



# 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

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## **I. INTRODUCTION AND EXECUTIVE SUMMARY**

Growth Energy, Archer Daniels Midland (“ADM”), and Biotechnology Innovation Organization (“BIO”) previously commented on EPA’s proposed RFS rule for 2018.<sup>1</sup> Here, Growth Energy, ADM, and BIO jointly respond to EPA’s request for additional comments, as well as to certain prior comments on the proposed rule. Specifically, building on our prior comments, we make the following points:

- EPA has no authority to waive the total renewable fuel volume requirement in order to promote U.S. energy security and independence;
- The term “domestic supply” as used in the general waiver provision includes foreign-produced renewable fuel that is available to U.S. importers;
- EPA has no power to flow a general waiver of one volume standard to another, unlike the waiver power for cellulosic biofuel and biomass-based diesel;
- EPA should adhere to its existing interpretation of the provision allowing a general waiver where implementation of the volume requirements would “severely harm the economy or environment,” and should assess the potential for severe harm in view of all circumstances bearing on compliance, including the availability of other types of waivers and of carryover RINs;
- EPA should conclude that implementation of the proposed 2018 total volume requirement would not severely harm the economy;
- EPA may not consider RIN costs or other compliance costs when evaluating the “supply” of renewable fuel for purposes of the general waiver;
- EPA should continue to disallow RINs associated with exported renewable fuel to be used to show RFS compliance;
- EPA should not reduce the BBD requirement; and
- If EPA does reduce the BBD requirement, it should not carry that reduction through to the advanced or total requirements.

## **II. PROMOTING U.S. ENERGY INDEPENDENCE AND SECURITY CANNOT JUSTIFY A WAIVER UNDER THE GENERAL WAIVER PROVISION OR AN IMPLIED WAIVER AUTHORITY**

EPA solicits comment on whether it is appropriate to consider the effect of achieving the required volumes on U.S. energy independence and security in exercising its waiver authorities.<sup>2</sup>

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<sup>1</sup> Comment of Growth Energy on 2018 NPRM (Aug. 31, 2017), EPA-HQ-OAR-2017-0091-3681 (“Growth Energy 2018 Comment”); Comment of Biotechnology Innovation Organization on 2018 NPRM (Aug. 31, 2017), EPA-HQ-OAR-2017-0091-3680 (“BIO 2018 Comment”); Comment of Archer Daniels Midland Company on 2018 NPRM (Aug. 31, 2017), EPA-HQ-OAR-2017-0091-3319.

<sup>2</sup> Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019; Availability of Supplemental Information and Request for Further Comment, 82 Fed. Reg. 46,174, 46,177 (Oct. 4, 2017) (“Request for Further Comment”).

As Growth Energy explained in its initial comment, EPA has no legal authority to consider these factors for a waiver.<sup>3</sup>

The statute explicitly specifies various waiver powers and the conditions that must be satisfied for EPA to exercise them, but promoting U.S. energy independence and security are not among the specified conditions for any of the waiver powers. Indeed, that the statute explicitly authorizes waivers under *other* circumstances and even authorizes EPA to consider U.S. energy security for *non*-waiver purposes convey Congress's clear intent *not* to permit EPA to waive a volume requirement to promote U.S. energy independence and security.<sup>4</sup> Further, a waiver for energy security would contradict Congress's view of how biofuels and energy security relate; the RFS was created because Congress believed that higher levels of biofuels would increase energy security. Allowing EPA to reduce biofuels levels because of energy security concerns would thus run counter to a key premise of the law.

### **III. FOR PURPOSES OF THE GENERAL WAIVER, THE “DOMESTIC SUPPLY” OF RENEWABLE FUEL INCLUDES FOREIGN-PRODUCED RENEWABLE FUEL THAT IS AVAILABLE TO U.S. IMPORTERS**

EPA solicits comment on whether the term “domestic” in the general waiver provision should “account for only volumes of renewable fuel that are produced domestically.”<sup>5</sup> EPA has long held the view that imported renewable fuel is part of the “domestic supply” to be measured for purposes of the general waiver,<sup>6</sup> and it should adhere to that view. The plain text of the statute and the D.C. Circuit's decision in *Americans for Clean Energy v. EPA* require that “domestic supply” include all foreign-produced renewable fuel that is available to U.S. importers for import to the United States.

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<sup>3</sup> Growth Energy 2018 Comment at 35-42.

<sup>4</sup> See, e.g., *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.”); *Americans for Clean Energy v. EPA*, 864 F.3d 691, 712 (D.C. Cir. 2017) (“[T]he fact that EPA thinks a statute would work better if tweaked does not give EPA the right to amend the statute.”).

<sup>5</sup> Request for Further Comment at 46,177.

<sup>6</sup> See, e.g., *Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017*, 80 Fed. Reg. 77,420, 77,433 (Dec. 14, 2015) (“2014-2016 RFS Rule”) (noting that “limitations in the ... importation of qualifying renewable fuels ... constitute circumstances that warrant a waiver of the total renewable fuel requirement”); *id.* at 77,435, 77,438, 77,448, 77,451, 77,467-77,468.

In *Americans for Clean Energy*, the D.C. Circuit held that “domestic supply” clearly and unambiguously refers to the “volume of renewable fuel that is available to refiners, blenders, and importers to meet the statutory volume requirements.”<sup>7</sup> The court elaborated:

[I]t is evident that the “inadequate domestic supply” waiver provision refers to the supply of renewable fuel available to refiners, blenders, and importers to meet the statutory volume requirements. Under that reading, EPA may consider factors affecting the availability of renewable fuel to refiners, blenders, and importers. Those factors may include, for example, the availability of feedstocks used to make renewable fuel, the production capacity of renewable fuel producers, *the amount of renewable fuel available for import from foreign producers*, or the infrastructure capacity needed to get renewable fuel from producers to refiners, importers, and blenders.<sup>8</sup>

Interpreting “domestic supply” to include only domestically *produced* renewable fuel fails to account for the fact that Congress used “supply” in the general waiver provision but “production” in the cellulosic waiver provision.<sup>9</sup> As EPA and many of the commenters now proposing that interpretation have recognized before, the statute’s difference in diction indicates that Congress intended “supply” to mean something different from “production.”<sup>10</sup> And specifically, as the D.C. Circuit observed, “supply” includes not “*only* production capacity” *but also* “the amount of renewable fuel available through import.”<sup>11</sup>

In contrast, interpreting “domestic supply” to include foreign-produced renewable fuel does not render “domestic” meaningless or superfluous. Rather, it clarifies that EPA should measure only the renewable fuel that is “available to” the U.S. market, not all renewable fuel present in the world, all of which could be considered the total “supply” of renewable fuel. So, for example, if Brazil prohibits export of sugarcane ethanol to the United States, Brazilian sugarcane could not be included in the “domestic supply” of renewable fuel because it would not be “available for import” into the United States. EPA’s task in assessing “domestic supply” is only to determine the amount of foreign-produced renewable fuel that is “available for import”

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<sup>7</sup> *Americans for Clean Energy*, 864 F.3d at 696 (citing 42 U.S.C. §7545(o)(3)(B)(ii)); *see also id.* at 707-708 (“[I]t is the *refiners, blenders, and importers*—not consumers—who must ‘use’ the statutorily required volumes of renewable fuel by incorporating that fuel into the Nation’s supply of transportation fuel. It follows that it is the *refiners, blenders, and importers*—not consumers—who must have access to an adequate ‘supply’ of renewable fuel in order to meet the Renewable Fuel Program’s statutory volume requirements.”).

<sup>8</sup> *Id.* at 709 (emphasis added).

<sup>9</sup> Compare 42 U.S.C. § 7545(k)(6)(A)(ii) with *id.* § 7545(k)(6)(B)(iii)(I).

