Growth Energy Comments on EPA's Notice of Receipt of Petitions for a Waiver of the 2019 and 2020 Renewable Fuel Standards

Docket # EPA-HQ-OAR-2020-0322

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

February 18, 2021

TABLE OF CONTENTS

I. INTRODUCTION

Growth Energy respectfully submits these comments in response to the Environmental Protection Agency's request entitled *Notice of Receipt of Petitions for a Waiver of the 2019 and 2020 Renewable Fuel Standards*.[1] Growth Energy is the leading association of ethanol producers in the country, with 89 producer members and 91 associate members who serve the nation's need for renewable fuel.

EPA should adhere to the established criteria for assessing whether to issue a waiver based on severe economic or environmental harm, and should deny the petitions seeking waivers of the 2019 or 2020 RFS requirements on that basis.

The existing criteria set an appropriately high bar for the issuance of a waiver. In particular, the criteria properly limit the use of waivers to remedying severe harm that would not exist but for the RFS program—in other words, harm caused by the RFS program itself. And the criteria correctly demand that EPA demonstrate a high degree of certainty both that the RFS program is causing the harm in question and that the harm is significant enough to qualify as "severe." Without these limitations, waivers would be nothing more than a tool for EPA to manage the transportation fuels market according to its policy preferences.

The petitions seeking a waiver based on claims of severe economic harm should be denied for various reasons. First, they do not show—do not even attempt to show—that the economic harms they identify are caused by implementation of the 2019 or 2020 RFS requirements. The COVID-19 pandemic undeniably has harmed the economy, but the severe-harm waiver is not available to address general economic hardship. And although the pandemic may have caused demand for transportation fuel to decline markedly in 2020, that does not translate into harm from RFS compliance because each obligated party's RFS obligation scales proportionally to that party's production of transportation fuel. Moreover, even though the refining industry may be significant in some states, the petitioners fail to explain how the economic harm refiners would supposedly suffer due to compliance with RFS obligations would constitute "severe" harm to a state, a region, or the country. Nor does the recent increase in RIN prices justify a waiver: As EPA has recognized in the course of rejecting the same argument before, obligated parties recover their RIN costs and current RIN prices would not be high enough to inflict "severe" harm anyway, and the petitioners identify no reason to depart from those prior conclusions. Finally, the possible categorical elimination of small-refinery exemptions would not cause severe economic harm to a state, a region, or the country because it would at most affect only a couple dozen "small" refineries.

On top of all this, petitioners fail to show why the existing RFS compliance flexibilities—in particular, the enormous carryover RIN bank and the ability of obligated parties to carry RIN deficits forward—would not sufficiently mitigate whatever severe economic harm

[1] 86 Fed. Reg. 5182 (Jan. 19, 2021).

the RFS program would otherwise cause. As EPA has recognized, it needs to account for such flexibilities in determining whether to issue a general waiver.

The small refinery petitioners' requests for individually targeted waivers should also be denied. The statute permits general waivers only to be implemented by reducing the national volume requirements; EPA has no authority to use a general waiver to reduce the RFS obligations for only some obligated parties.

Separately, the petition to waive the 2020 RFS standards based on a claim of severe environmental harm fares no better. EPA has already concluded that the 2020 RFS standards would not severely harm the environment, and there is no reason to alter that conclusion. Most renewable fuel production—in the form of ethanol—is driven by factors unrelated to the RFS program, such as the value of ethanol as an octane booster. Further, the RFS standards do not require any particular agriculture or production actions; those decisions are vested in unobligated third parties responsive to myriad other factors. Additionally, the crop acreage needed to meet the demands of the 2020 RFS standards has been declining as production efficiencies have increased. And in any event, the evidence is clear that the alternative to renewable fuel—fossil fuel—would have far worse environmental effects.

Even if petitioners could overcome those many failings, though, their request for waivers of the 2019 and 2020 standards would still be inappropriate because those years are over (and compliance demonstration for 2019 has already concluded). Congress did not grant EPA the authority to issue retroactive severe-harm waivers. On the contrary, retroactive severe-harm waivers would create perverse incentives, discouraging obligated parties from using renewable fuel or otherwise acquiring RINs and discouraging market participants from making the investments in renewable fuels that Congress intended. Retroactive waivers accordingly would not help unusually stressed obligated parties but would deprive the country of the many benefits Congress intended the RFS program to achieve, including increased energy security and independence, decreased emissions of greenhouse gases ("GHG"), and economic development, especially in rural areas.

II. EPA SHOULD ADHERE TO ITS ESTABLISHED, WELL-REASONED CRITERIA FOR ASSESSING WHETHER TO ISSUE A SEVERE-HARM WAIVER

The Clean Air Act provides: "The Administrator … may waive the requirements of paragraph (2)"—that is, the statutory applicable volumes—"in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2) … based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States."[2] EPA has long maintained a framework for evaluating whether it can and should exercise its severe-harm waiver power, and EPA should adhere to that framework.

[2] 42 U.S.C. § 7545(*o*)(7)(A)(i); *American Fuel & Petrochemical Manufacturers v. EPA ("AFPM")*, 937 F.3d 559, 579 (D.C. Cir. 2019).

A. EPA Has Long Maintained an Appropriate Waiver Framework

Across the three administrations that have so far implemented the RFS program, EPA has consistently adhered to a specific, demanding framework for determining whether EPA can and should issue a severe-harm waiver.[3] And the U.S. Court of Appeals for the District of Columbia Circuit recently approved EPA's framework, noting that the "high bar" EPA set appropriately reflects Congress's intent that the RFS program be "market forcing."[4] EPA's framework remains a well-reasoned and appropriate interpretation of the statute, and one to which EPA should adhere. In particular:

First, "implementation of the RFS program *itself* must be the cause of the severe harm."[5] It is not sufficient to show even that "implementation of the program would *significantly contribute* to severe harm" in combination with other factors unrelated to the RFS program's implementation.[6] Thus, as EPA explained, if the market were experiencing a certain kind of severe harm (e.g., prohibitively high crop prices), and the RFS program were a significant contributor to that harm but there were other contributing factors, too (e.g., drought or insufficient farmland), that would *not* suffice to make the waiver available.[7]

Second, the statute sets a "high threshold" for issuance of a waiver: "'severe' indicates a level of harm that is greater than marginal, moderate, or serious, though less than extreme."[8] In fact, "severe[] harm" is "clearly a much higher threshold than [the] 'significant adverse

---

[3] *See Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard* ("2008 Waiver Decision"), 73 Fed. Reg. 47,168 (Aug. 13, 2008) (establishing criteria); *Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard* ("2012 Waiver Decision"), 77 Fed. Reg. 70,752 (Nov. 27, 2012) (reaffirming criteria); David Korotney, *Assessment of Waivers for Severe Economic Harm or BBD Prices for 2018* ("2018 Waiver Assessment"), at 15-16 (Nov. 30, 2017), EPA-HQ-OAR-2017-0091-4925 (reaffirming criteria); *see also Renewable Fuel Standard Program—Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes: Response to Comments* ("2020 Response to Comments"), at 10-11, 14 (Dec. 2019), EPA-HQ-OAR-2019-0136-2157 (applying criteria); *Renewable Fuel Standard Program—Standards for 2019 and Biomass-Based Diesel Volume for 2020: Response to Comments* ("2019 Response to Comments"), at 13-15 (Nov. 2018), EPA-HQ-OAR-2018-0167-1387 (same); *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019* ("2018 Rule"), 82 Fed. Reg. 58,486, 58,517-58,518 (Dec. 12, 2017) (same); *Renewable Fuel Standard Program—Standards for 2017 and Biomass-Based Diesel Volume for 2018: Response to Comments* ("2017 Response to Comments"), at 54-55 (Nov. 2016), EPA-HQ-OAR-2016-0004-3753 (same).

[4] *AFPM*, 937 F.3d at 580.

[5] 2008 Waiver Decision, 73 Fed. Reg. at 47,171 (emphasis added).

