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Growth Energy Supplemental Comments on EPA's Renewable Fuel Standard (RFS) Program: Standards for 2026 and 2027, Partial Waiver of 2025 Cellulosic Biofuel Volume Requirement, and Other Changes; Supplemental Notice of Proposed Rulemaking

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INTRODUCTION

Growth Energy is the world's largest association of biofuel producers, representing 97 biorefineries that annually produce 9.5 billion gallons of renewable fuel. Growth Energy's members produce more than 60% of all ethanol sold in the United States, most of which is used to comply with the RFS. Growth Energy previously submitted comments on EPA's proposed *Renewable Fuel Standard (RFS) Program: Standards for 2026 and 2027, Partial Waiver of 2025 Cellulosic Biofuel Volume Requirement, and Other Changes* (hereinafter "Set 2 proposal" or "NPRM").[1] Here, Growth Energy respectfully submits these supplemental comments on the EPA's *Renewable Fuel Standard (RFS) Program: Standards for 2026 and 2027, Partial Waiver of 2025 Cellulosic Biofuel Volume Requirement, and Other Changes; Supplemental Notice of Proposed Rulemaking* (hereinafter "supplemental proposal" or "Supplemental NPRM").[2]

In the supplemental proposal, EPA proposes to increase the 2026 and 2027 national Renewable Fuel Standard ("RFS") standards so as to reallocate 100% or 50% of the RFS obligations that are covered by the small-refinery exemptions ("SREs") that EPA granted for compliance years 2023-2025.[3] EPA also solicits comment on reallocating other amounts, including 0%.[4] The SREs EPA granted for 2023-2024 freed 1.4 billion RINs from needing to be retired for those years and made them available for compliance going forward.[5] In the supplemental proposal, EPA states that it projects granting SREs for 2025 covering about 780 million RINs.[6] Thus, 100% reallocation would entail raising the 2026 and 2027 standards by about 2.18 billion gallons in the aggregate.

I. Growth Energy appreciates and firmly supports EPA's proposal to reallocate 100% of the exempt 2023-2025 obligations. The logic underlying the proposed reallocation is that the RINs associated with the 2023-2025 SREs will be available for compliance in 2026-2027, and thus they will reduce the binding force of the 2026-2027 RFS standards one for one and allow obligated parties to use those RINs in lieu of the required volume of renewable fuel, creating a renewable-fuel shortfall. That logic is sound and requires 100% reallocation. If the RINs associated with the 2023-2025 SREs are not fully drawn down for compliance in 2026 and 2027, they will merely recreate the problems in future years: any rolled-over RINs associated with those SREs will suppress the binding force of the 2028 RFS standards (one for one) and accordingly allow obligated parties to create a renewable-fuel shortfall in 2028 to that extent. This process will continue until all the SRE-associated RINs have inevitably been used in lieu of renewable fuel, ultimately creating a 2.18-billion-gallon renewable-fuel shortfall equal to the entire exempt renewable-fuel volume. Only 100% reallocation can avoid that outcome.

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[1] 90 Fed. Reg. 25,784 (June 17, 2025).

[2] 90 Fed. Reg. 45,007 (Sept. 18, 2025).

[3] Supplemental NPRM at 45,009:3.

[4] *Ibid*.

[5] *Id.* at 45,009:2.

[6] *Ibid*.

II. Given the effects of the 2023-2025 SREs, EPA is required as a matter of law to reallocate 100% of the exempt 2023-2025 obligations. That is required by EPA's "core mandate" under the CAA to set standards reasonably designed to "ensure" that the applicable volumes are met. And that is required by EPA's duty to engage in reasoned decisionmaking.

III. But even if reallocation were not mandatory, EPA would at least have discretion to reallocate the exempt 2023-2025 obligations under both its "ensure" duty and its "Set" power.

IV. And insofar as EPA is exercising its discretion, it would be arbitrary and capricious for EPA to reallocate less than 100% of those obligations. First, 100% reallocation best serves Congress' intent that the RFS program force the market to increase its renewable-fuel use and best achieves the public benefits Congress sought to achieve by creating the RFS program: increasing U.S. energy security and independence, decreasing greenhouse-gas emissions, and promoting job growth and rural economic development. Full reallocation is also most consistent with EPA's analysis of the various statutory Set factors and with EPA's conclusion that those factors overall favor the proposed applicable volumes. Second, reallocation—even 100%—would not harm non-exempt obligated parties because they can avoid all *net* RIN costs, and if there were any portion of those costs that they could not avoid, that portion would be far too small to justify non-reallocation. But at most, that unavoidable portion cost could justify only the same proportion of non-reallocation. Third, no statutory Set factor is affected adversely by reallocation. And fourth, it would be irrational for EPA to decline 100% reallocation in order to preserve or increase the carryover-RIN bank for the future.

V. There is no reason to treat the exempt cellulosic-biofuel obligations differently. The cellulosic-waiver standard plays no role when setting applicable volumes for 2023 or later years. And anyway, reallocation is not inconsistent with accounting for the cellulosic-waiver standard at this stage.