<sup>10</sup> *See Americans for Clean Energy*, 864 F.3d at 711; Final Brief of Obligated Party Intervenors at 20, *Americans for Clean Energy v. EPA*, No. 16-1005, ECF #1661212 (D.C. Cir. Feb. 14, 2017).

<sup>11</sup> *Americans for Clean Energy*, 864 F.3d at 711.

into the United States, for that is the volume that could be acquired and used to achieve compliance with RFS volume requirements.<sup>12</sup>

The supposed “common dictionary definitions of ‘domestic’” do not require the exclusion of foreign-produced renewable fuel.<sup>13</sup> Renewable fuel available for import to the United States is “domestic supply” in the sense that it “relat[es] to” and can be used “‘within’” the United States.<sup>14</sup> In contrast, renewable fuel that cannot be imported to the United States would not be “domestic supply” because it would not relate to or be available for use within the United States.

EPA posits that when the D.C. Circuit said that EPA “may consider factors affecting the availability of renewable fuel to refiners, blenders, and importers” for purposes of the general waiver provision, all the court intended was to “indicate the scope of permissible, but not required, interpretations, and not [to] foreclose further consideration by EPA of the scope of appropriate supply-side considerations.”<sup>15</sup> That reading of the opinion contravenes the plain text of the statute, completely misunderstands *Americans for Clean Energy*, and would impermissibly allow EPA to undermine the RFS program (much as EPA’s prior interpretation of “supply,” which the D.C. Circuit rejected, would have).<sup>16</sup> Nothing in the statute suggests that EPA has discretion to disregard the supply of renewable fuel or any category of available qualifying renewable fuel, including imports. In proposing that reading, EPA hangs its hat on the D.C. Circuit’s use of the word “may” (and the similarly used “authorized”) in remarking that EPA “may” (or is “authorized” to) consider supply-side factors in assessing “domestic supply” for general waiver purposes. That is misguided. The D.C. Circuit used “may” to refer to a series of examples of supply-side factors: not only “the amount of renewable fuel available for import from foreign producers” but also, e.g., “the production capacity of renewable fuel producers.”<sup>17</sup> If the court actually meant for “may” to imbue EPA with discretion to disregard a supply-side factor, that discretion would apply equally to *all* such factors. But the notion that EPA could ignore (for example) “the production capacity of renewable fuel producers” in measuring supply is nonsense. If EPA had that power, it could simply declare—contrary to the undeniable

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<sup>12</sup> *Id.* at 709; *see also id.* at 699 (“The percentage standards inform each obligated party of how much renewable fuel it must introduce into U.S. commerce based on the volumes of fossil-based gasoline or diesel it imports or produces.”).

<sup>13</sup> Request for Further Comment at 46,178.

<sup>14</sup> *Id.* (indirectly quoting dictionary).

<sup>15</sup> *Id.* at 46,177-46,178; *Americans for Clean Energy*, 864 F.3d at 709.

<sup>16</sup> *Americans for Clean Energy*, 864 F.3d at 710, 712 (EPA’s proposed interpretation of the “inadequate domestic supply” waiver provision “flouts th[e] statutory design,” is “goal-defying,” and “turns the Renewable Fuel Program’s ‘market forcing’ provisions on their head.”).

<sup>17</sup> *Id.* at 709 (“EPA may consider factors affecting the availability of renewable fuel to refiners, blenders, and importers. Those factors may include, for example, the availability of feedstocks used to make renewable fuel, the production capacity of renewable fuel producers, the amount of renewable fuel available for import from foreign producers, or the infrastructure capacity needed to get renewable fuel from producers to refiners, importers, and blenders.”).

reality—that there is *little or no* “supply” of renewable fuel, trigger the general waiver at will, and set new volume requirements wherever it wished. Much as with its now-rejected interpretation of “supply,” that interpretation would nullify the statutory volume requirements.<sup>18</sup> Rather, the context of the D.C. Circuit’s discussion makes clear that it was merely emphasizing that whereas EPA “may not consider” demand-side factors when measuring “supply” for general waiver purposes, supply-side factors are legitimate.<sup>19</sup>

EPA recites some commenters’ suggestion that interpreting “domestic supply” to exclude foreign-produced renewable fuel “could lead to volume requirements providing greater stability and certainty for obligated parties.”<sup>20</sup> This concern is misplaced; the long-term market predictability Congress sought to ensure to spur investment and growth comes from adhering to the long-term statutory volume schedule as much as possible,<sup>21</sup> and counting available foreign-produced renewable fuel as “supply” furthers that goal by reducing the likelihood that a general waiver will be triggered. Indeed, so long as the available imports together with domestic production are known to be sufficient to ensure adequate supply, any additional uncertainty about the precise availability of imports will have no bearing on the certainty of the need to meet the statutory requirements. And to whatever extent uncertainty regarding import volumes could engender uncertainty regarding the the potential for a waiver, that is irrelevant to the meaning of “domestic supply” because “policy arguments [can] not overcome the statute’s plain language,” which, as just discussed, treats foreign-produced renewable fuel as “domestic supply.”<sup>22</sup>

EPA also suggests that excluding foreign-produced renewable fuel from “domestic supply” “may better meet the [RFS statute’s] energy independence and security purposes.”<sup>23</sup> But

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<sup>18</sup> The same flaw dispatches one comment’s suggestion that the statutory phrase “as appropriate” somehow gives EPA the discretion to disregard an entire source of available renewable fuel. *See* Comment of American Fuel & Petrochemical Manufacturers and American Petroleum Institute at 27-28, EPA-HQ-OAR-2017-0091-3645 (“AFPM & API 2018 Comment”). That comment’s reading also founders on the statute’s plain meaning: the statute directs EPA to apply RVOs to “refineries, blenders, and importers, *as appropriate.*” 42 U.S.C. §7545(o)(3)(B)(ii)(I) (emphasis added). That discretion expressly has nothing to do with whether renewable fuel available to importers is “domestic supply”; it has only to do with what categories of market participants—refineries, blenders, importers—are obligated to show compliance. *See* 40 C.F.R. §80.1406(a)(1) (excluding parties that “simply blend[] renewable fuel into gasoline or diesel fuel” from definition of “obligated party”).

<sup>19</sup> *Americans for Clean Energy*, 864 F.3d at 709.

<sup>20</sup> Request for Further Comment at 46,178.

<sup>21</sup> *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 917 (D.C. Cir. 2014) (“The [statutory] volumes provide an incentive for continued investment and innovation.”); 2014-2016 RFS Rule at 77,433, 77,456, 77,459-77,460.

<sup>22</sup> *Americans for Clean Energy*, 864 F.3d at 698-699 (quotation marks and brackets omitted).

<sup>23</sup> Request for Further Comment at 46,178.

to date, the RFS program has not incentivized an appreciable level of ethanol imports.<sup>24</sup> More fundamentally, though, EPA’s suggestion departs from its prior understanding and is wrong. “Congress ... intended to increase the nation’s energy security” and independence *not* by restricting U.S. fuel sources but rather by the opposite: “[b]y aiming to diversify the country’s fuel supply.”<sup>25</sup> And in particular, as EPA recognized previously, supporting some level of renewable fuel imports actually “helps improve” U.S. energy security and independence by promoting “an increased diversity of fuels.”<sup>26</sup> Other leading experts agree that a diversified energy menu, including imported renewable fuel, strengthens U.S. energy security and independence.<sup>27</sup> And even if were possible for importation of renewable fuel to be detrimental, current import levels are so low that they could have only “a negligible adverse effect on U.S. energy independence, security, and dominance.”<sup>28</sup>

Additionally, it would have been sensible for Congress to encourage importation of renewable fuel given its environmental benefits. As BIO observed previously, EPA has correctly concluded that “limiting renewable fuel imports” would “conflict with furthering the goals of the Act” because renewable fuels “significantly contribute to a reduction in GHG emissions from transportation fuel.”<sup>29</sup> That is so especially when renewable fuels are compared to *imported* fossil fuels, which is significant because at the time Congress created the RFS program, most fossil fuels consumed in the United States were imported (the country was a net energy importer by a wide margin).<sup>30</sup>

Finally, EPA posits that even if it can and did disregard foreign-produced renewable fuel available for import when assessing the “domestic supply” for purposes of triggering the general

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<sup>24</sup> Growth Energy 2018 Comment, Ex. 2 at 13-15 (Marc Chupka and J. Michael Hagerty, the Brattle Group, and Philip K. Verleger, PKVerleger LLC, *Blending In: The Role of Renewable Fuel in Achieving Energy Policy Goals* (Aug. 31, 2017) (“Chupka, Hagerty & Verleger Report”).