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

[7] *Id.*

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

impacts'" standard applied by EPA in the ozone nonattainment context.[9] As EPA previously determined, for example, even "the substantial negative economic impacts suffered as a result of [2011's] historic drought," which had "taken a large toll on many States and sectors of the economy," including raising the price of U.S. corn and other feedstocks, did not qualify as severe harm to the economy.[10]

Third, it is not enough that severe harm *might* result, or even that severe harm is *likely* to result. Rather, EPA must have a "high degree of confidence" that severe harm *would* result but for a waiver.[11] As EPA has explained, "in situations where there is not such a high degree of confidence, a waiver might disrupt the expected growth in use of renewable fuels but there would be no clear expectation that a waiver would provide a benefit by reducing any harm."[12]

Fourth, the statute's use of the words "economy" and the "environment" means that the harm must be considered in light of the economy as a whole, not any one sector of it (e.g., the oil industry, or the poultry industry), and the environment as a whole, not any one element of it (e.g., a particular species).[13] EPA has explained: "[I]t would be unreasonable to base a waiver determination solely on consideration of impacts of the RFS program to one sector of the economy, without also considering the impacts of the RFS program on other sectors of the economy or on other kinds of impact. It is possible that one sector of the economy could be severely harmed, and another greatly benefited from the RFS program; or the sector that is harmed may make up a quite small part of the overall economy."[14] EPA underscored this point when it said during the rulemaking for the 2018 standard that, before deciding to issue a waiver, it would need to "take into account any negative economic impacts to farmers and biofuel producers from a waiver."[15]

Fifth, EPA has "discretion in determining whether to grant or deny a waiver request, even in instances where EPA finds that implementation of the program would severely harm the economy or environment of a State, region or the United States."[16] Because a waiver "will always … be national in character," EPA has decided that even if the qualifying "severe harm" is limited to a certain state or region, EPA should not as a matter of policy exercise that discretion without "look[ing] broadly at all of the impacts of implementation of the program, and all of the impacts of a waiver," including "the nationwide effects" of a waiver.[17]

---

[9] *Id.*

[10] 2012 Waiver Decision, 77 Fed. Reg. at 70,753, 70,775.

[11] *Id*.

[12] 2008 Waiver Decision, 73 Fed. Reg. at 47,172.

[13] *See, e.g.*, *id*.

[14] 2012 Waiver Decision, 77 Fed. Reg. at 70,774.

[15] 2018 Rule, 82 Fed. Reg. at 58,517 n.138.

[16] 2008 Waiver Decision, 73 Fed. Reg. at 47,172.

[17] *Id.*

Sixth, although EPA recognized that it may be appropriate to *deny* a severe harm waiver summarily, it is not proper to *grant* one without a "comprehensive and robust analytical basis for any claim that the RFS itself is causing harm, and the nature and degree of that harm," and without the public having notice of and an opportunity to comment on the details of that analysis.[18]

B. EPA Should Adhere to Its Longstanding Waiver Framework

EPA now seeks comment on "whether EPA should modify those criteria as requested by the petitioners." EPA should not. For starters, the petitioners make no effort to propose an alternative framework, let alone to justify an alternative framework or to show flaws in the existing framework. Some petitioners assert baldly that the Clean Air Act "does *not* require that the waiver we request be limited to situations in which the harm associated with RFS compliance is the *only* source of stress on the economy."[19] But EPA has never said that a waiver is permissible only if the economy would suffer no stress but for RFS compliance; rather, EPA has said that RFS compliance must "itself" cause severe harm—on top of any stress the economy might already be experiencing—and the D.C. Circuit has found that to be a valid interpretation of the Act.[20]

In any event, the criteria should be maintained. They resulted from EPA's careful and extensive analysis of the statute's language, context, purpose, and history,[21] and no new circumstances have arisen that would justify modifying or departing from them here. Indeed, they are not only textually required; they are critical to the functioning of the RFS program. The program depends on market participants having the long-term certainty that EPA will adhere to the statutorily prescribed volume requirements, so that they can make investments in the necessary infrastructure with an expectation that the investment will pay off.[22] Thus, EPA recognized that Congress did not intend to provide in the severe-harm provision an "open-ended and wide ranging waiver."[23] Rather, EPA found that "implementing a more limited waiver provision … will better implement Congress's overall desire to promote the use of renewable fuels, reflected in enacting the expanded RFS program and mandating the increased utilization of renewable fuels over a number of years."[24] The D.C. Circuit has since reinforced these points

---

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

[19] Tex. Pet. 2; *accord* La. Pet. 2.

[20] 2008 Waiver Decision, 73 Fed. Reg. at 47,171; *AFPM*, 937 F.3d at 579-580.

[21] 2008 Waiver Decision, 73 Fed. Reg. at 47,170-47,172; 2012 Waiver Decision, 77 Fed. Reg. at 70,756, 70,773-70,775.

[22] *See Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017* ("2014-2016 Rule"), 80 Fed. Reg. 77,420, 77,433, 77,456, 77,459-77,460 (Dec. 14, 2015); *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 917 (D.C. Cir. 2014).

[23] 2008 Waiver Decision, 73 Fed. Reg. at 47,171.

[24] *Id.*

when it rejected the notion that Congress provided a "boundless general waiver authority."[25] Such a broad waiver authority would interfere with "how the Renewable Fuel Program is supposed to work" through "increasing requirements [that] are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year."[26]

And there are additional reasons to adhere to EPA's longstanding principles. For example, the principle that implementation of the RFS program itself must be the cause of the severe harm simply reflects the common notion of "but for" causation: if the severe harm would not result but for the implementation of the program, it cannot be said that implementation "would … harm" the economy (or the environment).[27] Put another way, if a general waiver would not prevent the harm, EPA may not issue the waiver. That makes eminent sense; Congress would not have set up volume requirements to force the market to increase renewable fuel use only to allow EPA to negate the requirements unnecessarily. As both the D.C. Circuit and EPA have observed repeatedly, Congress did not enact "a very open-ended and wide ranging waiver provision."[28] And the D.C. Circuit further confirmed that the statute sets a high threshold for issuance of a waiver when it recognized that "lesser degrees of economic harm," such as heightened RIN prices and other compliance costs, do not satisfy the "severely harm" prong of the general waiver provision (or the "inadequate domestic supply" prong, for that matter).[29]

Finally, and for similar reasons, EPA should recognize that if it were to issue a severe-harm waiver, it could reduce the volume requirements no more than strictly necessary to avoid the *severe* harm that triggered the waiver (under all compliance circumstances). Although the statute authorizes EPA to waive a volume requirement "in whole or in part," that language does not vest EPA with discretion to reduce the volume requirement to any point it believes might be useful as a policy matter or to accomplish some economic or environmental objective other than relieving the *severe* harm that justified the waiver. A broader use of the waiver power would contravene the D.C. Circuit's conclusion that the statute cannot be interpreted to accord EPA "boundless general waiver authority."[30] On the contrary, the phrase "in whole or in part"

---

[25] *Americans for Clean Energy v. EPA ("ACE")*, 864 F.3d 691, 711 (D.C. Cir. 2017); *see also National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 149 (D.C. Cir. 2010) ("The EISA authorized the waiver of the volume requirements only in limited circumstances.").

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

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

[28] 2008 Waiver Decision, 73 Fed. Reg. at 47,171; *see ACE*, 864 F.3d at 711 (rejecting interpretation that would accord EPA "boundless general waiver authority").

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

[30] *ACE*, 864 F.3d at 711.

emphasizes that EPA must calibrate the size of the waiver to go no further than necessary to avoid the condition that triggered the waiver.

III. EPA SHOULD DENY THE PETITIONS TO WAIVE THE 2019 AND 2020 REQUIREMENTS BASED ON SEVERE ECONOMIC HARM

A. Petitioners Fail to Show that the 2019 or 2020 RFS Requirements Have Caused or Will Cause Severe Harm to the Economy

Petitioners seek a waiver based on three purported sources of severe economic harm: (1) the economic crisis caused by the global COVID-19 pandemic, including the reduced demand for transportation fuel; (2) a recent increase in RIN prices; and (3) the potential elimination of most, or all, small-refinery exemptions.[31] None of these events would permit EPA to waive the 2019 or 2020 requirements, let alone justify EPA in exercising its discretion to do so.

1. The Economic Crisis Caused by the COVID-19 Pandemic Does Not Make the Cost of RFS Compliance More Burdensome

Petitioners' principal argument is that EPA should grant an economic-harm waiver because the oil industry needs a bail-out. They assert that the COVID-19 pandemic has "suppressed international demand for refined products" and "significant harm to the energy economy is expected to result from depressed demand for transportation fuel."[32] "But," they say, "the 2020 RFS compliance obligations, in their current form, risk transforming the current severe economic harm to existential harm for some of the refineries in our states."[33] It is undoubtedly true that the pandemic has taken a severe toll on many aspects of the economy, including the refining sector, but there is no connection—and the petitioners do not even attempt to identify a connection—between that and the burden (if any) of RFS compliance, and that is fatal to their request.

