



August 30, 2019

Attention: Docket ID No. EPA–HQ–OAR–2019–0136

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

Via: www.regulations.gov

Re: Comments on *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes*; Proposed Rule (84 Fed. Reg. 36,762; July 29, 2019)

Dear Administrator Wheeler,

The Renewable Fuels Association (RFA) appreciates the opportunity to submit these comments regarding the U.S. Environmental Protection Agency's (EPA) proposed rule setting the 2020 renewable volume obligations (RVOs) under the Clean Air Act's (CAA) Renewable Fuel Standard (RFS) and its response to the remand of the 2016 standards. EPA, *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes*; Proposed Rule (84 Fed. Reg. 36,762; July 29, 2019).

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 volume obligation of 20.04 billion gallons of total renewable fuel and the implied volume of 15 billion gallons of conventional renewable fuel, there is every reason to expect that the continued abuse of the system for granting small refinery exemptions will render the 2020 volumes meaningless again, given that the Agency just approved an additional 31 small refinery exemptions without a transparent demonstration of severe economic

harm. Issuing small refinery exemptions after an RVO rule is finalized—as EPA has now done for the 2016, 2017 and 2018 compliance years—has the practical impact of reducing the effective RVOs to levels well below those specified in the rule. Thus, we do not consider the volumes that appear in the 2020 Proposed Rule to be actual blending requirements consistent with the Energy Independence and Security Act of 2007.

EPA can begin to address this problem and ensure that the 2020 RVOs are administered in a manner that is consistent with the statute simply by accounting for small refinery exemptions when it calculates the percentage standards. Indeed, this has been recommended during the interagency review process for two consecutive years, but EPA summarily rejected the notion, in blatant disregard for the statute and the reviewers. The formula used by EPA for calculating the annual percentage standards 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 after the EPA has granted large-scale exemptions for three straight years defies reality and is a flagrant abuse of the Agency’s waiver authorities under the program.

RFA’s strongly held position is that EPA’s final rule must prospectively account for small refinery exemptions in calculating the 2020 RVO percentages. The Agency has already shown it has the ability to do so and has explained why accounting for exemptions best meets the statutory intent of the RFS.

Finally, EPA’s proposal makes a mockery of the D.C. Circuit’s decision in *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017), by refusing to add back 500 million gallons of renewable fuel the Court determined were inappropriately waived by EPA based upon claims of an inadequate domestic supply in 2016. RFA strongly urges the EPA to include the 500 million gallons in the final 2020 RVO, as required by the Court decision in *ACEI v. EPA*.

For these reasons, and for those set forth more fully in the attached comments, we feel strongly that to ensure that the 2020 RVO is administered in a manner consistent with the statutory purpose of the program, the Agency must account for small refinery exemptions and the D.C. court’s remand. Thank you again for the opportunity to provide comments on this important matter, and we look forward to working with EPA to ensure that the goals of the RFS are achieved.

Sincerely,



Geoff Cooper
President & CEO

**COMMENTS OF THE
RENEWABLE FUELS ASSOCIATION (RFA)
IN REGARD TO
*RENEWABLE FUEL STANDARD PROGRAM: STANDARDS FOR 2020 AND BIOMASS-
BASED DIESEL VOLUME FOR 2021, RESPONSE TO THE REMAND OF THE 2016
STANDARDS, AND OTHER CHANGES; PROPOSED RULE*
DOCKET ID No. EPA–HQ–OAR–2019–0136
84 FED. REG. 36,762 (JULY 29, 2019)**

The Renewable Fuels Association (RFA) submits these comments in response to the U.S. Environmental Protection Agency’s (EPA) proposed rule setting the 2020 renewable volume obligations (RVOs) under the Clean Air Act’s (CAA) Renewable Fuel Standard (RFS) and the Agency’s response to the remand of the 2016 standards. EPA, *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes; Proposed Rule* (84 Fed. Reg. 36,762; July 29, 2019).

I. BACKGROUND

1. Small Refinery Exemption History and Authority.

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>. Until the 2016 compliance year, the EPA’s 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.

Under the current Administration, the EPA has granted an unprecedented number of small refinery exemptions, disregarding the established requirements for eligibility. In a July 19 letter to Senator Charles Grassley, Secretary of Energy Rick Perry confirmed that the EPA had ignored DOE recommendations, stating, “DOE is aware of one instance in which DOE’s analysis indicates that EPA consider no exemption, but the result was an EPA decision to grant an exemption to the petitioner.”¹ He further acknowledged that “to DOE’s knowledge, EPA has never granted a 50 percent exemption. EPA has...granted...exemptions in the past for which the results of DOE’s analysis indicate that a 50 percent exemption may be appropriate.”

2. *The RFS Demand Destruction from Small Refinery Exemptions Is Absolute and Pernicious.*

The EPA granted 54 small refinery exemptions for compliance years 2016 and 2017, relieving refiners of RFS blending obligations totaling 2.61 billion ethanol-equivalent gallons. On August 9, 2019, the EPA announced that it was granting another 31 exemptions for compliance year 2018, waiving an additional 1.43 billion gallons of renewable fuel usage obligations.²

Demand destruction has already occurred as a result of the exemptions that were granted for 2016 and 2017. Domestic ethanol consumption fell in 2018—the first year-over-year decline in over 20 years. Moreover, ethanol’s share of the U.S. gasoline pool, referred to as the “blend rate,” also fell for the first time since comparable statistics became available in 2009.