<sup>25</sup> 2014-2016 RFS Rule at 77,421.

<sup>26</sup> 2014-2016 RFS Rule at 77,433; *see also id.* at 77,497 (“the final BBD volume increases for 2016-2017”—which accounted for imported BBD—“will both contribute to market stability for the renewable fuels program and continue to promote a growing and competitive advanced biofuels marketplace, one which encourages the growth and development of diverse biofuels along with additional volumes of BBD beyond the volumes required by the BBD standard.”).

<sup>27</sup> Growth Energy 2018 Comment at 38 (citing Chupka, Hagerty & Verleger Report 21).

<sup>28</sup> *Id.* at 40-41 (citing Chupka, Hagerty & Verleger Report 12-13).

<sup>29</sup> Renewable Fuel Standard Program Standards for 2017 and Biomass-Based Diesel Volume for 2018: Response to Comments, at 413 (Nov. 2016), EPA-HQ-OAR-2016-0004, *quoted in* BIO 2018 Comment at 30.

<sup>30</sup> *Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program*, 75 Fed. Reg., 14,670, 14,786 (Mar. 26, 2010); 42 U.S.C. §7545(o)(1)(C), (2)(A)(i); Chupka, Hagerty & Verleger Report 8-11. Of course, domestically produced renewable fuel is environmentally superior to fossil fuels by a wide margin on a lifecycle basis. *See* Growth Energy 2018 Comment at 27-30.

waiver authority, it could still “consider the availability of imports as one factor among others in determining whether to exercise its discretion to use the waiver authority” because “qualifying imported renewable fuel could still be used to comply with the established standards, exactly as it is currently.”<sup>31</sup> That is incoherent and betrays the fundamental flaw in the narrower interpretation of “domestic supply” proposed by EPA. There is no difference under the statute between the renewable fuel that is “supply” and the renewable fuel that is available to achieve compliance. As the D.C. Circuit stated, “domestic supply” “refers to the supply of renewable fuel available to refiners, blenders, and importers *to meet*” their volume obligations.<sup>32</sup> Because imported gallons of renewable fuel are “‘actual renewable fuel’ available in a given year” and are available to achieve compliance with the RFS volume requirements<sup>33</sup>—as all agree—they are necessarily “domestic supply,”<sup>34</sup> and therefore they must be considered fully in assessing the “domestic supply” for general waiver purposes.<sup>35</sup>

EPA cannot have it both ways: either imported renewable fuel is part of the “domestic supply” *and* available to show compliance, or it is neither. The hybrid position EPA now proposes would undermine the RFS program as a “‘market forcing policy’ intended [by Congress] to overcome constraints in the market by creating demand pressure to increase consumption of renewable fuels.”<sup>36</sup> Under the proposed hybrid view, the amount of renewable fuel available for compliance would necessarily greatly outstrip the applicable volume requirements; foreign and domestically produced renewable fuel would be available to meet requirements set by reference solely to domestically produced volumes. With supply exceeding demand for renewable fuel, the competition between domestic and foreign producers for the limited demand pie would be tight and could incentivize domestic producers to slow their growth or even to contract. Then, because only domestic production would define the volume requirements and thus the magnitude of demand for each following year, the proposed hybrid approach could create a vicious circle, where volume requirements are stagnant or possibly ratchet down year over year. That is obviously not what Congress intended or sought to achieve.

#### **IV. EPA HAS NO AUTHORITY TO FLOW A GENERAL WAIVER OF THE ADVANCED BIOFUEL VOLUME REQUIREMENT THROUGH TO THE TOTAL RENEWABLE FUEL VOLUME REQUIREMENT**

EPA seeks comment on whether it can and should “provid[e] a reduction in the total renewable fuel applicable volume requirement commensurate with any reduction in the advanced

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<sup>31</sup> Request for Further Comment at 46,177-46,178.

<sup>32</sup> *Americans for Clean Energy*, 864 F.3d at 709-710 (emphasis added).

<sup>33</sup> *Id.* at 714; 42 U.S.C. §7545(o)(5)(A)(i), (E).

<sup>34</sup> *Americans for Clean Energy*, 864 F.3d at 714 (quoting 80 Fed. Reg. at 77,484).

<sup>35</sup> As noted previously, the RFS standards have not substantially incentivized importation of ethanol. Growth Energy 2018 Comment at 41.

<sup>36</sup> *Americans for Clean Energy*, 864 F.3d at 710 (recognizing that “the Renewable Fuel Program’s increasing requirements are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year”).

biofuel volume requirement.”<sup>37</sup> In other words, EPA asks whether it can flow a general waiver of the advanced volume requirement through to the total volume requirement, much as the statute authorizes EPA to do under the cellulosic and BBD waiver provisions.<sup>38</sup>

Simply stating the question answers it: EPA has no power to do this. The general waiver provision calls for EPA to measure the “supply” of each of the four volume categories separately and determine whether the corresponding volume standard may (and should) be waived.<sup>39</sup> Thus, if there is adequate supply of total renewable fuel, the general waiver may not be used to lower the total renewable standard, regardless of what general waivers may be warranted for the other volume standards. Congress provided no express flow-through authority, nor could there be a need for one given that the general waiver power is also available for any encompassing volume standards. It is certainly not necessary to prevent non-advanced biofuels from “exceed[ing]” a supposed “15 billion gallon implied cap”<sup>40</sup> because there is no cap. If Congress had wanted to limit the difference between advanced and total renewable fuel, it would have said so. Instead, Congress directed EPA “to ensure that transportation fuel sold or introduced into commerce in the United States ... contains *at least* the applicable volume of” *each* standard—“renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel.”<sup>41</sup>

In contrast to the general waiver provision, Congress explicitly authorized EPA to flow a cellulosic waiver or a BBD waiver through to the encompassing volume standards (advanced and total).<sup>42</sup> Given this statutory context, the absence of an explicit flow-through power for the general waiver shows that Congress did not intend to provide such a power and thus precludes

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<sup>37</sup> Request for Further Comment at 46,178.

<sup>38</sup> *Id.*

<sup>39</sup> See 42 U.S.C. §7545(o)(7)(A).

<sup>40</sup> Request for Further Comment at 46,178.

<sup>41</sup> 42 U.S.C. §7545(o)(2)(A)(i) (emphasis added).

<sup>42</sup> 42 U.S.C. §7545(o)(7)(D)(i) (“For any calendar year in which the Administrator makes such a reduction, the Administrator 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.”); *id.* §7545(o)(7)(E)(ii) (“For any calendar year in which the Administrator makes a reduction under this subparagraph, the Administrator 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.”).

EPA from interpreting the statute otherwise.<sup>43</sup> In fact, the D.C. Circuit recently rebuked the EPA for failing to heed this principle in its interpretation of the general waiver provision.<sup>44</sup>

**V. EPA SHOULD ADHERE TO ITS PRIOR INTERPRETATION OF THE SEVERE HARM STANDARD FOR A GENERAL WAIVER AND SHOULD ASSESS THE POTENTIAL FOR SEVERE HARM IN LIGHT OF ALL COMPLIANCE CIRCUMSTANCES**

On two prior occasions—once under the George W. Bush administration and once under the Obama administration—EPA has interpreted the provision of the statute allowing for a general waiver of a volume requirement if its “implementation ... would severely harm the economy or environment of a State, a region, or the United States.”<sup>45</sup> EPA now “solicit[s] comment on the appropriateness of th[at] interpretation.”<sup>46</sup> For the reasons EPA originally gave in adopting that interpretation, and for additional reasons discussed here, that interpretation remains sound and should continue to control EPA’s determinations regarding whether to issue a general waiver where severe harm to the economy or environment would otherwise result.

