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U.S. Environmental Protection Agency
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Re: Docket EPA-HQ-OAR-2018-0167 - Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, 83 Fed. Reg. 32,024 (7/10/18)

I. Introduction

The American Fuel & Petrochemical Manufacturers (“AFPM”) submits these comments in response to the Environmental Protection Agency’s (“EPA” or “Agency”) proposed rule entitled, “*Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020.*” AFPM’s members comprise virtually all the nation’s refining capacity, and as obligated parties under the Renewable Fuel Standard (“RFS”) will be substantially affected by EPA’s final 2019 rule.

The U.S. refining industry has a long history of reliably transforming natural resources into the fuels (including diesel, gasoline, home heating oil, and jet fuel) and petrochemicals that improve the lives of Americans and people all around the world. We continue to innovate and optimize our operations to produce cleaner, ever-more efficient products – products that literally and figuratively power our economy and transportation sectors. In recent years, the American energy renaissance coupled with our country’s unparalleled refining expertise, has transformed the United States from the number one refined products importer to the number one exporter in the world, and has created thousands of jobs along the way.

We acknowledge the difficult task that EPA has to implement a program that by almost any metric is broken and unworkable, and the justifications for which have long since eroded, if they ever existed at all. Indeed, we are no longer in a time of domestic energy scarcity. To the contrary, domestic oil and gasoline production is at all-time highs. And the notion that the RFS improves the environment has long been debunked. Yet, year after year, EPA is forced to try to justify increasing volume mandates that consumers and the market repeatedly demonstrate are unworkable. And, year after year, the U.S. refining industry and consumers are left holding the bag through enormous compliance obligations, phantom production, prevalent fraud, and higher prices at the pump.

We appreciate EPA’s efforts to develop volume requirements for 2019 and 2020 (in the case of biomass-based diesel) that are reasonably achievable, and we fully support its decision not to purposefully drawdown the Renewable Identification Number (“RIN”) bank. Unfortunately, the agency’s proposed volume requirements miss the mark—by a lot. As discussed in greater detail below, all of EPA’s proposed volume mandates are overly aggressive and unsupported by market realities.



For starters, EPA continues to utilize a flawed method to project cellulosic biofuel production. When EPA’s methodology overstates production, as it has repeatedly over the nine years that the cellulosic mandate has been in place, obligated parties are forced to purchase expensive cellulosic waiver credits from EPA. This amounts to nothing more than a tax on the refining industry and fuel. Based on production data to date, EPA’s 2018 cellulosic biofuel standard appears to have overpredicted production by 66 million gallons. Yet, EPA proposes to use essentially an adjusted version of the same methodology to justify an all-time-high cellulosic mandate of 381 million gallons for 2019, which is 32% higher than the 2018 standard that itself won’t be met.

In the face of the indisputable fact that EPA has dramatically overpredicted production yet again, EPA should go back to the drawing board and use a methodology to take better aim at accuracy. It would be arbitrary and capricious for EPA to use flawed methodology.

We further believe that in light of its record overpredicting cellulosic production, EPA should codify a process or mechanism for an automatic end-of-year review and adjustment to the cellulosic volume requirement that would be based on actual production data. Such a process would provide relief to EPA and obligated parties by avoiding the need for EPA to respond to waiver petitions and for obligated parties to purchase waiver credits for phantom fuels.

We are also troubled by EPA’s failure to comprehensively analyze and justify its total ethanol mandate for 2019. In light of the E10 blendwall, the only way EPA could justify its proposed volume requirements is through increases in E15 and E85 consumption and a substantial decrease in E0 domestic consumption. Yet, EPA inexplicably has taken the position that “there was not a need to precisely estimate such growth”¹ or analyze these issues. EPA is wrong on this count. Indeed, it would be arbitrary and capricious on its face for EPA to ignore such information, particularly since such analyses would undoubtedly show that E0 demand remains strong and that E15 and E85 growth will be miniscule next year and thus could not possibly justify EPA’s proposed volume requirements.

EPA makes a fundamental flaw with its proposed BBD volume requirement as well. Specifically, in large part, EPA justifies both the 2019 and 2020 BBD requirements on imported biofuels. Relying on foreign biofuels to establish annual volume mandates is inconsistent with the purpose and language of the RFS. The purpose of the RFS, as evidenced by the statutory factors that EPA is required to consider when establishing BBD volumes, is to promote domestic biofuel production, not foreign production. Thus, it is improper for EPA to consider anything other than domestic production capacity in establishing BBD volume requirements.

¹ “Market impacts of biofuels in 2019,” June 26, 2018, EPA-HQ-OAR-2018-1067-0025 at pp. 3-4.



For all the reasons set forth below, we urge EPA to fully utilize the waiver tools Congress provided—both the cellulosic and the general waiver authority—to set volume requirements that are in fact reasonably achievable. Volume mandates should be driven by data, not politics or wishful thinking. To that end, we recommend that EPA adjust its proposal as follows:

	EPA's Proposal For 2019	AFPM's Proposal For 2019	EPA's Proposal For 2020	AFPM's Proposal For 2020
Cellulosic biofuel (million gallons)	381	222	n/a	n/a
Biomass-based diesel (billion gallons)	2.1	1.9	2.43	2.0
Advanced biofuel (billion gallons)	4.88	3.112	n/a	n/a
Total renewable fuel (billion gallons)	19.88	17.372	n/a	n/a

Our specific comments on EPA's proposal are set forth below.

II. EPA's Proposed RFS Renewable Fuel Volumes

The table below, which compares EPA's proposal for 2019 and 2020 to promulgated RFS renewable fuel volumes for 2016-2018, contains numbers that will be referenced throughout these comments. EPA proposes large increases in all four categories.



	2016	2017	2018	Proposed 2019	Proposed 2020
Cellulosic biofuel (million gallons)	230	311	288	381	n/a
Biomass-based diesel (billion gallons)	1.9	2.0	2.1	2.1 ²	2.43
Advanced biofuel (billion gallons)	3.61	4.28	4.29	4.88	n/a
Total renewable fuel (billion gallons)	18.11 ³	19.28	19.29	19.88	n/a

EPA has the duty and responsibility to project reasonably attainable volumes of renewable fuel. The proposed volumes are not reasonably attainable, as explained in the sections that follow. The RFS renewable fuel volumes must reflect the market’s ability to produce and consume renewable fuels while protecting consumers.

III. RIN Carryover

The carryover RINs provision is very important, and AFPM supports EPA’s proposal not to purposefully drawdown the RIN bank balance. However, this will require lower renewable fuel volumes in the final 2019 rule.

EPA should continue to recognize the importance of the RIN bank for managing market liquidity, unforeseen or uncontrollable events (*e.g.*, droughts), and supply dislocations (*e.g.*, transportation disruptions), and not consider the size of this bank when setting the annual renewable fuel volumes (“RVOs”). A RIN bank is required under the statute and is necessary to ensure that obligated parties have reasonable access to the means (RINs) for RFS compliance.

² Already finalized, see 82 Fed. Reg. 58486 (December 12, 2017).

³ Remanded to EPA by the U.S. Court of Appeals for the D.C. Circuit in 2017, *see Americans for Clean Energy v. EPA* (“ACE”), 864 F. 3d 691 (D.C. Cir. 2017).



Specifically, the RFS contains a requirement that any generated credits (*i.e.*, RINs) be “valid to show compliance for the 12 months as of the date of generation.”⁴ This provision allows the use of RINs in the year generated and the following year. Thus, a RIN is valid if used in this two-year period and carryover RINs serve this statutory purpose.

EPA has also interpreted the statute in this manner. From the beginning of the RFS, EPA specified that “RINs are valid for compliance purposes for the calendar year in which they are generated, or the following calendar year.”⁵ EPA has explained that “Given that the renewable fuel standard is an annual standard, obligated parties will determine compliance shortly after the end of the year, and credits would be identified at that time . . . For a party to be able to use credits generated, such credit use must necessarily occur in a compliance year other than the one in which the credit was generated.”⁶ Thus, EPA should not take any action in the final rule that would increase RFS volumes required in 2019 based on the availability of carryover RINs.

If the Agency were to require a drawdown of the RIN bank, it would effectively preclude obligated parties from using credits for RFS compliance that were generated in the previous year, consistent with CAA §211(o)(5)(C). It would also be inconsistent with EPA’s imposition of a 20 percent regulatory cap on rollovers, which the Agency described as providing “the appropriate balance between, on the one hand, allowing legitimate RIN carryovers and protecting against potential supply shortfalls that could limit the availability of RINs, and on the other hand ensuring an annual demand for renewable fuels as envisioned by the Act.”⁷

AFPM also strongly agrees with EPA’s perspective regarding the policies served by the RIN bank:

Just as the economy as a whole functions best when individuals and businesses prudently plan for unforeseen events by maintaining inventories and reserve money accounts, we believe that the RFS program functions best when sufficient carryover RINs are held in reserve for potential use by the RIN holders themselves, or for possible sale to others that may not have established their own carryover RIN reserve. Were there to be no RINs in reserve, then even minor disruptions causing shortfalls in renewable fuel production or distribution, or higher than expected transportation fuel demand (requiring greater volumes of renewable fuel to comply with the percentage standards that apply to all volumes of transportation fuel, including the unexpected volumes) could lead to the need for a new waiver of the standards, undermining the market certainty so critical to the RFS program. Moreover, a

⁴ CAA §211(o)(5)(C)

⁵ 72 Fed. Reg. 23,909 (May 1, 2007).

⁶ *Id.* at 23,933-4.

⁷ 72 Fed. Reg. at 23,935.



significant drawdown of the carryover RIN bank leading to a scarcity of RINs may stop the market from functioning in an efficient manner (i.e., one in which there are a sufficient number of reasonably available RINs for obligated parties seeking to purchase them), even where the market overall could satisfy the standards. For all these reasons, the collective carryover RIN bank provides a needed programmatic buffer that both facilitates individual compliance and provides for smooth overall functioning of the program.⁸

IV. The 2019 RFS Volumes Are Not Reasonably Attainable

EPA is to set RFS volumes that are “reasonably attainable.”⁹ Unfortunately, EPA’s proposed 2019 volume requirements do not meet this standard. To reach appropriate levels, EPA should use its general and cellulosic waiver authority to set reasonably attainable volumes.

a. Total ethanol in 2019

Ethanol is, by far, the most prevalent renewable fuel used for compliance with the RFS, comprising approximately three-quarters of the fuel used to meet annual standards. Therefore, without an analysis that includes projected volumes of various ethanol fuel blends likely to be consumed by the public, EPA’s proposed 2019 RVOs and applicable percentages are lacking required technical support and are thus arbitrary and capricious. In addition, the absence of ethanol consumption data to support EPA’s proposed rule prevents interested parties from providing informed comment on EPA’s development of the volumes contained in the proposed rule. A notice of proposed rulemaking must include “a summary of . . . the factual data on which the proposed rule is based . . . the methodology used in obtaining the data and in analyzing the data . . .”¹⁰ The role of commenters is not to guess upon what data EPA relied, but rather to evaluate the data presented and, if necessary, provide EPA with corrected or supplemental data to facilitate informed rulemaking.

For both public and private entities, data-based fuel demand forecasts — including those issued by the Energy Information Administration (“EIA”) — are integral to the anticipation of the American public’s needs related to transportation and to the analyses that enable entities to collaboratively and appropriately meet those needs. However, in establishing the proposed 2019 RFS volume projections, the EPA did not cite forecasts for 2019 demand for various fuels

⁸ 83 Fed. Reg. at 32,029.

⁹ *Americans for Clean Energy v. EPA (“ACE”)*, 864 F. 3d 691 (D.C. Cir. 2017). As described by EPA in the current rule, “[v]olumes described as ‘reasonably attainable’ are those that can be reached without market disruptions and/or higher costs, such as those that could result from diverting advanced biofuels or advanced biofuel feedstocks from existing uses.” *Id.* at 32,039.

¹⁰ CAA §307(d)(3).



containing ethanol — fuels of different compositions that are neither universally interchangeable nor demanded in equal amounts by consumers.

The following considerations — including those unique to E15, E0 and E85 fuels — should be taken into account when developing an analysis to inform the development of reasonably attainable RFS volume projections.

The total ethanol mandate should not exceed 9.7% of gasoline (E0-E15). This level recognizes the E10 blendwall — or the point at which ethanol can safely be used by vehicles and retail infrastructure — and the strong market for E0 fuel. It also reflects consumer demand and practical constraints (*i.e.*, distribution and refueling infrastructure that limits the market for E15 and E85).

The Petroleum Marketers Association of America (PMAA) agree:

Preventing the ethanol mandate from exceeding E10 is absolutely critical to maintain price stability and supply in both the wholesale and retail gasoline markets. The reason for this is simple and straight forward: E10 plus blends are not compatible with the vast majority of fuel delivery equipment currently installed at retail stations nationwide. While many underground storage tanks may be compatible with ethanol blends over E10, UST system piping and dispensing systems are not compatible. E10 plus blends can quickly dissolve rubber seals, gaskets, plastic components along with the glue that holds them together in a liquid tight delivery system. Using E10 plus blends in these UST systems could result in widespread releases of gasoline into the environment. Moreover, it would cost small business petroleum marketers more than \$300,000 per location to replace existing equipment with E10 plus compatible components. A capital investment, even if it were available would fail to be recouped based on consumer rejection of E10 plus blends.... Mass disruption in retail gasoline supply and an unacceptable rise in prices at the pump is precisely the direction we are headed should the EPA not use its waiver authority to keep volumetric ethanol mandates at an E10 maximum level. PMAA cannot emphasize enough the very real catastrophic downstream consequences that will result should the annual corn ethanol mandate move beyond an E10 blend. PMAA urges the EPA to use their waiver authority to keep the current corn ethanol mandate at a maximum 9.7% of projected gasoline demand that will prevent the disruption of retail infrastructure for fuel delivery nationwide.¹¹

The July 2018 EIA Short-term Energy Outlook forecast for gasoline demand in 2019 is 9.36 million barrels per day (“b/d”), or 143.49 billion gallons. This includes E85. After allowing for,

¹¹ EPA-HQ-OAR-2017-0091-3962, August 30, 2017.



and adding back in E85, 9.7% of the remaining gallons would dictate a total of 13.97 billion gallons of total ethanol (corn, sugarcane, and cellulosic).¹²

Far from setting the 2019 ethanol volumes at 9.7%, EPA failed to even analyze projected 2019 ethanol use at all. EPA's memo to the docket on this subject acknowledges this deficiency:

For the purposes of proposing volume requirements for 2019, we have not projected specific volumes of E15 and E85 that we believe could be achieved in 2019. . . . However, there was not a need to precisely estimate the growth in the use of ethanol that can occur between 2018 and 2019.¹³

EPA offers no rationale for its position that it does not “need to precisely estimate” ethanol use in order to properly establish 2019 standards.¹⁴

Without this information, EPA has no basis to demonstrate that its proposed volumes are reasonable and attainable.¹⁵ Given the importance of ethanol to RFS compliance, there is no excuse for the Agency's failure to analyze this major component of the 2019 standards.

i. EPA cannot assume that use of E15 blends is likely to significantly grow

There are significant barriers to increased demand for E15 fuel: vehicle compatibility, legal barriers, and infrastructure constraints all impede demand for the fuel. Fueling with E15 in older cars and all small engines is problematic. Any damage it causes to engines not designed to run

¹² Table 4a. U.S. Petroleum and Other Liquids Supply, Consumption, and Inventories, U.S. Energy Information Administration, July 2018, Short-Term Energy Outlook. Subtracting an estimate for E85 from the EIA forecast for total gasoline demand leaves a projection for E0-E15 demand of 143.4 billion gallons. We have estimated 2019 E85 demand at 84.315 million gallons (5,500 b/d). This estimate considers growth in E85 demand from 3,500 b/d in 2018 and projected 2018 demand of 4,833 b/d based on the first six months of 2018 as reported by EIA in its Weekly Petroleum Status Report, Table 3, Weekly U.S. Refiner Net Production of Motor Gasoline and Blender Net Production of Motor Gasoline, Finished, Conventional, Greater Than Ed55 (Thousand Barrels per Day). Based on projected 2019 gasoline demand of 143.4 billion gallons of E0-E15 gasoline and 84.315 million gallons of E85, total (corn + sugarcane + cellulosic) ethanol should not exceed 13.97 billion gallons of ethanol in gasoline in 2019: $9.7\% * 143.4 \text{ billion gallons of E0-E15} = 13.91 \text{ billion gallons of ethanol plus } (74\% * 0.084315 \text{ billion gallons of E85}) = 13.97 \text{ billion gallons for 2019}$. (74 percent is the average ethanol content of E85).

¹³ “Market impacts of biofuels in 2019,” June 26, 2018, EPA-HQ-OAR-2018-0167-0025 at pp. 3-4.

¹⁴ EPA failed to look at ethanol content last year as well. See, e.g., EPA's Response to Comments for the 2018 RFS final rule, 420-R-17-007, at pp. 120, 121, 127, 128, and 133 (December 2017).

¹⁵ EPA must provide sufficient public notice and supporting information and rationale that complies with CAA §307(d)(3).



on E15 could be excluded from warranty protection. The potential liability associated with damage to vehicles from misfueling remains a concern as well.

E15 is unlawful to sell in a number of states, including California¹⁶ and New York,¹⁷ among others.

In addition to these legal barriers, there are only a limited number of retail stations that offer E15, perhaps because E15 is incompatible with some existing gasoline distribution infrastructure. Changes at retail stations would likely require significant infrastructure investments by station owners, including to replace or retrofit dispensers and associated piping. Rather than addressing E15's limitations, the Agency has arbitrarily decided that this evaluation is unnecessary.

With regard to the existing retail infrastructure, PMAA testified that:

To rely on UST system manufacturers to recertify every component of an existing storage system is almost impossible to achieve as they do not want the liability after the fact.”¹⁸

PMAA also submitted comments to EPA on the 2017 RFS to this same effect:

Without the ability to prove actual or legal compatibility, the vast majority of the retail gasoline tanks operated by PMAA members would be forced to close on a long-term temporary or permanent basis should the annual ethanol mandate push beyond an E10 blend. Even if PMAA members were able to afford replacement of E10 equipment with E10 plus certified components, there is not enough compatible UST equipment or installers available to prevent a mass disruption in the nationwide retail fuel distribution system. Moreover, those petroleum marketers with the means to upgrade to E10 plus blends cannot justify the large capital investment in a product few consumers want.... Based on current demand for E0 from boat, motorcycle and small engine owners, any E10 plus blend would meet with the similar consumer resistance as E85. PMAA believes that the ethanol industry has failed to convince consumers that

¹⁶ “The amount of ethanol blended into the final blend may not exceed 10.0 volume percent denatured ethanol” (https://www.arb.ca.gov/fuels/gasoline/082908CaRFG_regs.pdf, page 34).

¹⁷ 1 CRR-NY 224.3(a)(2)(i): “The total alcohol content of any gasoline alcohol blend shall not exceed 10 percent by volume.”

¹⁸ August 1, 2017, “PMAA Testimony before the EPA Public Hearing on the RFS Standards for 2018 and Biomass-Based Diesel Volume for 2019” Hyatt Regency Washington on Capitol Hill, PMAA Executive Committee Member Vern Kelley.



E10 plus blends are compatible with gasoline powered equipment and worth the loss in energy content based on current per gallon cost differentials.¹⁹

ii. EPA must recognize that E85 continues to struggle in the marketplace

There also are challenges to the increased adoption of E85 by consumers. The Agency has consistently overestimated the volume of E85 consumption and has apparently stopped trying.

According to PMAA, the number of stations that actually sell E85 has decreased rather than increased:

Many of the marketers who made the investment in E85 UST system components have since converted those tanks back to E10 service due to lack of consumer interest and concerns over engine performance and reduced energy content.²⁰

In addition to problems with the fueling infrastructure, the vehicle fleet is also a challenge for E85 fuels. Less than ten percent of the fleet is able to fuel with E85.²¹ EIA predicts the size of the flex-fuel fleet to grow very slowly,²² and automakers may stop producing as many flex-fuel vehicles because the credits they obtain for doing so under fuel economy standards have been decreasing and will end altogether in 2019.²³ Again, EPA has ignored these real-world constraints and has not presented them for public comment.

Consumer preferences, infrastructure compatibility, fleet composition, and market forces combine to render E85 an ineffective means to force more ethanol into U.S. transportation fuel.

iii. E0 remains in demand above EPA estimates

Demand for E0 has been far above EPA's estimates in the past. We again recommend that EPA work with EIA to improve understanding of the size of this market. As reflected in AFPM's past comments (attached) there is substantially more E0 than the sum of E15 and E85 volumes. Instead of addressing the much higher volume of E0 and relatively low volumes of E15 and E85, EPA entirely avoids analyzing the issue.

b. Cellulosic biofuel for 2019

¹⁹ EPA-HQ-OAR-2017-0091-3962, August 30, 2017.

²⁰ *Ibid.*

²¹ EIA Annual Energy Outlook 2018, table 40.

²² *Id.*

²³ See proposed "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," EPA-HQ-OAR-2018-0283, p. 876, fn. 879.



Last year EPA once again grossly overestimated production of cellulosic biofuel yet, notwithstanding access to this data, the Agency is using an “adjusted” methodology for 2019 that it claims improves upon the methods used in the 2018 rule.²⁴ This is inadequate. EPA must go back to the drawing board to improve its accuracy. Thus, EPA fails the legal standard that the D.C. Circuit articulated: 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 project that ‘takes a neutral aim at accuracy.’”²⁵

Since 2014, almost all cellulosic biofuel has come from biogas used for transportation. EPA does evaluate other sources of cellulosic biofuel (including feedstocks such as corn stover, corn kernel fiber, wood waste, and sugarcane bagasse to produce ethanol or heating oil). This proposal includes 381 million ethanol-equivalent gallons of cellulosic biofuel for 2019, which may be speciated as follows:

	<u>million gallons</u>
Liquid cellulosic biofuel	
without consistent commercial production	3
with consistent commercial production	21
Biogas for transportation	<u>358</u>
	381

EPA is proposing to set all-time high requirements for cellulosic biofuel, well above the 2017 promulgated value (311 million gallons) and the 2018 promulgated value (288 million gallons). If EPA had not regularly overestimated cellulosic production that would be one thing. But EPA now knows that it promulgated cellulosic volumes that overestimated production for 2016 and 2017 by 17% and 19% respectively.²⁶ It appears production will again fall short in 2018. Therefore, further increasing cellulosic biofuel volumes from 2018 to 2019 (which AFPM projects will represent an additional 32.3% increase) is engaging in impermissible “aspiration”²⁷ concerning the ability of the cellulosic biofuel industry to meet such aggressive and unsupported targets.

²⁴ 83 Fed. Reg. at 32,031.

²⁵ 83 Fed. Reg. at 32,028, citing *API v. EPA*, 706 F. 3d 474, 479, 476 (D.C. Cir. 2013).

²⁶ See 83 Fed. Reg. fn 38 at 32,032.

²⁷ *API v. EPA*, 706 F. 3d 474, 476 (2013). (“Section 7545(o)(7)(D)(i)’s reference to the projected volume of cellulosic biofuel seems plainly to call for a prediction of what will actually happen. EPA points to no instance in which the term projected is used to allow the projector to let its aspirations for a self-fulfilling prophecy divert it from neutral methodology.”).



	<u>2016</u>	<u>2017</u>	<u>2018</u>
Promulgated cellulosic biofuel	230 million	311 million	288 million
Actual / annualized cellulosic biofuel supply	190 million	252 million	222 million ²⁸ (annualized)
EPA Methodology Overprediction	40 million (21%)	59 million (23.4%)	66 million (29.7%)

As noted in the chart above, in terms of actual gallons produced, EPA is proposing to ignore the fact that it overestimated cellulosic biofuel production by 100 million gallons in the last two years alone. And in spite of these continuing shortfalls that require obligated parties to pay EPA for renewable fuel that is never produced,²⁹ EPA is proposing to compound its own error. The Agency proposes to further increase the requirements for cellulosic biofuels for 2019 by 32.2 percent over the promulgated volume for 2018, which, if current production continues at its current pace, will mean that the mandated volume will exceed actual supply by another 66 million gallons. This is far from a harmless error; EPA's chronic overestimation results in millions of dollars in direct costs to obligated parties.

The table below shows recent actual supply of cellulosic biofuel RINs³⁰ and an annualized estimate of RINs that will be generated in 2018 based on the first six months of 2018's actual production.

²⁸ As explained in detail below, if the rate at which cellulosic biofuel was produced during the first six months of 2018 is annualized for the entire year, the production of cellulosic biofuel production in 2018 would be 222 million gallons.

²⁹ Per CAA §211(o)(7)(D)(ii), EPA is required to make available cellulosic biofuel credits that obligated parties may purchase for compliance if they are unable to obtain sufficient cellulosic biofuel RINs to meet their individual renewable volume obligations.

³⁰ EPA Moderated Transaction System (EMTS) 2015 data: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2015-renewable-fuel-standard-data>; 2016 data: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2016-renewable-fuel-standard-data>; 2017 data: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2017-renewable-fuel-standard-data>.



	Cellulosic RINs (million)	Growth
2015	140.0	n/a
2016	190.8	36.2%
2017	252.2	32.2%
2018	222	-12.0%

In the years 2015 to 2017, there was annual growth of 50-60 million gallons per year in cellulosic biofuel. EPA’s proposal of 381 million gallons for 2019, however, will represent an increase of approximately 100 million gallons from EPA’s cellulosic standard for 2018 (288 million). Moreover, when compared to AFPM’s realistic estimate of 222 million gallons in 2018, the increase between 2018 and 2019 would constitute 166 million gallons, or over *three times the historical rate* of production increases. For these reasons, we believe that EPA’s proposed level for cellulosic biofuel in 2019 is unrealistic, improperly aspirational and not supported by real world historical data.

EPA’s proposal to not develop appropriate methodology (and EPA’s resulting projection of cellulosic biofuel production for 2019) lacks any awareness of its own chronic inability to accurately project future production. EPA required volumes for 2016 and 2017 that did not materialize. And while EPA has admitted its mistake, it has not corrected the problem. In fact, EPA’s proposal for 2019 exacerbates the problem that the Agency has created.

EPA explains its logic in a memorandum, “May 2018 Assessment of Cellulosic Biofuel Production from Biogas (2019).”³¹ In this memorandum, EPA compares cellulosic RIN generation for biogas for transportation for two 12-month periods, April 2016-March 2017 and April 2017-March 2018. Generation of RINs in this timeframe increased by 30 percent. EPA assumes that this growth would continue in 2019 in spite of shortfalls experienced in 2016 and 2017. This is clearly aspirational.

Under EPA’s methodology, the monthly average of cellulosic biofuel production in 2019 would need to increase to 31.75 million ethanol-equivalent gallons in order to support the proposed level for 2019.³² This is a very large increase on both a percentage basis and a volume basis and EPA has failed to cite any data for this increase or explain why it is justified given historical performance.

³¹ EPA-HQ-OAR-2018-0167-0026.

³² 381 million gallons/12 months = 31.75 million gallons/month.



EPA’s proposal must be reconsidered not only for its effect on the required volume of cellulosic biofuel in 2019 but also for its effect on the rest of the RFS. The Agency’s cellulosic projection for 2019 is the cornerstone for advanced biofuel and total renewable fuel because EPA relies solely on the cellulosic biofuel waiver to set the volumes for advanced biofuel and total renewable fuel. EPA’s simple subtraction to set advanced biofuel and total renewable fuel volumes, based on the cellulosic biofuel waived volume, may be administratively convenient for the Agency, but ignores EPA’s statutory duties to set renewable fuel volumes after considering all of its waiver authorities and to be reasonable and accurate when using its cellulosic waiver authority. Moreover, the Agency’s long history of overestimating cellulosic biofuel production demonstrates that its methodology is neither neutral nor accurate in defining the “available” reduction in total renewable fuel and advanced biofuel³³ since using less of its available waiver authority results in greater requirements for other renewable fuels.

