

August 17, 2018

Attention: Docket ID No. EPA-HQ-OAR-2018-0167

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

VIA EMAIL

a-and-r-Docket@epa.gov.

Re: Comments 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)

Dear Acting Administrator Wheeler,

The Renewable Fuels Association (RFA) appreciates the opportunity to submit 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).

RFA is the leading trade association for America's ethanol industry. Its mission is to advance the development, production, and use of fuel ethanol by strengthening America's ethanol industry and raising awareness about the benefits of renewable fuels. Founded in 1981, RFA serves as the premier forum for industry leaders and supporters to discuss ethanol policy, regulation, and technical issues. RFA's 300-plus members are working to help America become cleaner, safer, more energy secure, and economically vibrant.

While RFA supports the ostensible proposed volume of 19.88 billion gallons of total renewable fuel and the implied volume of 15 billion gallons of conventional renewable fuel, we are greatly concerned that continued abuse of small refinery exemptions will render the proposed volumes meaningless. Issuing small refiner exemptions after the RVO rule is finalized—as EPA did for the 2016 and 2017 RVO

rules and appears poised to do for the 2018 RVO—has the practical impact of reducing the actual required blending volumes to levels below those specified in the final rule. Thus, we do not consider the volumes that appear in the proposed rule to be authentic, meaning the preamble’s analyses of the impacts of the 2019 proposed volumes (e.g., “illustrative costs,” “consideration of statutory factors” regarding biomass-based diesel volumes, etc.) are flawed and indefensible. Accordingly, it is difficult for stakeholders to provide meaningful input on proposed RVOs that are broadly recognized as artificial.

EPA can avoid this problem and ensure that the RVOs are administered in a manner that is consistent with the statutory purpose of the program simply by accounting for small refiner exemptions prospectively when it calculates the RVO percentage. Indeed, the formula used by EPA for calculating the annual RVO percentage has always included a variable for “*projected* volume[s]” of gasoline and diesel for exempt small refineries, and EPA has in fact included non-zero values for these variables in past RVO rules. Failing to include a non-zero projection of exempted gasoline and diesel from small refineries—especially when EPA knows it will grant such exemptions—is a flagrant abuse of the Agency’s waiver authorities under the program.

EPA itself has acknowledged it has the authority—and the obligation—to prospectively account for small refiner exemptions. In a draft of the proposed rule that was submitted to the White House Office of Management and Budget for inter-agency review, EPA properly included projections of exempted volumes of gasoline and diesel from small refineries. The effect of including these exemptions in the RVO calculation is to increase the RVO percentage for remaining obligated parties, ensuring that the statutorily specified volumes of renewable fuel are in fact blended with gasoline and diesel. However, the administrative record shows that just days before the proposed rule was made public, EPA inexplicably deleted the provisions that would have effectively reallocated the projected small refiner exemptions.

RFA’s strongly held position is that EPA’s final rule must account for projected small refinery exemptions in calculating the 2019 RVO percentages. The Agency has already shown it knows how to do so and has explained why accounting for projected exemptions best meets the statutory intent of the RFS.

Finally, EPA has no excuse for failing to comply with the D.C. Circuit Court’s mandate to restore the 500 million gallons of conventional renewable fuel that were missing from the 2016 RVO. RFA recommends that EPA include the 500 million gallons, as required by the Court decision in *ACEI v. EPA*, in the 2019 RVO.

For these reasons, and for those set forth more fully in the attached comments, we feel strongly that to ensure that the 2019 RVO is administered in a manner that is consistent with the statutory purpose of the program, the Agency must account for any

expected small refinery exemptions. Thank you again for the opportunity to provide comments on this important matter, and we look forward to working with EPA to ensure goals of the RFS are achieved.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Dinneen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bob Dinneen,
President & CEO

**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

exemptions and its refusal to account for them reveals that its proposed RVOs for 2019 are neither reliable nor trustworthy. However EPA justifies its reduction of cellulosic and advanced volumes, EPA’s ostrich-like approach to retroactive small refinery exemptions all but ensures—in direct contravention of the statute—that the required volumes for 2019 will not be met.

1. Background

In Section 211(o)(9) of the Clean Air Act, Congress provided all small refineries with a statutory exemption from the RFS mandates from 2007 through 2010. 42 U.S.C. § 7545(o)(9)(A). To obtain the exemption, an eligible refinery had to submit a letter by July 1, 2010, verifying that its annual average aggregate daily crude oil throughput for 2006 was no more than 75,000 barrels per day. 40 C.F.R. § 80.1441. Congress specifically characterized the exemption as “temporary,” and provided only two ways for EPA to “extend” it: (1) by authorizing the Department of Energy to undertake a study for EPA to determine whether compliance with the RFS mandates “would impose a disproportionate economic hardship on small refineries”, *id.* at § 7545(o)(9)(A)(ii); and (2) by allowing small refineries to petition EPA for an “extension” of the temporary exemption if they demonstrate “disproportionate economic hardship.” *Id.* at § 7545(o)(9)(B)(i).