DISCUSSION

I. TO THE EXTENT THE 2023-2025 SRE OBLIGATIONS ARE NOT REALLOCATED, THEY WILL CONTINUE TO UNDERMINE FUTURE RFS STANDARDS AND WILL EVENTUALLY CREATE AN EQUIVALENT RENEWABLE-FUEL SHORTFALL

EPA "project[s] that a total of 2.18 billion RINs will not need to be retired as a result of SREs for 2023-2025."[7] As EPA notes correctly, the availability of those additional RINs will reduce the binding force of the 2026-2027 RFS standards one for one, which in turn could result in lower renewable-fuel usage in 2026-2027. The supplemental proposal, however, mistakenly treats the possibility that this usage reduction will not be fully experienced in 2026-2027 as possible justification for reallocating less than 100% of the exempted 2023-2025 obligations. To the extent that the SRE-based RINs are not used to reduce renewable-fuel usage in 2026-2027, they will continue to undermine the binding force of RFS standards in the future and will eventually reduce renewable-fuel usage by the entire exempt volume, i.e., the projected 2.18 billion gallons. In other words, any SRE-based RINs not drawn down in 2026-2027 to achieve compliance in lieu of renewable-fuel use will be rolled forward to 2028, where the process on which EPA rests its reallocation proposal will repeat, suppressing the effective RFS standards and depressing RIN prices until the SRE-based RIN-bank inflation has been fully drawn down through an aggregate renewable-fuel shortfall of 2.18 billion gallons. This is the inevitable product of the RFS program's structure and basic economic principles—structure and principles that EPA recognizes in the supplemental proposal (as it has recognized on prior occasions).

In the supplemental proposal, EPA correctly recognizes that the 2023-2025 SREs will make additional carryover RINs available for compliance in 2025-2027. The RINs associated with the 2023-2024 SREs "no longer need to be retired for compliance" with the now-closed 2023-2024 obligations, and therefore they can be carried over.[8] Although the RINs made available by 2023 SREs will have expired by the end of 2024 and therefore not be directly available for compliance with the 2025-2027 standards, they will in effect be extended for compliance with the 2025 standards through the "rolling" process that EPA describes in the supplemental proposal and has described before: obligated parties will use all the carryover 2023 RINs for 2024 compliance and instead bank additional 2024 RINs for 2025.[9] This rolling will *necessarily* happen because otherwise obligated parties would allow their valuable RINs to expire worthless—which no profit-maximizing economic entity would do. The only limit on this rolling is that carryover RINs can be used to meet only 20% of the obligations, but that limit has no practical force now because the 2023 SRE RINs are less than 20% of the 2024 obligations.[10] Similarly, the RINs made available by the 2024 SREs will be carried over to 2025. Thus, the 2023-2024 SREs will inflate the RIN bank in 2025.

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[7] Supplemental NPRM at 45,009:2.

[8] Supplemental NPRM at 45,010:2.

[9] Supplemental NPRM at 45,010:2; 85 Fed. Reg. 7,016, 7,021 n.15 (Feb. 6, 2020); *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1236 (10th Cir. 2020).

[10] Supplemental NPRM at 45,010:2; 85 Fed. Reg. 7,016, 7,021 n.15 (Feb. 6, 2020).

In 2025, the bank inflation from 2024 carryover RINs caused by the 2023-2024 SREs could affect obligated parties' actions in two ways. First, obligated parties "could choose to use [those] carryover RINs to comply with their [2025] RVOs in lieu of acquiring renewable fuel produced in [2025], thereby reducing the demand for renewable fuel production and use in [that] year[]."[11] In other words, those SREs could create a renewable-fuel shortfall relative to the 2025 applicable volumes and national percentage standards. This would draw down the RIN bank because obligated parties would retire the 2024 carryover RINs but not replace them with 2025 RINs, i.e., would not roll the 2024 carryover RINs into 2025 carryover RINs for use in 2026. Second, obligated parties could use the volume of renewable fuel required by the 2025 standards and avoid creating a renewable-fuel shortfall in 2025. In contrast to the first scenario, this second scenario would maintain the bank inflation from the 2023-2024 SREs because obligated parties would retire the 2024 carryover RINs but roll them into new 2025 RINs, which they would carry over to 2026. Obligated parties could also do a bit of both: partially draw down the SRE-based bank inflation, creating some degree of renewable-fuel shortfall, and partially roll the 2024 RINs into 2025 RINs, which they would carry over into 2026. Again, the 20% limit on using carryover RINs would have no force because it would exceed the total number of carryover RINs. Moreover, for the same reasons, the 2025 SREs would make additional 2025 RINs available to be carried over into 2026.

So far, this description of the effects of the 2023-2025 SREs accords with the description in the supplemental proposal. It also accords with prior EPA statements. For example, during the Set 1 rulemaking, EPA noted: "SREs generally affect[] the demand for RINs in the calendar year in which they were granted and the following years, rather than in the RFS compliance year to which they applied."[12] EPA explained that "a small refinery that was granted an exemption [might] continue[] to blend renewable fuel into its own gasoline and diesel due to the economic attractiveness of doing so. In such cases, the total number of RINs generated may not have been reduced by the SRE, but the carryover RIN bank may have increased."[13] Thus, for example, "lower D6 RIN prices"—reflecting lower demand for conventional renewable fuel—"[a]fter 2018 … [we]re largely the result of: (1) Small refinery exemptions (SREs) granted [retroactively] in 2018 [*for* the 2016 and 2017 compliance years], which reduced the total number of D6 RINs needed for compliance with the RFS obligations …; and (2) The large

[11] Supplemental NPRM at 45,010:3.

[12] *Renewable Fuel Standard (RFS) Program: RFS Annual Rules, Regulatory Impact Analysis* at 7 (June 2022).

