially reduced production volume becomes the basis for the next year's projection, which will again not be met because of additional unremedied small refinery exemptions, and so on. In fact, because the percentiles that EPA uses to project liquid cellulosic biofuel are an average of all prior years' actual percentiles (starting with 2016), the effects of the environment that has led to suppressed cellulosic production in recent years will continue to function as a drag on production in future years under EPA's projection method.[161] EPA's methods for projecting the production of cellulosic biofuel, therefore, do not comport with its duty to "take 'neutral aim at accuracy.'"[162] Particularly in light of the current, demand-suppressing environment that is largely a product of EPA's own

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[158] *See id.*; 2020 NPRM at 36,770-36,771.

[159] 2020 NPRM at 36,773-36,774.

[160] *Id.*

[161] *See Id.* at 36,774. Additionally, tying production projections to past performance is inappropriate for a nascent and rapidly changing industry. In a nascent industry like this, constraints on production, whether a matter of technology, economics, or regulation, can change quickly and have an outsize influence on results. *Cf. 2019 Response to Comments* at 50 ("We recognize that in some cases, the production technologies expected to be employed by potential producers of cellulosic biofuel in 2018 differ from the technologies used by potential producers of cellulosic biofuels in previous years.").

[162] *ACE*, 864 F.3d at 727 (quoting *American Petroleum Institute v. EPA ("API")*, 706 F.3d 474, 476 (D.C. Cir. 2013)).

making, EPA's projection methods systematically "disfavor[] growth in the cellulosic biofuel industry."[163] That is impermissible.

EPA could improve the situation by adjusting the cellulosic volume requirement to account for past and future retroactive extensions of small refinery exemptions, as discussed above.[164] An interagency reviewer concurred: EPA's "failure to incorporate a projection for waived gasoline and diesel volumes from small refinery waiver ensures that [its] analysis in setting the cellulosic RVO is not 'neutral,'" but rather "biased to one side, lower."[165]

EPA's projection methods themselves are also biased. As EPA correctly acknowledges, what it must take neutral aim at accurately forecasting is the "likely cellulosic biofuel production" or "expected growth in the near future."[166] And as EPA also correctly acknowledges, RIN prices, which are a function of the effective RVOs, drive production: EPA has observed that liquid cellulosic production is "generally dependent on a high RIN value to produce fuel economically,"[167] and more generally "higher required volumes for cellulosic biofuels have a positive impact on the market opportunities for producers of these fuels, as well as parties seeking to develop projects capable of producing cellulosic biofuel."[168] Unfortunately, EPA has not put these pieces together in crafting its projection methods. EPA claims that its approach "reflects a neutral aim at accuracy since it accounts for expected growth in the near future by using historical data that is free of any subjective bias."[169] But *subjective* bias is not all that is prohibited; whatever EPA's *motives*, its methods must not "systematically" "'tilt'" for or against "growth."[170] And EPA cannot accurately predict the likely production or expected growth as long as it tries to project production without considering RIN prices during the relevant period and thus without considering the practical effect of the very cellulosic volume requirement it is called upon to set.

To properly take neutral aim at accurately projecting the likely production or expected growth of cellulosic biofuel, EPA must account for the dynamic nature of the market, that is, that the market will respond to the price signals created by the RFS volume requirements EPA sets, and thus for the effect of its volume requirement in light of unremedied small refinery exemptions, the carryover RIN bank, and other regulatory factors affecting demand and

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[163] *Id.*

[164] *Supra* Part II.

[165] Interagency Comments at 1 (PDF at p.4).

[166] 2020 NPRM at 36,771, 36,775.

[167] *Id.* at 36,771.

[168] *2019 Response to Comments* at 36.

[169] 2020 NPRM at 36,770-36,771.

[170] *ACE*, 864 F.3d at 727 (quoting *API*, 706 F.3d at 478).

compliance.[171] More concretely, projecting likely production means that EPA should identify the point where, in light of all relevant factors, the marginal gallon of cellulosic biofuel becomes *unlikely* to be produced despite the incentives created by the volume requirement. Put another way, EPA should inquire whether, if it sets the cellulosic volume requirement at a particular level, an additional gallon is likely or unlikely to be produced, and then set the volume requirement at the point where the marginal gallon changes from likely to unlikely. To reach that inflexion point, EPA will undoubtedly have to raise the proposed volume requirement to mitigate the effects of its demand-suppressing practices, such as massive unremedied small refinery exemptions and a huge RIN bank. If EPA needs to collect additional business information from individual producers so that it can evaluate how D3 RIN prices are likely to affect their production, Growth Energy stands ready to assist EPA.

Although this approach would surely result in higher volume requirements and presumably more rapid growth in cellulosic production, it would not run afoul of the command that EPA's method not "favor … growth."[172] In issuing that command, the D.C. Circuit did not mean that EPA could not envision growth or that the volume requirement could not be used to incentivize growth. That extreme view would be at odds with the court's recognition that, "[i]n establishing the RFS program, Congress made commercial production of cellulosic biofuel … central to the program's objective of reducing greenhouse gas emissions"—a centrality reflected in the rapidly increasing statutory schedule of cellulosic volume requirements.[173] If all Congress intended EPA to do was set the cellulosic requirement to what the market would do if the RFS program did not exist, then the RFS program would be pointless. As the D.C. Circuit has explained, the "neutral aim" standard simply bars EPA from "adopt[ing] a methodology in which the risk of overestimation is set deliberately to outweigh the risk of underestimation."[174] That is, in the face of uncertainty, EPA may not err on the side of an "aspirational" projection—an unlikely but optimistic outcome—any more than it may err on the side of an unlikely but pessimistic one.[175] Growth Energy does not ask EPA to be a cheerleader for the cellulosic industry. Rather, it asks EPA to take a dispassionate, realistic view of how much cellulosic biofuel is likely to be produced, but doing so in light of a fuller picture of the factors affecting production and EPA's ability to adjust some of the most significant of those factors.

Finally, EPA asserts that cellulosic RIN prices, "which averaged $2.25 per RIN in 2018, [are] high relative to the fuel value for all types of cellulosic biofuels" and are "unlikely to change in 2020."[176] That is a bizarre claim that must not stand in the way of adopting the approach proposed here by Growth Energy. As noted above, D3 RIN prices have fallen

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[171] *See Monroe Energy*, 750 F.3d at 917 ("'[T]he volume[requirements] provide an incentive for continued investment and innovation.").

[172] *ACE*, 864 F.3d at 727.

[173] *API*, 706 F.3d at 476.

[174] *Id.* at 479.

[175] *Id.* at 480.

[176] 2020 NPRM at 36,771.

dramatically since 2017 and currently are about $0.50. So, relevant factors have changed substantially, and it is highly dubious that D3 RIN prices are now "high relative to the fuel value,"[177] if they ever were. Indeed, there is no accepted understanding—and certainly EPA offers none—of what an appropriate price-to-value ratio is for D3 RINs. If EPA has a RIN price cap in mind, that would plainly be an unlawful and irrelevant constraint on EPA's ability to project likely cellulosic production and set the volume requirement accordingly.

VII. EPA CORRECTLY PROPOSES NOT TO EXERCISE THE GENERAL WAIVER

In the 2020 NPRM, EPA states that it does not believe circumstances exist to justify any reductions of the requirements under the general waiver authority, whether for "inadequate domestic supply" or "severe[] … harm" to the economy or the environment.[178] This conclusion is clearly correct, for all the reasons Growth Energy has provided in comments on prior rulemakings and discussed above in explaining how little pressure the proposed requirement will exert.[179] EPA has consistently and correctly declined to grant general waivers since *ACE*. There have been no changes warranting a different conclusion now, and EPA does not provide any basis to believe otherwise in the 2020 NPRM. Indeed, any claim to severe harm would be particularly frivolous given the size of the carryover RIN bank, the extremely low D6 RIN prices (currently about $0.10 notwithstanding EPA's proposal not to use a general waiver in 2020[180]), and the fact that, as explained above, the total renewable fuel volume requirement is nowhere close to binding.[181]

VIII. EPA SHOULD FINALIZE THE PUBLIC ACCESS PROVISION OF THE PROPOSED REGS RULE AND DISCLOSE ADDITIONAL INFORMATION RELATING TO EPA'S SMALL REFINERY EXEMPTION DECISIONS

EPA is "considering finalizing certain provisions of the proposed REGS rule with the final 2020 RVO rule," including the provision on "Public Access to Information (REGS Section

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[177] *Id.*

[178] *Id.* at 36,766-36,767.

[179] *Supra* Part II & Part IV.B; Growth Energy 2019 Comment at 28-49; Supplemental Comments by Growth Energy, Archer Daniels Midland Company, and Biotechnology Innovation Organization on EPA's Proposed Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, at 9-16 (Oct. 19, 2017) (attached as Exhibit 12), EPA-HQ-OAR-2017-0091-4886; Growth Energy 2018 Comment at 14-35, 42-43.

[180] Edgeworth Economics at 2.

[181] *See supra* Part II.

VIII.O)."[182] In that section, EPA proposed that, under the Freedom of Information Act ("FOIA"), it may not withhold certain basic information relating to petitions by small refineries to extend their exemption from compliance with their annual RFS obligations.[183] That information includes: "the petitioner's name, the name and location of the facility for which relief was requested, the general nature of the relief requested, the time period for which relief was requested, and the extent to which the EPA granted or denied the requested relief."[184] The proposed rule would also establish that, prior to EPA's final decision to grant or deny a small refinery exemption extension, EPA would publicly release all these categories of information except for "the extent to which the EPA granted or denied" the extension, since that decision would not have occurred yet.[185]

Growth Energy supports EPA's proposal. None of the information covered by EPA's proposal plausibly qualifies as exempt from disclosure under FOIA. The information is not confidential business information ("CBI") because, as EPA explained in the Proposed REGS Rule, the covered information is not "obtained from a person" within the meaning of FOIA.[186] Nor is the covered information—which simply identifies the fact of an exemption extension—"confidential" at all, and therefore it is neither protected as CBI nor protected by the deliberative process privilege.[187] EPA should not presumptively shield such information from mandatory FOIA disclosure.