The DOE study resulted in a recommendation that the original, temporary exemption for 13 small refineries should be extended two years. *See* Department of Energy, Small Refinery Exemption Study (Mar. 2011), available at <https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf>. And until last year, the EPA extensions of the exemption were few and far between, consistent with Congressional intent that small refinery exemptions would be a “temporary” measure for a limited subset of refineries that could demonstrate their compliance obligation under the RFS would cause “disproportionate economic hardship.” 42 U.S.C. § 7545(o)(9). Small refineries seeking an additional extension have to show that they: (a) originally obtained an exemption by verifying to EPA by July 2010 that they met the definition of a small refinery; (b) met the definition of “small refinery” in §80.1401 for the most recent full calendar year prior to seeking an extension and are projected to meet the definition of “small refinery” in §80.1401 for the year or years for which an exemption is sought; and (c) submitted an application specifying the factors that demonstrate a “disproportionate economic hardship” from RFS obligations. *See id.*; *see also* 40 C.F.R. 80.1441. Despite these limitations,

EPA has begun awarding an unprecedented number of small refinery exemptions irrespective of those requirements, including 20 for 2016 and at least 29 for 2017.¹ *See* Letter from William L. Wehrum to Charles E. Grassley (July 12, 2018) (“Wehrum Letter”); *see also* Testimony of Scott Pruitt before House Energy and Commerce Committee (Apr. 26, 2018).

2. *EPA’s Granting of Small Refinery Exemptions Renders the Proposed 2019 RVOs Meaningless.*

EPA’s recent expansion of small-refinery exemptions awarded after EPA promulgated standards has resulted in enormous cuts to the renewable volumes previously finalized by EPA. There were 2.25 billion fewer Renewable Identification Numbers (RINs) required in 2016 and 2017 because of these exemptions—1.46 billion fewer in 2017 and 790 million fewer in 2016. *See* 83 Fed. Reg. 32,024, 32,029 (Jul. 10, 2019).

EPA’s use of retroactive small refinery exemptions has also resulted in a significant increase in carryover RINs available to meet obligations. This likely will further reduce volumes of renewable fuel actually blended in 2019, as obligated parties could draw down from the bank of carryover RINs rather than choosing to blend physical renewable fuels. Taken together, EPA’s exemptions have sabotaged the demand for renewable fuels, causing the price of RINs to plummet from an average of 70 cents in 2017 to 18 cents in June of 2018—a five-year low.² RIN prices in November 2017—a month in which the ethanol blend rate achieved a new record of 10.59 percent—were above 90 cents, but fell to under 40 cents in mid-March as news of the small refiner exemptions became public. Even with RINs trading this cheaply, small refineries continue to feign a “disproportionate economic hardship” from complying with the RFS. Worse yet, EPA has been buying it, knowing it not to be the case.

¹ One oil refining executive said, “The EPA was handing out those exemptions like trick or treat candy.” *See* Osborne, James (*Houston Chronicle*). “With flood of EPA waivers, refineries find way around ethanol mandate.” April 4, 2018. <https://www.houstonchronicle.com/business/article/With-flood-of-EPA-waivers-refineries-find-way-12805971.php>

² *See* Reuters. “Biofuel credits drop ahead of expected White House policy announcement.” June 4, 2018. <https://www.reuters.com/article/us-usa-biofuels/biofuel-credits-drop-ahead-of-expected-white-house-policy-announcement-idUSKCN1J01VD?rpc=401&>

Daily Ethanol (D6) RIN Price
(source: Oil Price Information Service)



The 2019 proposed rule does not even attempt to make up any of the substantial renewable volumes lost to small refinery exemptions for 2016 and 2017, nor does it account for renewable volumes that may be further reduced by EPA’s continued granting of small refinery exemptions in 2018. Such regulations are patently misleading because EPA knows the effective regulatory obligation will be something completely different.

EPA’s granting of retrospective small refinery exemption extensions without accounting for these lost volumes is also inapposite to Congressional intent, as EPA is failing to *ensure* the applicable volumes of renewable fuel established by statute are met. 42 U.S.C. § 7545(o)(2)(A)(i), (o)(3)(B)(i); *ACEI v. EPA*, 864 F.3d at 698 (citing *Monroe Energy*, 750 F.3d at 920). Ensuring compliance with those levels is between EPA and the obligated parties and should not be at the expense of biofuel suppliers. *See ACEI* 864 F.3d at 699 (“Once EPA issues a rule informing obligated parties (refiners and importers) of their renewable fuel obligations, it is up to the obligated parties to comply with the statute.”). Ensuring that the statutory volumes are met is also consistent with what EPA has consistently recognized as the “fundamental objective” of the Renewable Fuel Standard: “To increase the use of renewable fuels in the U.S. transportation

system every year through at least 2022.” *Id.* at 700 (internal quotations omitted), 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.”).