The severe-harm waiver provision is not a freewheeling device for EPA to deliver general economic relief. As discussed above, the waiver power exists to alleviate severe economic harm that would otherwise result from *the RFS program itself*. It would be plainly contrary the statute—which directs EPA to determine whether "implementation of the [RFS] requirement would severely harm the economy"[34]—were EPA to use a general waiver to try to ease economic stress that obligated parties (or anyone else) might be feeling where that stress is not caused by RFS compliance obligations. Such an expansive approach to the waiver would

---

[31] *See, e.g.*, Small Refineries Pet. 4; La. Pet. 1-2; Pa. Pet. 1-2; *see also Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206 (10th Cir. 2020), *cert. granted sub nom. HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, No. 20-472 (U.S. Jan. 8, 2021).

[32] Pa. Pet. 1-2; *accord* Tex. Pet. 2; La. Pet. 2.

[33] Pa. Pet. 2; *accord* Tex. Pet. 2; La. Pet. 2.

[34] 42 U.S.C. § 7545(*o*)(7)(A)(i).

also risk rendering the program toothless, unable to fulfill Congress's intent to "force the market to create ways to produce and use greater and greater volumes of renewable fuel each year."[35]

This is not to say that EPA should ignore broader economic conditions stemming from the pandemic or that the RFS program must be "the *only* source of stress on the economy" before a waiver can issue, as some petitioners assert.[36] On the contrary, "EPA agrees that implementation of the RFS must necessarily occur within the context of existing market conditions, and that it is necessary and appropriate for EPA to consider the effect of RFS implementation in the context of those existing conditions."[37] In other words, EPA's task is to measure the economic consequences of RFS compliance between (1) the actual world with a pandemic and no severe-harm waiver and (2) the actual world with a pandemic *and* a severe-harm waiver.[38] Only if the difference between those scenarios amounts to *severe* economic harm is the waiver even permissible.[39] This approach properly allows EPA to distinguish between economic harm caused by the RFS program itself, and background economic harm that exists regardless of EPA's waiver decision.

Petitioners, however, make no attempt to identify the supposed "existential" economic consequences of RFS compliance under current circumstances, as distinct from the general economic consequences of the pandemic. They merely compare (1) the world with a pandemic and no waiver to (2) *the world without a pandemic at all*, and thus their request rests entirely on the harm caused by the pandemic itself—harm that is significant and also irrelevant to the task at hand. As EPA explained in the 2012 waiver decision, "[t]hough EPA fully recognizes the harmful impact to the economy from the 2011 drought," "the issue before the agency in this case is a much more limited one."[40] Because the evidence there did not show to a high degree of confidence that the RFS requirements would cause *additional* severe economic harm beyond the harm independently caused by the drought, the standard for a waiver was not met.[41] The same result applies here.

---

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

[36] Tex. Pet. 2; *accord* La. Pet. 2.

[37] 2012 Waiver Decision, 77 Fed. Reg. at 70,773.

[38] *See id.* at 70,756 ("Although there are many factors that affect an economy, the RFS waiver provisions call for EPA to evaluate the impact of the RFS mandate itself …. To [do so], EPA evaluate[s] two scenarios: one in which no waiver is granted and another in which a waiver of the total renewable fuel mandate is granted …."); *id.* at 70,757 ("EPA compared circumstances with and without a waiver ….").

[39] *See id.* at 70,775 (2012 waiver "determination has two basic parts. The first part addresses whether there is a generally high degree of confidence that harm would occur from implementation of the RFS. The second part considers whether such harm, if it were to occur, is 'severe.'").

[40] *Id.* at 70,775.

[41] *Id*.

Nor could petitioners make the requisite causal showing in any event. The only pandemic-related harm they identify is the decline in demand for transportation fuel. That is particularly irrelevant for the 2019 standards given that the first economic effects of the pandemic did not occur until after 2019 was over and demand for transportation fuel remained comparable to 2018 levels throughout 2019.[42] More fundamentally, declining demand for transportation fuel has *zero effect* on the burden (if any, *see infra* pp. 10-11) of RFS compliance. Although EPA begins with volumetric requirements ("applicable volumes") when it sets annual RFS obligations, it then expresses those obligations as percentages ("applicable percentages") specifying the ratio of renewable fuel that must be introduced into commerce relative to the amount of gasoline or diesel that the party introduces into commerce that year.[43] Under the statute, it is these percentages, not a fixed volume of renewable fuel, that each obligated party must meet to fulfill its RFS compliance obligations. Consequently, as the demand for transportation fuel declines, the volume of renewable fuel that each obligated party must introduce into commerce also declines—and does so *proportionally*. Indeed, domestic ethanol production in 2020 was down 12% from 2019.[44] Put another way, "an obligated party's obligations are automatically scaled to their *actual* production."[45] Thus, obligated parties' marginal costs of compliance are unaffected by the level of demand for transportation fuel once the standards have been set for a given year. However much the decreased demand for transportation fuel stemming from the pandemic may have cut into obligated parties' sales, their total cost of compliance declined proportionally. This means that the Governor of Louisiana's request to reduce the 2020 standards "by an amount commensurate with the current project shortfall in national gasoline and diesel consumption"[46] has already automatically been achieved.[47]

Finally, even if the automatic proportional reduction in individual obligations did not exist, there would still be no reason to think that a waiver granted for 2020 would materially improve the economies of petitioners' states or regions as a whole rather than marginally increasing profits for the refining industry in particular, given that the refining industry still constitutes only a small share of the economies in those areas.[48]

---

[42] *See* U.S. Energy Information Administration, *U.S. Product Supplied of Finished Motor Gasoline*, https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MGFUPUS1&f=M.

[43] 42 U.S.C. § 7545(*o*)(3); *ACE*, 864 F.3d at 698-699; *Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 637 (D.C. Cir. 2019); *Renewable Fuels Ass'n*, 948 F.3d at 1222.

[44] Stillwater Report at 7.

[45] Stillwater Associates LLC, *Analysis of Requests for RFS Severe-Harm Waivers for 2019 and 2020* ("Stillwater Report"), at 5 (Feb. 18, 2021) (attached as Exhibit 1).

[46] La. Pet. 2.

[47] Stillwater Report at 5.

[48] Stillwater Report at 9.

In sum, there is no basis to conclude that RFS compliance in a time of the pandemic causes severe economic harm that would not exist but for RFS compliance.[49]

2. The Recent Increase in RIN Prices Is Not, and Does Not Cause, Severe Economic Harm

Some petitioners argue that the "recent tripling" of RIN prices presents a "clear threat to the [refining] industry,"[50] with "RFS compliance costs that exceed [some refiners'] payroll costs."[51] This argument fails for several reasons: (a) refiners do not actually bear the cost of RINs because they pass them down the supply chain; (b) almost all refiners produce fuel only where doing so is profitable net of RIN costs; and (c) in any event, petitioners have not shown how the supposed RFS-related harm to their sector would severely harm the economy of a state, a region, or the country.

a. EPA has already rejected this argument and repeatedly rejected its factual premise, and rightly so. During the rulemaking for the 2018 standards, some obligated parties "argue[d] that the high price of RINs has already caused economic harm to their companies, and some parties state that these high RIN prices could lead to a future refinery closure."[52] EPA disagreed, concluding that RIN prices are not "a valid indicator of the economic impact of the RFS program on these entities, since a narrow focus on RIN price ignores the ability for these parties to recover the cost of RINs from the sale of their petroleum products."[53] The D.C. Circuit affirmed that conclusion.[54]

---

[49] In the course of setting the RFS standards for 2018, EPA considered the projection that demand for gasoline in 2018 would be higher than in 2017, and remarked: "Gasoline demand affects the cost of RFS compliance because, as described in previous annual rules, ethanol produced for renewable fuel is most easily consumed as E10, and higher gasoline demand means that greater volumes of ethanol can be consumed as E10." 2018 Waiver Assessment at 14. That statement was true in the context in which it was made, namely, ex ante, when EPA is engaged in the process of determining the volumetric requirement for the upcoming year: for a given required volume of renewable fuel, the more transportation fuel is expected to be used, the lower the cost of compliance will be because the greater consumption of E10 (for reasons unrelated to the RFS program) will inevitably result in proportionally greater use of ethanol. But once the percentage standards for a given year are set, the subsequent decline in demand for transportation fuel results in a proportional decline in the amount of renewable fuel that must be used, as explained above, and therefore does not affect the cost of compliance.

[50] Texas Pet. 1; *accord* La. Pet. 1; Small Refineries Pet. 4 (alleging harm from "the surge in RIN prices").