[13] *Ibid.*

number of carryover RINs available."[14] Independent economic analysis confirms this reasoning.[15]

The supplemental proposal then tries to determine the specific year in which "the effect of these [SRE-based] RINs is likely to be most acute."[16] EPA surmises the most acute effect will likely be "in 2026 and 2027" because "only a few months remain in" 2025.[17] EPA seems to have in mind that the bank inflation caused by the 2023-2025 SREs is unlikely to cause an actual renewable-fuel shortfall in 2025 because there is too little time remaining for obligated parties to reduce their renewable-fuel use and rely on those RINs instead—in fact, by time EPA finalizes its supplemental proposal, 2025 could be over. Instead, EPA expects that "the effect of these RINs is likely to be most acute in 2026 and 2027."[18] EPA reaches this conclusion based on the same programmatic and economic logic just described. EPA explains:

> SREs granted for 2023-2025 will result in lower-than-anticipated RVOs for [2026 and 2027] and, all else being equal, will result in a higher number of carryover RINs available for use in 2026 and future years. Increased numbers of carryover RINs can negatively impact the demand for renewable fuel and the associated RINs. This is because obligated parties can use carryover RINs years to meet their compliance obligations in 2026 and 2027 in lieu of acquiring RINs generated in these years. An increase in the availability of carryover RINs to meet obligated

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[14] *Id.* at 40. In the Set 1 rulemaking, EPA erred, however, in stating that "higher-than-projected gasoline and diesel demand could offset the effect of SREs to some degree." *Id.* at 7. That could be true relative to the nominal applicable volumes but that is false with respect to the volumes implied by the percentage standards. The point of a percentage standard is that the required volume of renewable fuel varies in proportion to the volume of transportation fuel used. So, if more transportation fuel was used than projected, the RFS correspondingly requires that proportionally more renewable fuel also be used. Absent reallocation, SREs will necessarily create a shortfall relative to the volumes required by the percentage standards, regardless of whether transportation-fuel usage exceeds the projected volumess on which the standards were initially based.

[15] Edgeworth Economics, *The Impact of EPA's Policies Regarding RVOs and SREs* at 2 (Aug. 30, 2019) [Growth Energy Comment on Set 2 NPRM, Ex. 7 at 7, EPA-HQ-OAR-2024-0505-0646] (as EPA granted much greater amounts of SREs in 2018 and 2019, "D6 RIN prices fell [to] the lowest level since 2013, and the RIN bank once again expanded as obligated parties began to generate excess RINs" in light of the SREs); *id.* at 8 (those SREs "adversely affected ethanol demand by reducing the incentive to sell E85" and "[t]he remaining impact likely was absorbed by the RIN bank").

[16] Supplemental NPRM at 45,010:2.

[17] Supplemental NPRM at 45,010:2.

[18] Supplemental NPRM at 45,010:2.

parties' compliance obligations in 2026 and 2027 could decrease the demand for current-year RINs.[19]

EPA is probably correct that the 2023-2025 SREs' effect is likely not to be felt in 2025 and is likely to be most acute in 2026 and 2027. And that prediction correctly prompts EPA to propose reallocating the exempt 2023-2025 obligations through the 2026 and 2027 RFS standards: "Thus, failure to mitigate the market impacts of the increased number of carryover RINs due to the 2023-2025 SREs could result in a decrease in demand for renewable fuel produced in 2026 and 2027. … The co-proposed SRE reallocation volumes for 2026 and 2027 are intended to prevent increased numbers of carryover RINs from decreasing demand for renewable fuel below the proposed applicable volumes for 2026 and 2027 in the Set 2 proposal."[20]

So far, so good. But then EPA recognizes the possibility that the RINs made available by the 2023-2025 SREs in 2026-2027 will not cause an equivalent reduction in renewable-fuel use *in 2026-2027*, and this is where the supplemental proposal goes wrong: it mistakenly treats that possibility as a potential justification for reallocating less than 100% of the exempted obligations. The supplemental proposal states: "Obligated parties holding few or no carryover RINs may have an incentive to hold any carryover RINs attributable to 2023-2025 SREs as a compliance flexibility for future years rather than using them towards their 2026 or 2027 compliance obligations. If obligated parties hold, rather than use, these carryover RINs, we expect a much smaller impact, and potentially even no impact, on the RIN and renewable fuel markets. We are therefore co-proposing SRE reallocation volumes for 2026 and 2027 equal to 50 percent of the 2023-2025 exempted RVOs"[21] and soliciting comment on reallocating 75%, 25%, and 0% of the 2023-2025 exempted obligations.[22]

In suggesting less than 100% reallocation of the exempt 2023-2025 obligations, EPA contradicts its own analysis of the effects of the 2023-2025 SREs and the ineluctable programmatic and economic logic underlying that analysis. That logic dictates that the 2023-2025 exempt obligations *must* be *fully* reallocated. As EPA acknowledges, RINs made available by the 2023-2025 SREs—if not used in lieu of renewable fuel—can be "roll[ed] … forward to the 2025 compliance year *and beyond*"[23] and can be "available for use in 2026 and future *years*."[24] The "beyond" is not necessarily confined to 2026 and 2027, as the plural "future years" after 2026 implies. To the extent that the bank inflation caused by the 2023-2025 SREs remains in 2028, those available RINs will repeat the effects first felt in 2026-2027. They will reduce the volume of renewable fuel that must be used in 2028 (one for one). At that point, obligated parties will face the same choice they will face in 2026 and 2027: whether to use those

[19] Supplemental NPRM at 45,014:1:2; *see also* Supplemental NPRM at 45,010:3.

[20] Supplemental NPRM at 45,010:3; Supplemental NPRM at 45,014:1.

[21] Supplemental NPRM at 45,011:1; *see also* Supplemental NPRM at 45,014:3-45,015:1.

[22] Supplemental NPRM at 45,009:3.

[23] Supplemental NPRM at 45,010:2 (emphasis added).

