



Growth Energy Comments on EPA's Renewable Fuel Standard (RFS) Program: Standards for 2023–2025 and Other Changes

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TABLE OF CONTENTS

INTRODUCTION4

DISCUSSION8

I. THE SET FRAMEWORK8

 A. EPA Must Implement the Set to Drive Significant Increases in Renewable Fuel Use8

 B. Setting Volume Requirements and Percentages for the Next Three Years Is Appropriate11

II. EPA SHOULD SET HIGHER TOTAL VOLUME REQUIREMENTS TO INCENTIVIZE THE MARKET TO USE MORE OF THE AVAILABLE CONVENTIONAL ETHANOL13

III. THE RFS STANDARDS ARE UNLIKELY TO HAVE ADVERSE ENVIRONMENTAL EFFECTS18

 A. The Role of the Environmental Impacts Analysis in the Set Rulemaking18

 B. Mitigating Climate Change Must Be a Central Factor in EPA’s Analysis When Setting RFS Volumes19

 1. GHG emissions reductions are a core purpose of the RFS program20

 2. A robust biofuels industry is crucial to achieving U.S. decarbonization goals for the transportation sector21

 3. EPA continues to undervalue ethanol’s lifecycle GHG reductions22

 4. EPA must rely on the best available science to update the LCA for ethanol24

 C. There Is No Credible Evidence That The Proposed RFS Volumes Will Cause Adverse Impacts To Wetlands, Ecosystems, Wildlife Habitat, Water Quality/Supply, Or Soils29

 1. Conversion of wetlands, ecosystems and wildlife habitat31

 2. Water and soil quality34

 3. Water supply36

 D. Increasing the Proposed Volumes Will Drive Improvements in Air Quality36

IV. HIGHER RFS STANDARDS HAVE POSITIVE ECONOMIC EFFECTS37

 A. Increasing the Use of Ethanol Promotes Energy Security and Independence37

 B. The Proposed RFS Standards Will Not Raise Food Prices39

 C. Increasing the Use of Ethanol Promotes Rural Economic Health41

V. RFS IMPLEMENTATION POLICIES41

 A. EPA Must Set Volume Requirements High Enough to Draw Down the RIN Bank41

B.	EPA’s Projection of Zero SREs Is Sound.....	44
C.	EPA’s Proposed 2023 Supplemental Volume Is Necessary and Appropriate on Remand From <i>ACE</i>	45
D.	Cellulosic Biofuel	50
1.	Guidelines for setting cellulosic volumes	50
2.	eRINs should be subject to the same procedures and safeguards as other types of RINs	53
3.	Pathways	53
VI.	INCREASING RENEWABLE FUEL VOLUMES BENEFITS COMMUNITIES WITH ENVIRONMENTAL JUSTICE CONCERNS.....	54
A.	Climate Change.....	54
B.	Economic Impacts.....	55
C.	Air Quality	56
D.	Water/Soil Impacts.....	57
VII.	ENDANGERED SPECIES ACT	57
A.	EPA Should Promptly Finalize the Ongoing Endangered Species Act Section 7 Consultation, Concluding that the 2020–2022 Rule and the 2023–2025 Proposed Rule have “No Effect” or are “Not Likely to Adversely Affect” Threatened and Endangered Species or Critical Habitat	57
1.	Endangered Species Act statutory and regulatory background	57
2.	Status of ESA Section 7 Consultation for the 2020–2022 Rule	59
3.	Status of ESA Section 7 Consultation for the 2023–2025 Rule	60
4.	EPA should complete the ongoing Section 7 Consultation for both the 2020–2022 and 2023–2025 Rules before it finalizes the latter Rule in June 2023.....	60
5.	EPA should pursue a programmatic consultation for the RFS program to streamline the analysis for the Rules that have been and will be proposed.....	62
6.	EPA should avoid using Section 7(d) as a means of further delaying completion of the ongoing Section 7 consultation.....	63
B.	EPA Should Conclude Consultation With a “No Effect” or “Not Likely to Adversely Affect” Determination	64
1.	Any causal connection between the RFS standards and any species or habitat impacts is too attenuated to support a finding other than “no effect” or “not likely to adversely affect”	64
2.	The volumes set in the 2023–2025 Rule are unlikely to lead to land conversion, which is the primary underpinning for the concern that setting volumes impacts listed species.....	65

