

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| AMERICANS FOR CLEAN ENERGY et al., | |) | |
| | |) | |
| Petitioners, | |) | |
| | |) | Case No. 16-1005 |
| v. | |) | (and consolidated |
| | |) | cases) |
| ENVIRONMENTAL PROTECTION AGENCY and | |) | |
| ANDREW R. WHEELER, | |) | |
| | |) | |
| Respondents. | |) | |
| <hr/> | |) | |

MOTION OF RENEWABLE-FUELS PETITIONERS
TO ENFORCE THE MANDATE

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INTRODUCTION

In this case, the Court vacated EPA's 500-million-gallon reduction of the 2016 total volume requirement under the Renewable Fuel Standard ("RFS") program and remanded to EPA for further consideration. More than three years later, EPA still has taken no action to comply with the Court's mandate. EPA's failure nullifies the Court's judgment and undermines the RFS program.

Movants—renewable-fuels petitioners Growth Energy, Renewable Fuels Association, National Corn Growers Association, the National Biodiesel Board, American Coalition for Ethanol, National Sorghum Producers, and National Farmers Union—respectfully ask the Court to compel EPA to comply with the mandate.¹ Specifically, the Court should order EPA to issue a 500-million-gallon curative obligation with an effective date of no more than six months after the Court's order and with a compliance-demonstration deadline no more than three months after that effective date.² The Court should also declare that it will not extend these deadlines.

¹ Americans for Clean Energy, Inc., is defunct.

² This period accords with EPA's ordinary RFS compliance-demonstration periods. *See* EPA, *Reporting Deadlines for Fuel Programs* (Feb. 13, 2019), <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/reporting-deadlines-fuel-programs> [attached as Ex. A].

BACKGROUND

A. The RFS program “requires that increasing volumes of renewable fuel be introduced into the Nation’s supply of transportation fuel each year. Congress enacted those requirements in order to move the United States toward greater energy independence and security and increase the production of clean renewable fuels.” *Americans for Clean Energy v. EPA* (“ACE”), 864 F.3d 691, 697 (D.C. Cir. 2017) (quotation marks omitted). To accomplish this, Congress specified the minimum amount of total renewable fuel (and the minimum amount of three subcategories of renewable fuel) that must be used each year. *Id.* at 697-698; 42 U.S.C. §7545(o)(2)(A)(i) & (B)(i)

Congress “allow[ed] EPA to reduce the statutory volume requirements,” *ACE*, 864 F.3d at 698, but “only in limited circumstances,” *National Petrochem. & Refiners Ass’n v. EPA* (“NPRA”), 630 F.3d 145, 149 (D.C. Cir. 2010). Specifically, EPA may “reduce” the statutory total volume requirement only if the conditions for a “general” or “cellulosic” “waiver” are met: (1) “there is an inadequate domestic supply,” §7545(o)(7)(A)(ii); (2) “implementation of the [statutory] requirement would severely harm the economy or environment of a State, a region, or the United States,” §7545(o)(7)(A)(i); or (3) “the projected volume of cellulosic biofuel production is less than” the statutory volume, §7545(o)(7)(D)(i). *See ACE*, 864 F.3d at 698.

Congress then directed EPA to “ensure” that the transportation fuel sold in the United States “contains at least” that amount of renewable fuel.

§7545(o)(2)(A)(i). Accordingly, Congress imposed on EPA “a statutory mandate to ‘ensure’” that the statutory volume requirements—after any reductions under a waiver—“are met,” which EPA “fulfills” by “translating” the required volumes “into ‘percentage standards’” that “represent the percentage of transportation fuel introduced into commerce that must consist of renewable fuel.” *ACE*, 834 F.3d at 698-699 (quoting §7545(o)(3)(B)(i) (brackets omitted)). “By statute, EPA is required to promulgate the percentage standards for a given year no later than November 30 of the preceding calendar year.” *Id.* at 699; *see* §7545(o)(3)(B)(i).

B. In setting the percentage standards for 2016, EPA first invoked its cellulosic-waiver power to reduce the statutory total volume requirement by 3.64 billion gallons, and then invoked its “inadequate domestic supply” general-waiver power to reduce the total volume by an additional 500 million gallons. 80 Fed. Reg. 77,420, 77,439 (Dec. 14, 2015) (“2016 Rule”); *ACE*, 864 F.3d at 701-702.

With respect to the second waiver, “EPA concluded that the best reading of the ‘inadequate domestic supply’ provision is that it refers to the supply of renewable fuel available to *consumers* for use in their vehicles—not to the supply of renewable fuel available to *refiners, blenders, and importers* for use in meeting the statutory volume requirements.” *ACE*, 864 F.3d at 706 (citing 2016 Rule at

77,435-77,436). EPA claimed that, under its interpretation, it could “not only ... consider supply-side constraints affecting the availability of renewable fuel—such as renewable fuel production or import capacity—but also ... consider demand-side factors affecting consumers’ desire or ability to consume renewable fuels.”

Id.

EPA’s interpretation was crucial to its determination that there was inadequate domestic supply. It was undisputed that there was ample renewable fuel available for obligated parties—refiners and importers—to meet the statutory volume requirement, after adjusting for the cellulosic waiver, i.e., that there were no supply-side constraints on renewable fuel. *See* Growth Energy Comments on Proposed 2016 Rule at 28-32 (July 27, 2015) [attached as Ex. B]; Renewable Fuels Association Comments on Proposed 2016 Rule at 4-7 (July 27, 2015) [attached as Ex. C]; 2016 Rule at 77,438. But EPA nonetheless found that the “supply” was “inadequate,” and accordingly reduced the total volume requirement, solely because of “constraints ... related to the infrastructure build out and fuel consumption” of ethanol—that is, solely because of demand-side factors. 2016 Rule at 77,450; *see id.* at 77,740, 77,452, 77,456-77,465; 80 Fed. Reg. 33,100, 33,113 (June 10, 2015).

C. Representatives of producers of renewable fuel—including movants—petitioned for review of EPA’s supply waiver. Agreeing with petitioners, this

Court held that “the ‘inadequate domestic supply’ provision authorizes EPA to consider *supply-side* factors affecting the volume of renewable fuel that is available to *refiners, blenders, and importers* to meet the statutory volume requirements. It does not allow EPA to consider the volume of renewable fuel that is available to ultimate *consumers* or the *demand-side* constraints that affect the consumption of renewable fuel by consumers.” *ACE*, 864 F.3d at 696. “Th[e] prohibited factors include, for example, constraints on the infrastructure needed to distribute fuel from blenders to gas stations or the number of retail outlets that offer renewable fuel blends,” as well as the “pricing of renewable fuel, prevalence of vehicle engines that can use renewable fuel, and marketing efforts of those promoting renewable fuel products.” *Id.* at 709.

The Court explained that “[t]he central problem with EPA’s ‘supply equals demand’ argument (in addition to the text of the statute, of course) is that it runs contrary to how the Renewable Fuel Program is supposed to work.” *ACE*, 864 F.3d at 710. “[T]he Renewable Fuel Program’s increasing requirements are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year. EPA’s interpretation of the ‘inadequate domestic supply’ provision flouts that statutory design: Instead of the statute’s volume requirements forcing demand up, the lack of demand allows EPA to bring the volume requirements down.” *Id.*

Accordingly, the Court “vacate[d] EPA’s decision to reduce the total renewable fuel volume requirements for 2016 through use of its ‘inadequate domestic supply’ waiver authority, and remand[ed] the rule to EPA for further consideration in light of [its] decision.” *ACE*, 864 F.3d at 696-697.

D. *ACE* was decided on July 28, 2017. Now, after more than three years—and three annual RFS rulemakings—EPA still has taken no action to comply with the Court’s mandate.

Starting just a few months after *ACE* was decided, EPA acknowledged the importance of implementing the Court’s mandate. EPA’s 2018 Rule noted “considerable uncertainty” about the number of available “carryover RINs,” i.e., the size of the “carryover RIN bank,” because of “the possible impact of an action to address the remand in *ACE*,” 82 Fed. Reg. 58,486, 58,494 (Dec. 12, 2017); *see ACE*, 864 F.3d at 699-700 (describing carryover-RIN bank), as if the uncertainty were an external factor outside EPA’s control. A month later, EPA issued an EnviroFlash again acknowledging “some uncertainty” about available RINs “in light of ... the fact that the EPA has not yet indicated its intentions with respect to responding to the remand” in *ACE*. EPA, *RFS 2017 Annual Compliance deadline* (Jan. 12, 2018), <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/enviroflash-announcements-about-epa-fuel-programs#compliance-deadline> [attached as Ex. D]. In the EnviroFlash, EPA “noted that [it] currently believe[s]

that it would be appropriate for the EPA to allow use of current-year RINs (including carryover-RINs) to satisfy further obligations, if any, for a past compliance year that may result from the *ACE* remand.” *Id.*

EPA next deemed the *ACE* remand outside the scope of the 2019 rulemaking, despite acknowledging the “compelling need to respond to the remand” and re-affirming its “inten[t] to expeditiously move ahead.” 83 Fed. Reg. 32,024, 32,027 (July 10, 2018). Movants nonetheless urged EPA to “immediately address the D.C. Circuit’s vacatur of EPA’s general waiver of the 2016 total volume requirement,” pointing out that “EPA could easily remedy the vacatur by adding the 500 million RINs covered by the vacated general waiver to the total 2019 volume requirement it would otherwise impose,” so that obligated parties could use current-year RINs to make up the unlawful waiver (as EPA had suggested in January 2018). Growth Energy Comments on Proposed 2019 Rule at 3, 49-50 (Aug. 17, 2018) [attached as Ex. E]; *accord* Renewable Fuels Association Comments on Proposed 2019 Rule at 13-14 (Aug. 17, 2018) [attached as Ex. F]; National Biodiesel Board Comments on Proposed 2019 Rule at 11 (Aug. 17, 2018) [attached as Ex. G]; National Corn Growers Association Comments on Proposed 2019 Rule at 11-12 (Aug. 17, 2018) [attached as Ex. H].

In the final 2019 Rule, however, EPA took no action to address the *ACE* remand. Instead, it reiterated that “there remains considerable uncertainty

surrounding the number of carryover RINs that will be available for use in 2019 for a number of reasons, including the potential impact of any future action to address the remand in *ACE*.” 83 Fed. Reg. 63,704, 63,709 (Dec. 11, 2018).