[24] Supplemental NPRM at 45,014:1 (emphasis added).

RINs in lieu of using renewable fuel—i.e., whether to create a present renewable-fuel shortfall—or whether to roll them into 2029. To the extent that obligated parties roll them into 2029, the effects will continue and the choice will repeat in 2029, and so on, every year, until eventually every RIN originally made available by the 2023-2025 SREs has been used in lieu of renewable-fuel usage. And this eventual renewable-fuel shortfall equal to the SRE volume is inevitable given the logic of the RFS program and obligated parties' economic interests. In short, the entire volume of SREs—2.18 billion, according to supplemental proposal's estimate—will necessarily create an equivalent renewable-fuel shortfall of 2.18 billion gallons over the course of the RFS program unless fully reallocated.

Consequently, as explained below in Parts II and III, EPA *must* reallocate *100%* of the 2023-2025 exempt obligations.

II. BOTH EPA'S DUTY TO SET RFS STANDARDS THAT "ENSURE" THE REQUIRED VOLUMES WILL BE MET AND ITS DUTY TO ENGAGE IN REASONED DECISIONMAKING REQUIRE EPA TO REALLOCATE THE SREs FULLY

EPA is legally required to reallocate 100% of the exempt 2023-2025 obligations. This legal duty comes from two independent sources.

First, as EPA and the D.C. Circuit have recognized, EPA's "core mandate[is] to ensure the Act's annual renewable fuel volumes are met."[25] This means that EPA "must set percentage standards that … are reasonably designed … to meet the target volumes for th[e] upcoming year."[26] This mandate continues throughout the life of the RFS program, even after 2022. The statutory provisions articulating the "ensure" duty are not time-limited; on the contrary, one expressly states that EPA's regulations must comply with the "ensure" duty "[r]egardless of the date of promulgation."[27] Moreover, it would make no sense for EPA's "core mandate" to evaporate while the program continues. EPA itself has recognized that its "ensure" duty continues for the duration of the RFS program. EPA invoked this overarching "ensure" duty in the 2020 rulemaking as authority for modifying the percentage formula to account for projected retroactive SREs *for all future years*, not just for 2020 or 2020-2022.[28] EPA's 2022 Rule did likewise in reaffirming that modification.[29] Indeed, the 2022 rule expressly stated that the

[25] *Wynnewood Refining Co., LLC v. EPA*, 77 F.4th 767, 779 (D.C. Cir. 2023); *see also* 42 U.S.C. § 7545(*o*)(2)(A)(i), (iii)(I) & (3)(B)(i); 85 Fed. Reg. at 7,050:3, 7,051:2.

[26] Br. for Respondents at 27, 29, *Clean Fuels Alliance America v. EPA*, No. 20-1107, ECF #2112942 (D.C. Cir. Apr. 25, 2025).

[27] 42 U.S.C. § 7545(*o*)(2)(A)(iii)(I).

[28] 85 Fed. Reg. at 7,050:3 & nn.158-159.

[29] 87 Fed. Reg. 39,600, 39,632:2-39,633:1 & nn.185-186 (July 1, 2022).

revised percentage formula "would in fact better 'ensure' that the volumes are met" if EPA "grant[s] SREs for some future compliance year," i.e., after 2022.[30]

In the supplemental proposal, EPA correctly recognizes that insofar as carryover RINs made available by the 2023-2025 SREs are rolled into 2026 and 2027, they will diminish the binding force of the standards EPA sets for those years one for one because obligated parties could use those RINs in lieu of the corresponding volume of renewable fuel. In other words, if EPA sets the total applicable volume for 2026 to 24.02 billion gallons and there are 2.18 billion carryover RINs available from the 2023-2025 SREs, the percentage standard EPA establishes will actually *require* obligated parties to use 24.02 *minus* 2.18 billion gallons of renewable fuel, i.e., 21.84 billion gallons. If obligated parties use more than 21.84 billion gallons of renewable fuel in 2026, that will be a voluntary choice they make, not an act mandated by the 2026 RFS standards. In short, as long as there are RINs for compliance in 2026 or 2027 made available by the 2023-2025 SREs, the standards EPA establishes for 2026-2027 will not be reasonably designed to meet the required applicable volumes EPA sets for 2026-2027 unless the associated exempt obligations are fully reallocated. To fulfill its "ensure" duty, EPA must reallocate all the exempt 2023-2025 obligations.

In fact, EPA previously recognized this logic in modifying the percentage formula to account for retroactive SREs, and the D.C. Circuit upheld that analysis. In that rulemaking, EPA correctly explained that "should [it] grant [exemptions] without accounting for them in the percentage formula, those exemptions would effectively reduce the volumes of renewable fuel required by the RFS program, potentially impacting renewable fuel use in the U.S."[31] Raising the standards to reallocate retroactively exempt obligations, EPA declared, has "the effect of ensuring that the required volumes of renewable fuel are met when small refineries are granted exemptions from their [RFS] obligations after the issuance of the final rule."[32] The D.C. Circuit affirmed EPA's position, concluding that EPA's statutory duty "to 'ensure' that the applicable volumes 'are met'" supplies EPA with "the authority to adjust the percentage standards to account for small refinery exemptions."[33] The Court added that reallocating retroactive SREs

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[30] 87 Fed. Reg. at 39,633:1. The "ensure" duty expressed in § 7545(*o*)(3)(B)(i) is not time limited. The phrase "calendar years 2005 through 2021" only specifies when the establishment of percentage standards is no longer governed by the deadline specified in the preceding phrase: "Not later than November 30 of each of." § 7545(*o*)(3)(B)(i). For post-2022 calendar years, the CAA establishes a different deadline: "no later than 14 months" before the year begins. § 7545(*o*)(2)(B)(ii). Nor does the phrase "calendar years 2005 through 2021" time limit EPA's duty to issue percentage standards (as opposed to applicable volumes) for 2023 and later years. The RFS could not function without percentage standards, as EPA acknowledged when it decided to continue using them after 2022, 88. Fed. Reg. at 44,519:2-3—a decision expressly based on EPA's recognition that its continuing "ensure" duty continues after 2022, *id.* at 44519:2.