3. *EPA’s Failure to Account for Small Refinery Exemptions in the Proposed Rule Results in Flawed RVO Calculations.*

A key part of EPA’s formula used to calculate the yearly percentage standards is the inclusion of an estimate for the amount of transportation fuel produced by exempted small refineries. *See* 40 C.F.R. § 1407. The formula specifically requires EPA to project and exclude the gallons of gasoline and diesel attributable to exempted small refineries, thereby shifting the renewable fuel obligations to larger refineries so that the Congressional intent for the RFS mandate will still be met. 75 Fed. Reg. 76,790, 76,805 (Dec. 9, 2010). *See, e.g.,* 75 Fed. Reg. 14,716-14,717 (“Thus we have excluded [the exempt small refiners’] gasoline and diesel volumes from the overall nonrenewable gasoline and diesel volumes used to determine the applicable percentages until 2011.”); 77 Fed. Reg. 1,319, 1,324 (Jan. 9, 2012) (EPA “has also adjusted the final 2012 percentage standards to reflect the exemption of these small refineries from being RFS obligated parties in 2012.”). The specific formula used by EPA to determine the annual Renewable Volume Obligations (RVOs) explicitly includes variables representing “[t]he amount of gasoline [and diesel fuel] *projected* to be produced by exempt small refineries and small refiners...”

The formula does not, however, account for small refinery exemptions granted *retroactively* after EPA has finalized a given year’s RVOs. This practice seemed less problematic until recently. Indeed, RFA had little reason to believe that EPA was granting numerous retroactive exemptions, thereby systematically skewing the volumes of renewable fuel required nationally. But over the last year, EPA has overseen a dramatic increase in small refinery exemption extensions, all of which seem to have been granted after EPA’s final RVO rules. Worse yet, EPA has taken the position that it will not account for exemptions granted after the final rule. The net effect of these developments is a dramatic reduction in the actual total renewable fuel obligation, and a complete abdication of EPA’s statutory duty to ensure the statutory volumes are actually met by obligated parties.

If the gasoline and diesel volumes attributable to exempt small refineries in 2019 turn out to be zero, as suggested by EPA, the actual RVO, if finalized as in the proposed rule, would turn out to be approximately 19.88 billion gallons. But there is no basis for projecting zero volumes for exempt small refineries, at least based on EPA's dramatic recent increase in awarding such exemption extensions. Just look at 2017. On the contrary, EPA has already acknowledged that 1.46 billion RINs were not required to be retired for compliance in 2017 because of these exemptions, *see* 83 Fed. Reg. at 32,029. Although the total renewable fuel volume obligation for 2017 was 19.28 billion, a more honest prediction of the actual obligation would be 17.82 billion gallons—a volume 7.5% less than the purported required amount.

As long as EPA envisions continuing to grant a significant number of retroactive small refinery exemptions after the RVOs are finalized, it is arbitrary and capricious for EPA to propose a rule that refuses to adjust percentage standards to account for such retroactive exemption extensions. EPA could propose a rule, based on exemption extensions granted in the last two or three years, with some estimate of what those small refinery volumes might be in 2019. So, too, could EPA retire RINs to address improperly granted small refinery exemptions, just as EPA *created* new RINs (without creating new physical volumes of renewable fuels) to address what it considered to be improperly withheld small refinery exemptions to Holly Frontier and Sinclair Oil.³ And if information reasonably suggests that the next year's aggregate volumes will fall short, EPA has to account for that risk when promulgating renewable volume obligations standards. Although EPA has some discretion to determine how to ensure the requirements of Section 211(o)(2) are met, its duty is nondiscretionary. EPA must do *something* to account for the volumetric shortfalls resulting from the exemptions.

4. *The Agency Must Reconsider Its Annual Standard Equations to Account for the Unprecedented Increase in Retroactive Small Refinery Exemptions.*

The reasons EPA previously provided for not taking small refinery exemptions into account are no longer applicable because the Agency's recent actions belie its rationale. When

³ See Renshaw, Jarrett and Chris Prentice (*Reuters*). "Exclusive: U.S. EPA grants refiners biofuel credits to remedy Obama-era waiver denials." May 31, 2018. <https://www.reuters.com/article/us-usa-biofuels-waivers-exclusive/exclusive-us-epa-grants-refiners-biofuel-credits-to-remedy-obama-era-waiver-denials-idUSKCN1IW1DW>

adopting the annual standards in 2010, EPA assumed that it would grant very few extensions of small refinery hardship exemptions in any given year, and that the overall number would decline steadily over time until no more extensions would be granted—and therefore assumed that the net effect of the exemptions would be *de minimis* at first and eventually non-existent. In this earlier era when small refinery exemptions were rare, EPA’s failure to account for retroactive exemptions may have been a justifiable administrative convenience. But in the face of its recently and greatly expanded use of retroactive small refinery exemptions, EPA’s continued failure to include exemptions in the annual standard equations is now arbitrary and capricious.