In the proposed 2020 Rule, EPA finally proposed a response to *ACE*, recognizing that its “obligation [was] to reevaluate the 2016 total renewable fuel volume requirement in accordance with the court’s decision.” 84 Fed. Reg. 36,762, 36,788 (July 29, 2019) (“2020 NPRM”). Shockingly, however, EPA proposed to take *no curative* action, stating: “In light of the fact that we can no longer incent additional renewable fuel generation in 2016, and the significant burden on obligated parties of imposing an additional standard, we are proposing to retain the original 2016 total renewable fuel standard.” *Id.* EPA considered several approaches to curing the unlawful 2016 supply waiver, but it asserted that “in the case of the 2016 renewable fuel volumes, any approach that requires additional volumes of renewable fuel use” would constitute “a retroactive standard” imposing “a significant burden on obligated parties, without any corresponding benefit as any additional standard cannot result in additional renewable fuel use in 2016.” *Id.*

One approach that EPA’s proposal rejected was functionally what movants had urged during the rulemaking for the 2019 standards and what EPA had suggested in its January 2018 EnviroFlash: “imposing an additional obligation as a

supplement to the 2020 standards and allowing compliance with 2019 and 2020 RINs.” 2020 NPRM at 36,789. EPA asserted that because “there are very limited opportunities to use biofuels beyond the volumes [EPA was] proposing for 2020, [EPA] believe[s] that this is unlikely to incent significant new biofuel generation in 2020.” *Id.* “Instead,” EPA said, that approach “would likely lead to a significant drawdown of the carryover RIN bank, which [EPA] do[es] not believe to be appropriate,” even though, it acknowledged, “there would likely be sufficient [2019 and 2020] RINs to comply with an additional 500 million gallon standard.” *Id.*

EPA’s final 2020 Rule, however, again refused to adopt *any* response to the *ACE* remand—not even its facially improper proposal of retaining the invalidated volume. EPA stated that it was “still actively considering th[e] issue,” which it “deferr[ed] ... to a separate action ... anticipate[d] in early 2020.” 85 Fed. Reg. 7016, 7019 (Feb. 6, 2020) (“2020 Rule”).

Early 2020 has come and gone; it is now *late* 2020 and EPA still has not taken action in response to the *ACE* remand.³

³ EPA has not even *proposed* the 2021 RFS standards, though the statutory deadline to *finalize* them is imminent.

ARGUMENT

When an agency has unreasonably delayed curative action in response to a decision of this Court, a prevailing party may call upon the Court's mandamus power to compel the agency to comply promptly with the mandate. EPA's failure to act on remand for more than three years is beyond the pale. Long ago, EPA could easily have set a supplemental 500-million-gallon obligation to cure its unlawful waiver of the 2016 total volume requirement. Its failure to do so undermines the structure and goals of the RFS program. To date, EPA's only proposed response to *ACE* has been to retain the same volume requirement that *ACE* declared unlawful. Lest EPA override this Court's judgments and immunize its RFS actions from future judicial review, the Court should compel EPA not merely to act in response to the remand but to impose a curative obligation.

I. THE COURT SHOULD COMPEL EPA TO CURE ITS UNLAWFUL 2016 WAIVER

A. Mandamus Is Available to Compel EPA to Comply Promptly With the *ACE* Mandate

A "party always has recourse to the court to seek enforcement of its mandate." *Office of Consumers' Counsel, State of Ohio v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) (per curiam). The Court has "authority ... to issue a writ of mandamus to effectuate or prevent the frustration of orders previously issued." *NetCoalition v. SEC*, 715 F.3d 342, 354 (D.C. Cir. 2013) (quotation marks omitted). The Court "may do so either" to address "unreasonable agency delay" or

“to correct any misconception of [its] mandate by [an] ... administrative agency.” *Id.* (quotation marks omitted); *see also, e.g., United States Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016) (petitioners “may bring a mandamus petition to this court in the event that the EPA fails to revise its standards under the Clean Air Act on remand in a manner consistent with our earlier opinion” (quotations and brackets omitted)); *WildEarth Guardians v. EPA*, 830 F.3d 529, 535 (D.C. Cir. 2016) (“if EPA were to fail to initiate that sort of remedial response, WildEarth could then file a mandamus petition to compel agency action”).

Here, mandamus is appropriate if EPA’s delay in responding to the *ACE* mandate is “unreasonable.” *In re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 836 (D.C. Cir. 2012); *see, e.g., In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008).⁴ In assessing whether an agency’s delay is unreasonable, the Court ordinarily considers the so-called *TRAC* factors:

(1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in

⁴ In the context of compelling an agency to comply with a mandate, this Court ordinarily does not tarry over the traditional test for granting mandamus relief. *See In re Trade & Commerce Bank ex rel. Fisher*, 890 F.3d 301, 303 (D.C. Cir. 2018) (“our mandamus cases dealing with enforcement of the mandate may not explicitly spell out each of the factors”). Because an agency “has a ‘clear duty’ to respond to this Court’s remand” without unreasonable delay, *People’s Mojahedin*, 680 F.3d at 836, and there is no alternative remedy where an agency refuses to do so, the only pertinent question is whether the agency’s delay in responding is unreasonable. *See generally In re Flynn*, 973 F.3d 74, 78 (D.C. Cir. 2020) (en banc) (reciting traditional mandamus test).

the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Telecommunications Research & Action Ctr. v. FCC (“*TRAC*”), 750 F.2d 70, 80

(D.C. Cir. 1984) (citations and quotation marks omitted). Under *TRAC*,

“[a]lthough there is no *per se* rule as to how long is too long, a reasonable time for agency action is typically counted in weeks or months, not years.” *In re Public Emps. for Envtl. Responsibility*, 957 F.3d 267, 274 (D.C. Cir. 2020) (quotation marks omitted).

But in this case, the *TRAC* standard does not drive the analysis. What is “[d]ecisive” is that EPA “has failed to heed [the Court’s] remand.” *People’s Mojahedin*, 680 F.3d at 837. The *TRAC* standard was crafted for cases “involv[ing] delay by agencies in concluding their own rulemakings or in responding to requests by private parties to take administrative action.” *Core Commc’ns*, 531 F.3d at 855-856. When the delay pertains instead to complying with the Court’s mandate, the Court’s “overriding concern” is ensuring that the delay does not have “the effect of nullifying [the Court’s] decision while at the same time preventing [the affected petitioner] from seeking judicial review.”

People's Mojahedin, 680 F.3d at 838; accord *Core Commc'ns*, 531 F.3d at 856. In such circumstances, the Court's intervention is imperative. See *People's Mojahedin*, 680 F.3d at 837-838.

B. EPA's Three-Year Failure to Cure on Remand Is an Egregious Delay That Nullifies the Mandate

EPA's utter failure to take any curative action at all more than three years after the mandate issued is inexcusable and renders the mandate meaningless.

1. Congress provided a timetable that should have guided EPA and should now guide the Court: EPA was statutorily required to issue the 2016 standards by November 30, 2015. And for each year since, EPA has been statutorily obligated to issue the applicable standards by the preceding November 30. *Supra* p.3. Thus, once the Court held that EPA issued an unlawful standard for 2016, EPA should have taken curative action by the next annual RFS rulemaking, i.e., by the time it had to set the 2018 standards (November 30, 2017), or, if that was impracticable, by the time it had to set the 2019 standards (November 30, 2018).

2. EPA's inaction drags down the entire RFS program and prejudices movants. The 2016 supply waiver unlawfully reduced the amount of renewable fuel that was required to be used in 2016 by 500 million gallons—fuel that movants' members produce. Given that obligated parties were unlawfully relieved of such a large obligation even though there was ample renewable fuel available to

meet it, the effect of the unlawful waiver was to increase the number of carryover RINs available for compliance in subsequent years. In fact, the unlawful waiver enlarged the bank RIN-for-RIN by 500 million.⁵

That was bad for the RFS program because increasing the supply of carryover RINs decreases RIN prices. As both the Court and EPA have recognized, rising RIN prices are the mechanism by which the RFS forces the market to use greater amounts of renewable fuel. *See Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 651 (D.C. Cir. 2019) (rising RIN prices “provide a price signal to consumers to help achieve the Congressional goals of greater renewable fuel production and use”); *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919 (D.C. Cir. 2014) (“high RIN prices” “incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote”). And because EPA has not imposed a curative 500-million-gallon obligation, the unlawful 2016 waiver’s inflation of the RIN bank continues today, to the detriment of the RFS program, renewable-fuel producers, consumers, and the country as a whole.⁶

⁵ Between 2016 and 2017, the RIN bank increased by 835 million. EPA, *Carryover RIN Bank Calculations for 2019 Final Rule* at 7 (Nov. 7, 2018) [attached as Ex. I]. But for the waiver, obligated parties would have retired 500 million more RINs to meet their 2016 obligations.

⁶ Today, there are about 3.48 billion carryover RINs. 2020 Rule at 7,021.

3. Finally, it is inconceivable that EPA would need so much time to figure out how to cure its unlawful 2016 waiver. EPA could easily have imposed a supplemental obligation that could be met using current-year RINs, whether combined with an annual obligation or issued as a stand-alone obligation. EPA recognized this option in its January 2018 EnviroFlash and in the 2020 NPRM. *Supra* pp.6-9. And movants proposed this more than two years ago. *Supra* p.7.

Nor is this approach theoretical; it is the approach that EPA has already used to cure an unlawfully low volume requirement from a prior year. In the early days of the RFS program, EPA missed the 2008 statutory deadline for issuing the 2009 biomass-based diesel standard. *NPRA*, 630 F.3d at 149. To correct that failure, EPA later (in March 2010, to be precise) issued a biomass-based diesel standard for 2010 that “combined” the required 2009 volume with the required 2010 volume. *Id.* at 151. EPA explained that it “had adopted the combined 2009/2010 approach because it ‘more closely represented what would have occurred if EPA had been able to implement the [biomass-based diesel volume] requirement in 2009.’” *Id.* at 152 (quoting 75 Fed. Reg. 14,670, 14,719 (Mar. 26, 2010) (brackets omitted)). This Court approved of EPA’s solution. *Id.* at 152-158; *see also id.* at 158-166. EPA could have used this simple approach as soon as *ACE* invalidated the 2016 waiver.