Growth Energy further believes that EPA may not withhold additional categories of information in connection with its decisions on exemption extensions, including: (i) the specific standards EPA actually applied to decide whether to grant or deny the extension; (ii) EPA's final analysis of whether to grant or deny the extension; and (iii) if an extension is granted, the means by which EPA effectuated the extension, such as allowing the refinery to unretire RINs. Just like the information covered by EPA's proposal, these additional categories of information are not CBI or protected by the deliberative process privilege. Further, these categories of information constitute EPA's working law; failure to disclose them would illegally create a body of secret law.

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[182] 2020 NPRM at 36,798, 36,765; *see Renewables Enhancement and Growth Support (REGS) Rule* ("Proposed REGS Rule"), 81 Fed. Reg. 80,828 (Nov. 16, 2016). Growth Energy only comments on the portion of the Proposed REGS Rule's "Public Access to Information" section proposing to disclose certain basic information relating to small refinery exemptions. For convenience and readability, however, we use the Proposed REGS Rule as a shorthand to refer to that portion.

[183] Proposed REGS Rule at 80,909-80,910.

[184] *Id.* at 80,909.

[185] *Id.*

[186] *Id.*; *see* 5 U.S.C. § 552(b)(4).

[187] § 552(b)(4).

The adoption of Section VIII.O of the Proposed REGS Rule is long overdue. EPA first proposed this rule in 2016 but did not adopt it then. In the nearly three years since, EPA has granted vastly more small refinery exemption extensions than it ever had.[188] Yet, in the name of confidentiality, EPA has publicly disclosed only the aggregate number of extensions and renewable fuel volumes exempted despite numerous requests for further transparency,[189] and even refused to provide any specific information on the exemption extensions to members of Congress.[190] EPA appeared ready to adopt the Proposed REGS Rule again in April 2019, but inexplicably abandoned it once more.[191] Now is the time to finalize it. Not only does the law require disclosure of the information discussed here, but as EPA itself concedes, it would be "relatively straightforward and would reduce the burden of RFS program implementation" to finalize the Proposed REGS Rule with the 2020 RFS rulemaking.[192]

A. The Information Covered by the Proposal Is Not Plausibly Exempt from Mandatory Disclosure Under FOIA

FOIA mandates "broad disclosure of Government records" to the public[193] to "ensure an informed citizenry, vital to the functioning of a democratic society."[194] Although FOIA exempts certain information from mandatory disclosure, the Supreme Court has "consistently stated that FOIA exemptions are to be narrowly construed"[195] so that they "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of" FOIA.[196] Exemption 4 applies to "trade secrets and commercial or financial information *obtained from a person* and privileged or

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[188] *RFS Small Refinery Exemptions*.

[189] *See, e.g.*, Growth Energy FOIA Request (Apr. 9, 2018), EPA-HQ-2018-006398; Growth Energy FOIA Request (Apr. 12, 2018), EPA-HQ-2018-006524; Growth Energy FOIA Request (July 23, 2018), EPA-HQ-2018-009898; Growth Energy FOIA Request (Mar. 19, 2019), EPA-HQ-2019-004370; *see also* Growth Energy 2019 Comment at 17-22.

[190] Letter from Senator Charles E. Grassley, et al. to Administrator of EPA, Scott Pruitt, at 2 (Apr. 12, 2018) (attached as Exhibit 13), https://www.grassley.senate.gov/sites/default/files /Pruitt%20Small%20Refinery%20Letter%204.12.18.pdf; *see* Letter from Assistant Administrator of EPA, William L. Wehrum, to Senator Charles E. Grassley, at 1 (July 12, 2018) (attached as Exhibit 14).

[191] *See Renewables Enhancement and Growth Support (REGS) Rule* (Apr. 11, 2019), https://www.epa.gov/sites/production/files/2019-04/documents/sre-cbi-deter-notice-2019-04-11.pdf.

[192] 2020 NPRM at 36,765.

[193] *CIA v. Sims*, 471 U.S. 159, 166 (1985).

[194] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

[195] *DOJ v. Julian*, 486 U.S. 1, 8 (1988).

[196] *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *accord Milner v. Department of Navy*, 562 U.S. 562, 571 (2011) ("We have often noted '[FOIA's]… goal of broad disclosure' and insisted that the exemptions be 'given a narrow compass.'").

confidential,"[197] and Exemption 5 applies to information protected by the "deliberative process privilege."[198]

EPA's proposed rule would establish that certain basic facts relating to its decisions on small refinery exemption extensions are not CBI and therefore may not be withheld under Exemption 4.[199] The law clearly supports that because those facts are neither "obtained from a person" nor "confidential."[200] Further, the covered information is not plausibly protected by the deliberative process privilege, so there is no basis to withhold it under Exemption 5.[201] Moreover, even to the extent records are covered under Exemption 5, EPA should release them given their substantial importance to the well-functioning of the RFS program.[202]

1. The Information Covered by the Proposal Is Not Confidential Business Information

The information covered by EPA's proposal is not CBI for two reasons.

First, as EPA explained in the Proposed REGS Rule, the covered information is "inherently part of" EPA's decision and thus not "obtained from a person."[203] "[T]he extent to which the EPA granted or denied" a small refinery exemption extension is plainly information "generated by the government," rather than "obtained from a person."[204] And although the other covered categories of information—"the petitioner's name, the name and location of the facility for which relief was requested, the general nature of the relief requested, [and] the time period for which relief was requested"—might initially have been stated in the refinery's petition for an extension, they necessarily become part of EPA's "own analysis" in determining whether to grant or deny an exemption extension.[205]

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[197] 5 U.S.C. § 552(b)(4) (emphasis added).

[198] *Id.* § 552(b)(5).

[199] Proposed REGS Rule at 80,909.

[200] 5 U.S.C. § 552(b)(4).

[201] *Id.* § 552(b)(5).

[202] *See, e.g.*, Eric Holder, Attorney General, Memorandum for Heads of Executive Departments and Agencies re *The Freedom of Information Act* 1 (Mar. 19, 2009) ("an agency should not withhold information simply because it may do so legally").

[203] Proposed REGS Rule at 80,909 & nn.332, 333; *see* 5 U.S.C. § 552(b)(4).

[204] *Philadelphia Newspapers, Inc. v. Department of Health & Human Servs.*, 69 F. Supp. 2d 63, 66 (D.D.C. 1999); *see* Proposed REGS Rule at 80,909.

[205] *Center for Auto Safety v. U.S. Dep't of Treasury*, 133 F. Supp. 3d 109, 123 (D.D.C. 2015).

All small refineries were exempt from the RFS program under the Clean Air Act through 2010.[206] But after that, EPA could "exten[d]" an exemption only if certain statutory criteria are met.[207] As relevant here, EPA may grant an "extension" of a small refinery exemption upon a petition by a refinery showing that it will suffer "disproportionate economic hardship" if required to comply with its RFS obligations for a specified compliance year.[208] EPA evaluates that hardship "in consultation with the Secretary of Energy," and based on a study by the Department of Energy and "other economic factors."[209]

EPA cannot determine whether any of these requirements are met without the covered basic facts provided by the refinery, but EPA also does not at a merely "repeated verbatim or slightly modified" formulation of those basic facts.[210] Rather, EPA is statutorily obligated to use those facts to analyze whether the refinery is actually seeking an "extension" and will suffer "disproportionate economic hardship."[211] The covered basic information, in other words, becomes "the agency's information" when they are "substantially reformulated by" EPA in deciding whether to grant an exemption extension.[212]

EPA recognized as much in proposing to release the covered information before it reaches its final decision to grant or deny an extension petition.[213] EPA explained that those facts are "necessary to identify the nature and scope of" EPA's work and that "the matters" EPA has decided to undertake "reflect an EPA decision," which is "not 'obtained from a person.'"[214] Accordingly, once a small refinery petitions for an exemption extension, records containing the covered facts become EPA's information embodied initially in its work queue and eventually in its decision to grant or deny the petition based on its assessment of whether the refinery has met the requirements for the extension.

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[206] § 7545(*o*)(9)(A)(i); *see also id.* § 7545(*o*)(1)(K) (defining "small refinery" as "a refinery for which the average aggregate daily crude oil throughput for a calendar year … does not exceed 75,000 barrels").

[207] §§ 7545(*o*)(9)(A)(ii), (*o*)(9)(B).

[208] *Id.* § 7545(*o*)(9)(B)(i)-(ii).

[209] *Id.* § 7545(*o*)(9)(B)(ii); *see generally Hermes Consol., LLC v. EPA*, 787 F.3d 568, 574-579 (D.C. Cir. 2015) (discussing EPA's interpretation of "disproportionate economic hardship" and related financial analyses).

[210] *Center for Auto Safety*, 133 F. Supp. 3d at 123; *see also Philadelphia Newspapers*, 69 F. Supp. 2d at 67.

[211] § 7545(*o*)(9)(B)(i)-(ii).

[212] *Center for Auto Safety*, 133 F. Supp. 3d at 123.

[213] Proposed REGS Rule at 80,909.

[214] *Id.* at 80,909-80,910.

Second, even if "obtained from a person," the information covered by the proposal is not "confidential."[215] In *Food Marketing Institute v. Argus Leader Media*, the Supreme Court held that information is "confidential" under Exemption 4 "[a]t least" where the information is "both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy."[216] The first condition, the Supreme Court noted, was mandatory.[217] The term "confidential" means "'private' or secret,'" and "it is hard to see how information could be deemed confidential if its owner shares it freely."[218] (The Court did not resolve whether the second condition is also required for information to be deemed confidential.[219])

The covered information is not "customarily and actually treated private" by the small refineries (or the government). In *Food Marketing*, the information at issue was deemed confidential because "[u]ncontested testimony established" that the owners of the information "customarily do not disclose … [the] data or make it publicly available 'in any way.'"[220] That made sense because the information had significant competitive value, so its disclosure "could create a windfall for competitors." Thus, the owners "closely guard[ed]" the data to the point that "[e]ven within a company," "only small groups of employees usually ha[d] access to it."[221]

By contrast, refineries freely disclose the same or similar facts as the information covered by the Proposed REGS Rule. For example, HollyFrontier has disclosed all these facts (and more) in its securities filings, including: the fact of exemption extensions for two of its refineries, their names and locations, the years for which the refineries received extensions, when the extensions were granted, the effects of those extensions (e.g., "RINs cost reduction"), and how EPA effectuated the extensions (e.g., providing "vintage RINs to replace the RINs previously retired" or "reinstat[ing] the RINs previously submitted").[222] And in litigation, small

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[215] 5 U.S.C. § 552(b)(4).