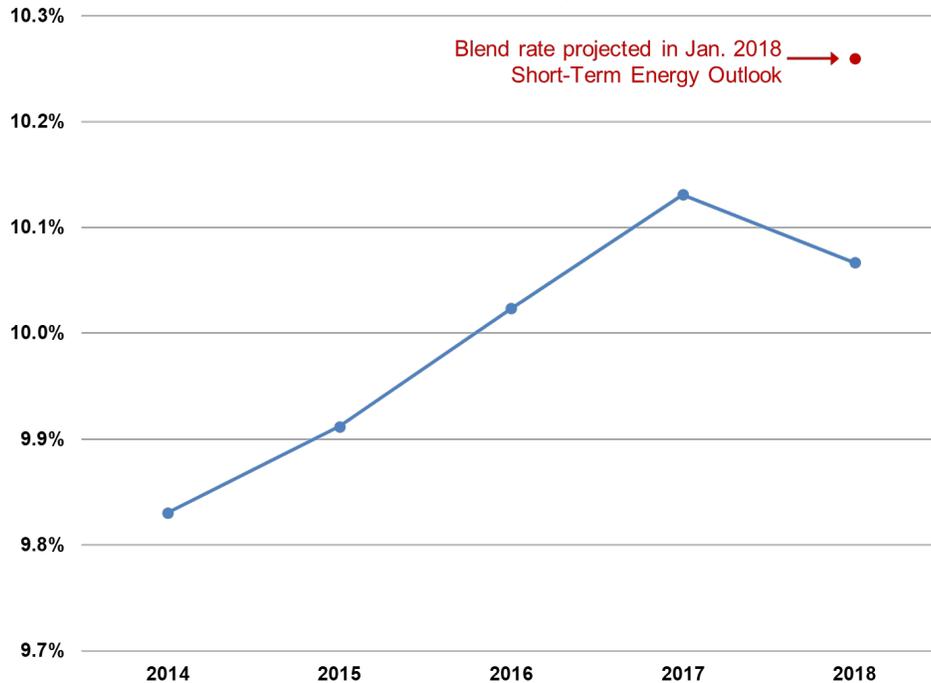
Ethanol consumption in 2018 was far below expectations at the start of the year. In its *Short-Term Energy Outlook* published in January, the U.S. Energy

¹ <https://www.grassley.senate.gov/sites/default/files/2019-07-19%20DoE%20to%20CEG%20%28Small%20Refinery%20Economic%20Hardship%20Analysis%29.pdf>

² See EPA, *RFS Small Refinery Exemptions*, <https://www.epa.gov/fuelsregistration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (last visited August 25, 2019).

Information Administration's (EIA) forecasts of ethanol and gasoline consumption implied a blend rate of 10.26 percent for 2018, representing a continuation of the consistent growth that had occurred in prior years. Had this blend rate been achieved, 276 million gallons more ethanol would have been used in 2018 than occurred, given the actual level of gasoline consumption. The situation would have been worse if ethanol prices had not fallen to a steep discount to gasoline prices for most of the year as the market adjusted to the reduction in demand.

Ethanol Blend Rate in Gasoline
(Source: EIA)



The demand destruction that has occurred has negatively impacted the ethanol industry. Since the widespread granting of exemptions began, three ethanol production facilities have closed permanently and another 11 have been idled. This has affected more than 2,400 jobs and more than 250 million bushels of corn on an annualized basis. In addition to the plants that have been idled or closed, many more have been running well below capacity.

Given the widespread granting of exemptions for each of the last three compliance years and the associated demand destruction, the EPA's refusal to adjust the applicable percentage obligation to shift the exempted volume obligations to non-exempt obligated parties is indefensible.

3. *The Impact of EPA's Exemptions on the Inventories and Prices of Renewable Identification Numbers Has Undermined the Effectiveness of the Program and Harmed Ethanol Producers, Farmers and Consumers.*

The increase in retroactive small refinery exemptions, awarded after EPA has promulgated annual standards, has resulted in enormous cuts to the RVOs that were previously finalized. There were 4.04 billion fewer Renewable Identification Numbers (RINs) required for compliance years 2016 through 2018 because of these exemptions.³ The 2020 Proposed Rule does not even attempt to make up for these lost volumes.

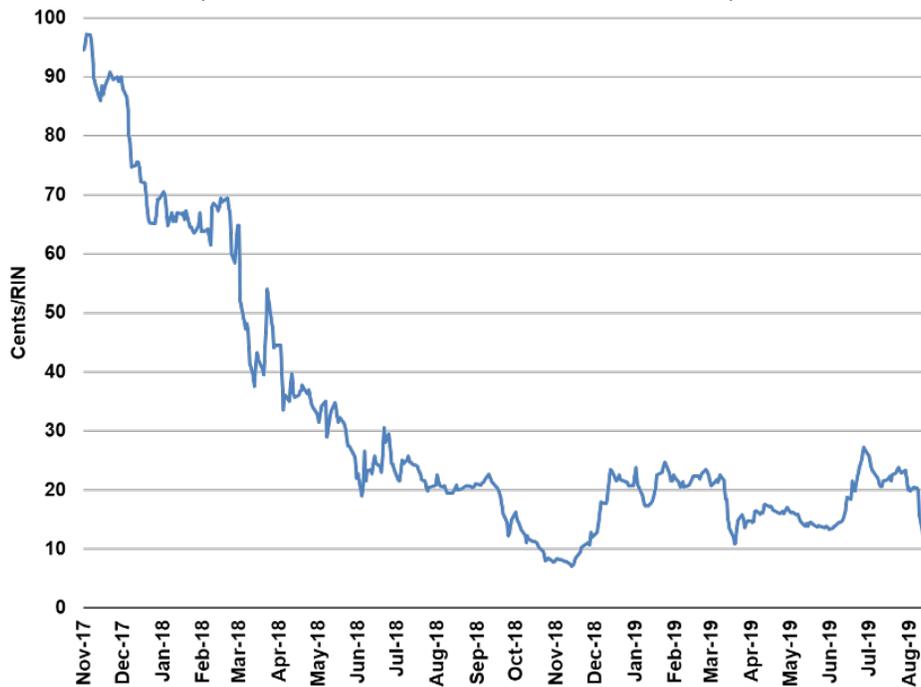
EPA's use of retroactive exemptions has also resulted in a significant increase in carryover RINs available to meet current and future obligations. For the 2020 Proposed Rule, EPA estimated that there were 2.19 billion RINs carried over from 2018 and available for compliance in 2019, and it assumed that there would be "neither a net gain nor a net loss of excess RINs" in 2019, so the same number of RINs would be available for compliance with the 2020 RVOs.⁴ However, as noted, after the Proposed Rule was issued EPA granted 31 exemptions for the 2018 compliance year, relieving small refineries of obligations amounting to 1.43 billion RINs. Accordingly, it is highly likely that the bank of carryover RINs available for compliance with the 2020 RVOs will be substantially higher than EPA assumed. This would be expected to further reduce volumes of renewable fuel actually blended in 2020, as obligated parties can draw down their RIN inventories rather than choosing to blend physical renewable fuels.