EPA previously said that it would not adjust the percentage calculation for the current calendar year based on retroactive exemptions because it believed that “the Act is best interpreted to require issuance of a single annual standard in November that is applicable in the following calendar year, thereby providing advance notice and certainty to obligated parties regarding their regulatory requirements.” 77 Fed. Reg. 1,340. Similarly, EPA stated that the retroactive exemptions granted for the previous year would not be “made up” the following year because “there is no provision for changing the percentage standards once they are set,” and because Congress did not require that the volume requirements be “precisely met” given that the RVOs are defined to be a percentage of *projected* transportation fuel use in the next year. 77 Fed. Reg. 1,340; *see also* 75 Fed. Reg. 76,780. And as recently as September 2016, EPA defended the Annual Standard Equations as striking the right balance between regulatory certainty and its own statutory duty to “achieve the CAA’s objectives of ensuring that applicable volumes of renewable fuel are used in the transportation sector.” *See* Response to Petitions of the American Petroleum Institute, American Fuel and Petrochemical Manufacturers, and Monroe Energy LLC for Reconsideration of Portions of the 2013 Renewable Fuel Standards Annual Rule, at 14 (Sept. 2016).

Retroactively changing the RVO percentages once they have been set is not the only way to make up retroactive exemption volumes, however. Instead, EPA could account for the exemptions by projecting them in the RVO formula, as described above. Alternatively, EPA could account for the exemptions in the *next year’s* RVO rulemaking. EPA has used a similar approach in other circumstances. *See Nat. Petrochemical & Refiners Ass’n v. EPA*, 630 F.3d 145, 157-58 (D.C. Cir. 2010) (“We therefore hold that the EISA authorized EPA to apply in 2010 the volume requirement for biomass-based diesel that Congress established for 2009”); *Monroe Energy, LLC*

v. EPA, 750 F.3d 909, 919-921 (D.C. Cir. 2014). That would also provide ample notice and regulatory certainty to the industry and obligated parties as they prepare to make up exempt volumes. In contrast, EPA’s new practice of granting multiple exemptions after an annual rule is finalized threatens to substantially disrupt the investment-backed expectations of renewable-fuel producers, feedstock suppliers, obligated parties, and other participants in the transportation fuel industry by suddenly and unexpectedly depreciating the value of RINs. And even though Congress tolerated some gap between the final RVOs and the amount of renewable fuel eventually used, there is a material difference between using best available projections to estimate gasoline and diesel use—which could equally overestimate or underestimate actual use—and structurally excluding retroactive small refinery exemptions from the Annual Standard Equations, which will *always* result in a *reduction in* required renewable-fuel usage. The latter violates EPA’s statutory mandate. 42 U.S.C. §§ 7545(o)(2)(A)(i), (o)(3)(B)(i).

5. *EPA’s Endorsement of a Bloated Carryover RIN Bank Only Exacerbates the Demand Destruction Inherent in its Small Refinery Exemptions.*

Although EPA appears unwilling to account for exempt small refinery volumes in setting the 2019 RVOs, it apparently considers it acceptable to use these exempt volumes to further inflate the bank of carryover RINs. EPA estimates that there are now 3.06 billion total carryover RINs available, an increase of 840 million RINs from the previous estimate of 2.22 billion carryover RINs in the 2018 final rule. 83 Fed. Reg. at 32,029. This means roughly 3 billion gallons of the proposed renewable fuel volume requirement—or 15 percent—could be met with carryover RINs rather than actual renewable fuel blending in 2019.

EPA further estimates that the 3.06 billion in carryover RINs is due, in part, to 1.46 billion RINs that were not required to be retired by small refineries granted hardship exemptions in 2017 and 790 million unretired RINs from exempt refineries for the 2016 compliance year. Consequently, over the past two years small refineries have enjoyed a windfall of 2.25 billion RINs that otherwise would have been retired to comply with RFS obligations. The end result for 2017 was that the final 15-billion-gallon conventional renewable fuel mandate was reduced to 13.887 billion gallons through the impact of small refinery exemptions.