[51] Pa. Pet. 1.

[52] 2018 Waiver Assessment at 5.

[53] *Id.*

[54] *AFPM*, 937 F.3d at 581.

EPA's finding that obligated parties recover their RIN costs is one it has reached after extensive empirical analysis and affirmed repeatedly over several years after accounting for the latest evidence, despite obligated parties' constant effort to challenge it. In 2017, EPA thoroughly examined the available evidence and found that "all" obligated parties (including importers and merchant refiners) recover their RIN costs.[55] The D.C. Circuit affirmed that finding, noting that even the obligated parties' evidence showed that 98% of the RIN price was "passed through … within two business days."[56] EPA has repeatedly rejected subsequent challenges to its finding. For example, in the rulemaking for the 2018 standards, EPA found that obligated parties "did not provide sufficient evidence that the purchase of RINs, as opposed to other market factors, is responsible for the compan[ies'] difficult economic circumstances, or why they cannot recoup the cost of RINs through higher prices of their products."[57] Most recently, during the rulemaking for the 2020 standards, EPA found in December 2019 that, based on the available data, RIN prices are "recovered by obligated parties in the revenues received for their petroleum products" and "do[] not represent a net cost to obligated parties," regardless of whether those parties acquire RINs by purchasing renewable fuel or by purchasing separated RINs.[58] At that time, EPA added that obligated parties had "provided no new credible evidence to indicate that they do not or cannot recover the cost of RINs."[59]

There is no reason—and certainly petitioners have offered no evidence—to depart from EPA's consistent, well-supported finding that all obligated parties recoup their RIN costs.

b. Most obligated parties incur RFS obligations only to the extent that doing so is profitable *net of their RFS obligations*. As a matter of course, integrated refiners acquire RINs as they produce their transportation fuel, and as rational economic actors, they produce each gallon of transportation fuel only if they expect that gallon to be profitable net of all costs, including whatever RIN cost they ultimately incur. This is also true of merchant refiners, most of which purchase RINs ratably as they refine their fuel, enabling them to assess the expected profitability of each gallon they produce net of their RFS obligations.[60] Thus, any refiners that elected not to

---

[55] *Denial of Petitions for Rulemaking to Change the RFS Point of Obligation* ("Point of Obligation Denial"), at 22-29 (Nov. 22, 2017), EPA-420-R-17-008.

[56] *Alon*, 936 F.3d at 649-652.

[57] 2018 Rule, 82 Fed. Reg. at 58,517.

[58] 2020 Response to Comments at 11; *see also* Dallas Burkholder and Nick Parsons, *Screening Analysis for the Final Renewable Fuel Standards for 2020*, at 6 (Dec. 5, 2019), EPA-HQ-OAR-2019-0136-2111 (emphasis added).

[59] 2020 Response to Comments at 11.

[60] *See* Small Refineries Pet. 4. The Small Refineries Petitioners admit this, but try to cabin it to 2019: "Obligated parties, other than small refineries, acquire RINs on a ratable basis, and will not be adversely impacted by the spike in RIN prices for the 2019 compliance year (although they are already being adversely impacted by RIN prices for the 2020 compliance year)." *Id.* That qualification is nonsense. Obligated parties that acquired RINs ratably have already acquired all (or nearly all) RINs they need for compliance with their 2020 obligations, even though the deadline for compliance demonstration has not yet arrived.

acquire their RINs ratably simply chose to place a bet on the future RIN market, i.e., bet that they could acquire their RINs later for less. If they lost that bet because RIN prices actually rose, that is the consequence of their decision to bet instead of satisfying their obligations as they went, and EPA cannot and should not use its waiver power to relieve them of the consequences of their voluntary market speculation. Indeed, such use of the waiver power would create a moral hazard, incentivizing obligated parties to disregard their RFS obligations until the end of the year, at which point they could elect between buying RINs if prices declined and obtaining a waiver if prices increased.[61]

c. Even if obligated parties bore the cost of RFS compliance, that would still not establish that RFS compliance is causing them severe economic harm, let along causing severe harm to the economy of a state, a region, or the country, as required for a waiver.

First, RIN costs—even "a significant increase in … RIN prices"—are precisely the "lesser degrees of economic harm" that the D.C. Circuit concluded would *not* qualify as "severe" economic harm for purposes of the general waiver.[62] Indeed, far from being a basis for waiver, the court has repeatedly recognized, "high RIN prices" are the very engine for the growth that Congress intended the RFS program to achieve because they "incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote."[63]

Nor is the current price environment indicative of burdensome compliance. Although RIN prices increased somewhat over the course of 2020, they are still well below the peaks obtained in 2017.[64] At the same time, the current net cost of ethanol to blenders relative to the spot price of gasoline is such that blending ethanol reduces blenders' cost of production and thereby increases their profitability.[65] The same is true with respect to biodiesel.[66]

Second, the refinery petitioners offer no explanation of how whatever compliance burden they believe they are incurring would severely harm the economy of a state, a region, or the country. They report that "the refining and petrochemical industries contribut[e] some $600 billion annually to the national economy and employ[] over three million industrial workers in some 33 states."[67] But even if true, petitioners do nothing to quantify the effect of RFS compliance on those industries. If they mean to suggest that RFS compliance would completely wipe out the entire refining and petrochemical industries nationally, that suggestion is patently implausible and unsupported by any evidence they have ever submitted to EPA. And even in

---

[61] *See* Stillwater Report at 10; *see infra* p. 25.

[62] *ACE*, 864 F.3d at 711-712.

[63] *Monroe Energy*, 750 F.3d at 919; *see ACE*, 864 F.3d at 705, 710; *Alon*, 936 F.3d at 651.

[64] *See* EPA, *RIN Trades and Price Information*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information (last accessed Feb. 15, 2021).

[65] Stillwater Report at 5-6.

[66] *Id.* at 11-12.

[67] Pa. Pet. 2; *accord* Texas Pet. 2; La. Pet. 2.

petitioners' own states, where there are relatively high concentrations of refineries, the refining industry represents a small share of the state's economy.[68]

Finally, although RIN costs are ultimately passed to consumers, there is no basis to conclude that the effect of RFS compliance on consumers will cause the requisite widespread severe economic harm. As EPA has long understood, "higher RIN prices do not result in higher prices for transportation fuel."[69] As EPA found in a 2015 docket memorandum and then reiterated in declining to change the point of obligation in 2017, RIN prices generally decrease the effective price of renewable fuel, while increasing the effective price of fossil fuel.[70] "[T]hese two price impacts generally offset one another for fuel blends such as E10 with a renewable content approximately equal to the required renewable fuel percentage standard."[71] Moreover, EPA has found, the normal "fluctuations" in retail fuel prices stemming from the volatility in the cost of crude oil "dwarf any impact of RFS compliance costs."[72] If anything, the RFS program has reduced the price customers pay for gas. During 2019 and 2020, the price of E10 was on average 2.85 cents per gallon cheaper than gasoline without ethanol.[73]

3. The Elimination of Small-Refinery Exemptions Would Not Cause Severe Economic Harm

Some petitioners claim that the "nationwide" application of the Tenth Circuit's decision in *Renewable Fuels Ass'n v. EPA* will "compound[]" "the economic crisis caused by the coronavirus … and [a] continuing drop in demand" for transportation fuel.[74] They argue that the decision "effectively eliminat[es] small refinery hardship relief" and has "led to a striking price increase in the RIN market."[75] This argument fails for multiple reasons.

First, EPA cannot at this time have "a high degree of confidence" that the *Renewable Fuels Ass'n* decision will eliminate any small-refinery exemptions at all. The Supreme Court has granted certiorari in the case and will likely not decide it until at least June, if not the fall of 2021. Any prediction about how the Court will resolve the case would be speculative and not the "comprehensive and robust analytical basis" that EPA must generate to issue a general waiver.

---

[68] Stillwater Report at 9.

[69] *Renewable Fuel Standard Program—Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments* ("2018 Response to Comments"), at 23 (Nov. 2017), EPA-HQ-OAR-2017-0091-4990.

[70] Dallas Burkholder, *A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects*, at 14-21 (May 14, 2015), EPA-HQ-OAR-2015-0111-0062; Point of Obligation Denial at 20-21.

[71] Point of Obligation Denial at 21.

[72] 2018 Waiver Assessment at 9.

[73] Stillwater Report at 2.

[74] Small Refineries Pet. 2-4.

[75] *Id.* at 1, 4.