II. THE COURT SHOULD CLARIFY THAT EPA CANNOT RETAIN ITS ORIGINAL 2016 STANDARD

The closest EPA has come to acting on remand from *ACE* was to propose in 2019 that it “retain the original 2016 total renewable fuel standard.” 2020 NPRM at 36,788; *see supra* p.8. In other words, EPA proposed to respond to *ACE* as if the Court had *not* “vacate[d] EPA’s decision to reduce the total renewable fuel volume requirements for 2016 [by 500 million gallons] through use of its ‘inadequate domestic supply’ waiver authority.” *ACE*, 864 F.3d at 696-697. It should go without saying that EPA is required to comply with *ACE* by curing its adjudicated legal error. This duty stems from both the *ACE* mandate and the Clean Air Act. *See, e.g., WildEarth Guardians*, 830 F.3d at 535 (“The necessary consequence of vacating the Implementation Rule on the ground that it failed adequately to adhere to Subpart 4 would be some kind of corrective EPA action strictly implementing that Subpart”).

EPA’s proffered reasons for rejecting any cure—and particularly the cure of setting a future 500-million-gallon obligation that could be met with current-year RINs—are nonsense and would nullify not only this Court’s mandate but also the Court’s power to review *any* EPA action whose effect was to reduce an RFS volume obligation.

A. *ACE* and the Clean Air Act Require EPA to Impose a 500-Million-Gallon Curative Obligation

EPA is “without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion” rendered in *ACE*. *City of Cleveland v. Federal Power Comm’n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (quotation marks omitted); accord *U.S. Postal Serv. v. Postal Regulatory Comm’n* (“*PRC*”), 747 F.3d 906, 910 (D.C. Cir. 2014). And the letter and spirit of *ACE*—along with the text and purpose of the Clean Air Act—command EPA to enforce the 2016 total volume requirement as if there had not been a 500-million-gallon supply waiver.

In the Act, Congress: specified the minimum amount of renewable fuel that EPA must ensure is used each year; granted EPA the power to reduce those volumes, but only if the statutorily specified waiver conditions are present; and mandated that EPA annually set percentage standards that ensure that the statutorily specified amounts of renewable fuel, after any waiver reductions, are met. *Supra* pp.2-3. In setting the 2016 total standard, EPA reduced the statutory volume through a cellulosic waiver and then through a supply waiver. *ACE* upheld the former but invalidated the latter. 864 F.3d at 701-704. Consequently, EPA is now statutorily bound to *ensure* that the congressionally prescribed 2016 total volume requirement, reduced *only* by the 3.64-billion-gallon cellulosic waiver, is

met. EPA’s suggestion that it retain its original 2016 standard, which reflects the unlawful 500-million-gallon reduction, obviously does not do that.

On the contrary, retaining EPA’s original 2016 standard would nullify *ACE*’s holding. A “decision that the agency’s action was substantively unreasonable generally means that, on remand, the agency must exercise its discretion differently and reach a different bottom-line decision.” *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 936 (D.C. Cir. 2017); *see Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (“Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”). Further, retaining the original 2016 standard would in effect reduce the 2016 volume requirement without a valid waiver—something that *ACE* and other precedents make clear EPA cannot do. *See* 864 F.3d at 712 (“EPA has not explained why Congress would have established the severe-harm waiver standard only to allow waiver ... based on lesser degrees of economic harm. ... [T]he fact that EPA thinks a statute would work better if tweaked does not give EPA the right to amend the statute.” (quotation marks omitted)); *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 485 (2001) (“EPA may not construe the statute in a way that completely nullifies textually applicable

provisions meant to limit its discretion.”); *MCI Telecommc 'ns Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

As the Court and EPA have recognized, EPA’s statutory mandate to ensure that the statutory volumes (after valid waivers) are met does not disappear just because the standard is imposed after the statutory deadline for issuing the standard or even after the initial deadline for demonstrating compliance. After EPA failed to issue the 2009 biomass-based diesel standard by the statutory deadline, the Court approved of EPA’s determination that issuing a combined 2009-2010 biomass-based diesel standard “best ... carr[ied] out Congress’ mandate that it ‘ensure’ the applicable volume requirement for 2009 is met.” *NPRA*, 630 F.3d at 166; *see id.* at 157. The Court observed that “[b]y including the authorizing phrase ‘at least’ Congress ... signaled its intent that volumes not be reduced” (absent a valid waiver). *Id.* at 156 (quoting §7545(o)(2)(A)(i)). Congress also signaled its intent that each year’s statutory volume be met even if the compliance period was shifted into another year through statutory provisions allowing RIN credits and deficits to be carried into a future year. *See NPRA*, 630 F.3d at 157; §7545(o)(5)(C)-(D). Thus, the Court concluded, combining the 2009 and 2010 volumes into a single standard “reflect[ed] Congress’ vision in expanding the renewable fuel program without.” *NPRA*, 630 F.3d at 156.

B. A Future Curative Obligation Would not Be “Retroactive”

In its proposal for 2020, EPA asserted that remedying the unlawful waiver by setting a future 500-million-gallon curative obligation to be met with current-year RINs would impose a “retroactive” “burden on obligated parties.” 2020 NPRM at 36,788. According to EPA, this approach would not “incent significant new biofuel generation in 2020” but rather would “likely lead to a significant drawdown of the carryover RIN bank.” *Id.* at 36,789. That is classic doublespeak.

Congress set the volume requirement to which obligated parties were subject, except to the extent EPA reduces it through a *valid* waiver. *See supra* p.2. Issuing a future obligation to remedy the unlawful 500-million-gallon reduction would merely restore the compliance obligation to which obligated parties were always properly subject. If obligated parties choose to meet a future curative obligation with carryover RINs (rather than by increasing renewable-fuel use), the RIN bank’s balance would not be *drawn down* but rather *restored* to reflect what it would have been but for the unlawful waiver. *See supra* pp.13-14. In other words, the bank has 500 million more RINs than it should have; those RINs reflect not obligated parties’ prior renewable-fuel use above the required amount but rather “a windfall for the regulated entities” stemming from EPA’s illegal waiver. *NPRA*, 630 F.3d at 157 (quotation marks omitted). EPA, therefore, cannot claim that the bank’s balance should be maintained. Finally, a future curative obligation would

indeed incentivize increased use of renewable fuel: a long enough timetable, such as the one proposed in this motion (nine months from the order to the compliance deadline), is ample to spur greater use; but even if obligated parties use carryover RINs to comply, the resulting reduction in the RIN bank would raise RIN prices and thus help spur greater use *in subsequent years*, see *supra* p.19.

In any event, setting a future curative obligation would not impose a retroactive obligation at all. A rule is retroactive only if it “attaches new legal consequences to events completed before its enactment,” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-270 (1994), but, again, obligated parties were always legally bound to meet the 2016 statutory volume requirement except to the extent EPA validly waived it; obligated parties could not have had settled “expectations” in an ultra vires waiver. See *Monroe Energy*, 750 F.3d at 920. Even if they did, moreover, “unsettl[ing]” those expectations would not render a future curative obligation “retroactive.” *Landgraf*, 511 U.S. at 269 n.24 (law not impermissibly “retroactive” merely because its application depends on preexisting facts). A future curative obligation would not penalize obligated parties for their past conduct; it would ensure that the statutory requirements are met while minimizing any compliance burden caused by EPA’s unlawful waiver, by affording them ample notice and opportunity to plan their future activity to achieve compliance. See *Monroe Energy*, 750 F.3d at 920 (suggesting “‘retroactivity’ label” did not

apply where “EPA finalized its [RFS] standards during the compliance year, well before the compliance demonstration deadline, [because] the rule did not change the legal effect of a completed course of conduct”).⁷

At bottom, if EPA could invoke the specter of “retroactivity” to avoid curing its unlawful 2016 waiver, this Court’s ruling in *ACE* would be a nullity and judicial review of *any* action by EPA that lowers an RFS volume requirement would be pointless. Judicial decisions invalidating such actions will always issue after the relevant compliance year is over.⁸ Thus, EPA could always invoke concerns about “retroactive” obligations to avoid curing its adjudicated legal errors, “effectively nullif[ying]” the Court’s decisions. *Core Commc’ns*, 531 F.3d at 856; *accord People’s Mojahedin*, 680 F.3d at 837-838. EPA should not be allowed to do that.

CONCLUSION

For the foregoing reasons, the Court should order EPA to comply with the mandate by issuing a 500-million-gallon curative obligation whose effective date is no more than six months after the Court’s order and whose compliance-demonstration deadline is no more than three months after the obligation’s

⁷ Presumably, EPA would issue a notice of proposed rulemaking in connection with the corrective obligation. Obligated parties have also received notice through *ACE* itself and EPA’s 2018 EnviroFlash statement that it would be “appropriate” to allow “use of current-year RINs ... to satisfy further obligations ... result[ing] from the *ACE* remand.” *RFS 2017 Annual Compliance deadline*.

⁸ That has been the case in all six lawsuits challenging EPA’s annual standards to date.

effective date. The Court should also declare that it will not extend these deadlines.

Respectfully submitted,

/s/ Seth P. Waxman

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Counsel for Movants

November 23, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, movants state:

Growth Energy is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. Growth Energy does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Renewable Fuels Association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

National Corn Growers Association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are corn farmers and supporters of the agriculture and ethanol industries. It operates for the purpose of promoting the general commercial, legislative, and other common

interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The **National Biodiesel Board** is a trade association as defined in D.C. Circuit Rule 26.1(b). It is the national trade association for the biodiesel and renewable diesel industry, and its mission is to advance the interests of its members by creating sustainable biodiesel and renewable diesel industry growth. The National Biodiesel Board has no parent companies, and no publicly held company has a 10% or greater ownership interest. It has not issued shares or debt securities to the public.

National Sorghum Producers is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are sorghum producers and supporters of the sorghum industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The Farmers Educational & Cooperative Union of America (doing business as the **National Farmers Union**) is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members include farmers who are producers of biofuel feedstocks and consumers of large quantities of fuel. It

operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

American Coalition for Ethanol is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members include ethanol and biofuel facilities, agricultural producers, ethanol industry investors, and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Respectfully submitted,

/s/ Seth P. Waxman

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November 23, 2020

CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to Circuit Rule 27(a)(4), movants certify that the parties in these consolidated cases are:

Petitioners: American Coalition for Ethanol; Biotechnology Innovation Organization; Growth Energy; National Corn Growers Association; National Biodiesel Board; National Farmers Union; National Sorghum Producers; and Renewable Fuels Association; Alon Refining Krotz Springs, Inc.; American Fuel & Petrochemical Manufacturers, American Petroleum Institute; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Ergon-West Virginia, Inc.; Hunt Refining Company; Lion Oil Company; Monroe Energy, LLC; Placid Refining Company LLC; U.S. Oil & Refining Co.; Valero Energy Corporation; and Wyoming Refining Company.⁹

Respondents: United States Environmental Protection Agency; Andrew R. Wheeler.