If EPA continues its present policy of not reallocating small refinery exemptions, we expect the effective RVOs in both 2018 and 2019 will be similar to those in 2017. And assuming that EPA exempts approximately 14-15 billion gallons of gasoline and diesel from small refineries—consistent with the level of small refinery exemptions awarded by EPA in 2017—the reductions in RVOs for all categories would total approximately 1.6 billion gallons—a far cry from ensuring the annual volumes are actually met.

So long as the amount of carryover RINs does not exceed the 20 percent statutory cap, EPA seems to think the statute supports any increase in the number of carryover RINs. *See* 83 Fed. Reg. at 32,030. But such a position ignores the justification for allowing carryover RINs in the first place. Carryover RINs are intended as a flexibility mechanism to encourage obligated parties to blend more renewable fuel than otherwise required so as to generate RINs in excess of compliance obligations that can be retained in case of shortfalls or sold to other parties. *See* 75 Fed. Reg. at 14,735. Increasing the carryover RIN bank as a result of small refinery exemptions does not achieve this objective because the increase does not result from increased renewable fuels blending but instead from exempting parties from compliance. EPA should strive to ensure that there is no net increase in carryover RINs due solely to small refinery exemptions, since such RINs would not be representative of actual renewable fuel volumes blended in excess of required amounts. Adjusting the annual RVO upward in an amount equivalent to the increase in carryover RINs directly attributable to the previous compliance year's retroactive small refinery exemptions would have the effect of increasing the applicable annual percentage by an amount adequate to ensure the volumes are being met by non-exempt obligated parties. Such an approach would be much closer to Congress's intent than EPA's current approach.

6. *The Small Refinery Exemptions Are Tantamount to an Unauthorized Waiver of the Statutory Volumes.*

The RFS allows EPA to reduce the statutorily-mandated volumes of renewable fuel through only one of three mechanisms, all of which require the Agency to issue a formal waiver. 42 U.S.C. § 7545(o)(7). The three waiver authorities are:

1. the “general waiver authority,” which allows EPA to reduce aggregate volumes when a volume would “severely harm the economy or environment of a State, a region, or

- the United States” or when there is an “inadequate domestic supply” of a renewable fuel, 42 U.S.C. § 7545(o)(7)(A);
2. the “cellulosic waiver authority,” which requires EPA to reduce the cellulosic-biofuel volume when there is a projected shortfall in cellulosic-biofuel production, *id.* at § (o)(7)(D); and
 3. the “biomass-based diesel waiver authority,” which is limited in scope and temporary, applying only when there are price spikes due to changes in the supply or market for the fuel. *Id.* § 7545(o)(7)(E).

Reducing the statutorily-mandated levels through small refinery exemptions, without making up the lost volumes from those exemptions, attempts to create a waiver authority that Congress never contemplated. EPA must work within the statutory framework Congress established for the RFS program, not within some alternative framework it wishes Congress had established. As explained by the D.C. Circuit,

“[T]he fact that EPA thinks a statute would work better if tweaked does not give EPA the right to amend the statute. *Cf. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445, slip op. at 21 (2014) (“An agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress.”). *Americans for Clean Energy, Inc. (ACEI) v. EPA*, 864 F.3d 691 (D.C. Cir. 2017).

Indeed, Congress could have easily relieved *all* obligated parties through a waiver of the volumes attributable to small refineries experiencing disproportionate economic hardship, but it chose not to do so. Instead, in the absence of the three limited waivers Congress put in place, it repeatedly commanded EPA to “ensure” the aggregate volumes are met. *Id.* § 7545(o)(2)(A)(i), (o)(3)(B)(i); *ACEI v. EPA*, 864 F.3d at 698.

EPA’s own data show that small-refinery exemptions for 2016 and 2017 reduced guaranteed demand for renewable fuels by 2.25 billion RINs. That’s an unauthorized and obfuscated carve-out without the public notice and opportunity for comment that the RFS

otherwise requires for legitimate waivers. 42 U.S.C. § 7545(o)(7)(A). Such actions undermine Congressional intent and are outside the limited authority granted to EPA to alter the mandated volumes of renewable fuels.

7. *EPA's Small Refinery Exemptions are Inconsistent with EPA's Prior Positions.*

Although EPA hinted that there could be a change in the number and magnitude of exemptions granted, 82 Fed. Reg. 34,242, it gave no indication of the scope of the coming change to EPA policy. *See* 82 Fed. Reg. at 58,523 (“EPA has granted exemptions pursuant to this process in the past. However, at this time no exemptions have been approved for 2018, and therefore we have calculated the percentage standards for 2018 without any adjustment for exempted volumes.”). Nor did it indicate that it had changed its prior position that the RFS program would not pose a significant economic impact on most small refining entities. *See* 82 Fed. Reg. at 34,242 (“[T]he impact on small entities from implementation of this rule would not be significant....a cost-to-sales ratio test shows that the costs to small entities of the RFS standards are far less than 1 percent of the value of their sales”). It is therefore difficult to see how there could be a sudden increase in “disproportionate hardship” to so many small refineries, particularly when RIN compliance costs have recently been at multi-year lows.

