



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

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

² 864 F.3d 691 (D.C. Cir. 2017).

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

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

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

A. EPA Has Radically and Unlawfully Expanded Small Refinery Exemptions

In recognition of the particular difficulties that small refineries could face in trying to come into compliance with the new RFS2 program, Congress granted all fifty-nine extant small refineries a “[t]emporary exemption” from “compliance with the [volume] requirements” through 2010.⁵ EPA then “extend[ed] the exemption” for twenty-four of those small refineries through 2012.⁶ Over the next three years, EPA further “exten[d]” the exemption to eight, eight, and then seven of refineries based on its determination that each would suffer “disproportionate economic hardship” absent exemption.⁷ At that point, EPA appeared to be gradually winding down the exemptions, as expected.

But then EPA’s approach to small refinery exemptions changed radically. EPA granted exemptions to nineteen refineries for 2016, thirty-five for 2017, and thirty-one for 2018.⁸ Whereas the *combined* exemptions for 2013 to 2015 covered 690 million RINs, the exemptions for 2016, 2017, and 2018 covered 790 million RINs, 1.82 billion RINs, and 1.43 billion RINs—

³ *ACE*, 864 F.3d at 705.

⁴ *Id.* at 710.

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

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

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

⁸ *RFS Small Refinery Exemptions*.

4.04 billion RINs combined.⁹ Whereas exemptions represented 1-2% of the annual total volume requirements between 2013 and 2015, they have represented 4%, 9%, and 7% between 2016 and 2018.¹⁰ Concurrently, D6 RIN prices—presumably the basis for claims of “hardship”—dropped constantly and now stand at just a few cents.¹¹

EPA’s massive expansion of small refinery exemptions rests on three fundamental flaws. First, EPA has been granting exemptions to refineries that were not exempt in the prior year, in contravention of the plain meaning of the word “extension”—the word used repeatedly in the section of the statute covering small refinery exemptions.¹² Put simply, if there was no exemption in the prior year, there is nothing to “extend.” Due respect for Congress’s chosen language would mean that EPA could have granted *at most* seven refineries’ exemption petitions after 2015.¹³ Second, EPA appears to have been granting exemptions to refineries that are owned and operated by some of the largest companies in the world, including ExxonMobil and Chevron—companies that can hardly claim to be “small.”¹⁴ And third, EPA substantially relaxed its interpretation of “disproportionate economic hardship.” In 2017, the Tenth Circuit held that “disproportionate economic hardship” does not “require a threat to a refinery’s survival as an ongoing operation.”¹⁵ But EPA appears to have further relaxed the standard beyond simply no longer requiring that compliance threaten the refinery’s viability: EPA’s publicly stated position is that “compliance with RFS obligations may impose a disproportionate economic hardship when it is disproportionately difficult for a refinery to comply with its RFS obligations—even if the refinery’s operations are not significantly impaired.”¹⁶ Under that approach, showing an actual *hardship* appears unnecessary. But however EPA now articulates the standard, the evidence is clear and indisputable that EPA has practically gutted the standard. During a period when D6 RINs have become nearly free and thus the cost of compliance has

⁹ *RFS Small Refinery Exemptions*.

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

¹¹ *See infra* p.8.

¹² § 7545(o)(9).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- In 2016, the bank contained about 1.6 billion RINs carried over from 2015.²⁴
- In 2017, the bank swelled to about 2.5 billion RINs carried over from 2016.²⁵ This 900-million RIN increase in the bank was the predictable result of two actions by

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

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

²³ 2020 NPRM at 36,767.

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

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

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

- In 2018, the volume of exemptions increased by 1.03 billion RINs (to 1.82 billion),²⁷ and the RIN bank increased by roughly 500 million RINs, to about 3.0 billion.²⁸ EPA says that the bank in 2018 contained only about 2.6 billion RINs carried over from 2017,²⁹ but that is incorrect. That was the size of the bank EPA estimated in November 2018. An EPA memorandum from May 2019, however, shows that about 3.0 billion RINs carried over from 2017 were retired for compliance (net of the carried deficit), and so the bank in 2018 must have contained at least that many carryover RINs.³⁰ This discrepancy is likely due in large part to the fact that EPA calculated the 2.6 billion figure in November 2018 and later appears to have exempted about 360 million more RINs for 2017.³¹
- Finally, although the 2020 NPRM states that the bank contains about 2.2 billion RINs carried over from 2018, that statement does not account for the 1.43 billion RINs covered by exemptions that EPA has since granted for 2018.³² Because at least 80%—and likely more than 90%—of those RINs will be unretired and thus added to the RIN bank, it is reasonable to estimate that the bank in 2019 contains about 3.5 billion RINs carried over from 2018, representing a 500-million RIN increase from last year.³³

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

²⁶ *RFS Small Refinery Exemptions*.

²⁷ *Id.*

²⁸ Edgeworth Economics at 4, 10.

²⁹ 2020 NPRM at 36,767.