Intervenors: All petitioners and E.I. du Pont de Nemours & Co.

Amici curiae: American Soybean Association; Arvegenix, Inc.; CVR Energy, Inc.; Canola Council of Canada; National Renderers Association; Small Retailers Coalition; U.S. Canola Association.

⁹ Americans for Clean Energy, Inc., is defunct.

Respectfully submitted,

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November 23, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,190 words, excluding the exempted portions, as provided in Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.
2. This motion complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s/ Seth P. Waxman

Seth P. Waxman

CERTIFICATE OF SERVICE

I certify that on November 23, 2020, I filed the foregoing using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ Seth P. Waxman

Seth P. Waxman

EXHIBIT A

An official website of the United States government.



Reporting Deadlines for Fuel Programs

Related Topics

- [How to report quarterly and annually for RFS](#)
- [How to report quarterly and annually for Gasoline](#)
- [How to report quarterly and annually for FFARs](#)
- [How to report Attest Engagements](#)

Summary of deadlines for all Fuel Programs

| Fuel Program | Report Type | Dates Covered | Deadline |
|--------------|-------------|-------------------------|----------------------------|
| All | Quarter 1 | January 1 – March 31 | June 1 of same year |
| All | Quarter 2 | April 1 – June 30 | September 1 of same year |
| All | Quarter 3 | July 1 – September 30 | December 1 of same year |
| All | Quarter 4 | October 1 – December 31 | March 31 of following year |

| | | | |
|--------------------|--------------------|-------------------------|--|
| Gasoline and FFARs | Annual | January 1 – December 31 | March 31 of following year |
| RFS | Annual | January 1 – December 31 | <p>March 31 of following year</p> <ul style="list-style-type: none"> • RFS 2700- Cellulosic Biofuel Producer Questionnaire • RFS 0303- Annual Compliance Report <p>June 1</p> <ul style="list-style-type: none"> • RFS0901- Production Outlook Report |
| All | Attest engagements | January 1 – December 31 | June 1 of following year |

LAST UPDATED ON FEBRUARY 13, 2019

EXHIBIT B



Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017

Docket # EPA-HQ-OAR-2015-0111

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July 27, 2015

The version of the amendment that was passed in the House would have permitted waivers “based on a determination by the Administrator ... that there is an inadequate domestic supply *or distribution capacity* to meet the requirement.”¹⁵² But during Conference, the reference to “distribution capacity” was excised, and Congress passed the bill as amended and the President signed it without that phrase. EPA dismisses this history as “uninformative,”¹⁵³ but Supreme Court precedent instructs otherwise: “drafting history showing that Congress cut out [specific] language ... from the final statute ... precludes any hope of a sound interpretation of” of the statute that would in effect restore the “trimmed” language.¹⁵⁴ The history of the statute therefore shows that Congress specifically intended that “supply” in the general waiver provision not encompass distribution capacity. EPA is not free to countermand Congress by adding “distribution capacity” back in through other linguistic means.

Still, EPA argues that Congress’s choice to exclude “distribution capacity” from the general waiver provision was intended to communicate that EPA would be permitted but not required to consider distribution capacity when assessing whether “supply” was adequate. That argument strains common sense, especially in the face of the various statutory provisions distinguishing between supply and distribution capacity noted above. Congress could have given EPA discretion to consider distribution capacity simply by using the word “or,” as in: “inadequate domestic supply *or distribution capacity*.” In fact, Congress did exactly that in section 7545(m)(3)(C), as discussed above. Or Congress could have written, “inadequate domestic supply and, if appropriate, distribution capacity.” Indeed, the reasonable possibilities are innumerable, but the language Congress actually used in the general waiver provision is not among them.

B. There Is Adequate Supply Of Renewable Fuels To Meet The Statutory Requirements Reduced No Further Than The Proposed Cellulosic Waiver Flow-Through In 2014-16

There is more than enough supply of renewable fuels for obligated parties to meet the renewable fuels volume requirements in 2014, 2015, and 2016 without a general waiver. Below, we consider only the domestic production capacity for two categories of renewable fuel: ethanol and biomass-based diesel (both biodiesel and renewable diesel). Were we to consider other categories of renewable fuel, such as biogas, or to consider imports of renewable fuel, the supply of renewable fuel would be markedly higher.¹⁵⁵

¹⁵² H.R. 6, 109th Cong. § 1501(a), at 710 (engrossed Apr. 21, 2005) (emphasis added).

¹⁵³ 80 Fed. Reg. at 33,113.

¹⁵⁴ *Doe v. Chao*, 540 U.S. 614, 622-623 (2004).

¹⁵⁵ For example, EPA projects 0.173 bil gal in non-ethanol cellulosic biofuels in 2016. 80 Fed. Reg. at 33,128, Table II.D.2-2 n.a. Stratas Advisors estimates, using conservative historical data after expiration of the biodiesel tax incentive, that an amount of biodiesel sufficient to support about 0.748 bil RINs could readily be imported, given appropriate RIN incentives. Stratas Advisors, *Non-Ethanol Potential for RFS Compliance*, at 9 (July 16, 2015) (“Stratas Report”) (attached as Exhibit 2). Stratas Advisors further estimates that an amount of renewable diesel sufficient to support about 0.742 bil RINs could readily be imported. *Id.* at 9-10.

1. Ethanol supply

According to the Renewable Fuels Association, domestic ethanol production capacity was 14.8795 bil gal per year (“bgy”) as of January 2014, 15.077 bgy as of January 2015, and 15.401 bgy as of July 1, 2015.¹⁵⁶ EIA reports that U.S. fuel ethanol plant production capacity was only 13.681 bgy as of January 1, 2014, and 14.575 bgy as of January 1, 2015.¹⁵⁷ But EIA’s 2014 capacity figure (at a minimum) is patently too low because it was exceeded by *actual* production. EIA reports that the average weekly U.S. oxygenate plant production of fuel ethanol was 0.919 mil barrels per day as of January 3, 2014, which annualizes to 14.088 bgy, 0.949 mil barrels per day as of January 2, 2015, which annualizes to 14.548 bgy, peaked at 0.994 mil barrels per day as of June 19, 2015, which annualizes to 15.238 bgy, and was 0.984 mil barrels per day as of July 10, 2015, which annualizes to 15.085 bgy.¹⁵⁸ There is no reason to believe that ethanol production capacity would be lower in 2016 than it is today.

These figures are summarized in Table 4.

| Source | January 2014 | January 2015 | June 2015 | July 2015 |
|---|---------------------|---------------------|------------------|------------------|
| RFA U.S. ethanol production capacity | 14.8795 | 15.077 | N/A | 15.401 |
| EIA U.S. fuel ethanol plant production capacity | 13.681 | 14.575 | N/A | N/A |
| EIA annualized average weekly U.S. oxygenate plant production of fuel ethanol | 14.088 | 14.548 | 15.238 | 15.085 |

All numbers in billions of gallons per year

2. Biomass-based diesel supply

EPA states that registered biodiesel production capacity is “about 2.8 billion gallons,”¹⁵⁹ which could generate 4.2 bil RINs.¹⁶⁰ Similarly, *Biodiesel Magazine* reports that biodiesel

¹⁵⁶ Renewable Fuels Association, *Historic U.S. Fuel Ethanol Production*, at <http://www.ethanolrfa.org/pages/statistics>; <http://www.ethanolrfa.org/bio-refinery-locations>.

¹⁵⁷ See U.S. EIA, *U.S. Fuel Ethanol Production Capacity Archives*, at <http://www.eia.gov/petroleum/ethanolcapacity/archive/2014/index.cfm> (2014 data); <http://www.eia.gov/petroleum/ethanolcapacity/> (2015 data).

¹⁵⁸ See U.S. EIA, *Weekly U.S. Oxygenate Plant Production of Fuel Ethanol*, at http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=W_EPOOXE_YOP_NUS_MBBLD&f=W.

¹⁵⁹ 80 Fed. Reg. at 33,116. EPA notes that there may be up to 0.800 bil gal of additional biodiesel capacity at *unregistered* facilities. *Id.* Because our capacity analysis does not account for unregistered facilities, to the extent that those facilities could register in time to yield RINs in 2016, our analysis is conservative.

¹⁶⁰ “Each gallon of biodiesel generates 1.5 RINs due to its higher energy content per gallon than ethanol.” *Id.* at 33,132 n.86.

production capacity is 2.796 bgy.¹⁶¹ And a recent report by Stratas Advisors concluded that maximum biodiesel production capacity is sufficient to generate about 4.140 bil RINs.¹⁶² These levels have been steady throughout 2014 and 2015, and there is no reason to believe they would decline in 2016.¹⁶³

EPA provides no reason that production could not reach these levels. EPA previously and correctly recognized that it is “relatively straightforward for much of the current unused capacity to be brought on line, something we believe will occur once sufficient incentive is put in place, such as the combined ... volume requirement in this rule.”¹⁶⁴ EPA further recognized at that time that “wide swings in production can occur extremely rapidly” and “[b]iodiesel plants have the ability to restart rapidly as evidenced by the long history of facilities shutting down temporarily and then starting back up again when economic conditions improve.”¹⁶⁵ The same is true today.¹⁶⁶

EPA also alludes to a need to secure sufficient feedstocks, but the proposal does not indicate this would be a problem.¹⁶⁷ Just the opposite. The proposal states that “[t]he combined volumes of soybean oil, corn oil, and waste oils produced annually is *far more than would be needed* to produce 2.1 billion gallons of biodiesel.”¹⁶⁸ The proposal explains that “[i]t is possible that the market could divert additional feedstocks from food and other domestic uses or exports to the production of biodiesel. For instance, in 2014 exports of soy oil were 250 million gallons and exports of rendered fats and greases were 440 million gallons.”¹⁶⁹ Further, according to a report by Stratas Advisors, over 100 domestic and foreign biodiesel plants are “grandfathered” to allow production of RINs from a wider source of sustainable feedstocks.¹⁷⁰ And a recent

¹⁶¹ See Biodiesel Magazine, USA Plants, <http://biodieselmagazine.com/plants/listplants/USA/> (last accessed July 25, 2015).

¹⁶² Stratas Report at 15 (attached as Exhibit 2).