[216] 139 S. Ct. 2356, 2366 (2019).

[217] *Id*. at 2363.

[218] *Id.* (quoting *Webster's Seventh New Collegiate Dictionary* 174 (1963)); *see also Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981) (if the information can be "freely or cheaply … reverse engineer[ed], it can hardly be called confidential").

[219] *Food Marketing*, 139 S. Ct. at 2363.

[220] *Id.*

[221] *Id.* at 2361, 2363.

[222] HollyFrontier Corp., SEC Form 10-K, at 41, 43, 77-78 (Feb. 20, 2019) ("HollyFrontier 2018 10-K"); HollyFrontier Corp., SEC Form 10-K, at 40-41, 76 (Feb. 21, 2018) ("HollyFrontier 2017 10-K").

refineries and EPA have similarly disclosed this information.[223] A news article also reported that a particular company (Husk Energy) told the reporter that it inherited a small refinery exemption for 2017 when it acquired a plant in Superior, Wisconsin, and that it will seek an exemption for the Superior plant for 2018.[224] These examples indicate that refineries often disclose the basic facts covered by the Proposed REGS Rule (seemingly without concerns of losing competitive advantage), and thus there is no reason to regard them as confidential.

2. The Information Covered by the Proposal Is Not Protected by the Deliberative Process Privilege

EPA has not indicated that the information it proposes to disclose could implicate the deliberative process privilege. To the extent EPA considers that privilege relevant, however, the covered information is not protected by it.

The deliberative process privilege protects information from FOIA disclosure only if the information is both "predecisional" and "deliberative."[225] The information covered by the proposal is neither. Although information is "predecisional if it was generated before the adoption of an agency policy,"[226] it can "lose that status if it is adopted, formally or informally, as the agency position on an issue."[227] EPA proposes to disclose the covered information "with respect to each *decision* on a small refinery/refiner exemption request."[228] Thus, EPA (sensibly) envisions that the covered information will be included in its final decision document. Regardless of when the covered information was originally generated or how it was used during EPA's process, once that information has been stated in, and as an integral part of, EPA's final decision, it is no longer "predecisional."

The proposed information is also not "deliberative" because it does not "'reflect[] the give-and-take of the consultative process."[229] Again, the covered information merely identifies the basic facts of an exemption for any given refinery. Records setting forth EPA's decision on

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[223] Petition for Review, *Ergon-West Virginia, Inc. v. EPA*, No. 17-1839, ECF #3-3 (4th Cir. July 17, 2017); Petition for Review 8, 10, *Sinclair Wyoming Refining Co. v. EPA*, No. 16-9532, ECF #01019636438 (10th Cir. June 10, 2016); Petition for Review 4, *Lion Oil Co. v. EPA*, No. 14-3405, ECF #4209931 (8th Cir. Oct. 24, 2014); Petition for Review 4, *Hermes Consol., LLC v. EPA*, No. 14-1016, ECF #1478886 (D.C. Cir. Feb. 3, 2014).

[224] Renshaw & Prentice, *Exclusive: Chevron, Exxon seek 'small refinery' waivers from U.S. biofuels law*, Reuters (Apr. 12, 2018) (attached as Exhibit 15), https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-chevron-exxon-seek-small-refinery-waivers-from-u-s-biofuels-law-idUSKBN1HJ32R.

[225] *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

[226] *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010).

[227] *Coastal States*, 617 F.2d at 866.

[228] Proposed REGS Rule at 80,909 (emphasis added).

[229] *Public Citizen*, 598 F.3d at 874.

exemption extensions or any other identifying facts are thus not "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, [or] the personal opinions of the writer prior to the agency's adoption of a policy."[230]

* * *

Because the information covered by EPA's proposal is neither CBI nor protected by the deliberative process privilege, EPA should adopt the Proposed REGS Rule recognizing that it may not withhold such information under FOIA Exemption 4 or 5.

B. Additional Categories of Information Connected to Decisions on Small Refinery Exemption Extensions Are Also Not Plausibly Exempt from Mandatory Disclosure Under FOIA

EPA also may not invoke Exemption 4 or 5 to withhold additional categories of information connected to its decisions on small refinery exemption extensions, including: (i) the specific standards EPA applied to decide whether to grant or deny an exemption extension; (ii) EPA's final analysis of whether to grant or deny the extension; and (iii) if an extension is granted, the means by which EPA effectuated the extension, such as allowing the refinery to unretire RINs. All the reasons that the information covered by the Proposed REGS Rule is not exempt from mandatory disclosure under FOIA apply equally to these additional categories of information.[231]

1. These Additional Categories of Information Are Not Confidential Business Information

These additional categories of information are not CBI. First, they were "generated by the government," rather than "obtained from a person."[232] The standards EPA applies to decide whether to grant or deny a petition are purely matters of agency policy and likely would not implicate any information obtained from a refinery. But even if they did, EPA is still obligated to disclose them because those standards are inherently part of EPA's "'own analysis'" of a refinery's entitlement to an exemption extension, which is EPA's information, not the refinery's.[233] The same is true of the means by which EPA effectuated the extension.

That makes sense given the scope of Exemption 4. As discussed above, "the key distinction" determining information "obtained from a person" is whether the information is "repeated verbatim or slightly modified by the agency," or whether the information is "substantially reformulated by the agency, such that it is no longer a person's information but the

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[230] *Id.* at 875.

[231] *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992); *see Milner*, 562 U.S. at 571 (FOIA exemptions must be "given a narrow compass").

[232] *Philadelphia Newspapers*, 69 F. Supp. 2d at 66; *see* Proposed REGS Rule at 80,909.

[233] *Center for Auto Safety*, 133 F. Supp. 3d at 123.

agency's information."[234] EPA certainly would have "substantially reformulated" any facts obtained from a refinery in applying the standards for an exemption extension or allowing unretirement of RINs, because it is impossible to do either (given the statutory requirements) by simply "repeat[ing] verbatim" or "slightly modif[ying]" those facts.[235] Where the information requested is "not merely the information collected and slightly reprocessed by the government, but disclosure of the agency's own executive actions," "[t]he fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA."[236]

Moreover, the additional categories of information are not confidential. To the extent any part of the additional information is owned by the refineries, it would clearly not be "customarily and actually treated as private by" the refineries.[237] In fact, HollyFrontier has disclosed in its securities filings at least the means by which EPA effectuated the exemption extensions, i.e., by providing "vintage RINs to replace the RINs previously retired" or "reinstat[ing] the RINs previously submitted."[238]

2. These Additional Categories of Information Are Not Protected by the Deliberative Process Privilege

These additional categories of information are also not protected by the deliberative process privilege. The standards EPA applies for determining whether to grant or deny an exemption extension and the means it uses to effectuate the extension are not even colorably deliberative or predecisional. They are not "advisory opinions, recommendations," or "personal opinions of the writer" that "reflect internal deliberations on the advisability of any particular course of action."[239] Instead, they are what EPA actually applied or decided—to which the deliberative process privilege "can never apply."[240] EPA's analysis of whether to grant or deny an exemption extension could at an earlier point in the process perhaps be deliberative and predecisional, but any such character is lost once EPA "adopt[s]" the analysis as its basis for deciding a petition.[241]

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[234] *Id.*

[235] *Id.*

[236] *Bloomberg, L.P. v. Board of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 148-149 (2d Cir. 2010).

[237] *Food Marketing*, 139 S. Ct. at 2366.

[238] HollyFrontier 2018 10-K, at 77; HollyFrontier 2017 10-K, at 76.

[239] *Public Citizen*, 598 F.3d at 875 ("an agency's application of a policy to guide further decision-making does not render the policy itself predecisional").

[240] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-154 (1975).

[241] *Coastal States*, 617 F.2d at 866; *see Public Citizen*, 598 F.3d at 874-875.

3. Failure to Disclose These Additional Categories of Information Illegally Creates a Body of Secret Law

For much the same reasons that these additional categories of information are not protected by the deliberative process privilege, they are also not exempt because they constitute EPA's working law on small refinery exemption extensions. Not disclosing them, therefore, would illegally create secret law.

Agencies must disclose their "working law," i.e., "the reasons which [supplied] the basis for an agency policy actually adopted," regardless of whether those reasons are formally binding.[242] An agency may not develop "secret law" used in the discharge of its regulatory duties.[243] An agency's working law includes: "orders and interpretations" the agency "actually applies in cases before it"[244]; "interpretations of established policy on which the agency relies in discharging its regulatory responsibilities"[245]; "considered statements of the agency's legal position" that attempt to "develop a body of coherent, consistent interpretations of federal … laws" [246]; and documents reflecting an agency's "formal or informal policy on how it carries out its responsibilities."[247]

The additional categories of information fit squarely within this framework. Records embodying the standards EPA uses to grant an exemption extension, its final analysis on a refinery's entitlement to an extension, and the means EPA uses to effectuate an extension are all "interpretations" or "considered statements" of EPA's policy on small refinery exemption extensions, including on the scope of EPA's statutory authority to grant an extension and to allow retroactive remedies using RINs.[248] Thus, once EPA grants or denies an exemption extension petition, the additional categories of information are the very definition of working law expressing EPA's policy on how it implements the statutory provision allowing small refinery exemption extensions.

Releasing the additional information is particularly critical and timely now. As noted above, EPA has granted record numbers of exemption extensions in recent years, and despite requests from members of Congress and various interested parties, EPA has not released any specific information regarding its disposition of small refinery exemption extensions.[249]

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[242] *Sears, Roebuck & Co.*, 421 U.S. at 152; *Coastal States*, 617 F.2d at 867-868,

[243] *Coastal States*, 617 F.2d at 867.