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

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

³² *RFS Small Refinery Exemptions*.

³³ Edgeworth Economics at 4, 10-11.

volume requirement, and then increased to 12.9% of the 2017 requirement, 15.5% of the 2018 requirement, and now 17.5% of the 2019 requirement.³⁴ As the law of supply and demand dictates, D6 RIN prices have cratered, falling from about \$1.00 in late 2016 to about \$0.40 in mid-2017, to about \$0.20 in early 2019, and finally to about \$0.10.³⁵ When EPA announced recently that it had exempted 1.43 billion RINs for 2018, D6 RIN prices experienced their largest 3-day drop (in percentage terms) in the history of the RFS program.³⁶ A recent study by Edgeworth Economics concludes that by exempting billions of RINs without requiring that they be made up, EPA has “eliminate[d] any incentive to increase conventional biofuel production and consumption, leading to continued increases in the RIN bank and neutering the original policy mandate.”³⁷

Consider how EPA’s proposed 2020 total volume requirement will be met. EPA proposes to set that requirement at 20.04 bil gal. If we assume (as EPA assumes) that the number of carryover RINs available in 2019—3.5 billion—continues to be available in 2020, then the effective total volume requirement for 2020 will be just 16.54 billion.³⁸ If we then assume that the net amount of (ethanol-equivalent) RINs from the use of BBD, renewable diesel, and biogas in 2020 will equal the 2018 amount—about 4 billion³⁹—the market would need to use just 12.54 bil gal of ethanol in 2020 to achieve full compliance with EPA’s proposed total volume requirement. But projected ethanol use in 2020 will exceed that by nearly 2 bil gal even without any demand pressure from the RFS program simply because of the inherently favorable economics of ethanol: as EPA recognizes, “even in the absence of the RFS standards refiners and blenders [a]re likely to continue to blend ethanol into gasoline at a 10% rate due to the favorable

³⁴ *Id.* at 4.

³⁵ *Id.* at 3.

³⁶ *Id.* at 9.

³⁷ *Id.*

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

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

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

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

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

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

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

⁴¹ 2019 Bank Calculation at A-4.

⁴² Edgeworth Economics at 9.

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

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

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

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

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

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

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

⁴⁴ Edgeworth Economics at 2, 12-14.

⁴⁵ *ACE*, 864 F.3d at 710.

⁴⁶ *Supra* Part II.

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

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

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

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

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

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

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

⁵² *National Petrochemical & Refiners Ass’n v. EPA* (“NPRO”), 630 F.3d 145, 149 (D.C. Cir. 2010) (emphasis added).

⁵³ § 7545(o)(9).

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

⁵⁵ *2019 Response to Comments* at 19.

⁵⁶ *ACE*, 864 F.3d at 712.

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

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

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

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

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

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

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

⁵⁹ *Id.* at 7-8 (PDF at pp.10-11).

⁶⁰ *Id.* at 7 (PDF at p.10).

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

⁶² *Id.*

- EPA has suggested that the statute precludes any makeup of retroactive exemptions by pointing to the statutory requirement that EPA adjust the volume obligations “to account for the use of renewable fuel during the previous calendar year” by exempt small refineries.⁶³ That has nothing to do with dealing with exempt volumes; it relates only to the situation in which an exempt refinery nonetheless used renewable fuel. Its inclusion in the statute, therefore, does not imply that Congress did not want EPA to make up exempt volumes.
- EPA has argued that the ex ante approach would require it to prejudge hypothetical petitions to project likely retroactive extensions. But EPA would not need to reach a firm conclusion about any extension, nor would its projection be pure speculation. Rather, the projection could be based on the prior aggregate history of exemption extensions and whatever expertise the agency has accumulated over the years of evaluating petitions for extensions. And an accounting based on a reasonable (even if somewhat conservative) estimate would make the resulting volume requirements far more accurate and far better for the efficacy of the RFS program than EPA’s current policy of doing nothing. EPA has claimed deference to its technical judgments, but a blanket rule not to project exemptions does not reflect any technical judgment about the quality of data before EPA on which it would rely in forming a projection for a given year. In any event, the ex post approach Growth Energy proposes here would not require any prejudgment or guesswork, and it could be used as the sole mechanism to address retroactive exemptions.
- EPA has claimed that the ex post approach contradicts the statute, which requires that in setting volume requirements, EPA “ensure[]” that the requirements are met with respect to *that* “calendar year.”⁶⁴ That argument disregards the statute and precedent. The ex post approach is much like the “combined” obligation EPA set for 2009 and 2010 to remedy its tardiness in promulgating the 2009 volume obligations (discussed further below).⁶⁵ In that context, EPA argued, and the D.C. Circuit agreed, that increasing a later year’s volume requirement to make up for a prior year’s deficiency serves not only EPA’s statutory duty to “ensure” that the *prior year’s* requirement “is met,”⁶⁶ but also its statutory duty to “‘ensure’ the specified renewable fuel volume requirements are sold or introduced into commerce on an average basis ... regardless of the date of promulgation of the necessary implementing regulations.”⁶⁷ Moreover, as a time-shifting mechanism, the ex post approach also functions like a carryover deficit and the carryover RIN bank that EPA has read into the statute and that EPA describes as “extremely important” to the RFS program.⁶⁸ It is the height of

⁶³ § 7545(o)(3)(C)(ii).