INTRODUCTION

Growth Energy is the world’s largest association of biofuel producers, representing 90 biorefineries that produce nearly 9 billion gallons annually of low-carbon renewable fuel and 107 businesses associated with the biofuel production process. Growth Energy respectfully submits these comments on the Environmental Protection Agency’s Proposed *Standards for 2023–2025 and Other Changes* (“Set”).¹

Congress established the Renewable Fuel Standard (“RFS”) program to spur the market to substantially increase the use of renewable fuel in the nation’s transportation fuel supply. Congress did so for the many important benefits that increased renewable fuel use would bring: reduction in harmful greenhouse gas (“GHG”) emissions, enhanced energy security and independence, and economic development, especially rural communities. The proposed 2023-2025 standards undoubtedly provide such benefits, but only to a modest extent; the standards are still far below the levels of increased usage that could reasonably be achieved without causing significant economic or environmental harms. Consequently, EPA’s proposal leaves significant climate, energy security, and economic benefits on the table at a time when such impacts must be prioritized.

Growth Energy, therefore, urges EPA to carefully reconsider several parts of its proposal to ensure that they accord with the goals Congress set for the RFS program and EPA’s obligations to rely on the best available science. EPA should use the full force of the RFS program to drive an innovative, low-carbon, domestically sourced energy transformation in the transportation sector.

More specifically, in this comment, Growth Energy argues as follows:

Part I.A: *EPA must implement the Set to drive significant increases in renewable fuel use.* Although EPA has some discretion in establishing RFS volume requirements for 2023 and beyond, that discretion is not unbounded. Above all, EPA must serve Congress’s primary purposes in enacting the RFS by setting volume requirements (particularly the total requirement) at the maximum achievable level that is unlikely to cause significant environmental or economic harm, such as the sort that would trigger a general waiver; EPA may not lower volume requirements for fear of causing some minor or improbable economic or environmental harms. To that end, EPA must operate with the understanding that “demand for renewable fuel will be a function of the renewable fuel standards set by EPA.”

Part I.B: *Setting volume requirements and percentages for the next three years is appropriate.* It is both permissible and reasonable for EPA to simultaneously set 2023-2025 volumes and percentage standards. The only relevant statutory constraint on the timing is that EPA set the standards no later than 14 months before the year in which they apply. Additionally, the statute allows EPA to set percentage standards for these years, and to do so concurrently with

¹ Proposed *Renewable Fuel Standard (RFS) Program: Standards for 2023–2025 and Other Changes* (“NPRM”), 87 Fed. Reg. 80,582 (Dec. 30, 2022).

the volume setting. Finally, EPA’s proposal to set volumes and percentage standards for three years at once (but not four years) strikes an appropriate balance between strengthening market certainty for producers, obligated parties, and other market participants while avoiding undue risk of inaccurate projections of fuel use.

Part II: *EPA should set higher total volume requirements to incentivize the market to use more of the available conventional ethanol.* The level of growth in renewable fuel use reflected in EPA’s proposed 2023-2025 volumes is far below Congress’s express goals. And the market already could easily achieve markedly higher volumes: it could annually produce, distribute, and consume more than 16 billion gallons of ethanol (more than 1 billion gallons beyond what EPA proposes) without increasing compatible distribution or consumption infrastructure, without increasing corn acreage, and without disproportionately reducing the supply of corn for non-ethanol uses—in other words, without causing environmental or economic harm. EPA’s volumetric analysis for ethanol is fundamentally flawed. EPA incorrectly treats the “blendwall” as an actual hindrance on achievable volumes, bases its forecast on historical performance that has been suppressed due to weak prior RFS requirements, and assumes that any ethanol growth will come solely from the expansion of infrastructure to deliver higher blends. EPA’s analysis disregards the fundamental economic principle and congressional intent that future demand for renewable fuel is a function of the standards EPA sets. That is, the RFS requirements are, in effect, self-fulfilling, provided there is sufficient supply of renewable fuel. Accordingly, to better serve Congress’s goals, EPA should increase the total volumes to reflect the full amount of ethanol (and all renewable fuel) that the market could use in response to those standards. In the end, EPA’s approach seems to reflect an unstated, unexplained price cap, which is unlawful.

