



# Growth Energy Supplemental Comments on EPA's Proposed RFS Small Refinery Exemption Decision

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## INTRODUCTION

Growth Energy is the world’s largest association of biofuel producers, representing 89 biorefineries that produce nearly 9 billion gallons annually of low-carbon renewable fuel and 99 businesses associated with the biofuel production process. Growth Energy respectfully submits these supplemental comments to rebut specific points that other commenters have made concerning the Environmental Protection Agency’s *Proposed RFS Small Refinery Exemption Decision* (“Proposed Decision”) (Dec. 2021).<sup>1</sup>

## DISCUSSION

### I. EPA’S FINDING OF RIN-VALUE PASSTHROUGH IS CONSISTENT WITH THE ABILITY OF HIGHER RIN PRICES TO INCENTIVIZE INCREASED USE OF RENEWABLE FUEL

“Congress intended the Renewable Fuel Program to be a ‘market forcing policy’ that would create ‘demand pressure’ to increase consumption of renewable fuel.”<sup>2</sup> And as the D.C. Circuit has recognized, the RFS program achieves this market-forcing policy through “higher RIN prices,” which “incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote.”<sup>3</sup> Relying on a series of rhetorical questions rather than actual analysis, American Fuel & Petrochemical Manufacturers (“AFPM”) contends that this economic structure at the heart of the RFS program is “inconsistent” with EPA’s finding that RIN value is passed through in the supply chain.<sup>4</sup> AFPM wonders how blenders could be incentivized to invest in the distribution of higher-renewable-fuel blends if they do not keep the “windfall” of the RIN value, and how refiners could be incentivized to make such investments if they do not bear the “costs” of acquiring RINs.<sup>5</sup>

There is no inconsistency. AFPM’s professed befuddlement reflects an erroneous understanding of how the RFS program is designed to work. As EPA explains, there are “two distinct” but related “market phenomena” involving RIN value: (1) blenders reduce the price of the renewable fuel they sell by the RIN value, a.k.a. “RIN discount,” and (2) refineries pass their RFS compliance costs through as a premium on the petroleum fuel they produce, a.k.a. “RIN cost passthrough.”<sup>6</sup> These two phenomena work together to promote the use of renewable fuel, with the RIN discount lowering the price of renewable fuel and the RIN cost passthrough raising the price of fossil fuel blendstock.<sup>7</sup> As the concentration of renewable fuel in a given gallon of

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<sup>1</sup> EPA-420-D-21-001.

<sup>2</sup> *American for Clean Energy v. EPA* (“ACE”), 864 F.3d 691, 705 (D.C. Cir. 2017).

<sup>3</sup> *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919 (D.C. Cir. 2014).

<sup>4</sup> Comment of American Fuel & Petrochemical Manufacturers (“AFPM Comment”) 13-14 (Feb. 7, 2022), EPA-HQ-OAR-2021-0566-0040.

<sup>5</sup> *Id.*

<sup>6</sup> Proposed Decision at 3.

<sup>7</sup> *Id.*

transportation fuel increases—with more of the discounted renewable fuel and less of the premium petroleum fuel—the twin phenomena of RIN discount and RIN cost passthrough enable retailers to price the gallon further and further below the price of the baseline transportation fuel. Indeed, empirical data confirms that E15 and E85, both of which have more renewable fuel and less petroleum fuel than the baseline E10, are generally priced below E10 on a volumetric basis.<sup>8</sup>

Higher RIN prices enhance the effect of these two phenomena and thus amplify retailers' ability to price higher-concentration fuels below the baseline fuel. Rising RIN prices increase the premium for fossil fuel blendstock and increase the discount for renewable fuel.<sup>9</sup> Eventually, with sufficiently high RIN prices, higher-concentration transportation fuels, such as E15 and E85, can be priced below E10 not only on a volumetric basis but also, critically, on an energy-equivalent basis. As EPA has explained, because “[f]uel buyers are extremely sensitive to prices,” such relative pricing incentivizes consumers to choose transportation fuels with higher concentrations of renewable fuel, increasing the demand for renewable fuel.<sup>10</sup> Finally, the revenue that could be earned by widely selling such higher-concentration transportation fuels incentivizes retailers and other market participants to invest in the ability to produce and distribute more such fuels.<sup>11</sup> In short, RIN passthrough is central to the RFS's ability to promote increased use of renewable fuel in the nation's transportation fuel.<sup>12</sup>

For additional discussion of how sufficiently high RIN prices could catalyze increased use of renewable fuel through higher-concentration transportation fuels, see Growth Energy Reset Comment at 69-70.