The EPA-proposed cellulosic waiver (billion RINs):

8.50	statutory
<u>- 0.381</u>	proposed
8.119	cellulosic waiver volume

AFPM’s proposal on calculation of cellulosic biofuel requirements would obviously greatly improve accuracy, while respecting procedural requirements of the RFS and CAA. In contrast, in the proposed rule, EPA “anticipates that our final projection of cellulosic biofuel will be based on additional data we will obtain prior to issuing a final rule . . .”³⁴ AFPM would remind EPA of its obligations pursuant to CAA §307(d)(3) as well as the Administrative Procedure Act, 5 U.S.C. §503, to allow for public comment on information the Agency relies on for its final rule; EPA should make available any such information and provide an opportunity for public comment.³⁵

In light of EPA’s methodology consistently overestimating cellulosic production, the Agency should evaluate production to provide for a year-end supplemental waiver of cellulosic (and nested categories). The Agency would implement this separate methodology in December to quantify the amount of cellulosic actually produced during the compliance year. A supplemental waiver would then be calculated based on any shortfall in production, so that obligated parties would not be forced to purchase credits for cellulosic fuel that was never produced. AFPM stands ready to assist the agency in developing this methodology.

³³ EPA has not proposed to use other waiver authorities to reduce the total renewable or advanced biofuel volumes for 2019, thus the amount that EPA reduces cellulosic biofuel through its CAA §211(o)(7)(D) waiver authority “caps” the amount of available reductions for total renewable fuel and advanced biofuel.

³⁴ 83 Fed. Reg. at 32,026.

³⁵ Any final rule that is not a “logical outgrowth” of the proposed rule is arbitrary and capricious. *See Sprint Corp. v. FCC*, 315 F. 3d 369, 375-76 (D.C. Cir. 2003). Relying on new information in the final rule could form the basis for a petition for reconsideration. 42 U.S.C. 7607(d)(7)(B).



EPA should also consider revising Cellulosic Waiver Credits (“CWCs”) to ensure that these credits also count towards compliance with the nested obligations (i.e., advanced biofuel and total renewable fuel), as discussed in section IX below.

c. Domestic production should be the basis for setting volumes for BBD and advanced biofuels.

The proposed BBD and advanced biofuels volumes, into which imported fuels are factored, are out of line with the RFS’s goal of promoting greater energy independence and security, as EPA itself has acknowledged.³⁶ It is fundamentally illogical that a program designed to promote energy security should serve as a basis for imposing mandates on obligated parties in the United States to either purchase foreign-produced renewable fuel or RINs associated with the importation of such fuel. At bottom, the EPA should not implement the RFS in a manner that serves to subsidize foreign biodiesel producers at the expense of American-manufactured fuels in the name of energy independence. Nor should consumers be effectively forced to purchase and subsidize such production.

In the proposed rule, EPA indicates it is considering 100 million gallons of imported sugarcane ethanol to be reasonably available, despite the fact that imports have been below this level for the past four years and that in 2017, when EPA believed 200 million gallons of imports was reasonable, actual imports were 77 million gallons.³⁷ Even more disturbing, however, is EPA’s rationale in leaving its estimate for such imports at 100 million gallons, *i.e.*, that EPA’s “proposed advanced biofuel volume requirement for 2019 would be higher than that for 2018, creating some incentive for increases in imports.”³⁸ Not only are such incentives contrary to the purposes of the RFS, but they run counter to *API v. EPA*, where the court found that “EPA’s effort to kickstart cellulosic biofuel production does not look like the sort of ‘supplementary analysis’ in pursuit of the same regulatory objective we found permissible in *Sierra Club*, 35 F.3d at 306, n. 7, but rather like the adoption of an entirely new goal.”³⁹

The statutory provisions for the BBD volume after 2012 include an assessment of the renewable fuel on the energy security of the United States.⁴⁰ Yet, in the proposed rule, EPA impermissibly set renewable fuel volumes with consideration for both domestic production and imports of biofuels. To accurately reflect the energy security and independence goals of the RFS, the final rule must be based only on domestically-produced renewable fuels; EPA should correspondingly reduce the 2019 volumes it has proposed for BBD to “back out” non-domestic production.

³⁶ 82 Fed. Reg. at 46,177 (2018 RFS Supplemental Information Notice).

³⁷ 83 Fed. Reg. at 32,040.

³⁸ *Id.* at 32,041.

³⁹ *API v. EPA*, 706 F.3d 474, 480 (2013).

⁴⁰ CAA §211(o)(2)(B)(ii)(II).



Taking such action will not only align the final 2019 RFS with statutory requirements but will also help to ensure that RVOs are achievable, aligning the program with its original objectives. Experience with implementation of the RFS has repeatedly shown that biofuels will not be produced because government sets aggressive regulatory targets and, even if consideration of foreign production was permissible, EPA cannot assume that foreign producers will respond to such actions.

Beyond energy security, EPA must analyze five other criteria in establishing the BBD mandate post 2012.⁴¹ Specifically, EPA “shall” determine applicable volumes with reference to “the impact of renewable fuels on the energy security of the United States . . . the impact of renewable fuels on the infrastructure of the United States [and] the impact . . . on other factors, including job creation . . . [and] rural economic development.”⁴² These statutory factors all unequivocally reference domestic concerns. Therefore, it would be illogical for EPA to impose requirements based on foreign-produced renewable fuels for the RFS program when such requirements are contrary to the domestic factors that EPA must consider when establishing BBD volumes after 2012.

No provision in CAA §211(o) prevents EPA from making distinctions between domestic and foreign-produced renewable fuels. That the statute contemplates renewable fuel may be imported, and that current regulatory provisions treat gasoline and diesel importers as obligated parties, is not controlling. Since the inception of the RFS program, RINs have been assigned to every batch of renewable fuel that is produced domestically or imported.⁴³ But neither of these regulatory actions prevents EPA from interpreting the language and structure of the RFS statute to support domestic renewable fuel production over foreign renewable fuel production.

EPA has consistently described one of the goals of the RFS as reducing the use of “imported oil and fuel.”⁴⁴ EPA has also observed that the Energy Independence and Security Act of 2007, which formed the basis of the current RFS program, has the twin goals of “promoting energy independence and the reduction of GHG emissions from transportation fuels.”⁴⁵ Given those goals, including foreign production of renewable fuels in the calculation of the amount of renewable fuel that is “reasonably attainable” makes no sense, because foreign production and imports are an obstacle to energy independence, not a promoter of such independence.

Excluding foreign-produced renewable fuel in RFS volume calculations would not require a broad rewrite of current regulatory provisions. EPA could allow the current RIN compliance structure to remain in place, along with requirements that renewable fuels produced outside the

⁴¹ CAA §211(o)(2)(B)(ii)(I)(III)-(VI).

⁴² CAA §211(o)(2)(B)(ii)(I),(IV),(VI).

⁴³ See 72 Fed. Reg. at 23,908.

⁴⁴ *Id.* at 23,906 (emphasis added).

⁴⁵ See, e.g., 75 Fed. Reg. 14,670, 14,705.



United States comply with applicable regulatory definitions. Were EPA to take this approach, foreign-produced renewable fuels would remain available for compliance purposes, and there would be no discrimination against such suppliers. But since foreign-produced renewable fuels do not promote U.S. energy independence, they should not serve as a basis for increasing mandates on obligated parties located in this country.

d. Biomass-based diesel for 2019

EPA has already established the BBD standard for 2019 at 2.1 billion gallons, or 3.15 billion RINs. EIA data show that the U.S. is not on a pace to meet 2.1 billion gallons for domestic BBD production in 2018. In establishing the advanced and total standards for 2019, EPA must recognize this potential shortfall in BBD production.

In 2016, imports were used to comply with more than 20% of the biodiesel mandate.⁴⁶ The bulk of those imports were from Argentina and Indonesia. Those imports have dried up. Specifically, U.S. imports of biodiesel from Argentina (and Indonesia) were the subject of an unfair trade case brought by U.S. producers early 2017.⁴⁷ Since preliminary duties took effect in September 2017, there have been no reported U.S. imports of biodiesel from Argentina, thereby eliminating a major source of foreign supply to the U.S. market. If EPA insists on including foreign-produced BBD within the annual RFS requirement, the Agency cannot ignore the effect of these duties.

EPA also cannot continue to overlook the substantial price difference between BBD and petroleum-based diesel. EPA reports that substantial price difference is \$1.04-1.43/ethanol-equivalent gallon.⁴⁸ Obviously, EPA can reduce the cost of the RFS program by promulgating a lower BBD (and overall) volume for 2019.

Biodiesel is expensive. The chart below shows persistent and substantial price differences between biodiesel and petroleum diesel over time.

⁴⁶ In 2016, biodiesel from Argentina represented about 21% of U.S. biodiesel consumption. EIA reports biodiesel consumption in 2016 as 2.085 billion gallons:

https://www.eia.gov/totalenergy/data/monthly/pdf/sec10_8.pdf;

EIA reports that Argentina supplied 10.679 million barrels (448.5 million gallons) of biodiesel to the U.S. in 2016:

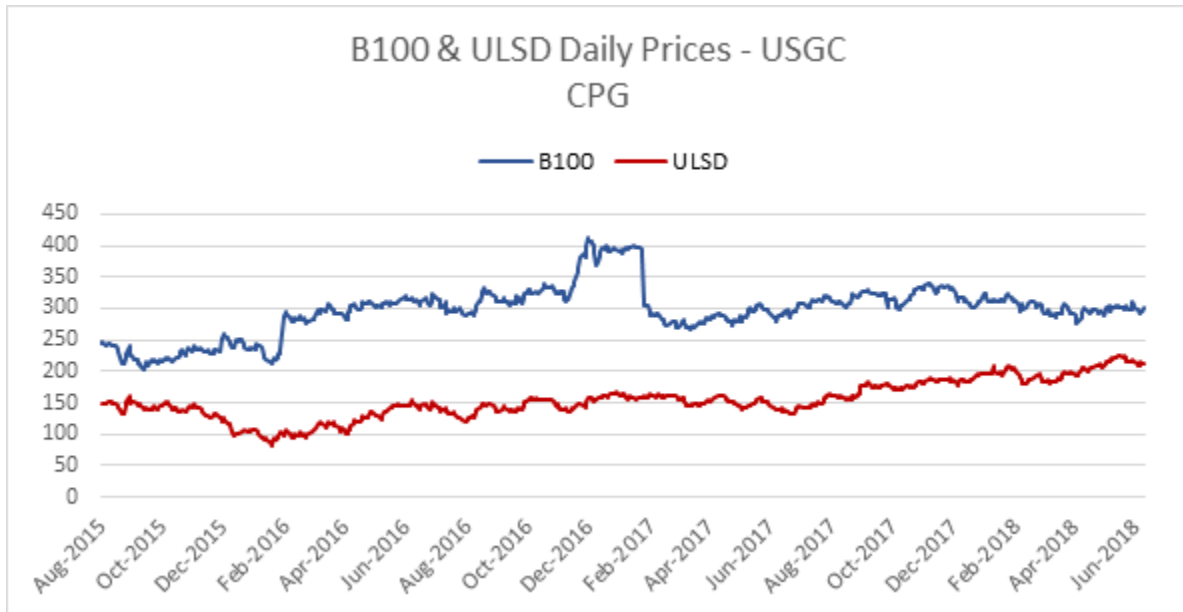
https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=m_epoordb_im0_nus-nar_mbbf&f=a; 448.5 million gallons is 21.5% of 2.085 billion gallons.

⁴⁷ U.S. International Trade Commission, “Biodiesel From Argentina and Indonesia,” Publication 4775, April 2018, https://www.usitc.gov/publications/701_731/pub4775.pdf.

⁴⁸ 83 Fed. Reg. at 32,053.



B100 and ULSD ABSOLUTE PRICE CHART



Projected domestic BBD volume (not BBD RINs) is on track for about 1.94 billion gallons this year.⁴⁹ There has been only a little growth in domestic BBD generation. Not only is this below 2.1 billion gallons – but some of these 2018 BBD RINs must be retired when BBD is exported, and they cannot be used for RFS compliance by obligated parties. As EPA promulgates the 2019 rule, it must reduce the nested categories (*i.e.*, advanced and total) to account for reduced BBD volume of 1.9 billion gallons, the current projected domestic supply. While the 2019 volume has already been promulgated, EPA retains authority under CAA §211(o)(7)(A)(ii) to determine that there is “an inadequate domestic supply.”⁵⁰

e. Advanced biofuel for 2019

The proposed 2019 advanced biofuel volumes are unachievable. The Agency must, at a minimum, consider the economics of BBD and reduced biodiesel imports when setting the

⁴⁹ Using EMTS data, the monthly rate in 2017 was 156.4 million gallons. This has increased to 161.9 million gallons for the first six months of 2018, suggesting an annualized rate of 1.943 billion in 2018. 2017 EMTS data: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2017-renewable-fuel-standard-data>; 2018 EMTS data: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2018-renewable-fuel-standard-data>.

⁵⁰ AFPM would note that EPA has not promulgated regulations to address use of general waivers. But a general waiver is available to EPA Administrator “on his own motion.” CAA §211(o)(7)(A).



advanced biofuel volume. EPA also cannot arbitrarily refuse to analyze and apply both its cellulosic and general waiver authorities to promulgate attainable 2019 projections.⁵¹

The advanced biofuel category includes cellulosic biofuel, biomass-based diesel, and other advanced biofuel (including renewable diesel that does not qualify as BBD because it is co-processed with petroleum diesel, naphtha and heating oil produced from biomass, and Brazilian sugarcane ethanol). The Agency proposes 4.88 billion ethanol-equivalent gallons for 2019:

EPA proposes to apply all of the cellulosic waiver to advanced biofuel (billion RINs).

13.00	statutory
- <u>8.12</u>	EPA’s proposed cellulosic waiver
4.88	EPA’s proposal

The Agency believes that 4.88 billion RINs is achievable and estimates the following volumes will be produced in 2019:

0.381	cellulosic
0.1	imported sugarcane ethanol
0.06	other (<i>i.e.</i> , non-cellulosic CNG, naphtha, heating oil, domestic advanced ethanol)
<u>4.34</u>	advanced biodiesel and renewable diesel RINs (2.89 billion wet gallons)
4.881	

EPA’s projection of 4.34 billion advanced biodiesel and renewable diesel RINs in 2019 is overly optimistic. Given tariffs on imported biodiesel from Argentina and Indonesia, the Agency must be projecting a large growth in domestic production and imports from other countries. Biodiesel imports in 2018 are less than half what they were in 2017.⁵² Domestic production of biodiesel is higher in 2018, but not high enough to meet 4.34 billion RINs in 2019 with meager imports.

EPA acknowledged in its proposal, “Domestic production of advanced biodiesel and renewable diesel in 2016 and 2017 was approximately 1.85 billion gallons. Of this total, approximately 150 million gallons of domestically produced biodiesel was exported in 2016 and 2017.”⁵³ EPA

⁵¹ As per comments above, EPA should exclude all biomass-based diesel imports from consideration in setting 2019 RFS volumes. Comments in this section are intended to raise additional reasons why EPA should reduce advanced biofuel requirements but should not be interpreted to contradict or qualify AFPM’s previous comments in excluding imports from the calculation of RFS volumes.

⁵² Comparing the first five months of 2018 to the first five months in 2017 – the most up to date data available – shows that imports are less than half in 2018 compared to 2017. EIA data, available here: https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=m_epoordb_im0_nus-z00_mbbf&f=m (last visited 8/16/18).

⁵³ 83 Fed. Reg. at 32,047.



admits that 2.8 billion gallons in 2019 is a risky bet, but the backstop are carryover RINs (“Alternatively, obligated parties could rely on the significant volume of carryover advanced RINs projected to be available in 2019.”).⁵⁴

The 2019 BBD estimate is unlikely to be achieved by domestic producers. As a result, EPA must reduce the advanced biofuel mandate to account for these variations. EPA arbitrarily limited the proposed reduction in advanced biofuel based on the amount that the Agency waived cellulosic biofuel. “We are proposing . . . that the applicable volume for advanced biofuels specified in the statute for 2019 is not attainable, and thus to exercise our cellulosic waiver authority to lower the applicable volume of advanced biofuel *by the same quantity as the reduction in cellulosic biofuel . . .*”⁵⁵ But the cellulosic waiver methodology relies on the projection of the production of only one advanced biofuel — cellulosic biofuel. In addition to serving as an artificial limit on the possible reduction on advanced biofuel, reliance solely on the cellulosic biofuel waiver authority failed to consider an important aspect of the problem — reasonably available volumes of all advanced biofuels.

The Agency is required to be “neutral” when setting the cellulosic biofuel standard. The following EPA statements show that EPA is not neutral:

- “The RIN generation data also show that while EPA has consistently preserved the opportunity for fuel other than BBD to contribute towards satisfying the required volume of advanced biofuel, these other advanced biofuels have not been supplied in significant quantities since 2013.”⁵⁶
- “Despite creating space with the advanced biofuel standard for ‘other’ advanced, in recent years that space has not been filled with significant volumes of ‘other’ advanced and BBD continues to fill most of the gap between the BBD standard and the advanced standard.”⁵⁷
- “EPA believes that the [2020] BBD standard we are proposing to set today still provides sufficient incentive to producers of ‘other’ advanced biofuels, while also acknowledging that the advanced standard has been met predominantly with biomass-based diesel.”⁵⁸
- “We believe this approach strikes the appropriate balance between providing a market environment where the development of other advanced biofuels is incentivized while also maintaining support for the BBD industry.”⁵⁹

⁵⁴ *Id.*

⁵⁵ 83 Fed. Reg. at 32,028. (Emphasis added).

⁵⁶ 83 Fed. Reg. at 32,054.

⁵⁷ *Id.*

⁵⁸ 83 Fed. Reg. at 32,055.



We recommend that EPA establish the advanced biofuel mandate at 3.112 billion RINs:

	Million ethanol-equivalent <u>gallons</u>
Cellulosic biofuel	222
Advanced biodiesel/renewable diesel (D4)	2,850 (domestic BBD)
Imported sugarcane ethanol	0
Other Advanced (D5)	<u>40</u>
	3,112

f. Total renewable fuel for 2019

EPA’s proposal for total renewable fuel is too high, and EPA should set a volume for total renewable fuel in 2019 that is substantially lower than EPA’s proposal of 19.88 billion RINs.

EPA proposes to apply the full amount of the cellulosic waiver to total renewable fuel (billion RINs):

28.00	statutory
<u>- 8.12</u>	EPA’s proposed cellulosic waiver
19.88	proposed by EPA

However, the Agency must consider the economics of BBD and, as discussed above, eliminate its reliance on biodiesel imports when setting the advanced and total biofuel volumes for 2019.⁶⁰

In 2017, D6 renewable diesel RIN generation was 244.9 million and zero for D6 biodiesel. We assume 300 million for 2019. Thus, AFPM’s recommendation for 2019 is:

⁵⁹ *Id.*

⁶⁰ AFPM reiterates its statutory interpretation that EPA should exclude renewable fuel imports from consideration in setting any RFS standards.



	<u>million RINs</u>
Ethanol	13,970
Non-ethanol cellulosic	212 ⁶¹
BBD	2,850 (domestic)
Other non-ethanol advanced	40
D6 biodiesel/renewable diesel	<u>300</u>
Total	17,372

Within the proposed rule, EPA shirks its duty to fully consider total renewable fuel requirements, the largest of the fuel categories established by the RFS. EPA summarizes its proposal for total renewable fuel in one short paragraph⁶² and then barely adds one column of *Federal Register* text while explaining the 2019 proposed volume requirement for total renewable fuel.⁶³ A memorandum to the docket attempts to explain ways in which the market might make 19.88 billion gallons of total renewable fuel available.⁶⁴ EPA's rationale that it cannot consider demand-side constraints pursuant to *ACE* misses the point. In the context of examining all of its authority under the RFS – as well as fully assessing the likely impacts and outcomes of setting total renewable fuel standards – EPA must support its proposed level for 2019 with more than a cursory discussion and a highly constrained analysis of the effect of applying the maximum amount of the cellulosic biofuel waiver (8.119 billion gallons) to the statutory level of total renewable fuel in 2019 (28.0 billion gallons).

V. Biomass-based Diesel in 2020

The Agency has failed to properly consider the economics of BBD and to eliminate reliance on biodiesel imports when setting the BBD volume for 2020. EPA's proposal is thus contrary to law and arbitrary and capricious.

Looking at EPA data, BBD imports in 2018 have been 312.0 million RINs during six months of this year (January – June).⁶⁵ Doubling this amount to annualize it would yield a total of 624.0 million BBD RINS (or 415.6 million wet gallons) imports.

⁶¹ Biogas for transportation. Liquid cellulosic is ethanol and is not included in 212 million RINs. Cellulosic ethanol is included in total ethanol, which is 13.97 billion gallons.

⁶² 83 Fed. Reg. at 32,026.

⁶³ Id. at 32,048.

⁶⁴ Market Impacts of biofuels in 2019, David Korotney, EPA-HQ-OAR-2018-0167.

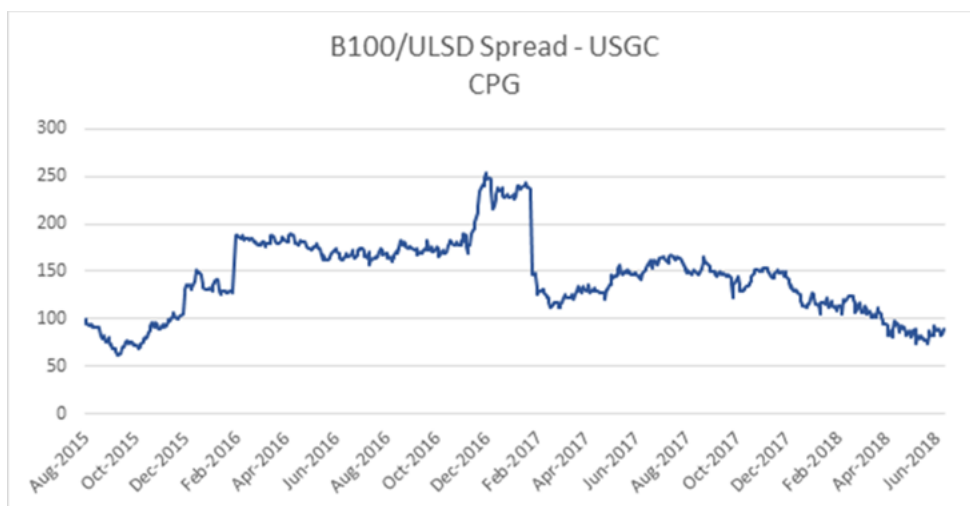
⁶⁵ See EMTS data, available here: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2018-renewable-fuel-standard-data> (last accessed 8/16/18).



BBD imports were a significant source of D4 RINs supplied in 2016-17 (more than 30%).⁶⁶ As discussed in section IV. c., above, imports must not be used in setting RFS volumes for 2020. Imported renewable fuel, however, could still be used for compliance.⁶⁷

EPA proposes the BBD volume in 2020 as 2.43 billion gallons (wet). This is unreasonably high and not supported by information in the administrative record. Domestic BBD generation in 2017 was 1.88 billion wet gallons.⁶⁸ Thus, domestic production would have to increase tremendously (nearly 30 percent) to meet EPA's targets, using a correct interpretation of the RFS.

In setting the 2020 levels, the same considerations come into play as for 2019. Biodiesel is expensive. The chart below shows price differences (biodiesel minus petroleum diesel) over time.



EPA cannot continue to overlook the substantial price difference between BBD and petroleum-based diesel. Biodiesel prices have been well over \$1/gallon more expensive than petroleum diesel. EPA reports that substantial price difference is \$1.04-1.43/ethanol-equivalent gallon.⁶⁹

⁶⁶ See EMTS data, available here: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2018-renewable-fuel-standard-data> (last accessed 8/16/18).

⁶⁷ See AFPM Comments, “Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019: Availability of Supplemental Information and Request for Further Comment.” EPA-HQ-OAR-2017-0091-4703; and Comments of the American Fuel & Petrochemical Manufacturers & The American Petroleum Institute, “Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019.” EPA-HQ-OAR-2017-0091-3645.

⁶⁸ See EMTS data, available here: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2018-renewable-fuel-standard-data> (last accessed 8/16/18).

⁶⁹ 83 Fed. Reg. at 32,053.



Obviously, EPA can reduce the cost of the RFS program by promulgating a lower BBD volume for 2020.

EPA did not adequately address this large cost impact in the memo in the docket, “Draft Statutory Factors Assessment for the 2020 Biomass Based Diesel (BBD) Applicable Volume.”⁷⁰ Rather, EPA is hoping without technical support that “this approach may temper to some extent BBD prices, by providing competition between the marginal BBD production volumes and other types of advanced biofuels.”⁷¹ EPA does not identify which other advanced biofuels may serve this aspiration. However, this “analysis” is insufficient, cursory and does not address the comprehensive evaluation required by Congress. In addition, given its exceedingly large cost impact on a per-gallon basis, the Agency has not explained why 2.43 billion gallons for BBD in 2020 is appropriate.

VI. Waiver Authority

EPA should use its waiver authorities to address unachievable statutory mandates. These include a general waiver based on *inadequate domestic supply* and a general waiver based on *severe economic harm*. These waivers must be: (1) separately analyzed from EPA’s analysis of the volume reductions justified under its cellulosic waiver authority; and (2) assessed with reference to “the requirements of [CAA §211(o)(2)] . . . and with reference to a decision with regard to “reducing the national quantity of renewable fuel required under [CAA §211(o)(2)].”⁷² It would be arbitrary and capricious for EPA in this rulemaking to not separately assess all the waiver authorities that Congress provided to adjust the statutory volumes of renewable fuels.

a. EPA may waive applicable volumes to prevent severe economic harm

EPA exercised only its cellulosic waiver authority in the 2018 RFS to require equivalent reductions in the levels of advanced biofuel and total renewable fuel. AFPM has challenged this exercise of RFS waiver authority as insufficient.⁷³ Because the 2019 proposed RFS contains volume requirements that are much higher than the 2018 RFS, RFS compliance will be more challenging in 2019 for obligated parties. Thus, EPA’s use of its general waiver authority is required based on a determination that imposition of the *statutory volumes* would cause severe economic harm affecting a state, region, or the United States.⁷⁴

There is abundant evidence to support this determination. For example, within weeks of the final rule for 2018 RFS, Philadelphia Energy Solutions declared bankruptcy and cited the compliance

⁷⁰ EPA-HQ-OAR-2018-0167-0102.

⁷¹ *Id.* at 14.

⁷² CAA §211(o)(7)(A).

⁷³ *American Fuel & Petrochemical Manufacturers v. EPA*, No. 17-1258 (D.C. Circuit).

⁷⁴ CAA §211(o)(7)(A)(i).



burden of the RFS. In addition, EPA granted dozens of petitions for small refinery RFS exemptions based on the harm that would be imposed by requiring compliance with 2018 RFS percentage standards. In addition, multiple governors requested waivers of the 2018 RFS based on economic harm to each state's economy.

Within the statutory terms of CAA §211(o)(7)(A), Congress did not require proof that RFS compliance is solely responsible for severe economic harm. The Administrator is to determine that implementation of the statutory volumes of renewable fuel “would severely harm the economy” but this does not prevent EPA from examining how these requirements impact other sectors that are not responsible for compliance, including the fuel distribution system, or bar EPA from examining the multiple direct and indirect economic effects stemming from RFS mandates to a State, region or the United States.

EPA's use of its general waiver authority would be proper here based on a determination that imposition of the statutory volumes would cause severe economic harm affecting a state, region, or the United States. As noted above, the 2019 RFS proposes much higher volume requirements than the 2018 RFS, presenting an even more pressing case for exertion of EPA's general waiver authority to avoid severe economic harm. To use its general waiver authority, EPA is to determine that severe harm *would occur* through implementation of a requirement or requirements contained in CAA §211(o)(2). In other words, if imposition of 28.0 billion gallons of total renewable fuel or 13.0 billion gallons of advanced biofuel or 8.5 billion gallons of cellulosic biofuel would result in severe economic harm in any state or region of the United States, then per the express language of the statute, EPA is empowered to waive such requirements “in whole or in part.”