Taken together, EPA's exemptions have caused the price of RINs to plummet and have undermined demand for renewable fuels. In November 2017, when the ethanol blend rate achieved a new record of 10.6 percent, ethanol (D6) RIN prices were above 90 cents. D6 RIN prices averaged 70 cents for 2017 as a whole; not coincidentally, the ethanol blend rate achieved an annual record of 10.13 percent in 2017, well above the so-called E10 "blend wall." However, RIN prices fell precipitously in early 2018 as news of widespread exemptions became public, and by the fall of 2018 they fell to five-year lows of 7 cents. In August 2019, they once again sank to just over 10 cents following the announcement that the EPA had handed out 31 exemptions for compliance year 2018—even though RIN prices, and thus RFS compliance costs, had been extremely low in 2018.

³ Id

⁴ See U.S. EPA. "Carryover RIN Bank Calculations for 2020 NPRM." Docket ID No. EPA-HQ-OAR-2019-0136-0003.

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



II. SMALL REFINERY EXEMPTIONS MUST BE PROPERLY ACCOUNTED FOR IN ORDER TO ENSURE THE 2020 REQUIRED VOLUMES ARE MET.

In the calculation of the applicable percentage obligations in the 2020 Proposed Rule, EPA assumed that there will be no small refinery exemptions granted for the 2020 compliance year. This strains credibility, as the EPA has granted 85 waivers for compliance years 2016 through 2018—an average of nearly 30 per year.

EPA has rendered all of the RVOs in the 2020 Proposed Rule meaningless by failing to account for small refinery exemptions in a manner that ensures the statutory volumes will be met, as required under the Renewable Fuel Standard. See 42 U.S.C. § 7545(o)(2)(B)(i). While the EPA has the authority to waive a portion of the statutorily mandated volume of cellulosic biofuels and to reduce the advanced and total renewable fuels standards accordingly, the Agency has effectively been using the issuance of small refinery exemptions as a general waiver authority not granted to it by Congress.

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

The formula EPA uses to calculate the yearly percentage standards explicitly includes an estimate of 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 such refineries, thereby shifting the renewable fuel obligations to non-exempt 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 formula used to determine the annual RVOs includes variables representing “[t]he amount of gasoline [and diesel fuel] projected to be produced by exempt small refineries and small refiners...”

Given the number of exemptions granted for the last three compliance years, there is no basis for EPA to project that the amount of gasoline and diesel fuel produced by exempt small refineries will be zero in 2020. Underestimating exemptions by ignoring them completely violates EPA’s duty to “ensure” required volumes are met. During the White House Office of Management and Budget’s (“OMB”) interagency review process, the comment was made, “EPA then, in *Table VII.C-1*, put a zero (0) in for *projected volume of gasoline for exempt small refineries* and *projected volume of diesel for exempt small refineries*, ensuring your projected totals are not met and all actual outcomes or resulting biofuel requirements are biased to one side, lower.” See Summary of Interagency Working Comments on Draft Language under EO 12866 and EO 13563 Interagency Review (“OMB to EPA 5.15.19 10.22pm”), EPA-HQ-OAR-2019-0136.

EPA can prospectively account for small refiner exemptions even if they are granted retrospectively, as has recently been the case. Indeed, OMB has acknowledged EPA has the authority and capacity to do so.⁵ The docket for this rulemaking contains OMB’s comment that EPA’s proposed percentage standards for 2020 in *Table VIII.C-2* “should be adjusted to incorporate projected gasoline and diesel exempted through small refinery waivers to ensure consistency of your analysis throughout the document.”⁶ RFA concurs with OMB’s assessment that

⁵ In the inter-agency review process for the 2019 RVO rule, EPA agreed as well. EPA briefly adjusted the percentage standards based on projected small refinery exemptions for the upcoming compliance year (2019). See EPA-HQ-OAR-2018-0167-0103 (June 19 “Revised version of 2019 RVO NPRM”). EPA was responding to comments from OMB reviewers that EPA “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.*” *Id.* (June 4 “EO 12866 comments”) (emphasis added). EPA’s draft rule stated: “For 2019, we have calculated the percentage standards adjusting for estimated exempted volumes, using the exempted volume for 2017.” *Id.* (June 19 “Revised version of 2019 RVO NPRM”). EPA noted that this “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.” *Id.*

⁶ See Summary of Interagency Working Comments on Draft Language under EO 12866 and EO 13563 Interagency Review (“OMB to EPA 5.15.19 10.22pm”), EPA-HQ-OAR-2019-0136.