Second, should the Tenth Circuit's interpretation of the statute be applied henceforth nationwide, it would eliminate exemptions for fewer than 30 refineries (i.e., facilities).[76] The petitioners make no attempt to show that the imposition of RFS obligations on those facilities would cause severe harm to the economy of a state, a region, or the country.

And third, even if the elimination of small-refinery exemptions raised RIN prices, that effect would not in turn cause severe harm to obligated parties in general or to the economy of a state, a region, or the country, for reasons explained above.[77]

4. Any Supposed Harm Caused by Implementing the 2019 and 2020 RFS Requirements Would Be Mitigated by the RIN Bank and the Ability to Carry RIN Deficits Forward

Even if petitioners' claims of harm from RFS compliance had merit, EPA could not issue a waiver without accounting for other compliance flexibilities available to mitigate those harms: the enormous carryover RIN bank and the ability of obligated parties to carry RIN deficits forward to the next year. According to EPA's most recent public estimate, there will be about 3.48 billion carryover RINs available to meet the 2020 standards—enough to cover about 17% of the required volume of 20.09 billion gallons.[78] There is no credible argument that reducing the bank somehow itself "would" cause severe economic harm. EPA has said that the purpose of the bank is to create a buffer to address unforeseen circumstances such as natural disaster.[79] Now is such a moment—an unforeseen global pandemic—and if this pandemic has created a financial crisis for obligated parties, the massive RIN bank they have accumulated is available to help. And deficit carryforwards can further mitigate RFS compliance burdens (if any).

That EPA must assess the potential for severe harm in light of all compliance circumstances follows from both the text and purpose of the statute. Use of other compliance flexibilities is part of the "implementation" of the volume requirements.[80] As long as compliance flexibilities are available to mitigate or eliminate the asserted harm, it cannot be said with any degree of confidence—let alone the requisite "high degree of confidence"—that implementation of the RFS requirements "would" result in severe economic harm. Otherwise, EPA could use the severe-harm waiver to undermine the RFS program's ability to force market

---

[76] *See id.* at 4.

[77] The small refineries petitioners also cite a "precipitous drop in crude oil prices due to the Russia-Saudi Arabia disagreement" as a basis for finding severe economic harm, but, again, EPA cannot use the waiver to redress non-RFS financial conditions, and the petitioners provide no explanation of why RFS compliance in an environment with lower crude oil prices will cause severe economic harm. *See id.* at 1.

[78] *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes* ("2020 Rule"), 85 Fed. Reg. 7016, 7021 (Feb. 6, 2020).

[79] 2014-2016 Rule, 80 Fed. Reg. at 77,483.

[80] 42 U.S.C. § 7545(*o*)(7)(A)(i).

growth in renewable fuels by reducing volume requirements unnecessarily—something, again, the D.C. Circuit recently made clear the statute should not be interpreted to permit.[81]

EPA recognized this point in 2012, when it concluded that it was necessary to consider carryover RINs (or "rollover RINs") as part of the analysis of whether severe economic harm would result. EPA stated: "[T]he impact of the RFS volume requirements is highly dependent on the volumes at issue, the number of RINs carried over from prior years and the relevant market commodity prices, such as corn and crude oil prices, and other factors applicable during the time period analyzed."[82] EPA explained that "the availability of rollover RINs can significantly affect the potential impact of implementation of the RFS volume requirements."[83] Accordingly, EPA modeled the availability of "one rollover RIN [as] equivalent to one liquid gallon of ethanol: both equally satisfy the RFS requirements, and thus both are sources of ethanol to draw upon in the model."[84] EPA noted that "if significant numbers of rollover RINs (i.e., 2.0 billion or more) are available [academic] studies suggest that the effect of a waiver [in potentially reducing purported harm] is significantly smaller."[85] EPA underscored this general point in the rulemaking for the 2018 standards when it rejected obligated parties' argument that it should evaluate the potential harm of implementing the RFS requirements against the *statutory* volumes, noting that it would be "reasonable" to assess the severe-harm waiver only after reducing the volumes pursuant to the cellulosic waiver authority.[86] In so doing, EPA properly characterized the question as whether volumes lower than the finalized requirements would be "*necessary* to prevent causing severe economic harm."[87] A waiver cannot be *necessary* to prevent harm if other RFS compliance flexibilities could achieve the same goal.

B. EPA Lacks Authority to Grant Individually Targeted Waivers

EPA should also deny the small refinery petitioners' request that EPA use its general severe-harm waiver authority to "waiv[e] small refineries' RFS renewable volume obligations."[88] But the general waiver simply cannot be used to grant "targeted relief" to

---

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

[82] 2012 Waiver Decision, 77 Fed. Reg. at 70,753.

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

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

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

[86] 2018 Waiver Assessment at 6.

[87] *Id.*at 6-7 (emphasis added).

[88] Small Refineries Pet. 1-2.

"individual" obligated parties.[89] Rather, as EPA has long recognized, a severe-harm waiver "will always … be national in character,"[90] and the statute cannot reasonably be interpreted otherwise.

1. The statutory text and structure foreclose the small refineries' interpretation. First, the waiver provision makes clear that the waiver may be implemented *only* by reducing the *national* volume requirement—that is what it means to "waive" the RFS requirements. The statute specifies that what the Administrator "waive[s]" are "the requirements of paragraph (2),"[91] which are the *national* volumetric requirements, i.e., the amount of renewable fuel that must be contained in the transportation fuel that is "sold or introduced into commerce *in the United States*."[92] And correspondingly, the statute specifies that the Administrator implements a waiver "by *reducing the national quantity* of renewable fuel required under paragraph (2)."[93] That is the only statutorily provided mechanism for implementing a general waiver and thus leaves no doubt that the general waiver authority cannot be used to reduce individual obligated parties' obligations.

This conclusion is confirmed by the fact that Congress provided a separate mechanism for granting individualized relief to small refineries: an "exemption" based on a showing that RFS compliance would cause the individual refinery "disproportionate economic hardship."[94] In contrast to a *waiver*, the statute makes clear that an *exemption* means that the RFS requirements "shall not apply to" the individual obligated parties that received the exemption.[95] Thus, the exemption provision shows that Congress "knew how to draft the kind of statutory language that [the small refinery petitioners] seeks to read into" it.[96] "[H]ad Congress intended to" allow the *waiver* power to be used to relieve individual obligated parties, it thus "would have said so."[97] Moreover, the small refineries request for a "targeted" general waiver in effect seeks the relief of an exemption without meeting the requirements for one, but EPA cannot mix and match its distinct statutory authorities. When Congress "uses certain language in one part of the statute and different language in another"—here, *exemption* and *shall not apply* versus *waiver* and *by reducing the national quantity*—courts and agencies must "assume[] different meanings were intended,"[98] and there is no reason to depart from that rule here. Congress would not have established a standard for relieving individual obligated parties of their RFS obligations only to

---

[89] *See* Small Refineries Pet. 6-7.

[90] 2008 Waiver Decision, 73 Fed. Reg. at 47,172.

[91] 42 U.S.C. § 7545(*o*)(7)(A).

[92] *Id*. § 7545(*o*)(2) (emphasis added).

[93] *Id*. § 7545(*o*)(7)(A) (emphasis added).

[94] *See id.* § 7545(*o*)(9).

[95] *See id.*

[96] *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 443-444 (2016).

[97] *Id.*

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

allow EPA to grant the same relief without meeting that standard.[99] EPA has no authority to rewrite the statute to create a new hybrid of its "exemption" and "waiver" powers.[100]

2. None of the small refineries' arguments for targeted waivers are remotely plausible. The small refineries begin with an analogy: that the "national quantity" could be "reduc[ed]" for a single state or region, just as a freeze in Florida might reduce "the national quantity" of oranges.[101] The small refineries are comparing oranges to apples. Their specious analogy ignores the difference between the amount of renewable fuel required and where the renewable fuel is used. Renewable fuel can be used anywhere in the United States; neither the statute nor the regulations impose greater geographic specificity. The text is unambiguous that the only requirement is a national quantity and the only mechanism for waiving that requirement is to reduce the national quantity. There simply is no more localized requirement that could be reduced.

Moving on, the small refineries claim that the "clause 'in whole or in part' indicates that the Administrator may tailor the antidote to 'severe economic harm' to the source of the ailment."[102] That is incorrect. The phrase "in whole or in part" simply speaks to the *quantity* by which the Administrator may "reduc[e] the national quantity": all the way to zero (in whole) or to some higher level (in part). The phrase "in whole or in part" neither on its own nor in context can reasonably be read to create a power to carve out individual obligated parties.