[244] *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971).

[245] *Coastal States*, 617 F.2d at 869.

[246] *Tax Analysts v. IRS*, 117 F.3d 607, 609, 617 (D.C. Cir. 1997).

[247] *Public Citizen*, 598 F.3d at 872, 875.

[248] *Id.* at 874; *Tax Analysts*, 117 F.3d at 609, 617; *Coastal States*, 617 F.2d at 869; *Sterling Drug*, 450 F.2d at 708.

[249] *Cf. RFS Small Refinery Exemptions* (disclosing only aggregate data on the number of small refinery exemption extensions and the volumes exempted).

Interested parties have had to resort to litigation in hopes of uncovering EPA's policies, interpretations, analyses, and actions regarding small refinery exemption extensions.[250] That is an inefficient use of resources for everyone; much of the litigation could have been streamlined had EPA disclosed this information, as it is legally obligated to do anyway.[251] Accordingly, EPA should clarify that the additional categories of information are "the law itself and as such should be made available to the public."[252]

IX. CONCLUSION

For the reasons explained above, EPA should: (1) increase the proposed 2020 volume requirements to make up for all past and expected future retroactive small refinery exemptions; (2) use a lesser cellulosic waiver of the proposed 2020 total volume requirement so that conventional ethanol can backfill the shortage in cellulosic biofuel production; (3) set a 500-million RIN supplemental obligation to cure its prior error in using the general waiver in 2016; (4) adopt methods for projecting cellulosic biofuel production that discern the likely production in response to volume requirements set high enough to incentivize production, accounting for EPA's practices regarding small refinery exemptions and the RIN bank; (5) continue to decline to issue a general waiver of the total volume requirement based on severe harm to the economy or environment; and (6) finalize the public access provisions of the proposed REGS rule and make clear that certain additional categories of information relating to small refinery exemption decisions are also not exempt from mandatory disclosure under FOIA.

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[250] *See, e.g.*, Joint Status Report, *Renewable Fuels Ass'n v. EPA*, No. 18-2031, ECF #26 (D.D.C. Aug. 9, 2019); *Advanced Biofuels Ass'n v. EPA*, No. 18-1115 (D.C. Cir.); *Renewable Fuels Ass'n v. EPA*, No. 18-9533 (10th Cir.).

[251] *Sears, Roebuck & Co.*, 421 U.S. at 152 ("the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted").

[252] *Sterling Drug*, 450 F.2d at 708.

EXHIBIT 6

THE IMPACT OF EPA'S POLICIES REGARDING RVOS AND SRES

Edgeworth Economics

August 30, 2019

I. The Purpose and Structure of the Renewable Fuel Standard

The Renewable Fuel Standard (RFS) was designed to incentivize the replacement of fossil fuel gasoline and diesel with renewable biofuels. Each year, EPA sets the Renewable Volume Obligation (RVO) in gallons for each type of biofuel specified in the statute and converts those requirements to percentages based on estimates of fuel demand. Each producer or importer ("obligated party") must then self-generate or acquire sufficient Renewable Identification Numbers (RINs) to meet their percentage requirements. RINs may be banked for the next compliance year, such that an obligated party who generates excess RINs in a particular year may retain them to enable compliance in the following year or sell them to another obligated party who may be in deficit. Obligated parties also may carry over a RIN deficit from one year to the next, a provision which serves a similar purpose to the bank. EPA may grant exemptions from these standards to certain petitioning small refiners (SREs), which effectively reduce their RVOs gallon-for-gallon.

The price of RINs, determined through trading between obligated parties and other entities, provides information about the cost of the RFS requirements, relative to a scenario without the program. If, for reasons unrelated to the RFS, every obligated party used a sufficient quantity of biofuels in the current year to meet the standard and expected to do so in subsequent years, then the market price for RINs would be zero. A non-zero price for RINs therefore is an indication that at least some fuel producers find the RFS constraints to be binding or expect them to be binding in the future with some positive probability. The RIN price provides an estimate of the marginal cost to the industry of reaching compliance, potentially moderated by expectations of such costs in the future.[1]

Under this regulatory structure, EPA plays a critical role in determining the marketplace outcomes. The impact of EPA's decisions can be seen in the movement of RIN prices. In the short run, the RIN market tends to respond immediately to announcements from EPA that affect the requirements for compliance, such as changes to the RVOs. For example, on August 6, 2013, EPA announced the publication of the 2013 Final Rule and indicated, for the first time, that future volume requirements likely would be adjusted downward to reflect difficulties in surpassing the 10-percent "blendwall" for ethanol in gasoline.[2] By August 8, 2013, D6 RIN prices had dropped 38 cents, still the largest decline over any three-day period in the history of the program. In the longer run, the general level of RIN prices reflects the stringency of the current standards and expectations about those conditions in the future. The size of the RIN bank also provides evidence regarding the feasibility of compliance with the current standards and the market's expectations about future standards.

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[1] The marginal cost of compliance is the cost of converting the last gallon of fossil-based fuel to renewable in order to meet the requirements. The average cost of compliance across the entire industry is necessarily less than the marginal cost.

[2] "EPA Finalizes 2013 Renewable Fuel Standards to Help Promote American Energy Independence, Reduce Carbon Pollution / EPA also announces steps to address concerns about the E10 blend wall," EPA press release, August 6, 2013, available at archive.epa.gov/epapages/newsroom_archive/newsreleases/02592be566ba346685257bbf005a7db2.html. See also, Gabriel E. Lade, C.-Y. Cynthia Lin Lawell, and Aaron Smith, "Policy Shocks and Market-Based Regulations: Evidence from the Renewable Fuel Standard," *American Journal of Agricultural Economics*, v. 100, n. 3, pp. 707-731.

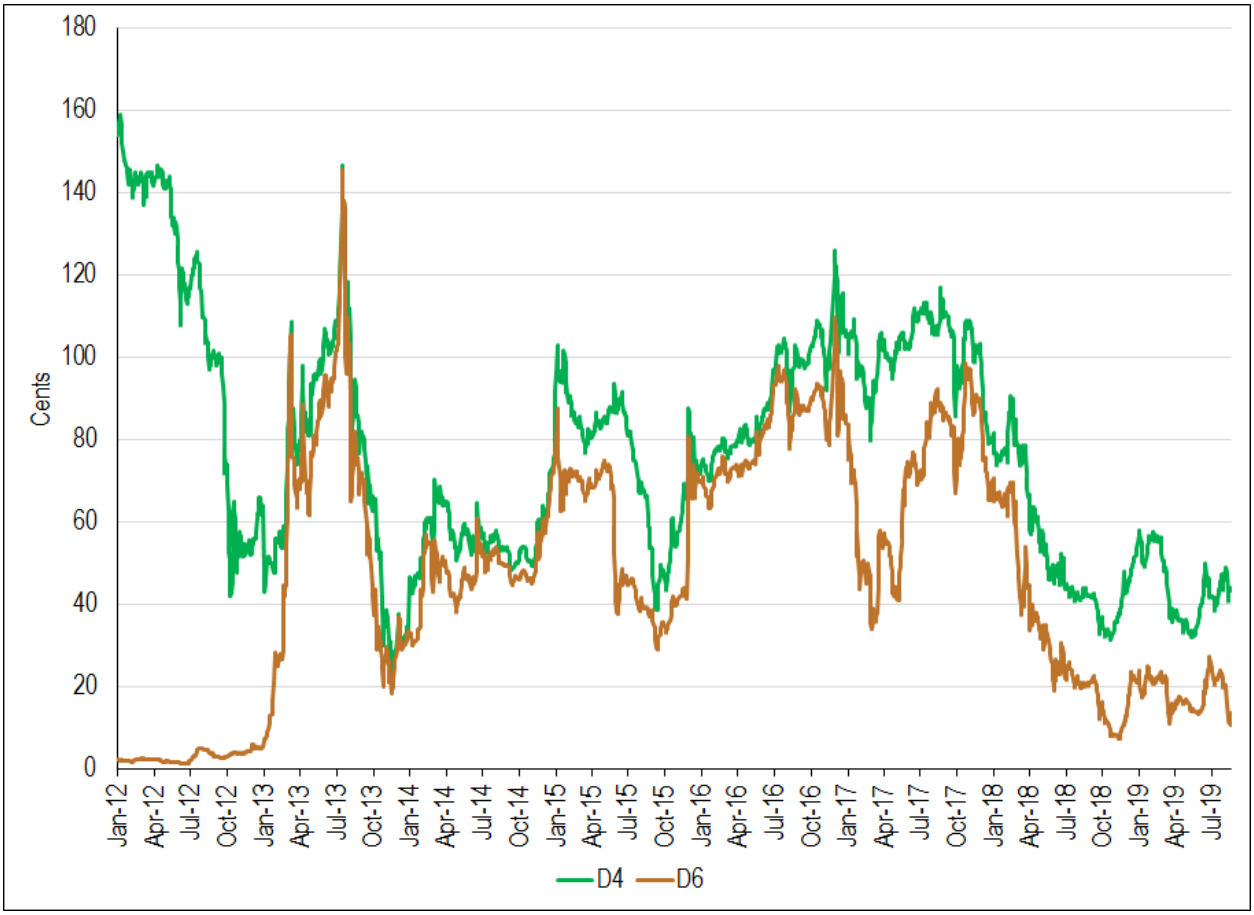
Ultimately, RIN prices are determined by EPA's policies—that is, EPA has the ability to choose the level of RIN prices through its decisions regarding RVOs and the various exemptions and waivers. Moreover, since the RIN market is forward looking, due to the banking and deficit provisions, EPA can recalibrate by adjusting RVOs or waivers in the next year if the RVOs in a particular year turn out to be difficult for industry to meet.

This paper summarizes the relationship between EPA's recent policies regarding RVOs/SREs and the RIN market, as well as current marketplace conditions. This analysis demonstrates that, as of mid-2019, the conditions are such that the RFS is no longer a binding constraint with respect to conventional biofuels. Under these circumstances, the industry will not be incentivized to increase E85 or E15 sales above currently modest levels. However, an increase of the implied conventional RVO for 2020 by 1 billion gallons—from 15 billion to 16 billion—would ameliorate the impacts of the SREs and would be unlikely to cause RIN prices to return even to 2016 levels.