EPA's estimated volume of gasoline and diesel from exempt small refineries (zero and zero, respectively) is—at least based on EPA's recent actions—"the least likely number you could project."⁷ Using EPA's own historical data regarding exemptions for 2016 and 2017, OMB proposed new values of 7.5 billion gallons of gasoline for exempt refineries (GE) and 5.0 billion gallons of diesel for exempt refineries (DE) to be used in the calculation of the 2020 percentage standards.⁸ RFA agrees with OMB that "EPA's methodology to account for exemptions is inconsistent with [its] approach to setting all of the other variables and factors used to calculate total volumes. EPA makes projections of gasoline and renewable fuels volumes, cellulosic production, CNG/LNG, carryover RINS, foreign sources, imported sugarcane, advanced biofuel, refinery capacity, etc. Given [its] approach to estimating other factors and variables," EPA should "conduct[] an analysis based on expected conditions at small refineries and the historic issuance of exemptions. This would provide a more accurate estimate of volumes of gasoline and diesel for exempt small refineries."⁹

The projections of exempted volumes can be updated since small refinery exemptions were granted for the 2018 compliance year after the 2020 Proposed Rule was published. Given that EPA has now granted 31 exemptions (thus far) for 2018 and issued 35 exemptions for 2017, it is logical for EPA to assume that at least 30 will be issued for 2020. The average volume of gasoline and diesel for which renewable volume obligations were exempted was just over 460 million gallons per refinery for 2017 and 2018. Accordingly, EPA should assume in its calculations for 2020 that exemptions will be granted to small refineries producing 13.85 billion gallons of gasoline and diesel fuel in aggregate. (It is presumed that the EPA knows the breakdown of the total exempted volumes for 2017 and 2018 between gasoline and diesel and can allocate the 13.85 billion gallons between the two in its formula.)

The impact caused by ignoring small refinery exemption extensions is not trivial. When, as part of the interagency review process for the 2019 RVO rule, an EPA draft of the rule accounted for projected small refinery exemptions for 2019, the percentage standard increased from 10.88 percent in the initial draft to 11.76 percent. *Id.* (June 19 "Revised version of 2019 RVO NPRM"). This adjustment to the percentage standard of almost one percentage point represents more than an 8 percent increase over the prior percentage standard, meaning EPA's Annual Standard Equations ensured the required volumes for 2019 fell short by at least 8 percent. EPA-HQ-OAR-2018-0167-0103 (June 19 "Revised version of 2019 RVO NPRM"); *see id.* (June 21 "Updated version of 2019 RVP NPRM"). Although EPA ultimately removed this language, and in a June 22, 2018, draft reverted the percentage standard back to 10.88 percent, *id.* (June 22 "Revised RVO rule"), this exchange between EPA and OMB shows that EPA and OMB already have

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

recognized that consideration of retroactive small refinery exemptions is necessary to ensure consistency with 42 U.S.C. § 7545(o)(3)(B)(i). EPA and OMB have also identified straightforward means of making prospective estimates.

2. EPA's Endorsement of a Bloated Carryover RIN Bank Only Exacerbates the Demand Destruction Inherent in Its Small Refinery Exemptions.

Although EPA appeared unwilling to account for exempt small refinery volumes in proposing the 2020 RVOs, the Agency apparently considered it acceptable to use the exempt volumes to further inflate the bank of carryover RINs. As previously noted, for the 2020 Proposed Rule EPA estimated that there were 2.19 billion RINs carried over from 2018 and available for compliance in 2019. It acknowledged that the RIN bank “includes the millions of RINs that were not required to be retired by small refineries that were granted hardship exemptions in recent years.” 84 Fed. Reg. 36,767. Although the Agency assumed the same number of RINs would be available for compliance with the 2020 RVOs, it granted 31 exemptions for the 2018 compliance year after the Proposed Rule was published, relieving small refineries of obligations amounting to an additional 1.43 billion RINs. As a result, it is highly likely that the bank of carryover RINs available for compliance with the 2020 RVOs will be substantially higher than EPA assumed.

This was acknowledged in the OMB interagency review, in which the comment was made that “under the current circumstance, your jump in RIN stocks is driven by your unaccounted for small refinery waivers. Then your analysis assumes a zero and thus you are not correctly assessing your Percent carryout, you are significantly under-estimating it.” It was further stated, “All of your items that could result in a smaller RIN bank are dwarfed by the issuance of small refinery waivers. We have seen this in the growth of RIN stocks over the last two years. This is the primary reason the RIN stock bank has grown and would likely drive continued growth.” See Summary of Interagency Working Comments on Draft Language under EO 12866 and EO 13563 Interagency Review (“OMB to EPA 5.15.19 10.22pm”), EPA-HQ-OAR-2019-0136.

If all 1.43 additional RINs from the 2018 exemptions were banked, total RIN inventories would be 3.62 billion. This would be equivalent to 18 percent of the proposed total renewable fuel requirement—approaching the 20 percent cap on RINs from one year that can be used toward the following year's obligations. Of the 2.19 billion RINs carried over into 2019, 1.80 billion are D6 RINs.¹⁰ Based on the annual percentage standards for 2018, it can be estimated that 1.11 billion RINs associated with exempted obligations were D6. If these were banked, the D6 inventory carried over into 2020 would be 2.92 billion—equivalent to 19.4 percent of the implied conventional renewable fuel requirement, which is perilously close to the 20 percent cap.

¹⁰ See U.S. EPA. “Carryover RIN Bank Calculations for 2020 NPRM.” Docket ID No. EPA-HQ-OAR-2019-0136-0003.

This is reflected in the drop in D6 RIN prices to roughly 10 cents in the aftermath of the announcement that 31 exemptions had been granted for 2018. These weak RIN prices undermine renewable fuel consumption, particularly the growth of E15, for which the EPA just this May issued a rule that provided vapor pressure parity and thereby allowed year-round sales, as well as ethanol flex fuels like E85.

According to data from the Minnesota Department of Commerce, sales of E15 in the state were sustained from May to June as a result of the EPA rule, as opposed to the plunge in summertime sales in previous years.¹¹ However, from December 2018 through May 2019, average E15 volumes per station per day were 13 percent lower than during the same period a year earlier. Not coincidentally, RIN prices were three times lower in the period of lower E15 sales. This is evidence that small refinery exemptions are suppressing the growth of E15 and higher-level ethanol blends.

If EPA grants small refinery exemptions for the 2019 compliance year consistent with those for the last three years, the probability that the 20-percent RIN threshold will be exceeded rises considerably. The resulting collapse in RIN prices to negligible levels would further undermine physical biofuel usage. Moreover, it would place the EPA in a position of repeatedly failing to ensure the applicable volumes of renewable fuel established by statute are met.