Next, they contend that the statute's "use of the word 'requirement(s)' in the waiver provision makes clear that individual obligations may be waived."[103] They explain (for lack of a better term) that "limiting the wavier to nationwide reductions" would render the waiver "redundant of" EPA's authority to make "adjustments" in "determining the applicable percentage for a calendar year."[104] That argument makes no sense. The statutory "adjustments" do not modify the national quantities specified in paragraph (2), but rather modify the percentage standards derived from those national quantities.[105] Moreover, the "adjustments" are not available to prevent the severe harm that authorizes a general waiver; they are available only for two other, narrowly defined purposes: "to prevent the imposition of redundant obligations" and "to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt."[106] Consequently, limiting severe-harm waivers to reducing the nationally required volumes would not render the adjustment power redundant at all.

---

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

[100] *See, e.g.*, *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 721 (D.C. Cir. 2016); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995).

[101] Small Refineries Pet. 6.

[102] *Id.* at 7.

[103] *Id.*

[104] *Id.*; *see* 42 U.S.C. § 7545(*o*)(3).

[105] 42 U.S.C. § 7545(*o*)(3).

[106] *Id.* § 7545(*o*)(3)(C).

In the same paragraph, the small refineries assert that their view is supported by EPA's regulation "imposing specific requirements on an 'obligated party.'"[107] For obligated parties, the small refineries evince a surprisingly poor grasp of how the RFS works. Under both the statute and the regulations, there is a nationally required quantity of renewable fuel—defined in paragraph (2)—which EPA converts to a percentage—pursuant to paragraph (3)—and each obligated party is required to ensure that the transportation fuel it introduces into commerce contains that percentage of renewable fuel.[108] "If each obligated party meets the required percentage standards, then the Nation's overall supply of … renewable fuel will meet the total volume requirements set by EPA."[109] Thus, that parties have individual obligations—defined as percentages under paragraph (3)—certainly does not show that a waiver of the requirements of paragraph (2) may be implemented through individual reductions of the percentage obligations defined under paragraph (3). On the contrary, the statute makes clear the difference between the national requirement and the individual obligations, and expressly specifies that the waiver operates by reducing only the national requirement.

The small refineries also find confirmation of their interpretation in the fact that the statute permits individual obligated parties ("any person subject to the requirements of this subsection") "to petition for a waiver."[110] But there is no necessary or obvious correspondence between who requests the waiver and the scope of that waiver. Rather, the statute makes plain that whoever provides the impetus for the waiver—a state, an obligated party, or the Administrator—the function of the waiver is the same: to reduce the national quantity required. The small refineries ask rhetorically: "Why add 'any person' to those who have the right to request a waiver if these same 'persons' cannot get any meaningful relief under the statute?"[111] Their premise is false; their question, misguided. Those persons *can* get meaningful relief, in the form of a reduction of the national quantity required, which in turn will reduce their applicable percentage standard and thus the amount of renewable fuel that they individually must use. And Congress allowed individual obligated parties to petition for waivers because it recognized that they could be positioned to identify the potential for a severe harm that would warrant a nationwide waiver.

The small refineries then contend that any "doubt" about the meaning of the statute is resolved in their favor by Congress's use of the word "may"[112] in the statutory phrase "The Administrator … may waive the requirements of paragraph (2)."[113] A single word like "may," of course, cannot impliedly authorize EPA to do anything it wants with its waiver power, and, indeed, as used in the waiver provision, "may" merely confers on EPA (as it has long

---

[107] Small Refineries Pet. 7.

[108] 42 U.S.C. § 7545(*o*)(3)(B); *ACE*, 864 F.3d at 698-699; *Alon*, 936 F.3d at 637.

[109] *ACE*, 864 F.3d at 699; *see also Alon*, 936 F.3d at 637; *Renewable Fuels Ass'n*, 948 F.3d at 1222.

[110] Small Refineries Pet. 8.

[111] *Id.*

[112] *Id.* at 9.

[113] 42 U.S.C. § 7545(*o*)(7).

recognized) "discretion to decline to issue a waiver even if it finds that the severe harm test is satisfied."[114] The discretion to decide whether to use a particular power—to waive the national volume requirements by reducing them—cannot reasonably be read to include discretion to do something else, such as to reduce the obligations for individual obligated parties.

The small refineries further argue that because a general waiver may be justified by severe harm to a state or region, requiring EPA to use nationwide volume reductions to redress such geographically limited harms would be "inefficient and unnecessarily destructive."[115] But the statute does not "*require* such an enormous nationwide downward adjustment of volume" to address a localized harm[116]; as just noted, EPA has discretion not to issue a waiver even where authorized, and it is has wisely recognized that in exercising that discretion, it should "look broadly at all of the impacts of implementation of the program, and all of the impacts of a waiver," including "the nationwide effects" of a waiver.[117] (Contrary to the small refineries' assertion, EPA has never "observed" that "limiting the waiver authority to 'nationwide' reductions would render the waiver provision useless and ineffective in addressing discrete harm to a state or region."[118]) In any event, "[e]ven if" the smaller refineries "had the better of the policy arguments, those arguments could not overcome the statute's plain language."[119]

As a fallback, the small refineries argue that EPA need exercise a waiver on a nationwide basis only when acting sua sponte. Invoking the "rule of the last antecedent" and pointing to the statutory list of who may request a general waiver, the small refineries assert that "the phrase 'by reducing [the] national quantity' modifies only the phrase that it immediately follows: 'or by the Administrator on his own motion.'"[120] Thus, they argue, when EPA instead issues a general waiver "on petition by one or more States[or] by any person subject to the requirements of this subsection," such as small refineries, the waiver need not be implemented by reducing the national volume requirement. That is nonsense. The rule of the last antecedent does not apply here at all. That rule "provides that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows."[121] But the "by reducing" clause is not a *limiting clause*; as discussed, it explicates how the waiver is implemented.[122] Indeed, if the "by reducing" clause operated only when the Administrative issued a waiver sua sponte, the

---

[114] 2012 Waiver Decision, 77 Fed. Reg. at 70,756.

[115] Small Refineries Pet. 8-9.

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

[117] 2008 Waiver Decision, 73 Fed. Reg. at 47,172.

[118] Small Refineries Pet. 8.

[119] *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017), *quoted in ACE*, 864 F.3d at 712.

[120] Small Refineries Pet. 10.

[121] *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (quotation marks and alteration omitted).

[122] *Cf., e.g.*, *id.* at 961 (in phrase "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," the clause "involving a minor or ward" "modifies only 'abusive sexual conduct'").

statute would absurdly leave the Administrator with *no* mechanism by which to implement a waiver on petition by a state or person. In any event, the rule of the last antecedent is not inflexible, and would be "overcome by other indicia of meaning" here, as described above.[123]

Finally, the small refineries seemingly argue that a waiver may be issued "in whole or in part" only when issued on petition by a state or obligated party.[124] They are plainly wrong. The phrase "in whole or in part" precedes the entire list of who may be the impetus for a waiver and thus modifies the word "waive" irrespective of who provides the impetus. That is also an odd argument given that the waiver they seek would occur not on the Administrator's own motion but on *their petition*. In any event, there is no rationale, textual or otherwise, to think that Congress intended to provide different waiver authorities depending on who initiated the waiver proceedings.

IV. EPA SHOULD DENY THE PETITION TO WAIVE THE 2020 REQUIREMENTS BASED ON SEVERE ENVIRONMENTAL HARM

The National Wildlife Federation ("NWF") asks EPA to waive the 2020 RFS requirements because, it says, the requirements "threaten" severe *environmental* harm.[125] This request is meritless, for myriad reasons.

First, EPA has already declined to waive the 2020 requirements based on claims of severe environmental harm.[126] In fact, EPA determined not only that it lacked the requisite high degree of confidence that the 2020 RFS requirements *would* severely harm the environment of a state, a region, or the country, but also that "there are no effects to [endangered] species or critical habitat that would not occur but-for the 2020 RFS standards and that are reasonably certain to occur."[127] Those findings were well supported, relying on studies that debunked evidence submitted by NWF and other commenters favoring a waiver based on claims of severe environmental harm, and NWF does not attempt to identify any reason to reverse them. In fact, the declining demand for renewable fuel stemming from the pandemic would only mitigate any adverse environmental consequences of using renewable fuel to meet RFS compliance obligations.