## **II. EPA'S INTERPRETATION OF THE STATUTORY STANDARD FOR SRES IS SOUND**

Some commentors challenge certain features of EPA's interpretation of the statutory standard that a small refinery must meet to obtain an extension of the exemption. Those challenges are meritless.

First, a coalition of small refinery owners (“Small Refinery Coalition”) asserts that EPA's requirement that “any disproportionality ... be of sufficient magnitude to warrant the

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<sup>8</sup> See Stillwater Associates LLC, *Comments to EPA on 2020-2022 RFS Rule* (“2022 Stillwater Report”) at 13-14 (Feb. 4, 2022) (Tables 5 & 7), attached as Exhibit 5 to Growth Energy, *Comments on EPA's Renewable Fuel Standard (RFS) Program: RFS Annual Rules* (“Growth Energy Reset Comment”) (Feb. 4, 2022), EPA-HQ-OAR-2021-0324-0521.

<sup>9</sup> See, e.g., Proposed Decision at 10.

<sup>10</sup> *Id.* at 60; see 2022 Stillwater Report at 13-15.

<sup>11</sup> Proposed Decision at 60-61.

<sup>12</sup> See, e.g., *id.* at 11, 34-35.

exemption” is “non-statutory.”<sup>13</sup> That is incorrect; EPA’s reference to a “sufficient magnitude” simply reflects the statutory requirement that compliance would cause the refinery “hardship.”<sup>14</sup>

Second, AFPM and the Small Refinery Coalition claim that EPA’s proposed analysis improperly focuses on a “single” factor, namely, the “RIN compliance costs,” asking only whether those costs are “disproportionate,” whereas the statute directs EPA to consider the Department of Energy’s report and ““other economic factors.””<sup>15</sup> But the statute “identifies no particular economic factors or metrics to be considered.”<sup>16</sup> Further, EPA “must not blindly adopt the conclusions” reached by DOE.<sup>17</sup> The Proposed Decision complies with these statutory obligations. EPA has considered, but disagrees with, DOE’s analysis and explains why: that analysis did not account for subsequent empirical evidence regarding RIN-value passthrough.<sup>18</sup> And EPA explains that whatever other economic factors one might wish to consider—including those that DOE considered—those factors do not support a finding of disproportionate economic hardship (“DEH”) given the proportionality of RFS obligations and the fact of RIN-value passthrough.<sup>19</sup>

Moreover, AFPM and the Small Refinery Coalition err when they assert that “Congress[] reject[ed] ... the 2009 DOE study,” that “Congress directed DOE to reevaluate whether small refineries experience DEH” in 2011, and that “Congress” required EPA to consider that 2011 DOE study.<sup>20</sup> Rather, Congress directed DOE to study DEH by the end of 2008,<sup>21</sup> and DOE did so when it issued its 2009 report. Only one committee in the Senate rejected the 2009 DOE report and called for a reevaluation, and did so in a report, not the text of a bill that was enacted.<sup>22</sup> That committee is not “the Senate,” let alone “Congress,” and its non-statutory

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<sup>13</sup> Comment of coalition of small refinery owners (“Small Refinery Coalition Comment”) at 7 (Feb. 7, 2022), EPA-HQ-OAR-2021-0566-0077.

<sup>14</sup> See 42 U.S.C. §7545(o)(9)(B)(i).

<sup>15</sup> Small Refinery Coalition Comment at 7; see AFPM Comment at 3-5.

<sup>16</sup> *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015).

<sup>17</sup> *Ergon-W. Virginia, Inc. v. EPA*, 896 F.3d 600, 612 (4th Cir. 2018); cf. *Lion Oil Co. v. EPA*, 792 F.3d 978, 980 (8th Cir. 2015) (upholding SRE decision where EPA considered DOE analysis but “then independently analyzed” the claim of DEH); *Ergon-W. Virginia, Inc. v. EPA*, 980 F.3d 403, 415 (4th Cir. 2020) (upholding SRE decision where EPA addressed DOE recommendation and “also independently addressed and defended its decision based on a variety of other economic factors after explaining why it rejected some of Ergon’s arguments in favor of its petition”).

<sup>18</sup> Proposed Decision at 21-22.

<sup>19</sup> *Id.* at 37-42, 52-62.

<sup>20</sup> AFPM Comment at 3, 6; Small Refinery Coalition Comment at 6-7, 11.

<sup>21</sup> 42 U.S.C. §7545(o)(9)(A)(ii)(I).