II. The Recent History of EPA Standards, RIN Prices, and Banked RINs

The history of RIN prices and the RIN bank provides context for understanding the relationship between EPA's decisions regarding RVOs and SREs and the marketplace outcomes. Figure 1 shows daily prices for biomass-based diesel (BBD) D4 RINs and conventional D6 RINs.

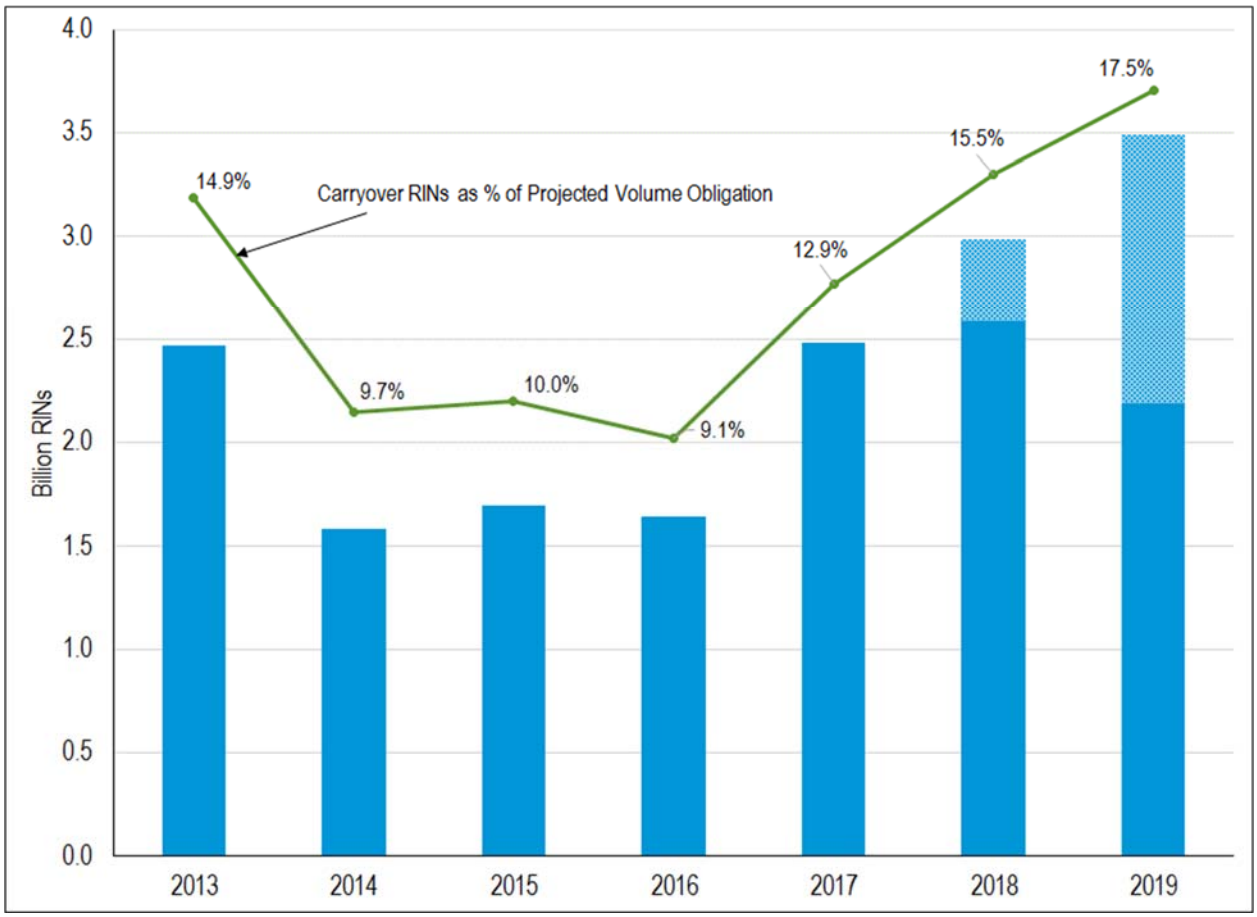
Figure 1
D4/D6 RIN Prices
January 2012 – August 2019



Source: OPIS.

This history indicates three general regimes. During the first regime, prior to 2013, fuel producers were able to fulfill their requirements for gasoline by blending ethanol up to a ratio of 10 percent (E10). Ethanol provides benefits as an oxygenate additive and has been priced competitively with gasoline on a volumetric basis. Thus, during this early period, the requirements of the RFS with respect to conventional biofuels imposed a negligible burden on the industry, as reflected by the near-zero D6 RIN prices. Moreover, since the conventional RVOs during this period fell below the 10-percent blendwall, obligated parties were able to bank a substantial number of RINs. As shown in Figure 2, 2.5 billion carryover RINs had been accumulated by 2013, equivalent to about 15 percent of the total RVO at that time.

Figure 2
Carryover RINs
EPA Calculations Through 2017 Plus Edgeworth Economics Estimates for 2018/2019



Notes: The darker shaded columns represent EPA's figures as reported in November 2018 (for 2013 through 2018) and May 2019 (for 2019). EPA's estimates for 2018 and 2019 do not include the impacts of SREs which were granted retroactively after the dates when the calculations were prepared. The lightly-shaded areas represent Edgeworth Economics estimates of those impacts (see Section IV, below, for a description of the methodology).

Sources: "Carryover RIN Bank Calculations for 2019 Final Rule," EPA Memorandum, November 7, 2018, Docket No. EPA-HQ-OAR-2018-0167; "Carryover RIN Bank Calculations for 2020 NPRM," EPA Memorandum, May 20, 2019, Docket No. EPA-HQ-OAR-2019-0136; and Edgeworth Economics calculations.

The second period began around early-2013 when ethanol blending rates in gasoline neared the 10-percent blendwall.[3] Some other method of compliance, in addition to E10, therefore became necessary to achieve the more stringent requirements imposed by the statute. In general, the options for meeting the conventional RVOs could include blending ethanol into gasoline at a greater ratio than 10 percent—i.e., E15 or E85—or increasing consumption of non-conventional renewable fuels, such as BBD, which offset conventional obligations due to the nested structure of the RFS requirements. E15 sales have been limited due to other regulatory constraints. Thus, the primary available options have been E85 and non-conventional biofuels, both of which historically have required non-zero RIN prices to incentivize production

[3] Scott Irwin, "Small Refinery Exemptions and Ethanol Demand Destruction," *farmdoc daily*, v. 8, n. 170, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, September 13, 2018.

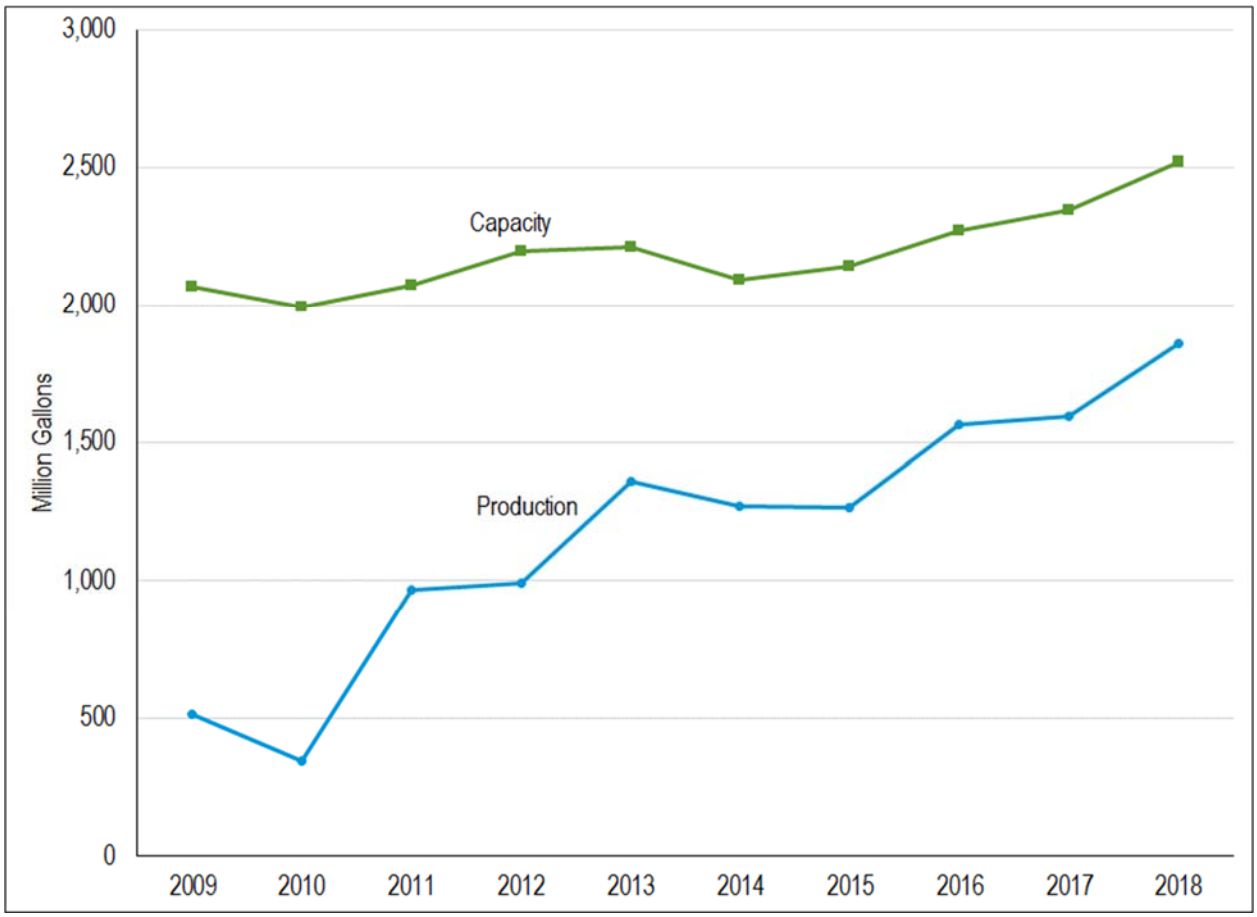
and consumption. In addition, drawing down the RIN bank has always provided another potential means of compliance.