As we previously discussed, EPA’s interpretation of the severe harm waiver provision in the Texas Waiver Decision articulated six controlling principles:

- 1) “[I]mplementation of the RFS program *itself* must be the cause of the severe harm.”<sup>47</sup> It is insufficient 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.<sup>48</sup>
- 2) 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

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<sup>43</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion[.]” (quotation marks and brackets omitted)); *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 467 (2001) (recognizing that Supreme Court has “refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted”).

<sup>44</sup> *Americans for Clean Energy*, 864 F.3d at 708 (“Those examples reveal that when Congress intended to allow EPA to consider downstream distribution capacity in addition to supply, it left little doubt in the matter.” (quotation marks omitted)).

<sup>45</sup> 42 U.S.C. §7545(o)(7)(A)(i); Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70752 (Nov. 27, 2012) (“2012 Waiver Decision”); 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 (Aug. 13, 2008) (“Texas Waiver Decision”).

<sup>46</sup> Request for Further Comment at 46,179.

<sup>47</sup> Texas Waiver Decision at 47,171 (emphasis added).

<sup>48</sup> *Id.* (emphasis added).

- extreme.”<sup>49</sup> 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 economy,” including raising the price of U.S. corn and other feedstocks, did not qualify as severe harm to the economy.<sup>50</sup>
- 3) EPA must have a “high degree of confidence” that severe harm *would* result but for a waiver.<sup>51</sup>
  - 4) EPA may not issue a waiver based “solely on consideration of impacts of the RFS program to one sector of an economy,” but rather must “evaluate the overall impacts on the economy” as a whole by “considering the impacts of the RFS program on other sectors of the economy.”<sup>52</sup>
  - 5) Because a waiver “will always ... be national in character,” even if the qualifying “severe harm” is limited to a certain state or region, EPA must “look 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, and “weigh all of th[os]e impacts before deciding to grant or deny a waiver.”<sup>53</sup>
  - 6) Although EPA may *deny* a severe harm waiver request summarily, it may not *grant* one without first developing 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 providing the public notice of and an opportunity to comment on the details of that analysis.<sup>54</sup>

This interpretation—which EPA reaffirmed in its 2012 Waiver Decision—resulted from EPA’s careful and extensive analysis of the statute’s language, context, purpose, and history.<sup>55</sup> For the reasons EPA gave in those prior waiver decisions, its interpretation remains sound, and we need not repeat that analysis here.

We note, however, that there are additional reasons to adhere to this interpretation. 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

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<sup>49</sup> *Id.* at 47,172.

<sup>50</sup> 2012 Waiver Decision at 70,753, 70,775.

<sup>51</sup> Texas Waiver Decision at 47,172.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 47,183-47,184.

<sup>55</sup> *Id.* at 47,170-47,172; 2012 Waiver Decision at 70,756, 70,773-70,775.

“would ... harm” the economy (or the environment).<sup>56</sup> 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.”<sup>57</sup> And the second principle listed above—that the statute sets a high threshold for issuance of a waiver—was confirmed recently by the D.C. Circuit, which 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).<sup>58</sup>

Moreover, another governing fundamental principle that EPA should recognize is that the question of whether EPA may use the severe harm waiver power must be assessed not against the statutorily prescribed volume in isolation (as some commenters assert<sup>59</sup>), but rather in light of all the circumstances relating to compliance. If other waivers—such as the cellulosic waiver or the BBD waiver or the “inadequate domestic supply” general waiver are available, EPA must evaluate whether implementation of the volume requirements *after* those waivers are applied would severely harm the economy (or environment). EPA must also account for all available compliance flexibilities, such as the size of the carryover RIN bank and obligated parties’ ability to successfully carry RIN deficits forward to the next compliance year. EPA did so in its 2012 Waiver Decision,<sup>60</sup> and it must and should continue to do so in the future. 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 requirements. Because the statute’s various waiver authorities and compliance flexibilities could mitigate or eliminate harm, it cannot be said with

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<sup>56</sup> See, e.g., *Burrage v. United States*, 134 S. Ct. 881, 887-891 (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 citation omitted)).

<sup>57</sup> Texas Waiver Decision at 47,171; see *Americans for Clean Energy*, 864 F.3d at 711 (rejecting interpretation that would accord EPA “boundless general waiver authority”).

<sup>58</sup> *Americans for Clean Energy*, 864 F.3d at 712 (quotation marks omitted).

<sup>59</sup> See AFPM & API 2018 Comment at 30-31.

<sup>60</sup> 2012 Waiver Decision at 70,753 (“[T]he impact of the RFS volume requirements is highly dependent on the volumes at issue, the number of RINs carried over from prior years and the relevant market commodity prices, such as corn and crude oil prices, and other factors applicable during the time period analyzed.”); *id.* at 70,758 (“For purposes of the current analysis, the number of rollover RINs available during the 2012/2013 marketing year affects the impact of implementation of the RFS volume requirements in 2013. The specific number of rollover RINs available for use in the 2012/2013 marketing year is an input into EPA’s stochastic modeling.”).

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.

Relatedly, and for similar reasons, EPA must account for the “severe harm” waiver itself when determining how much to reduce a volume requirement pursuant to a “severe harm” waiver. Put another way, EPA may use a “severe harm” waiver to reduce the problematic volume requirement only by the amount necessary to avoid the *severe* harm that triggered the waiver (again under all compliance circumstances). 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.”<sup>61</sup> 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).

Finally, one commenter asserts that “economic harm” potentially suffered by “just a few ... small refineries” may not only qualify for the small refinery hardship exemption but also would “amount to severe economic harm” for purposes of the general waiver.<sup>62</sup> Even if those small refineries suffer some economic harm sufficient to qualify for a hardship exemption, that would not suffice to also trigger a severe harm general waiver. First, economic hardship is measured with respect to the individual small refinery seeking the exemption and not the entire economy of a state, region, or nation, as required for a general waiver.<sup>63</sup> Second, the decision to grant a hardship waiver does not need to account for the potential effect of that exemption on nationwide volume requirements. And third, hardship may be found where compliance would “make [a refinery’s] life hard or difficult”<sup>64</sup>—an explicitly less-demanding threshold than “severe[] harm.” In fact, Congress’s choice to use “severely harm the economy” rather than “economic hardship” in the general waiver provision provides further indication of how high a threshold it set for the general waiver.

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<sup>61</sup> *Americans for Clean Energy*, 864 F.3d at 711.

<sup>62</sup> Comment of Valero on 2018 NPRM at 29-30 (Aug. 31, 2017), EPA-HQ-OAR-2017-0091-3677 (“Valero 2018 Comment”).

<sup>63</sup> See 42 U.S.C. §7545(o)(9)(A)(ii)(II), (B)(i).

<sup>64</sup> *Sinclair Wyoming Refining Co. v. EPA*, 867 F.3d 1211, 1221 (10th Cir. 2017).

## VI. THERE IS NO BASIS TO CONCLUDE THAT IMPLEMENTATION OF THE PREVIOUSLY PROPOSED 2018 TOTAL VOLUME REQUIREMENT WOULD SEVERELY HARM THE ECONOMY

Various commenters contend that implementation of the proposed 2018 total renewable fuel volume requirement would severely harm the economy. They are wrong.