¹⁶³ 80 Fed. Reg. at 33,128 n.72.

¹⁶⁴ See EPA, “Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments,” at 3-187 (Feb. 2010), at <http://www.epa.gov/otaq/renewablefuels/420r10003.pdf>.

¹⁶⁵ *Id.* at 3-189.

¹⁶⁶ For this reason, EPA correctly did not limit itself to EIA’s calculation that as of March 2015, biodiesel operating capacity was 2.125 bgy. See <http://www.eia.gov/biofuels/biodiesel/production/table4.pdf>; see also Stratas Report at 6 (attached as Exhibit 2). There is every reason to believe the registered capacity is available.

¹⁶⁷ 80 Fed. Reg. at 33,116.

¹⁶⁸ *Id.* at 33,128 (emphasis added).

¹⁶⁹ *Id.*

¹⁷⁰ Stratas Report at 7 (attached as Exhibit 2).

analysis by LMC International Ltd. found that available qualifying feedstocks in 2015 are equivalent to 7.6 bil gal of biodiesel.¹⁷¹

In addition, domestic production capacity of renewable diesel is capable of generating about 0.362 bil RINs per year, according to Stratras Advisors.¹⁷² According to EPA, in 2014 renewable diesel generated 0.269 bil RINs.¹⁷³

Therefore, there is sufficient BBD production capacity to generate between 4.409 bil RINs (4.14 bil from biodiesel and 0.269 bil from renewable diesel) and 4.562 bil RINs (4.2 bil from biodiesel and 0.362 bil from renewable diesel).

3. Renewable fuel supply is sufficient to meet statutory levels after the cellulosic waiver flow-through

Whether the top end or the bottom end of the production capacity ranges described above are considered, the combined production capacity of ethanol and BBD is plainly substantial and far higher than EPA's proposal expects. And EPA cannot use its general waiver authority to reduce volume requirements below the level of supply. But the fact that that combined capacity might not quite reach the statutory renewable fuel volumes does not mean EPA may invoke its general waiver authority to reduce them. In particular, given the supply of renewable fuel, EPA lacks authority to waive the renewable fuel volume requirements further than the cellulosic waiver flow-through would support alone.

As described above, EPA has exercised its cellulosic waiver authority based on the supply of cellulosic biofuels, and it has decided to partially flow that waiver through to the advanced biofuel and renewable fuels volume requirements. The statutory renewable fuel volume requirements, after being reduced by EPA's proposed cellulosic waiver flow-through, are 17.08 bil gal for 2014, 17.90 bil gal for 2015, and 18.40 bil gal for 2015.¹⁷⁴ If EPA maintained these cellulosic waiver flow-throughs, the combined production capacity of ethanol and BBD alone would be more than enough to meet the adjusted volume requirements.¹⁷⁵ In fact, even in the worst case, supply would suffice to support 1 bil RINs in excess of these requirements. Consequently, EPA lacks the power to invoke its general waiver authority to

¹⁷¹ Testimony of Andrea Kavalier, LMC International Ltd., EPA-HQ-OAR-2015-0111-0993 (June 25, 2015).

¹⁷² Stratras Report at 15-16 (attached as Exhibit 2).

¹⁷³ 2014 RIN Supply, EPA-HQ-OAR-2015-0111-0004.

¹⁷⁴ As explained above, EPA proposed to reduce the cellulosic requirement by 1.717 bil gal in 2014, 2.894 bil gal in 2015, and 4.044 bil gal in 2015, but to flow that waiver through only by 1.070 bil gal in 2014, 2.600 bil gal in 2015, and 3.850 bil gal in 2016. *See* 80 Fed. Reg. at 33,122.

¹⁷⁵ We assume for purposes of this comment that EPA performed its projection calculations properly when calculating the cellulosic waiver. If we discover that EPA made errors in this assessment, we reserve the right to object to the cellulosic waiver at a later time.

reduce the renewable fuel volume requirements for 2014-2016 further than it proposes to do by flowing the cellulosic waiver through. Table 3 summarizes this analysis.

| Table 3: Supply to Meet Renewable Fuel Volumes After Cellulosic Waiver Flow-Through | | | | | |
|--|----------------|------------|--------------|---|--------------------|
| | Ethanol | BBD | Total | Statutory After Cellulosic Flow-Thru | Excess RINs |
| 2014 | | | | | |
| Maximum | 14.8795 | 4.562 | 19.4415 | 17.080 | 2.3615 |
| Minimum | 13.681 | 4.409 | 18.090 | 17.080 | 1.010 |
| 2015 | | | | | |
| Maximum | 15.077 | 4.562 | 19.639 | 17.900 | 1.739 |
| Minimum | 14.548 | 4.409 | 18.957 | 17.900 | 1.057 |
| 2016 | | | | | |
| Maximum | 15.238 | 4.562 | 19.800 | 18.400 | 1.400 |
| Minimum | 15.085 | 4.409 | 19.494 | 18.400 | 1.094 |

All numbers in billions of RINs

V. EVEN IF EPA’S INTERPRETATION OF THE GENERAL WAIVER PROVISION WERE VALID, EPA COULD NOT INVOKE THAT AUTHORITY TO REDUCE THE RENEWABLE FUEL VOLUME REQUIREMENTS FURTHER THAN THE PROPOSED CELLULOSIC WAIVER FLOW-THROUGH BECAUSE SUPPLY WOULD STILL BE ADEQUATE

As discussed above, EPA believes that “factors that limit supplying [renewable fuels] to vehicles that can consume them,” not just “limitations in production or importation of qualifying renewable fuels, ... constitute circumstances that warrant a waiver.”¹⁷⁶ In EPA’s view, such factors include the blendwall, the number and distribution of retail stations offering the fuel, and the number of vehicles qualified to consume the fuel, among others.¹⁷⁷ We explained above why EPA’s interpretation of the general waiver provision is impermissible. In this Part, we *assume* that it is permissible, and then show that even still, “supply” so construed—again focusing only on ethanol and BBD—is adequate to reach the statutory renewable fuel volume requirements for 2014-2016, at least after the proposed flow-through of the cellulosic waiver. EPA, therefore, again lacks authority to exercise its general waiver authority to further reduce the renewable fuel volume requirements.

¹⁷⁶ 80 Fed. Reg. at 33,109-33,110.

¹⁷⁷ *Id.* at 33,109.

EXHIBIT C



**Comments of the
Renewable Fuels Association (RFA) on the
Proposed Rule for 2014-2016 Standards for the
Renewable Fuel Standard Program**

Docket ID: No. EPA-HQ-OAR-2015-0111

80 Fed. Reg. 33,100 (June 10, 2015).

Submitted July 27, 2015

comments, the Agency's proposed use of the general waiver is impermissible and contrary to the statute.

Table 1. EPA Proposed Volumes for Advanced and Total Renewable Fuel in Relation to Proposed Cellulosic Biofuel Volume Reductions (billion ethanol-equivalent gallons)

| | 2014 | 2015 | 2016 |
|--|---------------|---------------|---------------|
| Statutory Cellulosic Biofuel Volume Requirement | 1.750 | 3.000 | 4.250 |
| EPA Proposed Cellulosic Biofuel RVO | 0.033 | 0.106 | 0.206 |
| Amount of Proposed Cellulosic Biofuel Waiver | 1.717 | 2.894 | 4.044 |
| Statutory Advanced Biofuel Volume Requirement | 3.750 | 5.500 | 7.250 |
| EPA Proposed Advanced Biofuel RVO | 2.680 | 2.900 | 3.400 |
| Amount of Proposed Advanced Biofuel Waiver | 1.070 | 2.600 | 3.850 |
| Amount that Proposed Advanced Biofuel Waiver Exceeds (+) or Recedes (-) Proposed Cellulosic Waiver | -0.647 | -0.294 | -0.194 |
| Statutory Total Renewable Fuel Volume Requirement | 18.150 | 20.500 | 22.250 |
| EPA Proposed Total Renewable Fuel RVO | 15.930 | 16.300 | 17.400 |
| Amount of Proposed Total Renewable Fuel Waiver | 2.220 | 4.200 | 4.850 |
| Amount that Proposed Total Renewable Fuel Waiver Exceeds (+) or Recedes (-) Proposed Cellulosic Waiver | +0.503 | +1.306 | +0.806 |

c. Appropriate use of the cellulosic biofuel waiver alone would result in RVO volumes that “can reasonably be expected to be produced and consumed” and are consistent with statutory authorities

As described above, EPA has proposed advanced biofuel volume reductions that are *less* than the proposed cellulosic biofuel volume reductions, but total renewable fuel volume reductions that are *greater* than the proposed cellulosic reduction. EPA's imbalanced application of the cellulosic biofuel reductions to the advanced and total renewable fuel categories has led the Agency to believe it must also use a general waiver to arrive at volumes that “can reasonably be expected to be produced and consumed.”⁶

To the contrary, applying nothing more and nothing less than the full amount of the cellulosic biofuel waiver to both the advanced biofuel standard and the total renewable fuel standard would result in 2014-2016 RVOs that are “reasonably achievable” and consistent with statutory waiver authorities. Using only a cellulosic biofuel waiver—and fully carrying that waiver through both the advanced biofuel standard and the total renewable fuel standard—would obviate any need for invoking a general waiver and ensure EPA's implementation of the RFS remains faithful to the statutory text and Congressional intent of the program. Table 2 below shows how the cellulosic waiver can be fully carried through the advanced and total renewable fuel categories of the RFS.

⁶ 80 Fed. Reg. 33,114

It should be noted that fully carrying through the cellulosic waiver to both the advanced biofuel standard and total renewable fuel volume *does not* prohibit or discourage growth in the production and use of advanced biofuels beyond required levels. Any advanced biofuel production in excess of the finalized advanced biofuel standards would be available to meet requirements for undifferentiated renewable fuel. That is, the undifferentiated renewable fuel category of the RFS is not in any way “reserved” for corn starch ethanol, and is in fact open to any and all qualifying renewable fuels. Indeed, rather than discouraging development in advanced biofuels, implementing the RFS in this manner would demonstrate to potential advanced biofuel developers, lenders and investors that EPA is managing the program in a way that is faithful to statutory waiver authorities and consistent with Congressional intent.