NWF takes aims in particular at corn ethanol, arguing: "[T]he corn ethanol mandate has led to the loss of important wildlife habitat, particularly in regions critical for monarch butterflies, ducks and other ground-nesting birds, and many other species."[128] But as EPA has concluded, "the 2020 RFS standards do not cause any increase in corn ethanol production and

---

[123] *Id*. at 963; *see also, e.g.*, *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 344 n.4 (2005) (rule inapplicable where disputed phrase appears "at the end of a single, integrated list").

[124] *See* Small Refineries Pet. 10.

[125] NWF Pet. 1-2.

[126] 2020 Response to Comments at 19.

[127] Endangered Species Act No Effect Finding for the 2020 Final Rule ("2020 ESA No Effect") at 3 (Dec. 2019), EPA-HQ-OAR-2019-0136-2123.

[128] NWF Pet. 3.

therefore do not cause any increase in corn cultivation in the United States."[129] There are several reasons for this. First, as EPA has said, there is no "ethanol mandate."[130] Market participants determine what type of renewable fuels to use to meet each of the four nested renewable fuel standards, and they can use any type of renewable fuel to meet the total standard above the required volume of advanced renewable fuel.[131]

Second, as a practical matter, although the RFS program historically helped spur the growth of ethanol use in transportation fuel, the *2020 RFS standards* would have no effect on domestic ethanol production. As EPA found, ethanol demand from sources that are independent of the 2020 RFS standards accounts for all domestic ethanol production.[132] Almost all domestic ethanol consumption occurs through E10, but demand for E10 exists entirely independent of the RFS standards because of the value of ethanol "as a gasoline blending component and octane enhancer" and because "the entire gasoline production and distribution system" is designed to deliver E10 efficiently and could not easily be reversed to deliver E0.[133] When EPA finalized the 2020 standards, it expected only about 185 million gallons of ethanol to be used through higher-blend fuels, such as E15 and E85 (based on pool-wide ethanol concentration of 10.13%),[134] but most consumption of higher-blend ethanol-based fuels is dictated by non-RFS government mandates and incentives.[135] And the rest of domestic ethanol production is "driven by favorable export markets for corn ethanol."[136] In short, the 2020 RFS standards would have *at most* a negligible effect on the production or use of ethanol—certainly not enough to *severely* harm the environment.

Third, current demand for renewable fuel does not drive land use or conversion. NWF relies on outdated and cherrypicked studies of land use between 2008 and 2012.[137] More recent studies show that the total crop acreage has declined since the RFS program began.[138] Corn acreage, for example, peaked in 2012—when NFW's evidence ends—and has declined since,

---

[129] 2020 ESA No Effect at 4.

[130] *Id.* at 5; *see also AFPM*, 937 F.3d at 583-584; *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 177 (D.C. Cir. 2012) ("[T]he RFS does not mandate that obligated parties use E15 or any other particular product to meet its requirements.").

[131] *See* 42 U.S.C. § 7545(*o*)(2).

[132] *See* 2020 ESA No Effect at 5.

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

[134] David Korotney, *Updated Market Impacts of Biofuels in 2020*, at 6 (Dec. 18, 2019), EPA-HQ-OAR-2019-0136-2122.

[135] 2020 ESA No Effect at 6 & n.15.

[136] *Id.* at 7.

[137] *See* NWF Pet. 2.

[138] Stillwater Report at 6.

due to the development of technologies and techniques to farm corn and produce ethanol more efficiently.[139]

Fourth, decisions relating to growing the feedstocks for renewable biofuels, including ethanol—"[d]ecisions on what type of feedstock to use for biofuel production, where such feedstocks are grown, the types and volumes of agricultural inputs such as fertilizer or pesticide to use in growing the feedstocks," etc.—"are made by third parties, and any on-the-ground activities to implement and carry out those decisions are undertaken by such third parties."[140] Those actors are not subject to any RFS requirements, and their decisions are "a function of a large number of worldwide agricultural sector market factors, including markets in food and feed" unrelated to RFS needs.[141] Moreover, advances in farming practices and technologies have substantially reduced the negative environmental effects of farming.[142] Consequently, there is, at most, a "highly attenuated causal chain between the 2020 standards and potential impacts on listed species and critical habitat" or other environmental consequences.[143] In any event, NWF's environmental arguments are fundamentally flawed because they do not reflect any comparative analysis of a world without, or with lower, RFS standards. Any reduction in the use of renewable fuels resulting from a waiver of the RFS standards would lead *not* to a reduction in the use of transportation fuel overall but rather to the replacement of renewable fuel with fossil fuel. After all, renewable fuel is, by definition, fuel "that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel."[144] Consequently, the critical question for evaluating the environmental consequences of the RFS standards is how the effects of renewable fuel compare to the effects of the fossil fuel that it replaces.[145] NWF submits no such analysis, presumably because substantial evidence establishes that the production of gasoline has severe adverse environmental effects.[146]

Finally, NWF raises concerns about GHG emissions, charging that "land conversion from 2008-2012 releas[ed] as much carbon into the air as 36 coal-fired power plants."[147] "[R]educing

---

[139] *Id.*; Stillwater Associates LLC, *The RFS Reset: A Look at Corn Land Use and Conventional Ethanol Production* ("Stillwater *Land Use*"), at 7-8, 12 17, 24 & figs. 1-2, 6, 13 (Aug. 30, 2019) (attached as Exhibit 2); Ramboll, *The RFS and Ethanol Production: Lack of Proven Impacts to Land and Water* 11-13 ("Ramboll, *The RFS and Ethanol Production*") (Aug. 18, 2019) (attached as Ex. 3).

[140] 2020 ESA No Effect at 8.

[141] *Id*.

[142] Ramboll, *The RFS and Ethanol Production*, at 25-36.

[143] *Id.* at 4; *see also* Stillwater Report at 8-9; Stillwater *Land Use* at 9-10 & tbl.1; Ramboll, *The RFS and Ethanol Production* at 15-18, 21-23.

[144] 42 U.S.C. § 7545(*o*)(1)(J); *ACE*, 864 F.3d at 696.

[145] *See* Ramboll, *The RFS and Ethanol Production* at 37.

[146] *Id.* at 37-43.

[147] NWF Pet. 2.

greenhouse gas emissions" is the "objective" of the RFS program,[148] but the validity of NWF's claim is irrelevant because, again, the critical question is the comparative effects of renewable fuel relative to the fossil fuel it replaces, and all renewable fuel, including conventional ethanol, offers substantial advantages with respect to reducing GHG emissions. By definition, fuel qualifies as renewable fuel for RFS purposes only if it "achieves *at least* a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions" of the fossil fuel it replaces.[149] Even the gap between lifecycle GHG emissions associated with conventional ethanol and those of fossil fuels is substantial and growing wider. Recent analysis shows that corn starch-based ethanol reduces lifecycle GHG emissions by an average of 46% relative to gasoline.[150] And a report using data from the U.S. Department of Agriculture data and the Argonne National Laboratory's "GREET2016" Model found that conventional ethanol reduces GHG emissions by 40-48% relative to gasoline.[151] And there is also a clear link between increased ethanol use and enhanced air quality, as found in numerous studies.[152]

In sum, there is no basis at all to find that the 2020 RFS standards would severely harm the environmental of a state, a region, or the country.

V. RETROACTIVE SEVERE-HARM WAIVERS ARE UNLAWFUL AND COUNTERPRODUCTIVE

Even if the petitioners showed that compliance with the 2019 or 2020 RFS standards would have caused the requisite severe harm during those years, EPA could not and should not

[148] *American Petroleum Inst. v. EPA*, 706 F.3d 474, 476 (D.C. Cir. 2013).

[149] 42 U.S.C. § 7545(*o*)(2)(A)(i).

[150] Melissa J. Scully et al., *Carbon Intensity of Corn Ethanol in the United States: State of the Science* at 24, Env't Rsch. Letters (forthcoming 2021) (attached as Exhibit 4).

[151] Air Improvement Resource, Inc., *EPA Proposed Renewable Fuel Standards for 2018: Estimated Increase in National GHG Emissions If EPA Reduces the Conventional Fuel Volume* (Aug. 31, 2017) (attached as Exhibit 5); *see also* Air Improvement Resource, Inc., *Emissions Reductions from Current Natural Gas Corn Ethanol Plants* (July 27, 2015) (attached as Exhibit 6).