As shown in Figure 1, above, as the blendwall was reached around early-2013, D6 RIN prices increased rapidly. The extent of that increase was driven by the relative costs for the industry to comply with the conventional requirements through means other than E10, as well as the expectation of such costs in future years. The subsidy necessary to incentivize BBD production—i.e., the D4 RIN price—has generally remained below $1.00, averaging $0.72 since January 2013. Given historic ethanol and gasoline prices, this level has been somewhat below the level needed for E85 to attain parity with conventional gasoline on an energy-adjusted basis.[4] Thus, while E85 sales did increase modestly from 2012 to 2013—by about 100 million gallons—those quantities still represented a very small portion of overall motor fuel consumption (less than 0.2 percent).[5] Instead, the marginal compliance method for the conventional requirement became BBD, as evidenced by the synchronization of D6 RIN prices with D4 prices beginning around February 2013. BBD production increased more significantly in 2013, by about 370 million gallons relative to 2012 (see Figure 3). Obligated parties also utilized banked RINs to achieve compliance, as shown in Figure 2, above.

[4] See, for example, Jarrett Whistance, Wyatt Thompson, and Pat Westhoff, "Are RIN Prices High Enough for E85 Expansion?" FAPRI-MU Bulletin 01-15, University of Missouri, January 14, 2015; and Gabriel E. Lade, Sébastien Pouliot, and Bruce A. Babcock, "E15 and E85 Demand Under RIN Price Caps and an RVP Waiver," CARD Policy Brief 18-PB-21, Iowa State University, March 2018.

[5] U.S. Energy Information Administration, Annual Energy Outlook, Table: Petroleum and Other Liquids Supply and Disposition.

Figure 3
Biodiesel Production and Capacity
2009 – 2018



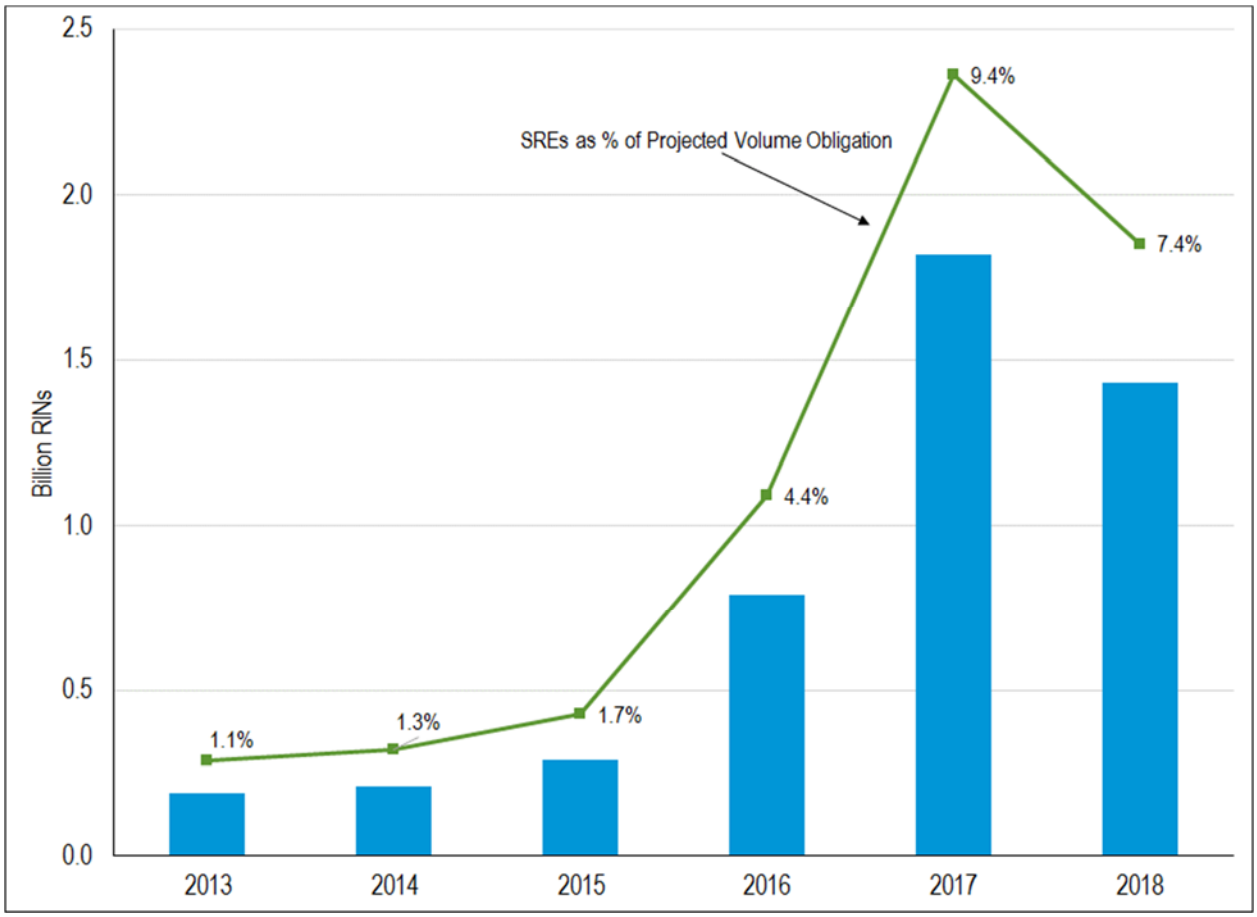
Source: U.S. Energy Information Administration, Form EIA-22M, "Monthly Biodiesel Production Survey."

The conditions remained generally stable for the next three years. As shown in Figure 1, above, the prices of D4 and D6 RINs remained closely linked through 2016—the difference averaged less than 10 percent during 2016. This indicates that BBD remained the marginal method of compliance for the conventional requirements. The RIN bank remained approximately unchanged at about 9-10 percent of the overall RVOs during this period (see Figure 2, above).

The third regime appears around early-2017. At this time, EPA began to increase substantially its granting of SREs, including retroactive SREs for 2016. As shown in Figure 4, for 2016 and 2017 combined, EPA increased exemptions by approximately 2 billion RINs, relative to 2015 levels. This caused a break in the linkage between D4 and D6 RINs. D6 RIN prices declined substantially in early-2017, both in absolute

terms as well as in relation to D4 RIN prices.[6] From January 2017 through mid-August 2019, D6 RINs have sold at an average of a 44-percent discount relative to D4 RINs. This indicates that the RVOs for conventional biofuels are no longer binding, although gasoline blending rates have been maintained near 10 percent due to the value of ethanol as an additive.[7] D6 RIN prices fell as low as $0.07 as of late-2018, the lowest level since 2013, and the RIN bank once again expanded as obligated parties began to generate excess RINs (see Figure 2, above).

Figure 4
Small Refinery Exemptions
2013 – 2018



Source: EPA website, www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions.

[6] EPA first began notifying refiners of a change in SRE policy at least as early as May 2017, and news of specific exemptions began to become public around April 2018. It is likely, however, that the market's expectations impacted RIN prices earlier. See, for example, Jarrett Renshaw, "Exclusive: Trump EPA did not await court ruling to loosen biofuel rules for refiners – documents," Reuters, May 16, 2019, available at www.reuters.com/article/us-usa-epa-biofuels-exclusive/exclusive-trump-epa-did-not-await-court-ruling-to-loosen-biofuel-rules-for-refiners-documents-idUSKCN1SM13Z.

[7] Scott Irwin, "Small Refinery Exemptions and Ethanol Demand Destruction," *farmdoc daily*, v. 8, n. 170, University of Illinois at Urbana-Champaign, September 13, 2018.

III. The Impact of Small Refinery Exemptions

The analysis above illustrates the dramatic effect of EPA's policies with respect to SREs, which have returned the industry to essentially the position it maintained as of early-2013, prior to reaching the blendwall. As shown in Figure 4, above, from 2013 to 2015 SREs averaged only about 0.2 billion RINs per year. In contrast, SREs granted (largely retroactively) for 2016 and 2017 totaled about 2.6 billion RINs, with 1.8 billion RINs granted for 2017 alone. The 2017 figure represented almost 10 percent of the overall volume requirement. The recently granted exemptions for 2018 again exceeded 1.0 billion RINs—1.43 billion according to EPA's latest information release.