EPA retains authority to utilize its general waiver authority at any time, whether in the context of annual rulemakings to promulgate RFS standards or upon the petition of “one or more States, by any person subject to the requirements [of CAA §211(o)], or by the Administrator on his own motion.”⁷⁵ EPA could for example, issue a supplemental notice regarding use of its general waiver authority as it did in 2017.⁷⁶ EPA therefore has full ability to consider general waiver issues in the context of the current rulemaking (*e.g.*, as a response to comments filed or through additional notice of its intention to exert such authority). What EPA cannot do is ignore the need to address the multiple issues raised by the volumes it has proposed, or arbitrarily decide that it will circumscribe the breadth of its legal authority to address such issues.

b. The “inadequate domestic supply” waiver is available to reduce required volumes of renewable fuels

⁷⁵ CAA §211(o)(7)(A).

⁷⁶ 82 Fed. Reg. 46,174 (Oct. 4, 2017).



Just as EPA must exclude imports when setting renewable fuel volumes, EPA must also exclude imports as part of its interpretation of “domestic supply.” The ordinary, natural meaning of “domestic supply” is that which originates in the United States. Thus, to apply the inadequate domestic supply waiver in a manner that does not distinguish between renewable fuel produced domestically or abroad would deprive the term “domestic” of meaning. Nor is EPA precluded by a judicial decision to use its general waiver authority.⁷⁷

That the statute requires EPA to determine whether to place compliance obligations on “refineries, blenders, and importers, as appropriate” does not mean that the statute mandates consideration of foreign sources of renewable fuels in determining whether there is “inadequate *domestic* supply” of renewable fuels. Indeed, whether importers can import enough renewable fuel to satisfy the statutory requirements Congress set has nothing to do with whether there is inadequate *domestic* supply to do so. In addition, as AFPM has previously noted to EPA, “[r]elying on imports to satisfy the advanced biofuel requirement runs contrary to the intent of Congress,” which was to foster domestic energy independence.⁷⁸

Exercise of EPA’s general waiver authority to exclude consideration of imported renewable fuel is appropriate since it is clear that the EPA-projected volume of renewable fuel and using the cellulosic waiver alone will be inadequate to address the lack of domestic supply in 2019. By any measure, the domestic supply of renewable fuel is inadequate to satisfy the statutory requirements that Congress provided for 2019, *i.e.*, 28.0 billion gallons of renewable fuel, 13.0 billion gallons of advanced biofuel and 8.5 billion gallons of cellulosic biofuel. Therefore, use of general waiver authority to address this massive disparity is not only appropriate – it would be irrational for EPA to maintain that such volumes can be supplied.

c. EPA should use both cellulosic and general waiver authority to reduce total renewable fuel and advanced biofuel volumes.

As noted above, proper analysis of renewable fuel supply in 2019 and the severe economic effects of imposing statutory volumes in 2019 dictate that EPA use all available authority within CAA §211(o) to further reduce volumes that it has proposed. The information presented below illustrates in a straightforward fashion, how EPA should utilize its available waiver authority in

⁷⁷ The court ruled, in 2017 in *ACE*, that EPA could not consider demand-side factors when evaluating whether to invoke its general waiver authority due to “inadequate domestic supply.” EPA can now clarify what supply-side factors can be used. While the court in *ACE* did state that “EPA may consider factors affecting the availability of renewable fuel available to refiners, blenders, and importers to meet the statutory volume requirements . . . [including] . . . the amount of renewable fuel available for import from foreign producers,” the question of whether the “*domestic* supply” of renewable fuel can permissibly include foreign renewable fuel that is available for import was neither briefed nor argued by any party.

⁷⁸ API-AFPM Comments on EPA’s Proposed 2014-2016 RFS standards, at 25. EPA-HQ-OAR-2015-0111-1948.



2019 for setting final volume standards for cellulosic biofuel, total renewable fuel, and advanced biofuel.

EPA should lower required volumes of cellulosic biofuel in 2019 beyond the levels proposed (expressed in billion RINs).

8.500	Statutory level for cellulosic biofuel
<u>- 0.222</u>	Reasonably attainable level of cellulosic biofuel
8.278	AFPM-recommended cellulosic biofuel waiver volume

EPA should assess the level of total renewable fuel requirements needed to avoid inadequate domestic supply and severe economic harm. AFPM's assessment of this level is 17.39 billion gallons for 2019. Therefore, EPA must use its general waiver authorities to reduce the statutory requirements by the following amount (expressed in billion RINs):

28.00	Statutory level for total renewable fuel
<u>- 17.372</u>	AFPM calculated level for total renewable fuel
10.628	AFPM-recommended use of general waiver authorities

In a similar fashion, EPA should also utilize its general waiver authorities to reduce the level of advanced biofuel from the 2019 statutory level:

13.00	Statutory level for advanced biofuel
<u>- 3.112</u>	AFPM calculated level for advanced biofuel
9.888	AFPM-recommend use of general waiver authorities

VII. Comparison of Proposed Renewable Fuel Volumes

Based on the data and analysis outlined these comments, AFPM proposes for consideration an alternative set of RFS volumes for 2019 and BBD targets for 2020. This table compares EPA and AFPM proposals:



	EPA's Proposal For 2019	AFPM's Proposal For 2019	EPA's Proposal For 2020	AFPM's Proposal For 2020
Cellulosic biofuel (million gallons)	381	222		
Biomass-based diesel (billion gallons)	2.1	1.9	2.43	2.0
Advanced biofuel (billion gallons)	4.88	3.112		
Total renewable fuel (billion gallons)	19.88	17.372		

EPA has the tools to further reduce renewable fuel volumes for 2019. AFPM urges the Agency to take appropriate steps to promulgate reasonably attainable volumes for the 2019 RFS and 2020 BBD that do not diminish the RIN bank.

VIII. Small Refiner Exemptions

AFPM supports EPA's determination that any small refinery/small refiner "exemptions for 2019 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 2019."⁷⁹ The appropriateness of this position is captured well in a recent letter to EPA from 21 U.S. Senators arguing against retroactive reallocation of small refinery obligations:

There is little doubt that retroactively reallocating obligations would only compound the problems with the RFS. Simply put, a retroactive reallocation of small refinery obligations to other obligated parties is illegal and fundamentally unfair, imposing a financial penalty on refineries that have otherwise been in compliance with the law. By so doing, retroactive reallocation violates the principles of due process and administrative law and is clearly not authorized under the Clean Air Act. Further, retroactive reallocation injects radical

⁷⁹ 83 Fed. Reg. at 32,057.



uncertainty into the market for compliance credits, hurting the U.S. refining base, its workers, and the communities they serve.⁸⁰

EPA's articulated position is supported by the RFS's waiver provisions, particularly CAA §211(o)(3)(C), which addresses how EPA is required to account for small refinery exempt volumes. Specifically, this provision requires EPA when "determining the applicable percentage for a calendar year. . . to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt." That Congress expressly gave EPA this prospective authority, but not the authority to retroactively reallocate small refinery exemptions is telling. It shows that Congress was aware of the issue and specifically chose not to give EPA such retroactive reallocation authority.

IX. Cellulosic Waiver Credit

The CWC serves as a critically-important consumer protection mechanism. Congress recognized that cellulosic biofuel production was virtually non-existent at the time EISA was enacted. As such, it created several consumer protection mechanisms, including the CWC. The CWC functions as a price cap on the amount obligated parties (and ultimately consumers) are forced to pay for cellulosic biofuel. For example, imagine a situation in which a company produces cellulosic biofuel and charges \$100 per gallon. In the absence of competition from alternative sources of cellulosic biofuel or the availability of the CWC, obligated parties would be legally compelled to purchase these gallons (at any price).

While CWCs are a helpful tool to cap the price cellulosic biofuel producers may charge, EPA has forced companies to purchase additional RINs for cellulosic biofuels that were never produced to address EPA's overestimations of cellulosic production. EPA should revise treatment of CWCs to ensure that these credits also count towards compliance with the nested obligations (*i.e.*, advanced biofuel and total renewable fuel).

Current RFS regulations provide that obligated parties may only use CWCs to comply with the cellulosic biofuel standard:

(4) Cellulosic biofuel waiver credits may only be used to meet an obligated party's cellulosic biofuel RVO.⁸¹

While some obligated parties were forced to declare a deficit, other obligated parties purchased 33 million and 12 million CWCs in 2016 and 2017 respectively. In addition to paying a penalty

⁸⁰ Letter from Senators to EPA dated July 26, 2018, accessed here <https://www.inhofe.senate.gov/download/?id=5C3704D3-C86B-4F9F-8224-69B2A90E5855&download=1> (last accessed 8/14/18).

⁸¹ 40 CFR 80.1456(c)(4).



for phantom fuels that an unrelated industry failed to produce, these obligated parties also were required to purchase advanced biofuel RINs corresponding to the CWC volume.

EPA should revise its existing regulations so the CWCs are usable for compliance with the cellulosic biofuel requirement as well as the advanced biofuel and total renewable fuel requirements because these mandates are nested through operation of RFS statutory provisions.⁸² In this regard, Congress provided both for this statutory structure of nested requirements and for availability of CWCs, but Congress did not specify that CWCs (which have become available through continuous cellulosic waivers and have become necessary for compliance based on the long history of zero or minimal production of cellulosic biofuel) should not be treated in the same manner as all other credits (“RINs”). There is nothing within the RFS credit provisions (CAA §211(o)(5)) or the CWC provisions (CAA §211(o)(7)(D)(ii)) that directs EPA to treat CWCs in the manner that it has done through regulation. Moreover, EPA’s treatment of CWCs is contrary to the purposes of the RIN system to provide for cost-effective implementation of the RFS.

To address these concerns, EPA should amend 40 CFR 80.1456(c)(4) as follows:

(4) Cellulosic biofuel waiver credits may **only** be used to meet an obligated party’s cellulosic biofuel RVO, **advanced biofuel RVO, and total renewable fuel RVO.**

⁸² See CAA §211(o)(1); Definitions.



X. Conclusion

AFPM's member companies are obligated parties under the RFS and are adversely affected, as are consumers, when EPA mandates unachievable and unrealistic renewable fuel volumes. As our comments have illustrated, this rule once again proposes cellulosic, BBD, and total renewable fuel volumes (largely met through ethanol) that are too high and which would impermissibly result in a drawing down of the RIN bank. We also have concerns that the amount of total renewable fuel proposed lacks a technical foundation, including any analysis of ethanol volumes, and should be reduced by approximately 2.5 billion gallons in 2019.

In order to set mandates at appropriate levels, EPA should continue to use its cellulosic waiver authority but must also use its general waiver authority, available on the basis of *severe economic harm or inadequate domestic supply*. In addition to adjusting volumes, EPA should allow CWCs to count towards the advanced biofuel and total renewable fuel nested categories.

AFPM appreciates the opportunity to comment and looks forward to continuing to work with the EPA on RFS issues. Should you have further questions, please contact Tim Hogan at thogan@afpm.org.

Respectfully submitted,

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October 19, 2017

Administrator E. Scott Pruitt
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Via www.regulations.gov

**Re: Docket EPA-HQ-OAR-2017-0091 – Renewable Fuel Standard Program:
Standards for 2018 and Biomass-Based Diesel Volume for 2019:
Availability of Supplemental Information and Request for Further Comment**

The American Fuel & Petrochemical Manufacturers (“AFPM”)¹ submits these comments in response to the Environmental Protection Agency’s (“EPA’s”) Notice of Data Availability Concerning Potential Reductions in the Volume Requirements for 2018 Renewable Fuel and 2019 Biomass-Based Diesel under the Renewable Fuels Standard Program (“NODA”).² AFPM members are directly regulated as obligated parties under the Renewable Fuel Standard (“RFS”) and will be substantially affected by the outcome of EPA’s promulgated standards for 2018 and 2019.³

AFPM supports EPA’s efforts to adjust the RFS mandates to reflect the market’s ability to produce and consume renewable fuels while protecting consumers. Recent events (*i.e.*, expiration of the biodiesel tax credit, assessment of estimated countervailing duties) call into question the ability to supply adequate quantities of biomass-based diesel (“BBD”) to U.S. consumers. These events require EPA to adjust the volume of renewable fuel that will be required under the RFS, and EPA has taken a necessary step to ensure robust public input on these changed circumstances by publishing the NODA and requesting further comments prior to the issuance of the 2018 RFS implementation rule. Basing the biodiesel mandate on domestic production will help protect manufacturing jobs, promote domestic energy security, and ultimately benefit consumers.

¹ AFPM is a national trade association representing virtually all U.S. refiners and petrochemical manufacturers. AFPM’s refinery members comprise more than 95 percent of U.S. refining capacity.

² 82 Fed. Reg. 46,174 (Oct. 4, 2017).

³ Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, 82 Fed. Reg. 34,206 (July 21, 2017).



AFPM welcomes this opportunity to provide comments and additional information concerning potential options for reductions in the total renewable fuel and advanced biofuel volumes that the EPA proposed for the 2018 compliance year and the volume of BBD it has proposed for the 2019 compliance year.⁴ AFPM is also pleased to provide comments regarding potential changes to the volume of BBD EPA promulgated for the 2018 compliance year.⁵

These comments provide EPA with additional data on BBD supplies, the impact of BBD import reductions on the advanced and total renewable fuel mandates, and the ultimate impact on the consumer, domestic biodiesel industry, and refining industry from these changed circumstances. EPA is right track to reconsider the renewable fuel requirements for 2018 and 2019. This NODA more appropriately advances Congress's stated purpose of bolstering America's energy security. American consumers should not have to shoulder more costs to help foreign biofuel producers. Moreover, with the imposition of countervailing duties on foreign biofuel imports, U.S. biodiesel producers should be able to compete in the artificial BBD market created under the RFS. Indeed, AFPM's proposal is to set the BBD mandate equal to actual domestic production, rendering the renewable fuel producers' claims of injury from the NODA baseless.

AFPM filed extensive comments on EPA's proposed 2018 rule that have a direct bearing on many of the issues discussed in this NODA.⁶ AFPM argued for substantially lower volumes for total renewable fuel, advanced biofuel, BBD, and cellulosic biofuel than EPA proposed and for broader use of EPA's waiver authorities. AFPM also offered specific comments regarding how EPA should treat imports of renewable fuel for purposes of calculating RFS volume requirements. In addition, EPA has received and placed in the docket many similar comments from individual parties who are regulated under the RFS. The options presented in the NODA are all well within the scope of the proposed rule and EPA should take the following actions:

- Utilize its waiver authorities to reduce the volumes of renewable fuels that EPA proposed for the 2018 compliance year based on considerations outlined in the proposed rule and comments received on the proposed rule and this NODA.
- Set 2018 volume requirements for total renewable fuel, advanced biofuel volume, and cellulosic biofuel at the levels advocated at 17.30 billion gallons of total renewable fuel, 2.856 billion gallons of advanced biofuel, and 216 million gallons of cellulosic biofuel.
- Establish the BBD volume requirements for 2018 and 2019 at 1.74 billion gallons, and utilize both general waiver authorities in CAA §211(o)(7)(A) as well as its BBD waiver authority in CAA §211(o)(7)(E) to make corresponding adjustments to the nested renewable fuel standards.

⁴ 82 Fed. Reg. 34,206 (July 21, 2017); hereinafter cited as "2018 proposed rule."

⁵ 81 Fed. Reg. 89,746 (Dec. 12, 2016).

⁶ EPA-HQ-OAR-2017-0091-3647, dated Aug. 31, 2017.



- Use its general waiver authority to focus on the domestic supply of renewable fuel. EPA must also consider domestic supply when setting BBD volumes for 2019 based on the statutory criteria for setting RFS volumes in years in which a statutory volume does not exist, *i.e.*, CAA §211(o)(2)(B)(ii).
- Consider costs with respect to setting all RFS requirements, including the effect of new import duties for BBD from Argentina and Indonesia.

We discuss each of these issues in greater detail below.

I. Current Market Conditions Dictate Lower Volume and Percentage Standards for BBD in 2018 and 2019

In prior years EPA developed the RFS volumes for BBD considering both domestic and imported supplies. AFPM does not believe it is appropriate for EPA to rely on foreign sources of biofuel when it sets the mandates under the RFS. Therefore, given EPA's prior reliance on imports to establish the RFS for 2017 and 2018, EPA must now correct this to exclude such sources of renewable fuel as well as to account for reduced imports of BBD, as discussed herein.

A. EPA Must Take Pending Duties on Imported Biodiesel Into Account When Projecting Available Supply

AFPM submitted information to EPA regarding biodiesel supply issues in 2017, particularly with respect to import volumes.⁷ In the NODA, EPA correctly notes that the assessment of estimated countervailing duties on imports of biodiesel from Argentina and Indonesia (that took effect on August 28, 2017) will substantially affect the supply and price of BBD going forward. Specifically, on August 22, 2017, the U.S. Department of Commerce announced its calculated preliminary subsidy margins ranging from 50.29 to 64.17 percent ad valorem on imports from Argentina⁸ and from 41.06 to 68.28 percent on imports from Indonesia.⁹ Initial statements from the Argentina biofuel industry indicate that exports of biodiesel to the United States will cease to exist if these duties are imposed.¹⁰

⁷ See AFPM Letter on Biodiesel Supply in 2017, EPA-HQ-OAR-2017-0091-4116, (Sept. 15, 2017).

⁸ See Biodiesel From Argentina: Preliminary Affirmative Countervailing Duty Determination and Preliminary Affirmative Critical Circumstances Determination, in Part, 82 Fed. Reg. 40,748 (Dep't Commerce Aug. 28, 2017).

⁹ See Biodiesel From the Republic of Indonesia: Preliminary Affirmative Countervailing Duty Determination, 82 Fed. Reg. 40,746 (Dep't Commerce Aug. 28, 2017).

¹⁰ See <http://www.reuters.com/article/us-usa-biodiesel/argentine-biodiesel-industry-says-u-s-duties-will-halt-exports-idUSKCN1B22AS?il=0>. Given the preliminary determination, the imposition of countervailing duties



In addition, the Department of Commerce is scheduled to announce its preliminary margins in the parallel antidumping investigations on imports of biodiesel from Argentina and Indonesia on Friday, October 20, 2017. Any preliminary antidumping margins calculated by the Department of Commerce as a result of this investigation will result in additional duty deposit requirements on those imports from Argentina and Indonesia that are additive to the already significant preliminary countervailing duty (anti-subsidy) margins announced in late August. As a result, it is likely that the volume of biodiesel imports from Argentina and Indonesia to the United States will decline substantially.

The Department of Commerce and the U.S. International Trade Commission are likely to announce their final determinations in the investigations on imported biodiesel from Argentina and Indonesia during the second quarter of 2018. In the event these agencies reach final affirmative determinations, U.S. importers will be required to post significant cash deposits on any imports of biodiesel from Argentina and Indonesia that enter the United States throughout the entire 2018 RFS compliance year. In addition to the obvious effect on imports during 2018, the Department of Commerce has already ordered preliminary duties to be collected,¹¹ thus ensuring that imports from Argentina and Indonesia during 2017 will be affected.

This is particularly relevant because biodiesel imports from Argentina and Indonesia accounted for more than 78 percent of U.S. biodiesel imports in 2016 (1.845 million metric tons out of total imports of 2.360 million metric tons).¹² Further, imports of biodiesel from Argentina and Indonesia accounted for 85.0 percent of total U.S. imports during the first eight months of 2017 (the most recent period for which import statistics are available).

While the U.S. Census Bureau has not yet published import statistics for September 2017, it appears that the imposition of a duty deposit requirement in connection with the Commerce Department's countervailing duty determination in late August is already having a very significant effect on the volume of U.S. imports of biodiesel. In particular, based on publicly available ship manifest information published by U.S. Customs and Border Protection, the volume of import shipments containing merchandise described as involving terms indicative of biodiesel declined precipitously in September 2017. Specifically, import shipments identified using biodiesel search terms during the first eight months of 2017 averaged 82,162 metric tons per month.¹³ In September 2017, however, the volume of import shipments identified using

is relatively certain and EPA must consider this fact in assessing the supplies of BBD that will be available for compliance with the RFS.

¹¹ The U.S. Department of Commerce has instructed U.S. Customs to require cash deposits for current imports based on the preliminary rates indicated in the Aug. 22, 2017 decision.

¹² See Appendix to these comments.

¹³ *Id.* Further, the volume of such imports averaged 143,539 metric tons per month between June and August 2017, reflecting increased volumes that might be expected in anticipation of the commencement of a duty deposit requirement in late August in connection with the ongoing Commerce Department investigations.



biodiesel search terms declined precipitously – falling to just 19,627 metric tons – or a level that is 76 percent less than the average monthly volume for the first eight months of 2017, or 86 percent less than the average monthly volume of imports between June and August 2017. *See id.* While this analysis of imports post countervailing duty determination includes data for only one month and, as noted above, official U.S. import statistics are not yet available for September 2017, it appears that the impact of the duty deposit requirements resulting from the Commerce Department’s preliminary countervailing duty determination is likely to be very significant. In addition, the volume of biodiesel imports from Argentina and Indonesia is likely to decline further once any additive cash deposit requirements associated with the Commerce Department’s preliminary antidumping determination are implemented in late October 2017. The impact of the preliminary duties is already evident through the decline in shipments, but also the adjustment in pricing.

In addition to the impact of new duty deposit requirements as a result of the Commerce Department’s preliminary unfair trade determinations, U.S. imports of biodiesel from Argentina and Indonesia are likely to be reduced due to significant reductions in the level of unfair trade duties assessed on such imports in the European Union (EU). Press reports indicate that the duties on Argentine biodiesel have been reduced from 22 to 25.7 percent to 4.5 to 8.1 percent (depending on the producer), following a finding by the World Trade Organization’s (WTO) appellate body that the EU’s measures were inconsistent with its obligations as a member of the WTO.¹⁴

Given that preliminary actions have been taken and that duties are now being collected, EPA may properly consider this information in decisions concerning the level of the 2018 BBD volumes included in the final RFS rule as well as resulting percentage standards. Further, the market data shows that any reduction in the mandate will come primarily at the expense of more expensive imported fuels, and not at the expense of domestic biofuel producers.

B. EPA Cannot Assume that the Biodiesel Tax Credit Will Be Available in 2018

In the proposed rule and the NODA, EPA correctly cites the expiration of the biodiesel tax credit as another reason why biodiesel supply will decline in the future. This is likely to occur in two ways. First, the most immediate impact of the expiration of the blender tax credit is that the effective price of biodiesel to blenders is now equivalent to the market price of biodiesel. The market will determine whether blenders are able to pass this increased cost to their customers;

¹⁴ “EU confirms Reduced import duties for Argentine biodiesel,” Reuters (Sept. 19, 2017) (available at: <https://www.reuters.com/article/eu-argentina-biodiesel/eu-confirms-reduced-import-duties-for-argentine-biodiesel-idUSL5N1M00Y9>); Kotrba, Ron, “EU vote to lower Argentine biodiesel duties prompts add’l action,” Biodiesel Magazine (Sept. 11, 2017) (available at: <http://www.biodieselmagazine.com/articles/2516139/eu-vote-to-lower-argentine-biodiesel-duties-prompts-addl-action>).



however, the higher the price that blenders must pay for biodiesel, the less likely they are to blend biodiesel into their finished fuel products.

Second, the price of biodiesel is currently about \$1.30/gallon more than the price of diesel derived from petroleum, and for 2017 biodiesel has priced on average \$1.50/gallon above petroleum derived diesel.¹⁵ Given this price disparity and in the absence of a tax credit, few consumers would voluntarily choose biodiesel and there would appear to be little incentive for blenders to expand the downstream market for this renewable fuel. This is especially true since large users of diesel fuel, such as the trucking industry, are very price sensitive.

It is possible that such changes in market behavior may not occur overnight. In previous years, substantial biodiesel blending occurred after expiration of the blender tax credit, largely based on the expectation that Congress would eventually restore the credit and apply it retroactively. This expectation has been at least partially validated on two occasions.¹⁶ But this expectation may become more remote the longer that no legislative action occurs on the biodiesel credit. And, while it may be permissible for the private sector to gamble on the speculative actions Congress will or will not take concerning taxes, the Executive Branch of government clearly cannot.

EPA cannot reasonably rely on a political forecast of what Congress *might* do as a basis for rulemaking.¹⁷ Moreover, there is nothing in the administrative record for the 2018 RFS rulemaking that is of probative value in projecting whether, how and when Congress might act to restore credits that are valuable to the biofuel industry. Indeed, it is possible that a tax credit will be approved, a tax credit will not be approved, or a different type of tax credit may be approved by Congress.¹⁸ Thus, EPA must discount the impact of potentially favorable tax treatment when determining final RFS standards.

In addition, EPA traditionally forecasts the economic effect of new regulations *based* on rules that are currently in effect or that will become effective during the period being analyzed. EPA's

¹⁵ Argus Media, Inc., *Argus Americas Biofuels*; (subscription), biodiesel B100 SME fob Houston rail/barge USC/USG – Houston close at: www.argusmedia.com (hereinafter “Argus Americas Biofuels”).

¹⁶ Pub. Law 112-240 retroactively authorized tax credits for 2012 and extended credits through 2013. After another extension of the blenders credit for 2014, on Dec. 15, 2015, Congress approved a tax extenders package which made credits retroactive to Jan. 1, 2015 and extended credits to Dec. 31, 2016. This extension was included within H.R. 2029, an unrelated appropriations measure.

¹⁷ Unlike the Department of Commerce's preliminary determinations of countervailing duties for imported biodiesel, the likelihood that Congress will pass legislation providing biofuel tax credits is too speculative to factor into EPA's analysis of the potential supply of BBD. *See* discussion of OMB and EPA guidance, *infra* at notes 21-22.

¹⁸ Legislation has also been introduced, H.R. 2383 and S. 944 which would change the type of tax credit that has historically been provided. The legislation would amend current law to provide for a biodiesel producers' credit rather than a blenders' credit. But EPA cannot speculate on when such an extension and/or a revision of tax credits will occur.



base case analysis relies only on rules that are “on the books” and enforceable.¹⁹ Therefore, it would be highly inconsistent for EPA, for purposes of this rule, to depart from this practice and/or otherwise presume reenactment of the credit and/or retrospective application of the credit. OMB Directives also provide for measuring a baseline assuming “no change” in regulatory programs that are in effect.²⁰ For these reasons, EPA must entirely discount the possibility that blending tax credits will be available in 2018 or subsequent years.

II. The 2018 Biomass-Based Diesel Volume Requirements Should be Reduced

EPA finalized the 2018 2.1 billion gallon volume requirement for BBD in late 2016 as part of its rulemaking to establish standards for all four renewable fuel requirements for 2017.²¹ During the public comment period for the 2017 RFS, AFPM recommended that EPA set the volume of BBD for 2018 at 1.28 billion gallons based on the expectation that the Agency would not comply with statutory provisions that require BBD requirements to be established at least 14 months prior to the start of a compliance year.²² AFPM and API also noted the substantial price differential between BBD and petroleum-based diesel. In 2017, biodiesel prices averaged \$1.50 per gallon more than petroleum diesel.²³

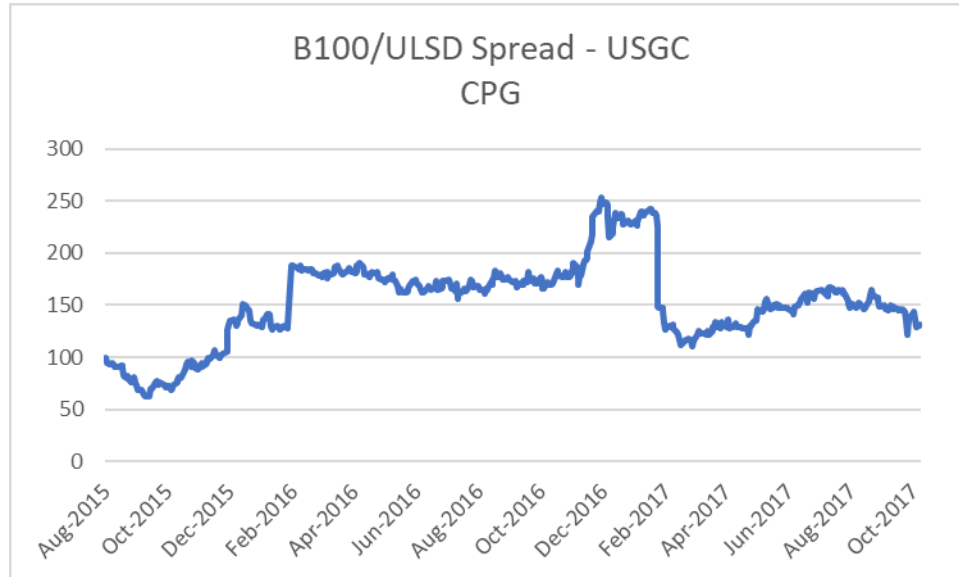
¹⁹ “A baseline is defined as the best assessment of the world absent the proposed regulation or policy action . . . In general, the most appropriate baseline will be the ‘no change’ or ‘reality in the absence of the regulation’ scenario; but in some cases, a baseline of some other regulatory approach may be considered. For example, if any industry is certain to be regulated (*e.g.*, by court order or congressional mandate) but that regulation has not yet been implemented, then a baseline including this regulation should be used.” Guidelines for Preparing Economic Analyses; EPA Office of Administrator, December 2010, at 5-1, 5-3.