[31] 85 Fed. Reg. at 7,050:3.

[32] *Ibid.*

[33] *Sinclair Wyoming Refining Co. v. EPA*, 101 F.4th 871, 891, 893 (D.C. Cir. 2024).

"helps prevent *undercompliance* by ensuring that the leeway afforded to small refineries does not lead to percentage standards that undershoot the target renewable fuel requirements."[34]

Second, EPA is separately "required to engage in reasoned decisionmaking," not arbitrary or capricious decisionmaking.[35] That means that in setting RFS standards, EPA must "consider [all] important aspect[s] of the problem" and "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[36] If EPA sets RFS standards without accounting for carryover RINs still available because of the 2023-2025 SREs, it will knowingly set standards that will not require the volume of usage that they purport to require, i.e., it will knowingly set ineffectual standards by blinding itself to obvious circumstances regarding how those standards will operate. That would not reflect reasoned decisionmaking.

As explained above, the programmatic logic underlying these twin legal duties does not end in 2026, or even 2027. Rather, it continues to all subsequent years as long as the RIN bank remains inflated *to any degree* because of the 2023-2025 SREs. For example, if 1 billion of the 2.18 billion RINs estimated to be available in 2026 because of the 2023-2025 SREs are drawn down for compliance in 2026 in lieu of using additional renewable fuel, then the remaining 1.18 billion RINs that are rolled forward into 2027 will reduce the effective requirement of the 2027 standards by an equivalent 1.18 billion gallons. If 500 million of those 1.18 billion RINs are then drawn down for compliance in 2027 in lieu of using additional renewable fuel, then the remaining 680 million RINs will be rolled forward into 2028 and will reduce the effective requirement of the 2028 standards by an equivalent 680 million gallons. This process will continue until all the SRE-based RINs are drawn down in lieu of renewable fuel use. Each year, EPA would set the standards in violation of its duties to "ensure" that the standards will require the specified volume of renewable fuel and in violation of its duty to engage in reasoned decisionmaking. The only way to avoid those violations is to reallocate 100% of the exempt the 2023-2025 obligations.

III. EPA'S "ENSURE" DUTY AND THE "SET" PROVISION AT LEAST GIVE EPA DISCRETION TO REALLOCATE THE SREs

Even if EPA were not statutorily required to reallocate 100% of the exempt 2023-2025 obligations, EPA would at least have statutory discretion to do so. Here again, there are two sources of such authority.

First, EPA's "ensure" "mandate" (described above) at a minimum gives EPA *permission* to reallocate the SRE obligations. As the D.C. Circuit has held, EPA finds "authority to account

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[34] *Ibid.*

[35] *Michigan v. EPA*, 576 U.S. 743, 750 (2015); *see also* 42 U.S.C. § 7607(d)(9)(A); 5 U.S.C. § 706(2)(A).

[36] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

for the small refinery exemptions in the statutory language directing EPA to promulgate regulations to 'ensure' that the applicable volumes 'are met.'"[37]

Second, as the supplemental proposal explains, the CAA's "Set" provision also authorizes EPA to reallocate exempt obligations when establishing annual standards. That provision requires EPA to set volume requirements "based on a review of the implementation of the program during [prior] calendar years … and an analysis of" an array of statutorily specified factors.[38] The supplemental proposal correctly recognizes that this framework allows EPA to reallocate the exempt 2023-2025 obligations in setting the 2026-2027 volume requirements.

As described above, the history of the RFS program shows that, if not reallocated, SREs ultimately suppress renewable-fuel usage—either immediately in the year for which they are granted or later by inflating the RIN bank, which then displaces renewable-fuel usage in subsequent years. EPA can and should heed this lesson in exercising its power under the Set provision, and EPA rightly acknowledges that in the supplemental proposal: "under our directive to review the implementation of the program, … the SREs granted for 2023-2025 … have a direct impact on the RFS obligations … for all [non-exempt] obligated parties in aggregate (which can now retire a greater number of carryover RINs and fewer current year RINs to satisfy their combined RFS obligations for 2024 and 2025). … [B]ecause obligated parties can now use the carryover RINs that otherwise would have been retired for compliance but for the 2023-2025 exemptions, SREs granted in one year can have an impact on the market for RINs and renewable fuel in future years."[39]

The supplemental proposal also accounts for the various statutory factors EPA must consider in setting volume requirements after 2022. In its initial Set 2 proposal, EPA determined, based on its consideration of the various statutory factors, that the market could produce, distribute, and use the proposed volumes of renewable fuel, and that the other factors were generally enhanced by or consistent with achieving such volumes.[40] Because full reallocation of the exempt 2023-2025 obligations would preserve the intended binding force of the proposed volume requirements, and thus the intended level of renewable-fuel demand, full reallocation is supported by and consistent with EPA's analysis of the statutory factors. EPA rightly acknowledges this in the supplemental proposal: "the statutory factors that the EPA must consider when establishing the applicable volumes for years after 2022 are impacted by the production and use of renewable fuel and are not impacted by the use of carryover RINs."[41]

The supplemental proposal states that the CAA "gives EPA considerable discretion to weigh and balance the various factors required by statute."[42] It is true that EPA has significant

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[37] *Sinclair Wyoming*, 101 F.4th at 891-892.