Several commenters contend that “RFS compliance is [a merchant] refinery’s biggest line item expense other than crude oil,” and that this expense is so great that it might cause refinery closures, which would severely harm the economy.<sup>65</sup> That contention is highly misleading, as it attempts to keep the focus only on the refineries’ costs while ignoring any gains. The fact is, as Growth Energy has explained, the “line item expense” of RINs is fully offset by the higher blendstock prices that these refiners are capturing, as a comparison of RIN prices to crack spreads shows.<sup>66</sup> And EPA has reached the same conclusion numerous times, including during the 2014-2016 RFS rulemaking, in the proposed denial of the pending petitions to relocate the point of obligation, and through the screening analysis accompanying the 2018 NPRM.<sup>67</sup>

The empirical analyses concluding that merchant refiners have been recovering their RIN acquisition costs are far more robust and reliable than those reaching the opposite conclusion.<sup>68</sup> Among the more compelling analyses is a paper by Knittel, et al. (on which opposing commenters Monroe Energy and Valero previously relied extensively) that found that “an obligated party with a net RIN obligation, such as a merchant refiner, is able to recoup their RIN costs on average through the prices they receive in the wholesale market, although this

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<sup>65</sup> Comment of Monroe Energy on 2018 NPRM at 17-21 (Aug. 31, 2017) (“Monroe Energy 2018 Comment”), EPA-HQ-OAR-2017-0091-3649; *see also, e.g.*, Valero 2018 Comment at 30-32; Comment of Small Refiners Coalition on 2018 NPRM at 5 (Aug. 31, 2017), EPA-HQ-OAR-2017-0091-3105 (“Small Refiners 2018 Comment”).

<sup>66</sup> *See* Growth Energy 2018 Comment at 23-24.

<sup>67</sup> *See, e.g.*, Dallas Burkholder, et. al., *Screening Analysis for the Renewable Fuel Standard Program Renewable Volume Obligations for 2018* at 4 (June 28, 2017), EPA-HQ-OAR-2017-0091-0097 (finding “there is no net cost of compliance with the RFS standards to obligated” parties); EPA, *Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation* at 18 (Nov. 2016) (“Proposed Denial”), EPA-HQ-OAR-2016-0544-0120 (describing merchant refiners’ contention as “illogical as it simply ignores the cost that ... refiners pay to acquire RINs”); Dallas Burkholder, *A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects*, at 2 (May 14, 2015) (“2015 Burkholder Memorandum”), EPA-HQ-OAR-2015-0111-0062.

<sup>68</sup> *See, e.g.*, Bruce A. Babcock, Gabriel E. Lade, and Sebastien Pouliot, *Impact on Merchant Refiners and Blenders of Changing the RFS Point of Obligation*, CARD Policy Brief 16-PB 20 (Dec. 2016) (“Babcock 2016 Analysis”), available at <http://www.card.iastate.edu/products/publications/pdf/16pb20.pdf> (attached as Exhibit 7); Edgeworth Economics, *Economic Issues Associated with a Change of the RFS Point of Obligation* (Feb. 22, 2017) (“Edgeworth 2017 Analysis”), Exhibit to Comment of Growth Energy (Feb. 22, 2017), EPA-HQ-OAR-2016-0544-0193 (attached as Exhibit 8).

mechanism would not be apparent on the balance sheet of the obligated party because there is no explicit revenue line item offsetting the explicit cost of purchasing RINs.”<sup>69</sup> The Knittel paper has since been updated with more recent data, and reached the same conclusions.<sup>70</sup> The updated Knittel study compared prices of chemically and geographically similar fuels where the principal difference is whether the fuel is regulated under the RFS or not. Using such a natural experiment “control[led] for non-RFS factors that affect the price of obligated fuel, thereby reducing the risk of omitted variable bias and increasing precision.”<sup>71</sup> By contrast, the new analysis cited by Monroe Energy (prepared by Charles River Associates) measures pass-through by simply regressing RIN prices with blender margins, and finds that because there is some weak relationship between the two, pass-through is not complete.<sup>72</sup> That analysis simplistically ignores the likelihood that some external variable (e.g., general crude oil prices) might explain the observed relationship between RIN prices and blender margins.<sup>73</sup>

Additionally, the oil industry improperly blames the RFS for the adverse consequences of their own business decisions. Monroe Energy exhibits a graph of *spot* D6 RIN prices as evidencing an “unpredictable” expense that makes it challenging for refiners to budget and attract investment.<sup>74</sup> That is misleading because it ignores the availability of RIN supply arrangements and other opportunities for refiners to smooth out short-term volatility by contracting with blenders or bringing blending in-house. Refiners may not cry “severe harm”

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<sup>69</sup> See Christopher R. Knittel, Ben S. Meiselman, and James H. Stock, *The Passthrough of RIN Prices to Wholesale and Retail Fuels Under the Renewable Fuel Standard*, National Bureau of Economic Research, at 20 (June 2015), EPA-HQ-OAR-2017-0091-0100.

<sup>70</sup> See 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) (“Updated Knittel Analysis”), available at [https://scholar.harvard.edu/files/stock/files/rin\\_prices\\_stock.pdf](https://scholar.harvard.edu/files/stock/files/rin_prices_stock.pdf) (attached as Exhibit 9).

<sup>71</sup> *Id.* at 1-2.

<sup>72</sup> See Monroe Energy 2018 Comment at 25 & Ex. D (discussing Charles River Associates, *Evaluating the Response of Blender Margins to RIN Price Changes: A More Direct Approach to Determining Pass-Through* at 3 (Feb. 2017) and Charles River Associates, *Review of Updated Pass-Through Analysis of Knittel, Meiselman, and Stock* (Feb. 2017)).

<sup>73</sup> Relying on the Charles River Associates analysis, Monroe Energy argues that the updated Knittel analysis is flawed because it removed two of the spreads that it had considered in the initial analysis. Monroe Energy 2018 Comment at 27. That mischaracterizes the updated Knittel analysis. The authors in fact considered those two spreads; they explained, however, that various supply-side factors (including a 2015 fire, California’s cap and trade program, and others) rendered analysis of those two spreads unreliable. Updated Knittel Analysis at 13-14.

<sup>74</sup> Monroe Energy 2018 Comment at 20.

from the RFS if they choose not to take basic steps to manage their business, or if they now regret prior decisions.<sup>75</sup>

For similar reasons, small retailers are also not experiencing “severe economic harm.” The premise of their complaint is that larger retailers with their own blending operations are realizing windfall profits selling RINs to obligated parties, which they can then use to compete with small retailers and force them out of business.<sup>76</sup> But the critical assumption that blenders or larger retailers have reaped “windfall profits” as a result of the RFS program has been repeatedly rejected by EPA and other authoritative literature.<sup>77</sup> Larger retailers naturally compete with small retailers to drive traffic that increases in-store sales or for other reasons related to longer-term strategy. Those strategies have nothing to do with the RFS program, however, and so any purported harms do not qualify as “harm” for purposes of the general waiver provision.<sup>78</sup>

Nor is there any claim that consumers are being harmed by the RFS. As Growth Energy and BIO have noted,<sup>79</sup> EPA has consistently recognized that RIN prices do not result in higher retail fuel prices.<sup>80</sup> And although refiners and small retailers bemoan the effect of retailer consolidation on consumers, any such trend, as noted above, has nothing to do with the RFS program, and if anything has benefitted consumers by reducing prices.

Of course, as Growth Energy has explained, even if it were the case that some harm was being experienced by merchant refiners, small retailers, or consumers, that would not be cognizable “severe” harm under the statute.<sup>81</sup> Any government policy encouraging certain market outcomes is liable 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. EPA has properly concluded that in applying the severe harm waiver, it cannot look to purported harms to some groups while ignoring the economic benefits provided by the RFS program.<sup>82</sup> And those benefits are substantial, as Growth Energy has explained:

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<sup>75</sup> See Reuters, *Special Report: Refiner Valero’s secret campaign against U.S. biofuel mandates*, (Aug. 21, 2017) (reporting that Valero sold the majority of its blending operations in deals in 2006 and 2013 in order to raise \$2 billion in cash) *available at* <http://www.reuters.com/article/us-usa-biofuels-valero-specialreport/special-report-refiner-valeros-secret-campaign-against-u-s-biofuels-mandates-idUSKCN1B115D>.