²⁰ In developing a baseline to measure benefits and costs, the Office of Management and Budget provides that “[f]or review of an existing regulation, a baseline assuming ‘no change’ in the regulatory program generally provides an appropriate basis for evaluating regulatory alternatives.” OMB Circular A-4, Sept. 17, 2003.

²¹ Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 Fed. Reg. 89,746 (Dec. 12, 2016). In this rule, EPA only finalized percentage standards for BBD for 2017 and did not calculate a percentage standard for 2018 based on the volumetric requirement. *See* 40 C.F.R. §80.1405(a).

²² AFPM Comments on proposed 2017 RFS at 32.

²³ Biodiesel price source: Argus Americas Biofuels. ULSD price source: U.S. Energy Information Administration at: https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=EER_EPD2DXL0_PF4_RGC_DPG&f=D.



Given this price differential and the Agency’s cursory treatment of the statutory factors it must consider to promulgate a BBD standard for 2018, AFPM argued that the level of the standard was arbitrary and capricious.²⁴

In comments filed on the proposed 2018 RFS rule, AFPM recommended that EPA set the volume of total renewable fuel volume at 17.05 billion gallons in 2018, over 2 billion gallons less than EPA’s proposed level of 19.24 billion gallons. AFPM also recommended that EPA set volume requirements for BBD in 2018 at 2.360 billion RINs or approximately 1.52 billion gallons.²⁵

Further comments on the appropriate volumetric level for BBD for the 2018 RFS compliance year are now appropriate given EPA’s examination of this issue in the NODA.²⁶ In this regard, AFPM suggests that EPA should set the volume requirement for BBD in 2018 at no higher than 1.74 billion gallons (2.61 billion RINs).²⁷ This volume preserves the amount of domestically produced biodiesel, while discounting imported biofuels.

²⁴ Along with many other petitioners, AFPM filed a petition for review of the 2017 RFS rule in the D.C. Circuit. This litigation is currently pending following a stay of proceedings based on the court’s consideration of challenges to the 2014-2016 RFS rule.

²⁵ AFPM/API Comments on proposed 2018 RFS at 3.

²⁶ See proposed 40 C.F.R. §80.1405(a); 82 Fed. Reg. at 34,242.

²⁷ This revised BBD volume recommendation is calculated by annualizing 2017 domestic BBD production in EMTS from January through August 2017. This BBD volume will continue to harm consumers by forcing expensive biodiesel into the transportation fuel supply. Moreover, given the choice, most consumers would reject



III. Adjustments to the 2018 Biomass-Based Diesel Volume Requirements Require EPA to Make Corresponding Adjustments to the Advanced and Total Renewable Fuel Categories

The anticipated reduction in BBD supply requires EPA to make corresponding adjustments to the renewable fuel categories that are based on BBD blending volumes. This means that a reduction in BBD necessitates a corresponding reduction in the advanced and total renewable fuel categories. AFPM's volumetric recommendations for the 2018 renewable fuel standards are set forth in Section V, *infra*.

Lowering the BBD volumetric level without lowering the total renewable fuel and advanced biofuel volumes would confound obligated parties' abilities to comply with the RFS mandates and undercut EPA's analysis of the achievable levels for all four renewable fuels. Consistent with previous practice, EPA attempted in the proposed rule to determine whether volumes of total renewable fuel are "reasonably attainable given assessments of individual fuel types, including biodiesel, renewable diesel, ethanol (in the form of E10 or higher ethanol blends such as E15 or E85), and other renewable fuel."²⁸ This "bottom up" analysis of individual fuel types means that adjusting nested fuels like BBD inevitably affects the "reasonably attainable" levels of other renewable fuel categories and vice versa.

Fortunately, Congress provided EPA with the tools it needs to adjust the statutory volumes of renewable fuels to address the change in circumstances related to BBD supplies. These tools take the form of "waiver authorities" and are discussed in Section IV, *infra*.

IV. EPA Has Multiple Waiver Authorities to Address Impacts on BBD Supplies

EPA has several waiver authorities that it must draw on to address the unachievable statutory mandates and the impact on BBD supply discussed in Section I, *supra*. These include a general waiver based on *inadequate domestic supply*, a general waiver based on *severe economic harm*, and a specific waiver to address anticipated shortfalls in BBD. EPA also has broad authority to reduce RFS volumes based on cellulosic biofuel shortfalls.²⁹

A. EPA May Use the Inadequate Domestic Supply Waiver to Reduce Requirements for Renewable Fuels

more expensive biodiesel, which performs poorly in cold weather and has a lower energy content than the petroleum diesel fuel it displaces.

²⁸ 82 Fed. Reg. at 34,210.

²⁹ The cellulosic waiver authority is discussed in AFPM's comments to the 2018 RFS proposed rule and is not repeated herein. See AFPM/API Comments at 21-24.



We first discuss EPA’s general waiver authority based on inadequate domestic supply. Congress included this waiver authority to address shortfalls in the supply of renewable fuel to U.S. consumers, and EPA is well within its statutory authority to apply this waiver to BBD and the nested renewable fuel categories.

1. EPA Should Exclude Imported Renewable Fuel When Calculating Supply

In *Americans for Clean Energy v. EPA*,³⁰ the D.C. Circuit held that EPA “exceeded its authority under the ‘inadequate domestic supply’ provision when it interpreted the term “supply” to allow it to consider demand-side constraints in the market for renewable fuel.”³¹ The court did not separately analyze the statutory meaning of “domestic” within the “inadequate domestic supply” waiver provision or reach any decision concerning the scope of EPA’s permissible interpretation of that term.

While the court stated that “EPA *may* consider factors affecting the availability of renewable fuel available to refiners, blenders, and importers” with respect to inadequate supply waivers and that such factors “*may include, for example* . . . the amount of renewable fuel available for import from foreign producers”³² the question of whether the “domestic supply” must be interpreted to include imported renewable fuel was not briefed in the litigation.³³ To the extent the court expressed any opinion on this issue, it is therefore dictum.³⁴

EPA may therefore exclude imports as part of the “domestic supply” of renewable fuel. Indeed, such an interpretation is supported by the statutory structure of the RFS, Congressional intent in enacting the RFS in 2005 and amending the RFS in 2007, and EPA’s multiple waiver authorities:

First, as AFPM/API’s comments on the proposed rule pointed out and as cited by EPA, the ordinary meaning of “domestic” refers to renewable fuel that originates within the United States.³⁵ Thus, to apply the inadequate domestic supply waiver in a manner that does not consider whether renewable fuel was produced domestically or abroad would be to deprive the term “domestic” of any meaning.

³⁰ *Slip Op.* No. 16-1005, D.C. Circuit (July 28, 2017).

³¹ *Id.* at 17.

³² *Slip Op.* at 29 (emphasis added).

³³ See also AFPM/API comments on proposed rule at 33.

³⁴ It should also be noted that even as dictum, the court indicated that EPA has discretion whether to include foreign-produced renewable fuel within the domestic supply of renewable fuel, *i.e.*, EPA “*may* consider factors” and “*may include, for example*” foreign-produced renewable fuel in determining RFS volume requirements.

³⁵ AFPM/API Comments at 32.



Second, the RFS applies not only in years for which an applicable volume of renewable fuel is specified (*i.e.*, 2006 to 2022) but also in “other calendar years after the calendar years specified in the tables [containing applicable volumes].” CAA §211(o)(2)(B)(ii). This part of the renewable fuels mandate requires that EPA “shall” determine applicable volumes with reference to “the impact of renewable fuels on the energy security of the United States . . . the impact of renewable fuels on the infrastructure of the United States [and] the impact . . . on other factors, including job creation . . . [and] rural economic development.”³⁶ These statutory factors all unequivocally reference domestic concerns. It would be illogical for EPA to be authorized to focus on domestic production after 2022, but not before.

Third, Congress enacted the RFS to enhance energy independence and security by reducing American fuel imports. Including foreign production of renewable fuels in the calculation of the domestic supply when setting renewable fuel volume standards does not enhance energy independence and security.

If not compelled by the statute, considering “domestic supply” to refer to domestically-produced renewable fuels is certainly a permissible construction of the statute and a far more rational interpretation of the statute than to either read out “domestic” from the waiver provision or interpret “domestic supply” to mean both the domestic and foreign supply of renewable fuel. There are several additional considerations that support this interpretation by EPA:

- The RFS was never approved by Congress as a stand-alone measure. Instead, the RFS was initially enacted in the Energy Policy Act of 2005 (“EPAct”)³⁷ and later amended and expanded in the Energy Independence and Security Act of 2007 (“EISA”).³⁸ EPAct provided for numerous programs aimed at improving energy efficiency and renewable energy resources in the United States³⁹ as well as increasing domestic oil and gas production and other domestic energy resources.⁴⁰ EISA similarly focused on increasing energy security through improved vehicle technology and the increased production of biofuels⁴¹ along with energy development and numerous research programs.⁴² Neither Act was intended to subsidize or favor foreign energy development over domestic development and production. Read in the context of its broader enactment, EPA may certainly infer that the RFS is focused on domestic sources of renewable fuel.

³⁶ CAA §211(o)(2)(B)(ii)(I),(IV),(VI).

³⁷ Pub. Law 109-58 (Aug. 8, 2005)

³⁸ Pub. Law 110-140 (Dec. 19, 2007).

³⁹ EPAct, Titles I, II.

⁴⁰ *Id.*, Title III.

⁴¹ EISA, Title I, II.

⁴² International energy programs were confined to one title of EISA and consisted of assistance from the United States to developing countries.



- Legislative history and intent supports this interpretation. Congressional consideration of EPAct focused on domestic energy production and the domestic production of renewable fuels. During final passage of EPAct by the Senate, Senator Durbin (then Senate Democratic Whip) indicated that the legislation “contains a renewable fuel standard that increases the use of *domestically produced renewable fuels* to 7.5 billion gallons by 2012. This change will be good for America’s economy, good for our energy security and good for Illinois farmers.”⁴³ When the House considered EISA, the rule providing for the adoption of the conference report for the legislation made it clear that the bill was intended to “move the United States toward *greater energy independence* and security [and] to increase the production of clean renewable fuels . . .”⁴⁴

Impending duties applying to imported biodiesel provide further support for this statutory interpretation. If, as anticipated, substantial import duties will be applied to biodiesel from Argentina and Indonesia, then basing RFS requirements on the consideration of such volumes would only serve to increase adverse economic impacts. Setting the required level of BBD higher within the nested volumes of the RFS for advanced biofuel and total renewable fuel (based on imports paying substantial duties) would force purchase and blending of these higher priced fuels.⁴⁵

Exercise of EPA’s general waiver authority to exclude consideration of imported renewable fuel is appropriate for 2018 and 2019 RFS volume requirements for BBD since, as explained in more detail above in Section I, it is clear that the domestic supply of BBD will be “inadequate” for these years without the market conditions (*e.g.*, the availability of tax credits) that existed in earlier RFS compliance years.

In addition, EPA may waive requirements for total renewable fuel and advanced biofuel on the basis of excluding imports of BBD from consideration in setting the level of the RFS. The nested nature of RFS requirements and EPA’s past implementation of RFS standards supports this result. Finally, while currently much smaller in amount, EPA should also exclude from consideration any other imported renewable fuel apart from BBD in setting volume requirements for the RFS.

⁴³ 151 CONG. REC. S9355 (July 29, 2005) (emphasis added). *See also* floor remarks of Senator Conrad (“[The bill] will also spur an increase in the production and use of domestic biofuels such as ethanol and biodiesel.”) *Id.* at S9360.

⁴⁴ H.Res. 877, 153 CONG. REC. H16651 (Dec. 18, 2007) (emphasis added). These same goals are incorporated within the Public Law version of EISA, Pub. Law 110-140.

⁴⁵ Setting aside whether imposing import duties is a good policy, EPA should consider that placing duties on imported BBD is meant to alleviate unfair competition for domestic producers and increase the domestic biodiesel industry’s ability to compete. Under these circumstances, domestic producers will benefit from the new duties and therefore have greater economic incentive and ability to produce.



2. Imported Biofuel RINs May be Used for Compliance

As AFPM explained in comments filed on the proposed rule, CAA §211(o)(5)(A)(i) provides for the generation of credits (called renewable identification numbers, “RINs”) with regard to “any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity” required of that obligated party for the year in question. EPA also has discretion in terms of how it interprets its authority within CAA §211(o)(5) to issue regulations regarding the generation and use of credits. Thus, EPA may focus on domestic production for purposes of determining annual RFS obligations while allowing the use of RINs generated through the importation of renewable fuel for compliance.

3. EPA May Consider Costs When Implementing Inadequate Domestic Supply Waiver

EPA is correct to consider cost impacts when considering whether to further utilize its waiver authorities for the 2018 Rule. Specifically, EPA can apply cost considerations to total renewable fuel, advanced biofuel, and BBD volume requirements when determining how much to adjust statutory requirements on the basis of inadequate domestic supply.

i. EPA Must Consider Costs in Establishing All Requirements for BBD

Consideration of cost is required when EPA promulgates RFS standards where there are no explicit statutory volumes provided in the statute, such as the case for BBD volumes after 2012. Pursuant to CAA §211(o)(2)(B)(ii), EPA is first required to consult with the Secretaries of Energy and Agriculture and conduct a review of the implementation of annual volumes of BBD that were specified in the statute, *i.e.*, 0.5, 0.65, 0.80 and 1.0 billion gallons. Next, EPA is required to consider six different factors in setting volume requirements, including the impact of renewable fuels on infrastructure and “the cost to consumers of transportation fuel and on the cost to transport goods.” Several other economic considerations are also to be assessed including “job creation, the price and supply of agricultural commodities, rural economic development and food prices.” Thus, consideration of costs is both an underlying evaluation that EPA must undertake with respect to the operation of the RFS program as a whole and an explicit consideration that EPA must take into account in establishing BBD volumes in 2018 and 2019.

ii. Cost Considerations for Total Renewable and Advanced Biofuel

The cost of renewable fuel to obligated parties (either incurred through direct blending or the purchase of RINs) is a necessary part of the waiver analysis required by the D.C. Circuit. EPA must look to the “supply available to refiners, blenders, and importers to meet statutory requirements.” *Americans for Clean Energy*, Slip Op. at 29. But supply is only “available” if it



is “present or ready for immediate use.”⁴⁶ Whether supply is present and ready for immediate use inherently involves consideration of the cost of the supply.

The CAA and, more specifically the RFS, does not require EPA to implement its requirements with regulatory blinders on as to the real world implications of its actions. Like other CAA programs, EPA must implement the RFS in a reasonable and rational manner. In this regard, when interpreting whether a standard for hazardous air pollutants was “appropriate” under the CAA, the Supreme Court has indicated that:

Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that “too much wasteful expenditure devoted to one problem may well mean that considerably fewer resources are available to deal effectively with other (perhaps more serious) problems.”⁴⁷

So too here, in the context of implementing the requirements of CAA §211(o), renewable fuel may only be considered available to obligated parties when consideration is given to the broader context of the RFS and its purposes including improving the energy security of the United States. This means that supply is not available if that supply is too costly or would perhaps have counterproductive results, such as a cost structure that would overly incentivize the importation of renewable fuels.

Instead, EPA must balance the costs it imposes under the RFS against other relevant considerations, including maintaining a reasonably-functioning market for renewable fuels, the E-10 blendwall, and constraints affecting the utilization of advanced biofuel, such as available infrastructure. Each of these considerations involves costs.

B. EPA May Also Waive RFS Requirements to Avert Severe Economic Harm

AFPM has already submitted comments with regard to EPA’s use of its general waiver authority to avert “severe economic harm” through the imposition of RFS volume requirements.⁴⁸ EPA’s ability to utilize this waiver authority is not time-constrained; it exists whenever the Administrator determines that implementation of volume requirements “would severely harm the economy or environment of a State, a region, or the United States.”⁴⁹ Thus, EPA’s exertion of this authority may be either forward or backward-looking. EPA might, for example, exert such

⁴⁶ Merriam-Webster online dictionary, accessed October 12, 2017.

⁴⁷ *Michigan v. EPA*, 135 S. Ct. 2699, _____(2015).

⁴⁸ AFPM/API Comments on proposed rule at 30-31.

⁴⁹ CAA §211(o)(7)(A)(i).



waiver authority after the end of a compliance year but prior to the submission of RINs for compliance in order to avoid imposing severe harm on parties that may need to purchase RINs. Or EPA might exert such waiver authority prior to or during a compliance year where it determined that previously-established requirements would, if implemented, result in severe harm.

EPA has discretion to determine what constitutes “severe economic harm.” When the Agency acted to deny a request from the State of Texas in 2008 it included “guidance” for future requests, but specifically stated that “this guidance is not a rule, and therefore is not binding on the public or EPA.”⁵⁰

Similarly, when EPA denied a request from several governors to waive RFS volume requirements due to drought conditions in 2012, the Agency did not find that conditions at the time justified a waiver, but agreed that “implementation of the RFS must necessarily occur within the context of existing market conditions, and that it is necessary and appropriate for EPA to consider the effects of RFS implementation in the context of those existing conditions.”⁵¹ EPA also indicated that it was not required to interpret “severe” harm in any particular manner but that the “circumstances [involved in the 2012 waiver request] do not demonstrate the kind of harm from RFS implementation that would be characterized as severe.”⁵²

EPA therefore retains discretion with respect to market conditions existing in 2017 to 2019 to waive RFS requirements on the basis of severe economic harm. It may do so on the basis advocated within AFPM’s comments on the proposed rule.⁵³

C. EPA May Use Authority in CAA §211(o)(7)(E)(ii) to Reduce 2018 BBD Volumes

The NODA represents the first time EPA is considering using the BBD waiver authority to address harm to obligated parties that would occur from market circumstances that increase the price of BBD.

CAA §211(o)(7)(E)(ii) allows EPA to reduce the quantity of BBD required “under subparagraph (A)”⁵⁴ on the basis of feedstock disruptions or other “market circumstances” significantly

⁵⁰ Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard, 73 Fed. Reg. 47,168, 47,183 (Aug. 13, 2008).

⁵¹ Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70,752, 70,773 (Nov. 7, 2012).

⁵² *Id.* at 70,774.

⁵³ See AFPM/API Comments at 30-31.

⁵⁴ AFPM interprets the cross reference to “subparagraph (A)” to reference subparagraph 211(o)(2)(A) rather than subparagraph 211(o)(7)(A) since subparagraph 211(o)(2)(A) contains authority for EPA to promulgate regulations to implement the RFS program. In contrast, subparagraph 211(o)(7)(A) contains the general waiver mechanisms for requirements established under paragraph 211(o)(2). This interpretation is reinforced when one



affecting price. The requirement for a “significant” effect presents a relatively low bar to the exertion of EPA’s waiver authority.

It must be presumed that Congress acts deliberately in the development and approval of legislation. Within the BBD waiver mechanism, it is notable that Congress did not require that the price of BBD increase “substantially” but only that “the price of biomass-based diesel fuel increase significantly,” and that the EPA Administrator consult with the Secretary of Energy and Secretary of Agriculture in issuing an order to reduce the required quantity of BBD.⁵⁵

As EPA observes in the NODA, the BBD waiver is measured with respect to the annual BBD requirement (*i.e.*, “the quantity of biomass-based diesel required under subparagraph (A)”).⁵⁶ The CAA authorizes EPA to waive in a 60-day period an amount that is equivalent of up to 15% of the applicable annual requirement.

Applying this waiver provision to the annual BBD volume makes sense given that RFS volume requirements are applied in each calendar year.⁵⁷ Further, any adjustments to RFS applicable percentages are to be made with respect to a calendar year and are to “account for the use of renewable fuel during the previous calendar year” by small refineries that are exempt.⁵⁸ Since the inception of the RFS program in 2007, EPA has applied the RFS program on a calendar year basis and existing regulations require that obligated parties calculate their obligations for any year based on the amount of gasoline and diesel they produced or imported during the year.⁵⁹ EPA may therefore reasonably interpret the BBD waiver mechanism to apply in the same

considers that the BBD waiver mechanism in §211(o)(7)(E)(ii) also provides that if the Administrator waives BBD requirements in any one year, the Administrator may also reduce the applicable volume of total renewable fuel and advanced biofuel by the same or lesser volume as “established under paragraph (2)(B).” Under this interpretation, the BBD waiver provision is referring to CAA §211(o)(2)(A) and (B), which impose annual volume requirements. Alternatively, the reference to “subparagraph (A)” is either unclear, allowing EPA to reasonably interpret the provision, or constitutes a legislative drafting error, again allowing reasonable interpretation of the provision within the statutory context of CAA §211(o). Finally, it would be illogical for a BBD waiver mechanism to refer to the “quantity of biomass-based diesel required under subparagraph (A)” as meaning CAA §211(o)(7)(A) since the general waiver acts to waive requirements established elsewhere in CAA §211(o)(2).

⁵⁵ CAA §211(o) does not define “significantly” for purposes of implementing the RFS program. While EPA has not advanced binding interpretations of the Agency’s RFS waiver authorities in previous considerations of waiver requests, EPA has indicated that it might look to other CAA statutory contexts to derive the meaning of waiver requirements. For example, in its 2012 denial of a waiver request, EPA referenced CAA §181(a) use of “severe” ozone nonattainment classifications to assert that “‘severe[] harm’ [to] the economy . . . is clearly a much higher threshold than ‘significant adverse impacts.’” 77 Fed. Reg. 70, 752, 70,774 (Nov. 27, 2012). EPA explained that while “it is not required to interpret the term ‘severe’ in section 211 in the same manner as section 181(a) . . . it is ‘instructive’ to do so.” *Id.*

⁵⁶ CAA §211(o)(7)(E)(ii).

⁵⁷ CAA §211(o)(2)(B). *See also* CAA §211(o)(3)(B)(ii) (RFS obligations are to be “determined for a calendar year.”).

⁵⁸ CAA §211(o)(3)(C).

⁵⁹ 40 C.F.R. §§80.1405(c), 80.1407(a).



manner as the RFS program is implemented while accounting for statutory language that limits a single waiver to 60 days.⁶⁰

Conversely, it would be inconsistent with the intended flexible implementation of the RFS for EPA to attempt to apply the waiver of “the applicable annual requirement for biomass-based diesel” within a 60-day period. Even if EPA could develop appropriate regulatory mechanisms to do so, applying a 15% annual waiver to a constrained 60-day period would likely lead to further market disruptions and would only serve to increase uncertainty.

Finally, neither CAA §211(o)(2)(E)(ii) nor §211(o)(2)(E)(iii) prohibits the Administrator from making more than one waiver determination (with or without an extension) in a calendar year. The provisions provide for “orders” to reduce for up to a 60-day period, but do not explicitly restrict the Administrator from addressing market circumstances that only manifest themselves once a compliance year starts. Therefore, despite any reliance EPA may place on the waiver mechanism in the final 2018 RFS rule, EPA may consider additional future waivers as circumstances may warrant during calendar year 2018.

V. AFPM Recommendations on RFS Volumes After Utilization of EPA CAA §211(o) Waiver Authorities

As explained herein and in the comments AFPM/API submitted on the proposed rule for the 2018 RFS, EPA should substantially reduce required renewable fuel volumes in 2018 and BBD requirements for 2019. Specifically, EPA should:

- (1) Use its cellulosic waiver authority to reduce volumes beyond those in the proposed 2018 rule and waive total renewable and advanced biofuel volumes by the same amount as the amount waived through use of the cellulosic biofuel waiver;
- (2) Use its general waiver authority - relying on both prongs of CAA §211(o)(7)(A) related to inadequate domestic supply and severe economic harm - to waive RFS volumes for total renewable fuel and advanced biofuel beyond the level of the amount waived through use of the cellulosic biofuel waiver;

⁶⁰ EPA has calculated that it may waive 315 million gallons of BBD in 2018 using its CAA §211(o)(7)(E)(ii) waiver authority. But CAA §211(o)(7)(E)(iii) allows EPA to issue an order to extend a waiver by another 60 days and waive an additional 15% of the applicable annual BBD requirement. This extension of an existing waiver means that for the 2018 RFS compliance year, EPA has, at minimum, the authority to waive an additional 315 million gallons if warranted under the criteria specified in §211(o)(7)(E)(ii)-(iii). This would mean that EPA could lower the BBD volume requirement by a total of 630 million gallons in 2018 simply by finding that the conditions for an extension exist as part of its final 2018 RFS rule. EPA additionally indicates that “*additional incremental reductions*” may be possible if circumstances warrant. 82 Fed. Reg. at 46,179 (emphasis added).



(3) Use its separate authority to waive BBD volumes to the full extent allowed under CAA §211(o)(7)(E) to lower “nested” BBD requirements within the lowered amount of total renewable fuel and advanced biofuel for 2018; and

(4) Apply the statutory criteria contained in CAA §211(o)(2)(B)(ii) to lower 2019 BBD volumes below the level proposed, consistent with not considering imported renewable fuel for purposes of establishing RFS volume requirements.

The resulting RFS volumes that EPA should promulgate as part of the pending 2018 RFS rulemaking are as follows:

	Total Renewable (billion gallons)	Advanced Biofuel (billion gallons)	BBD (billion gallons)	Cellulosic (billion gallons)
2018 RFS	17.30 ⁶¹	2.856 ⁶²	1.74	0.216
2019 RFS	n/a	n/a	1.74	n/a

Adjusting the mandated renewable fuel volumes as recommended herein would have a beneficial impact on U.S. consumers. Indeed, upon reports that EPA would issue the NODA, affected RIN prices fell by approximately 20 percent. After reports that the White House directed EPA to abandon the reforms contemplated in this NODA, RIN prices essentially returned to their pre-NODA levels.⁶³

CONCLUSION

EPA should reduce 2018 and 2019 RFS volumes. This NODA, when considered in conjunction with the proposed rule, outlines several bases for EPA to take such action, including but not limited to the preliminary determination of countervailing duties on biodiesel imports, the

⁶¹ 17.30 billion gallons is calculated as follows: 13.96 ethanol + 0.20 nonethanol cellulosic biofuel (biogas) + 2.61 domestic BBD + 0.03 other advanced biofuel + 0.50 D6 (not advanced) biodiesel/renewable diesel.

⁶² 2.856 billion gallons is calculated as follows: 0.216 cellulosic biofuel + 2.61 domestic advanced biodiesel and renewable diesel + 0.03 other advanced biofuel.

⁶³ Source: Argus Americas Biofuels. On October 18, 2017, *Bloomberg* reported that the White House instructed EPA to abandon efforts to reduce the volumes of renewable fuels mandated. See *Bloomberg Politics, Trump Tells EPA to Boost Biofuels After Iowa Uproar*, <https://www.bloomberg.com/news/articles/2017-10-18/trump-joins-debate-on-epa-ethanol-rule-in-call-to-iowa-governor>; see also *The Courier, Trump orders EPA to back off RFS changes, report says*, http://wcfcourier.com/news/local/govt-and-politics/trump-orders-epa-to-back-off-rfs-changes-report-says/article_de0a65df-de35-5535-ae91-51a0c7ad40e6.html. A political decision to prejudice these RFS issues prior to evaluating these comments and the conclusion of the rulemaking process is arbitrary and capricious and in violation of the Administrative Procedures Act.



expiration of the biodiesel tax credit, and the need to focus on the domestic supply of renewable fuel. A significant drop in imports combined with uncertainty over how quickly domestic production can increase and at what price, requires EPA to revise downward the 2018 BBD mandate and make corresponding adjustments to the nested renewable fuel categories.