⁶⁴ § 7545(o)(3)(B).

⁶⁵ *See infra* pp.26-27.

⁶⁶ *NPRA*, 630 F.3d at 163, 166.

⁶⁷ *Id.* at 158.

⁶⁸ 2020 NPRM at 36,767.

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

- EPA has said that adjusting one year’s volume requirements to make up for prior years’ exemptions would also mean that the volume requirements being set would not reflect achievable volumes in that year, contrary to congressional intent. That is not the pertinent question because EPA has no general power to set volume requirements equal to what it deems achievable and because, as just noted, EPA has the power to supplement one year’s requirement even if the market is unlikely to use that much renewable fuel in that year, as EPA did when it combined the 2009 and 2010 requirements. In any event, compliance with the increased requirement would be “achievable,” as explained below, through increased usage of renewable fuel, a drawdown of the RIN bank, or a combination thereof.⁶⁹ Moreover, adjusting the requirements would certainly not contradict the terms of the cellulosic waiver provision because it would not *require* the market to generate additional cellulosic biofuel; rather, the market could use the additional carryover RINs available because of the retroactive exemptions to meet the heightened volume requirements. Nor would the adjustment be impermissible just because it might result in a volume requirement above the statutorily specified amount. Those amounts are minimum requirements, as Congress specified that “at least” those amounts be used,⁷⁰ and again EPA has already set prior volume requirements well above the statutorily specified amount, with the D.C. Circuit’s approval (e.g., when it combined the 2009 and 2010 requirements).
- EPA has said that if it must make up retroactive exemptions, then it would also have to adjust volume requirements to account for a situation in which the total gasoline used in a given year ended up being less than projected. That is incorrect. A lower-than-projected use of gasoline does not cause the volume requirement to be missed because the obligation imposed is stated as a percentage of the amount of gasoline actually used.
- Finally, EPA has argued that making up for retroactive extensions would make RFS volume requirements a moving target, contrary to Congress’s directive to publish the standards by November 30 of the preceding year. That complaint is misguided. That would occur only if EPA were to adjust the RVOs during the compliance year, but neither the ex ante adjustment nor the ex post adjustment proposed by Growth Energy would entail mid-year adjustment. Rather, Growth Energy proposes that EPA account for extensions only at the time that it is setting volume requirements.

⁶⁹ See *infra* Part IV.B.

⁷⁰ § 7545(o)(2)(A)(i).

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

Last year's was the first RFS rulemaking since EPA's grants of unprecedented numbers of retroactive extensions came to light. But EPA refused to solicit comments on the subject and noted in the final rule that it was "maintaining [its] approach that any exemptions for 2019 that are granted after the final rule is released will not be reflected in the percentage standards that apply to all gasoline and diesel produced or imported in 2019."⁷¹ The only change EPA adopted was making "additional information available through [its] public website" on the "number of small refinery exemption petitions received, granted, denied by year" and the aggregate "fuel volume exempted by year."⁷² EPA insists again in the 2020 NPRM that it is not "reopening" its policy of not accounting for retroactive extensions and that no adjustment for the retroactive extensions will be made to the 2020 volume requirements⁷³—despite the acknowledged "possibility of additional small refinery exemptions" after the final rule.⁷⁴ Notwithstanding the discretion EPA generally enjoys in defining the scope of a rulemaking, it may not exclude this issue now.

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

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

⁷² 2019 Rule at 63,707.

⁷³ 2020 NPRM at 36,797 n.165.

⁷⁴ *Id.* at 36,768.

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

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

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

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

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

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

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

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

⁷⁷ 2020 NPRM at 36,776.

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

⁷⁹ *See* § 7545(o)(1)(B), (E).

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

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

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

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

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

⁸¹ *Id.* at 36,787.

⁸² *Id.* at 36,766.

⁸³ § 7545(o)(1)(F), (J), (2)(A)(i).

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

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

⁸⁶ Growth Energy 2019 Comment at 3-7.

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

B. Additional Conventional Renewable Fuel Volumes Are Reasonably Attainable

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

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

⁸⁷ § 7545(o)(7)(D)(i).

⁸⁸ § 7545(o)(2)(A)(i).

⁸⁹ 2020 Market Impacts Memo at 5.

⁹⁰ *Id.*

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

⁹² 2020 Market Impacts Memo at 3.

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

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

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

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

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

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

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

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

⁹⁸ *Supra* pp.7-8.

⁹⁹ 2020 NPRM at 36,768.

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

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

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

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

¹⁰⁰ *Id.* at 36,767.