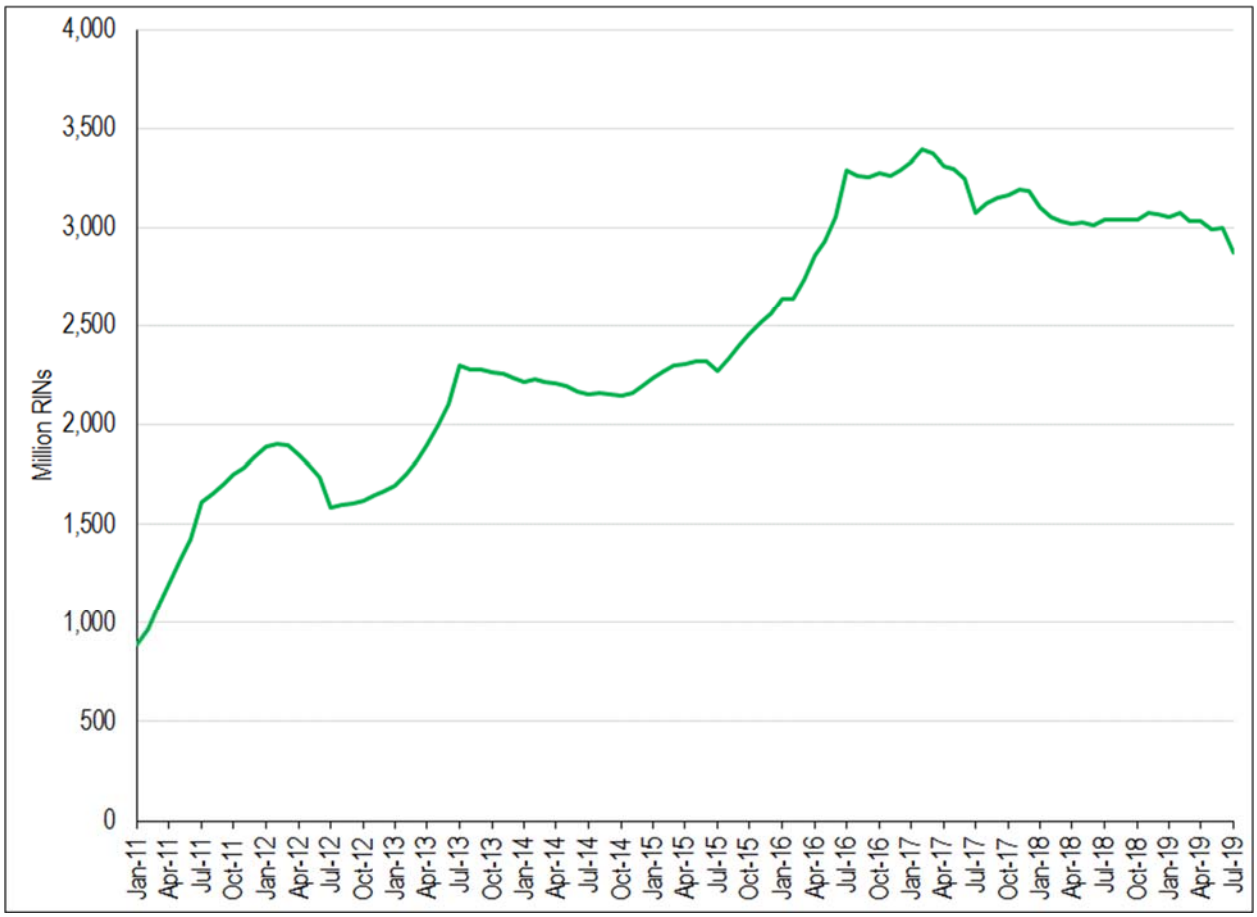
Because EPA has not reallocated exempt volumes, the exemptions effectively reduce the RVOs one-for-one. That is, under EPA's implementation of the SRE program, an exemption that reduces a refiner's obligation by one gallon of biofuel has largely the same impact on the overall marketplace as a reduction of the industry-wide obligation by one gallon. The only differences relate to the timing and the distribution of the burden of compliance.

In a series of papers published in 2018 and 2019, University of Illinois researcher Scott Irwin has shown that the reduced obligations caused by the recent exemptions were accommodated primarily by a reduction in BBD consumption and additions to the RIN bank.[8] Irwin calculates that demand for BBD in 2017 was reduced by 739 million gallons due to SREs. Figure 5 shows that, after several years of increases, D4 RIN generation from BBD has declined since early-2017. As described above, conventional ethanol blending in E10 was largely unaffected, due to the incentives to include ethanol as an oxygenate additive. The decline in RIN values, however, nonetheless adversely affected ethanol demand by reducing the incentive to sell E85.[9] The remaining impact likely was absorbed by the RIN bank, which expanded by almost 1 billion from 2016 to 2017 (see Figure 2, above).

[8] Scott Irwin, "Small Refinery Exemptions and Biomass-Based Diesel Demand Destruction," *farmdoc daily*, v. 9, n. 45, University of Illinois at Urbana-Champaign, March 14, 2019; and Scott Irwin, "Small Refinery Exemptions and Ethanol Demand Destruction," *farmdoc daily*, v. 8, n. 170, University of Illinois at Urbana-Champaign, September 13, 2018.

[9] As noted above (see footnote 4), incentivizing a large percentage of consumers to switch from E10 to E85 would require a consistent RIN subsidy sufficient to cause E85 prices at retail to maintain a level at least with energy-parity to E10. Some consumers, however, have demonstrated a preference for E85 even when the fuel is priced above E10 on an energy-equivalent basis. For this reason, E85 sales grew steadily until 2017 even though D6 RIN prices fluctuated and generally have remained below the level required for E85-E10 price parity on an energy-adjusted basis.

Figure 5
Monthly D4 RIN Generation from BBD (Annualized), 12-Month Moving Average
January 2011 – July 2019



Source: EPA website, www.epa.gov/fuels-registration-reporting-and-compliance-help/rins-generated-transactions.

As shown in Figure 1, above, after the SREs for 2016 and 2017 were granted, D6 RIN prices dropped almost to zero—hitting a low of $0.07. Although prices subsequently increased modestly, reaching $0.27 in June 2019, they dropped again to about $0.10 (and remain near that level at the time of the preparation of this report) as EPA announced the proposed 2020 volume requirements and then the 2018 SREs. In fact, following EPA's announcement of the 2018 exemptions, D6 RIN prices experienced their largest ever three-day decline in percentage terms (41 percent). Given that EPA has reduced the conventional biofuel requirement, net of exemptions, below the blendwall, the only reason D6 RIN prices are not literally zero (or closer to zero as occurred prior to 2013) is that there remains some uncertainty about EPA's decisions with respect to RVOs and SREs going forward.

If EPA continues to set the RVO for conventional ethanol in the range of 10-11 percent of overall gasoline demand, and further continues to issue SREs representing 10 percent or more of the conventional RVO (equivalent to at least 1 percent of overall gasoline demand) without reallocating or otherwise requiring makeup of those exempt volumes, then the effective conventional requirement will remain below the blendwall. This will eliminate any incentive to increase conventional biofuel production and consumption, leading to continued increases in the RIN bank and neutering the original policy mandate. This approach may not cause a substantial decline in ethanol blending in E10, due to the value of ethanol as an

oxygenate additive. This policy, however, does eliminate any incentive to increase E85 sales, and therefore to increase ethanol consumption more generally, so long as penetration of E15 remains limited due to other regulatory or industry constraints.[10]

IV. The Impact of EPA's Policies Regarding the RIN Bank

In the Final Rule for 2019, EPA states, as it has in previous years, that "a significant drawdown of the carryover RIN bank leading to a scarcity of RINs may stop the market from functioning in an efficient manner."[11] EPA cites the potential for a lack of a "sufficient number of reasonably available RINs for obligated parties seeking to purchase them." It is unclear how EPA reaches this conclusion, since the RIN market was designed to equilibrate supply and demand and all evidence indicates it has been functioning properly in that regard.[12] Moreover, EPA retains a variety of mechanisms to adjust the market if RIN prices increase to a level deemed unacceptable, including exemptions, waivers, and subsequent year RVOs.

In the 2019 Final Rule EPA further concludes that it would "not set the 2019 volume requirements at levels that would envision an intentional drawdown in the bank of carryover RINs."[13] Again, this is the same approach EPA has taken in previous years.[14] EPA, however, provides no analysis of what level of RIN bank *would* be "sufficient" to allow a drawdown (other than noting that the statutory carryover limit has not been reached). Thus, the Agency has imposed a ratchet. Under its stated approach, the size of the RIN bank can only increase, barring substantial unexpected changes in the marketplace. As shown in Figure 2, above, that is precisely what has occurred over the last three years.

In the recently issued 2020 NPRM, EPA states the same intention for the 2020 rule—namely, that the Agency will not set requirements based on an expectation of an "intentional drawdown in the bank."[15] EPA justifies this approach, in part, by citing an alleged "400 million RIN decrease in the total carryover RIN bank compared to that projected in the 2019 final rule." EPA asserts that this reduction occurred "despite…the millions of RINs that were not required to be retired by small refineries that were granted hardship exemptions in recent years."

EPA's statements, however, do not present an accurate picture of the changes in the RIN bank over time. A more accurate picture is found in Figure 2, above: net of exemptions, the RIN bank grew from about 1.6 billion in 2016 (i.e., 2015 carryover RINs), to about 2.5 billion in 2017—the year following the first year for which EPA granted a high volume of exemptions—then to about 3.0 billion in 2018, and finally to about 3.5 billion in in 2019. Over that period, not only did the size of the bank grow on an absolute basis, but it also has constituted an increasing percentage of the total volume obligation, rising from 9.1 percent to 17.5 percent. EPA's statements do not address the growth in the bank from 2016 to 2017 and further do not

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[10] EPA's recent extension of the 1-psi Reid Vapor Pressure ("RVP") waiver for E15 eliminates a significant constraint on E15 expansion. The extent to which other constraints, such as state-level regulations and the requirement for investment in new equipment, may continue to limit E15 expansion remains to be seen.

[11] 83 Fed. Reg. 237 (December 11, 2018) at 63,709. See also, 82 Fed. Reg. 237 (December 12, 2017) at 58,493-494.

[12] See, for example, "Economic Issues Associated with a Change of the RFS Point of Obligation," Edgeworth Economics, February 22, 2017, filed with Supplemental Comments by Growth Energy, Archer Daniels Midland, and Biotechnology Innovation Organization on EPA's Proposed Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, Docket # EPA–HQ–OAR–2017-0091.

[13] 83 Fed. Reg. 237 (December 11, 2018) at 63,710.

[14] 82 Fed. Reg. 237 (December 12, 2017) at 58,493-494.

[15] 84 Fed. Reg. 145 (July 29, 2019) at 36,768.

accurately represent the size of the bank in both 2018 and 2019. Although EPA reported in November 2018 that there were about 2.6 billion 2017 RINs available in 2018, more recent reporting by EPA indicated that about 3.0 billion 2017 RINs were used for compliance in 2018 (net of 2017 deficits), and thus the bank in 2018 must have had at least that many 2017 carryover RINs.[16] Similarly, in a May 2019 memo accompanying the 2020 NPRM, EPA stated that there are about 2.2 billion 2018 carryover RINs available for compliance in 2019, but that does not account for the 1.43 billion RINs EPA subsequently exempted for 2018.[17] Because at least 80 percent—and likely more than 90 percent—of those exempt RINs will be unretired and thus added to the bank, we assume that there will be about 3.5 billion 2018 carryover RINs available for compliance in 2019.[18] In sum, after accounting for all SREs granted to date, we estimate that the bank has increased by about half a billion RINs in each of the last two years.