EPA seems to think the statute supports any increase in the number of carryover RINs so long as it does not exceed the 20 percent statutory cap. 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 retroactive exemptions for the

¹¹ See Minnesota Dept. of Commerce. “2019 Minnesota E85 + Mid-Blends Station Report” and “2019 Minnesota E85 + Mid-Blends Station Report.” <https://mn.gov/commerce/consumers/your-vehicle/clean-energy.jsp>

2016-2018 compliance years 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.

III. THE PROPOSED 2020 RULE IGNORES CONGRESSIONAL INTENT AND A PLAIN READING OF THE SMALL REFINERY EXEMPTION AUTHORITY.

EPA’s granting of retrospective small refinery exemption extensions without accounting for these lost volumes is 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.”).

1. The Agency Retains the Authority and Is Obligated to Account for Retroactive Small Refinery Exemptions in the 2020 Renewable Volume Obligations.

The specific Congressional mandate with which the Proposed Rule must comply is to “ensure[] that the requirements of paragraph 2 are met” through the annual percentage standards. 42 U.S.C. § 7545(o)(3)(B)(i). This means that EPA must take steps to “make certain” that applicable cumulative volumes in paragraph 2—both statutory volumes (§ 7545(o)(2)(B)(i)) and those EPA sets through this rule (§ 7545(o)(2)(B)(ii))—are met. See *NPRA v. EPA*, 630 F.3d 145, 153 (D.C. Cir. 2010) (interpreting “ensure” as used in the analogous Section (o)(2)(A)(i) to require EPA to “make certain” that the “applicable volume of each type of renewable fuel is sold or introduced into commerce.”). In light of the fact that EPA has allowed obligated parties to seek exemption extensions for compliance years that have already ended, and that obligated parties can carry over RIN deficits from one year into another, it would be arbitrary and capricious for EPA to ignore prior year exemptions and yet claim it is ensuring that overall volumes are met.

EPA is obligated under the Clean Air Act to determine and publish by November 30 of each year, “with respect to the following calendar year, the

renewable fuel obligation that ensures that the [applicable renewable volumes] are met.” 42 U.S.C. § 7545(o)(3)(B)(i). Although the Agency accounts for any small refinery exemption extensions it grants before finalizing annual percentage standards for a compliance year, see 40 C.F.R. § 80.1405; 84 Fed. Reg. at 36,798, it maintains a head-in-the-sand approach to small refinery exemption extensions that it grants retroactively.¹² Yet, retroactive small refinery exemption extensions have effectively become the *only* form of small refinery exemption extensions, contrary to EPA’s original assumptions.¹³

This situation is reflected in a comment made during the OMB interagency review of the 2020 Proposed Rule, which stated, “The current EPA process of granting exemptions with DOE data ensures that prior to the start of the year, when the EPA is required to set the standard, that none will have yet been issue[d]. This ensures a bias and inconsistency in your analysis throughout.” See Summary of Interagency Working Comments on Draft Language under EO 12866 and EO 13563 Interagency Review (“OMB to EPA 5.15.19 10.22pm”), EPA-HQ-OAR-2019-0136.

Retroactive exemptions were less problematic in the past but have now exposed a massive flaw in the EPA’s methodology. For compliance years 2013-2015, the EPA granted a total of 23 exemptions, relieving small refineries of obligations amounting to 690 million gallons of renewable fuel. However, for 2016-2018, the number of exemptions granted has increased nearly four-fold and the volumes involved have risen nearly six-fold. All the 2016-2018 exemptions were granted after EPA’s final RVO rules were promulgated.

The net effect of EPA’s position that it will not account for retroactive exemptions has been a dramatic reduction in the *effective* volume obligations, and thus a complete abdication of EPA’s statutory duty to ensure the required volumes are actually met by obligated parties. For 2018 alone, the total renewable fuel volume obligation included in the final rule was 19.29 billion gallons, but 1.43 billion gallons have been exempted to date, lowering the effective total to 17.86 billion gallons—a reduction of 7.4 percent. For 2017, the differential between the total volume obligation in the final rule and the effective requirement was even larger, at 9.4 percent.

The proposed 2020 percentage standards continue the Agency’s practice of failing to ensure that the collective annual volume obligation is met. In fact, by

¹² By retroactive small refinery exemptions, RFA means those exemptions for a given compliance year that are granted after EPA promulgates the final rule for that same compliance year.

¹³ It is also questionable that Congress (or EPA) originally assumed EPA would ever grant exemption extensions from the RFS to small refineries on the basis of disproportionate economic hardship when the cost-to-sales ratio of compliance is 0.02%-0.08%. That figure is EPA’s own calculation based on small refineries’ actual confidential business information. See Screening Analysis for the Proposed Renewable Fuel Standards for 2020 (May 15, 2019), Docket EPA-HQ-OAR-2019-0136.

refusing to account for retroactive exemptions that EPA knows it will issue, the proposed 2020 percentage standards ensure that the collective annual volume obligation will not be met—by a significant margin.

The reasons EPA previously provided for not taking small refinery exemptions into account are no longer applicable given the Agency's recent practice. When adopting the annual standards in 2010, EPA did not have to contemplate retroactive exemptions because all small refineries were exempt from the RFS through December 31, 2010, 75 Fed. Reg. 14,716 (March 26, 2010). EPA also assumed that any small refinery exemption extensions petitions would be requested and granted prior to the promulgation of the next year's volume obligations and thus would be captured by the annual standard calculations. See *id.* at 14,717. Nor did EPA predict many extensions of the small refinery exemption due to disproportionate economic hardship in "the foreseeable future." *Id.* at 14,736. The 2020 Proposed Rule admits this is no longer the case. See 84 Fed. Reg. at 36,807 (discussing one 2017 and 39 2018 exemption extension petitions under review as of July 2019; no 2020 exemption petitions had been received).