Table 2. Advanced and Total Renewable Fuel Standards with Full Carry-through of Cellulosic Waiver (billion ethanol-equivalent gallons)

| | 2014 | 2015 | 2016 |
|--|--------------|--------------|--------------|
| Statutory Cellulosic Biofuel Volume Requirement | 1.750 | 3.000 | 4.250 |
| EPA Proposed Cellulosic Biofuel RVO | 0.033 | 0.106 | 0.206 |
| Amount of Proposed Cellulosic Biofuel Waiver | 1.717 | 2.894 | 4.044 |
| Statutory Advanced Biofuel Volume Requirement | 3.750 | 5.500 | 7.250 |
| Advanced Biofuel RVO with Full Cellulosic Waiver | 2.033 | 2.606 | 3.206 |
| Amount of Proposed Advanced Biofuel Waiver | 1.717 | 2.894 | 4.044 |
| Amount that Proposed Advanced Biofuel Waiver Exceeds (+) or Recedes (-) Proposed Cellulosic Waiver | 0.000 | 0.000 | 0.000 |
| Statutory Total Renewable Fuel Volume Requirement | 18.150 | 20.500 | 22.250 |
| Total Renewable Fuel RVO with Full Cellulosic Waiver | 16.433 | 17.606 | 18.206 |
| Amount of Proposed Total Renewable Fuel Waiver | 1.717 | 2.894 | 4.044 |
| Amount that Proposed Total Renewable Fuel Waiver Exceeds (+) or Recedes (-) Proposed Cellulosic Waiver | 0.000 | 0.000 | 0.000 |

When actual and expected volumes of renewable fuel production in 2014-2016 are considered along with carryover RIN stocks and the likelihood of modest growth in E15 and E85 sales, the advanced and total renewable fuel volumes shown in Table 2 above are undoubtedly “reasonably achievable.” Table 3 below shows one of many scenarios for complying with the volume requirements displayed in Table 2, which are based on fully carrying through the cellulosic biofuel waiver to both the advanced biofuel and total renewable fuel standards. Again, the ability to use surplus advanced biofuel (D5) and biomass-based diesel (D4) RINs for compliance with renewable fuel (D6) obligations adds significant flexibility and can help enable compliance under a variety of scenarios in which only the cellulosic waiver is exercised.

Table 3. Example of 2014-2016 Compliance Scenario Based on Full Carry-Through of the Cellulosic Biofuel Waiver (billion RINs)

| | 2014 | 2015 | 2016 |
|---|----------|----------|----------|
| BIOMASS-BASED DIESEL (D4) | | | |
| D4 RIN Carry-in Stocks ^[1] | 0.384 | 0.500 | 0.175 |
| D4 RIN Gross Generation ^[2] | 2.710 | 2.475 | 2.900 |
| D4 RIN Total Gross Supply | 3.094 | 2.975 | 3.075 |
| D4 RIN Retirements for Export/Non-compliance ^[2] | (0.195) | (0.140) | (0.125) |
| D4 RIN Net Total Available for Compliance | 2.899 | 2.835 | 2.950 |
| D4 RIN Obligation with Full Cellulosic Waiver Carry-Through | (2.000) | (2.500) | (2.800) |
| <i>D4 RINs Used for D6 Compliance</i> | (0.399) | (0.160) | 0.000 |
| D4 RIN Carry-out Stocks | 0.500 | 0.175 | 0.150 |
| ADVANCED BIOFUEL (D5) | | | |
| D5 RIN Carry-in Stocks ^[1] | 0.056 | 0.090 | 0.074 |
| D5 RIN Gross Generation ^[2] | 0.143 | 0.079 | 0.250 |
| D5 RIN Total Gross Supply | 0.199 | 0.169 | 0.324 |
| D5 RIN Retirements for Export/Non-compliance ^[2] | (0.009) | (0.005) | (0.010) |
| D5 RIN Net Total Available for Compliance | 0.190 | 0.164 | 0.314 |
| D5 RIN Obligation with Full Cellulosic Waiver Carry-Through | 0.000 | 0.000 | (0.200) |
| <i>D5 RINs Used for D6 Compliance</i> | (0.100) | (0.090) | (0.050) |
| D5 RIN Carry-out Stocks | 0.090 | 0.074 | 0.064 |
| CELLULOSIC BIOFUEL (D3) | | | |
| D3 RIN Carry-in Stocks | 0.000 | 0.000 | 0.003 |
| D3 RIN Gross Generation ^[2] | 0.033 | 0.110 | 0.225 |
| D3 RIN Total Gross Supply | 0.033 | 0.110 | 0.228 |
| D3 RIN Retirements for Export/Non-compliance | 0.000 | (0.001) | (0.002) |
| D3 RIN Net Total Available for Compliance | 0.033 | 0.109 | 0.226 |
| D3 RIN Obligation with Full Cellulosic Waiver Carry-Through | (0.033) | (0.106) | (0.206) |
| D3 RIN Carry-out Stocks | 0.000 | 0.003 | 0.020 |
| UNDIFFERENTIATED RENEWABLE FUEL (D6) | | | |
| D6 RIN Carry-in Stocks ^[1] | 1.435 | 1.149 | 0.474 |
| D6 RIN Gross Generation ^[2] | 14.354 | 14.700 | 15.500 |
| D6 RIN Total Gross Supply | 15.789 | 15.849 | 15.974 |
| D6 RIN Retirements for Export/Non-compliance ^[3] | (0.739) | (0.625) | (0.400) |
| D6 RIN Net Total Available for Compliance | 15.050 | 15.224 | 15.574 |
| D6 RIN Obligation with Full Cellulosic Waiver Carry-Through | 14.400 | 15.000 | 15.000 |
| <i>D5 RINs Used for D6 Compliance</i> | (0.100) | (0.090) | (0.050) |
| <i>D4 RINs Used for D6 Compliance</i> | (0.399) | (0.160) | (0.000) |
| <i>D6 RINs Used for D6 Compliance</i> | (13.901) | (14.750) | (14.950) |
| D6 RIN Carry-out Stocks | 1.149 | 0.474 | 0.624 |
| TOTAL (ALL D-CODES) | | | |
| Total Net RINs Available for Compliance | 18.172 | 18.332 | 19.064 |
| Total Renewable Fuel RVO w/Full Cell. Waiver Carry-Through | (16.433) | (17.606) | (18.206) |
| Total RIN Carry-out | 1.739 | 0.726 | 0.858 |

[1] Paulson, N. "2015 1st Quarter RIN Update." *farmdoc daily* (5):78, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, April 29, 2015

[2] EMTS for 2014; RFA estimates for 2015 (based on YTD EMTS) and 2016

[3] See Section IV(a) of these comments for explanation of 2014. 2015-2016 are RFA estimates

As demonstrated above, use of some carryover RINs and appropriate application of the cellulosic waiver alone can facilitate compliance with the RFS in a way that is consistent with statutory waiver authorities. Therefore, EPA should exercise only its cellulosic waiver authority in finalizing the 2014-2016 RVOs. EPA's proposed use of the general waiver is not only unnecessary to enable compliance, but it also runs afoul of the statutory waiver authorities granted by Congress.

III. The Proposed Rule's Methodology for Establishing RVOs Inappropriately Ignores the Availability of Carryover RINs and Other Provisions Designed to Provide Compliance Flexibility for Obligated Parties

In its assessment of "reasonably achievable" RVO levels, EPA is inexplicably proposing to ignore the availability of carryover RIN credits. The Agency states it has "...decided that the availability of carryover RINs should not preclude reducing the applicable volumes..."⁷ EPA's proposed exclusion of carryover RINs contradicts the Congressional intent behind the credit trading system, departs from the Agency's previous treatment of carryover RINs, and conflicts with past Court decisions supporting EPA's previous handling of carryover RINs. Because RINs represent physical gallons of renewable fuel that are, or were, part of the fuel supply, EPA's proposal to ignore carryover RINs essentially treats some gallons of previously produced renewable fuel as if they don't count, clearly undermining the intent of a program that was expressly designed to create a lasting growth market for renewable fuels.

a. The RIN credit program was designed to promote flexibility in complying with statutory RFS blending requirements

In establishing the RFS, Congress recognized the need to build flexibility into the program that would minimize the economic impacts of variations and anomalies in the marketplace, while still allowing obligated parties to comply with the program's annual requirements. Specifically, Congress created a credit trading system in CAA §211(o)(5) intended to add fungibility to the RFS program and allow compliance flexibility for obligated parties. Importantly, the program established by Congress allows trading, borrowing, and banking of the credits.

EPA was mindful of Congress' intended flexibility as it designed what would become the RFS program's RIN credit system: "One of our guiding principles in designing the RFS program was to *preserve the market mechanisms* that keep renewable fuel costs to a minimum."⁸ In finalizing the original RFS regulations, EPA established that RIN credits would have a two-year lifespan and that a portion of an obligated party's current-year RVO could be satisfied with RIN credits generated in the previous compliance year.⁹ Therefore, if renewable fuel production (and thus the availability of RINs) is reduced in a given compliance year because of an anomaly in the marketplace, obligated parties are still able to meet their obligations by turning in excess RINs

⁷ 80 Fed. Reg. 33,111

⁸ EPA, *Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program – Summary and Analysis of Comments*, at 5-24 (Apr. 2007) EPA420-R-07-006 available at <http://www.epa.gov/otaq/renewablefuels/420r07006.pdf> (emphasis added).

⁹ In practice, the life of some RINs can actually span 26 months because annual compliance reports for Year X are not due until February 28 of Year X+1.

EXHIBIT D

An official website of the United States government.



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This page lists recent EnviroFlash announcements that have been released to update stakeholders about EPA fuel programs.

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- 12/13/2019: [Information Regarding Implementation of RIN Market Reform \(RMR\)](#)
- 09/10/2019: [EPA Moderated Transaction System \(EMTS\) - XML Submissions](#)
- 08/21/2019: [EMTS v5.2.5 Patch Release Outage Scheduled for Friday, August 23, 2019](#)
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- 08/09/2019: [Notice of EPA's Intent to Update RFS Small Refinery Exemption Data](#)
- 06/25/2019: [PBR Rule Effective Date](#)
- 06/21/2019: [RFS Public Data for June - Delayed](#)

are listed below.

- Posting a list by registration ID of fuel registration requests submitted to EPA for review under the Part 80 fuels programs. This information will allow parties to monitor the status of their pending fuel registration requests. EPA intends to update this list online weekly.
- Providing several new compliance tools, including instructional videos and checklists, so that users have the information they need before submitting their registration requests to assemble complete registration packages.
- Implementing a new, more streamlined approach to processing registration requests that will allow EPA to focus its review on complete packages for faster review.

