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

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I. INTRODUCTION AND EXECUTIVE SUMMARY

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

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

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

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

[3] 42 U.S.C. § 7545(*o*)(2)(A)(i).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 19.

[11] *Id.* at 20.

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

[13] *Id.*

[14] *Id.*

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

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

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

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

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

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

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

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

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

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

[19] *Id.* at 6.

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

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

[22] *Id.* at 18.

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

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

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

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

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

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[23] *Id.* at 19.

[24] *Id.* at 12.

[25] *Id.* at 13.

[26] *Id.* at 14.

[27] *Id.*

[28] *Id.* at 14.

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

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

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

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

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

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

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

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

[33] NPRM at 32,029.

[34] 42 U.S.C. § 7545(*o*)(9)(B)(i).

[35] NPRM at 32,029.

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

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

[38] 40 C.F.R. § 80.1405(c).

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

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

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

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

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

[41] NPRM at 32,057.

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

[43] Wehrum Letter at 2.

[44] NPRM at 32,027.

[45] *Id.*

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

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

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

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

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

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

[48] Wehrum Letter at 1.

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

[50] 42 U.S.C. § 7545(*o*)(9)(A).

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

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

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

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

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

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

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

[56] *Id.* § 7545(*o*)(9)(A)(ii).

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

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

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

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

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

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

[59] Periodic Reviews at 11 n.33.

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

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

[62] 2012 RFS Rule at 1,323.

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

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

B. EPA Must Account for Retroactive Extensions

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

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

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

[64] 42 U.S.C. § 7545(*o*)(9)(B)(i).

[65] *Id.* § 7545(*o*)(9)(A)(ii).

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

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

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

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

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

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

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

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

[70] June 21 Version 74.

[71] *Id.*

[72] *Id.*

[73] June 5 OMB Comments 7.

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

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

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

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

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

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

[76] *See infra* Part IV.

[77] 42 U.S.C. § 7545(*o*)(9)(A)(i).

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

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

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

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

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

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

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

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[81] 2012 RFS Rule at 1,340.

[82] *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[90] NPRM at 32,027.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[100] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[112] *Id.*

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

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

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

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

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[114] 40 C.F.R. § 2.204(d)(1), (2).

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

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

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

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

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

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

[121] Reuters Retroactive Credits Article.

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

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

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

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

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

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

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

[123] NPRM at 32,027.

[124] *Supra* Part III.

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

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

[127] 42 U.S.C. § 7545(*o*)(7)(D)(i).

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

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

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

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

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

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[129] NPRM at 32,030.

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

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

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

[133] NPRM at 32,034.

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

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

[136] NPRM at 32,036.

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

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

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

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

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

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

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

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

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

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

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

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

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

[145] *Id.* at 47.

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

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

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

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

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

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

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[146] *Id.* at 57.

[147] *Id.*

[148] *Id.* at 47.

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

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

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

[152] *Id.* at 12.

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

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

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

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

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

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

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

[157] Misfueling Regulation at 44,433.

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

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

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

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

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

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

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

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

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

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

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

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

[161] *See supra* at 1.

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

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

1. 2008 and 2012 Waiver Decisions

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

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

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

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

[164] Texas Waiver Decision.

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

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

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

[168] *Id.*

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

[170] *Id.*

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

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

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

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

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

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

[172] Texas Waiver Decision at 47,172.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

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

2. 2017 and 2018 Waiver Decisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[189] 2018 RFS Rule at 58,517.

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

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

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

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

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

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

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

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

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

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

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

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[196] *See supra* Part I.

[197] 2018 Severe Economic Harm Memorandum at 6.

[198] Denial at 31-32.

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

[200] *Id.* at 32.

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

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

[203] Denial at 21.

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

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

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

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

3. These principles remain sound

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

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

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

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

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

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

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

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

[213] Texas Waiver Decision at 47,171.

[214] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[223] *Id.* at 3.

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

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

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

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

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

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

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

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

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

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

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

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

[231] 2018 Severe Economic Harm Memorandum at 14.

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

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

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

[232] 42 U.S.C. §7545(*o*)(7)(A)(i).

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

[234] 2012 Waiver Decision at 70,759.

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

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

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

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

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

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

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

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

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

[240] NPRM at 32,029.

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

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

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

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

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

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

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

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[243] Texas Waiver Decision at 47,172.

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

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

[246] 2018 Growth Energy Comment at 24.

[247] Texas Waiver Decision at 47,172.

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

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

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

4. EPA Continues to Understate Achievable Renewable Fuel Volumes

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

a. E85 distribution and consumption capacity

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

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

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

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

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

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

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

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

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

[255] *Id.* at 8.

[256] *Id.* at 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. E15 distribution and consumption capacity

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

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

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

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

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

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

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

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

[272] *Id.*

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

c. Ethanol production capacity

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

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

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

[275] *Id.*

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

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

[278] *Id.* at 5.

[279] *Id.* at 6.

[280] *See id.*

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

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

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

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

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

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[281] *Id.* at 6-7

[282] *Id.* at 8.

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

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

[285] Texas Waiver Decision at 47,171.

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

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

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

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

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

[286] 2018 Severe Economic Harm Memorandum at 7.

[287] NPRM at 32,048.

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

[289] 2012 Waiver Decision at 70,756.

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

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

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

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

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

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

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

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

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

[294] NPRM at 32,027.

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

IX. CONCLUSION

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

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

[296] January 2018 EnviroFlash Announcement.