EPA's statutory authority to waive RFS requirements in 2018 and 2019, however, is not constrained to such factors. Instead, using its general waiver authority in CAA §211(o)(7)(A), its cellulosic waiver authority in CAA §211(o)(7)(D), and its BBD waiver authority in CAA §211(o)(7)(E), EPA has the ability to further reduce RFS volumes for total renewable fuel, advanced biofuel, and BBD beyond the levels outlined in the proposed rule and this NODA. AFPM therefore encourages EPA to fully review the docket for this rulemaking and to take appropriate steps to reduce RFS volumes to the levels specified above and discussed more at length in the AFPM/API comments filed with respect to the proposed rule.

Respectfully submitted,

Tim Hogan
Director, Motor Fuels

Attachments



The American Fuel & Petrochemical Manufacturers (“AFPM”)¹ and the American Petroleum Institute (“API”)² submit these comments in response to the Environmental Protection Agency’s (“EPA”) proposed rule entitled, *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*.³ AFPM’s and API’s members are directly regulated as obligated parties under the Renewable Fuel Standard (“RFS”) and will be substantially affected by the percentage standards EPA sets in the final rule.

The RFS is at a crucial juncture. As the Agency is well aware, the problems facing the RFS have multiplied over the ten years that the program has been implemented. EPA has been required to continuously invoke its waiver authority to reduce statutory volumes in every compliance year since 2010. Cellulosic biofuel production has either been nonexistent or *de minimis* since the volumetric requirements first took effect, forcing the Agency to cumulatively waive 15.65 billion gallons of cellulosic biofuel requirements through 2017. From 2014 to 2017, EPA was further compelled by the circumstances to cumulatively waive 14.30 billion gallons of total renewable fuel and 12.06 billion gallons of advanced biofuel.

This is plain evidence of a severely flawed statutory scheme, emanating from an unjustified expansion of the RFS program in the Energy Independence and Security Act of 2007. But EPA has compounded the problem, for instance by failing to take “neutral aim at accuracy” in projecting volumes of cellulosic biofuel and by failing to set appropriate standards accordingly.⁴ The statutory flaws of the RFS have been further exacerbated by real-world constraints on producing renewable fuels and integrating them into transportation fuel. The current and ever-increasing required volumes of renewable fuels volumes simply cannot be forced into a system in which there is a flat or decreasing consumer demand for transportation fuel and an inability of vehicles and equipment to use such fuels. Obligated parties and consumers will pay a severe economic price if they are forced

¹ AFPM is a national trade association representing virtually all U.S. refiners and petrochemical manufacturers. AFPM’s refinery members comprise more than 95 % of U.S. refining capacity.

² API is a national trade association representing more than 625 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry.

³ 82 Fed. Reg. 34,206 (July 21, 2017), referenced as “proposed rule” or “2018 RFS.”

⁴ *API v. EPA*, 706 F.3d 474, 476 (D.C. Cir. 2013).

to absorb the volumes and attendant costs otherwise mandated by the statute and EPA through its rulemakings.

Most recently, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) vacated EPA’s use of its general waiver authority with respect to setting 2016 renewable fuel volumes while upholding the Agency’s use of cellulosic waiver authority to set total renewable, advanced biofuel, and cellulosic biofuel standards for the 2014, 2015, and 2016 compliance years.⁵ The court also agreed with EPA’s determination not to consider the number of “banked” Renewable Identification Numbers (“RINs”) in setting annual RFS volume requirements.

AFPM and API disagree with several aspects of the court’s opinion including the court’s analysis of the limits on EPA’s general waiver authority. But even under the constraints the court articulated, EPA has the statutory authority to reduce RFS standards for 2018 beyond the levels it has proposed. Our specific recommendations on the appropriate levels for total renewable, advanced biofuel, biomass-based diesel (“BBD”), and cellulosic biofuel levels for 2018 are contained in the comments that follow.

To promulgate a final rule that includes achievable volumes of renewable fuel, EPA may utilize its general waiver authority on the basis of both “severe economic harm” and “inadequate domestic supply.” Exercise of the “severe economic harm” prong of its general waiver authority requires EPA to find that enforcing any of the four required renewable fuel volumes would cause severe economic harm on a national, regional, or state level. EPA need only find that such harm would occur through imposition of the statutory renewable fuel volumes in order to avail itself of authority to waive volumetric requirements “in whole or in part.”⁶ Such harm will occur if EPA imposes the statutory volumes for 2018, and EPA may therefore waive those volumes pursuant to this provision.

The second prong of the general waiver authority may permissibly be used based solely on consideration of “domestic” supplies of renewable fuel, disregarding the availability of foreign-origin renewable fuels to set annual standards. When the RFS was amended in 2007 to greatly expand requirements related to renewable fuel, Congress indicated that its purpose was to “move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, [and] to protect consumers.”⁷ A waiver based on “inadequate *domestic* supply” must be understood in this context and with reference to the plain meaning of the adjective “domestic.” Thus, EPA may further reduce the volumes of renewable fuel it has proposed to the extent achieving those volumes requires reliance on foreign imports.

We note that, while Congress directed EPA to consider “domestic” supplies in setting the volumetric requirements, it expressly allowed consideration of imported renewable fuels for purposes of RIN generation and compliance. This dichotomy helps to accomplish two congressional purposes: increasing energy independence by focusing on domestic production of renewable fuels in setting the volumetric requirements while addressing costs to consumers and the impact of renewable fuel on job creation and rural economic development.


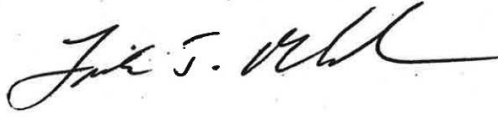
⁵ *Americans for Clean Energy v. EPA*, No. 16-1005, July 28, 2017 (D.C. Cir.).

⁶ CAA 211§(o)(7)(A).

⁷ Energy Independence and Security Act of 2007, Pub. Law 110-140.

If you have specific questions, please contact Tim Hogan at (202) 552-8462, or Frank Macchiarola at (202) 682-8167.

Sincerely,

 <p>Tim Hogan Director, Motor Fuels American Fuel & Petrochemical Manufacturers</p>	 <p>Frank Macchiarola Group Director, Downstream & Industry Operations American Petroleum Institute</p>
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**COMMENTS OF THE
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
AND THE AMERICAN PETROLEUM INSTITUTE**

*Renewable Fuel Standard Program: Standards for 2018
and Biomass-Based Diesel Volume for 2019*

Docket ID No. EPA-HQ-OAR-2017-0091

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I. Summary of Comments

AFPM and API appreciate EPA's continuing recognition of the real-world constraints, including anticipated costs that affect the RFS program.⁸ For 2018, EPA has relied on its cellulosic waiver authority⁹ to propose reductions in statutory volumes for total renewable fuel, advanced biofuels, and cellulosic biodiesel, but they are not enough. EPA must consider all effects of the E10 blendwall and other constraints and conditions that limit the use of ethanol and other renewable fuel, such as BBD, in transportation fuel. This recognition is key to understanding the real-world limitations on renewable fuel mandates in 2018 and future compliance years.

We also support EPA's proposal to maintain the full amount of RINs that have been reserved, or "banked," for future use. Clean Air Act ("CAA") §211(o)(5), which provides for the generation of renewable fuel credits, requires this action. In addition, maintaining a sufficient RIN bank will help mitigate some of the costs imposed by the RFS program, improve flexibility in compliance, and improve the functionality of the RIN marketplace.

AFPM and API support EPA's reduction of the required volumes of renewable fuel in recognition of the real-world constraints on their consumption. We also support EPA's decision to maintain a sufficient level of "banked RINs" to ensure compliance flexibility and a functioning RIN market. The Agency, however, should further revise the required volumes downward and make several improvements to the proposed rule including the following:

- Use the general waiver authority to reduce statutory volumes of total renewable fuel and advanced biofuels. Fully implementing the statutory volumes of renewable fuel would result in severe economic harm. EPA may also use its general waiver authority on the basis of an inadequate *domestic* supply.
- Base its assessment of total ethanol volumes in 2018 on the assumption that ethanol blended in gasoline will be limited to 9.7% by volume.¹⁰ As AFPM and API have pointed out in past comments, 9.7% ethanol blended gasoline, on average, represents a practical limit on ethanol use in the nation's pool of gasoline when consideration is given to the demand for E0 and compliance margins for E10 fuel. It also reflects legal and practical constraints, including refueling infrastructure and other environmental regulatory requirements that limit the use of ethanol blends above 10 percent.
- Lower projected volumes for cellulosic biofuel beyond the levels proposed to reflect the continuing, extremely limited production of liquid cellulosic biofuel and an overall production shortfall of 39 million gallons in 2016. Under applicable precedent, EPA must

⁸ *Id.* at 34,309.

⁹ As the D.C. Circuit recently affirmed in *Americans for Clean Energy v. EPA*, No. 16-1005 (D.C. Cir. July 28, 2017) (slip op.), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/5F1D8BC9815C4C698525816B00543925/\\$file/16-1005-1686284.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/5F1D8BC9815C4C698525816B00543925/$file/16-1005-1686284.pdf), "[t]he cellulosic waiver provision grants EPA 'broad discretion' to consider a variety of factors – including constraints on the demand for advanced biofuel – when determining 'whether and in what circumstances' to reduce the advanced biofuel volume requirement." Slip op. at 76 (quoting *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014)).

¹⁰ EPA does not consider E85 in the definition of gasoline.

take a “neutral aim at accuracy”¹¹ with respect to cellulosic biofuel volumes.¹² EPA, however, has in fact overestimated cellulosic biofuel production in every year for which it projected production levels since 2010.

- EPA should better utilize information developed by the Energy Information Administration (“EIA”) and further increase its projection of the actual volume of E0 consumed in the U.S. While EPA has revised its E0 projections upwards in the proposed rule compared to the projections EPA used in prior years, a significant discrepancy with EIA’s estimates of E0 consumption remains. This discrepancy needs to be resolved between the two agencies so that the final rule can incorporate more precise information on actual E0 use and what amounts of E0 are reasonable to project will be used in 2018.
- Set reasonable volumetric obligations for advanced biofuels, including BBD, that consider the impact of such obligations on the energy independence of the United States, focusing on the domestic production of such fuels. Excessive mandates serve to encourage imports of renewable fuel over time, particularly of biodiesel. Per Congress’s express instruction, RINs generated from imported fuel should continue to be allowed to be used for compliance purposes.
- Recalculate renewable fuel volumes for total renewable fuel and advanced biofuels in 2018 based on lowered volumetric requirements for cellulosic and biodiesel that more accurately reflect expected domestic production. Consistent with the proposed rule, EPA should reduce both total renewable fuel and advanced biofuel volumes by the full amount of the 2018 cellulosic biofuel waiver due to both supply and demand constraints. EPA should also lower the proposed level of the 2019 volume for BBD to reflect the anticipated domestic production of BBD.
- Review and adjust guidance documents and relevant regulations that have resulted in requirements for obligated parties to replace “invalid RINs” despite those parties’ lack of any actual knowledge of the RINs’ invalidity.
- Recognize that maintaining the confidentiality of the EPA Moderated Transaction System (“EMTS”) RIN generation data is essential and is necessary to ensure a level playing field. AFPM and API support any additional safeguards or protocols to ensure these data are made available to all industry participants at the same time. EPA should consider announcing in advance when RIN generation data will be published each month, or adopting a schedule for releasing the data at a regular fixed date and time to facilitate equal market access.

¹¹ 706 F.3d 474 (D.C. Cir. 2013).

¹² CAA 211§(o)(7)(A).

AFPM and API recommend that EPA determine “reasonably attainable” volumes of renewable fuel and utilize its available waiver authorities to finalize the following volumes in connection with the 2018 RFS implementation rule:

	<u>Million RINs</u>
Ethanol	13,960
Non-Ethanol Cellulosic	200
Biomass-Based Diesel	2,360
Other Advanced Biofuel	30
D6 Biodiesel/Renewable Diesel	<u>500</u>
Total Renewable Fuel Volume 2018	17,050

II. 2018 Proposed RFS Standards

A. EPA Must Continue to Comply with Statutory Deadlines

We are pleased that EPA issued the 2018 proposal in a timeframe that should allow the Agency to meet the November 30 statutory deadline for promulgating a final rule. We note that the statute specifies an earlier deadline of October 31, 2017, for setting the final 2019 volume for BBD. We believe that if the Agency acts promptly, it may be able to meet that clear statutory deadline. While EPA did not meet the deadline for promulgation of 2017 RFS standards, missing the required date by approximately 2 weeks,¹³ AFPM and API recognize that the Agency has made substantial improvements in bringing the RFS program more in line with the applicable statutory schedule.

We urge the Agency to continue down this path toward consistent timeliness. Regulatory certainty is critically important to obligated parties, who must develop their RIN compliance strategies well before a compliance period begins. In the past few years, obligated parties have suffered as EPA: (1) proposed a rule for 2014 that was subsequently withdrawn; (2) abruptly announced that it would combine three years of RFS requirements into a single rulemaking; (3) substantially delayed promulgating a final, combined 2014-2016 rule; (4) imposed two years of retroactive volumetric requirements for 2014 and 2015; and (5) created chronic uncertainty as to how the Agency would approach the use of prior year RINs and when compliance with retroactive standards would be required. While EPA ultimately “rolled forward” RFS annual requirements to mitigate the effects of its long delays in promulgating RFS standards, the RIN market has experienced continuing volatility over the last four years as well as periods when prices rapidly escalated.

B. EPA Should Consider the Overall Cost of the RFS Program in Setting Volumetric Requirements for 2018

As EPA readily acknowledges, the RFS program necessarily imposes a cost to the extent that “renewable fuels cost more than the petroleum fuels they displace.”¹⁴ This cost is substantial, and we

¹³ Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 Fed. Reg. 89,746 (Dec. 12, 2016).

¹⁴ Screening Analysis for the Renewable Fuel Standard Program Renewable Volume Obligations for 2018, Burkholder, Parsons and Sutton (“Screening Analysis”) at 5.

are pleased that EPA is taking these costs into account in setting the volumetric requirements for 2018.

For example, since CAA §211(o) does not provide applicable volumes for BBD past calendar year 2012, EPA is required to set such levels in accordance with the criteria contained in CAA §211(o)(2)(B)(ii). These criteria include “the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods.”¹⁵ Therefore, EPA is required to take into account the large differential in costs between petroleum diesel and BBD when setting applicable volume requirements.

EPA has estimated the cost difference between soybean biodiesel and petroleum diesel at \$1.34 to \$1.83 per gallon on a diesel-gallon equivalent basis.¹⁶ The 2017 BBD volume is 2.1 billion gallons, and EPA proposes to maintain this volume in 2018. Given the cost differential between petroleum diesel and soybean biodiesel, EPA’s biodiesel volumetric requirement for 2018 likely would impose substantial additional costs¹⁷ on obligated parties and American consumers who would otherwise use petroleum diesel.¹⁸

With regard to cellulosic biofuel, the CAA requires EPA to reduce the applicable volume of cellulosic biofuel to the “projected volume available during the calendar year.”¹⁹ EPA has used a variety of methodologies to project the volume of cellulosic biofuel in different RFS rulemakings. In the 2018 proposed rule, EPA relies on a narrower range of projected production volumes for both new facilities and “consistent producers” of liquid cellulosic biofuel.²⁰ EPA then projects volumes for liquid cellulosic biofuel producers on this basis, while using a separate methodology to project production for compressed natural gas and liquid natural gas from biogas.²¹

Since the statute requires projection of the “available” cellulosic biofuel volume, in making volume projections for 2018 EPA must consider costs; simply stated, costs are an appropriate consideration when deciding whether something is “available.”²² Indeed, EPA would err if it failed to consider “an important aspect of the problem,” like cost considerations here, when deciding whether regulation is appropriate.²³ In the proposed rule, EPA estimated that cellulosic biofuel costs \$3.06 to \$4.31 on a gasoline-gallon energy equivalent basis, compared with a projected wholesale cost of gasoline for 2018 of \$1.69 per gallon.²⁴ Thus, to the extent that cellulosic biofuel is mandated, substantial costs

¹⁵ CAA §211(o)(2)(B)(ii)(V).

¹⁶ Cost Impacts of the Proposed 2018 Annual Renewable Fuel Standards, Michael Shelby, Dallas Burkholder and Aaron Sobel (“Cost Impact Memorandum”) at 5.

¹⁷ Using EPA’s cost impact data cited above in nt. 14, 2.1 billion gallons * \$1.34/gallon = \$2.814 billion; 2.1 billion gallons * \$1.83/gallon = \$3.834 billion.

¹⁸ EPA has proposed a minimum requirement that is more than double the statutory minimum of one billion gallons. CAA 211§(o)(7)(A). EPA also projects that the minimum required level of the advanced biofuel requirement will drive additional BBD use. But unlike ethanol, which may be added to boost octane levels in finished fuel, BBD is a costlier *substitute* for conventional diesel, has a lower energy content, and performs poorly in cold weather. Thus, the market for BBD in the absence of the RFS would be more limited.

¹⁹ CAA §211(o)(7)(D)(i).

²⁰ 82 Fed. Reg. at 34,218.

²¹ *Id.* at 34,220.

²² CAA 211§(o)(7)(A).

²³ *Michigan v. EPA* 135 S. Ct. 2699, 2707 (2015), citing *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43.

²⁴ Cost Impact Memorandum at 11. While required volumes for cellulosic biofuel are much lower than for BBD, costs have risen in recent years as EPA has substantially increased annual cellulosic biofuel requirements.

are imposed on obligated parties and consumers that would otherwise have no economic incentive to use a much more expensive fuel.

In addition to the costs borne by those who purchase renewable fuels for blending, costs are also imposed on obligated parties who must purchase RINs for compliance. EPA has estimated that in the period from May 2016 to April 2017, prices for RINs averaged \$0.76 per gallon-RIN for conventional biofuel to \$2.25 per gallon-RIN for cellulosic biofuel.²⁵ The extent to which any obligated party must purchase RINs for compliance varies, but the overall number of RINs that must ultimately be surrendered to EPA for compliance -- *19.28 billion RINs in 2017*— inevitably imposes additional costs.²⁶ Some refiners may be able to pass through part of these costs to the consumer while some may not. In either case, the RFS raises costs compared with a fuel market that is not subject to annual renewable fuel mandates.²⁷

When considered in the aggregate, the RFS ranks among the nation’s more expensive energy/environmental programs.²⁸ We are therefore encouraged that EPA has considered costs among the other factors in proposing the total renewable fuel, advanced biofuel, and cellulosic biofuel volume requirements for 2018.²⁹

C. EPA Should Further Reduce Advanced Biofuel and Total Renewable Fuel Volumes for 2018

For 2018, EPA has proposed small reductions in the RFS volumetric standards for cellulosic biofuel, advanced biofuel, and total renewable fuel when compared to the final standards EPA promulgated for the 2017 RFS.

	Statutory (billion gallons)	Proposed 2018 (billion gallons)	Proposed 2019 (billion gallons)
Cellulosic biofuel	7.0	0.238	n/a

²⁵ Screening Analysis, Table 7.

²⁶ There are also additional costs that obligated parties must bear to secure and demonstrate compliance with the RFS (*e.g.*, transactional costs of acquiring RINs, recordkeeping, and other internal compliance costs). Obligated parties must also bear costs related to EPA’s Quality Assurance Plan, which was created in response to widespread fraud in the generation of RINs. These costs must either be borne by obligated parties or recovered, if possible, through the sale of transportation fuel.

²⁷ While asserting the costs for RINs represent a transfer payment as between obligated parties and blenders, EPA has conceded that there is a direct cost impact by virtue of imposing the RFS mandate itself. “If renewable fuels cost more on an energy-equivalent basis than the petroleum fuels they displace, as they did in 2013, there is a cost to using these renewable fuels. The higher the required volume of these fuels, the higher this cost will be. As a result, blending increasing volumes of renewable fuels likely increased the total cost of transportation fuel in the United States in 2013, relative to a scenario where there was no mandate for renewable fuels.” A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects, Dallas Burkholder, Office of Transportation and Air Quality, May 14, 2015 at 31. EPA-HQ-OAR-2015-0111-0062.

²⁸ EPA contends that obligated parties, including small entities, are “generally recovering the cost of acquiring the RINs necessary for compliance with RFS standards through higher sales prices of the petroleum products they sell than would be expected in the absence of the RFS program.” *Id.* at 1, citing Burkholder memorandum (EPA-HQ-OAR-2015-0111-0062) and Knittel, Meiselman, Stock Working Paper. To the extent that this is or is not the case with respect to any individual obligated party, the RFS program as a whole imposes costs through mandating displacement of economical fuels with more expensive fuels that, in many cases, also contain less energy on a per-gallon basis.

²⁹ 82 Fed. Reg. at 34,209.

Biomass-based diesel	≥1.0	2.1	2.1
Advanced biofuel	11.0	4.24	n/a
Total Renewable Fuel	26.0	19.24	n/a

The most sizeable reduction for 2018 compared to RFS statutory applicable volumes - in terms of both absolute volume and percentage requirements - is for cellulosic biofuel, a renewable fuel for which EPA has consistently over-predicted available volumes in *every* year since the program was implemented in 2010. Although AFPM and API support EPA’s proposal to make such year-over-year reductions in renewable fuel volumes, we believe that EPA can and should reduce these volumes further. Initially, EPA should further revise cellulosic biofuel volumes downward to correct the Agency’s historical pattern of over-predicting the volume of this renewable fuel and should make corresponding downward adjustments to the volumes of other advanced biofuels.

EPA has, for the most part, employed the same methodology it has used before in calculating the total renewable fuel requirements for 2018. In doing so, we believe that EPA has acted in accordance with its available authority under the cellulosic waiver provision and in recognition of the multiple constraints on the volume of total renewable fuel that may be reasonably produced and blended, including constraints on the demand for advanced biofuel and total renewable fuels.³⁰

As evidenced by the chart below, EPA has also calculated and considered the level of “conventional biofuel” (*i.e.* corn ethanol) and “non-cellulosic advanced biofuel” as part of its analysis of the proposed RFS standards. While EPA accurately notes that conventional biofuel is not a fuel category for which a percentage standard is explicitly established, EPA asserts that an “implied volume requirement . . . [of 15 billion gallons is] equal to that envisioned by Congress in 2018.”³¹ Therefore, EPA proposes to use its authority to adjust advanced biofuels in such a way as to avoid requiring non-cellulosic advanced biofuels to “backfill” for unmet cellulosic biofuel requirements.³² EPA has explained that:

Since the advanced biofuel volume requirement is nested within the total renewable fuel volume requirement, the statutory implied volume for conventional renewable fuel in the statutory tables can be discerned by subtracting the applicable volume of advanced biofuel from that of total renewable fuel. Performing this calculation with respect to the tables in CAA section 211(o)(2)(B) indicates a Congressional expectation that in the time period 2015–2022, advanced biofuel volumes would grow from 5.5 to 21 billion gallons, while the implied volume for conventional renewable fuel would remain constant at 15 billion gallons.³³

³⁰ “The cellulosic waiver provision grants EPA ‘broad discretion’ to consider a variety of factors – including constraints on the demand for advanced biofuel – when determining ‘whether and in what circumstances’ to reduce the advance biofuel volume requirement.” *Americans for Clean Energy v. EPA*, No. 16-1005 (D.C. Cir. 2017), *Slip Op.* at 76, citing *Monroe Energy* at 915.

³¹ 82 Fed. Reg. at 34,212-3. In discussing this implied volume, however, EPA fails to acknowledge that Congress contemplated 15 billion gallons of ethanol would be blended into approximately 150 billion gallons of gasoline, based on projections of gasoline supply at the time Congress passed the Energy Security Independence Act of 2007. This would result in roughly a 10% blending level. Simply put, Congress did not intend for ethanol to bust the blendwall.

³² *Id.* at 34,207.

³³ *Id.* at 34,229-30, nt. 80.

AFPM and API believe this is a reasonable and eminently sensible interpretation of CAA §211(o). As the Agency has noted, between 2015 and 2022, the differential between the statutory schedules for total renewable fuel and advanced biofuel is held constant at 15 billion gallons each year. Other provisions of the RFS also support limited reliance on non-advanced and non-cellulosic biofuels. For example, “conventional biofuel” is defined as “renewable fuel that is ethanol derived from corn starch,”³⁴ and such conventional biofuel is explicitly excluded from the definition of “advanced biofuel.”³⁵ Congress additionally limited the number of facilities that are “grandfathered” with respect to complying with required reductions in lifecycle greenhouse gas emissions. New facilities commencing construction after the date of enactment of the Energy Independence and Security Act of 2007 must achieve at least a 20% reduction in such lifecycle emissions.³⁶ Both provisions evince Congress’s intent to limit the participation of non-advanced biofuels in the RFS program.

III. RIN Carryover

As noted in more detail below, obligated parties began 2017 with a large RIN deficit carryover of 500 million RINs.³⁷ This deficit effectively increases the 2017 standards from 19.28 billion to 19.78 billion RINs, making it vital that EPA follow through on its intent not to intentionally drawdown the carryover RIN bank.³⁸ AFPM and API support this goal and the overall approach of the proposed rule regarding banked RINs. Nevertheless EPA should also recognize, as it has in the past, that the statutory structure of the RFS dictates this approach. As EPA correctly determined when it established the RIN system in 2007, RINs are required to be available in the year generated and the following year. Thus, preserving the RIN bank not only represents good public and economic policy – it is required by statute. EPA must correctly interpret CAA §211(o)(5) provisions regarding the generation and use of credits and act in a manner consistent with this statutory provision.

In addition, EPA should recognize that not all obligated parties are in the same position with regard to banked RINs and the ability to acquire the RINs that are needed for compliance each year. The burden of compliance may fall unevenly on obligated parties in any one compliance year. This is another reason why a robust RIN bank is needed; maintaining a fully “liquid” RIN bank helps ensure that obligated parties will have reasonable access to the means (RINs) by which EPA dictates compliance with the RFS.

³⁴ CAA §211(o)(1)(F).

³⁵ CAA §211(o)(1)(B)(i).

³⁶ CAA §211(o)(2)(A)(i).

³⁷ Source: EMTS Annual Compliance Data for Obligated Parties and Renewable Fuel Exporters under the Renewable Fuel Standard Program, Table 7 (2016 deficits totaling 502.33 million RINs are comprised of 4.4 million cellulosic RINs, 40.9 million BBD RINs, 66.5 million advanced biofuel RINs, and 390.5 million total renewable fuel RINs).

³⁸ 82 Fed. Reg. at 34,214.

A. EPA Must Preserve the RIN Bank to Ensure Compliance Flexibility and a Well-Functioning RIN Market

AFPM and API agree with EPA that “a bank of carryover RINs is extremely important in providing obligated parties compliance flexibility in the face of substantial uncertainties in the transportation fuel marketplace, and in providing a liquid and well-functioning RIN market ...”³⁹ EPA should maintain its longstanding position on the importance of the RIN bank and not take any action in the final rule that would increase RFS volumes on the basis that RINs generated in a prior year that are still available for compliance, *i.e.*, “carryover RINs” that may be available to obligated parties. EPA should continue to exclude all such carryover RINs – the “RIN bank” – from consideration when setting annual RFS standards.

In the proposed rule, EPA adopted the approach it took to the RIN bank in the final 2017 and 2014-2016 RFS rules. Specifically, in the final 2017 rule, EPA observed that “the RFS program functions best when sufficient carryover RINs are held in reserve for potential use by the RIN holders themselves, or for possible sale to others that may not have established their own carryover RIN reserves.”⁴⁰ EPA also noted that many obligated parties lack the ability to separate RINs through blending and that a significant drawdown in the RIN bank “may stop the market from functioning in an efficient manner, even where the market overall could satisfy the standards.”⁴¹ These conditions will not change in 2018, and they support EPA’s proposed determination to preserve the full amount of the RIN bank. In addition, the continuing volatility in the RIN market demonstrates that banking RINs is and will remain a prudent compliance strategy.

As noted above, the RFS also contains a statutory requirement that any generated credits (*i.e.*, RINs) be “valid to show compliance for the 12 months as of the date of generation.”⁴² This provision serves as a statutory bar against constraints on the use of a RIN in the year following its generation. That is, a RIN generated on January 1 or December 31 must be “valid to show compliance” in the subsequent year. And, since compliance with the RFS occurs on a calendar year basis, all RINs generated in year one must necessarily be available for compliance in year two.