More information can be found on the EPA's website at [Part 80 Pending Registration List](#). Make sure to check back often as we plan to post additional compliance tools and materials.

RFS 2017 Annual Compliance deadline

January 12, 2018

This Enviroflash is a reminder of the Renewable Fuel Standard (RFS) program's 2017 Annual Compliance deadline of March 31, 2018, by which all renewable fuel exporters and obligated parties must submit their annual compliance reports.

We understand that there may be some uncertainty with respect to which RINs should be used for 2017 compliance in light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017), and the fact that the EPA has not yet indicated its intentions with respect to responding to the remand in that case. Although the EPA is still evaluating how to proceed in light of the Court's decision, we anticipate that, consistent with the Court's decision, any future action we may take on a past year's renewable fuel standards will take into account the retroactive nature of such future action. For example, without prejudging any future action, we note that we currently believe that it would be appropriate for the EPA to allow use of current-year RINs (including carryover-RINs) to satisfy further obligations, if any, for a past compliance year that may result from the ACE remand. Therefore we do not believe concerns regarding future EPA action on remand should lead parties to retain 2016 RINs that they would otherwise retire for 2017 compliance.

If you have questions, please contact Fuels Programs Support at support@epamts-support.com.

Announcing the Final User Fee Rule and Next e-Manifest Webinar

December 21, 2017

EXHIBIT E



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

Docket # EPA-HQ-OAR-2018-0167

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August 17, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁹⁰ *ACE*, 864 F.3d at 696-97.

²⁹¹ *Id.* at 708, 710, 712.

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

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

²⁹⁴ NPRM at 32,027.

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

IX. CONCLUSION

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

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

²⁹⁶ January 2018 EnviroFlash Announcement.

EXHIBIT F



**COMMENTS OF THE
RENEWABLE FUELS ASSOCIATION (RFA)**

IN REGARD TO

***RENEWABLE FUEL STANDARD PROGRAM: STANDARDS FOR 2019 AND BIOMASS-BASED DIESEL
VOLUME FOR 2020; PROPOSED RULE***

DOCKET ID No. EPA-HQ-OAR-2018-0167

83 FED. REG. 32,024 (JULY 10, 2017)

The Renewable Fuels Association (RFA) submits these comments in response to the U.S. Environmental Protection Agency's (EPA) proposed rule for 2019 renewable volume obligations (RVOs) under the Clean Air Act's (CAA) Renewable Fuel Standard (RFS). EPA, *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020; Proposed Rule* (83 Fed. Reg. 32,024; July 10, 2018).

I. EPA'S SMALL REFINERY EXEMPTIONS

RFA does not dispute that EPA has the authority to take the statutorily-mandated levels for cellulosic biofuels and reduce them through a waiver specifically authorized by statute for cellulosic biofuels. Nor does RFA dispute that the Agency has similar authority to take the statutorily-mandated levels for advanced and total renewable fuels and reduce both of them up to the amount of the cellulosic waiver, as EPA has done in the proposed 2019 Proposed Rule. RFA's central objection to the 2019 Proposed Rule is that EPA has rendered all of these levels illusory by failing to account for small refinery exemptions in a manner that ensures the statutory volumes will be met, as required by the Renewable Fuel Standard. *See* 42 U.S.C. § 7545(o)(2)(B)(i).

As in past years, EPA's applicable percentage obligation assumes that all refineries will participate in the program. But unlike past years, EPA has begun to let a substantial number of refineries out of their obligation without changing the manner in which it calculates RVOs. It has acknowledged granting 49 retroactive exemptions from the RFS program to small refineries in 2016 and 2017 without adjusting the applicable percentage obligation to shift those volume obligations to non-exempt obligated parties. The Agency's clandestine use of small refinery

projected to meet the definition of ‘small refinery’ in § 80.1401 for the year or years for which an exemption is sought.” 40 C.F.R. § 80.1441(e)(2)(iii).⁴ Indeed, according to the Merriam Webster Dictionary the definition of “extend” is to “to spread or stretch forth”, and not to break into discrete pieces, such as discrete blocks of time.

Accordingly, EPA has no authority to issue a small refinery exemption extension to any refinery that has not qualified for and obtained a small refinery exemption repeatedly since 2011 (or 2013 in the case of the small refinery exemptions extended by the Department of Energy study pursuant to Section 211(o)(9)). This would include the Wynnewood, Oklahoma Refinery currently owned by CVR Energy, Inc., which was denied a small refinery exemption request. EPA simply cannot extend that which was previously denied.

9. *EPA Has No Excuse for Failing to Restore the RINs Mandated by the D.C. Circuit’s Decision in ACEI v. EPA.*

In the proposed rule for 2019, EPA acknowledges the 2017 decision by the D.C. Court of Appeals in *ACEI v. EPA* that rejected EPA’s attempt to expand its general waiver authority through an improper interpretation of the phrase “inadequate domestic supply” of renewable fuel. *ACEI v. EPA*, 864 F.3d 691 (2017). Although the Court vacated the rule and remanded it to EPA to conform to the Court’s decision, the Agency has inexplicably failed to do so. EPA recognizes that there is a “compelling need to respond to the remand” “expeditiously”, but it states that it prefers to address the Court’s decision in a subsequent rulemaking and refuses to even consider comments in the scope of the 2019 rulemaking. 83 Fed. Reg. at 32,027. Yet the D.C. Circuit’s mandate could not have been more clear or simple—restore the 500 million gallons of RINs that EPA had inappropriately waived in 2016.⁵

⁴ Although the Fourth Circuit recently allowed a small refinery exemption to be extended after EPA had previously denied a similar extension, the court did not address this issue, which was not raised by the parties, and instead was decided on the issue of whether the company suffered a disproportionate economic hardship. *See Ergon-West Virginia, Inc. v. EPA*, Civ. No. 17-1839 (4th Cir. 2018).

⁵ The 500 million RINs from the *ACEI* mandate are in addition to the roughly 330 million RINs that EPA agreed to not require Philadelphia Energy Systems to retire for 2017, as a result of a bankruptcy settlement. Taken together with the 2.25 billion RINs that were not required by small refineries in 2016

The only remaining plausible question for EPA following the court's decision is over whether EPA should require obligated parties to restore those RINs in 2019 alone or in 2019 and 2020—a question on which EPA should have solicited comment. There was no reason to defer action on responding to the Court's mandate, unless, of course, EPA has no intention of complying with the mandate. EPA was required to ensure that the 2019 rule included, in one rulemaking, all factors affecting the RVO for that year. *See* 42 U.S.C. § 7545(o)(2)(A)(i), (o)(3)(B).

EPA needs to follow through with a proposal immediately so that it can be included in the final rule for 2019.

10. The Interagency Review of the 2019 Proposed Rule Recognized the Propriety of Addressing the Small Refinery Exemptions and the D.C. Circuit's 2017 Decision in ACEI v EPA.

An examination of documents related to the White House Office of Management and Budget's inter-agency review of the 2019 Proposed Rule reveals that EPA was actually planning to project small refinery exemptions and reallocate expected 2019 exempted volumes to ensure achievement of statutory RFS requirements.⁶ Days before the proposal was publicly released, however, the reallocation measures were inexplicably stricken from the proposal. These inter-agency deliberations confirm that EPA remains well aware that restoring volumes from small refinery exemptions is the only defensible approach to finalizing the 2019 RVO.

The following is a timeline of key events based on inter-agency review documents:

- On May 25, 2018, the first round of comments from reviewers at other agencies was circulated.
 - One reviewer wrote, "...we suggest that EPA include an 'expected' amount of [small refiner] waivers for the 2019 standards.... In that way, the expected waivers

and 2017, EPA's actions have effectively reduced the RFS requirements by more than 3.08 billion RINs for 2016 and 2017.

⁶ See U.S. EPA. "Documentation of OM Review Under Executive Order 12866." Docket ID No. EPA-HQ-OAR-2018-0167-0103.

EXHIBIT G



COMMENTS OF THE NATIONAL BIODIESEL BOARD

ON

**RENEWABLE FUEL STANDARD PROGRAM:
STANDARDS FOR 2019 AND BIOMASS-BASED DIESEL VOLUME FOR 2020**

Proposed Rule, 83 Fed. Reg. 32,024 (July 10, 2018)
Dkt No. EPA-HQ-OAR-2018-0167

waiver authority, 80 Fed. Reg. at 77,439, EPA must make up for that improper 500-million-gallon shortfall.

The most obvious way for EPA to comply with the D.C. Circuit's holding in *ACE* would be to add 500 million gallons to the total renewable fuel volume in 2019. In the proposed rule, EPA has instead specifically declined to comply with *ACE* in a timely manner, suggesting instead that it will "respond to the court's remand in a separate process from this annual rulemaking." 83 Fed. Reg. at 32,027. But EPA provides no explanation for *why* it cannot address the D.C. Circuit's ruling now. In fact, addressing the ruling in conjunction with promulgating the 2019 renewable fuel standards would be an ideal time to address the issue because it would provide an additional signal to biofuels producers and others in the market to increase production.

EPA suggests that it is addressing "a number of issues" associated with addressing the *ACE* ruling. *Id.* But tellingly, EPA has already found a way to address the 10th Circuit's ruling in *Sinclair* that benefitted a refinery, even though that case was decided *after ACE*. The issues with EPA's remedy for that case are much more significant than any alleged issues with complying with *ACE*—as discussed above, EPA has no authority to create new RINs for Sinclair and other refineries in 2018 that are not associated with generation of renewable fuel.

Indeed, there is no good reason why EPA cannot make up for the 500 million gallons it left out of the 2016 total renewable fuel volume in 2019. As discussed above, the D.C. Circuit has repeatedly upheld EPA's ability to set volumes at a later date when it initially fails to set the volume in time, and EPA can likewise make up for a volume it has initially set too low. *See NPRA*, 630 F.3d at 152; *ACE*, 864 F.3d at 719. Nor is there any reason that the renewable fuel industry would be unable to produce 500 million additional gallons. Concerns about the purported ethanol blendwall can easily be overcome with use of higher ethanol blends. And to the extent there is any concern about the ability of ethanol to fill higher volumes, BBD could easily account for additional total renewable fuel volumes because there is *no* BBD blendwall. BBD can be used in engines in any blend up to B100, 77 Fed. Reg. at 59,466, and there are no capacity, feedstock, or structural constraints to increased BBD production.