To the extent EPA's reluctance to account for retroactive small refinery exemption extensions in the Proposed Rule is based on EPA's reading of the phrase "for the following calendar year" in 42 U.S.C. § 7545(o)(3)(B)(i), EPA's interpretation is unreasonable. Section 7545(o)(3)(B)(i) in fact provides statutory authority for EPA to account for retroactive small refinery exemption extensions in a future calendar year. Congress tied EPA's duty to ensure the "requirements of paragraph 2" are met to "the requirements of paragraph 2" *as a whole*. Congress used the phrase "for the following year" to specify the duration of the standards, not to limit or identify which aggregate volumes the standards must ensure. Congress pointedly did not require EPA to publish a rule by November 30 to ensure "the requirements of paragraph 2 are met" *only for the following year*. As a result, if EPA woefully underestimates upcoming small-refinery exemptions in one year (as it has for the past several rulemakings), EPA can shift the shortfall into a subsequent year by increasing that year's future percentage standards.

This better interpretation is reinforced by § 7545(o)(3)(C)(ii), which provides that EPA "shall make adjustments . . . to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt . . ." EPA's aversion to retrospective consideration of whether the required volumes are met is at odds with Congress's directive to account for prior small refinery exemption extensions.

Accounting for the volumes associated with retroactive exemptions in a subsequent year's rulemaking is similar to an approach EPA has taken 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). This would provide ample notice and regulatory certainty to the industry and obligated parties as they prepare to make up exempt volumes.

When small refineries receive retroactive exemptions for compliance years that have already ended, the RINs in the market from the exempt small refineries do *not* accurately reflect renewable fuel use in that year. The exempt small refineries are effectively credited with RINs that they nominally would have had to retire in the absence of the exemption extension. The renewable fuel use represented by the retroactively exempt small refineries' RINs is effectively double-counted. Accordingly, EPA could 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.¹⁴

In summary, RFA strongly opposes EPA's position in the 2020 Proposed Rule that any small refinery exemptions "that are granted after the final rule is released will not be reflected in the percentage standards that apply to all gasoline and diesel produced or imported in 2020." 84 Fed. Reg. at 36,797. RFA similarly objects to EPA's decision not to reopen its approach to retroactive small refinery exemptions "or any other aspect of the formula at 40 CFR 80.1405(c)" used to set annual percentage standards." *Id.* n.165. While EPA retains discretion on exactly how to account for retroactive small refinery exemptions, EPA is obligated by statute to do *something* to ensure the required volumes are being met. EPA has the authority and the means for modifying the Proposed Rule to account for retroactive small refinery exemptions.

2. *By Ignoring Small Refinery Exemption Extensions, EPA Does Not Take a "Neutral" Approach to Setting Cellulosic Volumes.*

In setting a level of cellulosic biofuel for a given year below the applicable volume in the statute, EPA may not "adopt a methodology in which the risk of overestimation is set deliberately to outweigh the risk of underestimation" but must make a projection that "takes neutral aim at accuracy." *Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 479, 476 (D.C. Cir. 2013). By systematically ignoring retroactive small refinery exemptions as well as the possibility of additional small refinery exemptions, EPA's approach fails to take this "neutral aim at accuracy." If small refinery exemptions, remain unaccounted for, the cellulosic volumes—post exemptions—will always be underestimated. EPA's statement to the contrary, 84 Fed. Reg. at 36,766, is inaccurate. Instead, RFA agrees with OMB's comments to EPA: "To the use of a neutral aim with respect to cellulose as directed by the court, your failure to incorporate a projection for waived gasoline and diesel

¹⁴ 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>

volumes from small refinery waiver ensures that your analysis in setting the cellulosic RVO is not ‘neutral’, in direct contravention to the courts direction.” To ensure a “neutral” approach and prevent systematic underestimation of cellulosic volumes, EPA must account for small refinery exemptions in the Proposed Rule.

3. *Unaccounted-for Retroactive Small Refinery Exemptions Amount to an Unauthorized Waiver of the Statutory Volumes.*

EPA’s failure to account for retroactive small refinery exemptions amounts to a sizeable *de facto* waiver of required volumes. As noted, retroactive exemptions collectively reduced the effective annual RVOs for 2017 by 9.4 percent (nearly 2 billion gallons) below the level set in the final rule, and exemptions granted thus far for 2018 have reduced the effective RVOs for that year by 7.4 percent. *Compare* EPA, *RFS Small Refinery Exemptions*, *supra* note 5 (showing estimated RVO exemptions of 1.82 billion RINs for 2017), *with* 81 Fed. Reg. 89,746, 89,747 (Dec. 12, 2016) (showing final renewable fuel volume requirement of 19.28 billion gallons for 2017). The 35 exemptions granted for compliance year 2017 represented 1.82 billion exempted RINs.¹⁵

Although Congress restricted EPA’s ability to waive volumes if certain conditions are met, those conditions do not apply here. See 42 U.S.C. § 7545(o)(7)(A), (D); *Nat’l Petrochemical & Refiners Ass’n v. EPA*, 630 F.3d 145, 149 (D.C. Cir. 2010). The RFS allows EPA to reduce the statutorily mandated volumes of renewable fuel, but only through one of three mechanisms, all of which require EPA 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, results in a waiver that Congress neither authorized nor 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

¹⁵ See EPA, *RFS Small Refinery Exemptions*, <https://www.epa.gov/fuelsregistration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (last visited August 25, 2019).

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...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). *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.”). Indeed, Congress could have relieved all small refineries from compliance permanently, but it chose not to do so. Congress explicitly made the initial “temporary exemption” for all small refineries expire after 2010. See 42 U.S.C. § 7545(o)(9)(A)(i). Moreover, in the absence of the three limited waivers Congress put in place, it repeatedly commanded EPA to “ensure” the aggregate volumes are met. 42 U.S.C. § 7545(o)(2)(A)(i), (o)(3)(B)(i); *ACEI v. EPA*, 864 F.3d at 698.