¹⁰¹ *Id.*

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

¹⁰³ § 7545(o).

¹⁰⁴ *ACE*, 864 F.3d at 714.

¹⁰⁵ *Id.*

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

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

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

C. EPA Must Address This Issue in This Rulemaking

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

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

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

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

¹⁰⁸ See *supra* Part II.

¹⁰⁹ 2020 NPRM at 36,767.

¹¹⁰ Edgeworth Economics at 10-11 (explaining how the bank has thereby become a “ratchet”).

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

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

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

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

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

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

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

¹¹¹ 2020 NPRM at 36,788.

¹¹² § 7545(o)(3)(B)(i).

¹¹³ *ACE*, 864 F.3d at 696-697.

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

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

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

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

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

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

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

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

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

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

¹¹⁷ 2020 NPRM at 36,788-36,789.

¹¹⁸ *Id.* at 36,788.

¹¹⁹ *ACE*, 864 F.3d at 719.

¹²⁰ 2020 NPRM at 36,788-36,789.

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

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

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

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

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

¹²² *Id.* at 269 (citation omitted).

¹²³ *Id.* at 269 n.24.

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

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

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

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

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

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

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

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

¹²⁷ *ACE*, 864 F.3d at 718.

¹²⁸ *Id.* (emphasis added).

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

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

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

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

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

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

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

¹³² *ACE*, 864 F.3d at 718-719.

¹³³ *Supra* pp.22-23.

¹³⁴ *ACE*, 864 F.3d at 697.

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

¹³⁶ *NPRA*, 630 F.3d at 163.

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

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

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

Furthermore, this approach would not cause any hardship to obligated parties because, as discussed above, they have had ample notice that EPA could adopt such a remedy.¹⁴¹ In any event, compliance hardship would be mitigated by the sizeable carryover RIN bank. EPA acknowledges that “there would likely be sufficient RINs to comply with an additional 500 million gal standard.”¹⁴² That is likely an understatement, given that the bank currently stands at about 3.5 billion RINs and could well increase after EPA grants small refinery exemption extensions for 2019.¹⁴³ Obligated parties would need less than 15% of these carryover RINs to comply with a supplemental 500-million RIN requirement. Because “obligated parties [would have] adequate lead time and access to a sufficient number of RINs to comply with the delayed requirement,” it would be, as the D.C. Circuit has said, entirely “reasonable” for EPA to remedy the *ACE* error by imposing a supplemental requirement.¹⁴⁴

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

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

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

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

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

¹⁴¹ *Supra* p.24.

¹⁴² NPRM at 36,789.

¹⁴³ *Supra* pp.7-8.

¹⁴⁴ *ACE*, 864 F.3d at 718.

¹⁴⁵ 2020 NPRM at 36,789.

¹⁴⁶ *Supra* pp.18-19 & n.97.

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

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

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

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

¹⁴⁷ 2020 NPRM at 36,787.

¹⁴⁸ *ACE*, 864 F.3d at 718.

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

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

¹⁵¹ *Supra* pp.19-21.

¹⁵² 2020 NPRM at 36,768.

EPA cites no evidence that reducing this theoretical cushion designed to protect the entire market against an event that has never occurred and is highly unlikely to occur in 2020 would actually hurt any obligated party in 2020.¹⁵³ And even if a bank drawdown could theoretically cause a hardship, it is exceedingly unlikely to do so as part of remedying the *ACE* error because, again, a 500-million RIN drawdown would, at most, reduce the bank by less than 15%.

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

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

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

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

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

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

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

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

¹⁵⁷ See *supra* Part II.

extending small refinery exemptions and its 9% under-projection of cellulosic biofuel production for 2018.¹⁵⁸

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

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

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

¹⁵⁹ 2020 NPRM at 36,773-36,774.

¹⁶⁰ *Id.*

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

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

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

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

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

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

¹⁶³ *Id.*

¹⁶⁴ *Supra* Part II.

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

¹⁶⁶ 2020 NPRM at 36,771, 36,775.

¹⁶⁷ *Id.* at 36,771.

¹⁶⁸ 2019 *Response to Comments* at 36.

¹⁶⁹ 2020 NPRM at 36,770-36,771.

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

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

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

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

¹⁷¹ See *Monroe Energy*, 750 F.3d at 917 (“[T]he volume[requirements] provide an incentive for continued investment and innovation.”).

¹⁷² *ACE*, 864 F.3d at 727.

¹⁷³ *API*, 706 F.3d at 476.

¹⁷⁴ *Id.* at 479.

¹⁷⁵ *Id.* at 480.

¹⁷⁶ 2020 NPRM at 36,771.