V. EPA's Methodology for Setting the Advanced Biofuel Volume Included Inaccurate Assumptions.

The proposed rule sets the advanced biofuel volume based on EPA's assessment of the "attainable" level of advanced biofuel production. 83 Fed. Reg. at 32,047. The proposed rule's methodology for setting the advanced biofuel volume is thus more appropriate than EPA's process in its 2018 rule, which simply lowered the advanced biofuel volume as much as possible in order to reduce costs. 82 Fed. Reg. at 58,513. Nonetheless, there are still two significant issues with how EPA set the advanced biofuel volume this year: (1) it did not examine whether a volume higher than 4.88 billion gallons was attainable; and (2) it made inaccurate assumptions

EXHIBIT H



August 17, 2018

Acting Administrator Andrew Wheeler
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

RE: Docket ID EPA-HQ-OAR-2018-0167

Dear Acting Administrator Wheeler:

On behalf of more than 40,000 dues-paying corn farmers nationwide and more than 300,000 corn growers who contribute to corn checkoff programs in their states, the National Corn Growers Association (NCGA) appreciates the opportunity to comment on the proposed rule for the 2019 volume standards under the Renewable Fuel Standard (RFS) program.

In the 11 years since Congress expanded the RFS, corn farmers have responded to the growing market for ethanol by increasing production efficiency to help meet the RFS goals of moving the United States toward greater energy independence and security and boosting production of clean, renewable fuels that benefit consumers.

NCGA appreciates that the Environmental Protection Agency (EPA) proposed an implied volume of 15 billion gallons for conventional renewable fuel, consistent with the volume requirement intended by Congress, as well as proposed growth in the cellulosic, advanced and total renewable fuel volumes.

The RFS requires an increasing volume of biofuels be blended into the nation's transportation fuel supply annually, and EPA's proposed rule, on the surface, follows the law's intent. However, because of EPA's failure to account for the extensive retroactive exemptions granted to 48 refineries for 2016 and 2017 obligations and failure to estimate 2019 exemptions, we have no confidence in the volumes EPA proposes. By not accounting for the impact of 2.25 billion ethanol-equivalent gallons in retroactive exemptions, or for future exemptions, EPA renders the proposed volumes meaningless.

We ask EPA to maintain the proposed conventional biofuel requirement in the final rule, as well as the growth in cellulosic, advanced and total renewable fuel volumes. To uphold the full clean air, cost-savings, energy independence and rural economic benefits consumers and farmers receive from the RFS, however, EPA must also use the 2019 volume rule to make, and keep, the RFS whole. NCGA's detailed comments on the proposed rule follow.

Sincerely,

Kevin Skunes, President
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farmers are producing larger crops, using less land and fewer inputs per bushel. In 2007, crop yields averaged 150.7 bushels per acre; the 2017 average is 176.6 bushels.

The RFS also requires EPA to assess whether new cropland has been brought into production since 2007 to support biofuel production. EPA's 2007 baseline for agriculture land is 402 million acres. In 2017, EPA concluded that U.S. agriculture land reached 376 million acres and did not exceed the 2007 baseline.²⁰ Based on EPA's assessment, the RFS is not causing aggregate land use change.

EPA's Triennial Report recommends continued adoption of conservation practices to improve water quality, soil quality and other factors, and EPA should ensure the agency is using the most recent information on conservation practices adoption, rather than 2010 data, to inform EPA's assessment of environmental impacts. Corn farmers are proud of our leadership in expanding conservation and best management practices. For example, NCGA's Soil Health Partnership engages a growing network of corn growers representing more than 140 farms in 14 states. These farmers are following established research protocols to measure the environmental and economic benefits of soil health strategies. Through data collection and analysis, the partnership is producing data-driven recommendations that farmers can use to improve sustainability and productivity, resulting in more carbon sequestration, erosion protection, drought tolerance and nutrient storage, among other benefits.

EPA's Triennial Report does not provide a comprehensive assessment of biofuels' environmental impact benefits. Unfortunately, this incomplete analysis is being erroneously touted by some to conclude the RFS is causing significant environmental harm. By issuing a report that only tells part of the story and draws conclusions based on limited data from past years, EPA's report does not fully capture the environmental benefits of biofuels. As such, as EPA evaluates use of general waiver authority, NCGA believes a comparative assessment to other transportation fuels must be part of that process.

Because the Circuit Court decision clarified "inadequate domestic supply" waiver authority and because the RFS is causing neither severe economic nor severe environmental harm, NCGA finds no justification for EPA to use its general waiver authority to reduce required volumes of renewable fuel in a final rule.

EPA Response to *Americans for Clean Energy v. EPA* Remand

In the proposed rule, EPA states its intent to use a separate rulemaking to address the 2017 decision from the United States Court of Appeals for the District of Columbia Circuit in *Americans for Clean Energy v. EPA*. The DC Circuit Court found that EPA improperly used the RFS general waiver authority in setting the 2014-2016 volume requirements, specifically vacating the 2016 volume requirements and remanding that rule to EPA.

²⁰ 82 Federal Register 58491 (December 12, 2017)

EPA has had a full year to comply with the Court's remand and address the 500 million gallons improperly waived. NCGA is extremely disappointed with EPA's failure to address the remand ordered by the Court in its 2019 volume rule. Addressing the remand in the 2019 volume rule would provide certainty and notice to obligated parties. A projected carryover RIN bank of 15 percent of the volumes proposed in 2019, or 3 billion RINs, provides a sufficient buffer to address the 500 million RINs affected by the remand. NCGA urges EPA to promptly adhere to the Court's remand and restore these gallons.

Effects of Carryover RIN Bank Size

As EPA outlines, the small refinery exemptions and other EPA actions have directly increased the number of carryover RINs that will likely be available for compliance with the 2019 standards.²¹ In the past year, the number of carryover RINs has increased by nearly 1 billion, from an estimated 2.2 billion when the 2018 rule was finalized to 3.06 billion now. Total carryover RINs are now nearly 15 percent of the total renewable fuel volume requirement that EPA is proposing, nearing the 20 percent maximum limit on carryover RINs. Even though advanced biofuel carryover RINs have declined, the volume is nearly 14 percent of the advanced volume proposed by EPA.

NCGA believes the increase in carryover RINs blunts the effectiveness of the RIN market as a mechanism to drive biofuels blending and, ultimately, to support the intent of the RFS to increase the volume of renewable fuel blended into transportation fuel. The current high level of carryover RINs means 3 billion gallons of the 2019 volume requirement could be met with these RINs rather than through actual biofuels blending. Should EPA continue granting small refinery exemptions, the carryover RIN bank could easily grow beyond the maximum of 20 percent of the annual volume obligation. Additional exempted volumes could result in carryover RINs that expire without being used.

The carryover RIN bank, now at its largest historical level, underlines the importance of EPA's timeliness in addressing the DC Circuit Court's remand of the 2016 volume rule and reallocation of small refinery exemptions now, while still providing a buffer for compliance flexibility and to meet uncertainties in the market.

RIN Market Operations

EPA discusses possible proposals to change RIN market operations, including changes in the type and frequency of RIN-related information released, as well as a future proposed rule addressing the length of time RINs can be held and/or allowed RIN market participants.

²¹ 83 Federal Register 32030 (July 10, 2018)

EXHIBIT I

MEMORANDUM

Date: November 7, 2018

Subject: Carryover RIN Bank Calculations for 2019 Final Rule

From: Nick Parsons, Office of Transportation and Air Quality, U.S. Environmental Protection Agency

To: Docket No. EPA-HQ-OAR-2018-0167

I. Introduction

The purpose of this memorandum is to detail the carryover RIN bank calculations performed by EPA in the context of developing the final 2019 RFS standards. Section II calculates the number of available 2017 carryover RINs for compliance with the 2018 RFS standards. Section III estimates the number of carryover RINs that may be available for compliance with the final 2019 RFS standards. Section IV analyzes the size of the carryover RIN bank relative to the annual volume requirements for each compliance year beginning with 2013. Appendix A details revised calculations of the number of available carryover RINs for previous compliance years. Appendix B summarizes EMTS data on RIN retirements and errors.

II. Number of Available 2017 Carryover RINs

In order to calculate the number of 2017 carryover RINs available for compliance with the 2018 standards, we began with the 2017 RFS compliance year data in Table II-1 below. From this data, we calculated that approximately 18.50 billion total RINs were retired for compliance in the 2017 compliance year.¹ Of this total, approximately 15.64 billion 2017 RINs and 2.86 billion 2016 carryover RINs were used.

¹ Includes RINs retired in the 2017 compliance year to satisfy 2016 compliance deficits.

Table IV-2: Carryover RINs Compared to Actual Total Renewable Fuel Volume Obligation

| Compliance Year | Reported Total Renewable Fuel Volume Obligation^a | Total Renewable Fuel Volume Compliance Deficit^b | Actual Total Renewable Fuel Volume Obligation^c | Actual Carryover RINs Available^d | Carryover RINs as % of Actual Volume Obligation |
|------------------------|--|---|--|--|--|
| 2013 | 16,847,826,477 | 68,855,617 | 16,916,682,094 | 2,471,227,385 | 14.6% |
| 2014 | 16,165,733,190 | 141,478,021 | 16,307,211,211 | 1,583,274,541 | 9.7% |
| 2015 | 16,985,857,027 | 10,419,624 | 16,996,276,651 | 1,694,851,738 | 10.0% |
| 2016 | 17,650,331,535 | 390,514,447 | 18,040,845,982 | 1,645,306,300 | 9.1% |
| 2017 | 18,175,981,173 | 681,283,823 | 18,857,264,996 | 2,480,419,582 | 13.2% |
| 2018 | n/a | n/a | 19,290,000,000 | 2,588,722,048 | 13.4% |

^a Obligation data current as of October 10, 2018, and compiled from Table 2 at <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and>. Data excludes exporter RVOs and deficits from previous compliance year.

^b Compliance deficit data current as of October 10, 2018, and compiled from Table 7 at <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and>.

^c Actual Total Renewable Fuel Obligation = Reported Total Renewable Fuel Volume Obligation + Total Renewable Fuel Volume Compliance Deficit. Obligation for 2018 is the projected volume in Table I-1 of the 2018 final rule (see 82 FR 58486, Dec. 12, 2017)).

^d Carryover RIN calculations for 2013-2016 are based on revised compliance data. See Appendix A for more detailed calculations.

under Consent Decree and Environmental Settlement Agreement) (Bankr. D. Del.). PESRM has emerged from bankruptcy and EPA does not anticipate further relief being granted under the RFS program.