[38] 42 U.S.C. § 7545(*o*)(2)(B)(ii).

[39] Supplemental NPRM at 45,014:2.

[40] *See* NPRM at 25,812:1-25,834:3.

[41] Supplemental NPRM at 45,014:2-3.

[42] Supplemental NPRM at 45,011:2.

discretion in exercising its power under the Set provision, and that discretion is sufficiently broad to include the proposed reallocation. However, as Growth Energy explained in its initial comment on the Set 2 proposal, that discretion is not unlimited: specifically, EPA must set the volume requirements at the maximum volume of renewable-fuel use that can be achieved in response to the RFS's incentives, unless achieving that volume would likely trigger the conditions for a general waiver based on severe economic or environmental harm.[43] This constraint supports the supplemental proposal because reallocation helps ensure that the required volumes are not effectively reduced when they are readily achievable (as the initial Set 2 proposal shows they are).

IV. IF EPA HAS DISCRETION REGARDING WHETHER TO REALLOCATE THE 2023-2025 SREs, IT WOULD BE ARBITRARY AND CAPRICIOUS NOT TO EXERCISE THAT DISCRETION TO REALLOCATE THE EXEMPT OBLIGATIONS FULLY

As explained above, EPA is statutorily required to fully reallocate the exempt 2023-2025 obligations, but at a minimum, EPA has discretion to do so. Under the circumstances, any reallocation that is less than 100% would be arbitrary and capricious.

A. Full Reallocation Would Best Serve All the Statutory Objectives That EPA Found Would Be Served by Achieving the Proposed Volumes

Congress created the RFS program "to force the market" to "replace" fossil fuel with "greater and greater volumes of renewable fuel each year."[44] Congress adopted this "market-forcing policy" to "move the United States toward greater energy independence and security," "to reduce greenhouse gas emissions," and to promote "job creation … [and] rural economic development."[45]

In its initial Set 2 proposal, EPA determined that the proposed applicable volumes would further the achievement of these congressional objectives. First, EPA assessed that its proposed volumes would force the market to increase its renewable-fuel usage above the amount that the market would use without the RFS program.[46] Specifically, EPA proposed to require about 6.514 billion gallons of renewable fuel above the "No RFS" level in 2026 and about 6.900 billion gallons of renewable fuel above the "No RFS" level in 2027.[47] Second, EPA's analysis found that "the proposed volume standards" would yield "benefits" in terms of "jobs, rural economic

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[43] Growth Energy Comment on Set 2 NPRM at 6-11, EPA-HQ-OAR-2024-0505-0646.

[44] *Americans for Clean Energy v. EPA*, 864 F.3d 691, 696-697, 710 (D.C. Cir. 2017).

[45] *Americans for Clean Energy*, 864 F.3d at 696-697, 705; 42 U.S.C. § 7545(*o*)(2)(B)(ii)(I)-(II) & (VI); *see also, e.g.*, NPRM at 25,829:3.

[46] Growth Energy, however, maintains that EPA's proposed implied conventional volumes are at least 1 billion gallons too low. *See* Growth Energy Comment on Set 2 NPRM at 11-17, EPA-HQ-OAR-2024-0505-0646.

[47] *Compare* NPRM at 25,811 Table III.D.1-1 (estimated No RFS use of 17.506 bil gal and 17.560 bil gal) *with id.* at 25,829 Table V.F-1 & Table V.F-2 (proposed RFS use of 24.02 bil gal and 24.46); *see also id.* at 25,785:3, 25,788:3.

development, energy security …, and … climate" through reduction in greenhouse-gas emissions—the very benefits that Congress intended the RFS to achieve by forcing the market to increasingly replace petroleum with renewable fuel.[48] Further, EPA considered the costs of achieving the proposed volumes, consistent with the statutory Set factors, and found in its initial Set 2 proposal that "the proposed volumes are appropriate under EPA's statutory authority as an outcome of balancing all relevant factors."[49]

Again, 100% reallocation of the exempt 2023-2025 obligations would simply preserve this analysis and thus preserve these positive overall consequences consistent with Congress' objectives and the statutory factors. As EPA notes, full reallocation will "not … increase the production and use of renewable fuel beyond the volumes previously proposed for 2026 and 2027"; rather, full reallocation will simply require that the RIN bank inflation resulting from the 2023-2025 SREs be drawn down, and "the statutory factors that the EPA must consider when establishing the applicable volumes for years after 2022 … are not impacted by the use of carryover RINs."[50] On the other hand, less than full reallocation would diminish or eliminate the statutory benefits: as discussed above, less than full reallocation would reduce renewable-fuel usage, which in turn would diminish the reduction in greenhouse-gas emissions, diminish the enhancement of U.S. energy security and independence, and diminish job growth and rural economic development.

In sum, full reallocation best accounts for the statutory factors and best serves the central objectives that Congress sought to achieve through the RFS program.

B. Reallocation Would Not Harm Non-Exempt Obligated Parties

Although reallocation would increase the obligations for non-exempt obligated parties, those increased obligations would not impose additional net financial cost on non-obligated parties. As Growth Energy explained in its initial comment, obligated parties incur no net compliance cost under the RFS program, or at most a *de minimis* net cost.[51] EPA recognizes this is in the supplemental proposal: "We do … expect that, on average at the national level, obligated parties would pass on the costs of purchasing additional RINs to consumers."[52] Indeed, objections that small refineries have raised to their ability to fully recoup their RIN costs are not only incorrect but also would generally not apply to non-exempt obligated parties anyway.