<sup>22</sup> S. Rep. No. 111-45, at 109 (2009).

statements have no legal force.<sup>23</sup> Indeed, the House’s conference report recognized the nonbinding nature of the Senate committee’s statement, remarking only that “[t]he conferees ... *expect* the Department to undertake the [Senate committee’s] *requested* economic review.”<sup>24</sup>

Finally, the Small Refinery Coalition asserts that EPA’s interpretation nullifies the SRE program because it means that when the refinery is having a “good year,” it will not experience hardship, and when it is having a “bad year,” the hardship will be attributed to factors other than the RFS—and either way, EPA will deny the SRE.<sup>25</sup> The Coalition’s argument rests on a mistaken understanding of both EPA’s interpretation and the purpose of the SRE program. The SRE program does *not* “merely prohibit[] EPA from kicking small refineries while they are down,”<sup>26</sup> and EPA’s proposed interpretation does not purport to authorize EPA to do that. Rather, the question properly framed, as EPA recognizes, is whether the refinery’s RFS compliance would directly cause it DEH, *irrespective* of whether the refinery is otherwise suffering economic hardship for reasons that are independent of RFS compliance.<sup>27</sup>

For additional discussion of how EPA should interpret the statutory standard for evaluating SRE petitions, see Growth Energy’s Comment on the Proposed Decision (“Growth Energy SRE Comment”) at 2-7 (Feb. 7, 2022).<sup>28</sup>

### **III. THE PROPOSED SRE DENIAL WOULD NOT ENTAIL IMPERMISSIBLE RETROACTIVE RULEMAKING**

The Small Refinery Coalition and HollyFrontier Corp. argue that “EPA cannot retroactively apply the Proposed Denial to any of the pending hardship petitions or the 2018 SREs.”<sup>29</sup> Its argument is incorrect, for several reasons. Here, Growth Energy addresses only a few basic errors in the Coalition’s argument.

First, the commenters invoke judicial precedent generally forbidding retroactive *rulemaking*,<sup>30</sup> but the Proposed Decision is not a rulemaking; it is an adjudication. “[A]gencies are authorized to make policy choices through adjudication, and giving a decision retroactive effect is not necessarily fatal to its validity.”<sup>31</sup> Indeed, in adjudication, “retroactivity is not only

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<sup>23</sup> See, e.g., *INS v. Chadha*, 462 U.S. 919, 928 (1983) (holding that legislative veto is unconstitutional).

<sup>24</sup> H.R. Rep. No. 111-278, at 126 (2009) (emphasis added).

<sup>25</sup> Small Refinery Coalition Comment at 8.

<sup>26</sup> *Id.*

<sup>27</sup> Proposed Decision at 7, 16, 23-26, 37-42, 49, 54, 61.

<sup>28</sup> EPA-HQ-OAR-2021-0566-0073.

<sup>29</sup> Small Refinery Coalition Comment at 38; see also Comment of HollyFrontier Corp. at 2-4 (Feb. 4, 2022), EPA-HQ-OAR-2021-0566-0039.

<sup>30</sup> Small Refinery Coalition Comment at 38.

<sup>31</sup> *NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008).

permissible but standard.”<sup>32</sup> EPA may use adjudication to announce and apply a new standard, as long as it “undertake[s] a balancing of the effects of retroactive application against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.”<sup>33</sup>

Second, whether EPA’s proposal to adopt a new standard for SREs is an instance of rulemaking or adjudication, it is not impermissibly retroactive. A standard’s retroactivity is problematic only when it “imposes new sanctions on past conduct”; where the new standard would “merely upset[] expectations,” ... [it is] invalid only if arbitrary and capricious.”<sup>34</sup> But EPA’s proposal to apply a revised SRE standard does neither. The denial of an SRE petition does not *punish* the refinery or impose a *new* obligation about which the refinery lacked notice. Nor does such a denial upset legitimate settled expectations. Just as obligated parties “ha[ve] no legally settled expectation that EPA would exercise its waiver authority to reduce [an RFS] obligation,”<sup>35</sup> small-refinery obligated parties have no entitlement to an exemption; they are legally obligated to comply with the RVOs that EPA sets, and SREs are merely an opportunity for them to obtain relief from that obligation if EPA determines that they have made the requisite showing.