If EPA were to require any drawdown of the RIN bank, its action would essentially preclude obligated parties and others from either using or transferring credits that have already been generated (*e.g.*, through a decision not to use the credit in a prior year). To do so would result in the “confiscation” of RINs that are, by statute, required to be treated as valid for compliance in the following year. The statute explicitly provides that an obligated party “shall” be allowed to generate credits and “may use” such credits for purposes of complying with annual RFS

³⁹ 82 Fed. Reg. at 34,213.

⁴⁰ Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 Fed. Reg. 89,746, 89,755 (Dec. 12, 2016).

⁴¹ *Id.*

⁴² CAA 211§(o)(5)(C).

requirements for “12 months as of the date of generation.”⁴³ And EPA has recognized this limit on its authority since the inception of the RIN program.⁴⁴

Using the Agency’s historical approach to the RIN bank is also in line with the D.C. Circuit’s recent decision in *Americans for Clean Energy*, in which the court upheld EPA’s treatment of the RIN bank for compliance years 2014-2016. In this recent decision, the D.C. Circuit agreed with EPA that the supply of renewable fuel EPA must consider in determining whether there is an “inadequate domestic supply” for purposes of EPA’s general waiver authority under CAA §211(o)(7) does not include the supply of “carryover RINs” from prior years.⁴⁵ The court rejected the biofuel industry’s arguments that EPA must consider available carryover RINs to be part of the supply of renewable fuel and that EPA must “ensure” that statutory RFS volumes are met through requiring a drawdown in the amount of RINs available for compliance from prior years. Instead, the court pointed to the requirement in CAA §211(o)(5)(C) that EPA allows obligated parties to carry credits over from one year to the next and recognized that “Congress contemplated that an obligated party would be allowed to carry over credits from one year to the next” for precisely the reasons stated here: to ensure compliance flexibility and a well-functioning RIN market.⁴⁶

Finally, EPA has noted that the RIN bank “balance” is currently approximately 11 percent of the proposed total renewable fuel standards.⁴⁷ This level is far below the 20 % “rollover” limit specified in EPA regulations. EPA has previously determined that such a limit is consistent with the structure of the RFS while recognizing that credits *must* be available in the year generated and the year thereafter. Specifically, when the 20 % limitation was included within the 2007 regulations for “RFS1” EPA commented that:

To be consistent with the Act, we believe that the rollover issue should be addressed in our regulations. However, *we also believe that the limits to preclude such unhindered rollovers should not preclude **all previous-year RINs from being used for current-year compliance.*** To accomplish this, we must restrict the number of previous year RINs that can be used for current year compliance. To this end, we proposed a 20 percent cap on the amount of an obligated party’s Renewable Volume Obligation (RVO) that can be met using previous-year RINs.

* * *

As described in the NPRM, we believe that the 20 % cap provides the appropriate balance between, on the one hand, allowing legitimate RIN carryovers and protecting against potential supply shortfalls that could limit the availability of RINs, and on the other hand ensuring an annual demand for

⁴³ CAA 211§(o)(5)(A)-(B).

⁴⁴ “RINs are valid for compliance purposes for the calendar year in which they are generated, or the following calendar year. This approach to RIN life is consistent with the Act’s prescription that credits be valid for compliance purposes for 12 months as of the date of generation, where credits are generated at the end of a year when compliance is determined.” Regulation of Fuels and Fuel Additives: Renewable Fuel Program; Final Rule, 83 Fed. Reg. 23,900, 23,909 (May 1, 2007).

⁴⁵ *Slip Op.* at 39-40.

⁴⁶ *Id.* at 38.

⁴⁷ 82 Fed. Reg. at 34,213.

renewable fuels as envisioned by the Act. We believe this approach also provides the certainty all parties desire in implementing the program. The same cap will apply equally to all obligated parties, and the cap will be the same for all years, providing certainty on exactly how obligated parties must comply with their RVO going out into the future.⁴⁸

EPA's approach to preserving the 2017 RIN bank is consistent with the purpose of the credit program and EPA's historic implementation of the program.⁴⁹

B. The Number of Carryover RINs May be Insufficient to Ensure Liquidity in the RIN Market

As noted above, obligated parties began 2017 with a large RIN deficit – a shortfall of 500 million RINs. This deficit effectively increases the 2017 standards from 19.28 billion to 19.78 billion and may result in a significant drawdown of carryover RINs to achieve compliance.

Several factors that led to the buildup of the RIN bank in prior years simply no longer apply. For example, in 2016, an increase in biodiesel production in anticipation of the blender tax credit expiration resulted in a surge in biofuel production and the generation of 200 million BBD RINs. That surge in renewable fuel production will likely not be repeated this year now that the tax credit has expired, reducing expected RIN generation by 200 million compared to last year. Similarly, imports of palm oil biodiesel from Indonesia are uneconomical without the tax credit.⁵⁰ This likely translates to a loss of an additional 200 million RINs (D6). These two factors alone create a 400 million RIN deficit compared to last year. There also is a concern that without the tax credit, many small U.S. biodiesel production facilities will close, putting further pressure on RIN supply.

Unlike the early years of the RFS when required levels were below the E10 blendwall, available opportunities to “build” the RIN bank going forward are now constrained by the E10 blendwall and other blending constraints.

Another circumstance likely to reduce the availability of RINs stems from the National Biodiesel Board's legal challenge to the importation of biodiesel. On August 23, 2017, the Department of Commerce issued a preliminary determination in the countervailing duty investigations. The Department found that Argentina and Indonesia provided subsidies to their biodiesel producers

⁴⁸ 72 Fed. Reg. 23,000, 23,934-5 (May 1, 2007) (emphasis added).

⁴⁹ We would note further that EPA has not proposed any rationale or justification for changing its approach in the proposed rule and would need to do so in order to change its interpretation of the statute. EPA would need to adequately explain why it had decided to “change course” with regard to its previous waiver decisions. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983). Moreover, as the D.C. Circuit has recognized, “an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked” and “may not alter [such a rule] without notice and comment.” A final rule cannot depart from past practice because such a result would not constitute a “logical outgrowth” of the proposed rule. As the D.C. Circuit has recognized, “an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked” and “may not alter [such a rule] without notice and comment.” *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992).

⁵⁰ According to EPA EMTS data, D6 imports in 2017 constitute ~0.1% of total D6 RINs generated in 2017 versus ~3% in previous years.

for biodiesel imported into the U.S.⁵¹ If the International Trade Commission (“ITC”) rules in favor of the National Biodiesel Board Fair Trade Coalition and a tariff is imposed on imported Argentinian and Indonesian biodiesel, these imports would be reduced, which could reduce the quantity of D4 RINs available for compliance by an additional 666 million.⁵² Combined with the factors above, these conditions represent a 1.066 billion cumulative RIN generation deficit versus last year.⁵³

There also is an expected shortfall in cellulosic RINs. Cellulosic biofuel production through the first half of 2017 was only 95 million gallons. If that production level continues for the balance of the year, cellulosic production will fall short of the 311 million-gallon standard by a substantial margin.

In addition, the continuing problem with invalid RINs will put further pressure on RIN supply and prices. In January, EPA said that it intends to revoke Genscape's authority to verify RINs as a third-party auditor and ordered the company to replace 68 million RINs generated by Gen-X and SRC that were verified by Genscape. Genscape must now enter the market to acquire these RINs, reducing the supply available to obligated parties for compliance. Future enforcement actions could also reduce the number of available banked RINs.

Finally, the percentage of the obligation met using prior year RINs has declined. In 2015, ten % of the obligation was met using prior year RINs. In 2016, obligated parties met the 2016 RVO using 91 % 2016 vintage RINs and nine % prior year RINs from the RIN bank. It is reasonable to expect that all prior year RINs available for use are used because they cannot be used for compliance after that year and become worthless. The declining use of carryover RINs therefore suggests that the balance in the RIN bank for 2018 will not be sufficient to offset the supply reductions discussed above and preserve market liquidity.

C. EPA Should Ensure the 2017 RIN Bank Will be Sufficient to Allow Obligated Parties to Comply with their 2018 RFS Obligations, as Contemplated by the Statute

EPA has *estimated* that the 2016 RIN bank (*i.e.*, the number of carryover RINs available to demonstrate compliance with 2017 RFS standards on March 31, 2018⁵⁴) will comprise 2.06 billion RINs.⁵⁵ This is 520 million more RINs than EPA *projected* would be available when the 2017 RFS was finalized in December 2016, but is still only about 11% of the proposed 2018 standards. EPA notes, however, that there is “considerable uncertainty” regarding the number of

⁵¹ See <https://www.commerce.gov/news/press-releases/2017/08/us-department-commerce-issues-affirmative-preliminary-countervailing-1>. See also <http://ia.ita.doc.gov/download/factsheets/factsheet-multiple-biodiesel-ad-cvd-initiation-041317.pdf>

⁵² EIA: 444 million gallons of biodiesel from Argentina in 2016 (444 x 1.5 equivalence value = 666); https://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mdbl_m.htm.

⁵³ See <https://in.finance.yahoo.com/news/u-finds-argentine-indonesian-biodiesel-200226922.html> (Argentine biodiesel association Carbio stated “The compensatory duties imposed result in an immediate stoppage of sales to the United States . . .”).

⁵⁴ 82 Fed. Reg. at 34,213; See also 40 C.F.R. §80.1451.

⁵⁵ Carryover RIN Bank Calculations for 2018 NPRM, Nick Parsons, July 5, 2017 at 3 (hereinafter referenced as “Carryover memo”).

carryover RINs that will be available for compliance with the proposed 2018 RFS.⁵⁶ Thus, it is very difficult to predict at this point how many valid carryover RINs will be in the RIN bank to help obligated parties demonstrate their compliance with the 2018 RFS, and the Agency should take no action that could increase that uncertainty by seeking to draw down or limit the size of the RIN bank.

EPA has not proposed any intentional drawdown of the RIN bank for 2018, and AFPM and API fully agree with this course. The fact that there may have been an increase in the size of the RIN bank from 2016 to 2017 should not alter this determination. In this regard, there is no statutory limit on the number of RINs that may be banked. And the number of 2017 RINs that EPA projects may be available for compliance with the 2018 RFS is far from the highest number of carryover RINs EPA has allowed to be banked in the past. For example, EPA has calculated that the net carryover 2012 RIN bank comprised 2.47 billion RINs.⁵⁷ This is about 400 million more banked RINs than EPA projects will be available for compliance with the 2018 RFS when overall requirements (a proposed volume of 19.24 billion gallons) far exceed the requirements imposed in 2013 (16.55 billion gallons).

In sum, based on the statutory requirements of the RFS program, past practice in implementing the RFS program, and the policy goals (*e.g.*, RIN market liquidity) EPA has expressed regarding maintenance of the RIN bank, EPA must not take any actions that would decrease the amount of RINs that are available for carryover in 2018 for 2019 compliance.

IV. EPA Must Limit the Average Rate of Ethanol Blending for 2018 to 9.7 Percent

EPA should employ its general waiver authority to further reduce the total renewable fuel volume to account for the significant costs being imposed on obligated parties due to the practical limits on blending ethanol into gasoline. Ethanol remains “the most widely produced and consumed biofuel, both domestically and globally.”⁵⁸ Thus, consideration of projected ethanol use remains central to the analysis of reasonably achievable RFS volumes. In the proposed rule and previous rulemakings, EPA has accurately observed that: (1) the rate of growth of ethanol use has declined as the gasoline market has become saturated with E10, and (2) substantial barriers remain to the use of E15, including legal constraints.

As indicated by the analysis below, however, while EPA has recognized some previous errors in estimating ethanol use in the proposed rule – most notably EPA’s prior significant underestimations of the use of E0 – the Agency must further refine its assessment of projected total ethanol use for 2018. AFPM and API believe that a correct analysis of historic ethanol use and current market conditions should lead EPA to conclude that a reasonable estimate of the attainable average rate of ethanol blending into gasoline for 2018 is 9.7%. Total renewable fuel volumes for 2018 should accordingly be reduced consistent with this percentage. Our detailed analysis follows.

⁵⁶ 82 Fed. Reg. at 34,213.

⁵⁷ *Id.* at A-3.

⁵⁸ 82 Fed. Reg. at 34,229.

A. Total Renewable Fuel

In the proposed rule, EPA determined that a volume of 19.24 billion gallons for total renewable fuel was “reasonably attainable given assessments of individual fuel types, including biodiesel, renewable diesel, ethanol (in the form of E10 or higher ethanol blends such as E15 or E85), and other renewable fuels.”⁵⁹ EPA thus reduced both the total renewable fuel volume (as well as the advanced biofuel volume for 2018) by 6.762 billion gallons based on the Agency’s decision to waive cellulosic biofuel requirements by that amount under the authority of CAA §211(o)(7)(D).

In this regard, for the purposes of determining whether 19.24 billion gallons of renewable fuel is attainable in 2018, EPA uses an ethanol percentage concentration of 10.13%, the same level of concentration as used in the final 2017 standards.⁶⁰ But EPA should also take into account two additional factors. First, the projection of total gasoline energy use in 2018 has *decreased* from the amount projected in 2017. Total quad Btu of gasoline energy is projected to decrease by 90 quad Btu from 2017 to 2018 (17,288 quad Btu to 17,198 quad Btu), meaning that the volume of ethanol that will be used in E10 and E15 will be directionally lower. Second, EPA’s projection of an ethanol concentration level of 10.13% conflicts with other estimates. For example, EIA’s actual estimates of ethanol concentration in 2016 were lower, specifically 9.81%.⁶¹ In general, EIA’s analysis of ethanol concentrations in gasoline has shown a leveling off of the average ethanol concentration in gasoline since 2011 after initial “ramping up” from 2005 to 2010.

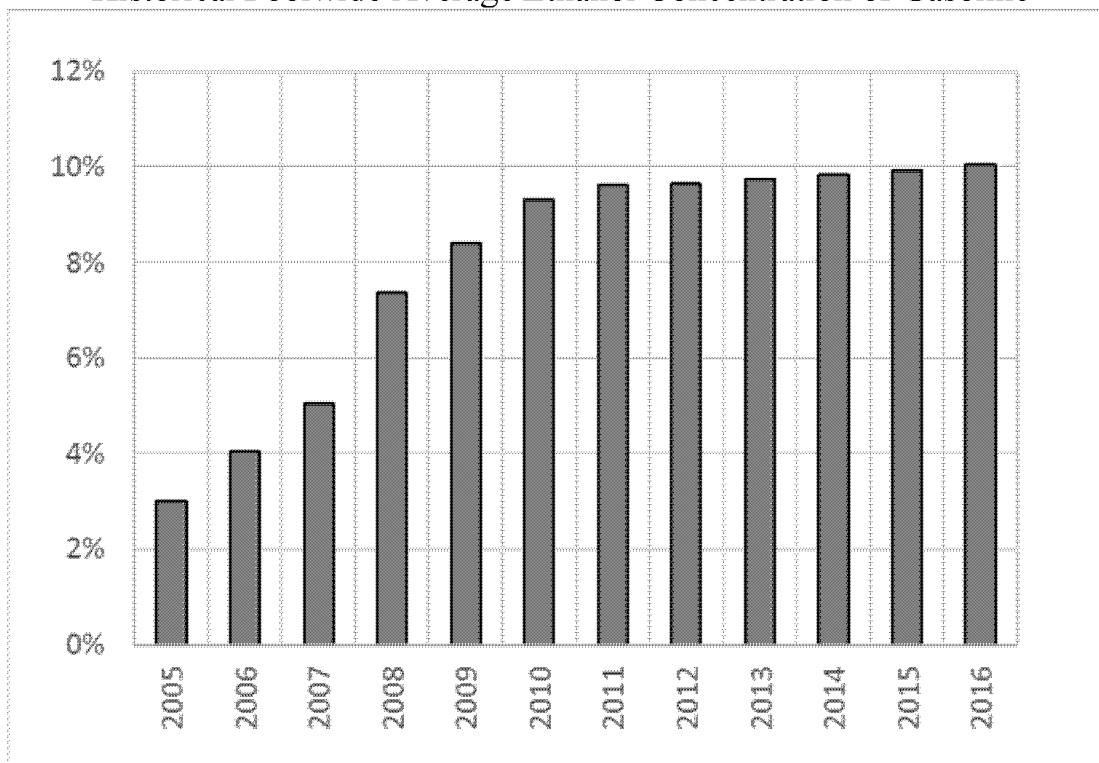
⁵⁹ *Id.* at 34,210.

⁶⁰ *Id.* at 34,232.

⁶¹ Refinery & Blender Net Input of fuel:

ethanol: https://www.eia.gov/dnav/pet/pet_pnp_inpt_a_epooxe_yir_mbb1_a.htm; Product Supplied of Finished motor: gasoline: https://www.eia.gov/dnav/pet/pet_cons_psup_a_EPMOF_VPP_mbb1_a.htm.

Historical Poolwide Average Ethanol Concentration of Gasoline



Source: EIA's Short-Term Energy Outlook

EPA should therefore *not* assume that the average ethanol concentration for 2018 will be 10.13% as it did for the 2017 RFS⁶² nor that this will result in consumption of 14.479 billion gallons of ethanol in 2018. In short, projecting this level of ethanol use in 2018 is supported neither by the overall trend in gasoline consumption, nor by any ability of the current marketplace to absorb additional amounts of E15.

EPA's assumption that ethanol concentration will reach 10.13% in 2018 is not based in fact, but rather an estimate used to illustrate a hypothetical example of how the 2017 RFS could be achieved. EPA's assumption is flawed, at least partly, because it is based on fuel ethanol or denatured ethanol. The quantity of the denaturant, a hydrocarbon additive, should not be counted as ethanol volume when calculating the average ethanol content of the gasoline pool.

More broadly, EPA should not assume that the market can simply absorb an ethanol concentration of 10.13% in 2018. History shows that E15 and E85 have not displaced the primary gasoline/ethanol blend, E10, nor as pointed out in Section IV.A. *infra*, driven E0 use down to the previously assumed level of 200 million gallons. Specifically, as referenced below, there is little growth in E15 or E85 utilization that could support the total renewable fuel volume

⁶² 82 Fed. Reg. at 34,232. EPA's analysis in the docket contends that there is a steadily increasing trend in average ethanol concentration since 2010 that means that 10.13% is reasonably attainable in 2017 based on a gradual increase in the average percentage of ethanol in those years. See Ethanol Supply scenarios for 2018, David Korotney, July 5, 2017. EPA assumes that the pool wide concentration in 2018 will be the same as 2017 and that this level will result in 14.479 million gallons of ethanol in 2018. See 82 Fed. Reg. at 34,232.

EPA has proposed. EPA also continues to underestimate the consumer demand for E0 and its utilization for many types of vehicles and nonroad equipment. High E0 usage has a continuing depressive effect on the demand for renewable fuels. In addition, as described in more detail below, there are real-world limitations to the utilization of advanced biofuels, including BBD.

While we disagree on the amount of ethanol that EPA estimates can be utilized in 2018, EPA's approach to setting the total renewable fuel level for 2018 – in which it utilized its cellulosic waiver authority fully – is completely in accord with the statutory text. The statute plainly provides that, whenever EPA makes a reduction in the applicable volume for cellulosic biofuel, it “may *also* reduce the applicable volume of renewable fuel and advanced biofuels requirement . . . by the same or lesser volume.”⁶³ EPA's proposed approach is also supported by the D.C. Circuit's recent decision in *Americans for Clean Energy* and its decision in *Monroe*.

EPA also has the authority to utilize the statute's general waiver provision in two circumstances relevant here, *i.e.*, “based on a determination . . . that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States . . . [or based on a determination] that there is an inadequate domestic supply.”⁶⁴ The prospect for such severe economic harm exists should EPA not reduce the renewable fuel volumes for 2018 and therefore EPA should exercise its general waiver authority to avoid severe economic harm *concurrently* with its exercise of its cellulosic waiver authority. In addition, to the extent that EPA considers the supply of renewable fuel in exercising its authority under the second prong of the general waiver provision, EPA may focus on the *domestic* supply of such fuel in determining whether the supply is inadequate. EPA's potential use of these waiver authorities to lower the mandated volumes are addressed in Section VI, *infra*.

B. E0 Remains in High Demand, Limiting the Ability to Introduce More Ethanol into Commerce

AFPM and API have commented extensively on the issue of real world production and use of E0 in the past.⁶⁵ Demand for E0 has been and remains far above EPA's projections. We believe, for instance, that actual E0 demand represented almost 4% of gasoline demand in 2015.⁶⁶ And, although E0 consumption declined from 2015 to 2016, substantial use of E0 continues today in the United States. In our previously submitted comments, we referenced projections from the EIA with regard to consumer demand for E0 that are far above EPA's estimates. (EIA estimated 5.3 billion gallons of E0 in 2015 versus EPA's previous estimate of 200 million gallons). We continue to believe that EIA is in the best position to provide accurate projections of E0 demand and recommend that EPA work with EIA to assess its projected use in 2018.

EPA estimates E0 demand based on total ethanol consumption, estimates of E15 and E85 sales, and the ratio of E0 and E10 sales needed to balance the total ethanol consumption. Under this methodology, EPA pegged total E0 demand in 2017 at 200 million gallons. But using EIA's

⁶³ CAA §211(o)(7)(D)(i) (emphasis added).

⁶⁴ CAA §211(o)(7)(A)(i)-(ii).

⁶⁵ See Appendix 1 at 17-20.

⁶⁶ See AFPM 2017 RFS Comments at 17 and API 2017 RFS Comments at page 5 (Significant E0 Demand).

methodology for consumption indicates that E0 consumption in 2016 was about 2.0 billion gallons.⁶⁷

AFPM and API have also previously cited the 2015 Iowa Department of Revenue’s retailers’ report that shows non-ethanol fuel (E0) sales account for more than 200 million gallons in annual sales in Iowa alone.⁶⁸ But the data are also revealing as to the persistence of the demand for E0 when the number of stations offering E0 and other ethanol-blended fuels is considered. For example, the Iowa Report demonstrates that the number of stations selling E0 decreased by 3%, however, the volume of E0 sold during this period only decreased by 0.9%. In contrast, over the same period, the number of E85/E20 stations in Iowa increased by 14%, but the sale of E85/E20 only increased by 5%. In addition, while the number of stations selling E15 increased by 74%, the sale of E15 actually *decreased* by 3.2%. These statistics clearly demonstrate that EPA cannot rely upon the number of stations as a proxy for the amount and types of blended fuels sold. This methodology is arbitrary and capricious in that it does not accurately predict the amount of biofuels actually sold.

Overall, within Iowa, the total volume of E0 sold was an order of magnitude greater than the combined sale of E15, E20, and E85. The data show that there is a very strong consumer preference for E0 even when outlets selling higher ethanol blends increase. These data support the need for EPA to reassess its estimate of the current demand for E0 in the nation.

2015 Iowa Fuel Sales⁶⁹

Fuel	Locations		Sales as percent of total gasoline and ethanol/gasoline sales		Volume (Million gallons)	
	2015	2016	2015	2016	2015	2016
E0	1797	1745	14%	13.75%	220.4	218.5
E85 and E20*	304	346	1%	1%	15.7	16.5
E15**	92	160	0.4%	0.38%	6.2	6.0
Total ethanol share of fuel sales	2102	2020	9.2%	9.2%	143.8	146.8
Total sales gasoline and ethanol			100%	100%	1,561.7	1,588.0

* E85 = For Year 2015, 13.2 million gal. and E20 = 2.5 million gal,

For Year 2016, 13.5 million gal. and E20 = 3.0 million gal

** E15 is defined by the State as E15 and E15 flex (E15 is sold in summer as Ethanol Flex Fuel)

Despite the submission of EIA and other data, in the past EPA has not increased its estimates of E0 sales. In the 2017 RFS, for example, EPA took the position that EIA data was based on

⁶⁷ As noted in more detail, *infra* nt. 84, AFPM and API believe that a conservative estimate of E0 use is approximately 3%.

⁶⁸ See API 2017 RFS comments at page 13.

⁶⁹ Iowa Department of Revenue, “2016 Retailers Fuel Gallons Annual Report, April 2017” and “2015 Retailers Fuel Gallons Annual Report,” at page 5.

information from domestic distribution at the terminal level and therefore did not account for downstream blending to create E10.⁷⁰ EPA asserted that its own EMTS data was superior to the EIA data and that this data provided more accurate information on actual use of ethanol in motor fuel. But even as EPA made these assertions and maintained its estimate of 200 million gallons of E0 use in 2017, the Agency conceded that E0 consumption using EMTS data suggested E0 consumption of *700 million gallons* in 2015.⁷¹ EPA then justified the use of 200 million gallons of projected E0 use in 2017 on the basis that increasing RFS requirements would force the gasoline market to transition away from the use of E0, which EPA now acknowledges was incorrect.

It should be readily apparent that the gasoline market has not “transitioned” away from E0 in the manner presumed by EPA. Instead, E0 use is driven by consumer demand for multiple end uses. In this regard, EPA has other information available to it justifying a much *higher* projection of E0 utilization than the 500 million gallons assumed in the proposed rule. For example, EPA received comments in response to EPA’s solicitation of comment for the Renewables Enhancement and Growth Support Rule from Magellan Midstream Partners, L.P. These informed comments addressed real world, everyday use of E0 indicating that E0 volume from Magellan’s central system alone is more than three times higher than EPA’s national estimate. Based on the data . . . and other market factors, we believe significant demand for E0 reaches beyond marine applications and extends into the automotive market.⁷²

Extensive information has previously been submitted on this issue from API, AFPM, and various other stakeholders,⁷³ and EPA is required to consider these and other new comments submitted in response to this proposed rule to further consider the level of E0 use in lowering the final 2018 RFS more than proposed.

C. E15 Cannot be Widely Used and Thus Does Not Provide a Solution

EPA continues to acknowledge real world constraints associated with the E10 blendwall, a position that is consistent with the Agency’s assessment in the 2014-2016 RFS, as well as the 2017 RFS rulemaking.⁷⁴ As EPA notes, both the limited number of retail stations that offer E15 as well as the limited number of vehicles that are able to use E15 act as constraints on additional volumes of this fuel. In addition, the complexity of the fuels marketplace means that setting RFS standards, in and of itself, will not result in additional use of E15. We agree with EPA that many of the same constraints that were reviewed in the 2014-2016 RFS and the 2017 RFS “will operate to limit growth in the availability of renewable fuel in 2018 as well, both for ethanol and non-ethanol renewable fuels.”⁷⁵

⁷⁰ See 81 Fed. Reg. at 89,776.

⁷¹ *Id.*

⁷² Comment from Magellan Midstream Partners, L.P. filed with respect to Renewables Enhancement and Growth Support Rule, Docket ID No. EPA-HQ-OAR-2016-0041.

⁷³ See, e.g., comments of National Marine Manufacturers Association, EPA-HQ-OAR-2016-0004-1949.

⁷⁴ 82 Fed. Reg. at 34,231.

⁷⁵ *Id.*, referencing 80 Fed. Reg. 77,450 (Dec. 14, 2015) and 81 Fed. Reg. 89,774.

We have commented extensively on the fact that E15 is not a viable solution to the E10 blendwall because E15 is incompatible with most of the existing vehicle fleet and the existing refueling infrastructure, and due to the potential liability issues associated with marketing the fuel.⁷⁶ In fact, automobile manufacturers do not recommend the use of E15 in approximately 85% of the vehicles on the road today, and the potential liability associated with misfueling or damage to such vehicles remains a concern. Further, with regard to the existing retail infrastructure, the Petroleum Marketers Association of America (“PMAA”) testified,

To rely on UST system manufacturers to recertify every component of an existing storage system is almost impossible to achieve as they do not want the liability after the fact.⁷⁷

Nearly seven years after EPA granted two partial waivers allowing for the use of E15 in certain light duty vehicles,⁷⁸ it is clear that E15 use has been minimal and that EPA lacks actual data on nationwide E15 use. Instead, EPA attempts to derive an estimate of nationwide E15 sales by relying on the number of retail outlets selling the fuel incorporating further estimates regarding the amount of total sales that are E15.