Even a *de minimis* cost cannot justify anything less than 100% reallocation, given that any such lesser reallocation would reduce renewable-fuel use and the associated congressionally desired benefits. But at most, if obligated parties would absorb some portion of the net compliance cost of the reallocated obligations, that would warrant non-reallocation only to that

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[48] NPRM at 25,829:3; *see id.* at 25,830:1-25,831:1.

[49] NPRM at 25,788:2.

[50] Supplemental NPRM at 45,014:2; *see also id.* at 45,015:1.

[51] Growth Energy Comment on Set 2 NPRM at 25-36, EPA-HQ-OAR-2024-0505-0646.

[52] Supplemental NPRM at 45,015:1.

proportional extent. For example, if obligated parties would have to bear 0.5% of the net RIN costs from complying with the reallocated obligations, then EPA could decline to reallocate only 0.5% of those obligations. A disproportionately large non-reallocation would be economically irrational, unfair to renewable-fuel producers, and detrimental to the achievement of the congressionally desired objectives of the RFS program.

To summarize the key points regarding compliance costs from Growth Energy's initial comment:

- Extensive empirical study has found that obligated parties pass at least 98% of their marginal RIN costs down the supply chain. The principal study finding less than 100% pass-through suffered from methodological flaws that understated the pass-through, but even if its finding were sound, that would mean that obligated parties absorb, at most, only a miniscule portion of the RIN cost.[53]

- All obligated parties can fully avoid net RIN costs through readily available RIN contracts. As with virtually any other financial instrument or commodity, actors in financial markets make contracts available for RINs to manage price fluctuations over time. Through such contracts, obligated parties can match their incremental RIN purchases and associated price risk to their incremental fuel sales, and thereby achieve consistent, reliable, and complete RIN-cost pass-through.[54]

- Even if obligated parties achieve only incomplete pass-through of their RIN costs, that does not necessarily mean they incur a *net* cost. RIN prices can rise or fall, and so incomplete pass-through of RIN costs can result in either a net cost or a net gain to the obligated party. And the history of the RIN market shows that RIN prices regularly rise and fall to a roughly equal extent, meaning that the gains will generally offset the costs overall. In any event, there is no *a priori* reason to conclude that the costs will exceed the gains overall, and EPA could conclude that the reallocation will inflict a *net* cost on obligated parties only if EPA finds that obligated parties' unpassed-through RIN costs will exceed their unpassed-through RIN gains, but there is no empirical evidence of that.[55]

- There is no reason an obligated party would lack sufficient working capital to fully pass through its RIN costs. Obligated parties never need to "pre-purchase"—i.e., lay out capital for—RINs before selling the corresponding fuel, and thus they will always have the capital from the sale of their fuel available to finance the corresponding RIN acquisition. In fact, obligated parties can use strategies for acquiring RINs that are accretive to their working capital.[56]

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[53] Growth Energy Comment on Set 2 NPRM at 27-28, 32, EPA-HQ-OAR-2024-0505-0646.

[54] Growth Energy Comment on Set 2 NPRM at 28-31, 32-34, EPA-HQ-OAR-2024-0505-0646.

[55] Growth Energy Comment on Set 2 NPRM at 27, 33-34, EPA-HQ-OAR-2024-0505-0646.

[56] Growth Energy Comment on Set 2 NPRM at 34, EPA-HQ-OAR-2024-0505-0646.

- Small merchant refineries have argued that they cannot achieve full pass-through of their RIN costs because of certain features unique to their small size or the small size of the local markets in which they operate. Those arguments are refuted by both the empirical evidence and economic theory. But in any event, those arguments generally would not apply to *non*-exempt obligated parties, which are typically integrated, are typically larger, and typically operate in larger markets.[57]

C. No Statutory Set Factors Weigh Against the Proposed Reallocation

In the supplemental proposal, EPA identifies only one statutory factor that *might* be affected adversely by reallocating the exempt 2023-2025 obligations: retail fuel prices for consumers (precisely because of RIN-cost pass-through). EPA explains: "We do … expect that, on average at the national level, obligated parties would pass on the costs of purchasing additional RINs to consumers, and that this action could increase the cost of transportation fuel to consumers."[58] But as EPA correctly recognizes, this effect does not alter EPA's initially proposed analysis of the "cost to consumers" statutory factor or the broader Set factor analysis.

Again, even 100% reallocation would merely preserve the binding force of the previously proposed volumes. In the Set 2 proposal, EPA already assessed the cost of those volumes to consumers and found it to be outweighed by the benefits Congress sought to achieve. The supplemental proposal's cost analysis confirms that even 100% reallocation would not increase the cost to consumers above what EPA had already accounted for.[59]

Moreover, as the D.C. Circuit has held, "in enacting the Renewable Fuel Standards Program, Congress made a policy choice to accept higher fuel prices in order to reap the benefits of greater energy independence and … reduced greenhouse gas emissions."[60] "If it were otherwise, the RFS Program would be largely superfluous; the market would independently incentivize the production and consumption of renewable fuels."[61] So, as a matter of law, the very small cost to consumers associated with achieving the full proposed volumes (with reallocation or not) *cannot* outweigh the statutory benefits associated with those volumes.

D. Any Desire to Maintain or Grow the RIN Bank as a Safety Valve Cannot Justify Any Non-Reallocation

Asserting that "[c]arryover RINs provide obligated parties compliance flexibility for substantial uncertainties in the transportation fuel marketplace," EPA states in the supplemental proposal: "Because of the limited number of carryover RINs available [apart from the 2023-2025 SREs], it may not be necessary or appropriate to propose SRE reallocation volumes for 2026 and

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[57] Growth Energy Comment on Set 2 NPRM at 34-36, EPA-HQ-OAR-2024-0505-0646.