The exemptions that EPA announced in August 2019 for compliance year 2018 (in addition to the more than 2.6 billion gallons exempted for compliance years 2016 and 2017) amount to additional unauthorized carve-outs without the public notice and opportunity for comment that the RFS otherwise requires for the proposed use of other waiver authorities. See 42 U.S.C. § 7545(o)(7)(A). Such obfuscated actions undermine Congressional intent and are outside the limited authority granted to EPA to alter the mandated volumes of renewable fuels.

IV. THE PROPOSED 2020 RULE VIOLATES THE LETTER AND INTENT OF THE COURT’S VACATUR OF THE EPA’S 2016 INADEQUATE SUPPLY WAIVER IN AMERICANS FOR CLEAN ENERGY.

EPA’s proposal makes a mockery of the D.C. Circuit’s decision in *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017), by refusing to add back 500 million gallons of renewable fuel the Court determined were inappropriately waived by EPA based upon claims of an inadequate domestic supply in 2016. In remanding the rule back to EPA for further deliberation, the Court’s directive was unequivocal and unconditional – to “vacate EPA’s decision in the Rule to reduce the total renewable volume requirements for 2016 through use of the ‘inadequate domestic supply’ waiver authority.” *Id.* at 696-97. EPA has no basis for ignoring this mandate based on its *post-hoc* consideration of other independent factors. Even if it did, EPA has no authority to effectively vacate the court’s vacatur.

The grounds EPA offers for disobeying the Court’s mandate are inconsistent with the Court’s holding as well. EPA justifies its insubordination on primarily two grounds – (1) the ability of the market to produce appreciably higher volumes than what EPA planned to propose for 2020 and (2) the burdens placed on obligated parties when setting retroactive standards. Proposed Rule at 36763. Neither reason is compelling or permissible under the statute.

EPA's first basis for ignoring the D.C. Circuit's mandate – the alleged ability of renewable fuels producers to produce higher volumes of renewable fuel – was specifically rejected by the D.C. Circuit as a consideration in modifying required renewable fuel volumes. According to the Court, the Agency has no discretion to make adjustments based on its consideration of extra-statutory factors. Moreover, even if EPA were to exercise its waiver authority, the statute provides such waivers only for inadequate domestic *supply*—not production. That, indeed, was the central holding of the Court's decision in the *Americans for Clean Energy* case. 864 F.3d at 737. It's brazen for EPA to now take that same rejected rationale and use it to escape the Court's directive. Similarly, EPA considers demand-side factors that also were rejected by the Court, arguing, "However, as we believe there are very limited opportunities to use biofuels beyond the volumes we are proposing for 2020, we believe that this is unlikely to incent significant new biofuel generation in 2020." Proposed Rule at 36,789.

In finding that EPA's attempt to lower the annual volume standard was impermissible, the Court specifically rejected the very same economic burden arguments EPA now offers as its second reason for disregarding the Court's order. EPA's insistence on ensuring that it sets the annual standards at a level that is comfortable to obligated parties is also at odds with the intent of Congress to increase and the Court's instruction because it "turns the Renewable Fuel Program's 'market forcing provisions' on their head." *Id.* at 712. And to the extent EPA wishes to invoke economic impacts, EPA is prohibited from making adjustments on that basis unless and until it meets the criteria set forth by Congress for *waiving* volumes on the basis of finding only *severe* economic harm. *Id.* (rejecting adjustments to the annual volumes based on "lesser degrees" of economic harm). It is undisputed that EPA did not make and has not made such a finding. See EPA's Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70752 (November 27, 2012); EPA's Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard, 73 Fed. Reg. 47168 (August 13, 2008).

EPA's assumption that restoring the volumes impermissibly waived would not provide "any corresponding benefit" confirms its focus on only the oil industry rather than the renewable fuels industry, which would benefit from increased production and stable RIN prices. Moreover, the agency's assumption that the fuels could not be retroactively restored to 2016 is disingenuous; nothing about the D.C. Circuit's decision suggests that the volumes could not be restored prospectively. EPA could have complied with the Court's order by restoring those volumes to the 2018 or 2019 annual standards.

Although EPA acknowledges that "there would likely be sufficient RINs to comply with an additional 500-million-gallon standard" in 2020, as noted above EPA suggests with no factual predicate that the opportunities to use the additional biofuels above the currently proposed 2020 volumes would be "limited." This thinly

veiled reference to a so-called blend wall has been consistently refuted and rejected.

Moreover, the notion that compliance is unattainable since it would “necessarily result in a drawdown of the carryover RIN bank” is ironic given the expansion of the RIN bank in recent years, which has been due in significant part to small refinery exemptions. In fact, the 2.19 billion carryover RINs assumed in the Proposed Rule to be available for 2020 are 545 million RINs higher than the 1.65 billion RINs carried over into compliance year 2016.¹⁶ That is, the increase in the RIN bank since the year 500 million gallons were waived is almost exactly equal to the waived volume. Moreover, the estimates for 2019-2020 were developed before an additional 1.43 billion RINs were waived for 2018.

EPA itself has maintained it has authority to make adjustments “to provide meaningful relief” for obligated parties whose small refinery exemptions denials are reversed. See *EPA Br., Producers of Renewables United for Trust and Transparency v. EPA*, No. 18-1202 (D.C. Cir. filed Apr. 1, 2019) (“In this case, EPA was concerned with providing meaningful relief to three specific small refineries for two specific years, based on the impact of a lengthy litigation-related delay.”). EPA apparently, and arbitrarily, intends for any “meaningful relief” to flow one way only—to obligated parties. In any event, in the *Americans for Clean Energy* litigation EPA never once suggested its hands would be tied from rectifying its challenged waiver. EPA cannot make a regulatory mess and now argue it doesn’t know how to clean it up.