<sup>76</sup> See Comment of the Small Retailers Coalition, at 3-4 (Aug. 31, 2017), EPA-HQ-OAR-2017-0091-3572.

<sup>77</sup> See, e.g., Proposed Denial at 19 (“EPA does not believe that the information presented by the petitioners substantiates their claims that unobligated blenders are generating windfall profits from RIN sales”); Babcock 2016 Analysis, at 4-5; Edgeworth 2017 Analysis at 3.

<sup>78</sup> Texas Waiver Decision at 47,170-47,171.

<sup>79</sup> See Growth Energy 2018 Comment at 24; BIO 2018 Comment at 14.

<sup>80</sup> See Proposed Denial at 16; 2015 Burkholder Memorandum at 14-21.

<sup>81</sup> Growth Energy 2018 Comment at 24.

<sup>82</sup> Texas Waiver Decision at 47,172.

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 in rural parts of the Midwest.<sup>83</sup> For these reasons, the severe harm waiver applies only in the event of catastrophic economic circumstances, not the very economic transfers that Congress expected and intended as part of the RFS program.

Finally, insofar as the oil industry suggest that the renewable fuel levels proposed in the 2018 NPRM cannot be achieved without causing severe harm, its contention is flatly contradicted by the evidence, as Growth Energy has explained at length.<sup>84</sup> That is particularly so in light of the availability of a large number of carryover RINs that make compliance readily achievable—as BIO pointed out in its initial comment, EPA’s proposed 2018 RVOs would result in a 2018 RIN bank in excess of the 20 percent maximum that could be used by obligated parties for compliance in 2018.<sup>85</sup> EPA has considered and must continue to consider the RIN bank in assessing whether severe harm would result.<sup>86</sup>

In sum, EPA must have a “high degree of confidence” that severe harm would result in order to exercise the waiver, and that burden cannot be met here.<sup>87</sup>

## **VII. EPA MAY NOT CONSIDER RIN COSTS WHEN ASSESSING “SUPPLY” FOR PURPOSES OF THE GENERAL WAIVER**

One commenter contends that “EPA must consider the cost of RINs when determining whether the supply of domestic renewable fuel is adequate” for purposes of the general waiver.<sup>88</sup> That argument cannot be taken seriously after *Americans for Clean Energy* (if it ever could). As the D.C. Circuit concluded, the statute clearly directs EPA to measure the “supply” of renewable fuel by reference to the “volume,” i.e., amount, “of renewable fuel that is available to refiners, blenders, and importers.”<sup>89</sup> That amount is separate and independent of the price of the credits that can be used to show compliance. More broadly, the D.C. Circuit emphatically rejected EPA’s prior effort to shoehorn “compliance costs on obligated parties,” including “renewable fuel and RIN prices,” into the “supply” assessment for purposes of the general waiver.<sup>90</sup> The new proposal simply recapitulates that now-rejected interpretation of “supply,” and should be rejected for the same reason. It would allow “the demand for renewable fuel [to] largely dictate[] the volume requirements” and thereby “turn[] the Renewable Fuel Program’s ‘market

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<sup>83</sup> Growth Energy 2018 Comment at 38-42.

<sup>84</sup> *Id.* at 19-23.

<sup>85</sup> BIO 2018 Comment at 16-21.

<sup>86</sup> Growth Energy 2018 Comment at 25-26 (explaining why carryover RINs cannot be excluded from severe economic harm analysis); *supra* at 11 (discussing EPA’s consideration of carryover RINs in 2012 severe harm decision).

<sup>87</sup> Growth Energy 2018 Comment at 22-23 (citing Texas Waiver Decision at 47,171).

<sup>88</sup> Small Refiners 2018 Comment at 5-6.

<sup>89</sup> *Americans for Clean Energy*, 864 F.3d at 696.

<sup>90</sup> *Id.* at 711-712 (quotation marks omitted).

forcing’ provisions on their head,”<sup>91</sup> for high compliance costs are the mechanism that “incentivize[s] precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote.”<sup>92</sup>

### VIII. EPA SHOULD CONTINUE NOT TO ALLOW EXPORTED RENEWABLE FUEL TO BE USED FOR COMPLIANCE

One commenter, Valero, has asked EPA to change course and begin to “allow RINs for all exported biofuels” to be available for compliance.<sup>93</sup> That issue is beyond the scope of this rulemaking. EPA has not proposed that change, EPA did not solicit comment on whether to make that change, and contrary to Valero’s bald assertion, that issue is not a “logical outgrowth of treatment of imported biofuels for the purposes of meeting statutory goals.”<sup>94</sup> EPA’s request for comment regarding whether imported renewable fuel is “domestic supply” for general waiver purposes does not “make[] clear that the agency is contemplating a particular change” to the availability of export RINs for compliance purposes<sup>95</sup> or enable interested parties to “anticipate[]” that such a change is “possible.”<sup>96</sup>

In any event, EPA should not allow export RINs to be used for RFS compliance. Valero asserts that any renewable fuel that was “transported, stored, and/or sold in the U.S.” qualifies as transportation fuel “sold or introduced into commerce *in the United States*”—even if it was subsequently exported.<sup>97</sup> That interpretation is wrong for several reasons.

First, Valero is wrong that “[r]enewable fuels are, by definition, transportation fuel.”<sup>98</sup> Congress expressly defined “renewable fuel” and “transportation fuel” differently; “[f]or the most part,” renewable fuel is the biofuel “present *in a transportation fuel*.”<sup>99</sup> This is fatal to Valero’s position because the RFS program mandates not how much renewable fuel is sold or introduced into United States commerce, but rather how much renewable fuel is *contained in*

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<sup>91</sup> *Id.* at 712.

<sup>92</sup> *Monroe Energy*, 750 F.3d at 919.

<sup>93</sup> Valero 2018 Comment at 18.

<sup>94</sup> *Id.*

<sup>95</sup> *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (quotation marks and brackets omitted), *cert. petition filed*, No. 17-504 (U.S. Sept. 28, 2017).

<sup>96</sup> *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017) (*per curiam*).

<sup>97</sup> Valero 2018 Comment at 24-25 (emphasis added); 42 U.S.C. §7545(o)(2)(A)(i), (3)(B)(ii).

<sup>98</sup> Valero 2018 Comment at 25.

<sup>99</sup> *Americans for Clean Energy*, 864 F.3d at 711; compare 42 U.S.C. §7545(o)(1)(J) (defining “renewable fuel”) with 42 U.S.C. §7545(o)(1)(L) (defining “transportation fuel”); see also 40 C.F.R. §80.1429(b) (expressly distinguishing concepts, and specifying narrow circumstances when “neat renewable fuel” may be deemed to be “transportation fuel”—when used as transportation fuel without further blending).

*transportation fuel* that is sold or introduced into United States commerce.<sup>100</sup> Domestically produced renewable fuel is almost exclusively exported in neat (or denatured) form, and those exports thus never become transportation fuel introduced into commerce in the United States. In such circumstances, there is simply no argument that this renewable fuel—which was never transportation fuel, never contained in transportation fuel in the United States, and often never even part of an intra-United States transaction insofar as the producer may export the fuel directly—should somehow count towards the RFS requirements.