D. EPA Overestimates the Amount of E85 the Market Can Absorb

EPA estimates of E85 consumption are also far removed from the realities of the fuel market, being based on the relationship between the price of E10 and E85 and a statistical correlation. EPA’s continued reliance on flawed methodology, particularly when other data and analysis have been submitted to the administrative record of this rule and other RFS rules over the last several years showing how far EPA’s estimates remain from real-world facts, is the epitome of arbitrary and capricious agency action. That the result of its flawed methodology is billions of dollars in additional costs to obligated parties only makes matters worse. EPA has a duty to obtain and base its volumetric requirements on more accurate information.

EPA admits in the proposal that it does not have comprehensive data on the amount of E85 sold in the United States.⁷⁹ Instead, the Agency seeks to either scale data that is available from several states to estimate national usage or correlate data on the “annual average E85 price discount” with E85 sales, taking into account the number of retail outlets selling E85. Using the latter methodology, EPA estimates that 192 million gallons of E85 will be used in 2018.⁸⁰ EPA further indicates that it may receive information regarding the first methodology later this year and take such into account in the final rule.

As discussed in AFPM’s and API’s extensive comments (in the appendices to these comments) on EPA’s approach to determining E85 usage in the proposed 2017 RFS rulemaking, EPA’s methodology suffers from several flaws. In summary:

⁷⁶ API 2017 RFS Comments at page 17. API/AFPM Comments on 2014-2016 RFS Rule at 28-34.

⁷⁷ August 1, 2017, “PMAA Testimony before the EPA Public Hearing on the RFS Standards for 2018 and Biomass-Based Diesel Volume for 2019” Hyatt Regency Washington on Capitol Hill, PMAA Executive Committee Member Vern Kelley.

⁷⁸ 75 Fed. Reg. 68,094 (Nov. 4, 2010); 76 Fed. Reg. 4,662 (Jan. 26, 2011).

⁷⁹ Preliminary estimate of E85 consumption in 2016, David Korotney, July 5, 2017.

⁸⁰ *Id.* at 3.

- The stochastic analysis of E85 data from a limited number of states is flawed and produces large uncertainties. Therefore, EPA should not try to scale data that is available from such states to estimate national usage in finalizing the 2018 rule.⁸¹
- EPA has repeatedly overestimated E85 levels in the past compared with relevant EIA data. For instance, in 2015, EIA estimated that only 86 million gallons of E85 were actually sold, which was approximately *half* of EPA’s estimated 166 million gallons.
- Infrastructure necessary to facilitate E85 consumption has undergone only modest change. In 2016, EPA estimated that between 3,024 and 3,127 E85 stations operated, according to data from the Alternative Fuels Data Center. As noted in previous comments, this represents only about two % of all gasoline stations. EPA estimates on the number of such stations are higher than those of the Department of Energy.⁸²
- The percentage of flexible fuel vehicles (“FFV”) in the U.S. light duty car and truck fleet has not appreciably changed. It has risen, but only from about seven % to about eight % of vehicles. At the same time, regulatory requirements that have incentivized FFV production are phasing out.⁸³
- EPA cannot reasonably rely on unclear consumer response to and acceptance of E85 based on price differential. As we indicated in our 2017 RFS comments, response to lower E85 pricing has varied.⁸⁴
- EPA has also recognized that current marketing of E85 does not support greater use of this fuel. Specifically, due to the withholding of RIN value, consumers do not receive a “pass through” of the RIN value, resulting in little incentive to use the fuel.⁸⁵

The latter point is further supported by the Fuels Institute study that analyzed the retail sale of E85 and found that factors other than price affect E85 sales.

Ultimately, consumers are influenced by numerous factors when deciding to purchase E85. Finding the right conditions to attract the 20 million FFV drivers on the road to opt for E85 instead of unleaded requires careful study of prevailing

⁸¹ EPA indicates that it may utilize additional information on 2016 E85 sales when it becomes available in the final rule. Korotney estimate of E85 consumption; *Id.* at 1. AFPM and API are concerned that extrapolating national sales based on this limited subset of states, which may have the majority of E85 sales, is not realistic.

⁸² See https://www.afdc.energy.gov/fuels/ethanol_locations.html.

⁸³ As EPA recognized in its 2012 light duty vehicle standards, pursuant to 49 U.S.C. § 32905(b), fuel economy calculations that favor FFVs are subject to a phase-out and are not available after model year 2019. See 77 Fed. Reg. 63,020 (Oct. 15, 2012).

⁸⁴ AFPM 2017 comments at 28.

⁸⁵ “[W]e believe that the generally poor pricing of E85 at retail is not due to the poor pricing of E85 at the wholesale level, but is instead the result of the noncompetitive retail market for E85. This non-competitive market often results in an E85 pricing strategy by retail stations that seeks to maximize fuel margins through withholding RIN value leading to greater profitability, rather than a strategy that seeks to maximize sales volumes through lower retail prices by passing a greater portion of the RIN value through to consumers.” See <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100PUF0.pdf>) at 30.

market conditions, consumer behavior and localized strategies to maximize the return on investment for the fuel. Relying upon price experience alone will not necessarily yield predictable results.

The data presented in this report indicates that retail facility analysis is necessary to fully understand why consumers choose to purchase or not purchase E85, and dispels the assumption that price alone will determine the success of an E85 retail fuel offer.⁸⁶

Additionally, according to a study by MathPro, “E15 and E85 have achieved only limited market acceptance, due in part to vehicle warranty issues with E15 and infrastructure limitations for both E15 and E85. In addition, when higher blends of ethanol are sold alongside E10, ethanol’s fuel economy deficit becomes apparent to consumers.”⁸⁷

In summary, although EPA’s current proposal estimates that lesser amounts of E85 will be reasonably consumed in 2018 (194 million gallons) than in 2017 (275 million gallons),⁸⁸ the Agency continues to overestimate E85 demand.

E. Conclusion Concerning Ethanol Use and Total Renewable Fuel Volumes

EPA’s methodology suffers from a number of flaws, including underestimating E0 use, overestimating the use of E15 and E85, and failing to adequately account for the flattening of gasoline demand. Consequently, EPA should not presume that ethanol will be blended into gasoline at an average rate of 10.13% for 2018. Instead, as AFPM and API previously noted, a conservative estimate of the percentage of E0 in the gasoline pool is 3%, meaning only 97% of gasoline may be blended with ethanol.⁸⁹ Because the overwhelming majority of gasoline that contains ethanol is E10, EPA may reasonably use 9.7% as the projected average annual ethanol blending in 2018. Under the July 2017 EIA Short-term Energy Outlook forecast, which projected the use of 143.95 billion gallons of gasoline in 2018, a 9.7% ethanol level would translate into a “requirement” for 13.96 billion gallons of ethanol.⁹⁰ EPA should promulgate final RFS standards on the basis of this ethanol volume, utilizing its general waiver authority to prevent “severe economic harm,” discussed in Section VI, *supra*.

⁸⁶ “Retailing E85: An Analysis of Market Performance, July 2014-August 2015,” Fuels Institute, p. 37

⁸⁷ “RENEWABLE FUEL STANDARDS AND THE ETHANOL BLENDWALL,” Prepared for API by MathPro Inc., August 29, 2013.

⁸⁸ 81 Fed. Reg. at 89,780.

⁸⁹ AFPM and API have previously calculated that E0 was approximately 4% of gasoline in 2015; EIA has calculated the E0 percentage as 1.4% in 2016. Averaging these two data points would yield 2.7%. But sales data from one state, Iowa, indicated an E0 level of approximately 14% in 2015 and 2016. Therefore, we believe that a conservative estimate would be a national average of approximately 3%.

⁹⁰ AFPM and API recognize that the RFS does not specifically mandate the use of ethanol in gasoline. But the Agency has also recognized that the total renewable fuel requirement “drives” the use of ethanol in gasoline subject to real world constraints on using E10 in vehicles built before 2001 and other significant nonroad uses.

V. EPA Should Recalculate the Cellulosic and Advanced Biofuel Volumes for 2018 By More Closely Aligning Projected Cellulosic Biofuel Volumes with Actual Production, and Should Fully Exercise Its Cellulosic Waiver Authority

AFPM and API support EPA’s proposal to lower the advanced biofuel volume by the full amount of the reduction in cellulosic biofuel volumes following EPA’s projection of 2018 volumes of cellulosic biofuel. AFPM and API further support EPA’s proposal to adopt more conservative percentile values in projecting 2018 cellulosic biofuel production. Nonetheless, in light of recent actual production data, we believe that EPA’s projected 2018 volume for cellulosic biofuel remains too high.

A. EPA’s New Methodology to Estimate Cellulosic Biofuel Production

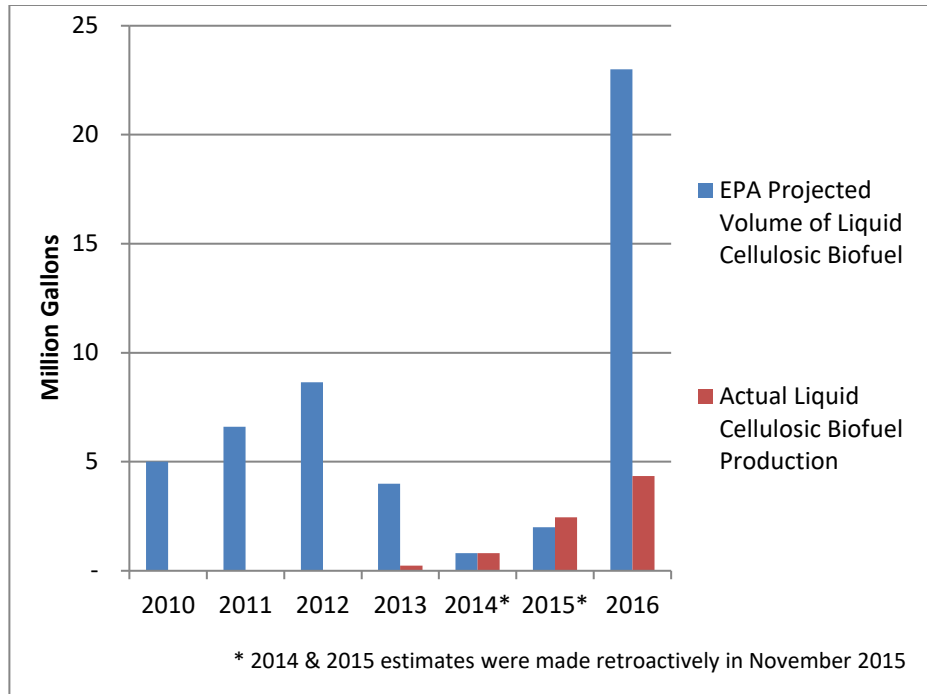
Under CAA §211(o)(7)(D)(i), EPA must project the “volume [of cellulosic biofuel] available during [each] calendar year.” Over the years since the cellulosic biofuel requirement first became applicable in 2012, EPA has used various methodologies to implement it. In the proposed rule, EPA has once again revised its methodology for projecting the production of cellulosic biofuel in 2018.

In projecting cellulosic biofuel volumes, EPA must “take a neutral aim at accuracy” and “reflec[t] on the success of earlier applications.”⁹¹ But EPA’s previous cellulosic biofuel methodologies have invariably overestimated cellulosic biofuel production. For the most recent completed compliance year, EPA projected a total volume of 230 million gallons of cellulosic biofuel would be available in 2016.⁹² Of this amount, EPA projected that 23 million gallons would be in the form of liquid cellulosic biofuel while 207 million gallons would be produced from compressed natural gas/liquified natural gas (“CNG/LNG”) facilities. API and AFPM support EPA’s decision to evaluate liquid cellulosic and CNG/LNG biogas production separately given fundamental differences between the two markets and fuel types.⁹³ The total amount of liquid cellulosic biofuel produced in 2016, however, was only 3.8 million gallons.

⁹¹ *API v. EPA*, 706 F.3d 474, 476-77 (D.C. Cir. 2013).

⁹² 80 Fed. Reg. at 77,508.

⁹³ *See* 80 Fed. Reg. at 77,499-77,509.



While the production of CNG/LNG cellulosic biofuel in 2016 was much closer to the EPA estimate (188.12 million gallons), EPA *still* overestimated production in this segment of the industry, which it considers to be largely mature.

For 2018, EPA proposes a cellulosic biofuel volume requirement of 238 million gallons, of which 221 million gallons is attributed to CNG/LNG biofuel producers. This represents a significant reduction from the 2017 volume requirement. In projecting 2018 production of *liquid* cellulosic biofuel, EPA has used a methodology similar to that which it has in the past - namely, assembling information concerning the production status of cellulosic biofuel facilities. This time, however, EPA has further adjusted production estimates downward based on actual liquid cellulosic biofuel production in 2016.⁹⁴ EPA is proposing to use a 1st percentile value for new facilities (versus a 25th percentile value used for such facilities in 2016) and a 43rd percentile value for “consistent producers” (versus a 50th percentile value for such producers in 2016). While these percentile values are lower than those used previously, historically *actual* production of liquid biofuel has never reached more than 2.1% of total industry capacity.⁹⁵

AFPM and API believe the lower percentile values proposed by EPA are a step in the right direction considering both the very large error rate EPA experienced in 2016 for liquid cellulosic biofuel projections, as well as EPA’s historic overestimation of production from both new and existing or “consistent” producers. EPA should consider, however, whether further downward adjustment is appropriate given that EPA’s 2018 projection of liquid cellulosic biofuel

⁹⁴ 82 Fed. Reg. at 34,215.

⁹⁵ 2.1% is based on EPA projections and capacity data used in previous rulemakings. See 75 Fed. Reg. 76,797; 77 Fed. Reg. at 1,330-31; 78 Fed. Reg. at 49,797, 49,808-09; 78 Fed. Reg. 71,779-80, 71,736. Where EPA included a facility in its projection table for a given year, but determined that production would not begin that year, the facility was excluded from the analysis for purpose of calculating utilization percentage.

production (17 million gallons) represents approximately a *450% increase* in production over the most recent full year (2016) for which production data exists. Available production data from 2017 further reinforces this point. Approximately five million liquid cellulosic (D3 and D7) RINs have been produced between January 2017 and July 2017 - a production rate that implies an annual 2017 total of 8.7 million RINs if the same rate of production occurs for the rest of the year.⁹⁶ Even that level of production will likely be reduced to account for RIN generation errors, spills and other adjustments, resulting in a final net RIN total equal to less than *half* of EPA's forecasted 17 million RIN forecast for 2018. EPA has not shown that the market conditions exist for such dramatic year-over-year increases in liquid cellulosic biofuel production.

AFPM and API urge EPA to abandon its prior methodologies that have historically overpredicted cellulosic biofuels. While EPA continues to tweak these methodologies, all suffer from the same fatal flaw - reliance upon the predictions of the very cellulosic producers that face financial pressure from their investors to provide optimistic production projections. For these reasons, AFPM and API continue to urge EPA to adopt a methodology that is based upon recent *actual* cellulosic production rather than the necessarily biased predictions provided by the cellulosic producers.

Specifically, EPA could annualize actual RIN generation data that will be available for August, September, and October 2017 to derive cellulosic biofuel volumes for both liquid cellulosic and CNG/LNG for 2018. This methodology has the benefit of being based on the most up-to-date data on actual proven production, which is a better indicator of future performance than the methods that EPA has used in the past to project production in accordance with statutory requirements.

EPA could also ensure that its projections of cellulosic liquid fuel production are realistic by calculating what percentage of industry-wide capacity is being projected by the methodology it employs to calculate projected production. If the forecasted utilization rate resulting from EPA's methodology materially exceeds the highest achieved historical levels of capacity utilization – *e.g.*, currently 2.1% – EPA could then make further downward adjustment in the final volume requirement based on the level that represents the highest historical percentage of capacity used for liquid cellulosic biofuel production. Such a procedure could serve as an additional check on overly optimistic predictions and as a further means of taking neutral aim at accuracy.

Using actual historic production as the methodology to project future production does not inhibit the growth of the cellulosic biofuel volumes. To the extent that actual production of cellulosic biofuel increases from year-to-year, a new “baseline” is established which EPA will be required to use in implementing the cellulosic biofuel mandate. All market participants will have this knowledge and, therefore, adequate incentive to increase production in order to establish the minimum EPA cellulosic biofuel requirement in an ensuing compliance year.

⁹⁶ See EPA, 2017 Renewable Fuel Standard Data, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2017-renewable-fuel-standard-data> (Accessed Aug. 30, 2017). AFPM and API hereby incorporate by reference the 2010-2017 production data provided in EPA's RFS Program website, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/public-data-renewable-fuel-standard>. See also EMTS data in an appendix to these comments.

Finally, API and AFPM urge EPA to provide greater transparency with respect to liquid cellulosic and CNG/LNG biogas production data. In prior years, EPA’s final rules have masked the net (as opposed to gross) number of liquid cellulosic and CNG/LNG RINs produced, and have made it difficult or impossible to determine net RIN production on a monthly and annual basis. Because net RINs (rather than gross RINs) are the basis for compliance, EPA should make this data easily accessible to regulated parties and make such data part of the administrative record for purposes of judicial review.

B. EPA Should Further Reduce Advanced Biofuel Volume Requirements

EPA appropriately proposed to reduce the statutory volume target for advanced biofuel in 2018 by the same amount as the proposed reduction in the 2018 cellulosic biofuel volume. EPA also properly proposed to not “backfill” advanced biofuel volumes with non-cellulosic biofuel volumes (primarily advanced biodiesel and renewable diesel) given that statutory volumes of advanced biofuel after 2015 are “driven primarily by increases in cellulosic biofuel.”⁹⁷

EPA’s approach to advanced biofuel volumes rests on the straightforward observation that Congress provided for dramatically increasing statutory volumes for cellulosic biofuel “nested” within the advanced biofuel statutory volumes. Over the period from 2015 to 2022, cellulosic biofuel becomes an increasingly substantial part of the overall advanced biofuel and total renewable fuel volumes. Thus, imposing RFS requirements that are inconsistent with this congressional expectation should be avoided. To the extent that this rationale in the 2018 proposal departs from EPA’s previous practice concerning determining the appropriate volume of advanced biofuel, EPA has authority to change its policy judgments and methodology where such an action is “permissible” and the Agency provides a “reasoned explanation” for this change.⁹⁸

EPA provides several rationales for its approach. For instance, imposing a higher advanced biofuel volume would redirect advanced feedstocks away from competing uses, which would cause market disruptions.⁹⁹ In particular, EPA projects that increasing volumes for advanced biofuels would shift supplies of advanced biodiesel and renewable diesel from other countries to the United States, thereby causing a shift to conventional renewable- or petroleum-based feedstocks in those other countries. In addition, this shift would result in additional emissions from transportation of the additional feedstocks to U.S. shores.

EPA also cites continuing economic uncertainty due to the expiration of a tax credit for blending biodiesel, as well as pending proposals to alter any renewed credit. Following the expiration of the blenders’ tax credit for biodiesel at the end of 2016, EPA does not believe it is reasonable to

⁹⁷ 82 Fed. Reg. at 34,220.

⁹⁸ EPA cites to *FCC v. Fox TV Stations*, 556 U.S. 502, 514-515 (2009) for its ability to adopt a new “permissible” approach to its use of cellulosic waiver authority. EPA may also clearly change course where it supplies a “reasoned analysis” for the change. *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983). Where EPA engages in appropriate balancing of RFS provisions and provides a rationale for adjusting its implementation of the statute as it does here, it is able to satisfy the requirements for altering its approach to setting advanced biofuel volumes.

⁹⁹ 82 Fed. Reg. at 34,221.

project increasing volumes of imported biodiesel and renewable diesel in 2018.¹⁰⁰ This situation may be further complicated by congressional consideration of changing the tax credit from a blenders' credit to a producers' credit, which would effectively disallow foreign renewable fuel producers to benefit from the credit. And pending Department of Commerce action on trade matters referenced in these comments will likely further reduce available supply.

EPA proposes that 2.5 billion gallons of advanced biodiesel and renewable diesel is “reasonably attainable” in 2018, an increase of 100 million gallons over 2017. EPA also believes that 60 million gallons of “other advanced biofuel” will be available in 2018, consisting of heating oil, naphtha, “D5” renewable diesel, and domestic ethanol.¹⁰¹ Combining these amounts with EPA’s 2018 projected volume of cellulosic biofuel (238 million) and 100 million gallons of projected imported sugarcane ethanol, EPA proposes to determine that 4.24 billion gallons of advanced biofuel is “reasonably attainable in 2018.”¹⁰²

EPA’s estimate of the volume of advanced biofuel that is “reasonably attainable in 2018” however is overly optimistic. Rather than treating imported biofuels, including the effect of the expired biodiesel tax credit on projected imports as EPA has in the proposal, EPA should take a more straightforward approach to imports. As discussed in the following section, EPA should focus on the domestic supply of these renewable fuels when determining advanced biofuel volumes for 2018. Exclusion of these imported fuels combined with other the analysis provided above would yield the following volumes for advanced biofuel in 2018:

	<u>Volume (million gallons)</u>
Cellulosic	216 ¹⁰³
Advanced Biodiesel/Renewable Diesel	2,360 ¹⁰⁴
Other Advanced Biofuel	<u>30¹⁰⁵</u>
Total 2018 Advanced Biofuel	2,606

¹⁰⁰ *Id.* at 34,225.

¹⁰¹ *Id.* at 34,227. In the category of “other advanced biofuel,” 60 million gallons represents total supply of advanced biofuel other than sugarcane ethanol.

¹⁰² *Id.* at 34,228.

¹⁰³ Per the discussion in Section V *infra*, EPA could consider setting cellulosic biofuel volumes on the basis of actual production in 2017, yielding a different amount. The cellulosic biofuel volume of 216 million gallons is an estimate based on the assumption that the three months of production used to set the 2018 standard average 18 million gallons per month.

¹⁰⁴ Expressed in gallon-RINs. The advanced biodiesel/renewable diesel volume is calculated by using only the domestic portion of the current 2.1 billion requirement for 2018. Specifically, in 2016, domestic D4 RINs that were generated were 2,900 million, while there were 1,200 million RINs generated based on D4 imports. Therefore, domestic production of D4 RINs in 2016 was 72.5% of the total 2016 volume for biomass-based diesel. If this same percentage is applied to the 2018 volume for biomass-based diesel, a total volume of 1,522.5 million gallons/2,360 million RINs can be calculated, *i.e.*, 2,100 million gallons * 72.5% = 1,522.5 million gallons (2,360 million RINs at 1.55 equivalence value).

¹⁰⁵ EPA has considered that the total supply of advanced biofuel (other than imported sugarcane) has been relatively constant during 2014 and thus proposes to find that 60 million gallons would be reasonably attainable in 2018. 82 Fed. Reg. at 34,227. EPA indicates, however, that it may modify its projection as information becomes available during the year. In 2016, EMTS shows 26.3 million D5 naphtha RINs and 1.5 million D5 heating oil RINs. This historical production is the basis of the 30-million gallon recommendation.

EPA should therefore utilize its waiver authorities to the extent permissible to address imported biofuels. EPA may rely on both prongs of its general waiver authority to revise advance biofuel requirements downward for 2018. As described in more detail in Section V.C. *infra*, EPA may exclude foreign-produced renewable fuel from its calculation of supply for purposes of exercising a waiver based on “inadequate *domestic* supply.” In addition, EPA may determine that severe economic harm would occur due to the imposition of statutory RFS volumes and waive requirements for the four renewable fuels “in whole or in part” on that basis. EPA’s authority to exercise this waiver authority is explained in more detail in Section VI.A.

C. EPA Should Focus on the Domestic Supplies of Renewable Fuels When Setting RFS Volumetric Requirements

EPA has requested comment concerning biofuel imports, including any “inherent authority or other basis consistent with general construction of authority in the statute to reduce the required volume of advanced biofuel (with a corresponding reduction to the total renewable fuel requirements) below the level proposed for 2018.”¹⁰⁶ As EPA notes, the goals of the RFS include promoting “greater energy independence and security,” and statutory provisions concerning BBD require an assessment of the impact of renewable fuels on the energy security of the United States.

EPA may properly interpret its statutory authority to *exclude* imported biofuel from its calculation of annual volumes of renewable fuel. At the same time, EPA may allow RINs generated from imported renewable fuel to be utilized for compliance. The basis for this treatment is outlined in more detail below and in Section VI.B. *infra*, but rests on the RFS goal of increasing the energy independence of the United States and on the statutory structure of the RFS, which calculates annual compliance obligations on the basis of annual gasoline and diesel production and imports. In enacting the RFS, Congress did not intend to create mandates that subsidize foreign fuel providers at the expense of the American consumer.

As a threshold matter, no provision in CAA §211(o) prevents EPA from making distinctions between domestic- and foreign-produced renewable fuels. The fact that EPA allows imported fuel to be imported for purposes of compliance does not mean that EPA should not make reasonable distinctions between domestic and foreign-produced renewable fuel for purposes of establishing RFS mandates.

EPA has consistently described one of the goals of the RFS as reducing the use of “imported oil *and fuel*.”¹⁰⁷ The Energy Independence and Security Act of 2007, which formed the basis of the current RFS program, also includes the goal of “promoting energy independence.”¹⁰⁸ Given those goals, including foreign production of renewable fuels in the calculation of the amount of renewable fuel that is “reasonably attainable” is illogical, because foreign production and imports are an obstacle to energy independence, not a promoter of such independence.

¹⁰⁶ 82 Fed. Reg. at 34,212.

¹⁰⁷ *Id.* at 23,906 (emphasis added).

¹⁰⁸ *See, e.g.*, 75 Fed. Reg. at 14,670, 14,705.

Indeed, to the extent that substantial reductions in the use of imported oil and fuel¹⁰⁹ have been achieved in recent years, these goals have been achieved for reasons other than implementation of the RFS. Thanks to technological advancements in oil production and refining, U.S. dependence on foreign sources of oil and fuel products has dropped from 58% in 2007, to 24% today.¹¹⁰

When projecting available supplies of renewable fuel for future compliance years, EPA typically reviews renewable fuel production in previous years.¹¹¹ Thus, inclusion of foreign supplies in the volumetric requirements for any one year tends to increase the volume of renewable fuel that EPA projects is available in the future. This risks improperly “locking in” such production, increasing future dependence on that foreign production. Including foreign-produced renewable fuel within the domestic supply of such fuel also provides an incentive for additional foreign production in the future. This can only serve to undermine the statute’s purpose of promoting American energy independence. This situation is exacerbated where there may be instances of product dumping and unfair subsidization of imports, as reflected in the pending Department of Commerce investigation of imports of biodiesel from Argentina and Indonesia.¹¹²

The Department of Commerce¹¹³ announced an affirmative preliminary determination in the countervailing duty (“CVD”) case on biodiesel imported from Argentina and Indonesia. This action will impact a significant source of imported¹¹⁴ biodiesel and potentially cause market disruptions. To the extent that biodiesel provides marginal volumes of renewable fuel for meeting annual standards, trade sanctions on imported biodiesel could further increase the costs for obligated parties and consumers. Historically, biodiesel¹¹⁵ has been a renewable fuel that is significantly more costly than petroleum diesel and more costly than ethanol.

AFPM and API recognize that, because the statute provides that importers may be obligated parties, some might argue that imports of renewable fuel are part of the supply of renewable fuel and should be used to calculate annual RFS volume requirements. But CAA §211(o) does not dictate this result. Instead, EPA has authority to determine the applicable volume of renewable fuel pursuant to CAA §211(o)(2)(B) and to calculate annual renewable fuel obligations under CAA §211(o)(3)(ii) that shall be applicable to importers, as well as to other parties, as *appropriate*. The statute does not specify that foreign-produced renewable fuel is part of the “applicable volume” of renewable fuel or that it is to be included within the volume percentages that apply to obligated parties.

Moreover, RFS obligations are imposed on importers on the basis of their importation of gasoline and diesel into the United States, not on their imports of renewable fuel. RFS obligations are required to “ensure that transportation fuel sold or introduced into commerce in

¹⁰⁹ 72 Fed. Reg. at 23,906 (emphasis added).

¹¹⁰ <https://www.eia.gov/tools/faqs/faq.php?id=727&t=6>.

¹¹¹ See, e.g., Table IV.B.3-1-- Historical Supply of Other Advanced Biofuels, 82 Fed. Reg. 34,227.

¹¹² Initiation of the Department of Commerce investigation began on April 13, 2017. See <http://www.trade.gov/press/press-releases/>.

¹¹³ <https://www.commerce.gov/news/press-releases/2017/08/us-department-commerce-issues-affirmative-preliminary-countervailing-1>.