Further, small refineries had no basis to rely on EPA’s prior interpretation of the statutory standard for SREs because that interpretation has been under serious legal cloud at least since *Renewable Fuels Association v. EPA*, No. 18-9533 (10th Cir.), was filed on May 29, 2018, before the pending SRE petitions were submitted. As the D.C. Circuit has repeatedly held, it is “unreasonable” for regulated parties to “rely” on an agency’s statutory interpretation once they have been “put on notice” that the interpretation is “in dispute,” whether through administrative or judicial challenges.<sup>36</sup> On top of that, as Growth Energy’s SRE Comment and EPA’s Proposed Decision explain, EPA’s proposed standard reflects the “most reasonable” and “natural” interpretation of the statute, and therefore, as the D.C. Circuit has held, the contention that small refineries did not have “fair notice” of the new standard necessarily fails.<sup>37</sup>

Plus, even if small refineries could otherwise claim a protected reliance interest in the SREs or the applicable standard, there would be no bar to EPA’s proposed denial now. The D.C. Circuit has made clear that the “normal” rules governing “retroactive” rulemaking do not apply

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<sup>32</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring).

<sup>33</sup> *Leggett & Platt, Inc. v. NLRB*, 988 F.3d 487, 494 (D.C. Cir. 2021) (quotation marks omitted).

<sup>34</sup> *National Petrochemical & Refiners Ass’n v. EPA* (“*NPRA*”), 630 F.3d 145, 159 (D.C. Cir. 2010).

<sup>35</sup> *Monroe Energy*, 750 F.3d at 920.

<sup>36</sup> *Verizon Tel. Companies v. FCC*, 269 F.3d 1098, 1111 (D.C. Cir. 2001) (citing *Pub. Serv. Co. of Colorado v. FERC*, 91 F.3d 1478, 1488-1491 (D.C. Cir. 1996)); *see also, e.g., NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008) (declaring it “obvious” that petitioner had “an unwinnable case under the retroactivity line” of cases because “the correctness of [the petitioner’s] interpretation was anything but ‘settled’”).

<sup>37</sup> *NetworkIP*, 548 F.3d at 123.

when an agency is “correct[ing] its own legal mistakes,” especially when the agency is “rectify[ing] legal mistakes identified by a federal court.”<sup>38</sup> That is the situation now: the Tenth Circuit identified significant legal errors in EPA’s prior SRE decisions, and the Proposed Decision would revise the standard to correct those errors.<sup>39</sup> It does not matter whether the Tenth Circuit’s judgment was vacated; the Supreme Court (like the Tenth Circuit on remand) “expressed no opinion on the merit of those holdings,” and “therefore” those portions of the Tenth Circuit’s decision “continue to have precedential weight.”<sup>40</sup> But even without *precedential* force, the Tenth Circuit’s conclusions still provide a sound basis on which EPA may revise its standard for SREs.

In any event, the Small Refinery Coalition identifies no different actions that it would have taken to meet EPA’s proposed SRE standard had it known that would be the standard. Thus, even if small refineries *could* have a reliance interest in EPA’s prior interpretation of the SRE statutory provisions, there is no basis to conclude that they in fact relied on that interpretation to their detriment. The Small Refinery Coalition complains about the timing of its purchase of RINs, asserting that if EPA had resolved the SRE petitions sooner, the refineries would have “had the opportunity to purchase RINs from the market at those (lower) prices.”<sup>41</sup> That problem (if it was a problem at all) stems from *when* EPA decided the petitions, not EPA’s proposal to apply a refined standard to decide them. Moreover, as EPA recognized in the Proposed Decision, all obligated parties should acquire RINs ratably to ensure compliance unless and until they receive an exemption; if they do not, that is their own business choice—and whether the decision to delay their acquisition of RINs proves beneficial or harmful is entirely a function of whether RIN prices later rise or fall.<sup>42</sup> EPA’s proposal thus rationally accounts for the supposed harmful financial effects of its application of the revised SRE standard. As the courts have frequently recognized, “[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes,” but “[t]his has never been thought to constitute retroactive lawmaking,” and “[s]uch expectations, however legitimate, cannot furnish a sufficient basis for identifying impermissibly retroactive rules.”<sup>43</sup>

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<sup>38</sup> *Verizon*, 269 F.3d at 1111.

<sup>39</sup> *See Renewable Fuels Association v. EPA*, 948 F.3d 1206, 1253-1254 (10th Cir. 2020); Proposed Decision at 1.

<sup>40</sup> *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991).

<sup>41</sup> Small Refinery Coalition Comment at 40.

<sup>42</sup> Proposed Decision at 49.

<sup>43</sup> *NPRA*, 630 F.3d at 161 (quotation marks omitted).