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

VII. EPA CORRECTLY PROPOSES NOT TO EXERCISE THE GENERAL WAIVER

In the 2020 NPRM, EPA states that it does not believe circumstances exist to justify any reductions of the requirements under the general waiver authority, whether for “inadequate domestic supply” or “severe[] ... harm” to the economy or the environment.¹⁷⁸ This conclusion is clearly correct, for all the reasons Growth Energy has provided in comments on prior rulemakings and discussed above in explaining how little pressure the proposed requirement will exert.¹⁷⁹ EPA has consistently and correctly declined to grant general waivers since *ACE*. There have been no changes warranting a different conclusion now, and EPA does not provide any basis to believe otherwise in the 2020 NPRM. Indeed, any claim to severe harm would be particularly frivolous given the size of the carryover RIN bank, the extremely low D6 RIN prices (currently about \$0.10 notwithstanding EPA’s proposal not to use a general waiver in 2020¹⁸⁰), and the fact that, as explained above, the total renewable fuel volume requirement is nowhere close to binding.¹⁸¹

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

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

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 36,766-36,767.

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

¹⁸⁰ Edgeworth Economics at 2.

¹⁸¹ *See supra* Part II.

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

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

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

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

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

¹⁸⁴ *Id.* at 80,909.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*; see 5 U.S.C. § 552(b)(4).

¹⁸⁷ § 552(b)(4).

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

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

FOIA mandates “broad disclosure of Government records” to the public¹⁹³ to “ensure an informed citizenry, vital to the functioning of a democratic society.”¹⁹⁴ Although FOIA exempts certain information from mandatory disclosure, the Supreme Court has “consistently stated that FOIA exemptions are to be narrowly construed”¹⁹⁵ so that they “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of” FOIA.¹⁹⁶ Exemption 4 applies to “trade secrets and commercial or financial information *obtained from a person* and privileged or

¹⁸⁸ *RFS Small Refinery Exemptions*.

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

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

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

¹⁹² 2020 NPRM at 36,765.

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

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

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

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

confidential,”¹⁹⁷ and Exemption 5 applies to information protected by the “deliberative process privilege.”¹⁹⁸

EPA’s proposed rule would establish that certain basic facts relating to its decisions on small refinery exemption extensions are not CBI and therefore may not be withheld under Exemption 4.¹⁹⁹ The law clearly supports that because those facts are neither “obtained from a person” nor “confidential.”²⁰⁰ Further, the covered information is not plausibly protected by the deliberative process privilege, so there is no basis to withhold it under Exemption 5.²⁰¹ Moreover, even to the extent records are covered under Exemption 5, EPA should release them given their substantial importance to the well-functioning of the RFS program.²⁰²

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

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

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

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

¹⁹⁸ *Id.* § 552(b)(5).

¹⁹⁹ Proposed REGS Rule at 80,909.

²⁰⁰ 5 U.S.C. § 552(b)(4).

²⁰¹ *Id.* § 552(b)(5).

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

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

²⁰⁴ *Philadelphia Newspapers, Inc. v. Department of Health & Human Servs.*, 69 F. Supp. 2d 63, 66 (D.D.C. 1999); *see* Proposed REGS Rule at 80,909.

²⁰⁵ *Center for Auto Safety v. U.S. Dep’t of Treasury*, 133 F. Supp. 3d 109, 123 (D.D.C. 2015).

All small refineries were exempt from the RFS program under the Clean Air Act through 2010.²⁰⁶ But after that, EPA could “exten[d]” an exemption only if certain statutory criteria are met.²⁰⁷ As relevant here, EPA may grant an “extension” of a small refinery exemption upon a petition by a refinery showing that it will suffer “disproportionate economic hardship” if required to comply with its RFS obligations for a specified compliance year.²⁰⁸ EPA evaluates that hardship “in consultation with the Secretary of Energy,” and based on a study by the Department of Energy and “other economic factors.”²⁰⁹

EPA cannot determine whether any of these requirements are met without the covered basic facts provided by the refinery, but EPA also does not at a merely “repeated verbatim or slightly modified” formulation of those basic facts.²¹⁰ Rather, EPA is statutorily obligated to use those facts to analyze whether the refinery is actually seeking an “extension” and will suffer “disproportionate economic hardship.”²¹¹ The covered basic information, in other words, becomes “the agency’s information” when they are “substantially reformulated by” EPA in deciding whether to grant an exemption extension.²¹²

EPA recognized as much in proposing to release the covered information before it reaches its final decision to grant or deny an extension petition.²¹³ EPA explained that those facts are “necessary to identify the nature and scope of” EPA’s work and that “the matters” EPA has decided to undertake “reflect an EPA decision,” which is “not ‘obtained from a person.’”²¹⁴ Accordingly, once a small refinery petitions for an exemption extension, records containing the covered facts become EPA’s information embodied initially in its work queue and eventually in its decision to grant or deny the petition based on its assessment of whether the refinery has met the requirements for the extension.

²⁰⁶ § 7545(o)(9)(A)(i); *see also id.* § 7545(o)(1)(K) (defining “small refinery” as “a refinery for which the average aggregate daily crude oil throughput for a calendar year ... does not exceed 75,000 barrels”).