Yet, at the same time EPA declined to adjust the 2018 volumes to account for lost small refinery volumes from calendar years 2016 and 2017, *see* 82 Fed. Reg. 34,242, unbeknownst to RFA and other interested parties, it was apparently in the process of approving a record number of small refinery hardship exemptions. As a result of new recent information – namely, the substantial increase in the number of retroactive small refinery exemptions granted – that has been brought to light by credible news reports only after the 2018 rule was finalized, EPA’s Annual Standard Equations at 40 C.F.R. § 1405(c) now *systematically* fail to ensure that the required volumes under the RFS are being met pursuant to 42 U.S.C. § 7545(o)(3)(B)(i). Consequently, 40 C.F.R. § 1405(c) can no longer be defended as a reasonable exercise of EPA’s discretion.

The only plausible explanation for the sudden surge in small refinery exemption extensions is that EPA has fundamentally changed the criteria on which it evaluates small refinery exemption requests, including criteria on whether a small refinery might be suffering a “disproportionate economic hardship.” Yet, EPA has failed to announce or solicit comment on these dramatic shifts

in its regulatory approach to these exemption extensions – a failure that renders its actions voidable. Where, as here, EPA is attempting to change the criteria it uses to implement a regulation, EPA must first put that change out for public comment. *See Nat. Res. Def. Council v. E.P.A.*, 643 F.3d 311, 320 (D.C. Cir. 2011) (EPA guidance which announced a binding change in applicable law and which did not receive notice and comment was in contravention of the APA); *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 385 (D.C. Cir. 2002) (Guidance document that imposes binding obligations upon the public must comply with APA notice and comment requirements). Moreover, this RVO rulemaking is *the* opportunity for EPA to address this 2.25-billion-RIN question. Whatever EPA may have known about the scope of small refinery waivers at the time it proposed and finalized the 2018 RVO, the Agency certainly knows *now* the extent of the volumes being exempted. With this knowledge, it is arbitrary and capricious for EPA not to solicit public comment on how to address these exemptions. Because of EPA’s preferred policy of finalizing only one RVO per calendar year for business certainty purposes, punting to a future as-to-be-determined rulemaking is cold comfort, as the remedy is unlikely to take effect until another compliance year has passed.

8. *EPA Cannot Extend Exemptions that are Not Continuous.*

RFA also objects to EPA’s extension of an exemption to any refinery that has not continuously qualified for a small refinery exemption since it verified that status in 2010. Section 211(o)(9)(B) allows EPA to *extend* the original, temporary small refinery exemption provided under Section 211(o)(9)(A) if the Agency concludes there is disproportionate economic hardship, but it does not authorize EPA to provide a new exemption after a refinery fails to qualify for an exemption in any prior year.

Although small refineries may petition the Agency “at any time,” the exemption is only capable of being extended, and not created anew. Consequently, unless a small refinery verified its eligibility as a small refinery by July 2010, 40 C.F.R. § 80.1441(b), and obtained a small refinery exemption *each year* since that time under 40 C.F.R. §. 80.1441(e)(2), it is not eligible for an extension of that exemption. This is consistent with the fact that, in order to qualify for an extension of its small refinery exemption, a refinery “must meet the definition of ‘small refinery’ in § 80.1401 for *the most recent full calendar year prior to seeking an extension* and must be

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.

will provide certainty to the industry with respect to their standards, but also will more closely meet the amount of renewable fuel stated as the objective of the rulemaking.”

- Another reviewer asked a series of questions related to small refiner exemptions, including, “In what ways can EPA provide more transparency regarding the number and volume of small refiner exemptions granted for the volume years covered by this proposed rule?”
- Yet another review commented, “EPA is required by [the *ACEI*] ruling to account for the 2016 incorrect waiver of 500 million gallons...” and therefore recommends that the “volume allowance for conventional biofuel” be increased to “15.5 billion gallons.”
- On June 4, 2018, following the second round of comments, agency reviewers again recommended that EPA “...include the 500 mg of conventional biofuels waived under the general waiver authority for 2016 as determined by the court” and “include an estimate for 2019 small refinery waivers based on the waivers granted over the past two years. Current procedures ensure the RVO isn’t met.”
 - Another reviewer stated, “...it is wholly consistent with efforts to come close to the promulgated volumes that you estimate small refinery waivers instead of using a zero.”
 - Regarding the small refiner exemptions, another comment suggested that “...it would be appropriate to provide information on numbers of operations and total volumes waived, the status of 2018 waivers at the time of the release and a discussion about the use of small refinery waiver estimates for gasoline and diesel.”
 - A few days later, another reviewer implored EPA to “Estimate small refinery waivers in calculating the percent standard.”
- On June 19, days after then-Administrator Pruitt returned from meetings with farmers in the Midwest—where he agreed to reallocate RINs from exempt small refineries—EPA

circulated a new draft of the 2019 RVO proposal that included significant changes regarding the approach to small refiner exemptions.