Part III: *In establishing maximum reasonably achievable standards that effectuate the RFS program’s core goal to reduce GHG emissions in transportation fuel, EPA must update its lifecycle assessment of corn starch ethanol to reflect best currently available science. The proposed volumes are unlikely to result in adverse environmental impacts such as land use conversion or impacts to wetlands, ecosystems, water quality/availability, or soil quality. Increased consumption of higher level ethanol blends would result in important air quality benefits that EPA should not overlook.* Reducing GHG emissions from the transportation sector is a core congressional objective of the RFS and deserves special emphasis. This requires EPA, in this rulemaking, to update its GHG emissions lifecycle analysis (“LCA”) for corn starch ethanol using the best currently available science, which is significantly more favorable than EPA’s existing 2010 lifecycle analysis. An expert report by Environmental Health and Engineering (“EH&E”), a multidisciplinary team of environmental health scientists and engineers, highlights that estimates of indirect land use change—an impactful component of total LCA values—have converged around a relatively narrow range that is considerably lower than EPA’s 2010 estimate, even accounting for different selections of model type and model inputs. Among other reasons, updating EPA’s LCA estimate is necessary to ensure that (1) EPA accurately captures the GHG emissions reduction benefits of the RFS program, and (2) implementation of the RFS program in pathway approvals for new fuels, such as alcohol-to-jet sustainable aviation fuel (“SAF”), reflect accurate GHG accounting. The EH&E report also provides EPA with a thoughtful framework for critically evaluating the scientific literature on LCA, which EPA identified in the proposal, according to fundamental criteria of scientific credibility. When this framework identifying the best available science is applied, the range of

LCA values for corn ethanol decreases considerably from the range presented in the proposal, resulting in a central credible estimate of *51 gCO₂e/MJ*.

In addition, as detailed in Ramboll's technical report, there is no credible evidence that the proposed standards will adversely affect wetlands, ecosystems, species, habitat, water quality/availability, or soils; EPA should therefore correct its overstatements relating to these impacts. The Ramboll report also presents economic research and regression analyses that find no connection between implied conventional RFS volumes, corn prices, and acres planted in corn, and, consequentially, no connection to environmental impacts associated with land use change. Finally, EPA must recognize that the significant air quality benefits of consumption of higher-level ethanol blends support finalization of volumes well-above those proposed.

Part IV: *Higher implied ethanol volumes would have positive economic effects.* Higher RFS standards would further increase energy security and independence and promote rural economic health, without increasing food prices. Specifically, both EPA's evidence and other studies show that raising RFS standards to maximize the achievable displacement of petroleum would further promote U.S. energy security and independence. Rural economies would also grow significantly if EPA used the RFS to accelerate the transition to year-round, nationwide E15. And these benefits would not come at the cost of increased corn prices. The country's increasing efficiencies in harvesting corn and converting it to ethanol means that achieving substantially higher volumes of ethanol use would not disproportionately divert corn away from food uses—a conclusion confirmed by empirical studies showing that corn prices are independent of RFS requirements.

Part V.A: *EPA must set volume requirements high enough to draw down the RIN bank.* EPA's proposal to intentionally set the RFS requirements low enough not to draw down the RIN bank through 2025 undermines Congress's intent that the RFS program force the market to increase its use of renewable fuel by artificially suppressing the amount of renewable fuel use needed to meet future obligations. Further, EPA's rationale for maintaining the bank is incoherent: liquidity is provided by RINs' tradability, not their ability to be carried over, and EPA's refusal to require obligated parties to use the bank to meet their 2020 obligations after the Covid-19 pandemic belies EPA's assertion that the bank is needed to provide compliance flexibility for unforeseen market disruptions. EPA's position is especially pernicious because the current bank stems largely from a wave of retroactive small-refinery exemptions that EPA now admits were illegal. EPA's proposal to set three years of RFS standards provides EPA with an opportunity to gradually draw down the bank and thereby enable the RFS program to spur greater use of renewable fuel.