²⁰⁷ §§ 7545(o)(9)(A)(ii), (o)(9)(B).

²⁰⁸ *Id.* § 7545(o)(9)(B)(i)-(ii).

²⁰⁹ *Id.* § 7545(o)(9)(B)(ii); *see generally Hermes Consol., LLC v. EPA*, 787 F.3d 568, 574-579 (D.C. Cir. 2015) (discussing EPA’s interpretation of “disproportionate economic hardship” and related financial analyses).

²¹⁰ *Center for Auto Safety*, 133 F. Supp. 3d at 123; *see also Philadelphia Newspapers*, 69 F. Supp. 2d at 67.

²¹¹ § 7545(o)(9)(B)(i)-(ii).

²¹² *Center for Auto Safety*, 133 F. Supp. 3d at 123.

²¹³ Proposed REGS Rule at 80,909.

²¹⁴ *Id.* at 80,909-80,910.

Second, even if “obtained from a person,” the information covered by the proposal is not “confidential.”²¹⁵ In *Food Marketing Institute v. Argus Leader Media*, the Supreme Court held that information is “confidential” under Exemption 4 “[a]t least” where the information is “both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.”²¹⁶ The first condition, the Supreme Court noted, was mandatory.²¹⁷ The term “confidential” means “‘private’ or secret,” and “it is hard to see how information could be deemed confidential if its owner shares it freely.”²¹⁸ (The Court did not resolve whether the second condition is also required for information to be deemed confidential.²¹⁹)

The covered information is not “customarily and actually treated private” by the small refineries (or the government). In *Food Marketing*, the information at issue was deemed confidential because “[u]ncontested testimony established” that the owners of the information “customarily do not disclose ... [the] data or make it publicly available ‘in any way.’”²²⁰ That made sense because the information had significant competitive value, so its disclosure “could create a windfall for competitors.” Thus, the owners “closely guard[ed]” the data to the point that “[e]ven within a company,” “only small groups of employees usually ha[d] access to it.”²²¹

By contrast, refineries freely disclose the same or similar facts as the information covered by the Proposed REGS Rule. For example, HollyFrontier has disclosed all these facts (and more) in its securities filings, including: the fact of exemption extensions for two of its refineries, their names and locations, the years for which the refineries received extensions, when the extensions were granted, the effects of those extensions (e.g., “RINs cost reduction”), and how EPA effectuated the extensions (e.g., providing “vintage RINs to replace the RINs previously retired” or “reinstat[ing] the RINs previously submitted”).²²² And in litigation, small

²¹⁵ 5 U.S.C. § 552(b)(4).

²¹⁶ 139 S. Ct. 2356, 2366 (2019).

²¹⁷ *Id.* at 2363.

²¹⁸ *Id.* (quoting *Webster’s Seventh New Collegiate Dictionary* 174 (1963)); see also *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981) (if the information can be “freely or cheaply ... reverse engineer[ed], it can hardly be called confidential”).

²¹⁹ *Food Marketing*, 139 S. Ct. at 2363.

²²⁰ *Id.*

²²¹ *Id.* at 2361, 2363.

²²² HollyFrontier Corp., SEC Form 10-K, at 41, 43, 77-78 (Feb. 20, 2019) (“HollyFrontier 2018 10-K”); HollyFrontier Corp., SEC Form 10-K, at 40-41, 76 (Feb. 21, 2018) (“HollyFrontier 2017 10-K”).

refineries and EPA have similarly disclosed this information.²²³ A news article also reported that a particular company (Husk Energy) told the reporter that it inherited a small refinery exemption for 2017 when it acquired a plant in Superior, Wisconsin, and that it will seek an exemption for the Superior plant for 2018.²²⁴ These examples indicate that refineries often disclose the basic facts covered by the Proposed REGS Rule (seemingly without concerns of losing competitive advantage), and thus there is no reason to regard them as confidential.

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

EPA has not indicated that the information it proposes to disclose could implicate the deliberative process privilege. To the extent EPA considers that privilege relevant, however, the covered information is not protected by it.

The deliberative process privilege protects information from FOIA disclosure only if the information is both “predecisional” and “deliberative.”²²⁵ The information covered by the proposal is neither. Although information is “predecisional if it was generated before the adoption of an agency policy,”²²⁶ it can “lose that status if it is adopted, formally or informally, as the agency position on an issue.”²²⁷ EPA proposes to disclose the covered information “with respect to each *decision* on a small refinery/refiner exemption request.”²²⁸ Thus, EPA (sensibly) envisions that the covered information will be included in its final decision document. Regardless of when the covered information was originally generated or how it was used during EPA’s process, once that information has been stated in, and as an integral part of, EPA’s final decision, it is no longer “predecisional.”