Combined with the impact of the increase in exemptions, EPA's "ratchet" approach to the RIN bank has resulted and will continue to result in a value for D6 RINs of essentially zero. As described above, D6 RIN prices are currently above zero due only to the carryover provision combined with uncertainty about EPA's policy stance in future years. EPA's current approach, under which the RVOs and SREs combine to bring requirement for conventional biofuels below the blendwall, completely eliminates any incentive for increasing E85 consumption or using any of the other pathways to increase ethanol consumption. Moreover, since the conventional requirements are no longer binding for the industry, i.e., E10 alone is once again sufficient to reach full compliance, BBD is no longer the marginal fuel for meeting the conventional standard. Continuing the present course therefore is likely to cause BBD production and D4 RIN generation to fall further, as well.

V. Considerations Related to Biomass-Based Diesel

Given that marketplace conditions have resulted in the utilization of BBD as the marginal compliance method for the conventional standard in recent years, it is important to consider the extent to which an increase in the implied conventional RVO would cause an increase in BBD production, as opposed to increases in ethanol production, and further the impact of such increases in terms of environmental benefits as well as costs.

Based on discussions with EPA personnel and apparent positions indicated in some of EPA's publications, we understand the Agency is concerned that increasing the conventional RVO above the blendwall has and will continue to cause increases in the consumption of BBD rather than of ethanol or other renewable fuels. For example, in its 2019 Statutory Factors Assessment, EPA states that compliance with the RFS requirements using BBD, as opposed to other biofuels, leads to less "favorable" outcomes with respect to

[16] In its May 2019 memorandum, EPA stated that 3.7 billion 2017 RINs were retired for compliance in 2018. In a November 2018 memorandum issued with the 2019 Final Rule, EPA stated that there was a 2017 compliance deficit of about 700 million RINs.

[17] EPA announced SREs for 2018 on August 9, 2019. "EPA Announces Biofuel and Small Refinery Exemption Priorities," EPA press release, August 9, 2019, available at www.epa.gov/newsreleases/epa-announces-biofuel-and-small-refinery-exemption-priorities.

[18] In prior years, EPA performed the exercise of updating historical calculations for the RIN bank. For example, EPA's memo supporting its RIN bank estimates for the 2019 Final Rule (published November 7, 2018) included calculations of carryover RINs available for 2013 through 2017, as well as a projection for 2018. While following an otherwise similar format, EPA's memo for the 2020 NPRM (published May 20, 2019) eliminated that section. It would be helpful if EPA returned to its practice of updating historical RIN bank calculations in the course of setting annual volume requirements.

environmental considerations as well as costs.[19] EPA's position appears to be that increases in the RVOs are problematic specifically because they would cause BBD production to rise, rather than incentivizing compliance through other methods. This position raises multiple concerns.

First, EPA's approach to evaluating the societal cost of BBD consumption raises a concern with respect to the $1.00-per-gallon tax credit that Congress has granted BBD producers. EPA calculates the relative costs of the various biofuels by measuring production costs at the wholesale stage, which the Agency asserts to represent "the approximate costs to society absent transfer payments."[20] EPA's approach therefore excludes the tax credit from the calculation. This is problematic. Presumably, Congress has designated the tax credit for BBD because it deems that production and consumption of that type of biofuel must provide societal benefits that (at least) offset the cost to the Treasury.[21] EPA's calculations, however, ignore any such benefits. By excluding the tax credit from its calculation of societal costs in its assessment and determination of the RVOs, EPA has, in effect, disadvantaged BBD relative to other biofuels, thereby undermining the intent of Congress with respect to the purpose of the tax credit.

Another issue relates to the ability of the marketplace to continue to provide increased BBD production to meet the rising RVOs over time. Available production capacity represents a constraint on the amount of BBD consumption that potentially could be used to comply with the conventional requirements. As shown in Figure 3, above, prior to reaching the blendwall in 2013, BBD capacity exceeded production by about 1.2 billion gallons, for a utilization factor of about 45 percent. That gap fell approximately in half as of 2018—to about 0.7 billion gallons—with utilization rising to about 75 percent. As the industry further approaches full utilization of available capacity, the marginal cost of production increases. This disadvantages BBD as a compliance option for the conventional standard (as well as for the requirements for other biofuels for which BBD represents a compliance option) relative to other biofuels, for example ethanol as a component of E85. Thus, going forward, increases in the conventional RVO or other RVOs within the conventional nesting structure will increasingly be met by options other than BBD. It is likely that E15 and/or E85 will become more significant components of the overall compliance strategy as increases in the required volumes push the industry closer to full utilization of existing BBD capacity and cause a drawdown of the RIN bank.

VI. The Impact of an Increase in the 2020 Implied Conventional RVO Above 15 Billion Gallons

Assuming fuel demand conditions in 2020 similar to 2019, setting an implied conventional RVO for 2020 between 10 and 11 percent (such as set by EPA in each year from 2016 through 2019) combined with continuing the issuance of SREs on the order of 1.5 billion (as EPA has for 2017 and 2018) without any reallocation or other makeup of exempt volumes, will result in a net requirement for conventional fuels in 2020 that will fall well below the blendwall. As described above, this will eliminate any incentive to increase ethanol consumption through means other than E10 and will further reduce the incentive to produce and

[19] "Final Statutory Factors Assessment for the 2020 Biomass Based Diesel (BBD) Applicable Volume," EPA Memorandum, December 11, 2018, Docket No. EPA-HQ-OAR-2018-0167.

[20] "Cost Impacts of the Final 2019 Annual Renewable Fuel Standards," EPA Memorandum, December 11, 2018, Docket No. EPA-HQ-OAR-2018-0167.

[21] In the 2019 Final Rule, EPA notes that the biodiesel tax credit had not yet been extended by Congress and further considers the "possible impact of the expiration" of the credit. In fact, Congress recently did extend the credit and applied it retroactively back to December 31, 2017, just as it has done in most years since the initiation of the policy.

sell BBD and other non-conventional biofuels. However, if the conventional RVO for 2020 instead were set at a higher level, the impact of the SREs could be mitigated.

The recent history of the RFS regulation and RIN marketplace provides context for evaluating the impact of an increase in the RVO for 2020. In particular, the reaction of the industry to EPA's policies in 2017 provides a useful benchmark for this scenario. SREs granted for 2017 exceeded those granted from 2013 through 2015 by about 1.5 billion gallons. Prior to those grants (i.e., in 2016), D6 RIN prices were relatively stable in the range of about $0.70 to $1.00 and the RIN bank was stable at about 1.6 billion. Increasing the conventional RVO for 2020 by 1 billion gallons (and assuming no significant change in the granting of SREs) would cause a partial reversal of the impacts of the 2017 policy changes. The results of such a policy would include primarily a drawdown of the RIN bank and an increase in BBD consumption.[22]

It is unlikely that this policy initially would lead to a large increase in overall ethanol consumption, since BBD likely would remain the marginal compliance option in the near term. D6 RIN prices therefore would continue to be capped by the incremental cost to produce BBD. Since BBD production is still below capacity (see Figure 3, above), that cost likely would be no more than the D6 RIN price as of 2016—i.e., below the range of approximately $0.70 to $1.00. However, to the extent some consumers are sensitive to prices below energy-parity, raising D6 RIN prices modestly above current levels would add a small incentive to reverse the decline in E85 sales.

The cost of this policy would be modest. Consider a scenario in which EPA raised the 2020 conventional RVO back above the blendwall, net of SREs, by 0.5 billion gallons. This would cause D4 and D6 RIN prices to again become synchronized. Given the larger size of the RIN bank at present, compared to 2013-2016, it is likely that RIN prices would, at least until significant drawdown, stabilize well below the prior level. For the purpose of this calculation, assume that level was $0.50. Further assuming the entirety of the excess compliance requirement was met by additional BBD consumption, the incremental cost of that policy would be no more than about $250 million (0.5 billion × $0.50). Distributed across total gasoline sales of about 143 billion gallons[23], that cost would represent a change in fuel prices of only about 0.17 percent, or less than 0.5 cents per gallon. If that cost was spread across the total pool of gasoline plus diesel (about 201 billion gallons), the average increase in fuel prices would be lower—about 0.12 percent. To the extent that compliance with the incremental increase in requirements was met with some drawdown of the RIN bank and/or increase in ethanol consumption through additional E85 and/or E15 sales, then the overall cost could be even lower.[24]

In summary, given the extent of the exemptions granted, EPA's recent policy of disregarding SREs in its process of setting the conventional RVO has effectively eliminated the incentives for increasing consumption of conventional biofuels. If EPA continues to grant SRE extensions at current levels without reallocation or otherwise making up the exempt volumes, raising the conventional RVO above the

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[22] For comparison, note that the conventional RVO for 2018 of 15.0 billion combined with the grant of 1.4 billion SREs resulted in a net increase in the RIN bank of about 0.5 billion relative to the prior year. Increasing that RVO to 16.0 billion, while maintaining all other policies, therefore would be likely to cause a reduction in the RIN bank by approximately 1.0 billion relative to the impact of the existing proposal, resulting in a reduction of 0.5 billion relative the current size of the bank

[23] EIA, Annual Energy Outlook 2019, Table 11, value for 2020, available at www.eia.gov/outlooks/aeo/data/browser/#/?id=11-AEO2019&cases=ref2019&sourcekey=0.

[24] Large increases in E85 consumption are unlikely to occur unless D6 RIN prices reach, or perhaps exceed, a level that provides energy-parity with E10. However, historically there has been some consumer demand for E85 even when priced above parity due to the small segment of consumers that are relatively price-insensitive to E85 (including, for example, government fleets mandated to use E85). Thus, increases in ethanol consumption are likely to provide some part of the overall industry compliance strategy, even when D6 RIN prices remain at or below the marginal cost of increased BBD production.

blendwall is necessary to allow the regulation to continue to incentivize increases in biofuel consumption, consistent with the original intent of the statute.