- In this draft, EPA said it was “taking a different approach in this proposed rule”: “Our proposed approach for 2019 is consistent with CAA section 211(o)(3)(B)(i), which states that EPA ‘shall determine and publish...the renewable fuel obligation that ensures that the requirements of’ the RFS program are met.”
- The draft continued, “For 2019, we have calculated the percentage standards adjusting for estimated exempted volumes, using the exempted volume for 2017. EPA finds that this number is appropriate because it represents the most recent year for which EPA has granted small refinery exemptions.”
- In calculating the RVO percentages, EPA projected that 8.18 billion gallons of gasoline and 5.44 billion gallons of diesel produced by small refiners will be exempt from renewable fuel blending requirements in 2019. Adding these exemptions into the RVO formula raised the applicable renewable fuel blending percentage for remaining obligated parties, effectively reallocating the volume lost via small refiner waivers.
- In this draft, consistent with the earlier recommendations of the inter-agency reviewers, EPA increased the total RVO for renewable fuel to 11.76% from the 10.88% in previous drafts, and the remaining non-exempt obligated parties were required to blend more biofuel to make up for exempted volumes from small refiners.
- On June 20, EPA circulated a slightly revised draft that added some legal heft to the proposal’s new approach to accounting for small refiner exemptions.
 - The enhanced draft stated, “EPA’s proposed approach implements CAA section 211(o)(3)(B)(i), which states that EPA ‘shall determine and publish...the renewable fuel obligation that ensures that the requirements of [the RFS program in CAA section 211(o)(2)] are met. Projecting the total exempted volume based on the most recent exemption data is an appropriate way to address this effect and

facilitate the satisfaction of the RFS program requirements in CAA section 211(o)(2).”

- EPA added that “...this approach is consistent with the text of our regulations, which accounts for the ‘amount of gasoline’ and ‘amount of diesel *projected* to be produced by exempt small refineries’ in 2019.”
- On June 21, an aggressive last-minute campaign was mounted by obligated parties to dissuade Administrator Pruitt from releasing a proposal that included a reallocation of small refiner exemptions.
 - According to the *Washington Examiner*, “Sources close to the lobbying push say the eleventh-hour push to get Pruitt to back off from reallocating ethanol gallons to refiners worked” and the proposal would be released “...without the reallocation measure attached.”⁷
 - *Reuters* reported that Pruitt cancelled an appearance with Agriculture Secretary Sonny Perdue scheduled for June 22 at a farm near Kansas City, where it was expected the 2019 RVO proposal would be announced.⁸
- Finally, on June 22, a new draft of the proposal was sent from EPA to the White House, showing that the reallocation measures were removed from the proposal.
 - In this draft, the total RVO percentage was reduced back to 10.88% from 11.76% and all the language regarding adjustments to the RVO to reapportion small refiner exemptions was stricken.
 - Adding insult to injury, EPA noted that it “...is not soliciting comments on how small refinery exemptions are accounted for in the percentage standards

⁷ Siciliano, John and Josh Siegel (*Washington Examiner*). “Daily on Energy: OPEC agrees to increase oil output.” June 22, 2018. <https://www.washingtonexaminer.com/daily-on-energy-opec-agrees-to-increase-oil-output>

⁸ Renshaw, Jarret and Chris Prentice (Reuters). “EPA considers delaying Friday biofuel announcement: sources.” June 21, 2018. <https://www.reuters.com/article/us-usa-biofuels-epa/epa-considers-delaying-friday-biofuel-announcement-sources-idUSKBN1JH214>

formulas...and any such comments will be deemed beyond the scope of this rulemaking.”

As these inter-agency deliberations reveal, EPA knows its statutory responsibilities when it comes to small refinery exemptions, from both a legal and policy perspective. It just needs to find the objectivity and resolve to fulfill its obligations under the statute.