The proposed information is also not “deliberative” because it does not “reflect[] the give-and-take of the consultative process.”²²⁹ Again, the covered information merely identifies the basic facts of an exemption for any given refinery. Records setting forth EPA’s decision on

²²³ Petition for Review, *Ergon-West Virginia, Inc. v. EPA*, No. 17-1839, ECF #3-3 (4th Cir. July 17, 2017); Petition for Review 8, 10, *Sinclair Wyoming Refining Co. v. EPA*, No. 16-9532, ECF #01019636438 (10th Cir. June 10, 2016); Petition for Review 4, *Lion Oil Co. v. EPA*, No. 14-3405, ECF #4209931 (8th Cir. Oct. 24, 2014); Petition for Review 4, *Hermes Consol., LLC v. EPA*, No. 14-1016, ECF #1478886 (D.C. Cir. Feb. 3, 2014).

²²⁴ Renshaw & Prentice, *Exclusive: Chevron, Exxon seek ‘small refinery’ waivers from U.S. biofuels law*, Reuters (Apr. 12, 2018) (attached as Exhibit 15), <https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-chevron-exxon-seek-small-refinery-waivers-from-u-s-biofuels-law-idUSKBN1HJ32R>.

²²⁵ *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

²²⁶ *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010).

²²⁷ *Coastal States*, 617 F.2d at 866.

²²⁸ Proposed REGS Rule at 80,909 (emphasis added).

²²⁹ *Public Citizen*, 598 F.3d at 874.

exemption extensions or any other identifying facts are thus not “advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, [or] the personal opinions of the writer prior to the agency’s adoption of a policy.”²³⁰

* * *

Because the information covered by EPA’s proposal is neither CBI nor protected by the deliberative process privilege, EPA should adopt the Proposed REGS Rule recognizing that it may not withhold such information under FOIA Exemption 4 or 5.

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

EPA also may not invoke Exemption 4 or 5 to withhold additional categories of information connected to its decisions on small refinery exemption extensions, including: (i) the specific standards EPA applied to decide whether to grant or deny an exemption extension; (ii) EPA’s final analysis of whether to grant or deny the extension; and (iii) if an extension is granted, the means by which EPA effectuated the extension, such as allowing the refinery to unretire RINs. All the reasons that the information covered by the Proposed REGS Rule is not exempt from mandatory disclosure under FOIA apply equally to these additional categories of information.²³¹

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

These additional categories of information are not CBI. First, they were “generated by the government,” rather than “obtained from a person.”²³² The standards EPA applies to decide whether to grant or deny a petition are purely matters of agency policy and likely would not implicate any information obtained from a refinery. But even if they did, EPA is still obligated to disclose them because those standards are inherently part of EPA’s “own analysis” of a refinery’s entitlement to an exemption extension, which is EPA’s information, not the refinery’s.²³³ The same is true of the means by which EPA effectuated the extension.

That makes sense given the scope of Exemption 4. As discussed above, “the key distinction” determining information “obtained from a person” is whether the information is “repeated verbatim or slightly modified by the agency,” or whether the information is “substantially reformulated by the agency, such that it is no longer a person’s information but the

²³⁰ *Id.* at 875.

²³¹ *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 872 (D.C. Cir. 1992); *see Milner*, 562 U.S. at 571 (FOIA exemptions must be “given a narrow compass”).

²³² *Philadelphia Newspapers*, 69 F. Supp. 2d at 66; *see Proposed REGS Rule* at 80,909.

²³³ *Center for Auto Safety*, 133 F. Supp. 3d at 123.

agency's information."²³⁴ EPA certainly would have "substantially reformulated" any facts obtained from a refinery in applying the standards for an exemption extension or allowing unretirement of RINs, because it is impossible to do either (given the statutory requirements) by simply "repeat[ing] verbatim" or "slightly modif[ying]" those facts.²³⁵ Where the information requested is "not merely the information collected and slightly reprocessed by the government, but disclosure of the agency's own executive actions," "[t]he fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA."²³⁶

Moreover, the additional categories of information are not confidential. To the extent any part of the additional information is owned by the refineries, it would clearly not be "customarily and actually treated as private by" the refineries.²³⁷ In fact, HollyFrontier has disclosed in its securities filings at least the means by which EPA effectuated the exemption extensions, i.e., by providing "vintage RINs to replace the RINs previously retired" or "reinstat[ing] the RINs previously submitted."²³⁸

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

These additional categories of information are also not protected by the deliberative process privilege. The standards EPA applies for determining whether to grant or deny an exemption extension and the means it uses to effectuate the extension are not even colorably deliberative or predecisional. They are not "advisory opinions, recommendations," or "personal opinions of the writer" that "reflect internal deliberations on the advisability of any particular course of action."²³⁹ Instead, they are what EPA actually applied or decided—to which the deliberative process privilege "can never apply."²⁴⁰ EPA's analysis of whether to grant or deny an exemption extension could at an earlier point in the process perhaps be deliberative and predecisional, but any such character is lost once EPA "adopt[s]" the analysis as its basis for deciding a petition.²⁴¹

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Bloomberg, L.P. v. Board of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 148-149 (2d Cir. 2010).