Second, even if somehow the renewable fuel were blended into transportation fuel domestically (or were, under limited circumstances, deemed to be transportation fuel<sup>101</sup>) and then that transportation fuel were exported, counting such volumes would not accord with the statute’s structure and purpose, as well as the D.C. Circuit’s decision in *Americans for Clean Energy*. The most natural reading is that the transportation fuel—defined as “fuel *for use*” in motor or nonroad vehicles (except for ocean-going vessels)<sup>102</sup>—must be sold or introduced into commerce *for use in the United States*, i.e., the United States must be the fuel’s final destination. In *Americans for Clean Energy*, the court held that the RFS program is “a ‘market forcing policy’ intended [by Congress] to ‘overcome constraints in the market’ by creating ‘demand pressure to increase *consumption*’ of renewable fuels,” and that “the Renewable Fuel Program’s increasing requirements are designed to force the market to create ways to produce *and use* greater and greater volumes of renewable fuel each year.”<sup>103</sup> Valero’s implicit assumption that this desired consumption could be international is implausible. In creating the RFS program, Congress never expressed an interest in increasing *international* consumption of renewable fuels, nor would Congress have the power to do so through a regulatory program administered by EPA; U.S. exports of renewable fuel might only displace foreign consumption of other countries’ renewable fuels.<sup>104</sup>

In fact, Congress’s intent was specifically to increase consumption within the United States, and Valero’s proposal, if adopted, would thwart that goal. As the D.C. Circuit and EPA have recognized, the constraints Congress intended the RFS program to overcome are those impeding domestic consumption of renewable fuel, such as the factors creating the so-called E10

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<sup>100</sup> 42 U.S.C. §7545(o)(2)(A)(i).

<sup>101</sup> See 40 C.F.R. §80.1429(b)(4), (5)(i).

<sup>102</sup> 42 U.S.C. §7545(o)(1)(L).

<sup>103</sup> *Americans for Clean Energy*, 864 F.3d at 710 (emphasis added).

<sup>104</sup> Valero perceives some such intent in the shift from “gasoline” in the RFS1 to “transportation fuel” in RFS2. See Valero 2018 Comment at 25. But that change plainly was designed to expand the types of fuels that were subject to the RFS program, e.g., diesel. Valero points to no evidence that Congress *sub silentio* intended for this change to upend how exports should be treated under the program.

blendwall.<sup>105</sup> If export RINs could be used for compliance with RFS volume requirements, the pressure to overcome market constraints on the consumption of renewable fuel in the United States would be diminished, directly contrary to Congress’s intent.

Valero asserts (without any analysis) that its proposal would “expand[] the market for domestically produced renewable fuels” and “add much-needed liquidity to the RIN market.”<sup>106</sup> That is nonsense. Currently, the market for domestically produced renewable fuels is defined by the applicable volume requirement (which creates the level of domestic “demand” for renewable fuels<sup>107</sup>) *plus* any demand by foreign buyers. Valero’s proposal to recognize export RINs for compliance could *shrink* the market for renewable fuel by the size of foreign demand; export RINs would merely displace RINs associated with domestic consumption. The result would be to reduce the pressure on U.S. distributors and retailers to increase their ability to facilitate domestic consumption, contrary to Congress’s intent. Valero suggests that the domestic market for consumption is maxing out as it approaches the E10 blendwall, and that eliminating the ERVO would create a new market for renewable fuel,<sup>108</sup> but that directly contravenes the D.C. Circuit’s recognition that EPA’s prior interpretation of “inadequate domestic supply” for general waiver purposes—in which the blendwall and other *demand* factors were considered—“turn[ed] the Renewable Fuel Program’s ‘market forcing’ provisions on their head,”<sup>109</sup> and that the way Congress sought to increase domestic use of renewable fuel past the blendwall is by setting volume requirements based solely on “the volume of renewable fuel that is available to refiners, blenders, and importers.”<sup>110</sup> Similarly, a policy of increasing the number of RINs available (purportedly to increase “liquidity”) would undermine rather than advance the goals of the RFS program: higher compliance costs resulting from tight RIN markets are precisely the mechanism that Congress intended to set up to force the market to overcome constraints on consumption.

Consequently, treating imported renewable fuel as “domestic supply” (as discussed above) while disallowing export RINs for compliance purposes is not internally inconsistent and does not “penalize[]” exports.<sup>111</sup> Both positions work in tandem to further the goal of increasing the use of renewable fuels in the United States.

Finally, confirming the flaw in Valero’s position are the abuse and wasteful practices it would encourage, which Congress surely did not intend. By counting both imports and exports

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<sup>105</sup> *Id.* at 700 (noting that “by 2014, ... the industry hit the ‘E10 blendwall’: an infrastructure and market-related constraint on ethanol demand that arises because most U.S. vehicle engines were not designed to handle gasoline consisting of more than 10 percent ethanol” (quotation marks omitted)); 2014-2016 RFS Rule at 77,423 (Congress intended RFS program to “overcome constraints in the market,” “including those associated with the ‘E10 blendwall’”).

<sup>106</sup> Valero 2018 Comment at 18-19, 23.

<sup>107</sup> *Americans for Clean Energy*, 864 F.3d at 705, 710.

<sup>108</sup> Valero 2018 Comment at 20-21.

<sup>109</sup> *Americans for Clean Energy*, 864 F.3d at 712.

<sup>110</sup> *Id.* at 696 (emphasis omitted).

<sup>111</sup> Valero 2018 Comment at 18.

for compliance, Valero’s proposal would establish a perverse incentive for the market (1) to *export* renewable fuel produced in the United States for consumption abroad while (2) *importing* foreign-produced renewable fuel to be consumed in the United States. That would allow the market to double the gallons that count towards the RFS requirements compared to the current system without increasing the production or use of renewable fuel. Congress did not seek to subsidize a wasteful “ethanol shuffle” that, for the mere price of a roundtrip voyage to Brazil, effectively halves the statutory requirements.

Recognizing this flaw in their proposal, Valero invites EPA to promulgate regulations prohibiting the short-term import and re-export of biofuel for the purposes of generating RINs.<sup>112</sup> Valero does not explain how such regulations could be structured and enforced (or how EPA would define “short-term” in a principled fashion), but in any event, Valero misses the point. The waste that would result does not depend on *the same gallons* being both imported and exported, or even on the importing and exporting being conducted by *the same company*. Gallons of ethanol or any other given type of renewable fuel are fungible, and so the incentive for the market to increase both imports and exports will exist even if no one party is directly importing and exporting the same biofuel. No enforcement scheme could address that fatal flaw, and thus EPA cannot countenance such a naked attempt to vitiate the regime it is charged to administer.<sup>113</sup>

To be sure, robust U.S. exports of renewable fuel enhance U.S. energy security and independence,<sup>114</sup> but the statute cannot be interpreted in such a way that it promotes exports while undermining the specific market-forcing mechanism Congress explicitly created.<sup>115</sup> In any event, the fact is that U.S. exports of renewable fuels have grown substantially during a period in which the associated RINs could *not* be used for compliance—so much so that the United States is now a net exporter of ethanol.<sup>116</sup> That reality belies Valero’s notion that export RINs must be available for compliance in order to promote U.S. exports of renewable fuels.

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<sup>112</sup> *Id.* at 24.

<sup>113</sup> These reasons also explain why Valero is wrong to assert that Congress required counting exports when it said that EPA’s regulations shall not “restrict geographic areas in which renewable fuel may be used.” 42 U.S.C. §7545(o)(2)(A)(iii)(II). Moreover, that provision is about restrictions within the United States. *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (setting forth presumption of extraterritoriality). And even if “area” as used in that provision had extraterritorial scope, it wouldn’t be implicated here because excluding export RINs for compliance purposes does not prevent the exported renewable fuel from being used overseas; it only prevents such volumes from counting towards the RFS requirements.

<sup>114</sup> Growth Energy 2018 Comment at 39.

<sup>115</sup> *Americans for Clean Energy*, 864 F.3d at 710, 712.

<sup>116</sup> Growth Energy 2018 Comment at 39; *see* Energy Information Administration, *U.S. Exports of Fuel Ethanol*,

[https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=m\\_epooxe\\_eex\\_nus-z00\\_mbbbl&f=a](https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=m_epooxe_eex_nus-z00_mbbbl&f=a) (accessed Oct. 19, 2017) (setting forth over 1bg of ethanol exports in 2016).