Part V.B: *EPA's projection of zero SREs is sound.* In line with the Tenth Circuit, EPA has correctly interpreted the statute to permit an SRE only if the small refinery shows that compliance with its RFS obligations will cause it disproportionate economic hardship. Further, EPA has properly determined, after extensive review of empirical evidence, that small refineries do not experience an economic hardship from compliance because they pass their RIN costs down the supply chain. Insofar as EPA's data suggests that, on average, some small refineries buy RINs above average market prices and sell below average market prices, those differences are far too small to constitute the requisite "hardship."

Part V.C: *EPA’s proposed 2023 supplemental volume is necessary and appropriate on remand from ACE.* Both EPA’s duty to obey the D.C. Circuit’s mandate in *Americans for Clean Energy* (“ACE”) and EPA’s statutory duty to ensure RFS volumes are met require it to impose supplemental obligations equal to the 500 million gallons that ACE held were unlawfully waived for 2016. Because EPA already imposed half of that volume in 2022, it remains obligated to set an additional 250-million-gallon supplemental obligation. A supplemental 2023 obligation would not be retroactive because it applies to future conduct, and retroactive rulemaking concerns do not apply in any event when an agency is rectifying court-identified legal errors. Moreover, a 2023 supplemental obligation would not even upset settled expectations; there was no legitimate expectation in the unlawful waiver to begin with, it was clear since ACE that a remedy was required, and EPA announced its intent to promulgate the proposed remedy in early 2021. Finally, even if EPA needed to account for the supposed “burden” of complying with the supplemental obligation, the ample availability of carryover RINs would adequately account for that.

Part V.D: *EPA should set fixed cellulosic volumes using eRIN projections, and subject eRINs to the same compliance safeguards as other RINs.* Growth Energy appreciates the challenge of setting cellulosic standards into the future when certain subcategories—eRINs and other potential pathways—are nascent. However, consistent with EPA’s duty not to assume the need to invoke a cellulosic waiver, it is better for EPA’s projections to err high rather than low because the cellulosic waiver will remain available to correct over-projection but the mechanism to correct under-projection is unclear and could introduce additional market uncertainty. Further, EPA has no authority to adopt a standard that automatically adjusts to match actual cellulosic volumes; it must fix definite cellulosic volume requirements in advance. Separately, it is imperative that eRINs be treated like other RINs, with adequate compliance procedures set in place to prevent double-counting and other forms of fraud. EPA is correct that its new eRIN program creates an increased risk of double-counting of biogas for RIN generation. Growth Energy agrees with EPA’s suite of proposed biogas regulatory reforms intended to address that risk.

Part VI: *Higher volumes of renewable fuel provide net benefits to communities with environmental justice concerns.* Growth Energy supports EPA’s decision to include environmental justice impacts as an additional factor for consideration in the “Set” rulemaking process. Biofuels play an important role in mitigating disproportionate impacts of climate change on low-income and vulnerable communities. However, biofuels have additional environmental justice benefits that EPA does not adequately consider in the proposed rule, including improvements to air quality as compared to petroleum fuels and providing lower-cost fuel options to consumers. EPA should note these significant benefits in the final rule, and reconsider its discussion of alleged adverse impacts that have not been shown to be causally related to the RFS program, such as impacts to water quality, soil quality, and food prices.

Part VII: *EPA should promptly finalize the ongoing Endangered Species Act (“ESA”) Section 7 consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service and conclude that the proposed standards have “no effect” or are “not likely to adversely affect” listed species or critical habitat.* EPA should act to prevent serial litigation over procedural aspects of the ESA by decisively concluding its ongoing Section 7 consultation process for both the 2023-2025 standards and the previous 2020-2022 standards prior to June 14,

2023, which is consent decree deadline for finalizing the proposed rule. EPA should make all efforts to avoid finalizing the rule without having completed its consultation obligations, in order to avoid a new round of litigation; furthermore, delay in the consultation process is not a justification for failing to timely publish the final rule under the consent decree. We also encourage EPA to pursue a programmatic structure in its consultation analysis such that subsequent RFS rulemakings can build on EPA's present work to facilitate consistent, timely compliance with ESA obligations moving forward. On the merits, the record evidence (reviewed in Part III) clearly shows that the best available science supports a determination that the RFS program either has no effect or is not likely to adversely affect any listed species or critical habitat. Any potential link between RFS volumes and species impacts is far too attenuated to show that species harms are reasonably likely to occur.