¹¹⁴ https://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_EPOORDB_im0_mbb1_m.htm.

¹¹⁵ https://www.eia.gov/pressroom/testimonies/howard_06222016.pdf.

the United States . . . contains at least the applicable volume of renewable fuel.”¹¹⁶ This requirement prevents a possible “loophole” whereby imported gasoline or diesel might be able to avoid incurring RFS obligations. However, the fact that RFS obligations may be incurred through the importation of gasoline and diesel is entirely separate from the issue of whether EPA should base RFS volume requirements on foreign-produced renewable fuel or should base such requirements solely on domestic production of renewable fuel that will be used in transportation fuel in this country. Since EPA has authority to *not* impose renewable fuel obligations on importers if *appropriate*, it likewise has authority to tailor this obligation to better serve the purposes of the RFS with regard to energy independence. Similarly, where EPA relies on the second prong of its general waiver authority to lower required applicable volumes of renewable fuel, it is required under CAA §211(o)(7)(A)(ii) to consider only the *domestic* supply.

AFPM and API recognize that current RFS regulations impose obligations on importers to surrender RINs in accordance with the amount of gasoline and diesel they import into the United States.¹¹⁷ And EPA in the past has cited to other requirements, such as the non-discrimination principles under the World Trade Organization, as a “concern” if the U.S. were to discriminate against foreign-produced renewable fuels.¹¹⁸ But these regulatory requirements and concerns do not dictate that EPA *must* consider foreign-produced renewable fuel for purposes of calculating “reasonably attainable” renewable fuel mandates. Instead, these factors go solely to domestic *compliance* with the RFS.

Excluding foreign-produced renewable fuel in determining annual RFS volumes of renewable fuel would not require a broad rewrite of current regulatory provisions. EPA can and should retain the current RIN compliance structure, along with requirements that renewable fuels produced outside the United States comply with applicable regulatory definitions. Were EPA to take this approach, foreign-produced renewable fuels would remain available for compliance purposes, and there would be no discrimination against such suppliers. But since foreign-produced renewable fuels do not promote U.S. energy independence, they would not serve as a basis for increasing the mandates on obligated parties located in this country.

Several other policy considerations support this approach. As noted in API’s comments on the proposed 2017 RFS:

A direct implication of setting renewable fuel volume standards that exceed the ethanol blendwall is that it encourages imported biodiesel that is produced from palm oil. EPA’s own analysis finds that biodiesel produced from palm oil fails to meet GHG emission reduction requirements of the RFS, except it is allowed if it meets grandfathering provisions of EISA. Biodiesel imports into the U.S. from Indonesia, a leading palm oil producing country, have increased from zero in 2012 to 73 million gallons in 2015. This outcome of increased palm oil biodiesel consumption in the U.S. is another inconsistency with EISA’s stated purpose to “...to increase the production of clean renewable fuels...”

¹¹⁶ CAA §211(o)(2)(A)(i); *see also* 40 C.F.R. §80.1407.

¹¹⁷ 40 C.F.R. §80.1406(a)(1).

¹¹⁸ Response to Comments for 2017 RFS at 186.

In the 2017 RFS proposal, EPA set the conventional volume at 14.8 billion RINs or 10.42% of the gasoline pool if all conventional biofuel were ethanol, hence breaching the E10 blendwall. In Table IID.1 of the proposal, EPA assumes 400 million gallons of conventional biodiesel/renewable diesel are included in the conventional D6 pool. This continued practice of EPA to encourage imports from grandfathered facilities, including palm based biodiesel/renewable diesel results in significant increases in GHGs, contrary to the stated intents of the Agency to lower GHGs.¹¹⁹

Given EPA’s express solicitation of comment in this area, we encourage the Agency in the final rule to consider whether there is “inadequate domestic supply” that supports use of its general waiver authority and to recalculate both advanced biofuel and total renewable fuel volumes without consideration of foreign production.

VI. Recommendation on 2018 Renewable Fuel Volumes/Use of “Severe Economic Harm” and “Inadequate Domestic Supply” General Waiver Authorities

On the basis of our comments above concerning total ethanol, cellulosic biofuel, and advanced biofuel volumes for 2018, we recommend that EPA determine “reasonably attainable” volumes of renewable fuel utilizing its available waiver authority as follows:

	<u>Million RINs</u>
Ethanol	13,960 ¹²⁰
Non-Ethanol Cellulosic	200 ¹²¹
Biomass-Based Diesel	2,360 ¹²²
Other Advanced Biofuel	30
D6 Biodiesel/Renewable Diesel	<u>500¹²³</u>
Total Renewable Fuel Volume 2018	17,050

This level of total renewable fuel and other renewable fuel volumes in 2018 is necessary to avoid severe economic harm, and thus it is lawful for EPA to reduce the volumes to these levels pursuant to the “severe economic harm” prong of its general waiver authority.

Before explaining why the present circumstances justify exercise of EPA’s “severe economic harm” authority, we note that EPA may exercise its general waiver authority *concurrently* with

¹¹⁹ Comment submitted by Frank J. Macchiarola, Group Director, Downstream and Industry Operations, American Petroleum Institute at 23. EPA-HQ-OAR-2016-0004-3512.

¹²⁰ Liquid cellulosic biofuel is included within the ethanol total.

¹²¹ Estimated; final total to be based on actual production during 2017.

¹²² The 2018 volume for BBD was promulgated in the 2017 RFS. Per the calculation above for domestic production, the 2018 volume may be calculated as 1,522.5 million gallons, or 2,360 million RINs on an ethanol-equivalent basis.

¹²³ In 2016, EMTS shows 169.3 million biodiesel D6 RINs and 281.6 million renewable diesel D6 RINs. This is the basis for the 500 million RIN recommendation for 2018.

its cellulosic biofuel waiver authority. The D.C. Circuit has noted that EPA has “‘broad discretion’ to determine ‘when and under what circumstances’ to use its cellulosic waiver authority.”¹²⁴ And in *Americans for Clean Energy*, the D.C. Circuit rejected arguments that use of cellulosic waiver authority was conditioned on use of general waiver authority, noting that “even though the cellulosic waiver provision cross-references two other statutory provisions, it does not cross-reference or otherwise incorporate by reference any limitations on EPA’s waiver authority.”¹²⁵ Use of general waiver authority is not incidental or incremental to EPA’s use of cellulosic waiver authority. “Congress chose to grant EPA two textually distinct waiver authorities that operate in different scenarios pursuant to different limitations.”¹²⁶

In addition, when exercising its general waiver authorities, EPA has statutory ability to waive “the requirements of paragraph (2).” Thus, EPA may reduce the national requirement for any of the four renewable fuels specified in CAA §211(o)(2)(B) since such are requirements of CAA §211(o)(2). In the context of the proposed rule, this means that EPA may waive either the national quantity for total renewable fuel, advanced biofuel, or cellulosic biofuel, or any two or more of these requirements in the same determination.

A. EPA May Waive Applicable Volumes to Prevent Severe Economic Harm

EPA’s use of its general waiver authority is proper based on a determination that imposition of the statutory volumes would cause severe economic harm affecting a state, region, or the United States. Specifically, to use its general waiver authority, EPA need only determine that severe harm *would occur* through implementation of a requirement or requirements contained in CAA §211(o)(2). In other words, if imposition of 26.0 billion gallons of total renewable fuel or 11.0 billion gallons of advanced biofuel in 2018 or 7.0 billion gallons of cellulosic biofuel would result in severe economic harm in any part of the United States, then per the express language of the statute, EPA is empowered to waive such requirements “in whole or in part.”

Such conditions certainly exist here. EPA has already determined that only 4.273 billion gallons of advanced biofuel is reasonably attainable in 2018 – not the statutory “requirement” of 11.0 billion gallons.¹²⁷ Similarly, EPA has determined that there will be an adequate supply to meet a 19.24 billion gallon volume of total renewable fuel in 2018, but not the 26 billion requirement contained in §211(o)(2). Additionally EPA is proposing to waive all but 238 million gallons of the 7.0 billion gallon requirement for cellulosic biofuel.

While EPA did not propose to use its general waiver authorities to lower 2018 proposed requirements, EPA only declined to do so because it felt it could rely on its cellulosic biofuel waiver authority to implement all necessary volume reductions for the year. At no point did EPA suggest that its general waiver authority was not available for such purpose; instead the

¹²⁴ *Americans for Clean Energy*, Slip. Op. at 73, citing the 2014-2016 final RFS rule and *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014).

¹²⁵ *Id.* at 77.

¹²⁶ *Americans for Clean Energy*, Slip. Op. at 77-78, nt.12.

¹²⁷ 82 Fed. Reg. at 34,227.

Agency indicated that it retained authority to use its general waiver authority¹²⁸ and solicited comment on whether it should use that authority to reduce volumes further.¹²⁹

EPA has repeatedly recognized over the last seven years (and particularly within the last four years) that the statutory renewable fuel requirements are simply not attainable. EPA has waived cellulosic biofuel requirements in every year they have been required (from 2010 to 2017) and has waived total renewable fuel and advanced biofuel requirements in every year since 2014. Since the volumetric requirements first took effect, the Agency has cumulatively waived 15.65 billion gallons of cellulosic biofuel requirements through 2017. From 2014 to 2017, EPA also was compelled by the circumstances to cumulatively waive 14.30 billion gallons of the statutory requirements for total renewable fuel and 12.06 billion gallons of advanced biofuel. And in the context of the current proposed rule, EPA is proposing to waive an *additional 6.8 billion gallons* of the statutory requirements for total renewable fuel, advanced fuel and cellulosic biofuel.¹³⁰

Nothing in the record indicates that the conditions that have been present from 2014 on, which have led to successive waivers of billions of gallons of renewable fuel, have changed in 2017 or will change in 2018. Consequently, EPA has recognized in this proposed rule, that it cannot implement any of the three statutory renewable fuel requirements in 2018 or increase the level of 2018 BBD requirements in 2019 without causing severe harm to the economy. This provides a *prima facie* case for exercise of the agency's general waiver authority. Where, as here, severe economic harm would occur¹³¹ if EPA does not act to waive statutory requirements for renewable fuel, general waiver authority is available.¹³²

B. The “Inadequate Domestic Supply” Waiver is Available to Reduce Required Volumes of Renewable Fuel

In *Americans for Clean Energy*, the D.C. Circuit held that “the ‘inadequate domestic supply’ provision authorizes EPA to consider only *supply-side* factors affecting the volume of renewable fuel that is available to *refiners, blenders and importers* to meet the statutory volume requirements”¹³³ AFPM and API do not endorse or adopt this interpretation of the statute. However, it is important to note that in *Americans for Clean Energy*, the court did not directly address the meaning of “domestic” within this prong of the general waiver provision, nor was the meaning of that term briefed or argued.

¹²⁸ “We also have the authority to reduce any volume target pursuant to the general waiver authority in CAA section 211(o)(7)(A) under specific conditions described in Section II.A.2 [describing general waiver criteria].” *Id.* at 34,228.

¹²⁹ *Id.* at 34,213.

¹³⁰ Statutory requirements for cellulosic biofuel, advanced biofuel, and total renewable fuel are 7.0 billion gallons, 11.0 billion gallons, and 26.0 billion gallons, respectively. EPA is proposing to reduce these volumes to 238 million gallons for cellulosic biofuel, 4.24 billion gallons for advanced biofuel, and 26.0 billion gallons for total renewable fuel.

¹³¹ NERA ECONOMIC CONSULTING, ECONOMIC IMPACTS RESULTING FROM IMPLEMENTATION OF THE RFS2 PROGRAM (2012, 2015). See appendices to these comments.

¹³² EPA has not provided definitive guidance on what constitutes “severe” harm even as it has addressed general guidance for the submission of petitions requesting a waiver. See 73 Fed. Reg. at 47,172, 47,183-184.

¹³³ *Slip Op.* at 4 (emphasis in original).

EPA has provided a sufficient rationale for substantially lowering both renewable fuel volumes in 2018, and as described elsewhere in these comments, we believe that the Agency should make further reductions in 2018 volume requirements. In this regard, while EPA has proposed to rely on its cellulosic waiver authority to make volume reductions, EPA may concurrently use its general waiver authority to reduce such volumes; specifically by excluding imported renewable fuel from consideration in setting annual volumes individually for *each* of these renewable fuels.

i. A General Waiver Based on Inadequate Domestic Supply Permits EPA to Focus on Domestic Production

EPA may rely on its “inadequate domestic supply” waiver authority to lower the statutory volumes to an amount equivalent to the anticipated *domestic* production of renewable fuel.¹³⁴ This approach flows directly from a plain reading of the statutory language.

The definition of “domestic” compels an interpretation that solely focuses on renewable fuels production occurring in the United States. *Merriam-Webster Dictionary* defines “domestic,” as pertinent in this context, as “of, relating to, or originating within a country and especially one’s own country.”¹³⁵ The *Oxford English Dictionary* similarly defines “domestic” as “[o]f or pertaining to one’s own country or nation; not foreign, internal, inland, ‘home.’”¹³⁶ The *American Heritage Dictionary* defines “domestic” as “[o]f or relating to a country’s internal affairs: domestic issues such as tax rates and highway construction.”¹³⁷ None of these definitions supports the interpretation that renewable fuels available for import from a foreign source are part of the “domestic supply” for purposes of determining whether the statutory volumes can be met.

The plain meaning of “domestic supply” is further supported by the criteria for setting BBD requirements starting in 2013 and for *all renewable fuel* starting in 2023. Specifically, CAA §211(o)(2)(B)(ii) provides that in setting requirements for these years EPA “shall” determine applicable volumes with reference to “the impact of renewable fuels on the energy security of the United States . . . the impact of renewable fuels on the infrastructure of the United States [and] the impact . . . on other factors, including job creation . . . [and] rural economic development.”¹³⁸ All of these criteria are unequivocally domestic concerns; no factor that EPA must consider references the consideration of any factors which occur exclusively outside of the U.S..

While EPA should not include imported renewable fuels to increase the RFS mandates, Congress specifically contemplated that imported renewable fuels *can* be used for demonstrating compliance with the volumes EPA establishes (*i.e.*, for the generation of RINs). For example,

¹³⁴ In the proposal, EPA explicitly solicited comment “on what steps EPA might take to ensure energy independence and security . . . and to what degree [consideration of biofuel imports] could support the use of the general waiver authority, inherent authority or other basis consistent with the general construction of authority in the statute to reduce the required volume of advanced biofuel (with a corresponding reduction to the total renewable fuel requirement) below the level proposed for 2018.” 82 Fed. Reg. at 34,212. Our comments regarding EPA’s use of the “inadequate domestic supply” waiver authority to exclude consideration of foreign-sourced renewable fuels in setting the volume requirements for 2018 are responsive to this request.

¹³⁵ <https://www.merriam-webster.com/dictionary/domestic>.

¹³⁶ <http://www.oed.com/view/Entry/56663?redirectedFrom=domestic#eid>.

¹³⁷ <https://ahdictionary.com/word/search.html?q=domestic>.

¹³⁸ CAA §211(o)(2)(B)(ii)(I),(IV),(VI).

CAA §211(o)(5)(A)(i) provides “for the generation of an appropriate amount of credits by any person that refines, blends, or *imports gasoline that contains a quantity of renewable fuel* that is greater than the quantity” required of that obligated party for the year in question. (Emphasis added.) In a similar vein, CAA §211(o)(5)(E) expressly provides that EPA “*may issue regulations providing: (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports additional renewable fuels specified by the Administrator; and (ii) for the use of such credits by the generator, or the transfer of all or a portion of such credits to another person, for the purpose of complying with*” the volumetric requirements.” (Emphasis added.) Thus, the statute explicitly provides that imports are able to generate RINs, but does not provide that EPA should use imported biofuels to increase RFS mandated volumes. This bifurcation of the treatment of imported fuels serves as an important consumer protection mechanism that allows competitors to lower the cost of complying with the mandate.

ii. Focusing on Domestically-Produced Renewable Fuels is Consistent with *Americans for Clean Energy*

Excluding imported renewable fuels from consideration when analyzing EPA’s waiver authority is consistent with the recent D.C. Circuit opinion on EPA’s 2014-2016 RFS standards. In *Americans for Clean Energy*, the D.C. Circuit held that “inadequate domestic supply” authorizes EPA “to consider supply-side factors affecting the volume of renewable fuel that is available to refiners, blenders, and importers to meet the statutory volume requirements.”¹³⁹ In reaching this decision, the court spent considerable time interpreting which product’s “supply” is referenced in the waiver provision and concluded (wrongly, we believe) that “the only reasonable interpretation is that the ‘product’ at issue is the only product referenced in the provision: ‘renewable fuel.’”¹⁴⁰

While the court did state that “EPA may consider factors affecting the availability of renewable fuel available to refiners, blenders, and importers to meet the statutory volume requirements . . . [including] . . . the amount of renewable fuel available for import from foreign producers,”¹⁴¹ the question of whether the “*domestic supply*” of renewable fuel can permissibly include foreign renewable fuel that is available for import was not at issue in that case, nor was it briefed or argued by any party. The court’s statement is therefore dictum.¹⁴² Moreover, including imported biofuels within the “inadequate domestic supply” waiver provision would serve to read “domestic” out of the statute.

VII. Biomass-Based Diesel in 2019

EPA has cited several factors that affect its assessment of BBD production and the amount of “reasonably available” BBD in 2019. First, biodiesel tax credits expired at the end of 2016, and

¹³⁹ *Slip Op.* at 4. As noted above, AFPM and API do not agree with the D.C. Circuit that use of the “inadequate domestic supply” general waiver is limited to supply-side factors affecting only the supply to obligated parties, but that the provision may also consider constraints on supply to consumers as articulated by EPA in its 2014-2016 RFS rule.

¹⁴⁰ *Id.* at 26.

¹⁴¹ *Id.* at 29 (emphasis added).

¹⁴² *See, e.g., Webster v. Fall*, 266 U.S. 507, 511 (1925) (stating that “[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents”).

it appears unlikely that such credits will be reinstated by November 30, 2017, the statutory deadline for promulgating requirements for total renewable fuel, advanced biofuel, and cellulosic biofuel. As EPA has noted, “[t]he historic data indicates that biodiesel tax policy in the United States can have a significant impact on the supply of biodiesel and renewable diesel in any given year.”¹⁴³ And, while EPA considers the impact of the expired tax credit on biodiesel imports to be “highly uncertain,”¹⁴⁴ it is clear that its expiration is a disincentive to the importation of BBD into the United States.

EPA also believes that the level of the 2018 standard for BBD affects the supply of qualifying fuel in 2019. EPA states that “it is reasonable to expect that the supply of biodiesel and renewable diesel could increase [by 100 million gallons] from 2017 to 2018 without the biodiesel tax credit, but with the 2018 RFS requirements in place to incentivize the necessary supply.”¹⁴⁵ With the 2018 requirement in place, EPA projects that the biodiesel and renewable diesel market is capable of supplying 2.9 billion gallons in 2019.

At the same time, however, EPA believes that the level of the BBD standard does not “drive” actual use, but that volumes above the standard are driven by the requirements for advanced biofuel and total renewable fuel, the tax credit, and favorable blending economics.¹⁴⁶ And EPA believes that it should set a standard for BBD that “preserv[es] space under the advanced biofuel standard for non-BBD advanced biofuels, as well as BBD volumes in excess of the BBD standard”¹⁴⁷

Given EPA’s interpretation of its authority to project BBD volumes and set standards with respect to what it perceives as an objective of the RFS program (*i.e.*, to allow for growth in advanced biofuels other than BBD), EPA would be well within its authority to focus on domestic production when setting the standard for BBD in 2019.

Imports of biodiesel and renewable diesel have been increasing since EPA began establishing volume requirements for BBD in 2013 in the absence of statutory volumes (other than the statutory “floor” of one billion gallons). Imported biodiesel and renewable diesel amounted to 156 million gallons and 145 million gallons respectively in 2013, for a total level of 301 million gallons of imported fuel. In 2016, imported biodiesel and renewable diesel amounted to 561 million gallons and 170 million gallons, respectively. Thus, total imports of biodiesel and renewable diesel have increased from 301 million gallons in 2013 to 731 million gallons in 2016.¹⁴⁸ This represents an increase of over 240% in four years. EPA may take this rapid growth in imports into account as contrary to the energy independence objectives of the RFS. Accordingly, as discussed above, EPA must focus on the domestic production of such renewable fuels when the Agency determines the appropriate renewable fuel volumes to be used.

¹⁴³ 82 Fed. Reg. at 34,255.

¹⁴⁴ *Id.* at 34,226.

¹⁴⁵ *Id.* at 34,233, nt. 96.

¹⁴⁶ *Id.* at 34,239.

¹⁴⁷ *Id.* at 34,240

¹⁴⁸ Source: Table IV.B.2-1 of proposed rule.

Given that there is no specified “applicable volume” of BBD after 2012, EPA also faces no statutory constraint in excluding amounts of imported BBD when it determines the appropriate renewable fuel volumes.¹⁴⁹ EPA’s proposed volume of 2.1 billion gallons in 2019 is over twice the level of the statutory minimum of 1.0 billion gallons and is considerably below actual levels utilized for compliance with the RFS. Thus, lowering the 2019 requirement to exclude consideration of imported BBD (*e.g.*, 730 million gallons in 2016) would still leave the required volume in excess of statutory minimums while allowing even greater opportunity for obligated parties to utilize a full range of advanced biofuels to meet 2019 RFS standards, consistent with EPA’s stated objective to create potential for competition between BBD and other advanced biofuels.¹⁵⁰ Such a result would also allow the market to better decide which renewable fuels to use given the large price differential between BBD and petroleum diesel.

Finally, when establishing the BBD requirement, EPA should account for the continuing enforcement actions and the large amount of BBD RINs that EPA has held to be “invalid”. AFPM and API have previously supported changes in enforcement policies in this area that require the replacement of invalid RINs even where an obligated party had no knowledge of illicit activity regarding fraudulent RINs. We include previous statements on this matter in AFPM/API comments to EPA on the RFS RIN Quality Assurance Plan proposal in 2013 (an appendix to these comments).

VIII. Suggestions for Improving the RIN Market

EPA seeks comment with regard to the operation of the RIN market related to market manipulation and RIN trading. EPA also seeks comment on specific RIN data elements and posting frequency that stakeholders believe would increase market transparency and liquidity.

Regarding market manipulation, EPA should reexamine how the Agency treats “invalid RINs” for the purpose of enforcement. While the Agency has taken some steps to improve validation methods for RINs, it is clear that invalid RINs continue to make their way into the marketplace. Within the last ten months, EPA has issued four separate Notices of Violations involving over 160 million RINs.¹⁵¹ These enforcement actions have included both RINs that were verified as A-RINs under EPA’s Quality Assurance Plan rule and unverified RINs. Given the breadth, variety, and indeed the ingenuity of past RIN fraud schemes, even the most diligent purchaser of RINs remains at risk of acquiring RINs that EPA will later determine are invalid and must be replaced.

EPA should therefore consider making adjustments to its enforcement policies concerning “invalid RINs,” as well as regulatory changes that protect good faith purchasers of invalid RINs. AFPM and API have previously submitted comments on these issues, specifically with regard to EPA’s requirement that invalid RINs be replaced by obligated parties, even while such parties took prudent steps in the purchase of RINs for compliance. Specifically, AFPM and API have noted that:

¹⁴⁹ EPA need only comply with the minimum volume of 1 billion gallons as specified in §211(o)(3)(B)(v).

¹⁵⁰ Draft Statutory Factors Assessment for the 2019 Biomass Based Diesel (BBD) Applicable Volume, Memorandum to docket, Office of Transportation and Air Quality at 5.

¹⁵¹ *See*: <https://www.epa.gov/enforcement/civil-enforcement-renewable-fuel-standard-program>.

EPA asserts that the requirement to replace RINs is needed to ensure the annual national RFS volumes are met. Yet, the fact remains that it is not possible to go back in time and induce additional biofuel production for a prior year. For this reason it is impossible to “keep the program whole” and EPA’s insistence on RIN replacement would not achieve that goal . . . The liability stemming from RIN invalidity should be limited to the party or parties that caused the invalidity to occur. Requiring RIN replacement or civil penalties for a verified RIN should be limited to renewable fuel producers, RIN generators, auditors, and parties that otherwise caused RINs to become invalid. Requiring obligated parties to replace verified RINs undermines the value of the affirmative defense and may not solve the RIN liquidity problem. Obligated parties who have purchased verified RINs without actual knowledge of invalidity should not be required to re-purchase RINs to replace any verified RINs that EPA subsequently has determined to be invalid.¹⁵²

Some of the same considerations also apply to the case of unverified RINs. As with verified RINs, requiring RIN replacement does not impact renewable fuel production that occurred in the past. EPA should therefore impose the requirement to replace RINs *to the party or parties who caused the invalidity to occur*.

Requiring obligated parties to replace either verified or unverified RINs can also place substantial compliance pressures on an individual party. Where, as in the proposed rule, EPA has calculated renewable fuel obligations based on an assessment of the anticipated, massive shortfall in the production of cellulosic biofuel in 2018, an obligated party may need to acquire additional RINs in tight market conditions and in a timeframe which is unrelated to their current year compliance strategy. This can impose substantial costs given that individual RIN fraud cases have involved tens of millions of invalid RINs and, as noted above, there was a cumulative total of 160 million invalid RINs within the last year alone.¹⁵³

Regarding RIN market transparency, EPA already publishes a substantial amount of information concerning RIN generation by fuel type on its website. EPA has both expanded the amount of information available through EMTS and improved the timeliness of providing such data. This data provides valuable insight into compliance activities related to the RFS.

It bears emphasizing, however, that information provided to EMTS from obligated parties is not voluntary; it is compelled by regulations requiring the reporting of transactions and other compliance activities. Therefore, obligated parties retain valid claims to Confidential Business Information concerning some of the information required to be provided to EPA.

¹⁵² Comments of AFPM and API, Proposed RFS Renewable Identification Number (RIN) Quality Assurance Plans, April 13, 2013, EPA-HQ-OAR-2012-0621.

¹⁵³ <https://www.epa.gov/enforcement/civil-enforcement-renewable-fuel-standard-program>.

IX. Conclusion

EPA may further reduce renewable fuel volumes for all four renewable fuels in 2018 relying on concurrent application of its general and cellulosic waiver authorities. Specifically, EPA may use such authority to lower the total renewable fuel volume in 2018 to 17.050 billion gallons, the total advanced biofuel volume to 2.606 billion gallons, and cellulosic biofuel volume to 216 million. BBD should be limited in 2018 to 1.522 million gallons (2,360 RINs). Reducing renewable fuel volumes and volume percentages that apply to obligated parties would better align such requirements with the statutory structure and purpose of the RFS, particularly with respect to enhancing the energy independence of the United States and the protection of consumers. Requiring no more than 9.7% volume ethanol in gasoline recognizes legal and practical constraints to utilization of higher ethanol blends in motor vehicles and equipment. Reducing the advanced and cellulosic biofuel requirements would acknowledge the hard reality that such fuels have not made significant progress in their development and use, despite ten full years of statutory mandates for such fuels.

EPA has authority to refocus the RFS on the production of *domestic* renewable fuels. EPA also should endeavor to make improvements to the operation of the RFS program and discard policies like replacement of “invalid RINs,” which do not support additional production and are fundamentally unfair.

To be clear, API and AFPM and their member companies believe that biofuels will continue to play a role in the U.S. fuel supply. Our membership both purchases and produces such fuels. But where we part company from EPA’s implementation of the program is where the RFS is implemented to require the use of biofuels that do not exist or that the market cannot support. EPA now has the opportunity to change course and properly refocus the RFS program consistent with Congressional intent and the realities of the fuel marketplace. We urge the Agency to proceed in this direction.

APPENDICES

AFPM comments to EPA on the 2017 RFS proposal

API comments to EPA on the 2017 RFS proposal (cover letter and detailed comments)

EPA Moderated Transaction System Data

“Economic Impacts Resulting from Implementation of RFS2 Program,” October 2012, prepared by NERA for API

“Economic Impacts Resulting from Implementation of the RFS2 Program,” July 27, 2015, prepared by NERA for API

AFPM/API comments to EPA on the RFS RIN Quality Assurance Plan proposal, April 18, 2013