In sum, EPA has no legal basis for ignoring the directives of Congress and the D.C. Circuit. “[T]he fact that EPA thinks a statute would work better if tweaked” gives EPA no right to alter those directives. *Id.*

V. SMALL REFINERY EXEMPTIONS ARE HARMING U.S. ETHANOL PRODUCERS BY STIMULATING INCREASED ETHANOL IMPORTS

In establishing the advanced biofuel requirement, the EPA based its assumption of the volume of ethanol imports in 2020 on a recent historical average. EPA stated, “Imports of sugarcane ethanol appear to have stabilized in the 2014-2018 timeframe in comparison to previous years. The average for these years was 62 million gallons. Due to the difficulty in precisely projecting future import volumes as described further below, we believe that a rounded value of 60 million gallons would be more appropriate and thus we use 60 million gallons of imported sugarcane ethanol for the purposes of projecting reasonably attainable volumes of advanced biofuel for 2020.” However, as shown in the accompanying Figure IV.B.1-1, imports had been significantly higher during most of the 2006-2013 period. EPA acknowledged, “We note that the future projection of imports of

¹⁶ See U.S. EPA. “Carryover RIN Bank Calculations for 2019 Final Rule.” Docket ID No. EPA-HQ-OAR-2018-0167-1298.

sugarcane ethanol is inherently imprecise and that actual imports in 2020 could be lower or higher than 60 million gallons,” and it listed several factors that could affect import volumes. Proposed Rule at 36,779.

Conditions have changed markedly from the 2014-2018 period. Nearly 90 million gallons of ethanol have already been imported from Brazil between January and August 2019. Monthly statistics from the U.S. Census Bureau indicate that 45 million gallons were imported through June. According to weekly data published by the EIA, another 12 million gallons were imported in July, while industry sources show another 32 million gallons arrived in August. Imports have been supported by a combination of a widening price spread between advanced biofuel (D5) and renewable fuel (D6) RINs, high prices for credits associated with the California Low Carbon Fuel Standard (LCFS), low world sugar prices and a period of higher U.S. corn prices. The EPA only obliquely referred to the RIN price spread as a factor affecting ethanol imports, and it did not mention LCFS credit prices at all.

From 2014 to 2018, the average price of an LCFS credit was \$86, according to data reported by Argus Media and OPIS and published by the California Air Resources Board.¹⁷ However, from January through July 2019, the price of a credit averaged \$187. The carbon intensity of sugarcane-based ethanol used in California is approximately 30 g/MJ lower than that of corn-based ethanol on average, which in 2019 has provided imported Brazilian ethanol with a premium of more than 40 cents per gallon over U.S. corn-based ethanol.

The price spread between D5 and D6 RINs was around just 10 cents in late 2017 and early 2018 before news of widespread small refinery exemptions caused it to widen, meaning there was little or no incentive to increase imports. However, from mid-February through December 2018, after news of the exemptions broke, the price spread averaged 21 cents—double the previous level.

A similar pattern occurred after the announcement on August 9, 2019 that 31 small refinery exemptions had been granted for the 2018 compliance year. In 2019 prior to the announcement, the D5-D6 RIN spread averaged 23 cents. However, after the announcement, the D6 RIN price slumped further, and the D5-D6 spread has consistently been around 30 cents. This widening spread is encouraging greater imports of sugarcane ethanol that would otherwise be economically uncompetitive with U.S.-produced ethanol. In August alone, more than 30 million gallons of ethanol have been imported. The effect of these imports is to displace domestic-origin ethanol, further contributing to the demand loss and price destruction from small refinery exemptions. Increased imports of sugarcane ethanol also displace the use of U.S.-produced biodiesel for compliance with advanced biofuel renewable volume obligations.

¹⁷ See California Air Resources Board, *LCFS Data Dashboard*, <https://ww3.arb.ca.gov/fuels/lcfs/dashboard/dashboard.htm> (last visited August 23, 2019).

The widening D5-D6 RIN price spread coupled with LCFS credit values is providing the incentive for renewed imports at a larger scale than assumed by EPA. Moreover, most of the factors driving higher imports are likely to continue through 2020. As a result, the assumption that 60 million gallons of Brazilian ethanol will be imported in 2020 appears far too low. However, the Agency should not increase the advanced biofuel obligation from the proposed level. Rather, it should reallocate the volumes associated with small refinery exemptions in order to avoid further harm to U.S. ethanol and biodiesel producers.

VI. EPA ARBITRARILY AND CAPRICIOUSLY REFUSED TO RECEIVE COMMENT ON CRITICAL ASPECTS OF THE PROPOSED RULE.

In the Proposed Rule, EPA stated that it is not soliciting comments on how small refinery exemptions are accounted for in the percentage standards formulas in 40 C.F.R. § 80.1405, and that any such comments would be deemed “beyond the scope of the rulemaking.” 84 Fed. Reg. at 36,797. That position is insupportable under the Clean Air Act and well-established principles of administrative law. Section 211(o)(3)(C)(ii) of the Act specifically directs EPA to “make adjustments” to account for the use of renewable fuel by exempt small refineries in the prior calendar year. 42 U.S.C. § 7545(o)(3)(C)(ii).

EPA’s refusal to solicit and consider comment on the central tenants of the proposal also is inconsistent with the Administrative Procedures Act (APA) as it constitutes a “fail[ure] to consider . . . important aspect[s] of the problem.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 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). Indeed, the key purpose of the proposed rule is to establish the 2020 applicable annual percentage standards by which obligated parties can determine their individual obligations. As noted, that equation includes variables representing exempted volumes of gasoline and diesel from small refiners. EPA cannot take comment on the proposed RVOs without accepting comment on fundamental issues directly related to how the RVO is calculated. Besides being inconsistent with the requirements of the Clean Air Act and the APA, EPA’s resistance to public comment on the most impactful aspects of its proposed rule reflects a tacit recognition that its action is indefensible.

VII. CONCLUSION

EPA's 2020 RVO proposal will remain misleading and meaningless until the Agency redistributes the renewable fuel volumes lost to arbitrary small refinery exemptions and to the inappropriate use of the general waiver authority in the 2016 RVO, as vacated and remanded by the *ACEI* decision. EPA should implement the Renewable Fuel Standard as Congress intended, thereby lowering prices at the pump for consumers, reducing greenhouse gas emissions, cutting dependence on imported oil, and creating economic opportunities for farmers across the country.