[58] Supplemental NPRM at 45,015:1.

[59] Supplemental NPRM at 45,015:2-3.

[60] *Sinclair Wyoming*, 101 F.4th at 889.

[61] *Sinclair Wyoming*, 101 F.4th at 889.

2027 equal to the full magnitude of the 2023-2025 exemptions to maintain the intended renewable fuel use in 2026 and 2027."[62] This notion is wrong and should be rejected.

First, even 100% reallocation of the exempt 2023-2025 obligations would not affect non-exempt obligated parties' ability to comply with their 2026-2027 RFS obligations or draw down any carryover RINs that would be available irrespective of the 2023-2025 SREs. To meet the additional obligations resulting from the reallocation, obligated parties would, by definition, need to draw down only the RINs made available by the 2023-2025 SREs.[63] And EPA already determined that the initially "proposed volumes [for 2026 and 2027] could be met with renewable fuel produced and used in 2026 and 2027," without the use of carryover RINs.[64]

Second, if EPA is suggesting that less than 100% reallocation might be warranted to enable obligated parties to increase the RIN bank for *after 2027*, then EPA's suggestion is mistaken. For one thing, as explained above, that tactic would simply transfer the problems that 100% reallocation would resolve to a future year: again, the RIN bank inflation from the 2023-2025 SREs would reduce the efficacy of a future year's standards and would eventually lead to a renewable-fuel shortfall in a future year.[65] That would subvert Congress's market-forcing policy and Congress' intent to use that policy to achieve important public benefits. For another thing, as Growth Energy previously showed, EPA completely misunderstands the proper role of carryover RINs, and intentionally setting RFS standards to preserve or increase the number of carryover RINs contradicts Congress' purpose and the CAA's text.[66]

In any event, it would be arbitrary and capricious for EPA to implement less than 100% reallocation in order to increase the RIN bank without a concrete analysis of what size the RIN bank should be. But EPA has not presented any such analysis. Indeed, EPA has *never* analyzed whether any particular RIN-bank size—5 billion? 20 billion?—was necessary for the well-functioning of the RFS program.

V. EPA SHOULD NOT TREAT CELLULOSIC BIOFUEL DIFFERENTLY FOR PURPOSES OF REALLOCATING EXEMPT OBLIGATIONS

In the supplemental proposal, EPA asks whether it "should include all, some, or none of [the exempt 2023-2025 cellulosic biofuel] volumes in the SRE reallocation volumes."[67] EPA must and should include all of those volumes.

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[62] Supplemental NPRM at 45,010:3-45,011:1.

[63] *See* Supplemental NPRM at 45,014:2 ("We project that the portion of the RFS obligations represented by the SRE reallocation volumes would be met with carryover RINs attributable to the 2023-2025 exempted RVOs.").

[64] Supplemental NPRM at 45,009:3.

[65] *Supra* Pt. I.

[66] Growth Energy Comment on Set 2 NPRM at 40-42, EPA-HQ-OAR-2024-0505-0646.

[67] Supplemental NPRM at 45,011:3.

EPA wonders whether it may account for the carryover cellulosic RINs made available by the 2023-2025 SREs given that the "projected volume available"—a phrase used in the CAA's cellulosic-waiver provision—excludes carryover RINs.[68] This question is inapt for two separate reasons.

First, the cellulosic-waiver standard plays no role in setting the cellulosic biofuel volumes for years after 2022. As Growth Energy explained in its comment on the initial Set 2 proposal, EPA misunderstands the CAA's directives regarding how to set the cellulosic biofuel volumes for those years. EPA must set those volume requirements *without regard to* whether a cellulosic waiver will be triggered, i.e., EPA must set the volume requirement to the maximum achievable level of cellulosic biofuel production in response to RFS incentives (just as it must do for the other categories of renewable fuel); EPA may exercise the cellulosic waiver *later*, on the eve of the compliance year, if it turns out that the market was unable to achieve the specified level of production.[69]

Second, even under EPA's mistaken interpretation of the cellulosic-waiver standard, that standard is not implicated by the reallocation of the exempt 2023-2025 cellulosic biofuel volumes. The reallocation would increase the percentage standards to draw down cellulosic RINs made available by the 2023-2025 SREs, but that is not because those carryover RINs would be included in the projection of cellulosic-biofuel production. Rather, EPA's approach would first determine the projected production and provisionally establish the volume requirements at that level, but then independently adjust the standards to preserve the efficacy of the production-based volume requirements that EPA otherwise determines are appropriate.

These conclusions are unaffected if EPA determines that the achievable cellulosic volumes are actually higher than it initially proposed.[70] In that case, EPA must still set the cellulosic volume requirements to that level and then adjust the standards to account for the reallocation of the 2023-2025 cellulosic volumes.

But if EPA were to exclude the exempt 2023-2025 cellulosic obligations from the reallocation, it should not correspondingly reduce the total volume requirement because, as Growth Energy has shown, there is ample additional conventional ethanol to backfill the cellulosic shortfall beyond the volume on which EPA based its proposed total volume requirements.[71]

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[68] Supplemental NPRM at 45,011:3; *see* 42 U.S.C. § 7545(*o*)(7)(D)(i).

[69] Growth Energy Comment on Set 2 NPRM at 10-11, EPA-HQ-OAR-2024-0505-0646.

[70] Supplemental NPRM at 45,011:3.

[71] *See supra* n.46.