11. EPA Cannot Refuse to Receive Comment on Critical Aspects of its Proposed RVO.

EPA states in the 2019 Proposed Rule that EPA is not soliciting comments on how small refinery exemptions are accounted for in the percentage standards formulas in 40 CFR 80.1405, and any such comments will be deemed “beyond the scope of the rulemaking.” The Agency’s position is untenable under the Clean Air Act and its own implementing regulations, and well-established principles of administrative law. Section 211(o)(C)(ii) of the Act specifically directs EPA to “make adjustments” to account for the use of renewable fuel by exempt small refineries. Similarly, as EPA reinforces in the 2019 Proposed Rule, its own regulations require the Agency to calculate the annual RVO by factoring in the amount of gasoline and diesel used by exempt small refineries. *See* 40 C.F.R. § 80.1407(f)(4); *see also* Proposed Rule at 32027 (“The specific formulas we use in calculating the renewable fuel percentage standards are contained in the regulations at 40 CFR 80.1405. The percentage standards represent the ratio of the national applicable volume of renewable fuel volume to the national projected non-renewable gasoline and diesel volume less any gasoline and diesel attributable to small refineries granted an exemption prior to the date that the standards are set.”).

Similarly, EPA cannot refuse to receive comment on “a number of issues” raised by the D.C. Circuit’s directive for the Agency to restore 500 million RINs from 2016. Proposed Rule at 32027. Although EPA recognizes there is a “compelling need” to respond to the mandate “expeditiously”, it has allowed a year to pass without acting on the Court’s mandate and offers no explanation as to why it failed to factor the mandate into the 2019 proposal.

In both instances, EPA’s refused to solicit and consider comment on these integral issues is inconsistent with well-established principles of administrative law. EPA’s failure to take comment on the central tenants of the proposal is inconsistent with the Administrative Procedures

Act (APA). *See N. Carolina Growers' Ass'n, Inc. v. Solis*, No. 1:09CV411, 2011 WL 4708026, at *9 (M.D.N.C. Oct. 4, 2011), *aff'd sub nom. N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012) (Department of Labor's failure to consider and discuss the substance and merits of key aspects of a proposed rule was arbitrary and capricious under the APA); *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1072 (N.D. Cal. 2018) (Bureau of Land Management's comment content restrictions prevented meaningful comment on key justifications underpinning the rule was insufficient to satisfy the APA.).

Indeed, the entire purpose of the proposed rule is to establish the 2019 RVO applicable percentages, which is done via the Annual Standard Equation formulas. As described elsewhere in these comments, that formula—which is the heartbeat of the annual RVO rule—includes explicit variables representing exempted volumes of gasoline and diesel from small refiners. How can EPA take comment on the proposed RVOs, without accepting comment on fundamental elements of the formula used to derive the RVO? It can't.

Besides being inconsistent with the requirements of the APA, the Clean Air Act, and its own regulations, EPA's resistance to public comment on two of the most impactful aspects of its proposed rule reflects a tacit recognition that its actions are indefensible.

12. EPA's Lack of Transparency Is Inexcusable.

Although EPA has indicated that it is constrained from sharing detailed financial information submitted by a refinery to support a claim of disproportionate economic hardship, EPA's refusal to share even the most basic information regarding small refinery exemptions belies any legitimate assertion of confidential business information or deliberative process. It is ludicrous to think that Congress would establish a program where eligibility and participation in the program, as well as the scope and magnitude of the program, remain obscured from public view. Moreover, the biofuels sector cannot respond to the supply needs of the market if it does not have accurate information regarding the number of small refinery exemption extensions submitted each year, the number of extensions granted, and the volumes of fuel exempt for the years in question.

In November 2016, EPA issued a proposed rule that would “codify a determination that basic information related to EPA actions on petitions for RFS small refinery and small refiner

exemptions may not be claimed as confidential business information.” 75 Fed. Reg. 80,828, 80,909 (Nov. 16, 2016). EPA recognized that at the very least, basic information—the small refiner/refinery “petitioner’s name, the name and location of the facility for which relief was requested, the general nature of the relief requested, the time period for which relief was requested, and the extent to which the EPA granted or denied the requested relief”—should be released to the public. *Id.* However, this proposed rule has been indefinitely delayed from proceeding to the final rule stage. Because such basic factual information is crucial to evaluating whether EPA is complying with its statutory obligation to ensure the required volumes are being met in the 2019 RVO Final Rule, RFA requests that EPA move ahead with finalizing this element of the November 2016 proposed rule and release basic information about small refinery exemptions to the general public.

II. CONCLUSION

EPA’s 2019 RVO proposal will remain misleading and meaningless until EPA reallocates those renewable fuel volumes lost to arbitrary small refinery exemptions and inappropriate use of the general waiver authority in the 2016 RVO, as vacated and remanded by the *ACEI* decision. The Agency needs to establish a more transparent and rational process for evaluating small refinery exemption requests to ensure that such requests are not abused or granted inappropriately. EPA should stop catering to the whims of the oil industry in implementing the nation’s renewable fuel program, and work to create demand for ethanol at Congress intended, lowering prices at the pump for consumers and creating economic opportunities for farmers across the country.