²³⁷ *Food Marketing*, 139 S. Ct. at 2366.

²³⁸ HollyFrontier 2018 10-K, at 77; HollyFrontier 2017 10-K, at 76.

²³⁹ *Public Citizen*, 598 F.3d at 875 ("an agency's application of a policy to guide further decision-making does not render the policy itself predecisional").

²⁴⁰ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-154 (1975).

²⁴¹ *Coastal States*, 617 F.2d at 866; *see Public Citizen*, 598 F.3d at 874-875.

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

For much the same reasons that these additional categories of information are not protected by the deliberative process privilege, they are also not exempt because they constitute EPA's working law on small refinery exemption extensions. Not disclosing them, therefore, would illegally create secret law.

Agencies must disclose their "working law," i.e., "the reasons which [supplied] the basis for an agency policy actually adopted," regardless of whether those reasons are formally binding.²⁴² An agency may not develop "secret law" used in the discharge of its regulatory duties.²⁴³ An agency's working law includes: "orders and interpretations" the agency "actually applies in cases before it"²⁴⁴; "interpretations of established policy on which the agency relies in discharging its regulatory responsibilities"²⁴⁵; "considered statements of the agency's legal position" that attempt to "develop a body of coherent, consistent interpretations of federal ... laws"²⁴⁶; and documents reflecting an agency's "formal or informal policy on how it carries out its responsibilities."²⁴⁷

The additional categories of information fit squarely within this framework. Records embodying the standards EPA uses to grant an exemption extension, its final analysis on a refinery's entitlement to an extension, and the means EPA uses to effectuate an extension are all "interpretations" or "considered statements" of EPA's policy on small refinery exemption extensions, including on the scope of EPA's statutory authority to grant an extension and to allow retroactive remedies using RINs.²⁴⁸ Thus, once EPA grants or denies an exemption extension petition, the additional categories of information are the very definition of working law expressing EPA's policy on how it implements the statutory provision allowing small refinery exemption extensions.

Releasing the additional information is particularly critical and timely now. As noted above, EPA has granted record numbers of exemption extensions in recent years, and despite requests from members of Congress and various interested parties, EPA has not released any specific information regarding its disposition of small refinery exemption extensions.²⁴⁹

²⁴² *Sears, Roebuck & Co.*, 421 U.S. at 152; *Coastal States*, 617 F.2d at 867-868,

²⁴³ *Coastal States*, 617 F.2d at 867.

²⁴⁴ *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971).

²⁴⁵ *Coastal States*, 617 F.2d at 869.

²⁴⁶ *Tax Analysts v. IRS*, 117 F.3d 607, 609, 617 (D.C. Cir. 1997).

²⁴⁷ *Public Citizen*, 598 F.3d at 872, 875.

²⁴⁸ *Id.* at 874; *Tax Analysts*, 117 F.3d at 609, 617; *Coastal States*, 617 F.2d at 869; *Sterling Drug*, 450 F.2d at 708.

²⁴⁹ *Cf. RFS Small Refinery Exemptions* (disclosing only aggregate data on the number of small refinery exemption extensions and the volumes exempted).

Interested parties have had to resort to litigation in hopes of uncovering EPA’s policies, interpretations, analyses, and actions regarding small refinery exemption extensions.²⁵⁰ That is an inefficient use of resources for everyone; much of the litigation could have been streamlined had EPA disclosed this information, as it is legally obligated to do anyway.²⁵¹ Accordingly, EPA should clarify that the additional categories of information are “the law itself and as such should be made available to the public.”²⁵²

IX. CONCLUSION

For the reasons explained above, EPA should: (1) increase the proposed 2020 volume requirements to make up for all past and expected future retroactive small refinery exemptions; (2) use a lesser cellulosic waiver of the proposed 2020 total volume requirement so that conventional ethanol can backfill the shortage in cellulosic biofuel production; (3) set a 500-million RIN supplemental obligation to cure its prior error in using the general waiver in 2016; (4) adopt methods for projecting cellulosic biofuel production that discern the likely production in response to volume requirements set high enough to incentivize production, accounting for EPA’s practices regarding small refinery exemptions and the RIN bank; (5) continue to decline to issue a general waiver of the total volume requirement based on severe harm to the economy or environment; and (6) finalize the public access provisions of the proposed REGS rule and make clear that certain additional categories of information relating to small refinery exemption decisions are also not exempt from mandatory disclosure under FOIA.

²⁵⁰ See, e.g., Joint Status Report, *Renewable Fuels Ass’n v. EPA*, No. 18-2031, ECF #26 (D.D.C. Aug. 9, 2019); *Advanced Biofuels Ass’n v. EPA*, No. 18-1115 (D.C. Cir.); *Renewable Fuels Ass’n v. EPA*, No. 18-9533 (10th Cir.).

²⁵¹ *Sears, Roebuck & Co.*, 421 U.S. at 152 (“the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted”).

²⁵² *Sterling Drug*, 450 F.2d at 708.