## IX. NO REDUCTION IN THE BBD RVO IS WARRANTED

The Agency invites “comment on how to interpret and implement the BBD waiver provision [42 U.S.C. §7545(o)(7)(E)] consistent with the text and goals of the [Clean Air Act].”<sup>117</sup> Specifically, EPA seeks comment on whether a large volume of imported biodiesel and renewable diesel could affect EPA’s evaluation and warrant a reduction in the 2018 and 2019 requirements. It also notes that a recent preliminary determination by the U.S. Department of Commerce that countervailing subsidies are being provided to producers and/or exporters of biodiesel from Argentina and Indonesia necessitate deposits equaling the subsidy rates. EPA asserts that if finalized, the Commerce Department’s action would have a direct impact on the cost of biodiesel from these countries and could lead to increased cost to consumers of transportation fuel and the cost to transport goods, and could lead to reduced imports and potentially more limited supplies.

The Act requires EPA to “evaluate the impact of the biomass-based diesel requirements ... on the price of *diesel fuel*,” when considering a BBD waiver.<sup>118</sup> Despite its assertions, the Agency provides no evidence that greater imports or the imposition of countervailing duties on Argentina and Indonesia will impact the price of diesel fuel in 2018, either for refiners or for consumers. Indeed, Figure III-1 of the Request for Further Comment shows that the sharp change in January 2017 in the estimated effective price of biodiesel to blenders had no measurable impact on the price of petroleum diesel.<sup>119</sup> Further, the U.S. Energy Information Administration’s “Weekly U.S. No. 2 Diesel Retail Prices” data shows no sharp increase in or lasting impact on the price of on-road diesel fuel to consumers during the same time period, or since.<sup>120</sup>

EPA projects that the 2.1bg BBD requirement for 2018 will represent 1.74 percent of obligated fuel volumes used in the United States and found that imported BBD represented approximately 29 percent of the BBD supply in 2016.<sup>121</sup> If BBD imports in 2018 are consistent with 2016, then imposition of countervailing duties on the relatively small volumes of Argentine and Indonesian BBD projected to be used in the United States in 2018 should have little to no impact on the price of diesel fuel. As such, EPA should not consider the imposition of countervailing duties when setting BBD volumes in 2018 or 2019.

Moreover, even if EPA considered the countervailing duties, which it should not, EPA established the 2018 BBD RVO at 2.1bg after fully considering the availability of feedstocks for this level of BBD production as well as the relative changes in supply of domestic and imported

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<sup>117</sup> Request for Further Comment at 46,179.

<sup>118</sup> 42 U.S.C. §7545(o)(7)(E)(i) (emphasis added).

<sup>119</sup> Request for Further Comment at 46,176.

<sup>120</sup> Energy Information Administration, “Weekly Retail Gasoline and Diesel Prices,” [https://www.eia.gov/dnav/pet/pet\\_pri\\_gnd\\_dcus\\_nus\\_w.htm](https://www.eia.gov/dnav/pet/pet_pri_gnd_dcus_nus_w.htm) (accessed Oct. 19, 2017).

<sup>121</sup> *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 34,206, 34,212 (July 21, 2017) (“NPRM”).

BBD from 2011 to 2016.<sup>122</sup> EPA concluded that *domestic production* of BBD—even when exports are considered—exceeded 2.5bg in 2016.<sup>123</sup> Currently available data indicate that domestically produced BBD will again exceed 2.5bg in 2017.<sup>124</sup> In fact, EPA has acknowledged that there is sufficient capacity within the United States to produce at least 2.9bg of biomass-based diesel in 2018.<sup>125</sup> Thus, any disruption to imports of BBD from Argentina and Indonesia would not represent a significant disruption to the United States’ ability to produce 2.1bg of biomass-based diesel in 2018, which is sufficient to meet the BBD RVO. Additionally, as BIO pointed out in its comments to the NPRM, EPA has estimated that the supply of carryover BBD (D4) RINs available in 2018 will exceed the maximum that can be used for the 2018 BBD RVO—20 percent of the 2.1bg volume.<sup>126</sup> EPA must consider availability of these carryover RINs as a mitigating factor in any potential feedstock disruption or other market circumstance that could affect a BBD waiver decision.

To the extent that commenters request, or the Agency considers, reductions in biodiesel volumes due to the expiration of the biodiesel tax credits, BIO in its comments to the NPRM set out why EPA should set the BBD RVO without considering the uncertain cycle of tax credit expirations and reinstatements. BIO pointed out that EPA’s own data demonstrates that the annual RFS volumes have a greater impact on the supply of biofuels in any given year than the availability of tax credits. Moreover, EPA anticipated the expiration of the biodiesel tax credit in 2017 when setting the 2018 RVO.<sup>127</sup>

**X. IF THE 2018 BBD RVO IS REDUCED, NO CARRY THROUGH REDUCTION IS WARRANTED**

If EPA reduces the 2018 BBD RVO, EPA should not carry through a reduction of BBD volumes to the advanced and overall volumes. As discussed above, EPA has acknowledged the ability of U.S. biofuel producers to exceed the 2.1bg BBD volume, and set the 2018 BBD RVO below the production capacity in order to “to provide continued incentive for the development of other types of advanced biofuel.”<sup>128</sup> If EPA reduces the applicable volume of the advanced biofuel requirement by the same or a lesser volume as any future BBD waiver, it will destroy the incentive for the development of these types of fuels.

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<sup>122</sup> *Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018*, 81 Fed. Reg. 89,746, 89,766-89,767 (Dec. 12, 2016) (“2017 RFS Rule”).

<sup>123</sup> Request for Further Comment at 46,177.

<sup>124</sup> EPA, *Fuels Registration, Reporting, and Compliance Help: 2017 Renewable Fuel Standard Data*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2017-renewable-fuel-standard-data> (accessed Oct. 19, 2017).

<sup>125</sup> NPRM at 34,234.

<sup>126</sup> Nick Parsons, *Carryover RIN Bank Calculations for 2018 NPRM*, at 4-5, tables 6 & 7 (July 5, 2017) (“2017 Parsons Memorandum”), EPA-HQ-OAR-2017-0091-0067.

<sup>127</sup> 2017 RFS Rule at 89,798.

<sup>128</sup> *Id.* at 89,749.

Additionally, as BIO pointed out in its comments to the NPRM, EPA has estimated that the supply of carryover advanced biofuel (D3, D4, D5 and D7) RINs would represent more than 18 percent of the 4.24bg advanced biofuel RVO proposed in July 2017.<sup>129</sup> A further reduction in the 2018 advanced biofuel RVO to 3.77bg, as EPA now proposes in the Request for Further Comment, would leave a bank of carryover RINs that exceeds the 20 percent maximum that can be used to meet the RVO. EPA should fully consider the availability of these carryover RINs as a mitigating factor before reducing the advanced biofuel volume by the same or a lesser volume as any BBD waiver.

EPA believes that “the statute provides that EPA may provide additional 60-day waivers, with an appropriate additional reduction in the annual requirement of up to 15%.”<sup>130</sup> The plain text of the statute at 42 U.S.C. §7545(o)(7)(E)(iii) does not permit the agency to flow extensions of any BBD waiver through to advanced and overall volumes.<sup>131</sup>

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<sup>129</sup> 2017 Parsons Memorandum at 4-5, tables 6 & 7.

<sup>130</sup> Request for Further Comment at 46,179.

<sup>131</sup> 42 U.S.C. §7545(o)(7)(E)(iii) reads in full: “If the Administrator determines that the feedstock disruption or circumstances described in clause (ii) is continuing beyond the 60-day period described in clause (ii) or this clause, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, may issue an order to reduce, for up to an additional 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed an additional 15 percent of the applicable annual requirement for biomass-based diesel.”