[152] Alberto Salvo, et al, *Reduced Ultrafine Particle Levels in São Paulo's Atmosphere During Shifts From Gasoline To Ethanol Use*, 8 Nature Comms. 77 (attached as Exhibit 7); John M.E. Storey, et al., *Ethanol Blend Effects On Direct Injection Spark-Ignition Gasoline Vehicle Particulate Matter Emissions*, SAE Technical Paper 2010-01-2129 (2010) (attached as Exhibit 8); M. Matti Maricq, et al., *The Impact of Ethanol Fuel Blends on PM Emissions from a Light-Duty GDI Vehicle*, 46 Aerosol Sci. & Tech. 576 (2012) (attached as Exhibit 9).

issue a waiver after those years have ended or after the associated compliance demonstration deadlines have passed. Retroactive severe-harm waivers are unlawful and counterproductive.[153]

First, the statute does not authorize retroactive severe-harm waivers at all. The statute permits EPA to waive upon a determination that "implementation of the [RFS] requirement *would* severely harm the economy or environment."[154] "Congress' use of a verb tense is significant in construing statutes,"[155] and here its use of the future conditional tense "would severely harm" means that EPA must assess the economic harm from implementation of the RFS requirements in a present or future that lacks a waiver to reduce those requirements. Although "Congress could have phrased its requirement in language that looked to the past"—e.g., "severely harm*ed*"—"it did not choose this readily available option," and its choice must be respected.[156] The statute thus contemplates that EPA's waiver determinations will occur *before* the RFS requirement has been implemented—not after the year has ended or after compliance has been demonstrated. Consequently, EPA has no authority now to grant a severe-harm waiver for 2019 or 2020.

Second, a retroactive waiver would also be bad policy—not only ineffective to achieve its purpose but actually counterproductive. With respect to the economic consequences of RFS compliance, as discussed above, nearly all obligated parties acquire RINs ratably as they produce transportation fuel during the year, and consequently they have largely already acquired the RINs they will need for compliance with the 2019 and 2020 standards. A retroactive waiver cannot change that and thus cannot relieve obligated parties of whatever costs they already incurred to acquire those RINs. Not only that, but obligated parties have already retired their RINs for 2019 and may well do the same for 2020 before EPA resolves the waiver petitions. If the requested waivers are implemented by unretiring RINs, then they will have little, if any, of the desired remedial effect because most of the unretired RINs—all the RINs used for 2019 compliance and all the 2019 carryover RINs used for 2020 compliance—would have expired and be unavailable for future compliance. And to the extent that the requested waivers increase the supply of carryover RINs—whether by relieving obligated parties of the need to retire them in the first place or by resulting in the unretirement of unexpired RINs—the waivers' principal effect would be to "greatly increase the supply of RINs for 2021 obligations," reducing the value of the RINs well below what the obligated parties have already spent to acquire them and reducing the value of their asset.[157] In short, retroactive waivers could redress the supposed economic harms that

---

[153] By the time EPA issues a final decision in this matter, the 2019 compliance period will have ended for most or all obligated parties, and the 2020 compliance deadline may also have passed. The 2019 compliance deadline was March 31, 2020, but EPA has proposed an extension for small refineries until November 30, 2021. 86 Fed. Reg. 3928, 3929 (Jan. 15, 2021). The 2020 compliance deadline is currently March 31, 2021, but EPA has proposed extending it for all obligated parties until January 31, 2022. *Id.*

[154] 42 U.S.C. § 7545(*o*)(7)(A)(i) (emphasis added).

[155] *United States v. Wilson*, 503 U.S. 329, 333 (1992).

[156] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987).

[157] Stillwater Report at 10-11.

would justify the waivers only partially at best, and quite possible not at all.[158] Similarly, with respect to the environmental consequences of RFS compliance, all agriculture and production decisions for 2020 were made long ago and cannot be changed—the corn has already been planted, grown, harvested, and converted to ethanol.[159]

In fact, retroactive waivers would affirmatively harm the goals that Congress intended to achieve through the RFS program by creating perverse incentives *against* RFS compliance. The availability of retroactive waivers would discourage obligated parties from using renewable fuel or otherwise acquiring RINs as they go, on the expectation that if needed they could obtain a severe-harm waiver after the year is past, based on their contention that having to now acquire all the necessary RINs would be very costly. Obligated parties that responsibly used renewable fuel or otherwise acquired RINs ratably would be disadvantaged for that behavior.[160] Even a one-off retroactive waiver would penalize compliant parties because they would lose the value of the investments they made in RINs, whereas parties who flouted their obligations and made equivalent investments elsewhere would suffer no equivalent loss.[161] Retroactive waivers would also upend the expectations of the other market participants that voluntarily produce, blend, and sell renewable fuels on the assumption that the regulations will be enforced.[162] Producers in particular must make long-term investment decisions informed, in part, by the anticipated value of the RINs generated by their production.[163] But a retroactive waiver would call those assumptions into question, undermining the confidence of firms who might otherwise invest in future renewable fuel capacity.[164] Petitioners' request for retroactive waivers would thus undermine the market's increased production and use of renewable fuels, in flat contradiction with Congress's intent that the RFS program "force the market to create ways to produce and use greater and greater volumes of renewable fuel each year."[165] That would deprive the country of the substantial political, economic, and environmental benefits that the RFS program promotes.

VI. EVEN IF PERMITTED, A SEVERE-HARM WAIVER SHOULD NOT BE ISSUED BECAUSE OF THE SIGNIFICANT RFS-RELATED BENEFITS THAT WOULD BE LOST

Even if the threshold requirement—that implementation of the 2019 and 2020 standards would severely harm the economy or the environment of a state, a region, or the country—were met, EPA would still have discretion to decide whether to issue a general waiver. As noted above, in exercising that discretion EPA must account for the political, economic, and environmental benefits that a waiver would impede or diminish.

---

[158] *Id*.

[159] Stillwater Report at 9.

[160] *Id.* at 10.

[161] *Id.* at 10-11.

[162] *Id.* at 10.

[163] *Id*.

[164] *Id*.

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

As Growth Energy has detailed above and in prior comments, the increased use of renewable fuel promoted by the RFS program provides myriad substantial political and economic benefits, including: balancing the country's energy trade (ethanol production both "expand[s] the overall domestic supply of fuel" and helps the U.S. become a net exporter of ethanol[166]), which strengthens U.S. energy security and independence; provides a cushion against oil price spikes; and spurs significant growth in domestic agriculture and rural economies, especially in the Midwest.[167] It also provides important environmental benefits, including: substantially reducing emissions of GHG and other pollutants and supporting investment in next-generation environmental technologies.[168] And it achieves these goals with minimal or no adverse effect on feed prices, retail gas prices, or retail food prices (because corn ethanol uses only the starch of the corn and thus has co-products that *add* to the feed supply, and retail food prices are driven more by crude oil prices than the price of individual crops like corn).[169]

Although it is too late for a waiver of the 2019 and 2020 standards to affect any of these activities in those years, a retroactive waiver would (as explained above) create a moral hazard by incentivizing obligated parties to use less renewable fuel during future years in the expectation—well-justified should EPA grant these petitions and issue the requested retroactive waivers—that they will be able to obtain a waiver after the fact. The result would be the undermining of the RFS program's intended incentive to use increasing amounts of renewable annually and the attendant loss of these many benefits that stem from the RFS program's commitment to increased use of renewable fuel. The serious risk of losing these benefits outweighs whatever marginal economic and environmental harms might flow from enforced compliance with the 2019 and 2020 RFS standards.

---

[166] Marc Chupka et al., *Blending In: The Role of Renewable Fuel in Achieving Energy Policy Goals – 2018 Updated Edition*, at 18 (Aug. 17, 2018) (attached as Exhibit 10); *see also* Stillwater *Land Use* at 5, 7-8.

[167] *See Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, at 3-7 (Aug. 17, 2018), EPA-HQ-OAR-2018-0167-1292 (attached as Exhibit 11); *Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019* ("2018 Growth Energy Comments"), at 38-42 (Aug. 31, 2017), EPA-HQ-OAR-2017-0091-3681 (attached as Exhibit 12); *Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017* ("2014-2016 Growth Energy Comment"), at 69-71, 73-75, 79-80 (July 27, 2015), EPA-HQ-OAR-2015-0111-2604 (attached as Exhibit 13); Edgeworth Economics, *Impact of the RFS Mandate on Motor Fuel Volumes and Prices, 2014-2016* (July 27, 2015) (attached as Exhibit 14).

[168] 2018 Growth Energy Comments at 27-33; 2014-2016 Growth Energy Comment at 71-73.

[169] 2014-2016 Growth Energy Comments at 75-78.

VII. CONCLUSION

For all the reasons stated above, EPA should decline to waive the 2019 and 2020 RFS standards.